C.A. NO. 24-0682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS
,
Appellant,
-v.-
COMMONWEALTH GENERATING COMPANY,
Appellee.

C.A. No. 24-0682

On appeal from the United States District Court for the Middle District of Vandalia

---

BRIEF FOR APPELLEES

TEAM 20
Attorneys for Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURTS OF APPEALS CASES:

UNITED STATES DISTRICT COURT CASES

ADMINISTRATIVE DECISIONS:

STATUTORY PROVISIONS:

LEGISLATIVE MATERIALS:

OTHER SOURCES:

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present appeal. The United States District Court for the Middle District of Vandalia exercised proper jurisdiction because Stop Coal Combustion Residual Ash Ponds presented claims arising under the Clean Water Act and the Resource Conservation and Recovery Act, each yielding federal jurisdiction under 28 U.S.C. § 1331. The district court granted Commonwealth Generating Company's motion to dismiss on October 31, 2024, and Stop Coal Combustion Residual Ash Ponds filed a timely petition for appeal with this Court on November 10, 2024. R. at 15. This Court also has jurisdiction to hear this timely appeal because federal appeals courts have jurisdiction over the final decisions of all district courts. 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is a permitted discharge under the Clean Water Act?

II. Whether, in deciding Issue I, the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*?

III. Whether SCCRAP has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment?

IV. Whether SCCRAP can pursue a 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

I. STATEMENT OF FACTS

Commonwealth Generating Company ("ComGen") is a wholly owned subsidiary of Commonwealth Energy ("CE"), a multistate electric utility holding company system providing electric service across nine states including the State of Vandalia. R. at 3. ComGen owns and operates a variety of power plants that have provided electricity to retail customers in Vandalia for more than a century. *Id.* at 3-4. ComGen employs more than 1,500 Vandalians at its facilities throughout the region. *Id.* at 4.

In 2015, ComGen announced its cost and pollution reducing program named "Building a Green Tomorrow." R. at 5. The cornerstone of the program is plans to retire several older coal-fired plants and replace them with renewable solar and wind facilities. *Id.* In the decade since Building a Green Tomorrow's launch, ComGen has constructed five solar facilities and two wind farms that are providing 110 megawatts ("MW") of sustainable power. *Id.* Riding on the winds of its success, ComGen announced in 2018 plans to close its Vandalia Generating Station in 2027. *Id.*

Opened in 1965, the Vandalia Generating Station ("VGS") is an aging 80 MW coal-fired electric generating plant that needs substantial upgrades to comply with the EPA's Effluent Limitations Guidelines ("ELG") for plants of its type to continue operation. R. at 4. The combination of VGS's age, condition, and limited capacity make the facility the best candidate for closure under ComGen's Building a Green Tomorrow program. *Id.*

VGS operates under a Vandalia Pollutant Discharge Elimination System ("VPDES") permit issued by the Vandalia Department of Environmental Protection ("VDEP") on July 30, 2020. R. at 4. The VPDES permit governs VGS outfalls—Outlets 001, 002, and 003—into the

Vandalia River and its tributaries, which meet the statutory definition of waters of the United States. *Id.* The Permit, expiring on July 29, 2025, sets limits for a wide array of pollutants, of which PFOS or PFBS are not limited nor monitored; the permit and application fail to mention these two pollutants. *Id.* The only mention of PFOS or PFBS in the entirety of the permitting process occurred when a deputy director of the VDEP informally asked a ComGen employee through email if any of the Outlets discharged the two pollutants. *Id.* The answer was no, and the matter considered final. R. at 4-5.

As part of its operations, VGS generates coal combustion residuals ("CCRs"), also known as "coal ash." Coal ash comes in several different forms, such as fly ash, bottom ash, boiler slag, and flue gas desulfurization material ("FGD"). R. at 3. Each of the forms comes with various contaminants such as mercury, selenium, cadmium, and arsenic. *Id.* Protecting groundwater and drinking water sources, both the Environmental Protection Agency ("EPA") and VDEP ensure that coal ash is properly disposed of in either off-site landfills, on-site landfills, or surface impoundments. *Id.* Surface impoundments are the most common means of disposal, and as of 2012 there were more than 735 active surface impoundments. ComGen's Little Green Run Impoundment is one of those facilities. *Id.*

The Little Green Run Impoundment ("Impoundment") is the receptacle of coal ash produced by the VGS. R. at 5. The unlined facility covers approximately 71 surface acres and stores close to 38.7 million cubic yards of CCRs, coal fines, and other coal cleaning waste materials. *Id.* With the VGS scheduled to close in 2027 in accordance with ComGen's Building a Green Tomorrow—and upgrading the Impoundment costing millions of dollars—ComGen is in the process of closing the Impoundment in accordance with the "CCR Rule." R. at 6.

On April 17, 2015, the EPA enacted a rule entitled the Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule"). R. at 5. The CCR Rule declares coal ash a solid waste under subtitle D of the RCRA and puts into place "national minimum criteria for existing and new CCR landfills…and surface impoundments…consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification and internet posting requirements." *Id.* The EPA designed the CCR Rule to be "self-implementing," in other words, "facilities are directly responsible for ensuring that their operations comply with the Rule's requirements." *Id.* The presumed primary enforcement mechanism for the CCR Rule are citizen suits under Section 7002 of the RCRA. *Id.*

A year after the CCR Rule's enactment, the Water Infrastructure Improvements for the Nation Act (the "WIIN Act") was enacted. R. at 5. The WIIN Act granted states the ability to obtain EPA approval to administer coal ash permitting programs "in lieu of" the CCR Rule and also granted states enforcement responsibilities. *Id.* The EPA granted the State of Vandalia approval to establish its own state-level coal ash permitting program with state regulations consistent with the CCR Rule. *Id.* Vandalia's CCR Regulations mirror the EPA's CCR Regulations, including the "Criteria for conducting the closure or retrofit of CCR units." *Id.*

The CCR Rule provides two impoundment closure options: (1) excavation and removal of the CCR; and (2) closure in place. R. at 6. ComGen elected the closure-in-place plan for the Impoundment. *Id.* The CCR Rule mandates four additional requirements when a utility elects to close in place. *Id.* First "free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues" prior to the installation of a "final cover system." *Id.* Second, the impoundment unit must be closed in such a way that "preclude[s] the probability of

future impoundment of water, sediment, or slurry." *Id.* Third, the closure must "control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters." *Id.* Finally, cap-in-place closure plans must illustrate how the final cover system will achieve the performance standards laid out by the CCR Rule. *Id.* Failure to satisfy these additional requirements constitutes an "open dumping" violation of the RCRA. *Id.*

In compliance with VDEP CCR regulations, ComGen prepared the initial closure-in-place plan for the Impoundment on October 17, 2016, and entered the plan in VGS's operating record. R. at 6. ComGen amended the plan in both 2019 and 2020 and submitted the initial "Permit Application for CCR Surface Impoundment" ("Initial Permit") to the VDEP in December 2019. *Id.* After issuing a public notice of ComGen's Initial Permit in February 2021 and conducting a public hearing on March 30, 2021, the VDEP granted ComGen a Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment (the "Closure Permit") in July 2021. R. at 6-7.

With the Closure Permit in place, ComGen initiated its $1 billion closure-in-place plan by installing 13 upgradient and downgradient groundwater monitoring wells for the Impoundment. R. at 7. These monitoring wells—operational by the end of 2021—monitor the Impoundment's efficacy of holding coal ash in place as well as any leaching of pollutants. *Id.* Each year ComGen releases the monitoring reports from each of the wells. R. at 8. These reports indicate that pollutants will not reach public water in the next five years, despite a finding of elevated levels of arsenic and cadmium above both federal and Vandalia quality standards. *Id.*

While PFAS, PFOS, and PFBS are not regulated under the Clean Water Act and were not part of the closure-in-place permit application, the environmental group Stop Coal Combustion

Residual Ash Ponds ("SCCRAP") became concerned about potential discharges by the VGS. R. at 8-9. SCCRAP identified PFAS discharge in Outlet 001 dating back to 2015. R. at 9. In addition to discharges in Outlet 001, SCCRAP also grew concerns for the Impoundment's approved closure-in-place plan because of potential floods, storms, and hurricanes could cause the coal ash to spill into the Vandalia River. *Id.* SCCRAP's final area of concern is that the arsenic and cadmium discharges could affect a proposed housing development that some of its members have placed their names on the waiting list. *Id.*

II. NATURE OF PROCEEDINGS

SCCRAP filed its Complaint against ComGen on September 3, 2024, in the United States District Court for the Middle District of Vandalia following a 90-day period after sending ComGen a notice letter of its intent to sue. R. at 12. SCCRAP's complaint alleged three separate claims - one under the Clean Water Act and two under RCRA. Under Section 505 of the Clean Water Act, SCCRAP alleged that ComGen violated the Act by discharging PFOS and PFBS into the Vandalia River through Outlet 001 without a NPDES permit for these pollutants. *Id.* SCCRAP contended these pollutants were not "within the reasonable contemplation of the permitting authority at the time the permit was granted" because they were not listed in the permit and ComGen allegedly provided incorrect information to the VDEP deputy director about such pollutants before its 2020 VPDES permit was issued. *Id.*

Under RCRA Section 7002(a)(1)(A), SCCRAP challenged the Closure Plan as inadequate under the CCR Rule's standards. R. at 12. SCCRAP also brought a claim under RCRA Section 7002(a)(1)(B), alleging that the Little Green Run Impoundment presents an imminent and substantial endangerment to the environment based on arsenic and cadmium exceedances in downgradient monitoring wells. R. at 12-13.

On September 20, 2024, ComGen filed a motion to dismiss the complaint. R. at 13. After expedited briefing, the District Court granted ComGen's motion in its entirety on October 31, 2024. R. at 14. SCCRAP filed this timely appeal on November 10, 2024. R. at 15.

SUMMARY OF THE ARGUMENT

The United States District Court of Vandalia correctly held that 1) ComGen's PFOS and PFBS discharges are protected by the permit shield defense, 2) no deference is owed to *Piney Run* in light of *Loper Bright*, 3) SCCRAP lacks standing to challenge the closure plan, and 4) RCRA does not support an imminent and substantial endangerment claim based solely on environmental impacts. To uphold these rulings, this Court should affirm the district court's judgment in all respects.

I.

The permit shield defense properly protects ComGen's PFOS and PFBS discharges because ComGen has fully complied with its permit obligations. ComGen obtained its VPDES permit in good faith, truthfully responded when VDEP specifically inquired about these substances, and has consistently complied with all permit monitoring and reporting requirements. When VDEP considered whether to include PFOS and PFBS limits in the permit, it made a reasoned decision not to do so after direct inquiry about these substances. Such good-faith compliance with express permit terms warrants protection under any interpretation of the permit shield provision.

II.

The Supreme Court's decision in *Loper Bright* fundamentally alters how courts must approach agency deference, requiring affirmation of the district court's departure from *Piney Run*. *Loper Bright's* rejection of mandatory agency deference eliminates the doctrinal foundation for

Piney Run's expansive interpretation of permit requirements. The permit shield's plain text protects permittees who comply with their permits' express requirements, and arguments for broader coverage based on agency interpretations cannot survive *Loper Bright's* command to focus on statutory text rather than agency guidance.

III.

SCCRAP lacks Article III standing because its alleged injuries stem from historical contamination that predates the closure plan by several years. The record conclusively establishes that contamination began "at least 5 to 10 years" before the first monitoring report in 2021, well before implementation of the closure plan in 2019. Both environmental groups and industry experts agree that the Impoundment's leaching issues predate any closure activities. This temporal disconnect breaks the causal chain between the closure plan and SCCRAP's claimed injuries, while invalidating the plan would not redress these pre-existing conditions.

IV.

SCCRAP's RCRA claim fails because the statute requires more than mere environmental impact to support an imminent and substantial endangerment claim. SCCRAP's complaint contains no allegations regarding endangerment to any living population, relying instead on speculative future use of groundwater by a housing development that would not be completed until 2031. R. at 9, 12. Courts have consistently interpreted RCRA's imminent hazard provision to require a showing of potential harm to human health or ecological populations, not merely the presence of contaminants in monitoring wells. The district court correctly recognized that accepting SCCRAP's broad interpretation would improperly transform RCRA into a general environmental protection statute, contrary to Congress's intent.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews de novo the district court's grant of ComGen's motion to dismiss. *Sierra Club v. U.S. EPA*, 964 F.3d 882, 891 (10th Cir. 2020). For Clean Water Act claims, this Court reviews questions of statutory interpretation de novo. *Nat. Res. Def. Council, Inc. v. EPA*, 808 F.3d 556, 569 (2d Cir. 2015). For RCRA claims, the Court reviews de novo both statutory interpretation questions and the district court's determination of standing. *Maine People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006).

I. PFOS AND PFBS ARE NOT UNPERMITTED DISCHARGES BECAUSE OF THE "PERMIT-SHIELD" DEFENSE.

The district court properly granted ComGen's motion to dismiss because PFOS and PFBS are permitted discharges under the Clean Water Act ("CWA"). Although the CWA prohibits the "discharge of any pollutant by any person" into navigable waters of the United States, the CWA also established the National Pollutant Discharge Elimination system ("NPDES") that authorizes the EPA to "issue a permit for the discharge of any pollutant." 33 U.S.C. §1311(a); 50 U.S.C. §1342 (a). States can establish their own EPA approved permit program, and once adopted the EPA suspends its federal permit program and defers to the State's. 50 U.S.C. §1342(b)-(c). Vandalia has elected to implement their own pollutant discharge system. R. at 4, 12.

A. The Clean Water Act Allows for the Permit Shield Defense.

The CWA created an avenue of compliance through its "shield provision." 33 U.S.C. §1342(k). In other words, if an individual complies with the terms of its NPDES or VPDES permit, the discharger is shielded from liability for any additional discharges not listed in the permit. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). The Supreme Court has stated that the purpose of the shield provision is to "relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I*

du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977). This Court has previously adopted the permit shield defense, which allows an NPDES or state permit holder to discharge pollutants in accordance with the terms of the permit. *Piney Run Pres. Ass'n v. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 267 (4th Cir. 2001); *see also* R. at 12, n.3 (12th Circuit adopted *Piney Run* in 2018).

The purpose of a NPDES or VPDES permit is two-fold (1) to identify and limit a facility's most harmful pollutants, and (2) to control the remainder of the pollutants through disclosure requirements. *Atlantic States*, 12 F.3d at 357. Once a permit has been granted, a facility can discharge pollutants not listed in its permit if it both complies with reporting requirements and abides by any new limitations from the EPA or VDEP regarding the non-listed pollutants. *Id.* The *Atlantic States* court reached this conclusion when it observed that the Toxic Substances Control Act Chemical Substance Inventory listed "tens of thousands of different chemical substances." 12 F.3d 353, 357 (2d Cir. 1993) (citing 15 U.S.C. §2607(b) (1988)). With such an exhaustive list of toxic substances to monitor, the EPA does not require equal information regarding each one of the thousands of potentially present chemical substances in a facility's wastewater because it would be "impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.,* 12 F.3d 353, 357 (2d Cir. 1993) (citing Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976)).

Even if the EPA or VDEP required a facility to list each of the many thousands of toxic substances discharged before granting a permit, such permit would be impossible to comply with. The EPA said so itself that "[c]ompliance 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." Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976). This point was further established in *Atlantic States* when the plaintiff conceded that not only is water a chemical, but it would be illogical to consider water a "pollutant" in an absolutist view of the CWA. 12 F.3d 353, 357.

Here, ComGen has complied with its VPDES permit and is shielded from liability of the CWA for its discharge of PFOS and PFBS. The VPDES permit covers several pollutants, namely selenium, aluminum, pH, temperature, etc. R. at 4. The VPDES permit is silent to both PFOS and PFBS discharges and to monitoring for those pollutants. R. at 4. When a deputy director of the VDEP informally asked a ComGen employee about PFOS and PFBS discharges at VGS and the employee answered that PFOS and PFBS discharges were unknown, the inquiry ended. R. at 4-5. Since the formal permit documents and application materials failed to mention PFOS and PFBS, ComGen did not fail its disclosure requirements and did not fail in complying with the VPDES permit. With no failure, there is no liability.

B. Should the Court Reject *Atlantic States* and Defer to *Piney Run*, ComGen Would Still Be Shielded from Liability.

The Twelfth Circuit adopted the permit shield defense with its 2018 adoption of *Piney Run*. This Court must answer two questions in determining whether a facility is shielded from liability when a valid VPDES permit is in place: (1) what comprises the scope or terms of the permit, and (2) whether the permit shield bars CWA liability for discharges not expressly allowed by the permit when the facility has complied with the permit's express restrictions? *Piney Run Pres. Ass'n v. Comm'rs of Carroll Cnty., MD,* 268 F.3d 255, 267 (4th Cir. 2001).

1. ComGen is shielded from liability because the PFBS and PFOS discharges are within the scope of its VPDES permit.

The Fourth Circuit Court of Appeals put it best when it explained that "the scope of the permit shield defense is relatively straightforward." *Id.* If the permit holder discharges pollutants in compliance with its permit, the permit holder is shielded from liability under the CWA. *Id.* The *Piney Run* court turned to the EPA for guidance on whether unlisted pollutants are considered within the scope of a NPDES permit. The EPA Environmental Appeals Board determined that when a permit holder makes adequate disclosures concerning its discharges during the application process, unlisted pollutants are within the scope of the issued permit even when the permit does not list those pollutants. *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 (E.P.A.) at *12-13. Simply put, if a facility follows the proper structure during the permitting process, the permit will shield the facility from CWA liability.

Since ComGen followed the proper structure in seeking its VPDES permit for VGS, the Outlet 001 discharge of PFOS and PFBS are within the scope of the permit. ComGen received a valid VPDES Permit on July 30, 2020. R. at 4. The Permit sets limits for the discharge and monitoring of a wide range of pollutants, but not PFOS and PFBS. R. at 4. The permit application and formal permit documents did not mention PFOS and PFBS, and ComGen was not aware of any discharge during the application process. R. at 4. Because PFOS and PFBS were not listed on the permit, the VDEP did not require reporting of PFOS and PFBS discharges and ComGen was not aware of any discharges, PFOS and PFBS are unlisted pollutants that are within the scope of ComGen's VPDES Permit.

2. There is no liability for ComGen because VGS has complied with the VPDES Permit's express conditions.

Moreover, ComGen has consistently complied with all express monitoring and reporting

requirements in its VPDES permit. R. at 4. The permit establishes specific limits for "a wide array of pollutants," and ComGen has adhered to these requirements. Id. This pattern of compliance further supports application of the permit shield under *Piney Run*, which recognizes that the shield protects permit holders who faithfully comply with their permit's express terms while providing honest and complete information to regulators. 268 F.3d at 259.

II. DEFERENCE SHOULD NOT BE GIVEN TO *PINEY RUN* FOLLOWING *LOPER BRIGHT*

The Supreme Court's landmark decision in *Loper Bright* fundamentally alters the legal landscape surrounding agency deference, requiring this Court to reconsider its adoption of *Piney Run* and its expansive interpretation of the Clean Water Act's permit shield provision. While principles of *stare decisis* typically counsel adherence to precedent, the Supreme Court has consistently recognized that significant shifts in legal doctrine can justify departing from circuit precedent. *See South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 183-84 (2018); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Here, *Loper Bright*'s wholesale rejection of mandatory agency deference constitutes precisely such a shift, warranting fresh examination of the permit shield doctrine.

A. *Loper Bright* Eliminates the Foundation for Agency Deference in Permit Shield Cases

Loper Bright fundamentally alters how courts must approach agency deference, requiring this Court to reconsider its adoption of *Piney Run* in two key ways. First, the pre-*Loper Bright* landscape of environmental regulation relied heavily on agency interpretations that can no longer stand. Second, *Loper Bright's* rejection of mandatory deference requires courts to interpret permit provisions according to their plain meaning rather than deferring to agency guidance, fundamentally changing how the permit shield must be analyzed.

1. Pre-*Loper Bright* agency deference led to improperly expansive permit interpretations

Prior to *Loper Bright*, courts routinely deferred to agency interpretations under the *Chevron* doctrine, particularly in environmental cases where agency expertise was viewed as crucial. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984). This deference framework led courts to adopt expansive readings of environmental regulations, often extending beyond the explicit text of permits or statutes. The Fourth Circuit's decision in *Piney Run*, which this Court adopted in 2018, exemplifies this approach. See R. at 12 n.3.

Critics may argue that abandoning *Piney Run* would weaken environmental protection. However, agencies retain full authority to modify permits or add new requirements through proper administrative procedures. The issue is not whether these substances can be regulated, but how.

2. *Loper Bright* requires return to plain text reading of permits

Loper Bright represents a fundamental shift away from agency deference, requiring courts to interpret statutory provisions according to their plain meaning rather than deferring to agency interpretations. This change is particularly significant in the context of environmental permits, where agencies have historically enjoyed broad interpretive authority.

ComGen's VPDES permit demonstrates the importance of this shift. The permit, issued on July 30, 2020, sets specific limits for various pollutants but does not mention PFOS or PFBS. R. at 4. When directly questioned about these substances, ComGen responded truthfully based on its knowledge at the time. R. at 4-5. Under *Loper Bright's* framework, these express permit terms—not agency interpretations—should control.

B. The Permit Shield's Plain Text Protects ComGen's Discharges

The permit shield provision, examined without the overlay of agency deference, reveals Congress's clear intent through both its plain text and legislative history. An analysis of the statutory language, coupled with the historical context of the permit shield's enactment and the emerging circuit split on its interpretation, demonstrates that permits must be interpreted according to their express terms rather than implied requirements derived from agency interpretations.

1. Congress intended the permit shield to protect express permit compliance

Without the overlay of agency deference, the permit shield provision must be interpreted according to its plain meaning. The statutory text states that compliance with a permit "shall be deemed compliance" with various provisions of the Clean Water Act. 33 U.S.C. § 1342(k). Nothing in this language suggests that permits should be read to implicitly cover unlisted pollutants.

Some may contend that requiring explicit permit terms for all pollutants would be administratively burdensome. However, this concern is outweighed by the benefits of regulatory clarity and reduced litigation risk that would result from clear permit terms. The permit shield's legislative history reveals that Congress intended to provide certainty to permit holders who comply with their permits' express terms. *See* S. Rep. No. 92-414, at 81 (1971).

2. A plain text reading would resolve circuit splits

The circuit courts have diverged in their interpretation of permit shield coverage, creating inconsistency that *Loper Bright* now provides an opportunity to resolve. At the heart of this appeal is the split between the Second, Fourth, and Twelfth Court of Appeals. *Compare Atlantic States*, 12 F.3d 353 (adopting narrower interpretation), with *Piney Run*, 268 F.3d at 259 (broader interpretation). Arguments that Congress intended broader permit coverage are undermined by the

statute's plain text and the absence of any explicit provision for unlisted pollutants. Post-*Loper Bright*, such arguments carry even less weight.

C. *Stare Decisis* Does Not Compel Adherence to *Piney Run* When Its Foundation Has Been Removed

The Supreme Court has recognized that changes in related legal doctrines can justify departing from precedent. *See Patterson*, 491 U.S. at 173. Here, *Loper Bright* has eliminated the doctrinal foundation of *Piney Run*—mandatory deference to EPA interpretations. While some parties may have relied on *Piney Run*, the permit shield's primary purpose is to provide certainty to permit holders. R. at 12. ComGen's good faith compliance with its express permit terms exemplifies exactly the type of behavior the permit shield was designed to protect. Expanding permit requirements through judicial interpretation undermines this very purpose.

D. Abandoning *Piney Run* Would Improve Regulatory Clarity and Environmental Protection

Abandoning *Piney Run*'s approach in light of *Loper Bright* would yield three significant practical benefits. First, it would provide clear guidance to both regulators and regulated entities through reliance on express permit terms. Second, existing environmental protection mechanisms would remain fully functional through established regulatory processes. Third, the transition could be managed to protect legitimate reliance interests while allowing the law to evolve in response to *Loper Bright*.

A plain-text reading of permits would provide much-needed clarity to both regulated entities and regulatory agencies. Under the current approach, permit holders face significant uncertainty about whether unlisted pollutants might later be deemed covered by their permits. ComGen's situation illustrates this problem: despite responding truthfully to VDEP's informal inquiry about

PFOS and PFBS, and receiving a permit that did not mention these substances, it now faces litigation over these discharges. R. at 4-5. The Supreme Court has consistently emphasized the importance of clear regulatory requirements in environmental law. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (emphasizing need for "clear congressional authorization" for significant regulatory impositions). A return to express permit terms would provide this clarity, allowing businesses to plan and invest with confidence while enabling regulators to focus on substances they specifically choose to regulate.

Environmental protection would remain robust under a plain-text approach because agencies retain multiple mechanisms to address emerging pollutants of concern. The Clean Water Act provides for permit modifications when necessary to address new pollutants. 33 U.S.C. § 1342(b)(1)(C)(iii). EPA and state agencies can also issue new effluent limitations, require additional monitoring, or add specific substances to permits during renewal. *See Natural Res. Def. Council v. EPA*, 808 F.3d 556, 569-70 (2d Cir. 2015) (discussing EPA's ongoing authority to modify permit requirements based on best technology available). For example, when VDEP wished to inquire about PFOS and PFBS, it could have formally required their inclusion in the permit rather than relying on informal email exchanges. R. at 4. This framework ensures environmental protection while maintaining clear lines of authority and responsibility.

The transition from *Piney Run's* approach can be managed to protect legitimate reliance interests while implementing *Loper Bright's* command. Courts have recognized that significant changes in regulatory interpretation may require transition periods to protect regulated entities that have relied on previous interpretations. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977) (discussing importance of regulatory stability in permitting context). Here, the Court could apply the plain-text interpretation prospectively to future permits while allowing a

reasonable transition period for existing permit holders. This approach would protect both environmental interests and regulated entities' legitimate expectations while implementing *Loper Bright's* requirements. ComGen's situation demonstrates why such protection matters: it made significant operational decisions based on its understanding of permit requirements, investing in compliance measures for expressly regulated pollutants. R. at 4. A measured transition would protect such good-faith compliance while moving toward clearer standards.

III. SCRAPP LACKS STANDING BECAUSE HISTORICAL POLLUTION CANNOT SUPPORT CLAIMS AGAINST THE CLOSURE PLAN .

The District Court correctly held that SCCRAP lacks standing to challenge ComGen's closure plan. Article III standing requires three elements: (1) an injury in fact that is concrete and particularized; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). While SCCRAP has demonstrated aesthetic and recreational injuries, these injuries are neither fairly traceable to the closure plan itself nor redressable by the relief sought.

A. There is No Causal Link Between Current Closure Activities and Historical Contamination

The record conclusively establishes that SCCRAP cannot demonstrate causation between its alleged injuries and ComGen's closure plan through two key temporal elements. First, the historical nature of the alleged contamination predates any closure activities by several years. Second, the pre-existing environmental conditions demonstrate that SCCRAP's members would face the same circumstances regardless of the closure plan's implementation.

1. All of the evidence points to pre-existing contamination

The record conclusively establishes that SCCRAP's alleged injuries stem from historical pollution that predates any closure activities. According to monitoring data, contamination began "at least 5 to 10 years" before the first monitoring report in 2021. R. at 8. This timeline places the source of injury well before ComGen implemented its closure plan in 2019. R. at 6. The Supreme Court has consistently held that such temporal disconnects severely undermine standing claims. *See Allen v. Wright*, 468 U.S. 737, 759 (1984) (finding chain of causation too weak where alleged injury predated challenged conduct).

Both environmental groups and industry experts agree that the Impoundment's leaching issues began years before closure activities commenced. R. at 8. This consensus is critical because it demonstrates that SCCRAP's members would face the same environmental conditions regardless of the closure plan's implementation or design. Such pre-existing injuries cannot support standing to challenge subsequent regulatory decisions. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

2. SCCRAP's injuries flow from past operations, not current closure activities

SCCRAP's members claim they have restricted their recreational use of the Vandalia River due to concerns over PFAS, arsenic, and cadmium pollution. R. at 9. However, the evidence shows these conditions existed long before the closure plan. The groundwater monitoring data reveals elevated levels of arsenic and cadmium predating closure activities, with environmental studies confirming historical contamination patterns. R. at 8. The Impoundment's unlined condition, which has existed since its construction, and leaching that began well before closure planning commenced, establish an environmental baseline independent of the closure plan. *See Texans*

United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 793 (5th Cir. 2000).

B. SCCRAP Fails to Show a Substantial Likelihood that the Closure Plan Caused Their Injuries

The Supreme Court has established that environmental plaintiffs must demonstrate a "substantial likelihood" that defendant's conduct caused their injuries. *See Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 75 n.20 (1978). While this burden is not insurmountable, plaintiffs cannot rely on speculative chains of causation. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

The record demonstrates multiple independent factors that preclude SCCRAP from establishing causation. First, the timing of injuries shows that contamination began years before closure activities, making it impossible to fairly trace current conditions to the closure plan. R. at 8. Second, the Impoundment's unlined condition and historical operations contributed to current environmental conditions independent of closure activities. R. at 3, 8. Third, natural groundwater movement and pre-existing contamination serve as intervening causes that break the causal chain between the closure plan and alleged injuries. *See Allen*, 468 U.S. at 759.

SCCRAP's situation differs materially from cases where courts have found standing to challenge environmental permits or closure plans. For example, in *Friends of the Earth, Inc. v. Laidlaw Env't Services*, 528 U.S. 167 (2000), plaintiffs challenged ongoing discharge violations that were directly causing their injuries. Similarly, in *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), plaintiffs established standing by demonstrating that newly permitted discharges would directly affect their recreational interests. Here, SCCRAP challenges a closure plan for conditions that predate the plan itself.

C. SCCRAP' Cannot Show That Invalidating the Closure Plan Would Redress Historical Pollution

SCCRAP's requested relief fails to satisfy Article III's redressability requirement in three critical ways. First, invalidation of the closure plan would not address the underlying historical contamination. Second, any alternative closure requirements would still need to confront the same pre-existing conditions. Third, SCCRAP's suggested benefits from a different closure approach remain entirely speculative.

Redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. The Supreme Court has consistently held that plaintiffs must demonstrate a substantial likelihood that their requested relief would remedy their alleged injuries. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”). In environmental cases, this requirement ensures that judicial intervention will actually improve environmental conditions affecting the plaintiffs. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000).

SCCRAP's requested relief—invalidation of the closure plan—would not address their underlying injuries. The existing arsenic and cadmium contamination would continue unabated, as these conditions result from decades of prior operations rather than the closure plan itself. R. at 8. The Supreme Court has repeatedly rejected standing where, as here, the requested relief would not practically improve the plaintiff's situation. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494-95 (2009); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996).

The fundamental characteristics of the Impoundment, including its unlined condition and historical contamination, would remain unchanged even if the Court invalidated the current closure plan. R. at 3. Courts have consistently required plaintiffs to demonstrate that their injuries are fairly traceable to the challenged action rather than independent historical causes. See *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (requiring demonstration that injury is 'fairly traceable' to challenged conduct rather than independent factors); *Nat. Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir. 1993) (explaining that standing requires causal connection between specific challenged action and alleged injury).

SCCRAP's argument that a different closure plan might better protect groundwater lacks any substantial support in the record. Courts have consistently rejected standing based on such speculative improvements. *See Clapper*, 568 U.S. at 414. The mere possibility that an alternative closure approach might marginally improve conditions does not satisfy Article III's redressability requirement. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005). Moreover, any alternative closure plan would still have to address the same pre-existing conditions while complying with federal and state regulations. R. at 5-6. The Supreme Court has emphasized that standing cannot rest on speculation about how third parties, including regulatory agencies, might respond to judicial intervention. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

D. Sound Policy Favors Denying Standing for Pre-Existing Environmental Conditions

Three key policy considerations support maintaining traditional standing requirements in environmental cases. First, judicial resources must be preserved for cases where relief can effectively address alleged injuries. Second, the existing regulatory framework provides

appropriate mechanisms for addressing closure plans. Third, proper standing requirements ensure that environmental litigation focuses on addressing actual causes of harm rather than tangentially related regulatory decisions.

First, permitting standing in cases where relief cannot effectively address the alleged injury would significantly strain judicial resources. The Supreme Court has long recognized that standing doctrine serves to prevent courts from issuing advisory opinions that would not practically resolve concrete disputes. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Here, invalidating the closure plan would merely delay necessary closure activities while failing to address SCCRAP's underlying environmental concerns.

Second, the comprehensive regulatory framework established by the CCR Rule provides appropriate mechanisms for addressing closure plans. R. at 5-6. Allowing standing based on pre-existing conditions would effectively circumvent this carefully crafted regulatory scheme. Courts have consistently recognized that standing requirements help maintain the proper balance between judicial and administrative authority. *See Allen*, 468 U.S. at 760; *see also Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1171 (10th Cir. 2011).

Third, maintaining proper standing requirements ensures that environmental litigation focuses on addressing actual causes of harm rather than tangentially related regulatory decisions. The Supreme Court has emphasized that standing doctrine helps ensure that limited judicial resources are directed toward cases where relief can effectively address environmental injuries. *See Summers*, 555 U.S. at 493. Allowing standing here would divert attention and resources from cases where judicial intervention could meaningfully improve environmental conditions.

The D.C. Circuit has particularly emphasized this point in the context of environmental regulation, noting that standing requirements help ensure that environmental litigation serves its

intended purpose of protecting concrete environmental interests rather than abstract procedural rights. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996). This principle applies with particular force here, where SCCRAP seeks to challenge a closure plan based on pre-existing environmental conditions that the plan neither created nor can effectively remedy.

IV. RCRA Requires Harm to Living Populations, Not Merely Environmental Impact

The District Court correctly held that RCRA's imminent and substantial endangerment provision requires a showing of potential harm to living populations, not merely environmental impact. This interpretation aligns with RCRA's statutory purpose, the majority of courts that have considered the issue, and sound environmental policy. SCCRAP's attempt to expand RCRA's reach beyond its intended scope should be rejected.

A. RCRA's Text and Structure Demands More Than Environmental Contamination

RCRA's text, structure, and legislative history demonstrate that the statute requires potential harm to living populations through three interconnected elements. First, RCRA's text explicitly requires that endangerment be both 'imminent' and 'substantial.' Second, Congress intended these terms to address concrete threats rather than mere environmental impact. Third, the Supreme Court's interpretation of similar environmental statutes supports requiring a showing of potential harm to living populations.

RCRA's citizen suit provision authorizes actions against any person "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). While this language includes "the environment" as a protected interest, courts have consistently interpreted this phrase in conjunction

with the "imminent and substantial endangerment" requirement. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485-86 (1996).

The Supreme Court's interpretation of similar environmental statutes supports reading RCRA to require more than mere presence of contamination. In *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-19 (2009), the Court emphasized that environmental liability statutes must be read to require a meaningful connection between the contamination and potential harm. The same principle applies here, where SCCRAP seeks to premise liability on groundwater contamination without showing any pathway to actual harm.

The record in this case illustrates why mere presence of contamination cannot satisfy RCRA's requirements. While monitoring wells show elevated levels of arsenic and cadmium, there is no evidence of exposure pathways to living populations. R. at 8. The Supreme Court's interpretation of similar environmental statutes supports reading RCRA to require more than such isolated contamination. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-19 (2009).

RCRA's legislative history confirms that Congress intended the imminent hazard provision to address threats to living populations, not abstract environmental impacts. The Senate Report accompanying RCRA's 1984 amendments emphasized that the provision was designed to address "substantial potential harm" rather than mere presence of contamination. S. Rep. No. 98-284, at 59 (1983). This focus on actual harm rather than technical violations aligns with RCRA's broader purpose as a public health statute.

B. SCCRAP Has Failed to Show Clear Risks to Actual Populations

The majority of courts examining RCRA's imminent hazard provision have required some showing of potential harm to living populations. The District Court correctly relied on *Courtland*

Co., Inc. v. Union Carbide Corp., which held that "it is difficult to reconcile the existence of an endangerment that is both imminent and substantial when the contamination present threatens no actual harm to someone or something." 2023 WL 6331069, at *57 (S.D. W. Va. Sept. 28, 2023).

This approach finds support in numerous other decisions that parallel ComGen's situation. For example, in *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994), property owners sought to require cleanup of lead-contaminated soil at a former military housing site. Despite evidence of contamination exceeding state standards—similar to the arsenic and cadmium levels in ComGen's monitoring wells—the Ninth Circuit held that RCRA requires evidence of actual or threatened harm to health or the environment, not merely the presence of contamination above regulatory thresholds. The court found no imminent and substantial endangerment because plaintiffs failed to show any pathway for human exposure to the contaminated soil. Like the plaintiffs in *Price*, SCCRAP has shown only the presence of contamination in monitoring wells without demonstrating any current exposure pathway to living populations. R. at 8-9.

Similarly, the First Circuit has emphasized that the endangerment must be "substantial," requiring more than mere environmental impact. In *Maine People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006), plaintiffs challenged mercury contamination in the Penobscot River from a former chemical plant. Though plaintiffs demonstrated mercury's presence in the river system—a more direct pathway to human contact than ComGen's groundwater monitoring wells—the court still required them to show how this contamination posed a substantial threat through specific exposure pathways or ecological impacts. Here, SCCRAP's showing is even weaker: there is no evidence that contaminants have reached the Vandalia River or any other public water drinking supply, and monitoring data shows they will not do so within the next five years. R. at 8. SCCRAP's only attempt to show potential exposure rests on a speculative future housing

development that would not be completed until at least 2031, R. at 9, making the threat even more remote than the immediate river exposure rejected in *Mallinckrodt*.

The temporal aspect of SCCRAP's claim further distinguishes it from cases where courts have found valid RCRA claims. Unlike situations involving ongoing discharges or immediate threats, SCCRAP challenges historical contamination that began "at least 5 to 10 years" before the first monitoring report. R. at 8. Both environmental groups and industry experts agree that the Impoundment's leaching issues began years before any closure activities commenced. Id. This historical nature of the contamination, combined with the lack of current exposure pathways, places SCCRAP's claim squarely within the category of cases where courts have found no imminent and substantial endangerment under RCRA.

While SCCRAP relies on certain Third and Tenth Circuit decisions suggesting a broader interpretation, these cases are distinguishable and ultimately unpersuasive. The Third Circuit's decision in *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005), involved chromium contamination in a densely populated urban area of Jersey City, where thousands of residents lived within 500 feet of the contaminated site. The contamination included surface-level hexavalent chromium that created immediate exposure risks through direct contact and wind-blown particles. The Third Circuit found an imminent and substantial endangerment based on these direct exposure pathways and the site's proximity to residential areas. In stark contrast, SCCRAP has shown only the presence of arsenic and cadmium in monitoring wells, with no evidence of current exposure pathways to any population. R. at 8. Unlike the *Interfaith* plaintiffs who demonstrated immediate risks to an existing population, SCCRAP relies solely on speculative future use of groundwater by a housing development that would not be completed until 2031. R. at 9.

Similarly, while the Tenth Circuit adopted a seemingly broader approach in *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), that case still required evidence of potential exposure pathways. There, plaintiffs demonstrated that residential properties were contaminated with lead and arsenic from historical smelting operations, and residents faced immediate exposure through direct contact with contaminated soil and dust in their homes. The court emphasized that the "substantial" element of RCRA's endangerment standard was satisfied because plaintiffs showed both the presence of toxic substances and clear pathways for human exposure. Here, SCCRAP has failed to demonstrate any such exposure pathway. The monitoring data shows no evidence that contaminants have reached or will reach the Vandalia River or any public water supply within five years. R. at 8. Moreover, no one currently uses groundwater wells for drinking within the potentially affected area. R. at 9. Unlike the *Burlington* plaintiffs who lived atop contaminated soil, SCCRAP can point only to monitoring well data without any connection to current human exposure.

Even under these more permissive interpretations of RCRA's endangerment standard, SCCRAP's claims fall short. Both the Third and Tenth Circuit decisions rest on evidence of actual exposure pathways to existing populations—evidence entirely absent from SCCRAP's complaint. The presence of elevated contaminant levels in monitoring wells, while concerning from an environmental perspective, does not rise to the level of endangerment found in these cases without some showing of how these contaminants might actually reach living populations.

C. A Speculative Future Housing Development Cannot Support an Imminent Claim

SCCRAP's complaint contains no allegations regarding endangerment to any current living population. R. at 12. The monitoring data shows no evidence that arsenic or cadmium have reached or will reach the Vandalia River or any other public water supply within the next five years. R. at

8. Courts have consistently rejected RCRA claims based on such speculative future harms. *See Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997).

Moreover, the "imminent and substantial endangerment" standard requires more than potential future harm. The Supreme Court has emphasized that RCRA's imminent hazard provision addresses present or near-term threats, not long-term possibilities. See Meghrig v. KFC W., Inc., 516 U.S. 479, 485-86 (1996). The absence of any current risk to living populations underscores the speculative nature of SCCRAP's claims. SCCRAP's only attempt to show potential harm relies on the possibility that groundwater might be used for drinking water in a future housing development. R. at 9. However, this development would not be completed until at least 2031, and there is no certainty it will use groundwater for drinking water. Id. Such speculative future use cannot support an imminent hazard claim. See Scotchtown Holdings LLC v. Town of Goshen, 137 F. Supp. 3d 478, 491 (S.D.N.Y. 2015) (rejecting RCRA claim based on speculative future development). The proposed development's 2031 completion date places any potential exposure well beyond what courts have considered "imminent" under RCRA. This temporal disconnect further demonstrates why SCCRAP's claims fail to satisfy RCRA's requirements for an imminent and substantial endangerment claim.

D. Requiring Harm to Living Populations Properly Balances Environmental Protection with Practical Reality

Requiring evidence of potential harm to living populations helps ensure that RCRA litigation focuses on genuine threats rather than technical violations. This approach allows courts and regulatory agencies to prioritize cases involving actual risks to human health and ecological systems. The Supreme Court has consistently emphasized the importance of such practical considerations in environmental litigation. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*

Found., Inc., 484 U.S. 49, 64 (1987). Reading RCRA to require harm to living populations aligns with the broader environmental regulatory framework. Other environmental statutes, such as CERCLA and the Clean Water Act, focus on addressing actual or threatened harm rather than mere presence of contamination. *See United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998). This interpretation promotes regulatory consistency and efficient resource allocation. Maintaining meaningful standards for RCRA claims ensures that the statute serves its intended purpose of protecting public health and the environment from genuine threats. Allowing claims based solely on environmental impact without showing potential harm to living populations would transform RCRA into a general environmental protection statute, contrary to Congress's intent. *See Meghrig*, 516 U.S. at 483.

CONCLUSION

For the foregoing reasons, Appellees respectfully requests that this Court affirms the order of the District Court for the Middle District of Vandalia granting Appellee's Motion to Dismiss. This Court should find (1) ComGen's discharge of PFOS and PFBS are not unpermitted discharge; (2) deference is not owed to *Piney Run* in light of *Loper Bright*; (3) SCCRAP does not have standing to challenge the Closure Plan; and (4) SCCRAP cannot pursue a RCRA imminent and substantial endangerment claim.

Respectfully submitted,

_____

ATTORNEYS FOR APPELLEES

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. 20