No. 18-02345

IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH GENERATING COMPANY,

Appellant/Respondent,

v.

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),

Appellee/Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND PETITION FOR REVIEW OF ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR APPELLEE/PETITIONER

Team #29
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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction pursuant to the citizen suit provisions of the Clean Water Act ("CWA"). 33 U.S.C. § 1365(a) (2012). The District Court entered a final judgment on June 15, 2018. Appellant ComGen timely filed an appeal to this Court on July 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

This Court has jurisdiction over the FERC Order under Section 313(b) of the Federal Power Act. 16 U.S.C. 825*l*(b) (2012). FERC issued an order on October 10, 2018 under Docket ER-18-263-000 for which Petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) timely requested rehearing. FERC denied the rehearing request on November 30, 2018. SCCRAP timely petitioned this court for judicial review of the FERC Order on December 3, 2018.

SCCRAP, ComGen, and FERC jointly filed a motion in this court to have the above actions consolidated. Fed. R. App. P. 3(b). This Court granted the motion on December 21, 2018.

STATEMENT OF THE ISSUES PRESENTED

Four questions are presented:

1. Whether the discharge of pollutants into navigable waters through groundwater that has a direct hydrological connection to the navigable waters creates an actionable claim under the Clean Water Act.

2. Whether the arsenic seeping from the flawed seam in ComGen's coal ash pond constitutes a discharge from a point source under the Clean Water Act.

3. Whether FERC's decision to approve ComGen's revised FERC Rate Schedules despite findings tending to show violations of the prudence and matching principles of ratemaking was arbitrary and capricious.

4. Whether ComGen's reduced profitability if FERC disallows recovery for environmental remediation costs related to the Little Green Run Impoundment would amount to an unconstitutional taking under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

Commonwealth Generating Company (ComGen) is the current owner of the Vandalia Generating Station (VGS), an 1100MW coal-fired powerplant located on the banks of the Vandalia River. R. at 4. ComGen currently sells power to two public utilities under Section 201 of the Federal Power Act (FPA), Vandalia Power and Franklin Power. *Id.* ComGen was established by its parent company, Commonwealth Energy Solutions (CES) in 2014 for the sole purpose of transforming the VGS from a wholesale electricity producer to one that operates in the regulated retail markets. R. at 3-4. ComGen, CES, Vandalia Power, and Franklin Power are all wholly-owned subsidiaries of Commonwealth Energy, an electric utility holding company. *Id.*

Since beginning operation in 2000, the facility has produced approximately 38.7 million cubic yards of solid pollutants, consisting mostly of coal combustion residuals (CCRs), commonly known as coal ash, coal fines, and other waste products. R. at 3-5. These solid pollutants are stored in the Little Green Run Impoundment which was formed with the construction of a 395-foot dam. R. at 4. The impoundment has a "high hazard rating" from the EPA. R. at 5.

In 2002 ComGen began detecting arsenic levels in the facility's groundwater that exceeded the Vandalia Department of Environmental Quality's (VDEQ) regulations. R. at 5. This resulted in a VDEQ-approved corrective action plan that ComGen began to implement in 2005. *Id.* As part of the plan, ComGen installed a high density polyethelene geomembrane liner on the impoundment in 2006 in an attempt to prevent arsenic from seeping into the surrounding groundwater. *Id.* Their efforts were unsuccessful as a 2017 analysis detected elevated levels of arsenic in the Vandalia River. R. at 5-6.

A subsequent investigation concluded that the River's elevated levels of arsenic were the result of seepage coming from the Little Green Run Impoundment. *Id.* The investigation found that the geomembrane liner installed in 2006 had a seam which was "inadequately welded." R. at 6. As a result, pollutants from the impoundment leaked into the surrounding groundwater, which then carried them into the Vandalia River. *Id.*

In December 2017, SCCRAP, a national public interest and environmental organization, filed suit in the U. S. District Court for the District of Columbia against ComGen under the CWA's citizen-suit provision. R. at 7. The suit alleged violations of 33 U.S.C § 1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters. *Id.* The District Court concluded that "the Act did indeed cover discharges into groundwater that had a 'direct hydrological connection' to navigable waters such that the pollutant would reach navigable waters through groundwater." R. at 8. It also found as a fact " that arsenic was reaching Fish Creek and the Vandalia River in that manner." *Id.* Lastly, it found that the coal ash pond was a point source because it "convey[ed] arsenic directly into the groundwater and thence into the surface waters." *Id.* As a remedy, in lieu of a civil penalty, the court ordered ComGen to "fully excavate" the coal ash found in the impoundment and relocate it to a properly secured facility. *Id.*

As a result, ComGen filed a proposed rate change with the Federal Energy Regulatory Commission (FERC) under Section 205 of the FPA to fully recover its costs associated with the court-mandated environmental remediation project. *Id.* SCCRAP promptly intervened, protesting the proposed allocation of costs as violative of the Commission's prudence and matching principles of ratemaking. R. at 9-10. Although the Commission agreed "in principle" with SCCRAP's protest, it concluded that SCCRAP's proposed return on equity for ComGen of

either 3.2% or 3.6% would amount to an unconstitutional taking under the Fifth and Fourteenth Amendments. R. at 11-12. As a result, the Commission issued a final order accepting ComGen's proposed rate revision and cost allocation structure. *Id.* SCCRAP promptly petitioned this Court for review of FERC's order. R. at 12.

SUMMARY OF THE ARGUMENT

This Court should hold ComGen accountable for its environmental mismanagement. ComGen has had eleven years to stop arsenic from seeping into the Vandalia River from its Little Green Run Impoundment. R. at 4-5. Instead of actively monitoring its "high hazard" impoundment and working to mitigate its harms, ComGen chose to do nothing. As a result of its inaction, this state's navigable waterways now carry excessive levels of arsenic and ComGen must pay the costs to remedy the harms it has caused. R. at 5-6.

The District Court correctly interpreted the CWA in finding that a discharge of pollutants into groundwater from a point source is actionable so long as there is a "direct hydrological connection" to navigable waters. R. at 8. Supreme Court precedent supports this interpretation under the "significant nexus" test. *Rapanos v. United States*, 547 U.S. 715, 759 (2006). To hold that a "direct hydrological connection" does not provide a "significant nexus" between point sources and this country's navigable waterways would undermine the Court's holding in *Rapanos* and create an extraordinary loophole for firms to escape liability when they pollute our waterways. It would also undermine the purpose and language of the CWA to "restore and maintain the... integrity of the Nation's waters." 33 U.S.C. § 1251 (2012).

The Court was also correct in concluding that the Little Green Run Impoundment is a "point source" under the CWA because the coal ash impoundment, formed by the creation of a 395-foot dam for the specific purpose of holding pollutants, functioned as a "discernible,

confined, and discrete conveyance". § 1362(14). It functions as a massive "container" for harmful substances and contains a "discrete fissure" in an inadequately welded seam. *Id.* This container discharged those pollutants, which were then conveyed through groundwater into navigable waters resulting in an actionable claim under the CWA. R. at 5-6. The District Court's judgment should be affirmed.

In a further attempt to avoid responsibility for the environmental harms it has caused, ComGen turned to FERC for permission to pass its remediation costs onto its consumers. R. at 7-8. The Commission obliged. R. at 11-12. However, FERC first found as a matter of fact that ComGen's implementation of its VDEQ-corrective action was not handled properly. R. at 11. It found that ComGen "failed to properly monitor" the functioning of the geomembrane liner for the eleven years that it was in place. *Id.* This factual finding necessitates the conclusion, which FERC refused to reach, that ComGen acted imprudently in handling its business affairs. Typically, FERC refuses to pass on costs that were incurred imprudently by a utility, which is the first reason why its final order is arbitrary and capricious.

The second reason is that FERC did not properly allocate the costs to consumers even if was correct to not disallow them entirely. Under long-standing FERC precedent, consumers should only be charged rates related to costs which they actually caused. *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992). Because ComGen's current consumers have only been buying its services since 2014, they should not be forced to pay to remove coal ash which was generated between 2000 and 2014. R. at 9-10. FERC's decision to allocate the entirety of the remediation costs, despite finding that this would generate a "windfall" to ComGen's shareholders, is also arbitrary and capricious. *Id.*

FERC defends its actions by claiming that establishing SCCRAP's proposed rate of return of either 3.2% or 3.6% would create a "confiscatory" rate in violation of the Fifth and Fourteenth Amendments. R. at 11-12. This conclusion does not follow from relevant precedent because such a rate would not endanger the financial integrity of ComGen, CES, or CE. *See FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). The limited rate of return, while still generating a profit for the firm's shareholders, is confined in scope and duration. It is the result of the predictable risks that accompany investing in the energy industry. For these reasons, this Court should vacate the FERC order and remand for the Commission to adopt the logical conclusions of its factual findings without fear of running afoul of the Constitution.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT WAS THE PROPER INTERPRETATION OF THE ACT AND THE SUPREME COURT'S 'SIGNIFICANT NEXUS' TEST.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). To that end, the CWA prohibits "the discharge of any pollutant by any person". § 1311(a). The phrase "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). The Supreme Court's characterization of the legislative history regarding the CWA found that "views on the comprehensive nature of the legislation were practically universal." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 319 (1981) (internal citations omitted). The language, purpose, and comprehensive framework of the CWA support the interpretation that pollutants discharged into groundwater with a "direct hydrological connection" to waters of the United States create actionable claims under the Act. This interpretation is also supported by

Supreme Court precedent in the landmark case *Rapanos v. United States*. 547 U.S. 715, 759 (2006) (Kennedy, J., concurring).

This court should affirm the District Court's holding because it is in alignment with Justice Kennedy's 'significant nexus' test. *Id.* (Kennedy, J., concurring) (reaffirming Supreme Court precedent by holding that a "'significant nexus' to waters that are or were navigable in fact" is the necessary test for jurisdiction under the CWA). This court should follow Justice Kennedy's concurrence because it is the 'narrowest grounds' under which the issue was decided. *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (determining that, when analyzing judicial opinions with no majority, the proper holding is the position of the Justices "who concurred in the judgments on the narrowest grounds.") (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). Justice Kennedy's concurrence is the 'narrowest grounds' under which to interpret *Rapanos* because his swing vote utilized a broader interpretation than the Plurality's opinion, but a narrower one than the Dissent's. *Compare Rapanos*, 547 U.S. at 757 (2006) (Scalia, J., plurality opinion) (holding that the proper test to determine jurisdictional waters of the United States involves determining whether they possess a "continuous surface connection"), *with Rapanos*, 547 U.S. at 788 (2006) (Stevens, J., dissenting) (siding with the US Army Corps' wetlands determination and Supreme Court precedent for a broader interpretation of 'waters of the United States'). *See also Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) (concluding that, after the *Rapanos* holding, waters would be jurisdictional if they met the requirements under either the 'continuous surface connection' or the 'significant nexus' test.).

Justice Kennedy's "significant nexus' test reaffirmed the Supreme Court's holding in *Riverside Bayview Homes* and *SWANCC* that the important factor was the "significant nexus between wetlands and 'navigable waters'". *Id.* at 767. *See United States v. Riverside Bayview*

Homes, Inc., 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001). The concurrence correctly found that the plurality's opinion impermissibly added two requirements to the 'significant nexus' test that did not comport with the text of the CWA: the 'relatively permanent' and 'continuous surface connection' requirements. *Id.* at 770. The 'significant nexus' test reaffirms that a 'hydrological connection' would be sufficient, so long as it was significant. *Id.* at 784.

This court should affirm the District Court's holding based on the text of the CWA and the 'significant nexus' test because the District Court found as a matter of fact that "arsenic was reaching Fish Creek and the Vandalia River" through a "'direct hydrological connection'". R. at 8. Other Supreme Court decisions regarding the extent of jurisdiction under the Clean Water Act are all distinguishable from this case because they attempted to discern whether a body of water could be dredged or filled without a CWA permit, whereas, in the case at hand, it is already confirmed that ComGen has caused the "addition of any pollutants into navigable waters" of the United States. § 1362(12)(A); *Rapanos*, 547 U.S. at 715; *SWANCC*, 531 U.S. at 159; *Riverside Bayview Homes*, 474 U.S. at 121. The confirmed addition of pollutants to navigable waters eclipses all the philosophical discussion in the aforementioned cases about when waters are connected enough such that one can be filled or dredged without a permit. In the case at hand, pollutants have been discharged and added to a navigable body of water which forecloses the need to even choose a test under *Rapanos*. 547 U.S. at 743 (Scalia, J., plurality opinion) ("The Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'").

The application of this interpretation to cases in which discharges into groundwater add pollutants to navigable waters is known as the Groundwater Conduit Theory. *Hawai'i Wildlife*

Fund v. Cty. of Maui, 886 F.3d 737, 743 (9th Cir. 2018), *amending and superseding on denial of reh'g en banc*, 881 F.3d 754 (9th Cir. 2018). This theory does not assert that groundwaters are waters of the United States or are navigable waters in and of themselves. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649-51 (4th Cir. 2018). Instead, the Groundwater Conduit Theory merely affirms that pollutants travelling through groundwater that are added to navigable waters via a direct hydrological connection create actionable claims under the Clean Water Act. *Id.*

The conclusion that actionable claims arise under the CWA when pollutants are added to navigable waters, regardless of whether they travel through another medium or conveyance before they get there is supported by numerous circuit courts. *Upstate Forever*, 887 F.3d at 649 (affirming the groundwater conduit theory where an underground gas pipeline ruptured); *Hawai'i Wildlife Fund*, 886 F.3d at 745-49 (affirming the groundwater conduit theory with discharges from injection wells); *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188 (2d Cir. 2010) (affirming that indirect discharges of pesticides from trucks and helicopters into the air were actionable under the CWA); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that "[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law."); *Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980) (holding that sediment basins dug by miners that add pollutants to navigable waters create actionable claims under the CWA and that groundwater playing a role in "delivering the pollutants... does not preclude liability under the statute.").

This interpretation is also supported by the weight of district court decisions which support the groundwater conduit theory. *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d

1359, 1366 (M.D. Ga. 2017); *Hernandez v. Esso Standard Oil Co. (P.R.)*, 599 F.Supp.2d 175, 181 (D.P.R.2009); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F.Supp. 1300, 1319 (S.D.Iowa 1997). *But see Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-CV-2148, 2018 WL 6042805 (C.D. Ill. Nov. 14, 2018).

Thus far, only one Circuit has disagreed with the Groundwater Conduit Theory and come to the incorrect conclusion that waters discharged into a 'diffuse medium' that are ultimately added to navigable waters do not constitute a CWA violation. *Ky. Waterways All. v. Ky. Utilities Co.*, 905 F.3d 925, 933 (6th Cir. 2018) (holding that groundwater pollution could not give rise to CWA liability under a "hydrological connection" theory). *See also Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (refusing to find groundwater discharges to be actionable under the CWA). The 6th Circuit came to this conclusion in error for several reasons. First, they incorrectly concluded that "*Rapanos* is not binding here." *Ky. Waterways All.*, 905 F.3d at 936. Second, they improperly equated the discussion of whether a groundwater itself was a 'point source' and whether discharges that travel through a medium to a navigable water are actionable. *Id.* at 934.

Finally, they put too much emphasis on the word 'into', which is used in a different section of the Act, by stating that "it leaves no room for intermediary mediums to carry the pollutants." *Id.* at 934. They then read the word 'directly' into the relevant section of the Act to justify their interpretation. *Id.* (condemning plaintiff's argument that the omission of the word 'directly' supports plaintiff's reasoning); *id.* at 936 (condemning plaintiff's reliance on Scalia's plurality opinion in *Rapanos* which focused on the lack of the word 'directly').

The 6th Circuit's interpretation leads to the absurd result that polluters could escape CWA regulation by simply spraying pollutants through the air or discharging them into a ditch

right next to a water of the United States. *Id.* at 933 (holding that groundwater discharges are not actionable because groundwater is a "'diffuse medium' that seeps in all directions, guided only by the general pull of gravity.").

Furthermore, the case at hand is readily distinguishable from the situation in *Kentucky Waterways Alliance* because ComGen's coal ash ponds were "inadequately welded" and suffered from a "seam in the geomembrane liner" that caused "seepage that pooled at the downstream toe of the west embankment." 905 F.3d at 936; R. at 6. This opening in the liner indicates that the discharge was happening from one specific point and pooling rather than diffusing. Such a discharge should merit a different analysis, even under the 6th Circuit's interpretation, because the pollutants were concentrated, and the discharge was the result of negligent construction instead of solely 'gravity'.

The argument that the CWA only regulates discharges of pollutants that go "*directly*" into waters is wholly inconsistent with the purpose, framework, and language of the Act. *Upstate Forever*, 887 F.3d at 650 (emphasis in original). The purpose of the Act would be severely compromised if "the presence of a short distance of soil and ground water were enough to defeat a claim." *Id.* at 652. Such an interpretation would lead to the absurd result that a company could forego CWA violation by moving their drain pipe a few feet inland from a body of water.[1] This Court should side with the factual and scientific conclusions of the investigation and the district

[1] The argument that the Resource Conservation and Recovery Act (RCRA) would cover such loopholes fails because that Act was not intended to cover such discharges. 42 U.S.C. § 6903(27) (2012) (excluding "industrial discharges which are point sources subject to permits under [CWA]" from the definition of "solid waste"); *Compare* 40 C.F.R. § 401.15 (2018) (listing toxic pollutants designated under 42 U.S.C. § 1317(a)(1)), *with* 40 C.F.R. § 261.30-261.32 (listing hazardous waste subject to RCRA regulation).

court as well as the legal doctrine underpinning the groundwater conduit theory upheld by the 9th and 4th Circuits.

II. THE DISTRICT COURT'S DETERMINATION THAT THE LITTLE GREEN RUN IMPOUNDMENT WAS A 'POINT SOURCE' IS CONSISTENT WITH THE LANGUAGE OF THE CLEAN WATER ACT BECAUSE IT IS A 'DISCERNIBLE, CONFINED AND DISCRETE CONVEYANCE' AS A 'CONTAINER' WITH A 'DISCRETE FISSURE'.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). To that end, the CWA prohibits "the discharge of any pollutant by any person." § 1311(a). The phrase "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). The term "point source" is defined as a "discernible, confined and discrete conveyance." § 1362(14). Examples of point sources include, but are "not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* The Supreme Court's characterization of the legislative history regarding the CWA found that "views on the comprehensive nature of the legislation were practically universal." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 319 (1981) (internal citations omitted). A broad interpretation of "point source" is consistent with the purpose, language, and comprehensive framework of the CWA because it is the best way to "restore and maintain… the Nation's waters." § 1251(a).

Supreme Court precedent supports a broad and inclusive interpretation of the definition of "point source", one that is flexible enough to meet the needs of the Act. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104 (2004) (holding that a pump-station transferring waters between a canal and an impoundment was a point source); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006) (finding that the CWA regulated a dam

that created a pond with the potential to discharge back to the riverbed below the impoundment); *City of Milwaukee*, 451 U.S. at 320 (finding that overflows from sewage systems that ended up in Lake Michigan constituted "point source discharges, under the Act, [and] are prohibited unless subject to a duly issued permit."). The Supreme Court has found that "a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 104.

This Court has not had many opportunities to review the extent of the definition of point sources, but it has rejected agency attempts to shrink the category in the past. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (striking down EPA's attempt to create a blanket exemption of stormwater discharges thereby affirming a broad interpretation of point source).[2]

The Circuit Courts have largely agreed that the "definition of a point source is to be broadly interpreted… embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188 (2d Cir. 2010) (quoting *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002).

Applying a broad interpretation to the definition of point source, numerous courts have recognized that industrial waste impoundments, including coal ash ponds, that discharge

[2] This Court found, in *Nat'l Wildlife Fed'n v. Gorsuch*, that EPA was reasonable in excluding dam-caused pollution, but this reasoning has been largely overturned by the Supreme Court's holding in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, that potential discharge from a dam triggered CWA requirements. 693 F.2d 156, 161 (D.C. Cir. 1982); 547 U.S. 370, 373 (2006).

pollutants to navigable waters could be point sources. *See, e.g.*, *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (sediment basins); *Earth Scis., Inc.*, 599 F.2d at 374 (groundwater seeps from a sump pit); *Flint Riverkeeper, Inc. v. Southern Mills, Inc.*, 276 F. Supp. 3d 1359 (M.D. Ga. 2017), *order aff'd*, 261 F. Supp. 3d 1345 (M.D. Ga. 2017) (seeps from fields); *Tri-Realty Company v. Ursinus College*, 124 F. Supp. 3d 418 (E.D. Pa. 2015) (fuel oil impoundment); *PennEnvironment v. PPG Industries, Inc.*, 964 F. Supp. 2d 429 (W.D. Pa. 2013) (industrial stormwater leachate from slurry lagoons); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997) (groundwater migration from unlined brine pond). The 5th Circuit found particularly persuasive that excluded waters, "when collected or channeled" may constitute as point sources. *Sierra Club*, 620 F.2d at 47. The 10th Circuit determined that a closed circulating system, while not a traditional point source, would constitute one "[w]hen it fails because of flaws in the construction or inadequate size... with resulting discharge, whether from a fissure... or overflow." *Earth Scis., Inc.*, 599 F.2d at 374.

This Court should affirm the District Court's conclusion that ComGen's Little Green Run Impoundment is a "point source" because ComGen used it to concentrate pollutants in one "discernible, confined, and discrete" location which "convey[ed] arsenic directly into the groundwater and thence into surface waters." § 1362(14); R. at 8. This Court should affirm the holding that a coal ash pond can constitute as a point source, or, in the alternative, that ComGen's specific coal ash pond constituted a point source due to its unique nature and structural inadequacy. R. at 6. The Little Green Run Impoundment is separate and 'discrete', including an easily 'discernible' 395-foot dam, and is 'confined' with a high-density polyethylene geomembrane liner making it fall squarely within the definition of 'point source'. R. at 4, 5.

The broad interpretation of the term "point source" intended by the CWA and afforded to it by the Supreme Court indicate that coal ash ponds are sufficiently "discernible, confined and discrete conveyance[s]" to create actionable claims when they discharge into navigable waters. § 1362(14). The Little Green Run Impoundment is a coal ash pond and functions as a "container" that collects and concentrates arsenic and other pollutants from coal ash, just like the ponds in *Earth Sciences, Inc.* 599 F.2d at 374.; R. at 8. A "container" is a listed statutory example of a point source. § 1362(14). This seeping container is discharging pollutants into a navigable waterway and is thereby creating an actionable claim under the CWA. § 1362(12)(A). To allow such containers to escape CWA liability just because they are not intended to release the pollutants that they hold would be contrary to the purpose and comprehensive framework intended by Congress and would severely hamper the government's ability to enforce it. § 1251(a).

In the alternative, should this Court find that all coal ash ponds do not constitute point sources under the CWA as a matter of law, it should still uphold the District Court's findings because ComGen's coal ash pond was inadequately constructed and suffered from a flawed seam from which the discharge was occurring. R. at 6. A "discrete fissure", such as the flawed seam in this case, is a listed statutory example of a point source. § 1362(14). The flawed seam in this case distinguishes the Little Green Run Impoundment from related cases that found coal ash ponds not to be point sources. *Ky. Waterways All. v. Ky. Utilities Co.*, 905 F.3d 925 (6th Cir. 2018). *See also Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018); *Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018). The flawed seam in this coal ash pond renders this case no different than the closed-circulating system in *Sierra Club* and bears strong similarities to the dam-made pond in *S.D. Warren Co.* 620 F.2d at

47; 547 U.S. at 370. Finding the Little Green Run Impoundment to be a point source would be more consistent with Supreme Court precedent than finding it to be exempt as a matter of law because the facts of the case show that it functioned as a point source when discharging arsenic into navigable waters. *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 104 (holding that the CWA "does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition.").

III. FERC'S DECISION TO APPROVE COMGEN'S REVISED RATE SCHEDULES WAS ARBITRARY AND CAPRICIOUS BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE FINAL ORDER AND THE FACTS FERC FOUND

This Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A) (2012); *United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016) ("we will vacate FERC ratemaking decisions that are arbitrary or capricious."). Factual findings are upheld as long as they are "supported by substantial evidence." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). To uphold the overall order, the Court first assures itself that the Commission examined all relevant information and established a "rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

This Court should vacate FERC's order for failing to establish a rational connection between its findings and its conclusion. First, FERC's factual finding that ComGen "failed to properly monitor" the VDEQ's corrective action plan necessitates the conclusion that ComGen acted imprudently and thus should not be able to include the remediation costs in its rate base. R. at 11. Second, FERC's finding that ComGen's ability to pass its full remediation costs onto

its consumers would generate a "windfall" to its shareholders necessitates the conclusion that the rate order violates the "matching principle." *Id.*

A. FERC's Finding that ComGen Failed to Monitor Its Corrective Action Plan Is Sufficient to Conclude that ComGen Acted Imprudently, Making FERC's Order Arbitrary and Capricious.

After a utility makes a rate filing under Section 205 of the FPA, 16 U.S.C. § 824d (2012), affected parties may file a complaint alleging that the utility should exclude some portion of its investments for failing to adhere to the "prudence standard." *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 253 (D.C. Cir. 1995). A public utility "may not recover its costs if those costs were incurred 'imprudently.'" *Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986). To succeed on a complaint that the utility failed to act with adequate prudence, the complainant must "present evidence sufficient to raise serious doubt that a reasonable utility manager, under the same circumstances and acting in good faith, would not have made the same decision and incurred the same costs." *Ind. Mun.*, 56 F.3d at 253 (citations omitted). The Commission's analysis of the utility's prudence in a particular action must focus on the "information available to the utility at the time the decision is made." *City of New Orleans v. FERC*, 67 F.3d 947, 954 (D.C. Cir. 1995).

When evaluating the prudence related to environmental compliance costs, this Court has accepted that utilities should not be held strictly liable for infractions of the environmental laws. *See Iroquois Gas Transmission System, L.P. v. FERC*, 145 F.3d 398, 402 (D.C. Cir. 1998). The Court reasoned that holding otherwise would impermissibly incentivize utilities to be overly risk-averse, ultimately to the detriment of the ratepayer. *Id.* Because "a firm incurring optimal environmental compliance costs will on occasion take measures that are ultimately found illegal," the Court concluded that sometimes utilities should be allowed to pass these costs to the

consumer. *Id.* In other words, not all environmental compliance costs are automatically imprudent, but the utility bears the burden of showing why the incurred costs are prudent. *Id.*

ComGen has been aware of the presence of arsenic in the groundwater surrounding the Little Green Run Impoundment since 2002. R. at 5. After installing a geomembrane liner in 2006 as part of a VDEQ-sanctioned corrective plan to stop the seepage, it took eleven years for ComGen to realize that its installation was "inadequately welded." R. at 6. ComGen's lack of oversight of the situation, which it claims to have delegated to a subcontractor, resulted in a continued rise of arsenic levels in the Vandalia River. *See* R. at 5-6, 10. ComGen's imprudence arises not from the fact that the geomembrane was inadequately welded in the first place, but from the fact that it subsequently failed to adequately monitor the project.

The Commission agreed with this conclusion. It found as a matter of fact that "ComGen failed to properly monitor the effectiveness of the correction action during the 2006-2017 period." R. at 11. A "reasonable utility manager" would have ensured that sufficient monitoring existed to assess the firm's compliance with a state-mandated environmental correction plan. Delegation of the task without any further oversight impermissibly exposed ComGen's shareholders to rising environmental compliance costs – costs which they should now be exclusively liable for. Because findings of fact are evaluated under the deferential "substantial evidence" standard, *Midwest ISO*, 373 F.3d at 1368, this Court should accept FERC's findings that ComGen's leadership is responsible for eleven years of seepage problems coming out of the Little Green Run Impoundment. ComGen's eleven-year oversight failure exacerbated a problem that could have been solved early on and likely at lower cost, and because of this its shareholders should not be allowed to pass through *any* of the costs related to the closure-by-removal corrective action mandated by the District Court.

Because the Commission found sufficient facts to conclude that ComGen acted imprudently, this Court should vacate the Commission's order holding otherwise as being arbitrary and capricious for failing to establish a "rational connection between the facts found and the choice made." *Midwest ISO*, 373 F.3d at 1368.

B. Alternatively, Because Current Ratepayers Only Caused the Creation of 19.5% of the Coal Ash in the Impoundment, they Should At Most Be Responsible for 19.5% of the Remediation Costs.

The Commission's "matching principle" in the ratemaking context stands for the simple proposition that ratepayers should only be "charged with the costs of producing the service they receive." *Town of Norwood v. FERC*, 53 F.3d 377, 380-81 (D.C. Cir. 1995). *See also KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) ("all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them."). Courts "evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO*, 373 F.3d at 1368-69 (citations omitted). Although FERC is not required "to allocate costs with exacting precision," *Id.*, courts should only approve rates "which match, as closely as practicable, the costs to serve each class" of customers. *Ala. Elec. Coop, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

The timing of the incurred costs is not dispositive of which customers caused the cost to be incurred. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 708 (D.C. Cir. 2000). Simply because a utility incurred the cost in the past does not mean that future customers will not benefit from that expenditure. *Id.* ("Cost causation requires not that costs be incurred at the same time they are included in rates, but that the rates reflect to some degree the costs

actually caused by the customer who must pay them.") (citations omitted). It follows, then, that a utility's current expenditures are not necessarily caused by its current customers. *Cf. id.*

There are some limited exceptions under which the courts will allow FERC to depart from the matching principle. *See Town of Norwood*, 53 F.3d at 380-81. For example, when a proposed order will, in the long-run, lead to a more faithful execution of the matching principle despite a short-term departure from it, the courts will look on such changes favorably. *Id.* Also, the Commission may allow some departure "to make a utility whole for properly deferred, prior period costs." *Id.* at 381. Thus, this Court affirmed FERC's decision to temporarily depart from the matching principle in *Town of Norwood* because both conditions were adequately met. *Id.*

Changes in "ratemaking conventions" can be a valid reason to allow utilities to recover costs from customers that did not necessarily cause those costs initially. *Id.* This scenario has played out repeatedly before FERC in the context of spent nuclear fuel. *See New England Power Co.*, 61 F.E.R.C. ¶ 61,331 at 62,215-16 (citing cases in which FERC approved departure from the matching principle for nuclear plants). When regulatory circumstances changed that required utilities to dispose of spent nuclear fuel instead of reprocessing it, the Commission allowed departures from the matching principle for the firms to recover these unexpected increases in costs. *See Town of Norwood,* 53 F.3d at 381.

For 80.5% of the time that the Vandalia Generating Station has been in operation, its impoundment has collected coal ash generated by customers other than those of Vandalia Power and Franklin Power. R. at 9. If FERC is to assess costs to current ratepayers related to the impoundment's closure and removal, it must limit those costs to the "benefits" which the ratepayers received; namely, the benefits amount to only that coal ash which has accumulated in the impoundment since 2014. *Id.* Nor can it be argued that the remediation costs should be

upheld under the properly deferred costs exception in *Town of Norwood*. 53 F.3d at 381. The costs that the District Court is compelling ComGen to pay are a result of mismanagement and could have been avoided by ComGen's leadership. These costs are not the result of regulatory or ratemaking changes outside of ComGen's control. Thus, there is no valid exception for FERC to depart from its matching principle precedent.

ComGen's argument that the timing of the costs incurred means that current ratepayers must carry the cost runs afoul of the rule established in *Transmission Access Policy Group*. 225 F.3d at 708. Just because the utility must pay the costs right now does not mean that the current ratepayers are responsible for the entire extent of those costs. *See id.*

The Commission agreed with this assessment in its order by concluding, as a factual matter, that a complete pass through of coal ash costs that pre-date the current ratepayer's usage of the facility would amount to a "windfall" for ComGen's shareholders. R. at 11. It was the shareholders that benefited from 80.5% of the coal ash currently found in the impoundment, so it is they who must shoulder the cost under the cost causation principle. R. at 11. Because these factual findings conflict with the Commission's conclusion to nevertheless allow the complete allocation of costs to current ratepayers, the Commission's order lacks "a rational connection between the facts found and the choice made." *Midwest ISO*, 373 F.3d at 1368.

Because FERC failed to connect its findings on the prudence and matching principles to its ultimate conclusion, this Court should vacate the order for being arbitrary and capricious unless the Commission's constitutional conclusions are correct. However, the Commission's legal conclusion that a 3.2% or 3.6% return on equity would amount to an unconstitutional taking under the Fifth and Fourteenth Amendments is unsupported by the relevant case law.

IV. DISALLOWING RECOVERY FOR THE LITTLE GREEN RUN IMPOUNDMENT WILL NOT ESTABLISH A "CONFISCATORY" RATE

AND THUS WILL NOT AMOUNT TO AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Under the Federal Power Act, FERC has jurisdiction over public utilities to set rates that are "just and reasonable." 16 U.S.C. 824d(a) (2012). At its core, this standard requires the Commission to engage in a "balancing of the investor and the consumer interests." *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). This statutory standard also "coincides with that of the Constitution," *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), in that the Commission is prohibited from setting a rate "which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired"). In other words, any rate set by the Commission that is "higher than a confiscatory level" does not amount to an unconstitutional taking pursuant to the Fifth and Fourteenth Amendments. *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974).

The Court has succinctly explained that Congress' primary purpose in enacting the Federal Power Act[3] "was to encourage the orderly development of plentiful supplies of electricity. . .at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). In pursuit of this purpose, the Commission's mandate to protect consumers is relatively clear: in order to prevent potential abuses of public utilities' monopoly power it must ensure that ratepayers are not charged exploitative prices. *See Hope*, 320 U.S. at 610; *Jersey Cent.*, 810 F.2d at 1177-78.

[3] The Court was also speaking of its companion, the Natural Gas Act of 1938. However, "courts rely interchangeably on cases construing each of these Acts when interpreting the other." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (en banc) (citing *Arkansas Louisiana Gas Co. v. Hall*, 435 U.S. 571, 577 n. 7 (1981)).

In *Hope*, the lodestar Supreme Court case on public utility takings, the Court held that on the other side of the scales lies the investor interest in the "financial integrity" of the utility so that it may continue to provide services to the consumer. 320 U.S. at 603. Securing the ongoing financial viability of the utility means that it should generate not only sufficient revenue to cover operating expenses, but it should also cover the "capital costs of the business." *Id.* In general, this means that the Commission should allow for a sufficient return on equity for the utility to be able to maintain its credit and to further attract capital. *Id.*

Accounting for the investor interest does not compel the government to "insure that the business shall produce net revenues." *Id.* As the D.C. Circuit has held more plainly: "[a] regulated utility has no constitutional right to a profit." *Jersey Cent.*, 810 F.2d at 1180-81 (citing *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. at 590).

In determining whether the Commission adequately balanced the interests of investors and consumers, courts must look to the "end result" of the rate order. *Hope*, 320 U.S. at 603. In other words, courts evaluate whether an order is "just and reasonable" by looking at the impact of the final rate instead of sifting through each portion of the Commission's methodology to determine whether that portion, standing on its own, is just and reasonable. *Jersey Cent.*, 810 F.2d at 1172, 1177.

There is no single algorithm or methodology that the Commission can use to always achieve a just and reasonable outcome, and the Supreme Court has acknowledged that determining the validity of any particular rate "will always be an embarrassing question." *Duquesne*, 488 U.S. at 308 (quoting *Smyth v. Ames*, 169 U.S. 466, 546 (1898)). Nevertheless, both statute and the constitution protect investors from rates so low as to be confiscatory, and consumers from rates so high as to be exploitative, and it is the role of the courts to make sure

that every rate is situated in a "zone of reasonableness" located between these two extremes. *Washington Gas Light Co. v. Baker,* 188 F.2d 11 (D.C. Cir. 1950). The zone of reasonableness is tied to the level of risk which accompanies the investment, which in turn is evaluated by comparison to other, similarly situated companies and investments. *See Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923). *See also Emera Me. v. FERC*, 854 F.3d 9, 20-21 (D.C. Cir. 2017). Although it is a necessary starting point, FERC is not bound by the zone of reasonableness and is empowered to make "pragmatic adjustments" to it if a "utility's circumstances" call for it. *Emera,* 854 F.3d at 21.

In *Duquesne,* the leading modern precedent on constitutional takings in public utilities cases, the Court struck down two firms' challenge to FERC's exclusion of a failed investment in nuclear facilities, even though the investments may have been prudent. 488 U.S. at 312. The Court held that the utilities' return on equity of 16.4% and 15.7%, even after exclusion of the investment from their rate bases, made the "total effect of the rate order" fall "well within the bounds of *Hope*." *Id.* at 311-12.

At the other extreme, in *Jersey Central* the D.C. Circuit remanded a FERC order for improperly excluding the utility's investment in a nuclear project because it failed to adequately account for the serious financial impact on the company. 810 F.2d at 1169-70. The utility alleged that FERC's rate order led it to being "unable to pay dividends for four years," "shut off from long-term capital," and to become "wholly dependent for short-term capital on a revolving credit arrangement that [could] be cancelled at any time." *Id.* at 1181. In short, the Court held that the utility's precarious financial position, a situation approaching bankruptcy, would render FERC's rate order an unconstitutional taking under *Hope*. *See id.*

In between these two cases there is a recent decision by this Court regarding a rate order that would have rendered a large portion of the utility's business to operate essentially "as a nonprofit." *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018). Without directly ruling on the merits, the Court remanded for further factfinding on the potential impact on the utility's financial integrity of being forced to operate "large non-profit appendages." *Id.* This Court applied an "entire enterprise" standard, looking at the effects of the rate order on the entire corporate entity instead of the small portion to which the order applied, and concluded that future investors might be impermissibly deterred from providing capital because the utility may be forced to use significant resources to maintain assets on which it could not receive *any* return on equity. *Id.* at 582.

One of the key considerations for the Court was that there was no limit on the extent to which the nonprofit portion of the business could grow. *Id.* (holding that "the non-profit innovation might remain bearable so long as the [non-profit expenditures] remain tiny relative to their host."). While reaffirming that "*Hope* does not guarantee that each portion of a regulated business will be profitable," the Court nevertheless concluded that the unpredictable and potentially limitless nature of the non-profit portion could violate "*Hope*'s capital-attraction standard." *Id.* In short, such an increase in the riskiness of the investment without a corresponding return for the investors can run afoul of the *Hope* test because it might deter future investment. *See id.* at 580.

ComGen and CE have no "constitutional right to a profit," although the Vandalia Generating Station would still generate one for them even if they are disallowed passing on the Impoundment's environmental compliance costs to consumers. *Jersey Cent.*, 810 F.2d at 1180-81; R. at 8-10. ComGen's return on equity under this scenario would clearly be significantly less

than the approximately 15% that the Court found constitutionally permissible in *Duquesne*, 488 U.S. at 311-12, but there are also no facts in the record to suggest that it would create the type of financial peril facing the utility in *Jersey Central*. 810 F.2d at 1181. Nothing in the record suggests that ComGen or CE are facing a shortage of long- or short-term credit options or that they have otherwise recently been unable to deliver returns to investors. R. at 3-5, 8-10. Furthermore, FERC's "pragmatic adjustment" to account for ComGen's imprudence and to impose a rate that might otherwise fall at the lower end of the "zone of reasonableness" is an acceptable use of its statutory authority. *See Emera*, 854 F.3d at 20-21.

ComGen's best argument is that the lower-than-expected return on equity will sufficiently deter future investors similarly to the situation in *Ameren*. 880 F.3d at 581. This argument fails on several grounds. First, ComGen will still be making a profit thereby disqualifying it from being considered a non-profit itself as well as from being a "non-profit appendage" of CES**.** *Id.* Second, the lower-than-expected profits are expressly confined in both time and space. R. at 10-11. Unlike in *Ameren* where investors had to worry about the actions of third parties to influence the scope of their non-profit operation, here the scope is clear and limited: ComGen will have to accept at worst a 3.2% return for the next ten years. *Id.* The impact of such a rate order under the *Ameren* "entire enterprise" standard shows that it falls squarely within the allowable exception even for entirely non-profit operations. 880 F.3d at 581. That is, the lower rate of return will account for only a "tiny" portion of the utility behemoth's operations. *Id.* at 582.

Related to the "entire enterprise" argument is that the entire web of corporate entities involved in this proceeding are wholly-owned subsidiaries of CE. R. at 3-5. CE is the sole investor and shareholder with interests related to the sale of power from the Vandalia Generating

Station. *Id.* As long as CE remains confident in the ability of its managers to avoid repeated and large-scale environmental disasters, then it should be comfortable continuing to invest in ComGen knowing that the firm will return to a double-digit rate of return in ten years. R. at 8-10.

ComGen's public policy argument regarding the necessity of ensuring sufficient funds for environmental clean-ups in the future is inapposite. Perhaps this would be a relevant question if the proposed rate ran afoul of the *Hope* test by casting doubt on the firm's shareholders to cover environmental remediation costs. Seeing as that is not the case here, disallowing the recovery of compliance costs from rate-payers will not endanger future clean-up operations. Environmental risks are inherent in many industries, particularly in the energy space. *See, e.g.*, *Ameren* 880 F.3d at 583 (acknowledging that "fines and penalties for violations of mandatory. . .environmental regulations are generally charged directly to the utility, not passed through to customers via rate increases."). Furthermore, as opposed to less-regulated industries, investors in public utilities remain statutorily and constitutionally protected from financial disaster if environmental compliance costs ever endanger the "financial integrity" of the firm.

In sum, a proposed ten-year rate of return between 3.2 and 3.6% will not endanger the financial integrity of ComGen or its parent corporations because it will not impermissibly deter future investment. Thus, neither proposed rate would be so "unjust" as to be confiscatory pursuant to the Fifth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment. It should also vacate the FERC order and remand to the Agency for further proceedings.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Team #29 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, 2018.

Respectfully submitted,

Team No. 29