NO. 18-02345

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

COMMONWEALTH GENERATING COMPANY,

Intervenor.

Consolidated on Appeal from the United States District Court
for the District of Columbia and the Federal Energy Regulatory Commission

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BRIEF FOR PETITIONER

TEAM NO. 22

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STATEMENT OF THE ISSUES PRESENTED

I. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.

II. Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of § 311(a) of the Clean Water Act.

III. Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.

IV. Whether SCCRAP's position in the FERC proceeding—to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment—is an unconstitutional taking under the Fifth and Fourteenth Amendments.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction over the citizen-suit under the Clean Water Act—under 28 U.S.C. § 1331 (2012). The Federal Energy Regulatory Commission (FERC) had jurisdiction over Commonwealth Generating Company's filing under 16 U.S.C. § 824(b). This Court has jurisdiction over the district court's decision under 28 U.S.C. § 1291 and FERC's decision under 16 U.S.C. § 825l(b).

Commonwealth Generating Company (ComGen) timely filed an appeal on July 16, 2018. R. at 8. Stop Coal Combustion Residual Ash Ponds (SCCRAP) timely pursued judicial review with its petition on December 3, 2018. R. at 12. Because the two appeals involve common parties and issues, SCCRAP, ComGen, and FERC jointly filed a motion in this Court to have the actions consolidated. R. at 12. On December 21, 2018, this Court granted the motion. R. at 12.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves a utility company that polluted navigable waters via hydrologically connected ground water and its attendant strategy to recover in rates the costs associated with addressing the problem. R. at 1–2.

ComGen challenges an order by the United States District Court for the District of Columbia granting SCCRAP injunctive relief. R. at 1. The order requires ComGen to excavate and relocate 38.7 million cubic yards of coal ash lying at rest at the bottom of an onsite impoundment. R. at 4, 8. Meanwhile, SCCRAP challenges FERC's refusal to rehear the Order Accepting ComGen's Revised Rate Schedules, which allows ComGen to recover the costs of the remediation plan in rate hikes. R. at 1, 8.

ComGen is a wholly owned subsidiary of Commonwealth Energy (CE), an electric holding company that provides electric service at retail and wholesale rates in several states, including Vandalia and Franklin. R. at 3. In 2014, ComGen acquired Vandalia Generating Station (VGS) from Commonwealth Energy Solutions (CES)—another wholly owned subsidiary of CE that at one time owned thirteen merchant electric generating plants. R. at 3–4. The sale of VGS to ComGen was part of CE's strategy to "reduce its exposure to competitive wholesale markets." R. at 4. Other CES merchant plants were sold off to independent power producers. R. at 4.

Soon, ComGen entered into "unit power service agreements" with Vandalia Power Company and Franklin Power Company—also wholly owned subsidiaries of CE that provide retail service in Vandalia and Franklin respectively. R. at 4. Because the service agreements were wholesale transactions in interstate commerce, they were subject to FERC's jurisdiction under the Federal Power Act (FPA). R. at 4. The agreement between ComGen and Vandalia Power was

designated as ComGen's FERC Rate Schedule No. 1. R. at 4. The agreement between ComGen and Franklin Power was designated as ComGen's FERC Rate Schedule No. 2. R. at 4.

Around the turn of the century, CES developed the VGS near Mammoth, Vandalia on the Vandalia River—executing CE's prior vision to become a major wholesale energy supplier. R. at 4. Coal ash produced by the VGS was disposed of in the Little Green Run Impoundment, an onsite surface impoundment next to plant. R. at 3, 4. Coal ash—or coal combustion residuals (CCRs)—is the byproduct of coal combustion. R. at 3. Coal ash contains mercury, arsenic, and other contaminants that cause cancer and other grave health effects. R. at 3. Coal ash "is one of the largest industrial waste streams generated in the United States." R. at 3.

The Little Green Run Impoundment covers nearly 71 surface acres and currently holds approximately 38.7 million cubic yards of coal ash. R. at 4. As of March 2014, the Little Green Run Impoundment is one of 63 coal waste impoundments in the United States with a "'high' hazard rating." R. at 5.

In 2002, ComGen detected levels of arsenic in the groundwater around VGS that exceeded Vandalia's quality standards. R. at 5. ComGen notified the Vandalia Department of Environmental Quality (VDEQ). R. at 5. In 2006, under a plan approved by VDEQ, ComGen installed a high density polyethylene (HDPE) geomembrane liner on the west embankment of the impoundment. R. at 5. (The north, east, and south embankments were protected by compacted clay, while the west embankment was constructed in part by bottom ash, a type of coal ash. R. at 5.)

In 2017, an environmental NGO, Vandalia Waterkeeper, discovered elevated levels of arsenic in the Vandalia River and suggested the source of the arsenic was the Little Green Run Impoundment. R. at 5–6. Vandalia Waterkeeper filed a complaint with the VDEQ. R. at 6.

VDEQ investigated. R. at 6. The investigation showed a seam in the HDPE geomembrane liner was improperly welded. R. at 6. Rainwater and groundwater leached arsenic from the coal ash in the impoundment. R. at 6. The arsenic escaped through the faulty liner. R. at 6. The surrounding groundwater then carried the arsenic into the navigable waters of Fish Creek and the Vandalia River. R. at 6.

Meanwhile, SCCRAP, a national environmental and public interest organization with several members located throughout Vandalia and Franklin, was actively suing owners and operators of polluting coal ash impoundments. R. at 5. SCCRAP also intervened in utility ratemaking proceedings before FERC to challenge the practice of recovering expenses associated with polluting coal ash impoundments through rate increases. R. at 5.

II. NATURE OF THE PROCEEDINGS

In December 2017, SCCRAP sued ComGen in the U.S. District Court for the District of Columbia under the Clean Water Act (CWA). After a bench trial, the district court found the Little Green Run Impoundment was polluting the groundwater. R. at 7. The court concluded the CWA covered "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. The court ordered ComGen to excavate and relocate the coal ash in the Little Green Run Impoundment. R. at 8. ComGen filed this appeal on July 16, 2018 challenging the court's conclusions that "(1) the Clean Water Act regulates discharges into navigable waters through hydrologically connected groundwater, and (2) the Little Green Run Impoundment constitutes a 'point source' under the Clean Water Act." R. at 8.

On the same day ComGen filed this appeal, it also submitted a filing to FERC to recover the costs of relocating the coal ash from Vandalia Power and Franklin Power. R. at 8. The filing

proposed revisions to ComGen's FERC Rate Schedule No. 1 and ComGen's FERC Rate Schedule No. 2 that would allow ComGen to recover the $246 million price tag for remediation over a 10-year period. R. at 8. The cleanup costs would then be handed down to retail customers—in their monthly bills. R. at 9.

SCCRAP intervened and argued ComGen's shareholders should shoulder the consequences of ComGen's "imprudence." R. at 9. Alternatively, SCCRAP argued in the event FERC allowed ComGen to pass its cleanup costs to the public, ComGen should only be permitted to pass along the percentage attributable to the 2014 Vandalia Power and Franklin Power service contracts—according to the "'matching principle' of utility ratemaking." R. at 9.

ComGen claimed it acted prudently by retaining a competent subcontractor to install the liner. So, it should not be held strictly liable for the defective weld. R. at 10. Also, regarding the "matching principle," ComGen argued the relevant fact was the time the violation was alleged. R. at 10. And, according to longstanding principles, a utility can recover in its rates costs associated with "legal and regulatory requirements." R. at 10. Finally, ComGen claimed if it was disallowed recovery of its cleanup costs, it would have to forego 10 years of projected profits, and concomitantly its reputation in the market place—a veritable taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. R. at 10.

In October 2018, after three days of evidentiary hearings, FERC decided ComGen should not be held strictly liable for the actions of its subcontractor, even while concluding ComGen failed to monitor the repair over the ensuing twelve years—"which likely would have revealed the problem with arsenic seeping through the imperfect weld in the liner." R. at 11. In the end, FERC approved the rate revisions solely on ComGen's taking argument under the U.S. Constitution. R. at 11.

SCCRAP sought a rehearing of FERC's decision, but its request was denied. R. at 12. So, SCCRAP appealed to this Court. R. at 12. SCCRAP claims FERC's decision to approve the revised service agreements was "arbitrary and capricious" and challenges FERC's constitutional concerns for disallowing ComGen to recover its remediation costs via the public. R. at 12.

Because SCCRAP's appeal of the FERC decision and ComGen's appeal of the U.S. District Court's decision involve common parties and issues, SCCRAP, ComGen, and FERC jointly filed a motion in this Court to have the actions consolidated. R. at 12. In December 2018, this Court granted the motion and issued an order setting forth the issues to be briefed and argued. R. at 12.

SUMMARY OF THE ARGUMENT

Surface water pollution via hydrologically connected groundwater is actionable under the CWA because Congress intended for the Act to apply to "all waters of the United States," not just navigable in fact waterways. The CWA was intended to be interpreted broadly, and the EPA, along with the United States Supreme Court, have done just that. Including groundwater under the CWA furthers the statutes purpose, fulfills Congress' intent, and is directly in line with administrate and judicial interpretations of the CWA. For these reasons, this Court should affirm the court of appeals' judgment holding that pollution via hydrologically connected groundwater is actionable under the CWA.

Second, the seepage of arsenic from the Little Green Run Impoundment constitutes a discharge of a pollutant from a point source because it meets the statutory definition of a point source. A holding in the alternative would improperly narrow the scope of the statue and fail to recognize the purpose behind the Act. Coal ash runoff contains pollutants in the form of cancer-causing arsenic, mercury, and cadmium. Further, the Little Green Run Coal Ash Impoundment

meets the definition of a point source ad is covered by the CWA because the conveyance of these pollutants into the surrounding water through the torn liner is discernable, confined, and discrete. This Court should affirm the court of appeals' judgment that the seepage of coal ash runoff from the Little Green Run Impoundment constitutes a discharge from a point source as defined by the CWA.

Third, FERC's decision to approve ComGen's revised rate schedules was arbitrary and capricious because the revised rates are neither just nor reasonable. A utility cannot negatively affect the health of its customers and then expect its customers to pay remediation costs. Further, a corporate duty existed to monitor the Little Green Run Impoundment, and that duty was ignored. FERC's decision weighed investor interest but fully failed to consider consumer interest. This Court should reverse FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2.

Finally, SCCRAP's position is not a taking under the Constitution because ComGen is not entitled to a profit, and its losses are not an element to consider when determining whether rates are confiscatory. More significant, ComGen's losses were preventable—the result of ComGen's imprudence. This Court should reverse FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2.

ARGUMENT AND AUTHORITIES

The first two issues constitute an appeal of a final judgment. The findings of fact are not in dispute. Accordingly, the only issues remaining before this Court are questions of law, which are subject to de novo review. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The second two issues constitute an appeal of a final FERC order. This Court reviews FERC orders by applying the Administrative Procedure Act's "arbitrary and capricious"

standard. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007). Under this deferential standard, this Court must affirm the Commission's orders if its decision is rational considering all relevant facts. *Id.*

I. SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT BECAUSE CONGRESS INTENDED THE STATUTE TO APPLY TO "ALL WATERS OF THE UNITED STATES."

Under the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA or Act), it is illegal for corporations to discharge pollutants, such as coal ash, into "navigable waters without a permit. 33 U.S.C. § 1311(a) (2012). The "discharge of pollutants" occurs when there is "*any* addition of *any* pollutant to navigable waters from *any* point source." *Id.* § 1362(12) (2012) (emphasis added). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7) (2012). Adopting a plain meaning approach when determining the meaning of "navigable waters" fails to properly address the broad scope given to the term. The plain meaning of the term means those waters that are navigable-in-fact. But the legislature gave "navigable" a different definition, defining navigable waters as "the waters of the United States, including the territorial seas." *Id.* § 1362(7) (2012). The "waters of the United States," includes far more than just navigable-in-fact waterways. *See* 33 C.F.R. § 328.3 (2012). One noticeable inclusion under this definition is the "waters adjacent to wetlands." *See id.*; *see also Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 805 (E.D.N.C. 2014) (holding that "wetlands are 'adjacent' even if separated from other waters by man-made dikes or barriers, natural river berms, beach dunes and the like"). "Wetlands" are those areas "inundated or saturated by groundwater." 40 C.F.R. 232.2 (2012). The Supreme Court has recognized this distinction and has held that by defining "navigable waters" as "the waters of the United States," the term "navigable" is of "limited import." *United*

States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). The broadly defined terms of the CWA, coupled with the Act's intended purpose, is evidence that hydrologically connected groundwater is covered by the Clean Water Act.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). The Supreme Court has recognized that "'it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'" *Rapanos v. United States*, 547 U.S. 715, 722 (2006).

The idea that the CWA applies to surface water, but not to groundwater mere inches below that very surface water, defies logic. When this polluted groundwater reaches a stream, or becomes surface water itself, it mixes with navigable waterways in the same manner as surface water, while carrying many of the same pollutants. The harm these pollutants cause to the public and the surrounding wildlife is identical, regardless of how it was carried. This logic has been addressed by the Northern District Court of California, where it stated: "[I]it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." *N. Cal. River Watch v. Mercer Fraser Co.*, No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). Polluting navigable waterways via groundwater is still polluting, and the CWA was enacted to prevent this exact harm.

A. The CWA Applies to Groundwater Because Both the EPA and the Supreme Court Have Recognized that the Stated Purpose of the CWA Requires a Broad Interpretation of the Statute.

The EPA has stated that while "The Clean Water Act does not directly answer the question of whether a discharge to surface waters via hydrologically connected ground water is unlawful . . . the broad construction of the terms of the CWA by the federal courts and the goals and purposes of the Act, [lead] the Agency [to] believe[] that while Congress has not spoken directly to the issue, the Act is best interpreted to cover such discharges." 66 Fed. Reg. 2960, 3015.

The EPA has claimed that not all groundwater falls within the definition of "waters of the United States." *See* 79 Fed. Reg. at 22,193. But the EPA has determined that groundwater with a direct hydrological connection to navigable waters of the United States is covered under the CWA, but only on a case-by-case basis." *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,420 (Nov. 20, 2008). Here, there is a hydrological connection between the groundwater located around ComGen's Vandalia Generating Station, Fish Creek, and the Vandalia river.

The EPA has stated that "the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water." 66 Fed. Reg. 2960, 3015; *see also Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015). The EPA's determination that groundwater hydrologically connected to navigable waters is covered by the CWA should be given deference. The EPA's longstanding interpretation is that "point source discharges of pollutants to 'waters of the United States' via groundwater with a direct hydrologic connection to

surface waters are discharges subject to the CWA." *See* Technical Support Document for the Clean Water Rule: Definition of Waters of the United States pg. 17 (May 2015); *see also* Concentrated Animal Feeding Operation Proposed Rule, 66 FR 2960, 3015 (Jan. 12, 2001)).

In line with the EPA's broad interpretation of the CWA's reach, the Supreme Court has concluded that the groundwater and other forms of water that are not navigable in fact are entitled to CWA protection. The Supreme Court recognizes that the term "the waters of the United States" is not limited to only those waters which are "navigable in fact" and has adopted a broad approach in deciphering the statutory language of the CWA. *Riverside Bayview Homes, Inc*., 474 U.S. at 123. Further, the Court has held that by defining "navigable waters" as "the waters of the United States," the term "navigable" is of "limited import," meaning that a waterway need not necessarily meet the definition of "navigable "to be afforded protection under the CWA. *Id*. at 121.

In *Riverside*, the Court noted that Congress's adoption of "waters of the United States," as opposed to a more restrictive definition, was evidence of Congress's intent "to repudiate limits that had been placed on federal regulation . . . [and] regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* The Court's approach follows the Congressional reports, which state that the term waters of the United States should "be given the broadest possible constitutional interpretation." Sen. Conf. Rep. No.92-1236, 92d Cong., 2d Sess., *reprinted in* (1972) U.S.Code Cong. & Admin. News at 3668, 3776, 3822; *see also United States v. Earth Scis., Inc*., 599 F.2d 368, 375 (10th Cir. 1979).

The stated purpose, when viewed with the EPA's position and the Court's broad interpretation, provides ample evidence that Congress did not intend to limit the application of the CWA to just navigable in fact waterways. Groundwater with a hydrological connection to

these water ways is afforded equal protection because pollutants can be carried to navigable waterways through these channels. To hold in the alternative, and restrict the CWA, would fall short of the goal of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). This has been recognized by both the EPA and the courts.

B. Multiple Circuit Courts Have Interpreted the CWA to Include Groundwater.

Many circuit courts interpret the CWA broadly, and include a multitude of scenarios where pollutants enter navigable waterways to be covered by the CWA. The Second Circuit has interpreted the scope of the Act to include pollution conveyed through a storm water discharge system. See *United States v. TGR Corp*., 171 F.3d 762 (2d Cir. 1999). The Eleventh Circuit has established precedent consistently affirming district court decisions which interpret the CWA to apply to waters that are not navigable. *See United States v. Banks*, 115 F.3d 916, 920–21 (11th Cir. 1997); *see also Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986) (per curiam). In *Banks*, the Eleventh Circuit held that wetlands located up to a half mile away from any navigable waterway were covered under the Act due to the "ecological adjacency" of the wetlands to the navigable waters. *Id.* Finally, in *United States v. Pozsgai*, the Third Circuit held that wetlands adjacent to a tributary that was not navigable were within the scope of the CWA because the tributary flows into navigable waters. *United States v. Pozsgai*, 999 F.2d 719, 727–32 (3d Cir. 1993). This broad interpretation has garnered the attention of the Supreme Court, which has recognized the "difficulty of delineating the boundary between water and land." *Rapanos*, 547 U.S. at 740. The Court has recognized that water does not end at the edge of a river, and the implications of polluting groundwater with a hydrological connection to these rivers led Justice

Kennedy to set forth a test for determining when groundwater warrants CWA protections, called the "significant nexus" test. *Id*. at 779.

While the circuit courts have adopted and interpreted the CWA in their own way, Justice Kennedy's "significant nexus" analysis sets forth a clear test for determining if certain pollutants are within CWA jurisdiction. *Id*. In *Rapanos*, the Court held that point sources which do not maintain either a "significant nexus" or continuous surface connection to a traditional navigable water body fall outside of the jurisdiction of the CWA. *Id*. at 769. When applying this test, the "nexus must be assessed in terms of the statute's goals and purposes. *Id*. at 779. The Court took the CWA's purpose into consideration in this decision, holding that the significant nexus test properly addressed Congress' intent because any of waters that do not have a significant nexus to navigable waters do not affect the "waters of the United States." *Id*. at 782. Following the *Rapanos* decision, a majority of the circuit courts adopted the significant nexus test, further solidifying it as the guidepost for determining if a certain point source is covered under the CWA.[1]

A point source has a significant nexus if it, "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Rapanos*, 547 U.S. at 780. The facts of the record clearly illustrate that the Little Green Run Impoundment's coal ash ponds have been seeping arsenic, mercury, and other pollutants into the ground water since 2002. R. at

[1] *See United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 283 (4th Cir. 2011); *United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); *United States v. Robinson*, 521 F.3d 1319, 1327 (11th Cir. 2008); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006).

5. Further evidenced in the record is the fact that these pollutants have made it to the Vandalia river. R. at 5.

Applying the significant nexus test to this case will show that the CWA covers groundwater that is hydrologically connected to navigable waterways. The factual evidence of pollution in the record shows a long history of pollution which has significantly affected the chemical, physical, and biological integrity of the Vandalia River. The elevated levels of arsenic show that this cannot resolve itself. These facts, coupled with the wide adoption of Justice Kennedy's concurrence, provide this Court with a clear path to proceed in concluding that groundwater is covered by the Clean Water Act.

II. THE SEEPAGE OF ARSENIC FROM THE LITTLE GREEN RUN'S COAL ASH IMPOUNDMENT CONSTITUTES THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE BECAUSE IT MEETS THE STATUTORY DEFINITION OF A POINT SOURCE AND TO FIND OTHERWISE IMPROPERLY NARROWS THE SCOPE OF THE STATUTE.

"[I]t contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point." *Earth Scis., Inc.*, 599 F.2d at 373. Congress enacted the CWA to keep the waters of the United States free of pollution. 33 U.S.C. § 1251(a). The Act defines a "point source" as "any discernible, confined and discrete conveyance," meaning that if there is an identifiable location, where pollution is flowing into a navigable water, that location constitutes a "point source." 33 U.S.C. § 1362(14). The Fourth Circuit recently went against this logic and attempted to narrow the scope of the CWA. But multiple other courts make up the majority and have held that coal ash ponds constitute a "point source" when they leak into groundwater and effect the surrounding navigable waters.

A. This Court Should Not Follow the Fourth Circuit's Interpretation of the CWA Because It Improperly Narrows the Scope of the Act and Fails to Address the Act's Stated Purpose.

In *Sierra Club v. Va. Elec. & Power Co*. ("Virginia Electric"), the Fourth Circuit Court of Appeals considered whether runoff from "coal ash piles" that was contributing to arsenic being deposited into a local river constituted the discharge of a pollutant from a point source. 903 F.3d 403, 412 (4th Cir. 2018). In its narrow interpretation of the CWA, the court concluded that the discharge of pollutants from coal ash piles was not covered by the CWA because the discharge does not constitute a "conveyance," and because coal ash is "solid waste." *Id*. at 407. Neither of these conclusions should be adopted by this court.

The Fourth Circuit's interpretation of the CWA and its narrow application of its own precedent draws a stark contrast to the stated purpose of the Act. The CWA's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Upstate Forever v. Kinder Morgan Energy Partners, L.P*., 887 F.3d 637, 642 (4th Cir. 2018) (citing 33 U.S.C. § 1251(a)). In *Virginia Electric*, there was no dispute that "arsenic was found to have leached from static accumulations of coal ash . . . thereby polluting the groundwater and ultimately navigable waters. 903 F.3d at 411. Despite having the knowledge that navigable waters were being polluted, the court wrestled in its analysis by using an adopted definition of one word, "conveyance." *Id*. at 410. The court's narrow reading of the statute is directly contradictory to Congress's intent in drafting the Clean Water Act broadly and impermissibly narrows a statute intended to be read broadly. See *Dague v. Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (holding that "[t]he definition of a point source is to be broadly interpreted")).

The court hinges its argument on the assumption that the proven and discernable leaching of arsenic from coal ash deposits does not constitute a "conveyance" as defined by the court. *Va.*

Elec. & Power Co., 903 F.3d at 411. The court conceded that pollutants were being conveyed to the surrounding area but disregarded this fact as irrelevant in its analysis. *Id*. The court concluded that the broad nature of the conveyance into "the entire peninsula" placed the issue outside of the reach of the CWA. *Id.* This argument is akin to the idea that widespread pollution which "distribute[s] the leached arsenic widely into the groundwater of the entire peninsula" is not a discrete enough conveyance and does not warrant protection from the CWA. *Id*. In reaching this conclusion, the court placed a greater weight on words rather than logic. The court was presented with factual evidence that pollution was occurring because of the coal ash piles and acknowledged that the purpose of the CWA was to restore and maintain the nations waters. *Id*. at 406. But the court chose to run through the broadly defined terms of the CWA with a fine-toothed comb and pick out a single word to take issue with. The legal rational in *Virginia Electric* is untenable, and inconsistent with the CWA's stated purpose. As such, it should not be adopted by this court.

A secondary argument asserted by the 4th Circuit assumes that the CWA does not apply to the storage of coal ash because it is a "solid waste" and should be governed by the Resource Conservation and Recovery Act (RCRA). *Id.* at 407. However, in coming to this conclusion the court fails to recognize Supreme Court precedent from just six years prior. See *Rapanos*, 547 U.S. 760. In *Rapanos*, the Court correctly recognized that "pollutants" covered under the CWA "include not only traditional contaminants, but also solids such as 'dredged soil, *solid waste*, . . . sand, cellar dirt, and industrial, municipal, and agricultural waste." *Rapanos*, 547 U.S. at 760 (emphasis added); *see also* 33 U.S.C. § 1362(6). As such, solid waste clearly falls within the confines of the CWA, and to exclude coal ash simply on the principle it is "solid waste" improperly narrows the scope of the Act.

The Fourth Circuit's opinion in *Virginia Electric* fails to address the purpose of the CWA, narrows the scope of the statute, and fails to acknowledge binding Supreme Court precedent that addresses the issues. This Court is not bound by the Fourth Circuit, and for the preceding reasons, the opinion in *Virginia Electric* should not be followed by this court.

B. Coal Ash Is a Pollutant and the Majority of Courts Have Held that Coal Ash Ponds Constitute a "Point Source" As Defined by the CWA.

A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts look to many factors when determining whether groundwater is a point source, such as: distance to surface water, topography, climate, geology, flow, slope, and other geologic factors. *See Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 515 (2d Cir. 2005) (recognizing that topography, climate, distance to surface water, and geologic factors influence and how pollutants discharge and enter surface water via groundwater); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (recognizing that time and distance that it takes a point source discharge to reach surface waters via hydrologically connected ground waters "will be affected by many site specific factors, such as geology, flow, and slope."). While point sources come in many shapes and forms, one court has already addressed the precise type of point source at issue here, coal ash ponds, and held that these ponds constitute a point source under the statutory definition afforded by the CWA. See *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 444.

1. The runoff from coal ash ponds has been recognized as a pollutant by both the courts and the EPA and should be viewed as a point source.

The Little Green Run Impoundment has garnered a "high" hazard rating by the EPA. R. at 5. Coal ash contains contaminants such as mercury, cadmium, and arsenic, which are all associated with cancer and can cause many other health implications. R. at 3. These toxic

substances can leach into groundwater and other sources of drinking water, creating a significant risk to public health. R.3. Runoff from coal ash results in arsenic being deposited into "groundwater and ultimately navigable waters." *Va. Elec. & Power Co*., 903 F.3d at 411. When arsenic reaches navigable waters, it can have negative effects on the surrounding communities. The World Health Organization ("WHO") has identified arsenic as a carcinogen with multiple long-term side effects such as cancer, heart disease, and kidney failure. https://www.who.int/news-room/fact-sheets/detail/arsenic. In the short term, the WHO has associated arsenic with "adverse pregnancy outcomes and infant mortality," with lasting impacts on cognitive development, intelligence, and memory. *Id*.

Courts and administrative agencies have recognized the risk associated with coal ash and have taken significant action to prevent the dissemination of these contaminants. In 2014, the EPA enacted the Disposal of Coal Combustion Residuals from Electric Utilities (Coal Ash Disposal Rule) in recognition of the dangers posed by coal ash. 80 Fed. Reg. 21,302 (Apr. 17, 2015). This rule "establishes nationally applicable minimum criteria for the safe disposal of coal combustion residuals in landfills and surface impoundments." *Id*. at 21,303. Following the EPA, Carolina has also recognized the dangers associated with coal ash ponds and has tried to mitigate the damages caused by these sites. In 2014, North Carolina entered legislation which plans to close all such ponds by 2029. *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 437; *see also* N.C. Gen. Stat. § 130A309.211–.212, .214 (2015).

The implications of allowing arsenic to seep into this nation's groundwater and subsequently its stream and rivers will have a lasting impact on the health of the entire country. North Carolina's proximity to this issue has led it to take steps to protect its citizens, and the EPA has attempted to prevent this contamination from reaching the rest of the country. There is

no question that the runoff from coal ash constitutes a pollutant, and if this court concludes that the coal ash deposit ponds constitute a "point source" then every statutory requirement for CWA protection will be met.

2. Coal ash deposits constitute a "point source" as defined by the CWA.

A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This definition is broad, consisting of a non-exhaustive list which includes, "but [is] 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." *Id.*; *see also Consol. Coal Co. v. Costle,* 604 F.2d 239, 249–50 (4th Cir. 1979).

The CWA was written broadly and should be interpreted as such. The EPA has recognized that the statutory terms of the CWA "clearly indicate Congress' broad concern for the integrity of the Nation's waters." 66 Fed. Reg. 2960, 3015. Further, courts analyzing this statutory language have interpreted it in a broad manner. *See Earth Scis., Inc*., 599 F.2d at 373. When analyzing the term "point source," courts have held that Congress's "intent to eliminate pollution from the nations waters" can only be fulfilled "by embracing the broadest possible definition" to include "any identifiable conveyance from which pollutants might enter the waters of the United States." *Id.*; *see also Dague,* 935 F.2d at 1354

While the Fourth Circuit's analysis of "coal ash piles" in *Virginia Electric* was an analysis of pollution derived from "solid waste," other courts have considered the issue as applied to "coal ash in the form of liquid waste" and held that these coal ash ponds are in fact a "point source." *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 444. In *Yadkin*, the court held that coal ash lagoons that are "leaking pollutants into the groundwater" are in fact "conveying pollutants to

navigable waters." *Id*. The court further held that "[a]s confined and discrete conveyances, the [coal ash] lagoons fall within the CWA's definition of "point source." *Id*. Not only is this analysis more applicable to the present case because it deals with the same type of coal ash ponds seen in Vandalia, it also considers the policy and purpose of the CWA in preventing pollution.

In *Yadkin*, the court compared the coal ash lagoons to the statutory definition of "point source" to determine if the lagoons were a point source. 141 F. Supp. 3d at 443. The coal ash lagoons in *Yadkin* are analogous to the coal ash ponds in Franklin. The Yadkin lagoons were "surface impoundments designed to hold accumulated coal ash" and are "impounded by dams towering above the Yadkin River." *Id*. The Little Green Run Impoundment in Vandalia is an identical "on-site surface impoundment . . . located adjacent to the Vandalia Generating Station," which was "formed by the construction of a dam." R. at 3–4. The court in *Yadkin* held that this dam "appear[s] to be defined and discrete." 141 F. Supp. 3d at 444. Further, the court held that because the lagoons were "leaking pollutants into the groundwater" and "conveying pollutants to navigable waters," they constituted "confined and discrete conveyances." *Id*. Here, there is no question that coal ash runoff from the Little Green Run Impoundment is leaking arsenic into the groundwater and conveying those pollutants into the navigable waters of the Vandalia River. R. at 5. Since 2002, arsenic has been detected in the groundwater. *Id*. More recently, in 2017, "elevated levels of arsenic" were found in the Vandalia River. *Id*.

Just like the ponds in *Yadkin*, the Little Green Run Impoundment constitutes a point source because it is defined and discrete. The exact location of the pollution has been identified, the coal ash is seeping into groundwater through a tear in the pond's liner. R.6. It is difficult to imagine a more "defined and discrete" location. Further, the seepage of the groundwater has been proven to

come from the coal ash ponds. Just like the ponds in *Yadkin*, this discharge into groundwater, and subsequently the navigable waterways, constitutes a conveyance. As such, the coal ash disposal pond at the Little Green Run Impoundment is a point source.

III. FERC'S DECISION TO APPROVE COMGEN'S REVISED FERC RATE SCHEDULES NO. 1 AND NO. 2 WAS ARBITRARY AND CAPRICIOUS.

FERC's decision to approve ComGen's revised rate schedules was both arbitrary and capricious. First, FERC did not properly balance the interests of consumers against the interests of investors, resulting in unjust and unreasonable rates. Second, FERC did not properly consider ComGen's directors' duty to monitor the Little Green Run Impoundment repair.

A. FERC Did Not Properly Balance Consumer and Investor Interest When Approving ComGen's Rate Schedules.

This Court should set aside a FERC decision if it is "arbitrary [and] capricious," or otherwise contrary to law. *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991). When determining whether a FERC ruling is arbitrary and capricious this Court inquires whether the decision was a clear error in judgment given all relevant factors. *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002). A relevant factor is a utility's statutory duty to establish rates that are just and reasonable. *See* 16 U.S.C. § 842(a).

"The rate-making process . . . *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests." *Fed. Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). But Congress has not provided a formula by which "just and reasonable" rates are to be determined. *Id*. at 600. "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Id*. at 602.

In *Bluefield Water Works & Improvement Co. v. Public Service Commission*, a water utility company challenged regulated rates prescribed by the Public Service Commission of the State.

262 U.S. 679, 683 (1923). The Commission's order was overturned by the Court, in part, because "investors take into account the result of past operations . . . when determining the terms upon which they will invest in such an undertaking." *Id*. at 694. ComGen deduces from this case that financial integrity and soundness is the constitutional standard for setting "just and reasonable rates"—for balancing the interests of ratepayers and ComGen shareholders. R. at 11.

ComGen also looks to *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944), to bolster its claim. In *Federal Power Commission*, the Commission found that rates received by Hope Natural Gas were unjust, unreasonable, and excessive. 320 U.S. at 595. The Circuit Court of Appeals set aside the order. *Id*. at 599. The Supreme Court reversed. *Id*. at 619. The Court reasoned, "The investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated." *Id*. at 603. Again, ComGen concludes from this case that financial integrity, to attract capital, is the sine qua non for setting "just and reasonable" rates. The Court continued, "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock." *Id*. at 603.

Here, FERC accepted ComGen's testimony that if it was held responsible for the remediation, the financial impact would jeopardize its financial integrity and amount to a taking under the Federal Constitution. R. at 12. But, FERC failed to consider ComGen is a wholly owned subsidiary of Commonwealth Energy (CE). R. at 3. ComGen need not worry about balancing the interests of CE with its ratepayers. ComGen has the support of a stable parent company should its financial integrity ever be jeopardized. This factor was not properly weighed by FERC.

And while financial integrity is a factor to consider in the rate-making process, it is not the only factor. When considering ComGen's proposed rate revisions, FERC weighed ComGen shareholder interest too heavily, while giving no weight to consumer interest. For example, the EPA included the Little Green Run Impoundment in its list of coal ash impoundments with a "high hazard rating." R. at 5. A high hazard rating means the failure of the coal ash dam will "probably cause loss of human life."[2] The Little Green Run Impoundment has been compromised for over 10 years. R. at 6, 11. Sadly, it is more likely than not—according to the EPA—the failure of the Little Green Run Impoundment has already delivered negative impacts to countless ComGen customers.

But under ComGen's proposed plan, utility rates for customers in each jurisdiction will be expected to rise by an initial increase of $2.15 followed by an average of $3.30 per month for the next 10 years. Each customer will pay approximately $400 by the end of this 10-year amortization period. ComGen's goal in issuing these new rates is to fully recover its costs incurred from remediation.

After properly weighing the facts, FERC's approval of the revised rates was an error in judgment since it is neither just nor reasonable to expect ComGen customers—many of whom have been poisoned by the arsenic in Fish Creek and the Vandalia River—to pay for ComGen's negligence. R. at 11. FERC never considered consumer interest. In *Bluefield Water Works* and *Federal Power Commission*, neither business was attempting to adjust costs to pay for its past negligence. Rather, the businesses sought rates that would allow them to pay their bills in the ordinary course of business.

To meet the standard of "just and reasonable" rates, a utility must balance investor and consumer interest. Here, ComGen considered the financial interest of ComGen but gave no

[2] https://www.federalregister.gov/d/2015-00257/p-138).

thought to its consumers. The total effect of the rate schedules is unjust and unreasonable; therefore, FERC's approval of the schedules was arbitrary and capricious and should be set aside.

B. FERC Did Not Properly Consider ComGen's Directors' Duty to Monitor the Little Green Run Impoundment.

Besides unjust and unreasonable rates, FERC's decision was arbitrary and capricious because FERC never considered ComGen's corporate duties. Under D.C. corporate code a director is liable to a corporation or its shareholders if the party asserting liability establishes "[a] sustained failure . . . to devote attention to ongoing oversight of the activities and affairs of the corporation, or a failure to devote timely attention, by making . . . appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore." D.C. Code § 29-306.31(a)(D).

Here, FERC reached a factual finding that CES and ComGen failed to monitor the effectiveness of the liner repair from 2006–2017, which would have likely revealed the problem. R. at 11. This failure to devote oversight and attention and inquire into such a significant environmental and health concern—which should alert a reasonable director—places liability on corporate directors. As a matter of law, placing the burden on the backs of the public is wrong.

In the end, FERC failed to fairly balance consumer and investor interests, which resulted in approving unjust and unreasonable rates—a statutory violation. FERC failed to consider the financial protection ComGen stood to receive from its single, corporate shareholder, while failing to consider whether it would be equitable to hold negatively affected consumers responsible for breached corporate duties. Because FERC failed to consider consumer interest, its approval of the revised rate schedules should be set aside as arbitrary and capricious—a clear error of judgment.

IV. SCCRAP'S POSITION IN THE FERC PROCEEDING TO DISALLOW THE RECOVERY RATES OF ALL OR A PORTION OF THE COSTS INCURRED BY COMGEN IN REMEDIATING THE LITTLE GREEN RUN IMPOUNDMENT IS NOT AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH OR FOURTEENTH AMENDMENTS.

SCCRAP's position on ComGen's revised rate schedules is not equal to an unconstitutional taking under the Fifth and Fourteenth Amendments. First, utility companies are generally not entitled to recover costs due to imprudence. Business losses shifted to the customer must stem from practices that are "used and useful" in providing service and cannot be non-recurring capital expenditures. *Nat. Gas Pipeline Co. v. FERC*, 765 F.2d 1155, 1158 (D.C. Cir. 1985). Such expenditures that are non-recurring capital expenditures or that are not "used and useful" in provision of services should fall on shareholders. *Id*. Second, utility companies are not entitled to profits. *FCP v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

A. ComGen Cannot Recover Its Cost to Relocate the Coal Ash from the Little Green Run Impoundment Because It Is A Non-Recurring Cost Not "Used and Useful" in the Provision of Utility Service.

Generally, utility companies are not permitted by FERC to recover costs from their customers when those costs result from non-recurring capital expenditures not "used and useful" in providing services. In *Natural Gas Pipeline v. FERC*, this Court upheld FERC's decision to deny Natural Gas Pipeline Company of America (Natural) to recover in rates costs from three unsuccessful gas supply projects. 765 F.2d a 1156. Natural's plan was to raise rates and amortize the costs through higher rates to their customers over five years. *Id*. This Court reasoned FERC did not abuse its discretion by denying Natural the rates because the costs were non-recurring capital expenditures not "used and useful" for providing services. *Id*. This Court also agreed with FERC's decision to let shareholders shoulder the burden of these costs. *Id*. at 1158. While FERC has allowed electric companies to recover unsuccessful generation projects, the Commission permitted plants to amortize "prudently incurred expenses." *Id*. at 1166.

In *NEPCO Municipal Committee v. Federal Energy Regulatory Com.*, the New England Power Company (NEP) argued FERC erred in disallowing NEP to recover in rates cancelled project expenditures. 668 F.2d 1327, 1331–35 (D.C. Cir. 1981). NEP claimed FERC's decision denied it "the opportunity to earn a return on prudent investments in the cancelled projects" and deprived NEP "of property without just compensation in violation of the Fifth Amendment." *Id*. at 1335. This Court reasoned an expenditure may be included in a public utility's rate base only when the item is "'used and useful' in providing service; that is, current rate payers should bear only legitimate costs of providing service to them." *Id*. at 1333. This Court held FERC's decision was not a taking under the Federal Constitution because the cancelled power projects were not "used and useful" in providing service. *Id*. at 1333, 1335.

Here, as in *Natural Gas Pipeline Co.* and *NEPCO*, the costs ComGen seeks to recover are not "used and useful" in providing service. Nor do they stem from prudent attempts to generate electricity. The costs result from ComGen's negligence—costs that could have been mitigated had ComGen prudently maintained its facility. ComGen's failure to manage its affairs is no fault of the public. Therefore, the cost of relocating the Little Green Run Impoundment should fall on ComGen's shareholders.

SCCRAP's stance on the proposed rate schedules is not an unconstitutional taking. The only unconstitutional taking with which this Court should be concerned is the unconstitutional taking of the life and health and financial integrity of those situated around Fish Creek and the Vandalia River. Many ComGen customers will have other bills to pay because of ComGen's mismanagement and negligence. The price of remediation is ComGen's concern, outside the scope of providing service or devoting resources to prudent generation projects. Because

ComGen should not be allowed to recover the costs in its rates, SCCRAP's position is not an unconstitutional taking under the Fifth and Fourteenth Amendments.

B. ComGen Is Not Entitled to Profits.

SCCRAP's position on the revised rate schedules is not an unconstitutional taking because utilities are not promised net revenues, especially when losses result from errors in judgment.

In *FCP v. Natural Gas Pipeline Co.*, the Supreme Court considered whether rates for a natural gas company were so low as to be considered confiscatory. 315 U.S. 575, 585 (1942). The Court pointed out utility companies are not entitled to returns at all. *Id*. at 590. "Regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by . . . adding them to the rate base." *Id*. The Court held "the Commission has [not] deprived the companies of their property by refusing to permit them to earn for the future a fair return and amortization on the costs of maintenance." *Id*. at 591.

Similarly, in *Galveston Electric Co. v. Galveston*, the Court held that an attempt to amortize deferred maintenance expenses attempted to capitalize past losses, and was denied. 258 U.S. 388, 389 (1921). The Court explained past losses are not an element to consider when determining whether a rate is confiscatory. *Id.* "A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence . . . or errors in management . . . cannot erect out of past deficits a legal basis for holding [rates] confiscatory." *Id*. at 395; *see also Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 14 (1909) ("When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return

cannot be enhanced by a consideration of the errors in management which have been committed in the past.").

As in *FCP* and *Galveston Electric Co.*, ComGen is not entitled to a profit. Yet ComGen wants to raise its rate schedules to amortize its losses over 10 years because it thinks 3.2% is too low a return. ComGen has an entitlement problem. Losses are not an element to consider when determining whether a rate is confiscatory, especially losses that result from errors in judgment and imprudence. ComGen failed to properly monitor the effectiveness of its remediation action on the Little Green Run Impoundment, which likely would have revealed the issue. R. at 11. SCCRAP maintains its position on the revised rate schedules because approving the revisions under the circumstances would violate longstanding principles and precedent.

CONCLUSION

This Court should affirm the judgment of the United States District Court of Appeals for the District of Columbia Circuit and reverse the order by the Federal Energy Regulatory Commission denying rehearing of the Order Accepting Commonwealth Generating Company's Revised Rate Schedules.

Respectfully submitted,

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TEAM 22
ATTORNEYS FOR PETITIONER

Appendix A

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Petitioners 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 email before 1:00 p.m. Eastern time, February 4, 2018.

Respectfully Submitted,

Team No. 22