UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18-02345

Commonwealth Generating Company, *Appellant,*	)	
	)	
-v.-	)	D.C. No. 17-01985
Stop Coal Combustion Residual Ash Ponds (SCCRAP), Appellee,	)	
	)	
	)	

Stop Coal Combustion Residual Ash Ponds (SCCRAP), *Petitioner,*	)	
	)	
	)	
-v.-		Docket ER-18-263-000
	)	
Federal Energy Regulatory Commission, Respondent,	)	
Commonwealth Generating Company Intervenor.	)	
	)	
	)	
	)	

On Consolidated Appeal from the United States District Court for the District of Columbia and Federal Energy Regulatory Commission (FERC) Final Order

BRIEF OF APPELLEE / PETITIONER

Team Number 25
Counsel for Appellee

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II. Jurisdictional Statement

Subject matter jurisdiction in the District Court for the District of Columbia ("District Court") was invoked via federal question jurisdiction under 28 U.S.C. § 1331 (1980). Jurisdiction of the District Court ruling in this is invoked under 28 U.S.C. § 1291 (1982) as an appeal from a final order of the District Court. Jurisdiction of the Federal Energy Regulatory Commission ("FERC") proceeding is invoked under 16 U.S.C. § 825l(b) (2017) as an appeal from a final order of FERC. Commonwealth Generating Company ("ComGen") filed timely appeal to D.C. Circuit Court of Appeals ("D.C. Circuit") on July 16, 2018. Record, p. 8. Stop Coal Combustion Residual Ash Ponds ("SCCRAP") timely appealed FERC's final order to the D.C. Circuit on December 3, 2018. *Id.* at 12. Both parties moved for these matters to be consolidated due to the common parties and issues. *Id.* at 2. On December 21, 2018, this Court granted the motion to consolidate. *Id.*

III. Statement of the Issues Presented

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.
2. 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 §402 of the Clean Water Act (33 U.S.C. §1342 (2017)).
3. 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.
4. 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.

IV. Statement of the Case

SCRAPP filed suit under the citizen-suit provision of the Clean Water Act against ComGen. Record, p. 7. The final judgement by the District Court was entered on June 15, 2018. *Id.* The judgement granted the injunctive relief sought by SCCRAP against ComGen and ordered ComGen to "fully excavate" the coal ash in the Little Green Run Impoundment ("the Impoundment") and relocate it to a "competently lined" facility. *Id.* at 8. The court based this order on a finding that arsenic from the coal ash was leaching into groundwater which was later carried to navigable waters. *Id.* Thus, the Impoundment constituted a "point source" as defined by the Clean Water Act and the ongoing pollution was a violation of 33 U.S.C. § 1311(a). *Id.*

Concurrently, with the District Court order, ComGen filed proposed revisions to their FERC Rate Schedules Nos. 1 and 2 to recover the costs of complying with the District Court order to fully excavate and relocate from the Impoundment, estimated at $246 million. *Id.* ComGen estimated the cost of compliance to be $246 million, to be recovered over a 10-year period with 50% coming from Vandalia Power Company ("Vandalia Power") and 50% coming from Franklin Power Company ("Franklin Power"). If FERC approved this rate schedule, Vandalia Power and Franklin Power's customers would bear the costs full costs of the excavation. *Id.* SCRAPP intervened. *Id.* Although FERC agreed with many of SCRAPP's arguments and factual assertions, it issued a final order denying rehearing of their approval of the Order Accepting Commonwealth Generating Company's Revised Rate Schedules on November 30, 2018. *Id.* at 12.

Because the appeal to the D.C. Circuit both involved the same parties and claims, the parties filed a joint motion to consolidate the two cases in the D.C. Circuit. *Id.* at 2. On December 21, 2018, the D.C. Circuit Court of Appeals granted this motion. *Id.*

Statement of the Facts

Commonwealth Generating Company ("ComGen") is a wholly owned subsidiary of Commonwealth Electric ("CE"). Record, p. 3. ComGen purchased the Vandalia Generating Station from Commonwealth Energy Solutions, a wholly unowned, unregulated subsidiary of CE. *Id.* In November of 2014, ComGen entered into unit service agreements with both Vandalia Power and Franklin Power. *Id.* at 4. Under these agreements, the electrical output of Vandalia Generating Station would be sold half to Vandalia Power Company and half to Franklin Power Company. *Id.* These service agreements are subject to FERC jurisdiction under the Federal Power Act. *Id.*

Vandalia Generating Station is located near Mammoth, Vandalia on the Vandalia River. *Id.* The station contains two 550 megawatt coal-fired units. *Id.* Unit No. 1 began commercial operation in 2000 and Unit No. 2 began operation in 2002. *Id.* Coal combustion residuals ("coal ash") produced by the Vandalia Generating Station are disposed of in the Impoundment. *Id.* The Impoundment was created by a dam across Green run which currently contains 38.7 million cubic yards of solids, mainly coal ash, coal fines, and waste material. *Id.* at 5. The effluent from the Impoundment flows south, entering Fish Creek and ultimately Vandalia River. *Id.*

The Vandalia Department of Environmental Quality (VDEQ) requires groundwater monitoring. *Id.* Through this monitoring, ComGen detected arsenic in the groundwater that exceeded Vandalia's groundwater quality standards in 2002. *Id.* VDEQ approved a corrective plan in 2005 which required ComGen to install a high-density polyethylene (HDPE) geomembrane liner on the west embankment of the Impoundment in 2006. *Id.* In March of 2017, elevated levels of arsenic were detected in Vandalia River. *Id.* VDEQ's investigation showed

that a seam in the HDPE geomembrane liner had been inadequately installed and was allowing seepage to pool downstream. *Id.* at 6.

V. Summary of the Argument

Surface water pollution via hydrologically connected groundwater is a violation of the Clean Water Act (CWA). The CWA forbids the discharge of non-permitted pollutants into navigable waters of the United States. 33 U.S.C. § 1311(a). This includes both direct and indirect discharges of pollutants into navigable waters. *Rapanos v. U.S.*, 547 U.S. 715, 743 (2006). An indirect discharge of pollutants into navigable waters via hydrologically connected groundwaters is prohibited under the CWA, so long as the discharge is fairly traceable to the point source of pollution. *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754, 756 (9th Cir. 2018). The District Court correctly concluded that ComGen's polluting of the Vandalia River was actionable under the CWA, since ComGen indirectly discharged arsenic into the river through hydrologically connected groundwater and the arsenic was traceable back to the point source. If pollution via hydrologically connected groundwater were not actionable under the CWA, it would prevent the Act from achieving its goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(2017).

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 the CWA. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure…" etc. 33 U.S.C. § 1362(14) (2017). As to whether a source of pollution is a point source, "the ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." *Sierra Club v. Abston Construction Co.*, 620

F.2d 41, 45 (5th Cir. 1980). In the case at hand, the seepage of pollutants came from one specific spot where a seam was welded incorrectly in the Impoundment's liner membrane. This seepage point is a "discrete fissure," which is specifically listed as a point source in section 1362(14) of the CWA. This point source is also distinguishable from a line of recent cases that determined that diffuse groundwater percolation of pollutants in unlined coal ash pits were not covered under the CWA. Therefore, the District Court was correct in holding that the Impoundment is a point source under the CWA.

Additionally, FERC's decision to approve ComGen's revised rate schedules was arbitrary and capricious as FERC's findings of fact were inconsistent and not rationally connected with their findings of law. FERC misapplied two foundational principles of the Federal Power Act (FPA), the prudency standard and the cost-causation principle (sometimes also called matching principle). The "prudency test" measures a utility's actions against what reasonable utility management would have done "in good faith, under the same circumstances, and at the relevant point in time." *Violet v. FERC*, 800 F.2d 280, 283 (1st Cir. 1986). The "cost-causation principle" requires that rates charged for electricity reflect the costs of providing it. *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018). FERC found that ComGen engaged in imprudent behavior by failing to properly monitor the Impoundment for eleven years, but also concluded that ComGen was not liable which is incongruent with the prudency standard. Further, FERC factually found that pushing the entire burden of the remediation costs onto Vandalia Power and Franklin Power's customers would be a windfall for ComGen's shareholders, but FERC also paradoxically concluded that doing so was necessary to protect the financial health of ComGen though this violates the cost-causation principle. Therefore, FERC's decision to approve ComGen's revised rate schedules was arbitrary and capricious.

It is also not an unconstitutional taking for FERC to disallow recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Impoundment. Ratemaking must involve a "balancing of investor and consumer interest." *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944). This balancing must be "just and reasonable." *Id.* at 602. The methodology of how the rates are established is unimportant. *Id.* It is only the impact of the order that matters. *Id.* It is not a taking under the Fifth and Fourteenth amendments to preclude recovery from expenditures that were not used and useful to the public. *Duquesne Light v. Barasch.* 488 U.S. 299, 310 (1989). It is not unjust or unreasonable to disallow ComGen to recover the costs of the Impoundment's closure by removal because the costs of remediation are not used and useful to the public.

VI. Argument

A. SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT BECAUSE IT IS A DISCHARGE OF POLLUTION INTO A NAVIGABLE WATERWAY THAT IS FAIRLY TRACEABLE TO A POINT SOURCE.

District Court decisions to grant injunctions are reviewed under several standards. *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 442 (6th Cir. 2018). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed *de novo*, and the scope of injunctive relief is reviewed for abuse of discretion… As always, review of statutory construction is de novo. *Id.* (quotations emitted). In this case, after a bench trial the judge found that the Impoundment was a point source and that ComGen had violated the Clean Water Act (CWA). We review these decisions de novo.

The CWA was enacted in 1972, and states that "Except in compliance with this… title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2017). According to the CWA, the term "discharge of pollutant" means "any addition of any pollutant

to navigable waters from any point source," and the term "pollutant" has a broad meaning which definitely covers arsenic. *Id*. § 1362(12). The discharge of a pollutant into navigable waters must comply with section 1342 of the CWA, the National Pollution Discharge Elimination System (NPDES), under which "the Administrator [of the EPA] may… issue a permit for the discharge of any pollutant." *Id*. § 1342(a)(1). The NPDES program can be replaced by a state permitting program for the discharge of pollutants, so long as that state program meets the same federal minimum requirements of the National program. *Id*. § 1342(b).

1. The Clean Water Act is enforceable in terms of both direct and indirect discharges of pollutants into navigable waterways.

Section 1311(a) of the CWA "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.'" *Rapanos v. U.S.*, 547 U.S. 715, 743 (2006) (plurality opinion) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)). In *Rapanos*, the Supreme Court was deciding how to define the term "navigable waters" under the CWA, and whether discharge of pollutants into wetlands counted under this definition. *Id.* at 715. In his plurality opinion, Scalia noted that discharge of pollutants into non-navigable waters that are then washed downstream into navigable waters "likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* at 743. So indirect "conveyances" such as tributaries, tunnels, underground wells, or groundwater that conduct discharged pollutants from a point source into navigable waters can be actionable under the CWA.

The Fourth Circuit reinforced this idea in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, when it held that the CWA does not apply exclusively to discharges of pollutants that enter navigable waters "directly" from a point source. 887 F.3d 637, 648 (4th Cir. 2018). In

that case, a gas pipe that was located six to eight feet underground burst and spewed several hundred thousand gallons of gasoline into the surrounding soil and waterbed. *Id.* at 641. The gasoline then seeped a distance of one thousand feet or less into nearby navigable waterways that were undoubtedly covered under the CWA. *Id.*

The plaintiffs brought an action against Kinder Morgan alleging violations of the CWA, claiming that the company "caused discharges of pollutants that continue to pass through ground water with a 'direct hydrological connection' to navigable waters." *Id.* at 644-45. The Fourth Circuit agreed with the plaintiffs, holding that the pipeline burst violated the CWA even though it discharged pollutants only indirectly into navigable waters through the hydrological connection. *Id.* at 652. The Court reasoned that, while a pollutant needed to start from a point source to be actionable under the CWA, "that starting point need not also convey the discharge directly to navigable waters." *Id.* at 650. They supported their reasoning by citing EPA documents showing that the "EPA consistently has taken the position that the Act applies to discharges 'from a point source via ground water that has a direct hydrologic connection to surface water.'" *Id.* at 651. However, they conditioned this application of the Act on the ability of the plaintiffs to show that there was in fact a direct hydrological connection between the groundwater and the navigable waters at issue. *Id.*

The Ninth Circuit Court of Appeals also enforced the idea that indirect discharges are actionable under the CWA in *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018). In that case, the Court held that the County was illegally discharging wastewater effluent into the Pacific Ocean indirectly through underground wells that were hydrologically connected to groundwater. *Id.* at 749. The Court reasoned that, under the CWA the County would not be allowed "to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It

cannot do so indirectly either to avoid CWA liability." *Id.* at 768. It also specified that "this case is about preventing the County from doing indirectly that which it cannot do directly," namely discharge treated wastewater into the ocean. *Id.* at 752. The Ninth Circuit judge then chided the County for "reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged 'directly' to navigable waters." *Id.* at 749.

In the case of the Impoundment, there is an indirect discharge of pollutants into groundwater. SCCRAP successfully argued in its complaint that ComGen's coal ash pond was a point source that was "hydrologically connected" to Fish Creek and the Vandalia River, which are navigable waters under the CWA. Record, p. 7-8. By alleging and proving this direct hydrological connection, as the successful plaintiffs did in *Kinder Morgan* and in *Hawaii Wildlife Fund*, SCCRAP has brought a successful CWA suit based on an indirect discharge of pollutants.

2. The discharge of pollutants into navigable waters via groundwater is actionable under the Clean Water Act so long as the pollutants are 'fairly traceable' from the point source.

While a successful CWA suit can be brought by alleging a hydrological connection between groundwater and navigable waterways, this does not mean that all pollution discharged into groundwater is actionable under the Act. In *Kinder Morgan*, the court held that "a discharge through ground water does not always support liability under the Act… Instead, the connection between a point source and navigable waters must be clear." *Kinder Morgan*, 887 F.3d at 651. While the discharge of pollutants into navigable waters does not necessarily have to be direct, the connection between the navigable water and the conveyance (i.e. groundwater) must be shown to be "direct" or "fairly traceable" for a successful CWA suit. *Hawaii Wildlife Fund*, 881 F.3d at 756.

Such a "fairly traceable" connection can be proven through scientific studies or testing that links the point source to the navigable waters. *Id.* at 742-43. In *Hawaii Wildlife Fund*, the County of Maui was injecting its treated wastewater into 4 discrete underground wells near the Pacific Ocean. *Id*. at 742. They injected about 3 to 5 million gallons of treated water into these wells per day, and a scientific study conducted by the Environmental Protection Agency (EPA) and several other groups found that 64% of the treated wastewater that was injected into 2 of the 4 wells was ending up nearby in the ocean. *Id.* at 759.

This study, called the Tracer Dye study, established that "effluent injected into the wells travels a southwesterly path from the Facility, appearing in submarine springs only a half-mile away." *Id.* at 763. The Court held that the Tracer Dye Study "establish[ed] an undeniable connection between the wells and the Pacific Ocean," and that the County was "liable under the CWA because… the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of discharge into the navigable water." *Id.* at 765.

Similar to the EPA conducting the Tracer Dye study, the Vandalia Waterkeepers conducted a "[s]ubsequent analysis" after finding elevated levels of arsenic in the Vandalia River in 2017 during water quality monitoring. Record, p.5-6. The analysis determined that the arsenic was coming from the Impoundment. *Id.* p.6. There was a poorly welded seam in the Impoundment's liner, which led to seepage that "leach[ed] arsenic from the coal ash in the Impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River." *Id.*

The District Court in this case found the Waterkeeper's study to be valid, found that this hydrological connection through groundwater was actionable under the CWA, and "found as fact

that arsenic was reaching Fish Creek and the Vandalia River in that manner." *Id.* p.8. ComGen has not appealed this finding of fact, and there has been no other dispute that the arsenic entered the river in this way. Therefore, SCCRAP has established a "direct," "fairly traceable" and "undeniable" hydrological connection between the point source (the Impoundment) and the navigable waters.

3. The CWA could not enforce its statutory goals if it did not cover pollutants that are indirectly discharged into navigable waters.

The stated 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) (2017). The main mechanism through which the Act seeks to accomplish this goal is the prohibition on discharging of pollutants into the nations' waters, unless authorized by the NPDES permit program under § 1342(a)(1). If there was an easy way to bypass this permitting system, for instance by "ensuring that all discharges pass through soil and ground water before reaching navigable waters," it would entirely strip the Act of its ability to achieve this goal. *Kinder Morgan,* 887 F.3d at 652. "[I]f the presence of a short distance of soil and groundwater were enough to defeat a claim" under the Act, then pollutant emitters "easily could avoid liability under the CWA." *Id.*

In *Hawaii Wildlife Fund,* the court held that the County of Maui was prohibited from directly dumping wastewater effluent into the ocean, and that "[i]t cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions." *Hawaii Wildlife Fund,* 881 F.3d at 768. It would be pointless for the NPDES permitting system of 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. C–04–4620 SC,

2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). For this reason, the court must uphold the coverage of pollutants discharged into hydrologically connected groundwater if the CWA is to retain any enforcement power whatsoever.

B. THE SEEPAGE OF ARSENIC FROM THE LITTLE GREEN RUN IMPOUNDMENT CONSTITUTES THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF 33 U.S.C. §1311(A) BECAUSE IT FLOWS FROM A DISCRETE CONVEYANCE.

The CWA prohibits illegal "discharge of pollutants" that is unauthorized by the NPDES permitting system. 33 U.S.C § 1311(a) (2017). The term "discharge of a pollutant… means (A) any addition of any pollutant to navigable waters from any point source." *Id.* § 1362 (12) (quotations omitted). The Act defines a "point source" as "any discernible, confined and discrete conveyance, including but 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.* § 1362 (14). A source of pollution falls under the definition of a "point source" as long as it can be characterized as a "discernible, confined [or] discrete conveyance." *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980).

1. The impoundment's seepage point is a "discernible, confined and discrete conveyance" rather than a "diffuse" discharge.

A point source does not necessarily have to be one of the conveyances listed in the Act (i.e. a pipe, ditch, or channel). 33 U.S.C § 1311(a) (2017). It need only be a discrete point to which the discharge of the pollution can be traced. It is also not completely necessary that human manipulation is the sole reason for the discharge, as "the ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." *Id.*

In *Hawaii Wildlife Fund*, the Ninth Circuit found that the 4 wells into which effluent was injected were point sources under the Act. *Hawaii Wildlife Fund*, 881 F.3d at 760. Similarly, in *Kinder Morgan*, the Fourth Circuit found that the "gasoline pipeline unambiguously qualifies as a point source." *Kinder Morgan*, 887 F.3d at 647. In a recent case involving coal ash lagoons, a court in North Carolina determined that the lagoons, which were "impounded by dams towering above the Yadkin River… appear[ed] to be confined and discrete." *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F.Supp.3d 428, 443-44 (M.D. N.C. 2015). The lagoons were unlined and were simply leaking arsenic and other pollutants into the surrounding groundwater, but the court found that they were a point source under the CWA because they were discernible, confined, and were all located in one area near the river. *Id.*

If coal ash produced during the combustion of coal-fired power plants is stored in dispersed landfills and settling ponds rather than impoundments, then they might not count as point sources. In *Sierra Club v. Virginia Electric & Power Co*., the Fourth Circuit found that the multiple ditches located around the property were not point sources. 903 F.3d 403, 410 (4th Cir. 2018). The landfill and settling ponds at issue were unlined, so rainwater was running through them and causing pollutants to seep into the groundwater. *Id.* The court held that these sources "were not discrete conveyances," because "the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil. This diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula." *Id.* at 411.

In this case, the seepage through the Impoundment is by no means "diffuse," and is even more "discernible, confined, and discrete" than the coal ash lagoons at issue in *Duke Energy*. The Impoundment is lined on 3 sides with clay that stops the pollutants from seeping out, and is lined

on the fourth side with a membrane. Record, p. 5. The Vandalia Waterkeepers determined that the seepage happened at one specific spot where a seam was welded incorrectly in the pond's liner membrane. *Id.* at 6. This seepage point is a "discrete fissure," which is specifically listed as a type of point source in section 1362 (14) of the CWA. This point is unlike the landfill and settling ponds described in *Sierra Club*, where pollutants were seeping into the groundwater through the soil from many different ponds. In that case, it would have been difficult to discern the exact spot from which the pollutant was seeping, whereas the Waterkeepers in this case have been able to locate that exact discrete spot.

2. The point source at issue here is distinct from a line of recent cases on nonpoint sources.

A series of recent court decisions have ruled that diffuse discharge of arsenic from unlined coal ash ponds into groundwater does not constitute a point source under the CWA. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 408 (4th Cir. 2018); *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 439 (6th Cir. 2018); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018) (holding additionally neither groundwater itself nor karst topography are point sources). Though the courts in each of these cases did not recognize a CWA violation, they pointed to a possible Resource Conservation and Recovery Act ("RCRA") violation. *Id.* Under RCRA, the EPA has issued standards for the management of facilities storing coal ash. 40 C.F.R. § 257.50-257 (2017). RCRA and the CWA do not overlap as RCRA regulates the solid waste stored in a pond or landfill and the CWA regulates the discharge of pollutants into navigable waters.

While SCCRAP does not necessarily agree in full with these decisions, the point source conveyance at hand is wholly unlike the nonpoint sources in the aforementioned cases. Here, a discrete seam in the impoundment's liner was incompetently soldered, resulting in arsenic

seepage from a specific spot in the Impoundment. Record, p. 6. The seepage is not generalized or site-wide. Neither is SCCRAP alleging that groundwater itself is the point source. The poorly welded seam is a "discrete fissure" resulting in seepage from a specific portion of the Impoundment, meaning it is point source under the definition of the CWA. Additionally, RCRA is not applicable here as the issue is the pollution of navigable waters and not the coal ash pond itself.

C. FERC'S DECISION TO APPROVE COMGEN'S REVISED FERC RATE SCHEDULE NO. 1 AND REVISED FERC RATE SCHEDULE NO. 2 WAS ARBITRARY AND CAPRICIOUS AS THEIR FINDINGS OF FACT WERE INCONSISTENT AND NOT RATIONALLY CONNECTED WITH THEIR FINDINGS OF LAW.

FERC orders are reviewed under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. 5 U.S.C. § 706(2)(A) (2017). The legal standard of review provides that Article III[1] courts may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* This deferential standard means the courts may not substitute their judgment for that of the agency. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016).

An agency action will be arbitrary and capricious if the agency (1) has relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) failed to consider key evidence and important alternatives; or (4) ruled in a manner so improbable with the facts at hand that this could not be attributed to a difference in view or agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 S. Ct. 2856 (1983). To satisfy this standard, FERC must examine the relevant information and

[1] "Article III" courts are those that have been granted authority under Article III of the U.S. Constitution which created the federal court system.

articulate a satisfactory explanation for its action including a rational connection between the facts found and the final decision. *Elec. Power Supply Ass'n,* 136 S. Ct. at 782. Reasoned decision-making will demonstrate "the connection between the facts found and the choice made." *Pub. Serv. Com. v. FERC,* 259 U.S. App. D.C. 86, 813 F.2d 448, 451 (1987).

This portion of the Brief will demonstrate that FERC's findings of fact were entirely inconsistent with their findings of law, and thus their approval of ComGen's rate schedules was arbitrary and capricious. FERC misapplied two foundational principles of the FPA: the prudency test and the matching principle. FERC found that ComGen was not liable for imprudent behavior and also that pushing the full remediation costs onto Vandalia Power and Franklin Power was necessary to preserve ComGen's financial integrity. Both of these conclusions are in stark violation of the FPA's principles as well as incongruent with FERC's factual findings. Therefore, FERC's decision to approve ComGen's revised rate schedules was arbitrary and capricious.

1. In violation of the prudency test, FERC concluded that ComGen could not be held liable for the negligent actions of its subcontractor despite also finding as fact that for over eleven years ComGen failed to properly monitor its subcontractor's work though doing so "likely would have revealed the problem with arsenic seeping through."

Section 201 of the Federal Power Act (FPA) grants FERC jurisdiction over the transmission and sale of wholesale electricity in interstate commerce. 16 U.S.C. § 824(a)-(b) (2017). FERC must review rates to ensure that they are just and reasonable. 16 U.S.C. § 824d(a) (2017). To determine reasonableness, FERC applies a "prudence" test to determine whether a utility can recover in their rates the cost of investments. *City of New Orleans v. FERC,* 314 U.S. App. D.C. 253 (1995).

Though a utility has broad discretion in operating their business in a manner conducive to providing consistent service to their customers, their actions will be found prudent only if reasonable utility management would have made the same decision, "in good faith, under the

same circumstances, and at the relevant point in time." *Violet v. FERC,* 800 F.2d 280, 283 (1st Cir. 1986). The Louisiana Supreme Court thoughtfully pointed out that this prudence standard is so very important as "only the utility, and not the ratepayer, is in a position to minimize imprudence and maximize efficiency." *Gulf States Utils. Co. v. La. PSC,* 689 So. 2d 1337, 1346 (La. 1997).

Challenging a utility's rates or practices as imprudent requires a petitioner to present sufficient evidence to raise serious doubt that a reasonable utility manager would have made the same decision under the same circumstances. *Ind. Mun. Power Agency v. FERC,* 312 U.S. App. D.C. 283 (1995). Once the petitioner submits evidence sufficient to raise doubt, the burden is then on the utility to present evidence sufficient to prove otherwise. *Id.* If a utility cannot find or present compelling evidence that a reasonable utility manager would have made the same decision, then the petitioner wins. *Id.* If FERC determines that costs were imprudently incurred, then the company's stockholders and not ratepayers must bear the burden of the utility's imprudence. *Miss. Power & Light Co. v. Mississippi,* 487 U.S. 354, 385 (1988).

Additionally, a utility's intentions are not the controlling factor in the prudence test, rather the prudence of a decision is measured by the end result. *Id.* This is an affirmation of the famous principle found in *Federal Power Commission v. Hope Natural Gas Co.,* in which the Court stated that "under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling," 320 U.S. 591, 602 (1944). In applying the prudence standard, an agency's final decision must be supported by substantial evidence and they must give "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Ind. Mun. Power Agency,* 312 U.S. App. D.C. at 254.

The prudency test considers a broad scope of factors including things that should have been anticipated. FERC found a company acted imprudently when the company could and should have anticipated increased costs and yet continued making large purchases while knowing it had declining sales. *Panhandle E. Pipe Line Co. v. FERC*, 250 U.S. App. D.C. 80 (1985). The D.C. Circuit affirmed FERC's decision to deny this company the ability to recover the costs stemming from this imprudence. *Id.*

Here, SSCRAP met its burden of showing that there was doubt concerning the prudence of ComGen's actions, but ComGen did not meet its burden of proving that its actions were reasonably prudent. And FERC did not meet its burden of drawing a rational connection between the facts it found and its final ruling. Rather, FERC's factual findings are almost entirely at odds with their legal conclusion.

Though the hiring of the subcontractor was likely something another utility would have done, a reasonable utility would have certainly checked the work of that subcontractor and then performed normal oversight and monitoring of a site. In fact, a reasonable utility would have actually hyper-scrutinized and conscientiously monitored the Impoundment as it listed as one of just sixty-three other impoundments in the United States with a "high" hazard rating. Record, p. 5.

ComGen has separate and specific liability for their own imprudent actions. It is not rational for FERC to conclude that ComGen cannot be held liable for the actions of its subcontractor while also concluding that ComGen failed at critical oversight and monitoring—for eleven years—which would have likely revealed the seepage issue. Record, p. 11. ComGen's liability stems not from their subcontractor's shoddy work, but ComGen's failure to review and

monitor that work. ComGen could have and should have known better, and that is enough to fail the prudency test.

Additionally, ComGen's failure to properly line the Impoundment in the first place, and then failure to monitor its subcontractor's remediation efforts have now resulted in even greater costs needed to fix this issue. The estimated cost of $246 million for the corrective action could have been entirely avoided if ComGen simply acted as a reasonable utility would have and monitored the site properly. Record, p. 9. As a public policy matter, FERC and the courts should want to encourage immediate discovery and remediation of any hazards or accidents. By allowing ComGen to simply push this entire remediation cost stemming from its own negligent monitoring of a known hazard site on to ratepayers, FERC is tacitly approving of ComGen's eleven years of sloppy monitoring. If utilities know that they can simply push on costs of bad management onto ratepayers, they will have no incentive to pursue diligent operational practices.

As FERC found as a matter of fact that ComGen did not exercise good judgment such that another utility would have made the same decision, "in good faith, under the same circumstances, and at the relevant point in time," it is then an erroneous and unsubstantiated to then conflate ComGen's personal liability with that of their subcontractor and conclude that ComGen cannot be liable. Therefore, FERC misapplied the prudency test and its final ruling was arbitrary and capricious.

2. In violation of the matching principle, FERC concluded that charging Vandalia Power and Franklin Power with the full remediation costs was necessary to preserve the financial integrity of ComGen, though also contradictorily finding that doing so would represent a "windfall" to ComGen's shareholders.

Under the FPA, electric utilities must charge "just and reasonable" rates. 16 U.S.C. § 824d(a) (2017). Both FERC and the courts have long understood the requirement for "just and reasonable rates" to include a "cost-causation principle"—that rates charged for electricity should

reflect the costs of providing it. *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018); *Town of Norwood v. FERC,* 311 U.S. App. D.C. 306 (1995) (describing the same concept as the "matching principle" where ratepayers are charged with the cost of producing the service they receive). Under the cost-causation or matching principle, the burden is matched with the benefit so that FERC "generally may not single out a party for the full cost of a project, or even most of it, when the benefits of the project are diffuse." *Old Dominion,* 898 F.3d at 1254.

When a FERC order violates the cost-causation principle, the courts have repeatedly ruled against the agency. In *Old Dominion,* the D.C. Circuit found a FERC decision arbitrary and capricious as it violated the cost-causation principle by not allowing cost sharing for two high-voltage transmission projects that would have benefited an entire region within the PJM network. *Id.* The court pointed out that under FERC's ruling, the utility seeking cost recovery, Dominion, would receive only about 47% of benefits from one project and about 43% benefits from the other project—and yet would be forced to pay for both projects entirely by itself. *Id.*at 1261. The D.C. Circuit strongly chastised this decision, noting that this wasn't a "quibble about exacting precision" rather a "wholesale departure from the cost-causation principle, which would shift a grossly disproportionate share of the costs" onto a single entity. *Id.*

In correlation to *Old Dominion,* the court will not force all companies in a region to pay an equal share of cost of projects where there are questionable or de minimis benefits for them. *Ill. Commerce Comm'n v. FERC,* 756 F.3d 556, 559 (7th Cir. 2014). In Ill. Commerce Comm'n, utilities on the eastern side of PJM tried to make utilities on the western side of PJM contribute equally to a series of transmission projects, despite these projects primarily benefiting just the eastern region. *Id.* The Seventh Circuit held that FERC's order that allowed this would "shift a grossly disproportionate share of costs" to the western utilities, especially in light of the "only

future, speculative, and limited benefits" to them. *Id.* at 565. Thus FERC's order was remanded for the second time in order for FERC to come up with another way to more fairly allocate costs. *Id.*

ComGen's rate recovery schedules unreasonably and unfairly burdens today's customers with the costs of power produced decades ago that they did not benefit from. The 38.7 million cubic feet of coal ash currently in the Impoundment amassed over eighteen years. Record, p. 9. For fourteen years, the electricity from the Vandalia Generation Station benefited other customers than Vandalia Power and Franklin Power. Record, p. 9. Therefore, Vandalia Power and Franklin Power customers should not then bear the full remediation costs that benefited these prior consumers and ComGen shareholders. Though SCCRAP fundamentally disagrees with any rate recovery for these costs, the cost-causation principle mandates that total share of the remediation costs that could possibly be allocated to Vandalia Power and Franklin Power is purely that of the last four years. At a maximum, Vandalia Power and Franklin Power can only be responsible for approximately 19.5% or $48 million of the $246 million in total costs with the remaining $198 million inescapably allocated to ComGen's shareholders. Record, p. 9.

Here, there are no disperse region-wide benefits that can be debated as in *Old Dominion*. In that instance, the D.C. Circuit held that forcing Dominion to pay for the entirety of the two projects would be a gross violation of the cost-causation principle as Dominion was only receiving benefits of about 43% and 47% respectively from the projects. *Old Dominion*, 898 F.3d at 1261. Thus, the surrounding utilities that were also benefiting needed to pay their fair share. *Id.* Here, the amount of "benefits" received by Vandalia Power and Franklin Power of about 19.5% is far lower than that of the amount of benefits that Dominion would have received,

and yet FERC has pushed the entire cost of the remediation efforts onto them which is an egregious and clear violation of the cost-causation principle.

As FERC found as a matter of fact that that forcing the entire remediation costs on to the Vandalia Power and Franklin Power ratepayers would represent a "windfall" to ComGen's shareholders, it is then erroneous and unsubstantiated to conclude that forcing Vandalia Power and Franklin Power to bear the full remediation costs is necessary to protect these same ComGen shareholders. Record, p. 11. This is a clear gap between FERC's fact finding and FERC's legal conclusion. Moreover, FERC misapplied the cost-causation and matching principle and thus its final ruling was arbitrary and capricious.

D. IT IS NOT AN UNCONSTITUTIONAL TAKING FOR FERC TO DISALLOW RECOVER IN RATES OF ALL OR A PORTION OF THE COSTS INCURRED BY COMGEN IN REMEDIATING THE LITTLE GREEN RUN IMPOUNDMENT BECAUSE THE COSTS OF REMEDIATION ARE NOT USED AND USEFUL TO THE PUBLIC.

The Fifth Amendment in the Constitution prevents against the unlawful taking of private property for public use without just compensation. U.S. Const. amend. V. The Fourteenth Amendment extended this protection to the states under the Due Process Clause. U.S. Const. amend. XIV. Constitutional limits on ratemaking, "the fixing of 'just and reasonable rates, involve[] a balancing of the investor and consumer interests." *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944). Constitutionally, utility companies are entitled to earn a reasonable return on their assets which are devoted to public service. *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679, 692-93 (1923). "The Constitution does not require that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he put into it." *Federal Power Comm'n v. Nat'l Gas Pipeline Co. of America,* 315 U.S. 575,

593 (1942). "A regulated utility has no constitutional right to a profit." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1180-81 (1987).

The Supreme Court established in *Hope* that the methodology behind establishing rates was unimportant. *Hope,* 320 U.S. at 602. It is "the impact of the rate order which counts." *Id.* "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.*

> In reviewing rate orders of Federal Energy Regulatory Commission, courts must determine whether end result of that order constitutes reasonable balancing, based on factual findings, of investor interests in maintaining financial integrity and access to capital markets and consumer interest in being charged non-exploitative rates; moreover, order cannot be justified simply by showing that each choice underlying it was reasonable, rather, those choices must still add up to reasonable result.
>
> 16 U.S.C. § 824d(a) (2017).

Such a just and reasonable balance then between investor and consumer interests must occur somewhere between "two illegal extremes: illegal confiscatory rates at the lower end and illegal exploitative rates and the upper end." James M. Van Nostrand, *Constitutional Limitations on the Ability of States to Rehabilitate Their Failed Electric Utility Restructuring Plans,* 31 Seattle L. Rev. 593, 598. In *Bluefield,* The Supreme Court established three standards to be used to find the required balance. *Bluefield,* 262 U.S at 692-93. Rates that do not meet these standards "confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." *Id.* at 690. Under *Bluefield,* rates must 1) properly balance the interests of rate payers and shareholders, 2) maintain the financial integrity of the company, and 3) enable the company to continue to attract capital. *Id.* at 692-93.

The balance of interests and the Takings Clause were both invoked in *Duquesne Light v. Barasch.* 488 U.S. 299 (1989). In *Duquesne,* several Pennsylvania electric utilities undertook a venture to build seven nuclear power plants. *Id.* at 299. Due to intervening events, four the planned nuclear plants were never built. *Id.* Duquesne Light applied to the Pennsylvania Public Utility Commission to "obtain a rate increase and to amortize its expenditures on the canceled plants over 10 years. *Id.* Before the rate proceeding concluded, a state law was enacted that prevented a utility from including cost of construction of a generating plant in the rate base until the plant "is used and useful in service to the public." *Id.* However, Pennsylvania Power Co. had been granted a rate increase to amortize its share of the canceled nuclear plant plans, even with the new state law in place. *Id.* The State Office of the Consumer Advocate asked PUC to reconsider their rulings. The case made its way to the Supreme Court which held that "a state scheme of utility regulation, such as is involved here, does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public." *Id.* at 300. The Court reiterated the holding of *Hope*: "it is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end." *Id.* at 310. It was then, not unreasonable, to disallow recovery from investments that were not used or useful to the public. *Id.*

Similarly, in *NEPCO Municipal Rate Committee v. FERC*, this Court ruled that it was not a constitutional taking to disallow NEPCO from including expenditures from a cancelled construction project from their rate base. 668 F.2d 1327,1333 (1981). Disallowing this was not a constitutional taking. *Id.* NEPCO argued from Justice Brandeis' dissent in *Pacific Gas & Electric Co. v. San Francisco* that "capital prudently invested in a generating facility is taken for public use and therefore must be included in the rate base." 265 U.S. 403 (1924). However, this

Court had previously rejected this argument in *Democratic Central Comm. v. Washington Metropolitan Area Transit Comm'n*, 485 F.2d 786, 801 (1973), cert. denied sub nom., D.C. *Transit System, Inc. v. Democratic Central Comm.*, 415 U.S. 935 (1974). Rather, this Court has held the prevailing rule to be that "expenditure for an item may be included in a public utility's rate base only when the item is used and useful in providing service: that is, that is current rate payers should bear legitimate costs of providing service." *NEPCO,* 668 F.2d at 1333.

Here, ComGen filed under §205 of the Federal Power Act to recover from both Vandalia Power and Franklin Power the costs of complying with the District Court order to fully excavate the 38.7 million yards of coal ash from the Impoundment and relocate it to a new facility. Record, p. 8. ComGen estimates that the cost of excavation will be $246 million. *Id.* Per the unit power service agreements, Vandalia Power and Franklin Power, and thus their rate payers would each be responsible for 50% of this cost. *Id.* However, 80.5% of the coal ash in the Impoundment is attributable to" ComGen. Record, p. 10. Moreover, had ComGen exercised an appropriate "standard of care consistent with prudent utility practice in implementing" VDEQ's 2006 corrective plan, there would have been no arsenic seepage into the groundwater around the Impoundment and thus no need for the current $246 million corrective action mandated by the District Court's injunction. Record, p. 9.

Disallowing ComGen from recovering the costs of all or part of the corrective plan is not a Taking under the Fifth and Fourteenth amendments because the recovery costs for the Court ordered "closure by removal" are not a service that was used and useful to the public. Just as canceled construction projects were not considered to be used and useful in to the public in *Duquesne* and *NEPCO,* neither are costs for "closure by removal" that would not be necessary absent ComGen's failure to properly oversee the installation of the HDPE liner that would have

prevented these costs entirely. Disallowing costs of canceled construction projects was not an unconstitutional taking in *Duquesne* and *NEPCO* and it would not be an unconstitutional taking here to disallow the costs of a plant being closed due to ComGen's own negligence.

ComGen argues that disallowing all or a portion of the costs would essentially erase the majority of its profits. Record, p.11. However, a profit is not what is constitutionally guaranteed. ComGen is constitutionally permitted a reasonable return on investments made that are used and useful for public service. *Bluefield,* 262 U.S at 692-93. It is not promised a profit. *Jersey Cent. Power & Light,* 810 F.2d at 1180-81. ComGen is not constitutionally guaranteed a profit for a court mandated environmental clean-up and impoundment closure and it is not an unconstitutional taking to disallow such recovery. It is not unjust or unreasonable for FERC to disallow ComGen from recovering on a remediation which is neither used by, nor useful to, the public.

VII. Conclusion

For the foregoing reasons, SCCRAP respectfully requests this Court grant a rehearing of FERC's approval of ComGen's rate schedules and also affirm the District Court's granting of injunctive relief against ComGen to "fully excavate" the coal ash in the Little Green Run Impoundment.

Appendix B

Certificate of Service

Pursuant to Official Rule IV, Team Members representing Stop Coal Combustion Residual Ash Ponds (SCCRAP) 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 4, 2018.

Respectfully submitted,

Team No. 25

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