
No. 18-02345

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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*

BRIEF FOR INTERVENOR

TEAM NO. 5

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the suit under 28 U.S.C. § 1331 (2018). FERC had jurisdiction over Commonwealth Generating Company's request under 16 U.S.C. § 824(b) (2018). This Court has appellate jurisdiction 28 U.S.C. § 1291 (2018) and FERC's decision under 16 U.S.C. § 8251(b) (2018). Commonwealth Generating Company timely filed an appeal on July 16, 2018. R. at 8. Stop Coal Combustion Residual Ash Ponds timely filed its petition on December 3, 2018. R. at 12. A joint motion to consolidate was filed, which this Court granted. R. at 12.

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the District Court reasonable interpreted the Clean Water Act to include surface water pollution via hydrologically connected groundwater as actionable under Section 1311.
- 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 Section 1311(a) of the Clean Water Act.
- III. Whether the Federal Energy Regulatory Commission's decision to approve Commonwealth Generating Company's revised Rate Scheduled No. 1 and revised Rate Schedule No. 2 was arbitrary and capricious.
- IV. Whether Stop Coal Combustion Residual Ash Pond's position in the Federal Energy Regulatory Commission's proceeding is an unconstitutional taking under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Stop Coal Combustion Residual Ash Ponds (SCCRAP) requests this Court affirm the district court's granting of injunctive relief under the Clean Water Act. R. at 1–2. Additionally, SCCRAP appeals FERC's decision approving Respondent's revised rates under the Federal Power Act, which Respondent initiated to recover remediation costs associated with the injunctive relief granted. R. at 1–2.

The Little Green Run Impoundment (LGRI) is a facility that stores accumulated wet coal ash produced by two coal-fired units at the VGS owned and operated by Respondent. R. at 3–4. Due to its excessive size and previous environmental hazards, in March 2014 the EPA listed the LGRI as one of 63 electric industry coal waste impoundments in the United States with a “high” hazard rating. R. at 4–5.

In 2002, Respondent detected high levels of arsenic in groundwater and reinforced the LGRI’s west embankment with a high-density polyethylene (HDPE) geomembrane to mitigate the pollution. R. at 5. Unfortunately, the corrective action did not withstand the test of time. In 2017, after monitoring the groundwater near the LGRI, a local environmental NGO Vandalia Waterkeeper detected arsenic in levels that exceeded the standards of the Vandalia Department of Environmental Quality (VDEQ). R. at 5.

Upon further analysis of the arsenic-riddled water, the NGO suggested that the toxin came from the LGRI due to its proximity to the nearby Fish Creek and Vandalia River and proclivity to rainwater. R. at 5–6. Once Vandalia Waterkeeper filed a complaint with the VDEQ, an investigation revealed that a seam in the HDPE geomembrane liner was inadequately welded, resulting in seepage that pooled at the downstream tow of the west embankment. R. at 6. VDEQ found that the seepage caused erosion and indentations in the soil as it made its way down the embankment towards Fish Creek. R. at 6. Respondent failed to adhere to a standard of care in monitoring the ineffectiveness of the HDPE geomembrane liner. R. at 11.

Respondent overlooked the leaking of arsenic into groundwater between 2006 and 2017. Not until Vandalia Waterkeeper stepped in did environmental impact tests conclude that arsenic was still leaching into Fish Creek and the Vandalia River. The state of the Little Green Run

Impoundment all but ensures that human health and environmental impact are at the lowest tier of Respondent's concern.

SCCRAP challenges FERC's decision, asserting that this Court should bar Respondent from recovering from ratepayers any costs associated with its inept execution of the VDEQ corrective plan. R. at 9.

Title II of the FPA provides FERC with jurisdiction over the actions of a "public utility," defined as "any person who owns or operates" facilities for "the transmission of electric energy in interstate commerce," and "to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). Furthermore, the FPA gives FERC exclusive regulatory authority over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce but leaves the states to regulate retail energy sales. 16 U.S.C. §§ 824 to 824m, 824(b)(1). Under Title II of the FPA, FERC's must ensure that all rates, terms, and conditions of wholesale electric sales by public utilities are "just and reasonable" and not "unduly discriminatory," and remedy rates that it finds are unjust, unreasonable, or unduly discriminatory. 16 U.S.C. §§ 824d, 824e.

Respondent is a wholly owned subsidiary of Commonwealth Energy (CE), a multistate electric utility holding company system providing electric service at retail and wholesale rates in several states, including Vandalia and Franklin. R. at 3. In 2014, CE sold Vandalia Generating Station (VGS) to Respondent to reduce its exposure to competitive wholesale markets by moving merchant plants into the regulated rate base of CE's retail electric companies. R. at 4.

Following the sale, Respondent entered into unit power service agreements with Vandalia Power Company and Franklin Power Company under which half of the electrical output of the VGS would be sold to each company. R. at 4. The agreement between Respondent and Vandalia

Power is designated as ComGen’s FERC Rate Schedule No. 1 (Vandalia Agreement), and the agreement between Respondent and Franklin Power is designated as Comgen’s FERC Rate Schedule No. 2 (Franklin Agreement). R. at 4.

II. NATURE OF THE PROCEEDINGS

This case involves an appeal from orders in two separate proceedings. R. at 1. The first concerns an order by the District Court for the District of Columbia granting SCCRAP’s request for injunctive relief against Respondent under the CWA. R. at 1. The second entails a rehearing of FERC’s acceptance of Respondent’s revised rate schedules under the Federal Power Act. R. at 1.

District Court. The national environmental organization, SCCRAP, brought a citizen suit against Respondent—the owner and operator of the coal power plant and the Little Green Run Impoundment—for violating the CWA based on discharge of arsenic from coal ash piles at the LGRI into surrounding surface waters, including Fish Creek and the Vandalia River. R. at 7. Respondent challenged the statutory definitions that seepage of arsenic from its coal combustion residual (CCR) impoundment into groundwater is not actionable or in violation of the Act under Section 1342(a). R. at 8. The District Court rejected Respondent’s arguments that hydrologically connected groundwater is not within the purview of the Clean Water Act and that the Little Green Run Impoundment was not a “point source” as defined by the Clean Water Act. R. at 7–8.

The District Court found the operator liable for violations of the CWA, granting SCCRAP’s action for injunctive relief. R. at 7–8. Consequently, the District Court ordered a “closure by removal” corrective action requiring Respondent to “fully excavate” the 38.7 million cubic yards of coal ash in the LGRI and relocate it to a facility that complies with CCR standards. R. at 8.

FERC Proceeding. Contemporaneously with its appeal of the District Court’s decision, on July 16, 2018 Respondent submitted a filing to FERC under § 205 of the FPA to revise rate schedules for the Vandalia Power and Franklin Power to cover the costs of complying with the District Court’s order. R. at 8. FERC approved Respondent’s revised rate schedules; however, SCCRAP intervened in the FERC proceeding and filed a protest in opposition to Respondent’s filing under the prudent utility ratemaking and the matchmaking principles. R. at 8-9. FERC responded by suspending Respondent’s rate filing and set the matter for an evidentiary hearing. R. at 10.

Respondent suggested that the relief requested by SCCRAP would constitute an unconstitutional taking set forth in the Fifth and Fourteenth Amendments. R. at 11. On October 10, 2018 FERC approved the rate revisions, contingent upon Respondent implementing the required remedial action imposed by the District Court. R. at 11. Currently, SCCRAP appeals FERC’s decision to this Court. R. at 1. SCCRAP and the Respondent jointly moved to consolidate, which this Court granted on December 21, 2018. R. at 1.

SUMMARY OF THE ARGUMENT

This case presents issues balancing state and federal authority over environmental and economical risks borne by the government, businesses, consumers, and advocates of clean water. Here, Respondent attempts to sidetrack formative legislation, pollute the environment, and perpetuate unbridled capitalism.

I.

The CWA prohibits unpermitted discharges of pollutants from “point sources” into waters of the United States. The first issue concerns the groundwater conduit theory, which makes actionable under the CWA any discharge of pollutants from hydrologically connected

groundwater that has a direct, immediate and generally traceable connection to surface water. Because ComGen's coal ash impoundment, the Little Green Run Impoundment (LGRI) leaked arsenic into groundwater hydrologically connected to the Vandalia River, the discharges are actionable under the CWA.

II.

The second issue concerns whether the coal ash impoundment leaking arsenic constitutes a "point source" in violation of Section 1342 of the CWA. A discharge that passes from a point source through groundwater to navigable waters may support a claim under the CWA if the connection between a point source and navigable waters is clear. Thus, the improperly welded lining of the Little Green Run Impoundment signified the cause of and the starting point from which the pollutants began its journey to navigable waters. This Court should affirm the district court's holding that Respondent is liable under Section 1342 for the unpermitted discharge of arsenic from a point source into navigable waters.

III.

The third issue deals with a review of the Federal Energy Regulatory Commission's (FERC) approval of ComGen's revised rates to recover costs incurred after the district court imposed the remedial action for violating the CWA. Because FERC failed to consider the prudence utility ratemaking principle and the matching principle, its decision was arbitrary and capricious. This Court should reverse FERC's decision approving the revised rates that shift financial responsibility onto innocent customers.

IV.

The fourth issue concerns the constitutionality of implementing SCCRAP's proposed relief under the Takings Clause of the Fifth and Fourteenth Amendments. Under the constitutional

standards for setting “just and reasonable rates,” a public utility must balance investors and ratepayers. FERC’s decision discredited consumers’ interests for the shareholders and the financial integrity of ComGen despite utility mismanagement. This Court should reverse FERC’s decision to approve Respondent’s revised rates that shift financial responsibility onto innocent customers.

ARGUMENT AND AUTHORITIES

I. CONGRESS INTENDED POLLUTION OF NAVIGABLE WATERS VIA HYDROLOGICALLY CONNECTED GROUNDWATER TO NOT BE ACTIONABLE UNDER THE CLEAN WATER ACT.

This Court should affirm the lower court’s judgment because the Clean Water Act has jurisdiction over hydrological groundwater connected to the Vandalia River. Through groundwater, pollutants from the LGRI reached the Vandalia River. There exists a significant nexus to surface water that is direct, immediate and generally traceable, further affecting the integrity of the navigable waters.

A proponent of a claim actionable under the CWA, must demonstrate five elements: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). To achieve its objective of preserving the integrity of the nation’s waters, the CWA prohibits the “discharge of any pollutants by any person” into “navigable waters” unless authorized by the CWA. 33 U.S.C. §§ 1311(a), 1362(11). The Act defines the term “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). The EPA has repeatedly asserted that discharges of pollutants to

groundwater that has a “direct hydrologic connection” to surface water are subject to CWA regulation and require an NPDES permit. 66 Fed. Reg. 2960, 3015-18 (Jan. 12, 2001).¹

A. The LGRI’s Discharges into Groundwater Have a Direct Hydrological Connection to Navigable Waters under the “Groundwater Conduit Theory.”

The hydrological groundwater connecting the LGRI and the Vandalia River is actionable under the CWA because there is a direct and immediate link between the two entities of water that justifies a significant nexus so that the groundwater is covered under “waters of the United States.” An important element in the application of the CWA is the “significant nexus standard” developed in *Riverside Bayview* and *SWANCC* and refined in Justice Kennedy’s opinion in *Rapanos*.

Between 1985 and 2006, the Supreme Court decided three seminal cases addressing the scope of “navigable waters” within the purview of the CWA. The Supreme Court determined that “Congress chose to define the waters covered by the Act broadly,” finding that wetlands contiguous to and physically connected to navigable waterways constitute “waters of the United States” especially if they affect navigable waters. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133–34, 136 (1985). Yet, isolated waters and wetlands are not “waters of the United States” due to the lack of a “significant nexus” to navigable waters. *Solid Waste Agency of N. Cook Cty. v. U. S. Army Corps. of Eng’rs*, 531 U.S. 159, 167 (2001) (hereafter *SWANCC*). Some courts interpreted *SWANCC* to mean that the CWA does not reach isolated, non-navigable waters, but does reach waters or wetlands with a hydrological or ecological connection to navigable waters. Accordingly, the Court rejected the assertion that the CWA regulates water that has “any hydrological connection” to navigable waters. *Rapanos v. U.S.*, 547 U.S. 715, 731–

¹ Water continuously moves through the hydrologic cycle, and it is difficult to distinguish between surface and groundwater. 2 Waters and Water Rights §18.02 (Robert E. Beck & Amy L. Kelly eds., 3d ed. LexisNexis/Matthew Bender 2009). Despite the scientific recognition of the hydrologic link between surface and groundwater, the law has somewhat lagged in acknowledging this connection. *Id.*

32 (plurality), 767, 784 (Kennedy, J., concurring). Building off the “significant nexus” concept from *SWANCC*, Justice Kennedy extended CWA jurisdiction over waters if they “significantly affect the chemical, physical, and biological integrity” of navigable waters. *Id.* at 754. If the non-navigable water’s impact is speculative or insubstantial, it does not receive CWA protection. *Id.* at 780. Thus, CWA applicability may extend to hydrologically connected groundwater that significantly affects the integrity of navigable waters that is direct, immediate, and generally traceable.

1. A “significant nexus” exists between the groundwater and navigable waters that is direct and immediate.

Under Justice Kennedy’s “significant nexus” test, there is a direct link between the groundwater and the navigable water confirmed through the significant and substantial effect on the Vandalia River due to high levels of arsenic originating from the LGRI. *Rapanos*, 547 U.S. at 780-82 (Kennedy, J., concurring). This analysis bolsters SCCRAP’s position that the groundwater significantly affects the chemical, physical and biological integrity of the Vandalia River because arsenic had been detected in groundwater near the VGS in 2006 and later at elevated levels in the Vandalia River in 2017. The EPA recognizes arsenic as toxic and hazardous, thus the groundwater negatively affects the integrity of navigable waters. From these cases, as long as this water is connected to the navigable water and bears a significant effect on the chemical, physical, and biological integrity of the more clearly defined navigable waters, the non-navigable waters fall within the purview of the CWA.

In *Upstate Forever v. Kinder Morgan Energy Partners, LLC*, the Fourth Circuit held groundwater discharges may be subject to the CWA if the discharges are sufficiently connected to navigable waters through a direct hydrological connection. 887 F.3d 637, 651 (4th Cir. 2018). There, defendant’s underground pipeline ruptured and spilled approximately 369,000 gallons of

oil, which moved through groundwater to ultimately reach navigable waters. *Id.* at 643. Plaintiff(s) alleged a direct hydrological connection between the groundwater and navigable waters because the pipeline discharged pollutants that seeped into navigable waters that were less than 1,000 feet from it. *Id.* at 652. The court held that the CWA regulates pollutants discharged from a point source, there, a ruptured pipeline, which reached navigable waters, so long as the discharges were “sufficiently connected to navigable waters” and “the connection between point source and navigable waters” was “clear” and direct. *Id.* at 651–52.

Similarly, this case concerns a deficient geomembrane liner that caused the leakage of arsenic from a point source (a coal ash impoundment) into groundwater hydrologically connected to navigable water. Just as the oil moved through groundwater to ultimately reach navigable waters in *Upstate Forever*, here too the arsenic reached the navigable waters of Fish Creek and the Vandalia River via hydrologically connected groundwater. Before Respondent installed the (faulty) liner in 2006, groundwater monitoring demonstrated high levels of arsenic, resulting from the VGS power plant and subsequent storage of pollutants in the coal ash reservoir, the LGRI. Years later, due to environmental concern, a non-profit tested the water quality of the Vandalia River and found elevated levels of arsenic, alleging the LGRI as the source. Beyond the adjacency of the power plant to the coal ash pond, and the proximity of the coal ash impoundment to the river, the evidence of arsenic levels in both entities of water, establishes a clear and direct connection between the groundwater and the navigable waters. *See, e.g., Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018) (finding hydrological connection between leakage of arsenic from a coal ash plant to groundwater and surface water).

Likewise, the Court here may draw an inference that the hydrologically connected groundwater significantly connects to the Vandalia River because water quality monitoring evinces elevated arsenic levels. There is a logical inference that the deficient lining in the impoundment allows arsenic to leak at alarming levels into the groundwater, which in turn reaches the navigable water (demonstrated by the high levels of arsenic in the river), which indisputably affects its integrity.

Courts examine distance and time to establish a direct and immediate connection between groundwater and navigable waters. *See, e.g., Greater Yellowstone Coalition v. Larson*, 641 F.Supp. 2d 1120, 1139 (D. Idaho 2009) (finding no hydrologic connection when pollutants traveled “between one to four miles until reaching the surface water,” and “would take between 60 and 420 years for peak concentrations . . . to arrive at surface water”). The proximity in space and time by which groundwater moved arsenic into navigable waters is clear here. First, the LGRI abuts Fish Creek and the Vandalia River, establishing proximity. Second, the arsenic was found in the groundwater in 2006 and later detected in the Vandalia River in 2017, suggesting a short time frame during which the arsenic-laden groundwater reached the navigable waters. The proximity to navigable waters and short time frame indicate that LGRI’s discharge has a “direct and immediate” hydrologic connection with the river.

In *Exxon Corp. v. Train*, the Fifth Circuit denied the regulation of wastewater in 5,000-foot deep wells because the groundwater was isolated and non-tributary. 554 F.2d 1310, 1312–13 (5th Cir. 1977). There, the groundwater did not affect navigable surface water because it did not migrate into or affect surface waters, thus constituted no discharge of a pollutant into navigable waters within the meaning of § 1311(a). *Id.* at 1329.

Here, groundwater hydrologically connects to the surface water of the LGRI because of the structural makeup of the impoundment. More than half of the impoundment is lined with clay, which is less reliable as a barrier to toxin leakage than the HDPE liner installed in 2006. Hazardous and Solid Waste Management System. 75 FR 35128-01, 35144 (June 21, 2010). Because toxic materials associated with the CCRs spill out of the impoundment into the groundwater, which affects the waters of Fish Creek and the Vandalia River, there exists a “significant nexus” between the groundwater and the navigable waters. Unlike *Exxon*, here the arsenic flows from the groundwater to the surface waters, thereby affecting the integrity of the adjacent surface waters. Substantial factual evidence exists supporting this connection based on the groundwater monitoring that occurred in 2006 and 2017 representing high levels of arsenic, which is known to be a constituent toxin from CCRs. Unlike *Exxon*, the groundwater here is not isolated, but rather tributary due to its hydrological connection by which the groundwater affects the surface water of the navigable waters of Fish Creek and then Fish River.

Therefore, finding a hydrological connection as the basis for CWA jurisdiction follows Justice Kennedy’s concurring opinion in *Rapanos*. A claim is actionable when the hydrologically connected groundwater establishes “a reasonable interference of ecologic interconnection” which can be demonstrated if the groundwater significantly affects the “chemical, physical, and biological integrity” of the adjacent navigable waters. *Rapanos*, 547 U.S. at 187. Here, the groundwater maintains a significant nexus to the navigable water and thus falls under CWA jurisdiction.

2. The LGRI discharged arsenic into navigable waters through a hydrological connection that is generally traceable.

The arsenic discovered in the Vandalia River is traceable to the LGRI and the coal combustion residuals therein because the discharge of pollutants from a point source need not

reach navigable waters *directly*. Specifically, the Act does prohibit the ‘addition of any pollutant to navigable waters.’ 33 U.S.C. § 1362(12)(A) (emphasis added). This language suggests an indirect connection between the discharge of pollutants and navigable waters (through groundwater), is actionable under the CWA, so long as the connection is traceable. To qualify the discharge of pollutants as generally traceable, the Court may rely on two factors: (1) empirical water quality evidence and (2) structural (and managerial) failures.

For example, in *Upstate Forever* defendant’s pipeline ruptured, releasing approximately 369,000 gallons of oil, which reached navigable waters through groundwater. *Upstate Forever*, 887 F.3d at 643. As a result, the plaintiffs traced pollutants found in surface water back to the discharge of pollutants from the point source that moved through hydrologically connected groundwater. *Id.* at 652. The Court found a traceable discharge from the ruptured pipeline. *Id.*

The Ninth Circuit applied the groundwater conduit theory when a wastewater reclamation facility discharged pollutants in treated effluent from four injection wells through hydrologically connected groundwater to the Pacific Ocean without a permit. *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 742 (9th Cir. 2018). The court determined through empirical evidence that the discharge of pollutants was “fairly traceable” from a point source to navigable water. *Id.* at 749. Although there was no direct discharge, the evidence established a traceable connection and demonstrated “the functional equivalent of a discharge into navigable waters” by the county. *Id.*; *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (requiring evidence of a link between discharges and contamination of navigable waters).

Similarly, in the case at hand Petitioners also employed empirical evidence to demonstrate a traceable connection between point source pollution and the navigable water via affected groundwater. In 2006, groundwater monitoring detected elevated levels of arsenic in

groundwater surrounding the VGS. To sustain its NPDES permit, Respondent installed a high-density polyethylene (HDPE) geomembrane liner to prevent further seepage of arsenic into groundwater. Yet in 2017, routine monitoring of the Vandalia River uncovered elevated levels of arsenic. Additional investigation revealed that the 2006 HDPE liner had been improperly welded, thus, the impoundment continued to leach arsenic into the groundwater and consequently into the navigable waters of Fish Creek and the Vandalia River. Discharges via spills and seepage from retention ponds are actionable under the CWA because the migration of pollutants from groundwater to navigable waters through a hydrological connection is traceable to the accidental discharge.

The CWA prohibits unpermitted discharges into groundwater that has a direct, immediate, and generally traceable hydrological connection to navigable waters. A court may consider the “significant nexus” test promulgated by Justice Kennedy that calls for a significant effect on the chemical, physical, and biological integrity of the more clearly defined “navigable waters.” If the groundwater carrying pollutants from a point source demonstrates such a direct hydrological connection to the affected surface water, it may fall under CWA regulation.

B. Finding a Hydrological Connection Between the LGRI-Polluted Groundwater and the Vandalia River Follows Congress’s Intent of Enacting the CWA.

This Court would safeguard Congress’s intent by finding the polluted groundwater within the purview of the Act, promoting its goal of protecting the integrity of the nation’s waters. Congress shifted its regulatory focus to limiting discharges of pollutants. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (en banc). The Act aimed to protect “waters of the United States,” traditional navigable waters and their tributaries,

interstate waters, and the territorial seas by regulating discharges into any body of water that would significantly affect those waters. 33 U.S.C. § 1362(7).

Congress intended the CWA to have broad, uniform application. 118 Cong. Rec. 33,757 (1972); *see, e.g., Riverside Bayview*, 474 U.S. at 133. Interpreting its language and structure, Congress consistently refers to “navigable waters and ground waters” in those portions of the Act dealing with EPA program development as well as the study of water pollution. *See, e.g.,* 33 U.S.C. § 1252(a), § 1254(a)(5), & § 1256(e)(1). On the other hand, in the provisions for water quality standards and discharge permits, Congress only expresses the phrase “navigable waters.” *See, e.g.,* 33 U.S.C. § 1312(a), § 1342(a)(4). If the terms were interchangeable, Congress need not separately refer to groundwater and navigable water. *Washington Wilderness Coalition v. Hecla Min. Co.*, 870 F. Supp. 983, 989 (E.D. Wash. 1994).

Excluding all groundwater from CWA protection conflicts with the statute, which have consistently interpreted the scope of the statute based on hydrologically connected groundwater bearing a “significant nexus” or effect on the navigable surface water. Through the hydrological connection theory, the “significant nexus” standard mirrors the CWA’s objective of protecting the integrity of the nation’s waters.

Just as the Court deferred the ecological relationship between the waters and their adjacent wetlands in *Riverside Bayview Homes* and *Rapanos*, the Court here should also recognize the impact of adjacent waters on waters that fit within the definition in the CWA. Groundwater permeated with pollutants by the LGRI capable of reaching navigable waters must be within the purview of the CWA because of its hydrological effect on the integrity of the surrounding navigable waters. Otherwise, rejecting the [groundwater conduit] theory “would greatly undermine the purpose of the [CWA].” *Upstate Forever*, 887 F.3d at 652. By analogizing cases

that support the groundwater conduit theory and defer Congress's intent, in applying Section 1311(a) the Court must give "navigable waters" a broad interpretation to preserve the authority and objectives intended under the CWA.

II. SEEPAGE OF ARSENIC FROM THE LGRI CONSTITUTES THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF SECTION 1311(A) OF THE CLEAN WATER ACT.

The LGRI is a point source because it is a discernible, confined and discrete conveyance of pollutants into the Vandalia River via hydrologically connected groundwater.

A. The LGRI Is a Point Source Because It Is a Discernible, Confined, and Discrete Conveyance of Pollutants.

By retaining coal combustion waste produced by nearby power plants and subsequently leaking toxic effluent into groundwater, the LGRI constitutes a confined and discrete container that conveys pollutants either directly or indirectly (via groundwater) into navigable waters.

The CWA prohibits (1) any addition (2) of any pollutant (3) to navigable waters (4) from any point source (5) by any person, except in compliance with a CWA permit. 33 U.S.C. § 1311(a) (emphasis added). Congress designed the concept of a "point source" to advance the Act's objective by "embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). Additionally, the language "including but not limited to" suggests a broad interpretation. 33 U.S.C. § 1362(14).

Points sources systematically act to convey pollutants from a source to navigable waters. *United States v. Plaza Health Lab*, 3 F.3d 643, 646 (2d Cir. 1993). They are the "means by which pollutants are deposited into a navigable body of water." *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980). Courts have concluded that point sources must be the vehicle by which the pollutants are added to the navigable water.

Many courts have found that point sources can include coal ash impoundments or unlined ponds. *See, Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F.Supp. 3d 428 (M.D.N.C. 2015) (finding that coal ash lagoons were point sources because the unlined impoundment held liquid waste that leaked into groundwater conveyed into navigable waters); *see also Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321 (D. Oregon 1997) (holding that an unlined brine pond constituted a “point source” under the CWA because it was readily identifiable as a single source of pollutants). Therefore, it is not unprecedented for this Court to find that a coal ash pond, releasing pollutants into protected waters is a confined and discrete conveyance under the CWA.

1. The LGRI constitutes a point source because it is an identifiable location of pollution.

The LGRI is a discernible, confined and discrete retainer of coal ash waste from which arsenic is discharged and conveyed into navigable waters. To fall under the CWA, courts consider if the point source pollution is readily identifiable. *See Or. Nat'l Desert Ass'n*, 550 F.3d 778, 780 (9th Cir. 2008). Therefore, the LGRI is a point source because pollutants are detectable and confined in one particular location from which they are conveyed into groundwater that reaches navigable waters.

The Tenth and Fourth Circuits clarify that the touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped. *See, e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370 (10th Cir. 1979) (system of sump pumps, ditches, and hoses is a “point source”). In *Earth Sciences* the court found that discharges from a pond or refuse pile can easily be traced to their source. 599 F.2d at 374. Even though runoff may be caused by rainfall, the discharge is from a point source because the pond or pile acts to collect and channel contaminated water. *Id.*

The Fourth Circuit held that a point source is the starting point and cause of pollution that migrated and/or is migrating through groundwater to navigable waters. *Upstate Forever*, 887 F.3d at 651. CWA jurisdiction applied because the gasoline was discharged from a discernible and discrete point source, a ruptured pipeline, which conveyed the pollutants into navigable waters. *Id.* at 651–52. Kinder Morgan’s gasoline pipeline qualifies as a point source. The plaintiffs alleged that the pipeline is a discrete source of pollution because the gasoline is traceable to Kinder Morgan’s pipeline. *Id.* at 648, n.7.

The LGRI is a “point source” under the CWA because it is a coal ash pile impounded by a dam, adjacent to navigable water, the Vandalia River. It concentrates coal ash and its constituent pollutants in one confined location. Because three-quarters of the impoundment are unlined, and one embankment has an improperly welded lining, the pollutants leached into groundwater and could be traced back to that one location. Even Respondents agree that the failure in the HDPE liner was the source of the seeping arsenic into the groundwater surrounding the LGRI. R. at. 10. This coal ash impoundment is essentially a discrete mechanism that conveys pollutants originated at the VGS to the Vandalia River.

2. To be a point source, the CWA does not require the LGRI to generate the arsenic it conveys into navigable waters.

Though it does not generate the pollutants, the LGRI is a conveyance that discharges arsenic into groundwater through which it ultimately reaches the Vandalia River. The listed examples of point sources covered by the CWA suggests that a point source need not be the original source of the pollutant; it need convey only the pollutant to “navigable waters.” 33 U.S.C. §§ 1362(7), (14). Such enumerated objects merely transport them. Thus, a point source need not generate the pollutants, but rather it must be capable of conveying the pollutants to navigable waters. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians*,

541 U.S. 95, 105 (2004). In this context, to be a conveyance, the point source in question must be the location from which pollutants are or may be discharged. 33 U.S.C. § 1362(14). *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (using a “but for” analysis, the Supreme Court found the pumping station (the point source) to be the cause-in-fact of the release of pollutants into navigable waters).

The LGRI does not generate arsenic but rather retains the coal ash waste. That coal ash waste and its constituent pollution, including arsenic, is concentrated in one location, discernible from other wetlands in that the impoundment is a massive retainer used by the VGS and impounded by a dam adjacent to the Vandalia River. The LGRI is the cause-in-fact of the release of pollutants into navigable waters because, without the deficient lining in the impoundment, the discharge of pollutants into navigable waters via groundwater would not occur naturally. As before, the Court should hold that the LGRI is a point source because it is a conveyance from which pollutants move into navigable waters.

Despite the Fourth Circuit broadening CWA liability in *Upstate Forever*, in *Sierra Club v. Virginia Electric & Power Company*, the court narrowed its application of the theory in considering a “point source.” 903 F.3d 403, 410 (4th Cir. 2018). The Fourth Circuit found that a coal power plant landfill and related settling pond did not constitute “point sources” even though arsenic from the coal ash stored on site reached navigable waters. *Id.* The court determined that since the pollutants were leached by rainwater, and carried by groundwater into navigable waters, there was no discernible, confined or discrete conveyance. *Id.* The court held that landfill and settling ponds were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. *Id.* at 411. Since the rainwater conveyed arsenic into groundwater, they were not a “point source”. *Id.*

Turning to the present case, the Court can draw on a significant factual difference. In particular, the *Sierra Club* court distinguished between the gradual leaching of pollutants to groundwater through a settling pond and the direct discharge of pollutants to groundwater resulting from a discrete conveyance like a channel or ruptured pipe. *See, e.g., Upstate Forever*, 887 F.3d at 637. Gradual leaching through rainwater does not equal the leaking caused by a ruptured pipe, or even an improperly welded seam on an impoundment lining which would constitute discrete conveyances. In the present case, the LGRI's liner was corrupted even after Respondent took corrective action. For eleven years, the impoundment leaked arsenic into the creek that ran into the Vandalia River. With reference to *Sierra Club*'s finding that a point source must function in a manner to convey something the deficient lining transcends the LGRI into a point source.

A coal ash impoundment is the repository where a power plant dumps waste produced. The impoundment at issue concentrates coal ash and its constituent pollutants in one located receptacle. Also, like a pipe when ruptured, an impoundment with a deficient lining that is susceptible to leaks, such a facility channels and conveys arsenic directly into the groundwater which flows directly into surface waters. Coal ash piles can be classified as discrete mechanisms that convey pollutants from its generating source to navigable waters. The LGRI is the same type of mechanism from which arsenic spills out of from a fractured lining. Therefore, this Court should hold that the LGRI is a point source actionable under the CWA.

B. The CWA Regulates the LGRI's Discharges of Arsenic That Reach Navigable Waters Indirectly Through Hydrologically Connected Groundwater.

The LGRI is a point source despite not conveying arsenic directly into Fish Creek or the Vandalia River because the pollutants reach navigable waters through hydrologically connected

groundwater. The plain language of the CWA requires only that a discharge come “from” a “point source.” 33 U.S.C. § 1362(12)(A).

Under the plain meaning of “from,” a point source is the starting point or the cause of a discharge under the CWA, but that starting point need not convey the discharge directly to navigable waters. *Upstate Forever*, 887 F.3d at 650. Furthermore, an NPDES permit might be required when “pollutants travel from a point source to navigable waters through hydrologically connected groundwater serving as a conduit between the point source and the navigable waters.” *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015).

Though groundwater is neither a “water[] of the United States” nor a “point source,” it aids the pollutants to migrate from an original point source into navigable waters. *See* 33 U.S.C. §§ 1362(7), 1362(12). As a result, the following courts find liability under the CWA for unpermitted discharges of pollutants conveyed from a point source through groundwater.

To constitute a regulable point source, a direct hydrological connection is sufficient. The Fourth Circuit has found a ruptured pipeline to constitute a point source because it was “the starting point or cause of a discharge.” *Upstate Forever*, 887 F.3d at 650. A discharge must originate from a point source, and to hold otherwise would require a qualified point source to seamlessly channel any discharge of a pollutant until the moment the pollutant enters navigable waters. *Id.* at 650; 33 U.S.C. § 1362(12)(A). An indirect discharge may fall within the CWA if it is sufficiently connected to navigable waters. *Id.* at 651.

Here, the LGRI conveyed arsenic via hydrologically connected groundwater that acted as a direct discharge into the navigable water. Just like a ruptured pipeline or an injection well, the improperly welded HDPE geomembrane lining caused the escape of arsenic from the impoundment indirectly via hydrologically connected groundwater. The CWA prohibits all

pollution from a point source that reaches navigable waters “by means of groundwater with a direct hydrological connection to such navigable waters.” *Upstate Forever*, 887 F.3d at 652. The unpermitted leaks from the LGRI are unlawful discharges of pollutants from a point source.

To be covered by the Act, a point source must be a distinguishable location from which pollutants may be conveyed. Jurisdiction under the CWA does not require a point source to discharge pollutants directly into navigable waters; the indirect conveyance via groundwater with a hydrological connection into navigable waters satisfies the language and intent behind the Act.

III. FERC’S DECISION TO APPROVE COMGEN’S REVISED RATES WAS ARBITRARY AND CAPRICIOUS BECAUSE FERC FAILED TO CONSIDER THE PRUDENT UTILITY RATEMAKING AND THE MATCHING PRINCIPLES.

Under the Administrative Procedure Act, this Court may set aside a FERC order only if it determines that the decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A). Keeping with this deferential standard, this Court should find that FERC’s decision was arbitrary and capricious based on the disregard of substantial evidence for the prudent utility principle and the matching principle. First, under the prudence principle of utility ratemaking, Respondent is barred from recovering from utility ratepayers any of the remediation costs of the LGRI due to its own inept execution and imprudent monitoring of the VDEQ’s 2006 corrective plan. Second, under the matching principle, if FERC allows Respondent to revise rate schedules, Vandalia Power and Franklin Power (and their customers) should only bear a proportionate share of the costs.

A. Under the Prudent Utility Ratemaking Principle, ComGen May Not Recover Costs Incurred Through Imprudent Management.

FERC’s decision to approve the revised rates was arbitrary and capricious in light of substantial evidence offered and FERC’s agreement with SCCRAP under the “prudent utility ratemaking principle”. Notably, the Commission found that ComGen acted imprudently for failing to properly monitor the effectiveness of the VDEQ corrective action during the 2006 to

2017 period. Disregarding substantial evidence of utility mismanagement bolsters the conclusion that FERC's decision to revise rates in favor of an imprudent public utility was arbitrary and capricious.

FERC has applied the "prudence" test to determine the recoverability of a utility's expenses. *Permian Basin Area Rate Cases*, 390 U.S. at 767. Under this test, a public utility may recover its costs from consumers if it acted prudently in incurring those costs. Costs due to unnecessary errors and lack of ordinary foresight and efficiency in management constitute imprudent charges. *See generally, West Ohio Gas Co.*, 294 U.S. at 63. The Supreme Court prohibited regulated entities from recovering through rates "obviously wasteful or imprudent expenditures" because they would be unjust and unreasonable *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289 n. 1 (1923) (Brandeis, J., concurring).

For the presumption of prudence to apply to a utility's FERC filing, the utility must demonstrate that it went through "a reasonable decision-making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner." *State, ex rel. Pittman v. Mississippi Public Service Comm'n*, 538 So. 2d 387, 398 (Miss. 1989). Here, ComGen cannot demonstrate that it went through a reasonable decision-making process in accordance with what a prudent utility management knew or could have known.

Under the prudence standard, a complainant must present evidence sufficient to raise doubt that a reasonable utility manager, under the same circumstances and acting in good faith, would have made the same decision and incurred the same costs. Knowing that the LGRI is an EPA-rated "high hazard" facility, Respondent should have taken greater caution in its management of

the impoundment. The record shows that in 2002, after two years of production, Respondent initially detected arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards.

It was foreseeable that the impoundment would have future problems with the liner since it had already leaked pollutants. Given the information available at the time, a prudent manager facing the same corrective actions and risks would know to monitor the effectiveness of the new liner and the surrounding groundwaters to ensure the contractor resolved the leak.

After monitoring the Vandalia River, Vandalia Waterkeeper, pursued an investigation with VDEQ in 2017 that revealed an inadequately welded seam in Respondent's HDPE liner dating back to 2006. Between 2006 and 2017 Respondent either (1) failed to routinely and *effectively* monitor the condition of the HDPE liner or (2) negligently turned a blind eye to the inadequacy of the liner designed to prevent hazardous waste from leaking into navigable waters. Respondent must monitor surrounding groundwater, not NGOs. The record is silent as to Respondent's compliance (or lack thereof) with this permit requirement, which if followed would lead one to assume Respondent would continue to detect and report high levels of arsenic in the water. Despite claiming it performed its routine utility operations, Respondent did not dispute that the failure of the HDPE liner was the source of the seeping of arsenic into groundwaters and navigable waters.

Because of Respondent's imprudence, the LGRI leaked significant amounts of arsenic into navigable waters, requiring a closure-by-removal corrective action costing \$246 million. Respondent incurred the remedial costs due to utility mismanagement, which cannot be recovered through revised rates. This argument adds to the conclusion that FERC's original

decision was arbitrary and capricious because the decision was not supported by substantial evidence.

FERC acted arbitrarily in approving revised rates for Respondent to recover 100% of remedial costs incurred from managerial incompetence. Because costs were imprudent, they cannot be included with operating expenses and should not be recoverable. In conclusion, FERC's decision, to allow cost recovery despite a factual finding that Respondent failed to properly monitor the effectiveness which would have likely revealed a foreseeable problem with arsenic leakage in an inadequately welded liner, contradicts the prudent utility ratemaking principle. SCCRAP satisfied its burden under the prudent utility principle to overcome the presumption of prudence in rate settings, proving that FERC's order was arbitrary and capricious.

B. Under the Matching Principle, ComGen May Not Impose a Disproportionate Share of the Burden on Customers Who Benefited from Electricity Production.

FERC's decision to approve the revised rates was arbitrary and capricious in light of substantial evidence offered in the record and FERC's agreement with SCCRAP under the matching principle. The Commission agreed that allocating the full costs to Vandalia Power and Franklin Power violated the longstanding "matching principle" because the retail utilities (and their consumers) would bear a disproportionate share of the costs. Disregarding substantial evidence of disproportionate benefits and burdens bolsters the conclusion that FERC's decision to revise rates for ComGen was arbitrary and capricious.

Under the FPA, utilities must charge "just and reasonable" rates. 16 U.S.C. § 824d(a). FERC and the courts have understood this requirement to incorporate a "matching principle," meaning that rates charged for electricity should reflect the costs of providing it. *K N Energy*,

Inc. v. FERC, 968 F.2d 1295, 1300 (D.C.Cir. 1992). Often, courts frame this principle as one that ensures the burden matches 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.” *BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 268 (D.C. Cir. 2014).

In *Old Dominion Electric Cooperative v. Federal Energy Regulatory Commission*, this Court concluded that FERC acted arbitrarily in requiring a utility company to pay the full cost of two power-line upgrades. 898 F.3d 1254 (D.C. Cir. 2018). FERC amended a tariff that shifted a disproportionate share of costs of high-voltage projects onto one retail power plant. *Id.* at 1260.

Here, FERC also approved a huge misallocation of costs for this power plant. ComGen’s revised rates are unjust and unreasonable in that they disproportionately burden Vandalia Power and Franklin Power to pay the full the remediation costs of the corrective action. This violates the “matching principle” of utility ratemaking. Only coal ash produced by the VGS’s operation since November 2014 (when Respondent executed the unit power service agreements) is properly allocable to these retail utilities and in turn their customers. Because 80.5% of the coal ash in the LGRI is attributable to electricity produced when the VGS was a merchant plant, the same percentage of remediation costs should be borne by Respondent’s shareholders, who in fact benefitted from revenue from electricity sales during the period from 2000 to November 2014. Vandalia Power and Franklin Power should not bear the full cost of the corrective action.

Additionally, FERC agreed in principle with SCCRAP’s argument regarding the “matching principle” of utility ratemaking. FERC acknowledged approving the revised rates allow Respondent’s shareholders to receive benefits of the revenues produced by the output of the VGS without bearing their proportionate share of the burden. FERC described that its decision would

create a “windfall” for ComGen’s shareholder, Commonwealth Energy. But FERC approved the rates—a decision that floats above discretion and transcends into whim.

The Commission failed to indicate fully the purposes for which it acted, and its assessment of the consequences of its orders for the character and future development of the industry. Rather, FERC hung its hat on an irreconcilable policy point: allowing the coal-power plant to recoup costs of damages from an environmental catastrophe (it caused) for the sake of promoting environmental protection. This Court should reverse FERC’s decision.

IV. FERC DISALLOWING THE RECOVERY OF ALL OR A PORTION OF COMGEN’S REMEDIATION COSTS IS NOT AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Disallowing ComGen’s remediation costs will not affect the financial integrity of the public utility because the costs were imprudently incurred. Thus, it is not an unconstitutional taking to deny ComGen’s revised rate schedules.

Under the FPA, rates and charges for wholesale transactions of electric energy must be “just and reasonable” and not “unduly discriminatory or preferential.” 16 U.S.C. §§ 824d(a), 824e(a) (2003). This statutory requirement coincides with applicable constitutional standards in two seminal Supreme Court cases. In determining a just and reasonable rate, the ratemaking authority must permit a utility to earn a return “reasonably sufficient to assure confidence in the financial soundness of the utility . . . under efficient and economical management,” *Bluefield Water Works v. Public Service Comm’n*, 262 U.S. 679, 693 (1923), and balances “the investor and the consumer interests,” *Federal Power Comm’n v. Hope Nat’l Gas Co.*, 320 U.S. 591, 603 (1944).

The statutory requirement also has been interpreted, together with the Takings Clause of the Fifth and Fourteenth Amendments, as guaranteeing regulated public utilities an opportunity

to recover prudently incurred investments and a reasonable return on invested capital. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 605 (1944); *Bluefield Water Works & Improvement Co.*, 262 U.S. at 692–93. “The Fifth Amendment does not proscribe the taking of property, rather it proscribes taking *without just compensation*.” *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (emphasis added).

A. ComGen Is Not Constitutionally Entitled to a Reasonable Rate of Return in the Face of Utility Mismanagement.

ComGen’s remediation costs were incurred due to mismanagement and failure to monitor the effectiveness of the HDPE geomembrane liner. ComGen claims that SCCRAP’s position would cause an unconstitutional taking by erasing the majority of its profits. Respondent argues that instead of earning 10% return on equity (ROE) authorized by FERC in Respondent’s most recent rate proceeding in 2016, its actual ROE over this period would fall to either 3.2% if the entire amount is disallowed, or 3.6% if 80.5% of the entire amount is disallowed. However, the Supreme Court has held that an adverse utility-rate decision is not “confiscatory” for the Takings Clause unless it produces an overall unfair rate of return for the utility. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 310, 313–14 (1989) (finding that challenged disallowances did not result in an unconstitutional taking because rates should not be increased due to managerial failures by which costs pass onto the public).

B. Allowing ComGen to Recover Costs Would Fail to Properly Balance the Interests of Ratepayers and Shareholders.

ComGen’s revised rates improperly skew remediation costs onto ratepayers in favor of their sole shareholders despite ComGen’s mismanagement. A public utility is only allowed “just and reasonable” rates that strike a balance between investors and ratepayers. *Permian Basin Area*

Rate Cases, 390 U.S. 747, 770 (1968). Rates cannot be confiscatory to the utility but so high on burden the consumer. *Bluefield*, 262 U.S. at 690.

In *Hope*, the court found that the Constitution requires regulatory commissions to set rates that satisfy the investor interest; however, such rates need not reflect imprudent investments. *Hope* demonstrates that a substantial public interest can justify a good deal of economic harm to the investor interest without violating the Constitution. In striking this balance between the public and investor interests, courts evaluate both the importance of the public interest used to justify harm to the investors and the extent of the financial harm. If FERC reasonably balances consumer and investor interests, then the resulting rate is not confiscatory. *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1210 (D.C. Cir. 1987).

Claims that disallowing remediation costs would affect ComGen's financial integrity and that disallowing all or 80.5% of the remediation costs contradict the constitutional standards for setting "just and reasonable" rates are misguided. The public interest, as described in *Hope*, permits consideration of the financial impact of utility rate increases on customers. Since *Hope*, the Supreme Court repeatedly emphasized that the primary purpose of federal regulation of the natural gas and electric industries has been to protect consumers from unreasonable prices charged by utilities that take advantage of their monopoly or near-monopoly status. *See, e.g., NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669–70 and n.5 (1976); *Hope*, 320 U.S. at 610. Disallowing remediation costs would hardly affect ComGen's financial integrity, as its only shareholder is Commonwealth Energy.

FERC discounted the balance of interests between consumer and investors by approving ComGen's revised rates because of the risk of financial integrity (to one shareholder). The Commission failed to indicate fully the purposes for which it acted, as well as its assessment of

the consequences of its orders for the character and future development of the industry. Rather, FERC hung its hat on an irreconcilable policy point: allowing the coal-power plant to recoup costs of damages from an environmental catastrophe (it caused) for the sake of promoting environmental protection. This Court should reverse FERC's decision.

Here, the Commission turns a blind eye to the fact that this public utility inadequately balances the interests of investors and consumers. Despite agreeing with many of SCCRAP's arguments, in principle, ultimately FERC based its decision that disallowing all the remediation costs would jeopardize the financial integrity of the public utility. Respondent values capital formation and shareholder investment over environmental conservation and customer retention. By approving the rates, FERC suggests that a return on equity justifies harm upon consumers and the environment, completely uncompensated by the perpetrator. Improperly revising rates for shareholder interests justifies no reasonable rate.

CONCLUSION

This Court should AFFIRM the holding of the United States District Court for the District of Columbia regarding Issue I and Issue II, and REVERSE FERC's decisions regarding Issue III and Issue IV.

Respectfully submitted,

TEAM 5
ATTORNEYS FOR INTERVENOR

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 pm Eastern time, February 4, 2019.

Respectfully submitted,

Team No. 5