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

Commonwealth Generating Company,)

Appellant,)

v.)

Stop Coal Combustion Residual Ash Ponds (SCCRAP),)

Appellee,
)

--- C.A. No. 18-02345

Stop Coal Combustion Residual Ash Ponds (SCCRAP),)

Petitioner,)

v.
)

Federal Energy Regulatory Commission,
)

Respondent,

Commonwealth Generating Company,)

Intervenor.)

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

Brief of the Appellee/Petitioner

Team No. 17

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Columbia has jurisdiction to hear a citizen suit by Stop Coal Combustion Residual Ash Ponds (SCCRAP), since it presented claims "arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331 (2012); *see* 33 U.S.C. § 1365 (2012) (Clean Water Act citizen-suit provision); *see also* Record, p. 7. The district court issued its order on June 15, 2018, following a bench trial, and Commonwealth Generating Company (ComGen) appealed to this Court on July 16, 2018. *Id.* at 7-8. This Court has jurisdiction to hear this timely appeal, as federal courts of appeals have jurisdiction over "final decisions of the district courts," including the granting of injunctive relief. 28 U.S.C. § 1291 (2012).

This Court also has jurisdiction over SCCRAP's appeal of the ratemaking decision by the Federal Energy Regulatory Commission (FERC). After applying to FERC for rehearing, "[a]ny party" aggrieved by a ratemaking order may obtain review in "the United States Court of Appeals for the District of Columbia" within 60 days of FERC's order on the rehearing application. 16 U.S.C. § 825*l* (2012). SCCRAP is an aggrieved party because it has members throughout the States of Vandalia and Franklin who are affected by the proceedings below. On November 30, 2018, FERC denied SCCRAP's request for rehearing. Record, p. 12. On December 3, 2018, SCCRAP timely petitioned this Court for review. *Id.*

STATEMENT OF THE ISSUES PRESENTED

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

II. Whether pollutants from a coal ash impoundment that pass through groundwater to navigable waters are discharged from a point source in violation of the Clean Water Act's permitting requirements.

III. Whether FERC's decision to allow ComGen to recover approximately $246 million in remediation costs was reasonable when those costs resulted from ComGen's negligence.

IV. Whether ComGen has a Takings right under the Fifth and the Fourteenth Amendments to full rate recovery of remediation costs when the costs resulted from ComGen's imprudence and are only partially attributable to current ratepayers.

STATEMENT OF THE CASE

The Little Green Run Impoundment, which is owned by ComGen, has been used to store coal combustion residuals (CCRs) for nearly two decades. Record, p. 4. ComGen, a wholly owned subsidiary of Commonwealth Energy (CE) incorporated in the District of Columbia, purchased the Vandalia Generating Station and the Impoundment from Commonwealth Energy Solutions (CES), another subsidiary of CE, in 2014. *Id.* at 3-4. CCRs (also known as coal ash) are the byproducts that remain after Vandalia Units Numbers 1 and 2 use coal to produce electricity at the Vandalia Generating Station (Station). *Id.* Coal ash is disposed of in wet form in surface impoundments like the Little Green Run Impoundment and contains a variety of contaminants, including arsenic. *Id.* at 3.

In 2005, the Vandalia Department of Environmental Quality (VDEQ) required CES, the previous owner of the Station, to take corrective actions after monitors found that arsenic levels in the groundwater exceeded the State's water quality standards in 2002. *Id.* at 5. In response, CES hired a contractor to install a high density polyethylene (HDPE) geomembrane liner on the west embankment of the impoundment in an attempt to mitigate the pollution. *Id.* In 2017, an environmental group detected high levels of arsenic in the Vandalia River, which it traced back to the Little Green Run Impoundment. *Id.* at 5-6. A State investigation later revealed that a contractor improperly installed the HDPE liner in 2006, resulting in years of continued seepage

along the west side of the embankment. *Id.* at 5-6. A state permit process governs the discharge of pollutants from the impoundment into Fish Creek and the Vandalia River. *Id.* at 5, 7.

In December 2017, environmental organization SCCRAP filed a citizen suit in the U.S. District Court for the District of Columbia, alleging that ComGen violated a provision of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants into navigable waters. *Id.* at 7. Specifically, SCCRAP alleged that arsenic seepage from the Little Green Run Impoundment contaminated the nearby groundwater, which was hydrologically connected to Fish Creek and the Vandalia River. *Id.* ComGen argued that the Act did not apply to polluted groundwater and that the impoundment did not qualify as a "point source" for which liability could be attached. *Id.* at 8. The district court rejected both of these arguments after a bench trial, finding that the Act applied to "discharges into groundwater that had a 'direct hydrological connection' to navigable waters" and that the impoundment was a point source as defined in the Act. *Id.* at 7-8.

That court further found as fact that arsenic was reaching Fish Creek and the Vandalia River because pollutants were seeping into hydrologically connected groundwater because rainwater and groundwater were leaching arsenic from the coal ash in the impoundment. *Id.* at 7-8. As a result of these findings, the district court awarded injunctive relief to SCCRAP on June 15, 2018, ordering ComGen to close the impoundment and move all of the coal ash to a new facility with proper lining technology to prevent further discharge of pollutants. *Id.* ComGen appealed to this Court on July 16, 2018, arguing that the district court incorrectly interpreted the law when it found that discharges into hydrologically connected groundwater present a viable claim under the Clean Water Act and also erred by finding that the impoundment was a point source. *Id.* at 8.

After the District Court's injunction, on July 16, 2018, ComGen quickly commenced a rate proceeding with the Federal Energy Regulatory Commission (FERC) under 16 U.S.C. § 824d for rate increases to recoup its estimated remediation costs of $246 million from Vandalia Power Company and Franklin Power Company—and ultimately from Vandalia and Franklin ratepayers. *Id.* at 8-9.

ComGen has wholesale unit power service agreements with Vandalia Power and Franklin Power, both CE subsidiaries, which then pass costs on to public ratepayers through state public utilities commissions. *Id.* at 4. SCCRAP intervened to oppose the rate proceeding, and FERC subsequently suspended the proceeding and held an evidentiary hearing on the matter. *Id.* at 10. ComGen claimed the cost of compliance with the court order would reduce its return on equity from 10% (as approved by FERC) to 3.2%. *Id.* The vast majority of coal ash currently in the impoundment—80.5%—accumulated when the Station was a merchant plant, and thus, CE exclusively profited from its sale on the wholesale market. *Id.* at 11-12.

As a result of the hearing, FERC made a finding of fact that ComGen had "failed to properly monitor" the 2006 corrective action plan (the HDPE liner), and that but for this negligence, it likely would have discovered the seepage issue. *Id.* at 11. In other words, the current remediation costs are the direct result of ComGen's imprudent management. FERC also determined that under the "matching principle," it would be inequitable to approve ComGen's recovery of the 80.5% of the remediation costs traceable to a time period when ComGen opperated the Station as a merchant plant selling power in the wholesale market. *Id.* at 9-11.

Despite these findings, FERC approved revised Schedules 1 and 2, placing Vandalia and Franklin ratepayers on the hook for the costs of ComGen's negligence. *Id.* at 11. FERC based its decision on a public policy rationale of environmental protection and on constitutional concerns

that a lower rate of recovery would violate the Takings Clause. *Id.* at 12. FERC issued its decision on October 10, 2018, and denied SCCRAP's petition for rehearing on November 30, 2018. *Id.* SCCRAP petitioned this court for judicial review on December 3, 2018. *Id.*

The record does not indicate that FERC addressed the fact that CE, ComGen's sole shareholder, formed ComGen in 2014 solely for the purpose of acquiring the Vandalia Station, nor does it indicate that FERC made a factual finding that a rate lower than the 10% return on equity approved in a prior ratemaking would likely cause ComGen to cease operations. *Id.*

SUMMARY OF THE ARGUMENT

This appeal first presents the question of ComGen's liability under the Clean Water Act. ComGen is liable under the Act for pollution that reaches navigable waters by travelling through hydrologically connected groundwater. Congress intended for the Act to protect navigable waters from pollution, and hold polluters liable when pollutants are released into tributary groundwater channels with a direct, immediate, and traceable connection to waters that are navigable vindicates this core purpose. Furthermore, the legislative history from the time of the Act's drafting, as well as post-enactment interpretations made by the administrative agency tasked with enforcing the statute, confirm that hydrologically connected groundwater presents an actionable claim.

Furthermore, ComGen has violated a clear command of the statute by discharging pollutants in excess of the levels mandated by its state-issued permit. The statute attaches liability to unpermitted discharges of pollutants from any point source into navigable waters. Here, ComGen has violated the statute in two ways. First, the Little Green Run Impoundment qualifies as a point source, since the facility contains coal ash and conveys pollutants from that ash directly into groundwater and navigable waters. Second, the groundwater channels that

ComGen's pollutants flow into are an independent point source, since they create a discrete conveyance that carries pollutants to navigable waters.

Additionally, FERC's decision to allow ComGen to recover its remediation costs from Vandalia Power and Franklin Power was arbitrary and capricious because several pieces of relevant evidence pointed in one direction, and yet FERC came to a contrary conclusion without an adequate justification for doing so. Allowing recovery of the remediation costs directly conflicts with the factual finding that ComGen negligently necessitated those costs. By finding the costs to be imprudent and then allowing them anyway, FERC behaved irrationally and reached the absurd outcome of forcing the ratepayers to insure against Cogan's negligence.

FERC was preoccupied with non-cost factors such as environmental policy and ComGen's financial well-being and stayed from its "primary aim" of protecting ratepayers, thereby failing to fulfill its basic duty of balancing the interests of the utility against those of the ratepayers. FERC also placed too much emphasis on policy concerns, and its policy rationale was misguided. Making ratepayers—and not ComGen—pay for the remediation, does not help the environment. Rather, it removes ComGen's incentive to avoid creating environmental hazards in the first place. Moreover, FERC failed to explain how shielding ComGen from the results of the prudence and matching principles would ultimately benefit ratepayers. There was insufficient evidence that ComGen's financial failure was likely and would foreseeably harm ratepayers in order for this consideration to rationally inform FERC's decision.

Finally, disallowance of rate recovery of all or a portion of ComGen's remediation costs would not violate the Takings Clause because the costs were the result of ComGen's imprudence, and a majority of the waste is not attributable to consumption by Vandalia and Franklin ratepayers. The Takings right in utility ratemaking is not absolute, and ComGen's

imprudent oversight of the HDPE liner precludes ComGen's Takings claim, preventing it from passing the costs of its own negligence on to public ratepayers. Additionally, because 80.5% of the coal ash is attributable to consumption when the Vandalia Station was operating exclusively to the benefit of its shareholders, FERC can disallow recovery of the costs associated with that prior waste. Ultimately, if FERC properly weighed the prudence and matching principles of utility ratemaking, it would disallow all or part of ComGen's requested recovery, a decision that would be accorded judicial deference.

ARGUMENT

I. Surface water pollution that occurs as a result of a direct hydrological connection between groundwater and navigable waters is actionable under the Clean Water Act.

The goals of the Clean Water Act (CWA) are "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). To further these goals, the statute prohibits "the discharge of any pollutant by any person" into "navigable waters." *See Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (first quoting 33 U.S.C. § 1311(a); then quoting 33 U.S.C. § 1362(7)). Here, the district court found as fact that arsenic, a pollutant, traveled from an impoundment owned by ComGen through groundwater to reach navigable waters. Record, p. 7-8. "When a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's factual findings, unless they are clearly erroneous, and review the district court's application of the law to the facts de novo." *Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 872 (6th Cir. 2016). The district court ruled that "the [CWA] applies to discharges of pollutants . . . through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced." Record, p. 8 & n.7. This Court should affirm

that analysis, which is consistent with the purpose of the Clean Water Act, the statute's legislative history, and longstanding agency interpretations, as recognized by a majority of district courts that have addressed similar claims. *See Flint Riverkeeper, Inc. v. S. Mills*, 276 F. Supp. 3d 1359, 1366 (M.D. Ga. 2017).

A. The purpose of the Clean Water Act demonstrates that Congress intended to regulate pollution that travels through groundwater to reach navigable waters.

The Supreme Court has historically read the language of laws controlling water pollution in broad terms "in light of the purpose to be served." *See United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960). The Supreme Court and lower courts have recognized that Congress intended for the CWA to "regulate as fully as possible all sources of water pollution." *See Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 989 (E.D. Wash. 1994). It is "clear" from the "language and structure of the Act" that Congress did not intend to regulate groundwater with no connection to navigable waters. *Id.* at 989-90. However, groundwater that has a direct hydrological connection to navigable waters should be treated differently. In similar cases, "[o]ther courts addressing the issue whether discharges to something other than 'waters of the United States' are nonetheless covered by the [National Pollutant Discharge Elimination System (NPDES)] program have . . . taken note of the ultimate effect on surface waters." *McClellan Ecological Seepage Situation ("MESS") v. Weinberger,* 707 F. Supp. 1182, 1196 (E.D. Cal. 1988). This limited extension of the CWA's jurisdiction helps advance the purpose of the overall statutory scheme. It would be an absurd result if the law could prevent pollution from entering navigable waters directly, but entities could avoid state or federal regulations by dumping pollutants into hydrologically connected groundwater, even though there would be an eventual and direct impact on navigable waters. *See Haw. Wildlife Fund v. County of Maui*, 24 F.

Supp. 3d 980, 995 (D. Haw. 2014). "Since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit." *Hecla Mining*, 870 F. Supp. at 990. This purpose-based approach cleanly fits within the text of the Act; Justice Scalia noted in his plurality opinion in *Rapanos* that the Act "does not forbid the 'addition of any pollutant *directly* to navigable waters . . .' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. at 743 (plurality opinion) (emphasis in original) (quoting 33 U.S.C. § 1311(a)).

Justice Kennedy, who provided the fifth vote in his *Rapanos* concurrence, proposed a standard similar to the one adopted here by the district court in a case that involved jurisdiction over wetlands. *See* 547 U.S. at 780 (Kennedy, J., concurring). In that case, he wrote that "in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense" and that "[t]his conclusion is supported by 'the evident breadth of congressional concern for protection of water quality and aquatic ecosystems.'" *Id.* at 767 (citations omitted). Justice Kennedy thought that the Army Corps of Engineers' jurisdiction under a permitting scheme similar to the one at issue in this case should "depend[] upon the existence of a significant nexus between the wetlands . . . and navigable waters in the traditional sense." *Id.* at 780. For Justice Kennedy, this connection could not be "remote and insubstantial," but the "statute's goals and purposes" would be vindicated if there was a "reasonable inference of ecological interconnection" such that there would be an effect on the integrity of navigable waters. *Id.* Justice Kennedy's approach is "the most widely accepted by the lower courts" that were tasked with applying a split opinion after *Rapanos*. Allison L. Kvien, Note, *Is Groundwater That Is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 Minn. J.L. Sci. &

Tech. 957, 973 (2015). The test adopted by the lower court here is consistent with that approach. The existence of a "direct, immediate, and [traceable]" hydrological connection between the groundwater and navigable surface waters does not present the mere possibility of such a connection, but in fact shows the significant nexus required for an actionable claim under Justice Kennedy's standard. Record, p. 8 & n.7.

B. This interpretation is consistent with the Clean Water Act's legislative history.

The text of the Clean Water Act shows that Congress meant to protect the "integrity of the Nation's waters." 33 U.S.C. § 1251(a). The conference committee's final definition of "navigable waters" deleted the term "navigable" from the original House definition, signifying a "congressional intent to eliminate navigability as a constraint on jurisdiction." *See* Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569, 589 n.107 (1988). Representative Dingell, a member of the conference committee, explained this language in remarks on the House floor, noting that it "clearly encompasses *all* water bodies, including main streams *and their tributaries*, for water quality purposes." *Id.* at 589-90 (emphasis added) (citations omitted).

There is strong evidence from the legislative history that Congress did not intend to regulate isolated groundwater. *See Hecla Mining*, 870 F. Supp. at 989-90. Language from the Senate committee report shows, however, that the Senate was "well aware" of hydrological cycles and the flow of groundwater into traditionally navigable surface waters. Wood, *supra*, at 580 n.68 (citation omitted) (quoting the Senate committee report's statement that "[t]he importance of groundwater in the hydrological cycle cannot be underestimated . . . [and] rivers, streams and lakes themselves are largely supplied with water from the ground"). The Senate

report further noted that, due to hydrological cycles, "reference to the control requirements must be made to the navigable waters . . . *and their tributaries*." *Id.* at 592 (emphasis added). Under this scheme, tributary groundwater that directly flows into navigable waters, like the groundwater at issue here, should be subject to regulation.

C. This interpretation is consistent with the EPA's approach to surface water pollution that travels through groundwater.

The Environmental Protection Agency has "consistently . . . taken the position that the [CWA] applies to discharges 'from a point source via ground water that has a direct hydrological connection to surface water.'" *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018) (citations omitted); *see also Haw. Wildlife Fund*, 24 F. Supp. 3d at 995-96; *Hecla Mining*, 870 F. Supp. at 990-91. The agency's interpretation applies to claims, as it does here, where "there is a clear connection between the discharge of a pollutant and navigable waters when the pollutant travels through ground water." *Upstate Forever*, 887 F.3d at 651. While this interpretation is not binding upon the courts, it "'warrants respectful consideration,' especially in the context of a 'complex and highly technical regulatory program.'" *Id.* (quoting *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002)).

II. Seepage of arsenic from a coal ash impoundment that passes through groundwater into navigable waters violates the Clean Water Act.

The Clean Water Act makes unlawful "any addition of any pollutant to navigable waters from any point source." *Rapanos*, 547 U.S. at 723 (plurality opinion) (quoting 33 U.S.C. § 1362(12)). Here, ComGen disputes that the "point source" element of the statute has been satisfied. Record, p. 8. The Act further 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." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371 (10th Cir. 1979) (emphasis added) (quoting 33 U.S.C. § 1362(14)). The term was "designed to further th[e statutory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Id.* at 373. This reading is consistent with the text of the statute's wording, as it uses the phrase "including but not limited to" to clarify that the list of specific point sources is not exhaustive. *See Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D. N.C. 2015) (citations omitted). "[R]eview of the requirements of the CWA is de novo." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 396 (D.C. Cir. 2017). Here, the trial court found that ComGen violated the statute because ComGen's impoundment containing coal ash was a point source. Record, p. 7-8. This Court should affirm ComGen's CWA liability under the Clean Water Act on that basis, or, alternatively, it should affirm ComGen's liability because the groundwater that the arsenic seeped into is itself an independent point source under the Act.

A. The Little Green Run Impoundment is a point source.

The trial court found that rainwater and groundwater were "leaching arsenic from the coal ash in the Little Green Run impoundment," polluting both the groundwater and navigable waters. Record, p. 7. The trial court then found, as a matter of law, that the impoundment was a conveyance, as that term was used in the definition of a point source. *Id.* at 8. According to that court, "the coal ash piles and ponds . . . concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters." *Id.*

"[T]he touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped." *Hecla Mining*, 870 F. Supp. at 988. This inquiry is a fact specific one, as "the court must consider evidence of the 'precise nature' of the Defendant's facility." *Id.* at 989 (citations omitted). The coal ash piles and ponds at issue here are "surface impoundments designed to hold accumulated coal ash in the form of liquid waste. . . . impounded by dams." *Yadkin*, 141 F. Supp. 3d at 443; *see also* Record, p. 3 (noting that "[c]oal ash is disposed of in wet form in large surface impoundments and in dry form in landfills"). Numerous cases "support the conclusion that man-made ponds . . . are 'conveyances' or 'containers' under the definitions in the [CWA]." *Hecla Mining*, 870 F. Supp. at 988 (summarizing several holdings from the Fourth, Fifth, Ninth, and Tenth Circuits); *see also Yadkin*, 141 F. Supp. 3d at 444 (noting that other district courts have found that ponds located within impoundments meet the definition of a point source). Here, "even though runoff may be caused by rainfall . . . percolating through a pond or refuse pile, the discharge is from a point source because the pond or pile acts to collect and channel contaminated water." *Hecla Mining*, 870 F. Supp. at 988 (citing *Earth Sciences*, 599 F.2d at 374). Because ComGen's impoundment is a discrete facility that collects and conveys pollutants into groundwater and navigable waters, it is a point source regulated by the Clean Water Act.

This approach is consistent with some EPA pronouncements on the definition of a point source. For example, a letter from EPA Region VIII defined point sources to include "any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, *ponds*, pits, etc.)." *Hecla Mining*, 870 F. Supp. at 988 (emphasis added) (citations omitted). While this source is not authoritative, it is nevertheless "persuasive" authority that has been endorsed by the Ninth Circuit. *Id.* at 988-89; *cf. Upstate Forever*, 887 F.3d at 651 (noting that pronouncements

from agencies administering "a complex and highly technical regulatory program" deserve "respectful consideration" from courts).

A recent opinion from the Fourth Circuit took an opposing approach, holding that a coal ash pond is not a point source because the pond is not a conveyance, which, according to that term's dictionary definition, is designed "for the movement of something from one place to another." *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410-11 (4th Cir. 2018). However, this rationale is at odds with the plain text of the statute. As Judge Clay noted in a recent dissent from a Sixth Circuit opinion which favorably cited *Va. Elec. & Power Co.*, "[t]he canon of *ejusdem generis* . . . suggests that man-made coal ash ponds are included in [the Act's definition of a point source]." *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 449 n.2 (6th Cir. 2018) (Clay, J., dissenting). Judge Clay noted that the canon requires the generic term, conveyance, to "take its meaning from the specific terms with which it appears." *Id.* (citations omitted). He further noted that some of the statutory examples of point sources, such as wells, containers, and vessels, would not necessarily fit under the Fourth Circuit's interpretation in all cases, even though they are specifically included in the statute's text. *Id.* Therefore, the fact that the impoundment was not designed to move coal ash should not be sufficient to prove that it is not a point source.

B. The contaminated groundwater is an independent point source that is also subject to regulation under the Clean Water Act.

This Court could also affirm the district court's ruling by holding that the polluted groundwater is a separate point source regulated by the Clean Water Act. The Supreme Court has held that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' . . . ." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*,

541 U.S. 95, 105 (2004) (citations omitted). Here, there is no question that the groundwater is conveying arsenic to navigable waters. Record, p. 8.

The underground groundwater channels are analogous to a system of man-made pipes; both can bring pollutants to navigable waters. *See* Wood, *supra*, at 574 (noting a similar "capacity to transport pollutants from points of discharge to surface waters"). In addition to the term "channel" itself, groundwater channels also fit into several other examples of point sources listed in the Clean Water Act, including tunnels, conduits, and discrete fissures. *Id.* at 576. Courts have held that surface waters that serve as tributaries to navigable waters can be regulated as a point source. *See Haw. Wildlife Fund*, 24 F. Supp. 3d at 995. As the district court noted in *Hawaii Wildlife Fund*, "[t]here is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits" because "either type of waterway [can be] a conduit through which pollutants reach [navigable waters]." *Id.* at 995; see also *Raritan Baykeeper, Inc. v. NL Indus.*, 2013 U.S. Dist. LEXIS 2628, at *51-53 (D. N.J. Jan. 8, 2013) (finding that hydrologically connected groundwater transferring pollutants into navigable waters was a point source). Finally, the Hawaii court also looked to the two exclusions from the definition of point sources, relating to agriculture and stormwater, to "infer[] from this narrow list of exclusions that Congress sought to include sufficiently 'confined and discrete' groundwater conduits as 'point sources' under the Act" by not including groundwater in the list of exceptions. *Haw. Wildlife Fund*, 24 F. Supp. 3d at 995. Since groundwater channels with hydrological connections to navigable waters are discrete conduits through which pollution can reach those waters, the channels can be regulated as point sources under the Act.

III. FERC's approval of ComGen's estimated $246 million rate increase was arbitrary and capricious.

Justice Souter once observed that "[t]he traditional regulatory notion of the 'just and reasonable' rate was aimed at navigating the straits between gouging utility customers and confiscating utility property." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 481 (2002) (citations omitted). FERC has the duty to navigate these straits and to ensure that utility rates are "just and reasonable." *See* 16 U.S.C. § 824d (2012); *FirstEnergy Serv. Co. v. F.E.R.C.*, 758 F.3d 346, 348 (D.C. Cir. 2014). FERC's decision below fails in that responsibility, seriously undervaluing the ratepayer interests at stake, and thereby gouging Vandalia and Franklin customers.

In a Section 205 ratemaking proceeding, the utility has the burden of proving that its proposed rate is just and reasonable. § 824d(e); *Nw. Corp. v. FERC*, 884 F.3d 1176, 1180 (D.C. Cir. 2018). The utility must "justify its entire revised and redesigned rate, including all of the rate's components." *Nw. Corp.*, 884 F.3d at 1180 (citing *NorthWestern Corp.*, 155 FERC ¶ 61,158 at ¶¶ 27-29 (2016); *Kan. Gas & Elec. Co. v. FERC*, 758 F.2d 713, 719-20 (D.C. Cir. 1985)). Pursuant to the Administrative Procedure Act, this Court reviews FERC's decisions under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(a) (2012). On a surface level, this standard requires that "an agency's decision be reasonable and reasonably explained." *Nw. Corp.*, 884 F.3d at 1179. But this seemingly simple standard requires FERC to (1) "articulate the critical facts upon which it relies" and "fully explain" the assumptions and public policy rationale that inform any "predictions or extrapolations from the record," *Mo. Pub. Serv. Comm'n v. F.E.R.C.*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); (2) balance the interests between the utility and the ratepayers, *Id.* at 1074-75; and (3) justify both departures from its traditional principles and reliance on factors outside the scope of it purview. *Id.* at 1071.

As this Court recently reiterated, "[C]ourts have never given regulators carte blanche." *Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (citations omitted). Here, FERC's decision fails the arbitrary and capricious test because it (1) fails to connect the facts to its conclusions in a rational way; (2) places undue emphasis on non-cost factors; (3) rests on specious policy assumptions concerning factors outside of its scope of expertise; and (4) departs from traditional principles without adequate justification or a sufficient evidentiary basis.

A. FERC's decision fails to reconcile its factual finding that ComGen was negligent with its ultimate decision to allow the rate increase.

FERC's decision is irrational because it directly conflicts with its factual findings without justification. Agency decisions that betray an insufficient examination of the "relevant data" or fail to rationally account for that data are arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 165, 168 (1962)). FERC's decision must not "run[] counter to" the evidence before it. *Id.* The reviewing court has the duty to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

In *State Farm*, the Supreme Court reviewed the National Highway Traffic Safety Administration's ("NHSTA") rescission of an automobile safety regulation requiring the use of "passive restraint" systems. *Id.* at 34-35, 38-39. At most, NHTSA's factual findings supported only a decision to amend and the decision to rescind actually contradicted NHTSA's factual findings. *Id.* at 47-48. Further, the agency failed to consider other options, was "too quick to dismiss the safety benefits of [the regulation]," and made an ultimate decision in conflict with the evidence. *Id.* at 49, 51. The Court explained that part of drawing the required "rational connection between the facts found and choice made" was justifying the lack of "a search for further evidence." *Id.* at 52 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

Moreover, NHTSA seemingly failed to "bear in mind that Congress intended safety to be the preeminent factor," and neglected to articulate a basis for not requiring nondetachable belts. *See id.* at 55. NHTSA's decision was arbitrary and capricious because it undervalued safety concerns, misinterpreted the facts, failed to pursue additional evidence, and "failed to present an adequate basis and explanation for rescinding the [regulation]." *Id.* at 34, 51, 55.

In this case, FERC came to an ultimate conclusion that directly contradicts its own factual finding. FERC found as fact that after the HDPE liner was installed in 2006, ComGen "failed to properly monitor [its] effectiveness." Record, p. 11. FERC further found a causal link between ComGen's negligence and the resulting cleanup costs, as properly monitoring the effectiveness of the HDPE liner "likely would have revealed the problem with arsenic seeping" into Fish Creek. *Id*. In other words, as a factual matter, FERC traced the cleanup costs to ComGen's imprudent actions.

Normally, this finding would exclude those costs from the rate because ratemaking bodies and courts often use the "prudent investment" standard, *Gulf States Utils. Co. v. La. Pub. Serv. Comm'n*, 578 So. 2d 71, 84-85 (La. 1991), which prevents a utility from "recover[ing] its costs if those costs were incurred 'imprudently,'" *Violet v. F.E.R.C.*, 800 F.2d 280, 282 (1st Cir. 1986). This standard's purpose is "to give utilities an incentive to make smart investments deserving a 'fair' return, and thus to mimic natural incentives in competitive markets." *Verizon Commc'ns, Inc.*, 535 U.S. at 486. The principle "essentially applies an analogue of the common law negligence standard for determining whether to exclude value from rate base." *In re Cons. Law Found.*, 507 A.2d 652, 637 (N.H. 1986).

FERC's decision also failed to rationally reconcile its finding that the "matching principle" should exclude 80.5% of the cleanup costs with its ultimate decision to allow those

costs. Record, p. 11. This matching principle holds “that those who benefit from facilities should pay their costs.” *East Tex. Elec. Coop., Inc. v. FERC*, 331 F.3d 131, 136 (D.C. Cir. 2003). Its goal is “to prevent mismatch between benefits and costs.” *Id.*

Here, FERC found that ComGen’s negligent oversight of the corrective action plan led to the environmental damage and resulting remediation costs. Record, p. 9. It also acknowledged that charging Vandalia and Franklin customers for the 80.5% of the ash generated when the Vandalia Generating Station was a merchant plant would be unjust. *Id.* at 11. Thus, by allowing ComGen to recover 100% of the cleanup costs and an overall 10% rate of return, FERC completely disregarded the prudence and matching principles. *Id.* at 10-11. The relevant data—including the specific factual finding of imprudence—compelled one outcome, and FERC instead reached a different, irrational outcome.

B. FERC’s decision placed too much emphasis on factors that Congress did not clearly intend for it to consider.

Congress’s statutory mandate to FERC is to protect ratepayers by making sure that rates are “just and reasonable.” 16 U.S.C. § 824d(a). “[T]he Federal Power Act . . . charge[s FERC] with setting just and reasonable wholesale rates.” *Pub. Sys. v. F.E.R.C.*, 709 F.2d 73, 75 (D.C. Cir. 1983). “Its primary aim is the protection of consumers from excessive rates and charges." *Mun. Light Bds. v. FPC*, 450 F.2d 1341 (D.C. Cir. 1971). In a ratemaking decision, FERC must balance the interests between the utility and ratepayers. *Mo. Pub. Serv.*, 337 F.3d at 1074. Here, FERC's rationale has created an unjust and unreasonable result that does not balance these interests: Vandalia and Franklin ratepayers are forced to act as an insurance policy against ComGen's negligence.

FERC neglects its duty to balance the interests of ComGen and ratepayers in favor of advancing its policy rationale of “promoting environmental protection,” by making sure that

utilities can finance remediation. Record, p. 12. FERC is not the Environmental Protection Agency. Environmental concerns are undeniably important, but they are not FERC's "primary aim." FERC also gave undue weight to ComGen's financial stability without explaining how its instability would harm ratepayers. Like the NHTSA in *State Farm*, which did not prioritize safety concerns sufficiently, FERC has failed to stick to the path that Congress set for it—that of protecting ratepayers. *See* 463 U.S. at 47-49. By valuing its own version of environmental policy over fairness to ratepayers, the decision neglects Congress's imperative that rates be "just and reasonable."

C. FERC's policy rationale is misguided.

Even if FERC's environmental policy concerns carried equal weight with Congress's "just and reasonable" imperative, FERC's decision still fails because its policy rationale is misguided and likely to result in additional environmental harm. While this policy may promote cleanups, it actually encourages the environmental hazards that *necessitate* cleanups in the first place by reducing utilities' financial incentives to avoid creating future environmental hazards. Here, ComGen finds itself in a win-win. If its future environmental negligence happens not to result in harm, shareholders prosper. And if such a gamble does not pay off (and, for example, more toxins flow into Vandalia waterways), no problem: just ask FERC to raise rates.

The speciousness of FERC's policy rationale makes its decision arbitrary and capricious. Its reasoning resembles NHTSA's claim in *State Farm* that it was actually *protecting* the public by not requiring safety features on cars because doing so would "poison[] popular sentiment" against safety regulations. *State Farm*, 463 U.S. at 39. While policy rationales are inherently predictive, predictions cannot take the place of reasoned analysis. FERC must demonstrate that it "went through a reasonable decision-making process to arrive at a course of action." *Gulf States*

Utils. Co., 578 So. 2d at 85. The record suggests that FERC's decision-making process rested too strongly on environmental policy considerations outside its core competence or Congressional mandate, and that its policy conclusions are questionable.

D. FERC failed to explain its departure from the prudence and matching principles of utility ratemaking and its reliance on non-cost factors.

FERC's departure from traditional ratemaking principles in favor of speculative policy considerations without justification also renders its decision arbitrary and capricious. "[D]eviations from the Commission's customary cost-based approach . . . must be 'found not to be unreasonable and to be consistent with the Commission's . . . responsibility.'" *Mo. Pub. Serv.*, 337 F.3d at 1071 (quoting *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)). FERC "must specify the nature of the relevant non-cost factor and offer a reasoned explanation of how the factor justifies the resulting rates." *Id.* FERC may allow imprudent costs in a situation where doing so would ultimately inure to the benefit of ratepayers*, see Gulf States Utils. Co.*, 578 So. 2d at 95-96, but it cannot do so without developing an adequate record explaining why ratepayers would benefit. *See Mo. Pub. Serv.*, 337 F.3d at 1074-75.

Missouri Public Service involved the analogous context of a natural gas pipeline. *Id.* at 1068. There, a state regulatory agency opposed FERC's approval of the pipeline's rates. *Id.* at 1070. FERC had departed from cost-based principles in its approval, and attempted to explain its departure by citing the pipeline's "financial integrity," particularly its ability to avoid default on a certain loan. *Id.* at 1071-72. FERC could consider non-cost "public interest" factors, but "mere invocation" of them could not supplant the requirement of a "reasoned explanation of how the [non-cost] factor justifies the resulting rates." *Id.* at 1071. FERC had previously rejected the pipeline's attempt to justify higher rates using loan repayment concerns, correctly concluding that there was "no nexus" between the burden of the loan and benefits to ratepayers. *Id.* Then, with

no intervening change in the facts, FERC suddenly changed course and adopted the pipeline's reasoning that loan repayment concerns justified the utility's proposed rates. *Id.* at 1072-73.

This Court also took FERC to task on the merits of its concern for the utility's finances. There was insufficient evidence that foreclosure would result from default, bankruptcy from foreclosure, finally leading to dissolution of the utility; FERC's fears were heavily based on speculation. *Id.* at 1073-74. The parties' citations were devoid of "evidence of the likelihood of [the pipeline's] financial ruin." *Id.* at 1074. Moreover, FERC did not show its work in balancing the interests of the pipeline against those of the ratepayers. *Id.*

Here too, FERC departed from cost-based principles. Finding both imprudence and a violation of the matching principle, it nevertheless approved a 10% rate out of overborne fears for ComGen's financial stability. Accepting FERC's concerns involves accepting without evidence that a rate below 10% will lead to financial instability, instability to bankruptcy, and bankruptcy to harm to Vandalia and Franklin ratepayers. While FERC need not prove this chain reaction to a certainty, this Court should require it at least to anchor its speculations on a fully developed record and reasonable evidentiary conclusions.

Moreover, FERC failed to develop an adequate record as to whether disallowance of the imprudent costs would actually jeopardize ComGen's ability to serve ratepayers in the future. Instead, FERC seems to have blindly taken ComGen at its word, accepting its self-serving forecast of financial doom and gloom. Compounding these problems, FERC seems to have ignored that ComGen's parent company, CE, is its sole shareholder, and that CE created ComGen simply to purchase the Vandalia Station. Record, p. 3-4. There is no indication in the record that disallowing the imprudent costs will put CE in any financial distress, or that CE will refuse to rescue ComGen in the event that it actually faces financial distress.

Without such a record and such findings, FERC's decision is arbitrary and capricious. FERC failed to explain how it was in the long-run benefit of ratepayers to allow the imprudently incurred costs. Without this explanation, it is impossible to know whether FERC acted rationally. Because the record contains no substantial evidence that (1) ComGen's forecast of financial distress was legitimate and (2) ratepayers would be harmed by such financial distress, FERC's decision fails the "arbitrary and capricious" test.

IV. A disallowance of Appellant's rate filing to recover environmental compliance costs would not be a regulatory Taking under the Fifth and Fourteenth Amendments.

ComGen claims a Fifth Amendment right to a 10% return on equity from the Vandalia Station, despite its imprudent oversight of the VDEQ corrective plan and a corporate restructuring aimed at shifting the risks of the Vandalia Station from CE to public ratepayers. Record, p. 10-11. Such a broad reading of the Takings Clause is at odds with constitutional doctrine and fundamental fairness. FERC was incorrect to assume that a rate below ComGen's request would violate the Fifth and Fourteenth Amendments. Rather, the prudence principle and the matching principle provide ample support for a denial or a reduction of ComGen's requested rate increase, a determination that would be entitled to deferential judicial review.

The Fifth Amendment prohibits the federal government from taking private property for public use "without just compensation." U.S. Const. amend. V. The Fourteenth Amendment incorporates a Due Process component to the Takings Clause analysis and makes the Clause applicable to state regulators. *Smith v. Ames*, 169 U.S. 466, 523 (1898). In the context of a public utility, this creates a right to rates that "permit it to earn a return on the value of the property which it employs for the convenience of the public," and which are commensurate with returns to corresponding businesses in the region. *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923). This right, however, is not absolute: there is "no

constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Id.* at 692-93. Moreover, although this rate typically should be sufficient to allow the utility to maintain its credit, *Bluefield* suggests that this right is at least partially contingent upon "efficient and economical management." *Id.* Ultimately, after a "balancing of the investor and consumer interests," the constitutional determination should be based on the "total effect on the rate order," with the utility bearing the "heavy burden" of showing that the end results of a contested rate order would be unjust and unreasonable. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602-03 (1944).

Because ComGen's imprudent monitoring failure led to the legal judgment against it, and because a significant majority of the coal ash subject to the judgment is exclusively attributable to wholesale profits of CE, the Takings Clause does not prohibit FERC from disallowing rate recovery for some or all of the remediation costs associated with the district court judgment.

A. ComGen's imprudent monitoring precludes its Takings claim.

Because ComGen failed to adequately monitor and address the deficient HDPE liner, it is not constitutionally entitled to a rate recovery from the resulting costs. Critically, the Takings right is often bounded by the prudence principle, first proposed by Justice Brandeis, which focuses on the "amount prudently invested" as a baseline for evaluating the proper rate. *Mo. ex. rel Sw. Bell v. Pub. Serv. Comm'n*, 262 U.S. 276, 292-93 (1923) (Brandeis, J., concurring). While the Takings Clause typically requires regulators to set rates that ensure a utility's financial stability and even the ability to issue dividends, *Hope*, 320 U.S. at 603, regulators frequently disallow recovery of costs that were caused by the utility's imprudence. *See, e.g.*, *Midwestern Gas Transmission Co. v. Fed. Power Comm'n*, 388 F.2d 444, 448 (7th Cir. 1968); *Minnesota Power & Light Co.*, 11 F.E.R.C. ¶ 61,313, 61,659 (1980). Moreover, various courts have held

that the Takings Clause does not guarantee an imprudent utility's ongoing financial survival. *Gulf States Utils. Co.*, 578 So. 2d at 95-96 (citing cases from the supreme courts of Kansas, New Hampshire, and Pennsylvania).

Utilities typically operate in a monopolistic setting, which insulates them from competitive pressures to be prudent. *See id.* at 85 n.6. Accordingly, the prudence principle provides an essential check for ratepayers, ensuring that utilities take due care to avoid charging the public for their negligence. *Id.*

In *Gulf State Utilities Co.*, the Louisiana Supreme Court upheld the state Public Service Commission's decision to disallow from rate calculation $1.4 billion of the costs of an energy company's decision to restart a nuclear power plant, a decision that was imprudent given economic circumstances. *Id.* at 93-97, 106. The court found the determination to disallow the costs, supported by a thorough hearing process, to be consistent with constitutionally required balancing of ratepayer and investor interests. *Id.*

Instructively, in *Minnesota Power & Light Co.*, FERC disallowed recovery by an electricity provider for losses stemming from a failed investment in defective pollution control devices, finding no constitutional concerns in such a decision. 11 F.E.R.C. ¶ 61,313, 61,659. The Commission determined that the contractor hired to construct the device was unreliable, and his performance on the contract was not adequately secured and enforced by the utility. *Id.*

Like the company in *Minnesota Power*, which failed to properly oversee a contractor, ComGen's imprudent oversight over the VDEQ corrective action plan directly led to the environmental damage and legal judgment that is the subject of this proceeding. Record, p. 11; s*ee id.* After three days of evidentiary hearings, FERC made a factual determination that ComGen "failed to properly monitor" the VDEQ corrective action plan over a period of eleven

years after the faulty HDPE liner was installed. Record, p. 11. This costly failure to monitor surely was imprudent, as prudence is a standard that is analogous to common law negligence. *See Az. Pub. Serv. Corp.*, 21 F.E.R.C. ¶ 63,007, 65,103 (1982). Though a complete or partial disallowance of the judgment costs would have a more significant impact on ComGen's return on equity than in cases like *Duquesne Light Company v. Barasch*, such disallowance is justified by ComGen's imprudence and the attendant unfairness of passing massive imprudent costs on to ratepayers. 488 U.S. 299, 311-12 (1989); *see Gulf State Utils. Co.*, 578 So .2d at 95 (citing *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)) ("[P]ublic utility regulation does not insure that the business shall produce net revenues.").

B. Under the matching principle, FERC can disallow all or some of the recovery for ash accumulated before ComGen chose to be subject to FERC regulation without violating the Takings Clause.

Finally, because regulators must weigh the interest of the ratepayers against those of the utility, FERC should consider cost principles—such as the matching principle—that maintain the ratepayers' interest in a fair rate. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301-02, 316 (1989) (rejecting Takings challenge against a state law that required investments be "used and useful" for inclusion in the rate base).

Additionally, FERC would not violate the Takings Clause if it determined that it was proper to disallow recovery of part or all of the judgment because CE—not the ultimate ratepayers—benefited from the accumulation of acres of coal waste. Fundamental to Takings analysis in utility ratemaking is the mandate that regulators balance the interests of the investors against the interests of the ratepayers. *Hope*, 320 U.S. 591, 602-03. Judicial review of a regulator's rate determination focuses on the end result of the rate, rather than the particular method of reaching it. *Id.* at 602.

In *Duquesne*, the Supreme Court rejected the contention that Pennsylvania's statutory prohibition on the inclusion of investments that were not "used and useful" to the ratepayers in rate calculations violated the Takings Clause. 488 U.S. at 301-302. This concept directly implicates the matching principle of ratemaking, which holds that those who did not receive the benefits of a prior arrangement should not subsequently bear the associated costs. *See, e.g.*, *Tenn. Gas Pipeline Co.*, 65 F.E.R.C. ¶ 61,138, 61,701 (1993). In *Tennessee Gas Pipeline Co.*, after allowing a utility to retroactively recoup the full value of rates that were lowered pending settlement, FERC explained that, "the principle of matching cost causation with cost incurrence prevents us from recouping refunds from customers . . . who received no benefit from the lower rate of return and original refunds." *Id.*

This language is readily applicable to the case at hand, where 80.5% of the coal waste subject to the judgment was created when CE shareholders alone were benefiting from generation at the power station. Record, p. 9. FERC can and should consider the consumer interest in not paying for waste not generated for public ratepaying consumers when making a determination on the rate request, and a determination to disallow rate recovery for previously incurred costs would be subject to deferential judicial review. *See Hope*, 320 U.S. at 602.

As FERC rightly recognized, allowing ComGen to fully recover the disposal costs of coal ash generated when CE shareholders exclusively benefited from the output of the plant would represent a significant windfall to CE. Record, p. 11. This would reward CE for orchestrating a corporate reshuffling through which it shifted the risks of participating in the wholesale electricity market on to public ratepayers. Record, p. 3-4. From 2001 to November 2014, the Vandalia Station generated acres of coal ash and significant profits for shareholders; because CE freely set rates and received these profits in a competitive market, it should also bear the

downstream costs it created. Crucially, the 2017 judgment was not an isolated event, but the outcome of years of imprudence and waste creation by CES.

Because the Takings Clause does not guarantee large utility profits, particularly after imprudent action, nor does it preclude the matching principle of utility ratemaking, FERC is within its statutory authority to reject ComGen's rate recovery request.

CONCLUSION

This Court should affirm the district court's ruling enjoining ComGen's unauthorized discharge of pollutants from the Little Green Run Impoundment. ComGen violated the Clean Water Act by discharging pollutants into navigable waters through groundwater that was hydrologically connected to those waters, which is an actionable claim under the Act. Additionally, ComGen discharged pollutants into navigable waters from at least one of two point sources covered by the Act: the Impoundment and the groundwater channels into which the pollutant's seeped.

This Court should also grant SCCRAP's petition for review, vacate revised FERC Rate Schedules Nos. 1 and 2, and remand this case to FERC for further proceedings. FERC's approval of the revised Schedules was arbitrary and capricious because the facts fail to justify the result reached and FERC's rationale was either flawed or inadequate. Moreover, disallowance of all or part of ComGen's requested rate recovery would not violate the Takings Clause. The court-mandated remediation costs are attributable to ComGen's imprudence, and a refusal to compel ratepayers to compensate ComGen for its own negligence does not violate the Takings Clause. Moreover, because the vast majority of the coal waste was generated when CE was the exclusive beneficiary of the Station's power generation, the matching principle should disallow any cost recovery beyond 19.5%.

For the foregoing reasons, SCCRAP asks this Court to affirm the injunction granted by the United States District Court for the District of Columbia in D.C. No. 17-01985 and vacate and remand the Revised Rate Schedules granted by FERC in Docket ER-18-263-000.

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, 2019.

Respectfully submitted,

*Team No. _17_*