IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT COURT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLEE/PETITIONER STOP COAL COMBUSTION RESIDUAL ASH PONDS

TEAM 23

Commonwealth Generating Company,
Appellant,

C.A. No. 18-02345

v.

Stop Coal Combustion Residual Ash Ponds (SCCRAP),
Appellee.

Stop Coal Combustion Residual Ash Ponds (SCCRAP),
Petitioner,

-v.-

Federal Energy Regulatory Commission,
Respondent,

Commonwealth Generating Company
Intervenor.

CONSOLIDATED APPEAL FROM THE ORDER OF THE DISTRICT COURT DATED JUNE 15, 2018 D.C. No. 17-01985 AND FEDERAL ENERGY REGULATORY COMMISSION'S ORDER DENYING REHEARING DATED NOVEMBER 30, 2018 Docket ER-18-263-000.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

D.C. Circuit Court of Appeals Cases — Pages

Other Authorities

Statutes

JURISDICTIONAL STATEMENT

Appellee/ Petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) asserts that this Court retains jurisdiction under 28 U.S.C. § 1291 to review and affirm the June 15, 2018 order issued by the United States District Court for the District of Columbia. SCCRAP also asserts this Court possesses jurisdiction under 15 USCA § 717r (b) to review and reverse the order issued by Federal Energy Regulatory Commission (FERC). On December 21, 2018, the D.C. Circuit Court of Appeals granted Petitioner SCCRAP's motion to have the previous action and the Federal Energy Reserve Commission (FERC) action consolidated. (R. at 12.)

The District Court Order granted injunctive relief, therefore this Court reviews this order under an abuse of discretion standard. See United States v. Miami Univ., 294 F.3d 797, 806 (6th Cir. 2002). A district court "abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law." Id. Thus, this Court has the power, to affirm the lower court's decision if it finds that the ruling was not an abuse of discretion. See Id.

As to FERC's order, this Court follows the well-settled principle that orders issued by FERC are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. Alabama Power Co. v. Fed. Energy Regulatory Comm'n, 220 F.3d 595, 599 (D.C. 2000). Although this Court's review of rate design is highly deferential, such review is not an "empty gesture." Id. FERC must demonstrate that: (1) it made a reasoned decision based on substantial evidence in the record, and (2) the path of its reasoning is clear. Id; see also Fed. Power Comm'n. v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (requiring the court to determine whether the rates are just and reasonable).

STATEMENT OF THE ISSUES PRESENTED

I. Under the Clean Water Act, is pollution of navigable waters actionable when the contaminated groundwater has a significant nexus to such navigable waters?

II. Under the Clean Water Act, does an improperly lined coal ash impoundment constitute a point source when hydrologically connected groundwater conveys a pollutant to navigable waters?

III. Under the just and reasonable standard of ratemaking, did a federal agency approve unjust rate schedules when the agency employed flawed methodology violative of ratemaking principles?

IV. Under the Fifth and Fourteenth Amendment, does a utility company's inability to recover remediation costs constitute a taking when investor interest in financial integrity does not encompass earning a profit in the event of company mismanagement?

STATEMENT OF THE CASE

Stop Coal Combustion Residual Ash Ponds (SCCRAP), a national environmental organization, aims to protect the public from coal ash contamination through a two-pronged initiative. (R. at 5.)

Part One of the SCCRAP Initiative: Filing Lawsuits Under the Clean Water Act

SCCRAP focuses on pursuing action against the owners and operators of coal ash impoundments found to be responsible for pollutants leaking into groundwater. (R. at 5.) SCCRAP enjoined Commonwealth Generating Company (ComGen), an experienced public utility holding system, from further ruining the chemical integrity of navigable waters. (R. at 7.) ComGen first became responsible for polluting the groundwater when the company acquired the Vandalia Generating Station from Commonwealth Energy Solutions (CES). (R. at 3.)

Under CES ownership, the Vandalia Generating Station, which consists of two coal-fired units, commenced commercial operation in 2000 and 2002, respectively. (R. at 4.) This station produces coal combustion residuals (CCRs), which are disposed of in the Little Green Run Impoundment (Impoundment). (R. at 3.) The Environmental Protection Agency (EPA) issued a clear warning that, without proper protection, CCRs can leach into groundwater and potentially migrate to drinking water sources, posing significant public health concerns. (R. at 3.) Indeed, the effects of coal ash are not foreign to well-versed actors in the field of energy; CCRs are one of the largest industrial waste streams in the United States. (R. at 3.)

Based on the EPA's March 2014 listing, the Impoundment is one of sixty-three electric industry coal ash impoundments in the United States with a "high" hazard rating. (R. at 5.) Thus, it is no surprise that, through required groundwater monitoring, CES detected arsenic in the groundwater at levels that exceeded groundwater quality standards. (R. at 5.) As required by the

Vandalia Department of Environmental Quality (Department), CES developed and implemented a corrective action plan to mitigate the pollution, which the Department approved in 2005. (R. at 5.) One year later, in accordance with the corrective plan, CES installed a high-density polyethylene geomembrane liner on the west embankment of the Impoundment. (R. at 5.)

ComGen acquired Vandalia Generating Station in 2014, and, only three years later, Vandalia Waterkeeper detected elevated levels of arsenic in the Vandalia River. (R. at 5.) Subsequent analysis indicated rainwater and groundwater were leeching arsenic from the coal ash Impoundment, polluting the groundwater, which carried the arsenic into the nearby waters of Fish Creek and Vandalia River. (R. at 6.) Investigation by the Department revealed a seam in the geomembrane liner was inadequately welded, resulting in seepage that pooled at the downstream toe of the embankment. (R. at 6.) According to the Department report, the seep, which is present during times of significant rainfall, has actively occurred for many years. (R. at 6.) Moreover, the seepage caused erosion and indentations or grooves in the soil as it made its way down the embankment toward Fish Creek. (R. at 6.)

SCCRAP's Enjoinment of ComGen's Pollution

To enjoin ComGen's pollution, SCCRAP filed suit in December 2017 against ComGen in the U.S. District Court for the District Court of Columbia under the citizen-suit provision of the Clean Water Act. (R. at 7.) On June 15, 2018, the District Court issued an order that found as fact rainwater and groundwater were leaching arsenic from the Impoundment point source, polluting groundwater, which carried the arsenic into navigable waters. (R. at 7.) Thus, ComGen was liable for ongoing violations of the Clean Water Act. (R. at 7.)

To remedy the eighteen years of pollution, the court ordered ComGen to fully excavate the coal ash in the Impoundment and relocate it to a *competently* lined facility. (R. at 8)

(emphasis added). Although the court noted the burden of closure by removal may be great, it stated such closure was "the only adequate resolution to an untenable situation that has gone on far too long." (R. at 8.) Thereinafter, on July 16, 2018, ComGen appealed to this Court. (R. at 8.)

Part Two of the SCCRAP Initiative: Intervening in Rate Schedule Filings

To protect unsuspecting consumers, SCCRAP intervenes in utility ratemaking proceedings before the Federal Energy Regulatory Commission (FERC) and challenges rate recovery of expenses associated with coal ash pollution. (R. at 5.)

Following the acquisition, ComGen sold the electrical output from Vandalia Generating Station to two electric retail companies, Vandalia and Franklin Power. (R. at 4.) In turn, the retail companies sold the electricity to consumers at a regulated rate base. (R. at 4.) The wholesale transactions between ComGen and Vandalia and Franklin Power were memorialized in two separate unit power service agreements, which are designated as FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement). (R. at 4.)

To deflect the cost of complying with the District Court injunction, a total amount of $246 million, ComGen unilaterally submitted proposed revisions to the Vandalia and Franklin Agreements. (R. at 8.) Under these revisions, ComGen allocates fifty percent of compliance costs to each of Vandalia Power and Franklin Power, respectively, which will be recovered over a ten-year period. (R. at 8.) Upon FERC's approval, the costs allocated to each affiliate will be flowed through to unsuspecting retail customers. (R. at 9.) Without having any say in the matter, ratepayers will see electric bills increase by about $2.15 per month in November 2019, and average households will see bills rise by about $3.30 per month for the ten-year amortization period. (R. at 9.)

SCCRAP's Intervention in ComGen's Rate Filing

SCCRAP again intervened, this time protesting against ComGen's unilateral filing of unreasonable rates with FERC. (R. at 9.) Such interference prompted FERC to suspend ComGen's rate filing and set the matter for an evidentiary hearing. (R. at 10.) On October 10, 2018, FERC issued an order approving ComGen's proposed rate schedules, giving undue weight to ComGen's argument that its inability to recover remediation costs would jeopardize the company's financial integrity. (R. at 11.)

However, FERC reached a factual finding that ComGen failed to properly monitor the effectiveness of the corrective action, which likely would have revealed the contamination earlier. (R. at 11.) FERC also found that charging Vandalia and Franklin Power's ratepayers with the full remediation costs would represent a "windfall of sorts" to ComGen shareholders because the shareholders would receive revenue from the Vandalia Generating Station electrical output between 2000 and 2014. (R. at 11.) Thus, FERC concluded shareholders should bear a proportionate share of the remediation costs corresponding to the period prior to ComGen's acquisition of the power plant. (R. at 12.)

Refusing to passively watch ratepayers assume this burden, SCCRAP sought rehearing of FERC's decision on November 9, 2018, and, upon FERC's denial of rehearing, pursued judicial review from the D.C. Circuit Court of Appeals on December 3, 2018. (R. at 12.) Because SCCRAP's appeal of FERC's decision and ComGen's appeal of the District Court decision involve common parties and issues, SCCRAP, ComGen, and FERC jointly filed to have the actions consolidated. (R. at 12.) On December 21, 2018, this Court granted the motion and issued a subsequent order setting forth the issues to be briefed and argued on appeal. (R. at 12.)

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's order enjoining Commonwealth Generating Company (ComGen) from continuing to pollute navigable waters. Justice Kennedy's narrow significant nexus test provides this Court an avenue to protect the unsuspecting public from dangerous levels of arsenic.

Adoption of the significant nexus test will align this Court with Supreme Court advisement, most circuits, and Environmental Protection Agency guidance. Moreover, such adoption will properly extend Clean Water Act jurisdiction to hydrologically connected groundwater that conveys arsenic from the coal ash impoundment. In doing so, the public will be safeguarded from extensive health hazards previously acknowledged by this Court.

This Court should reverse Federal Energy Regulatory Commission's (FERC's) refusal to rehear Stop Coal Combustion Residual Ash Pond's (SCCRAP's) challenge to ComGen's unreasonable rate schedules. FERC's flawed methodology resulted in rate schedules violative of both the matching and prudence principles, resulting in arbitrary rates.

Rejecting ComGen's unreasonable rate schedules does not constitute a taking because such action will not strike an unjust balance between the consumer and investor interests. Indeed, ComGen's interest in maintaining financial integrity does not encompass earning a profit in the face of mismanagement. Further, under the Mobile Sierra Doctrine, privately contracted rate schedules cannot be unilaterally altered by utility companies, unless the public interest demands such protection.

ARGUMENT

I. THE SUPREME COURT AND THE ENVIRONMENTAL PROTECTION AGENCY REPEATEDLY DICTATE THAT GROUNDWATER WITH A SIGNIFICANT NEXUS TO WATERS OF THE UNITED STATES IS ACTIONABLE UNDER THE CLEAN WATER ACT.

The Petitioner in the consolidated action, Stop Coal Combustion Residual Ash Ponds (SCCRAP), urges this Court to follow Supreme Court precedent and hold that the Clean Water Act (CWA) embodies discharges into groundwater that have a "direct hydrological connection" to navigable waters. (R. at 6, 8.) This affirmation is warranted for the following two reasons: (1) the narrow significant nexus test established by Justice Kennedy dictates that groundwater seepage from the coal ash impoundment is connected to the navigable waters of Vandalia River and Fish Creek, and (2) the guidance issued by the Environmental Protection Agency (EPA) supports this outcome. Rapanos v. United States, 547 U.S. 715, 779 (2006) (plurality) (Kennedy, J., concurring); Environmental Protection Agency, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf, (Dec. 2, 2008).

The Supreme Court states that groundwater with a significant nexus to navigable waters is subject to CWA authority. See United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985) (finding it is permissible "for the [U.S. Army Corps of Engineers] to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features"); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 167 (2001) (SWANCC) (noting a "significant nexus between the wetlands and 'navigable waters'" is necessary for the Corps to exercise jurisdiction); Rapanos, 547 U.S. at 743

(2006) (plurality) (establishing the significant nexus and two-part tests to determine the reach of Corps' jurisdiction).

In Riverside Bayview Homes, 474 U.S. at 124, the Court found that "low-lying marshy land near the shores" was subject to U.S. Army Corps of Engineers' (Corps') authority, and, thus, actionable under the CWA. Id. This decision was a reversal of the lower court, which wrongly interpreted "the Corps' regulation to exclude . . . adjacent wetlands." Id. at 125. Applying the Chevron Doctrine, the Court relied on a plain reading of the Corps' regulation to conclude it was permissible "for the Corps to exercise jurisdiction over wetlands adjacent to *but not regularly flooded* by rivers, streams, and other hydrographic features." Riverside Bayview Homes, 474 U.S. at 124 (emphasis added); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (stating courts are required to give deference to an agency interpretation if the statute is ambiguous and the interpretation reasonably resolves that ambiguity). In reaching its conclusion, the Court broadly stated that wetlands are subject to the Corps' jurisdiction, so long as they fit within a "permissible interpretation" of the CWA. Riverside Bayview Homes, 474 U.S. at 131. The Court defined a "permissible interpretation" as one that is "reasonable, in light of the language, policies, and legislative history of the [CWA]." Id. (noting the inclusion of adjacent wetlands in the term "waters" supports the broad goal of maintaining and improving water quality).

Sixteen years later, the Court placed a limit on the Corps' broadly defined jurisdiction, finding that it does not extend to isolated and intrastate waters. SWANCC, 531 U.S. at 163. For example, CWA jurisdiction could not extend to dumping grounds that developed into seasonal ponds that *lacked a significant nexus to navigable waters.* Id. at 167 (emphasis added). In determining the reach of CWA jurisdiction, the Court noted that "[i]t was the significant nexus

between the wetlands and 'navigable waters' that informed [their] reading of the CWA." Id. (citing Riverside Bayview Homes, 474 U.S. at 131). Therefore, the Court declined to extend Chevron to dumping grounds that developed into *isolated* seasonal ponds. Id. at 174 (emphasis added).

Five years later, the Court developed two determinative analyses for determining CWA jurisdiction: the significant nexus and two-part tests. Rapanos, 547 U.S. at 743 (plurality). In this 4-4-1 decision, the Court considered whether jurisdiction extended to wetlands near man-made drains or ditches, which emptied into navigable waters. Id. In his concurrence, Justice Kennedy established the narrow significant nexus test that has been adopted by a variety of circuits. See, e.g., United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007).

In establishing the frequently adopted significant nexus test, Justice Kennedy looked to precedent, stating, "'It was the *significant nexus* between the wetlands and 'navigable waters' that informed [the] reading of the CWA in Riverside Bayview Homes.'" Rapanos, 547 U.S. at 766 (Kennedy, J., concurring) (quoting SWANCC, 531 U.S. at 167) (emphasis added). Kennedy found "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters', if the wetlands, either alone or in combination . . . significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Rapanos, 547 U.S. at 779 (Kennedy, J., concurring).

Additionally in Rapanos, Justice Scalia proposed an alternative, but uncommonly utilized, two-part test that focuses on: (1) the definition of navigable waters, and (2) adjacency between the wetland and the navigable waters. Id. at 741. First, Scalia based his analysis on the Court's prior definition of "navigable waters," noting it refers to only "*permanent* bodies of

water." Id. at 734 (emphasis in original). Second, Scalia focused on the term "adjacency," which he interpreted to require a "continuous surface connection" between the wetland and navigable water. Id. at 741. However, in subsequent guidance, the EPA explicitly rejected this standard and established that adjacency is defined as "bordering, contiguous, or neighboring." Environmental Protection Agency, supra.

In interpreting Rapanos, circuit courts have looked to the advice of the Supreme Court, which indicates the narrower test should be applied. Marks v. United States, 430 U.S. 188, 193 (1977) (stating that when the Court fails to come to a majority agreement, lower courts can follow the narrowest holding agreed upon by a majority of the justices). In attempting to apply the Marks standard, circuits disagree over which test is narrower. However, Justice Stevens determined that Kennedy's significant nexus test may be narrower, noting, "Kennedy's approach will be controlling in most cases." Rapanos, 547 U.S. at 810 n. 14 (Stevens, J., dissenting).

Despite difficulty in apply the Marks standard, most circuits have followed Justice Stevens' advice and concluded that Kennedy's concurrence is the narrower holding. See Robison, 505 F.3d at 1221 (noting Kennedy's concurrence was "less far-reaching"); N. Cal. River Watch, 496 F.3d at 999 (finding that Kennedy's concurrence is the narrowest ground to which a majority of the Supreme Court Justices would agree); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (finding that Kennedy's concurrence was "the least common denominator").

Only a few circuits, including this Court, found the Marks rule impossible to apply, deciding to uphold CWA jurisdiction when *either* the two-part or significant nexus tests were met. See United States v. Duvall, 740 F.3d 604, 611 (D.C. 2013) (Kavanaugh, J., concurring) (finding that both tests are equally narrow and, therefore, this Court should "strive to decide the

case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve the current case"); United States v. Bailey, 571 F.3d 791, 798 (8th Cir. 2009) (finding there is little overlap between Scalia's and Kennedy's opinions, making it difficult to determine which holding is narrower); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (stating the understanding of "narrowest grounds" does not translate to the decision in the Rapanos case). Other circuits similarly find the Marks rule difficult to apply and require that *both* the significant nexus and two-part tests be met. See United States v. Cundiff, 555 F.3d 200, 210 (6th Cir.); United States v. Lucas, 516 F.3d 316, 324 (5th Cir. 2008). Nevertheless, no circuit explicitly rejects Kennedy's significant nexus test.

SCCRAP urges this Court to align itself with the circuits that conclude Kennedy's opinion is narrower triggering application of the significant nexus test. Pursuant to the significant nexus test, wetlands that drain into navigable waters fall comfortably within the limits of CWA jurisdiction. Rapanos, 126 S. Ct. at 779 (Kennedy, J., concurring). Applying this test to the present matter, the hydrologically connected groundwater warrants CWA jurisdiction because the seepage of arsenic reached nearby navigable waters through the groundwater. (R. at 6.) As a result, the contaminated groundwater caused elevated levels of arsenic in Vandalia River. (R. at 5.) Thus, the groundwater has a significant nexus to navigable waters, warranting CWA jurisdiction. See Id.

Further, the EPA supports this conclusion, stating, "'[R]elatively permanent' waters . . . [flowing] only in response to precipitation" justify CWA jurisdiction that should be "evaluated under the *significant nexus standard*." Environmental Protection Agency, supra, at 7 (emphasis added). Here, the groundwater is "relatively permanent" and satisfies the significant nexus test, thus, the EPA supports CWA jurisdiction in the case at hand.

II. ARSENIC SEEPAGE FROM THE COAL ASH IMPOUNDMENT CONSTITUTES A POINT SOURCE BECAUSE GROUNDWATER ESTABLISHES A DIRECT HYDROLOGICAL CONNECTION BETWEEN THE IMPOUNDMENT AND NAVIGABLE WATERS.

This Court should align itself with the Supreme Court's determination that point sources need not "emit 'directly into' covered waters, but [can] pass 'through conveyances' in between." Rapanos, 547 U.S. at 743. In accordance with Rapanos, the majority of circuit courts have deemed groundwater to be a sufficient conveyance. See, e.g., Hawai'i Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 995 (D. Haw. 2014); Nw. Envtl. Def. Ctr. v. Grabhorn, Inc., No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009). This determination is warranted because it encompasses the full spirit of the CWA: to "protect the quality of surface waters." Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994). Therefore, this Court should hold that the seepage of arsenic from the Impoundment, which passes through groundwater into navigable waters, is a point source, violating section 311 (a) of the Clean Water Act. 33 U.S.C. § 1342.

A. The Majority of Circuit Courts Agree That Seepage of Groundwater from the Coal Ash Impoundment Constitutes a Point Source Under the Clean Water Act.

The CWA defines point source as "any discernible, confined and discrete conveyance, including… but not limited to any conduit… from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14). In applying this definition, the Supreme Court determined that a point source need not "emit 'directly into' covered waters." Rapanos, 547 U.S. at 743. In doing so, the Court employed reasoning from cases where CWA jurisdiction was extended to point sources that were separated from navigable waters. See United States v. Vesicol Chemical Corp., 438 F. Supp. 945, 946-47 (finding a point source where a municipal sewer system separated the point

source from navigable waters); Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1137 (C.A.10 2005) (explaining a point source was separated from navigable waters by 2.5 miles of tunnel). Relying on Supreme Court rationale, the Ninth Circuit Court of Appeals established the "direct hydrological connection" test. N. Cal. River Watch, 496 F.3d. at 1000.

Of the district courts to decide this issue, a majority have adopted the "hydrological connection test" and expanded the point source definition to encompass groundwater conveyance. See, e.g., Nw. Envtl. Def. Ctr., 2009 WL 3672895, at *11 (holding "the CWA covers discharges to navigable surface waters via hydrologically connected groundwater"); Hernandez v. Esso Standard Oil Co. (P.R.), 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (finding "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); Wash. Wilderness Coal., 870 F. Supp. at 990 (reasoning the CWA encompasses "any pollutant which enters such waters, whether directly or through groundwater").

Moreover, the Fourth and Ninth Circuit Courts of Appeals agreed groundwater is a sufficient conveyance to establish a point source. See Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 651 (4th Cir. 2018) (finding that groundwater is subject to CWA jurisdiction so long as it has a "direct hydrological connection to navigable waters"); Hawai'i Wildlife Fund, 886 F.3d at 749 (holding the CWA applies to discharge from a point source into groundwater so long as the discharge is "fairly traceable from the point source to navigable water"). While these courts utilize different analyses, the Fourth Circuit Court of Appeals acknowledged that it saw no difference between the two tests. Upstate Forever, 887 F.3d at 651, n. 12.

However, other courts have declined to adopt the Supreme Court's reasoning, rejecting the hydrological connection test. See, e.g., Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 810 (E.D.N.C.2014) (holding Congress "did not intend for the CWA to extend federal regulatory authority over groundwater"); Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1320 (D. Or. 1997) (reasoning that discharges of pollutants into groundwater are not subject to CWA jurisdiction). These holdings rested on the courts' narrow interpretations of pre-Rapanos Supreme Court decisions and the CWA, explaining "waters of the United States" included only "open waters," and thus, excluded groundwater. See Cape Fear River Watch, Inc., 25 F. Supp. 3d at 810 (citing Riverside Bayview Homes, 474 U.S. at 134; SWANCC, 531 U.S. at 164).

This Court should align itself with the majority of district courts and two circuit courts of appeals by adopting the direct hydrological connection test. See, e.g., Upstate Forever, 887 F.3d at 651; Hawai'i Wildlife Fund, 886 F.3d at 749. This ruling is warranted because the Supreme Court encourages a broad definition of point source, stating, "the Act 'makes [it] plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" South Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 105 (2004) (quoted in Rapanos, 547 US. at 743). According to the Vandalia Department of Environmental Quality (Department) report, a seam in the high density polyethylene (HDPE) geomembrane liner was inadequately welded, resulting in seepage that pooled at the downstream toe of the west embankment. (R. at 6.) This seepage caused erosion and indentations or grooves in the soil as it made its way down the embankment to Fish Creek. (R. at 6.) Thus, dangerous levels of arsenic are seeping from the Impoundment and flowing through hydrologically connected groundwater into navigable waters, making the Impoundment a point source.

Further, the EPA encourages courts to adopt the direct hydrological connection test and finds it "consistent with the text and purpose of the [CWA]." Brief for Petitioner at 13, Hawaii Wildlife Fund, 24 F. Supp 3d at 1005. The EPA eloquently stated that Congress "did not limit the term 'discharges of pollutants' to only direct discharges to navigable waters" and thus, "discharges through *groundwater* may fall within the purview of the CWA." Id. (emphasis added). Thus, this Court should follow the EPA's guidance and find that groundwater is a sufficient conveyance under the CWA.

B. The Seepage of Arsenic from the Coal Ash Impoundment Is a Point Source Within the Spirit of the Clean Water Act, as this Supports both Intentional and Nonintentional Point Sources.

The CWA defines "point source" as "any discernible, confined, and discrete conveyance." 33 U.S.C. § 1362 (14). The spirit of the CWA is to "protect the quality of surface waters," which encompasses "any pollutant [that] enters such waters, whether directly or *through groundwater*." Wash. Wilderness Coal., 870 F. Supp. at 990 (emphasis added). As one circuit court stated, the rationale is simple:

> [I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants . . . some distance short of the river via the groundwater.

N. Cal. River Watch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 WL 21222052, at *2 (N.D. Ca. Sept. 1, 2005). Therefore, the coal ash impoundment is a point source within the spirit of the CWA as the Act embraces the "broadest possible definition" of point source. United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979).

Considering CWA guidance, in a case of strikingly similar facts, the Tenth Circuit Court of Appeals found that contaminants from a gold leaching operation process, which overflowed

from rapidly melting snow, constituted a point source. See Earth Sciences, Inc., 599 F.2d at 373. The court rejected the defendant's argument that the CWA covers *only* intentional discharge of pollutants into navigable waters and found that a mine system, designed to catch runoff during periods of excess melting, amounted to a point source. Id. (emphasis added). Similarly, here, the arsenic is leaching from the Impoundment into groundwater, which is magnified by precipitation. (R. at 5.) This groundwater, carrying arsenic, causes erosion in the soil as it flows down the embankment to navigable waters. (R. at 6.) Therefore, the Impoundment, similar to the mine system, constitutes a point source.

C. As a Matter of Public Health, Society Should Be Protected From the Significant Negative Consequences of Arsenic Seepage.

Further, it is within society's best interest to adopt a broad reading of point source due to the public health dangers caused by arsenic seeping into drinking water from coal ash impoundments. Indeed, this Court has emphasized the risk of arsenic to humans, which includes "elevated probabilities of 'cancer in the skin, liver, bladder, and lungs,' as well as non-cancer risks such as 'neurological and psychiatric effects,' 'cardiovascular effects,' 'damage to blood vessels,' and 'anemia.'" Util. Solid Waste Activities Grp. v. Envtl. Protec. Agency, 901 F.3d 414, 423 (D.C. Cir. 2018) (ruling the EPA acted arbitrarily and capriciously by failing to require the closure of unlined surface impoundments). In listing these risks, this Court emphasized the public health concerns inherent in the mismanagement of coal ash impoundments. Id. Moreover, this Court noted factual data, stating, "[the] EPA has confirmed a total of 157 cases . . . in which [Coal ash impoundment] mismanagement has caused damage to human health and the

environment." Id. Thus, to prevent previously acknowledged health hazards, this Court should protect public health and find that the Impoundment constitutes a point source.

III. THIS COURT PREVIOUSLY HELD THAT FLAWED METHODOLOGY RESULTS IN UNJUST AND UNREASONABLE RATES, RENDERING THE FEDERAL ENERGY REGULATORY COMMISSION ORDER ARBITRARY AND CAPRICIOUS.

This Court should find Commonwealth Generating Company's (ComGen's) proposed rates were both unjust and unreasonable, rendering Federal Energy Regulatory Commission's (FERC's) order arbitrary and capricious. FERC bears the responsibility of ensuring utility rates meet the just and reasonable standard, and, in doing so, FERC employs several ratemaking methods, such as the matching and prudence principles. Pub. Serv. Comm'n of Ky. v. Fed. Energy Regulatory Comm'n, 397 F.3d 1004, 1006 (D.C. 2005). The matching principle ensures ratepayers only incur the cost of servicing their electricity, and the prudence principle shields ratepayers from bearing *improper or excessive service costs*. Town of Norwood v. Fed. Energy Regulatory Comm'n, 53 F.3d 377, 380-81 (D.C. 1995) (emphasis added); Pac. Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n, 306 F.3d 1112, 1117 (D.C. 2002). For several years, ComGen failed to properly monitor the effectiveness of the corrective-action plan, and ComGen plans to recover the affiliated remediation costs from current ratepayers. (R. at 11.) Thus, ComGen's revised rate schedules fail to meet both principles, rendering the rates unjust and unreasonable.

Pursuant to the Federal Power Act, the rates charged by electric utilities in interstate commerce are regulated by FERC, and such regulation imposes a statutory obligation to ensure the rates are both just and reasonable. Pub. Serv. Comm'n of Ky., 397 F.3d at 1006 (noting utilities submit proposals to FERC, but FERC retains the authority to modify such proposals);

see also 16 U.S.C. § 824(d). FERC is not bound to any "single formula" in determining rates, so long as the "end result" of the rate order is not unjust or unreasonable. Washington Gas and Light Co. v. Baker, 188 F.2d 11, 14-15 (D.C. 1950); see also Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

In determining the reasonableness of proposed rate schedules, FERC adheres to, among other methods, the matching and prudence principles of utility ratemaking. Town of Norwood, 53 F.3d at 380-81 (emphasizing FERC follows a general ratemaking principle of matching); Pub. Sys. v. Fed. Energy Regulatory Comm'n, 709 F.2d 73, 80 (D.C. 1983) (noting FERC's primary rationale for normalization was the matching principle). Pac. Gas & Elec. Co., 306 F.3d at 1117 (applying the prudence standard to flow-through costs).

Pursuant to the matching principle, ratepayers are only charged with the costs of producing the electric service they receive, rather than costs previously accrued. Town of Norwood, 53 F.3d at 380-81 (acknowledging that allowing a utility to recover transition costs over a twenty-year period violates the matching principle). Underlying the matching principle is the concept of "used and useful property," which states property can usually be included in the rate base only if it provides service to *current* ratepayers. Pub. Sys., 709 F.2d at 80. (emphasis added). For example, construction work in progress is generally not included in the rate base because the used and useful concept allocates the tax benefits of expenses to the periods when ratemaking policy recognizes the expenses. Id. Thus, in allowing utility companies the benefit of tax deductions, flow-through ratemaking is inconsistent with the matching principle. Id.

Moreover, the prudence standard places an even stricter limit on the costs allocated to customers: utilities are precluded from recovering service costs when those costs are excessive or improper. Pac. Gas & Elec. Co., 306 F.3d at 1117 (refusing to affirm utility rates where FERC

failed to apply the prudence standard). To prevail under the prudence standard, a complainant must present evidence sufficient to raise serious doubts that a reasonable utility manager, under the same circumstances and acting in good faith, would not have made the same decision and incurred the same cost. Ind. Mun. Power Agency v. Fed. Energy Regulatory Comm'n, 56 F.3d 247, 253 (D.C. 1995). As such, the standard provides a mechanism for complainants to challenge utility ratemaking under the just and reasonable standard. Transmission Agency of N. Cal v. Fed. Energy Regulatory Comm'n, 495 F.3d 663 n.8 (D.C. 2007).

In reviewing rate schedules approved by FERC, courts must examine FERC's methodology to determine whether the end result of the rate order is just. Pac. Gas & Elec. Co., 306 F.3d at 1118; see also Town of Norwood, 53 F.3d 377 at 533 (explaining the court's role is to ensure FERC employed methodology that is "either consistent with past practice or adequately justified"). Thus, despite deference to ratemaking decisions, courts must set aside any rate, even one within the zone of reasonableness, if FERC's methodology is flawed. Maine v. Fed. Energy Regulatory Comm'n, 854 F.3d 9, 23 (D.C. 2017).

In 2002, Commonwealth Energy Solutions (CES), the unregulated subsidiary that previously owned the Vandalia Generating Station, detected elevated levels of arsenic in the groundwater. (R. at 5.) CES notified the Department and, thereinafter, CES worked with the Department to develop and implement a corrective action plan. (R. at 5.) After the Department approved the corrective plan, CES installed a geomembrane liner on the west embankment of the Impoundment. (R. at 5.) In 2017, despite implementation of the corrective action plan, Vandalia Waterkeeper detected arsenic in the Vandalia River, which prompted the Department to launch an investigation. (R. at 6.) Pursuant to the investigation results, a seam in the geomembrane liner was inadequately welded, resulting in arsenic seepage that flowed into Vandalia River. (R. at 6.)

FERC reached the factual finding that ComGen, the regulated subsidiary who acquired Vandalia Generating Station from CES, failed to properly monitor the effectiveness of the corrective action, which likely would have revealed the arsenic seepage. (R. at 11.)

In keeping with prudent utility practice, ComGen should have, at the very least, conducted groundwater monitoring, because a reasonable utility manager, under the same circumstances and acting in good faith, would have monitored the groundwater for contamination. In fact, permits issued by the Department *required* ComGen to monitor the groundwater, just as CES monitored and discovered the contamination in 2002. (R. at 5.) In failing to monitor the same groundwater that CES monitored effectively, ComGen lacked the reasonableness of another utility manager under the same circumstances.

If ComGen monitored the groundwater, then it would have, at some point during the "many years" of seepage, detected arsenic. (R. at 6.) Thus, any presumption of managerial competence is overcome by ComGen's inability to "maintain the chemical, physical, and biological integrity" of Vandalia River. (R. at 6, 10.) Despite FERC's acknowledgement of ComGen's contributory role in the contamination, FERC still placed the full burden of remediation costs on ratepayers. (R. at 11.) In doing so, FERC approved rates that violated the prudence principle of utility ratemaking, which renders the rates unjust and unreasonable. Therefore, this Court should grant a FERC rehearing to determine whether ComGen can recover any of the remediation costs.

In the event ComGen can recover remediation costs, it should only recover costs incurred since 2014. In compliance with statutory procedures, ComGen submitted revisions to the Commission for both FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2, in order to recover the costs of fully excavating the Impoundment. (R. at 8.) These costs, which amount to

$246 million, result from eighteen years of accumulated coal ash in the Impoundment. (R. at 9.) The revisions allocate fifty percent of remediation costs to each of Vandalia Power and Franklin Power, respectively. (R. at 8.) Upon the Commission's approval of the revised rate schedules, Vandalia and Franklin Power will flow-through the remediation costs to their unsuspecting retail customers. (R. at 9.)

Under the proposed rate changes, customer bills will increase by about $2.15 per month in November 2019, and average households will see bills rise by about $3.30 per month for the ten-year amortization period. (R. at. 9.) Due to increased bills, Vandalia and Franklin Power customers will bear the burden of producing electricity at the Vandalia Generating Station for the entire eighteen years the station deposited coal ash into the Impoundment. (R. at 9.) Yet, these customers have only received the benefit of the station's electricity production since 2014, when ComGen acquired the Vandalia Generating Station. (R. at 4.) Prior to the transition, the Vandalia Generating Station produced electricity for the wholesale market, and, therefore, current ratepayers did not receive a benefit from the station. (R. at 4.) Because unsuspecting ratepayers will incur the cost of producing electricity prior to 2014, the revised rate schedules violate the matching principle of ratemaking.

In FERC's order, it agreed the revised rates violate the matching principle, going so far as to note the rate schedules will represent a "windfall of sorts" to ComGen shareholders. (R. at 11.) In effect, the rate schedules allow shareholders to profit from the fourteen years the Vandalia Generating Station produced electricity for the wholesale market, without requiring shareholders to bear the burden of remediation costs for coal ash accumulated during that same fourteen-year period. (R. at 11-12.) Despite acknowledging the matching principle violation, FERC sympathized with ComGen's financial integrity argument and approved the proposed rate

schedules. (R. at 11.) When FERC directly contradicted its acceptance of the matching principle argument, FERC produced an unreasoned, incoherent decision, rendering its order arbitrary and capricious. Thus, this Court should demand a FERC rehearing predicated on accurate ratemaking methodology.

IV. THE INVESTOR INTEREST IN EARNING A PROFIT IS RESTRAINED IN THE FACE OF COMPANY MISMANAGEMENT AND, THEREFORE, LIMITING THE PROFITS OF A MISMANGED COMPANY IS NOT A CONFISCATORY TAKING.

This Court should demand FERC conduct a rehearing with applicable analysis of the Mobile-Sierra Doctrine. See generally United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956). When analyzing the reasonableness of FERC-approved utility rates, courts primarily focus on the consequences of the order. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). If the order fails to strike a just balance between the investor and consumer interests, then the order constitutes a confiscatory taking. Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n., 810 F.2d 1168, 1191 (D.C. 1987) (Starr, J., concurring). Judicial protection of investors is limited, especially in the face of company mismanagement, whereas judicial protection of consumers is broad, encompassing the cost of failed investment. D.C. Transit Sys, Inc. v. Wash. Metro. Area Transit Com., 466 F.2d 394, 419-20 (D.C. 1972); Jersey Cent. Power & Light Co., 810 F.2d at 1212 (Mikva, J., dissenting).

The Mobile-Sierra Doctrine places an additional limit on the investor interest: investors cannot unilaterally change a rate agreement that no longer works in their favor. Me. Pub. Util. Comm'n. v. Fed. Energy Regulatory Comm'n, 520 F.3d 464, 478 (D.C. 2008). The contract may be modified only if: (1) the utility can no longer provide service, (2) consumers bear an excessive burden, or (3) the rates are unduly discriminatory. Id. at 476. In the case at hand,

FERC afforded ComGen's interest in earning a profit far greater protection than warranted, directly violating the protection afforded to consumers under both the Hope balancing and Mobile-Sierra Doctrine.

A. Disallowing Recovery of Remediation Costs Does Not Misbalance the Investor and Consumer Interest, and, Therefore, Does Not Constitute a Taking.

In accordance with Supreme Court precedent, those who oppose a rate order must show the order exacts unjust consequences. Duquesne Light Co. v. Barasch, 488 U.S. 299, 314 (1989); Hope Natural Gas Co., 320 U.S. at 602. Indeed, when a rate is claimed to extend beyond just and reasonable boundaries, the focus of the analysis should be on the end result of FERC's order. Hope Natural Gas Co., 320 U.S. at 602; see also Jersey Cent. Power & Light Co., 810 F.2d at 1175 (explaining courts rely interchangeably on the Natural Gas Act and Federal Power Act when interpreting both statutes).

To properly analyze the consequences, courts must balance two competing interests: the investor and consumer interest. Jersey Cent. Power & Light Co., 810 F.2d at 1177. When courts balance these interests, there is a "zone of reasonableness" where rates may fall comfortably, with the investor interest setting the lowest reasonable rate. Id. By long standing usage in the field of rate regulation, the lowest reasonable rate is one which is not confiscatory in the constitutional sense. Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. at 575, 585 (1942); Duquesne Light Co., 488 U.S. at 307 (affirming a rate is too low if it destroys the value of property for all purposes for which it was acquired). Thus, a taking occurs when the balance between investor and ratepayer interests – the very function of utility regulation – tips heavily in favor of the consumer. Jersey Cent. Power & Light Co., 810 F.2d at 1191 (Starr, J., concurring).

At the lower end of the zone of reasonableness, the investor interest encompasses the financial integrity of the company. Hope Natural Gas Co., 320 U.S. at 603. A return should be reasonably sufficient to assure confidence in the financial soundness of the utility, as well as adequate, *under efficient and economical management*, to maintain company credit and attract capital. Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 693 (1923) (emphasis added). Thus, rates that maintain the financial integrity of the company cannot be condemned as invalid, even though they might produce only a meager return. Hope Natural Gas Co., 320 U.S. at 605; see also Bluefield Water Works & Improvement Co., 262 U.S. at 692, 93 (noting utilities have no constitutional right to profits, such as those profits anticipated in highly profitable enterprises); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 412 (1894) (opining shareholder entitlement to profit is not unlimited). Meager returns are especially permissible in the face of company mismanagement because inferior service deserves less return than would normally be expected. D.C. Transit Sys., Inc., 466 F.2d at 419-20. Therefore, the caliber of a utility's service may constitutionally qualify as a prominent and even decisive factor in the regulation of its rates. Id.

At the upper end of the zone of reasonableness lies the consumer interest, which embodies protection against exploitative rates. Jersey Cent. Power & Light Co., 810 F.2d at 1207 (Mikva, J., dissenting) (emphasizing FERC stands as a watchdog providing a "permanent bond of protection" for excessive rates); see generally Market St. Ry. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) (opining a company that cannot survive without charging exploitative rates has no entitlement to such rates). Because the consumer interest presents an additional variable in the reasonableness analysis, regulation may, consistent with the Constitution, stringently limit investor returns. In Re Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968); see also

Jersey Cent. Power & Light Co., 810 F.2d at 1212 (Mikva, J., dissenting) (explaining that protection of public interest is diminished when the risk of failed investment is thrust upon ratepayers). Therefore, the public interest presents a counterweight, which should be balanced accordingly, against the investor interest in financial integrity. Jersey Cent. Power & Light Co., 810 F.2d at 1208.

In this instance, ComGen alleges that refusal to approve the revised rate schedules would fail to properly balance the investor and consumer interest. (R. at 11.) According to ComGen, a 3.2 percent rate of return would not allow the company to maintain its financial integrity or assure confidence in its financial soundness, thereby undercutting its ability to raise capital on reasonable terms. (R. at 11.) If this argument prevails, then ComGen, a mismanaged company that caused significant environmental pollution, will be afforded the same level of protection as companies that abide by EPA regulations. ComGen failed to properly monitor the effectiveness of the corrective action, and, therefore, due to company mismanagement, ComGen shareholders no longer warrant the judicial protection regularly afforded to utility companies. (R. at 11.)

The cost of remedying the contamination amounts to $246 million, which will be flowed through to retail customers. (R. at 9.) In placing the burden of remediation on ratepayers, the consumer interest, which encompasses protection against excessive rates, becomes severely jeopardized. Thus, in effect, refusal of the proposed rate schedules would strike the proper balance between ComGen's interest in earning a return notwithstanding company mismanagement and the ratepayers' interest against bearing the burden of ComGen's pollution.

B. In Order to Give Proper Weight to the Consumer Interest, This Court Should Apply the Mobile-Sierra Doctrine.

The Mobile-Sierra public interest standard is an application of the just and reasonable standard in the context of rates set by contract. NRG Power Mktg., LLC v. Me. Power Utils.

Comm'n, 558 U.S. 165, 168 (2010). The purpose of the doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, and, therefore, Mobile-Sierra is invoked when one party to a contract attempts to effect a unilateral rate change by asking FERC to relieve the party's obligations. Me. Pub. Util. Comm'n, 520 F.3d 464, 476 (D.C. 2008) (noting the doctrine recognizes the superior efficiency of private bargaining). For example, a public utility may itself agree by contract to a rate affording less than a fair return, and, if it does so, the utility is not entitled to be relieved of its unbeneficial bargain. NRG Power Mktg., LLC, 558 U.S. at 172-73. In such circumstances, the sole concern of FERC is whether the rate is so low as to adversely affect the public interest by: (1) impairing the ability of the public utility to continue service, (2) casting upon consumers an excessive burden, or (3) being unduly discriminatory. Id. (explaining FERC contemplates abrogation of contract only in circumstances of unequivocal public necessity).

Although the standard's purpose is to preserve the parties' contract, the Mobile-Sierra doctrine does not overlook third-party interests. NRG Power Mktg., LLC, 558 U.S. at 175. In directing FERC to reject a contract that seriously harms the consuming public, the doctrine is actually framed with a view to third-party protection. Id. The doctrine, by emphasizing the essential role of contracts, also aims to ensure stability in the electricity market, to the benefit of consumers. Id. at 173-74. Therefore, a presumption that the public interest standard is only applicable to contracting parties – thereby excluding consumers and advocacy groups – could scarcely provide the protection and stability the doctrine aimed to secure. Id. at 176.

ComGen entered into unit power service agreements with Vandalia and Franklin Power Company under which the electrical output of the Vandalia Generating Station would be sold fifty percent to Vandalia Power and fifty percent to Franklin Power. (R. at 4.) The unit power

service agreements are wholesale transactions in interstate commerce, and said agreements are designated as FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2. (R. at 4.) To recover the cost of fully excavating the Impoundment, ComGen submitted a filing to FERC, which consisted of proposed revisions to FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2. (R. at 8.)

ComGen entered into a bilaterally-created private contract with Vandalia and Franklin Power, as opposed to unilaterally filing a tariff. Yet, in filing the proposed rate schedules, ComGen attempted to unilaterally modify the private contract, triggering the Mobile-Sierra public interest standard. Pursuant to the Mobile-Sierra Doctrine, FERC must defer to the intent of the contracting parties, rather than striking a balance between investor and consumer interests. See Hope Natural Gas Co., 320 U.S. at 602. Indeed, the public interest standard only allows contract modification in circumstances of unequivocal public necessity. NRG Power Mktg., LLC, 558 U.S. at 172-73. Because the original rates did not impair the ability of ComGen to provide electrical service, impose an excessive burden on consumers, or create unduly discriminatory rates, FERC possessed no justification for modifying the private contracts.

CONCLUSION

Based on the foregoing reasons, the Appellee/Petitioner, Stop Coal Combustion Residual Ash Ponds, respectfully requests this Court affirm as to issues one and two, enjoining Commonwealth Generating Company from using Little Green Run Impoundment, and reverse and remand as to issues three and four, granting a rehearing in front of the Federal Energy Regulatory Commission.

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. 23