**NO. 18-02345**

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**IN THE**

**UNITED STATES CIRCUIT COURT OF APPEALS**

**FOR THE DISTRICT OF COLUMBIA**

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**STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),**

***Petitioner,***

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**

***Respondent,***

**COMMONWEALTH GENERATING COMPANY,**

***Intervenor.***

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

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# BRIEF FOR INTERVENOR

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**TEAM NO. 14**

***Attorneys for Intervenor***

## TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

*Page(s)*

**CASES:**

**CONSTITUTIONAL PROVISIONS:**



**STATUTES:**

**FEDERAL REGISTER:**



**LEGISLATIVE MATERIALS:**

## JURISDICTIONAL STATEMENT

Regarding the action brought in the U.S. District Court for the District of Columbia, the district court had subject matter jurisdiction under 28 U.S.C. § 1331, insofar as the complaint alleged claims arising under the Clean Water Act, 33 U.S.C. §§ 1251, *et seq*. This Court has appellate jurisdiction under 28 U.S.C. § 1291, as the district court entered final judgment on June 15, 2018, and the defendant timely filed notice of appeal on July 16, 2018.

Second, the FERC panel issued the decisions under review pursuant to § 203 (16 U.S.C. § 824b) and § 205 (16 U.S.C. § 824d) of the Federal Power Act. Petitioners have invoked this Court's jurisdiction to review the final order of the Commission pursuant to § 313(b) of the Act, 16 U.S.C. § 8251. The Commission's Order on Rehearing was denied on November 30, 2018. Petitioner SCCRAP filed its petition for review on December 3, 2018.

## STATEMENT OF THE ISSUES PRESENTED

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

II. Whether the seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act (33 U.S.C. § 1342).

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

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

## STATEMENT OF THE CASE

Commonwealth Generating Company ("ComGen"), a District of Colombia corporation, is a wholly owned subsidiary of Commonwealth Energy ("CE"). R. at 3. ComGen was incorporated by CE in 2014 to purchase the Vandalia Generating Station from Commonwealth

Energy Services ("CES"), a separate wholly owned subsidiary of CE. R. at 3. In November 2014, ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company under which the electrical output from the Vandalia Generating Station would be sold 50% to each respective company. R. at 4. The aforementioned unit power service agreements are subject to FERC jurisdiction under the Federal Power Act ("FPA") because they are wholesale energy transactions in interstate commerce. R. at 4.

The Vandalia Generating Station consists of two 550 megawatt coal-fired units near Mammoth, Vandalia on the Vandalia River. R. at 4. Coal combustion residuals ("CCRs") produced by the Vandalia Generating Station are disposed of in the Little Green Run Impoundment, which was formed by the construction of a dam across Green Run, immediately east of the Vandalia Generating Station. R. at 4. The dam has a current height of 395 feet from toe to crest, and the dam forming the impoundment covers approximately 71 surface acres of land. R. at 4. The dam currently contains approximately 38.7 million cubic yards of solids, mainly CCRs, coal fines and waste material removed during the coal cleaning process. R. at 4–5. With a current height of 395 feet, the Little Green Run Impoundment has the highest existing dam structure among the coal waste dams listed by the EPA. R. at 5. The effluent from the Little Green Run Impoundment flows south and enters Fish Creek before entering the Vandalia River. R. at 5.

In 2002, CES detected arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. R. at 5. As required by its permits, CES notified the Vandalia Department of Environmental Quality ("VDEQ") and developed and implemented a corrective course of action to mitigate the pollution. R. at 5. CES installed a high density polyethylene geomembrane liner on the west bank of the embankment of the Little Green Run Impoundment

in 2006. R. at 5. During routine monitoring in March 2017, Vandalia Waterkeeper, an environmental activist group, detected elevated levels of arsenic in the Vandalia River. R. at 5. Later testing determined that rainwater and groundwater were leaching arsenic from the coal ash in the impoundment polluting the groundwater which carried arsenic into the navigable waters of the nearby Fish Creek and Vandalia River. R. at 6.

Vandalia Waterkeeper filed a complaint with the VDEQ, which determined the geomembrane liner installed in 2006 was inadequately welded resulting in seepage that pooled at the downstream toe of the west embankment. R. at 6.

***Stop Coal Combustion Residual Coal Ash Ponds***. Stop Coal Combustion Residual Coal Ash Ponds ("SCCRAP") is a national environmental and public interest organization based in Washington, D.C. R. at 5. Beginning in 2015, SCCRAP commenced an initiative targeting coal ash impoundments across the United States. R. at 5. First, SCCRAP files lawsuits under the Clean Water Act and/or Resource Conservation and Recovery Act against the owners and operators of coal ash impoundments found to be responsible for pollution. R. at 5. Second, SCCRAP intervenes in rate utility proceedings before state public utility commissions and FERC to challenge rate recovery expenses from coal pollution. R. at 5.

***Procedural History***. In December 2017, SCCRAP sued ComGen in the U.S. District Court for the District of Colombia under the citizen-suit provision of the Clean Water Act. R. at 7. The complaint alleged that ComGen was violating the Act by discharging pollutants into navigable waters. R. at 7. According to SCCRAP's complaint, the Little Green Run Impoundment qualified as a point source from which arsenic polluted Fish Creek and the Vandalia River. R. at 7. During the bench trial, the judge found that the Impoundment constituted a "point source" as defined by the Clean Water Act, and the court held that the Act covered discharges into groundwater that

has a "direct hydrological connection" to navigable waters. R. at 7-8. As a remedy, the court ordered ComGen to fully excavate the coal ash in the Little Green Run Impoundment and relocate it to a "competently lined" facility. R. at 8. ComGen filed this appeal on July 16, 2018 challenging the court's conclusions and orders. R. at 8.

***ComGen's FERC Filing***. Contemporaneously with its appeal of the district court's decision, on July 16, 2018 ComGen submitted a filing to FERC under §205 of the FPA to recover from Vandalia Power and Franklin Power the costs of complying with the district court's order. R. at 8. The filing consisted of proposed revisions to ComGen's FERC Rate Schedule No. 1 ("Vandalia Agreement") and FERC Rate Schedule No. 2 ("Franklin Agreement") to recover over a 10-year period that cost of complying with the lower court's order. R. at 8. The cost of compliance was estimated by ComGen to be $246,000,000.00. R. at 8.

SCCRAP intervened in the FERC proceeding and filed a protest in opposition to ComGen's filing. R. at 9. SCCRAP had two primary arguments for its objection to rate recovery. R. at 9. First, SCCRAP argued ComGen should be precluded from recovering any cost of correcting the alleged incompetent implementation of the corrective plan as prescribed by VDEQ in 2006. R. at 9. Second, SCCRAP objected to Franklin Power and Vandalia Power bearing the full cost of the corrective action. R. at 9. SCCRAP submits that requiring the companies to bear 100% of the costs of the corrective action would violate the "matching principle" of utility ratemaking, which preserves the relationship between benefits and burdens. R. at 9.

In response to SCCRAP's arguments, ComGen asserted that its implementation of VDEQ's corrective plan in 2006 followed prudent utility practice, and it cannot be held strictly liable for the failure of the weld in the seam of the liner. R. at 10. Regarding the "matching principle" proffered by SCCRAP, ComGen notes the relevant fact is that the time when the violation of the

Clean Water Act was alleged was well after ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company. R. at 10. Finally, ComGen asserts the relief requested by SCCRAP, if granted, would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. R. at 10.

On October 10, 2018, following three days of evidentiary hearings, FERC allowed the proposed rates to become effective, subject only to a compliance filing by ComGen confirming that the injunctive relief imposed by the district court withstood judicial review and that ComGen would have to implement the required remedial action. R. at 11. SCCRAP promptly sought rehearing of FERC's decision on November 9, 2018 and upon FERC's denial of rehearing by order issued on November 30, 2018, pursued judicial review with its petition to this Court on December 3, 2018. R. at 12. SCCRAP, ComGen, and FERC jointly filed a motion in this D.C. Circuit Court of Appeals to have the actions consolidated for decision, and on December 21, 2018, this Court granted the motion. R. at 12.

## SUMMARY OF THE ARGUMENT

The Clean Water Act ("CWA") was established to limit unregulated pollutants being introduced directly from a point source to navigable streams. Despite this, courts of appeals have allowed CWA suits to proceed when pollutants enter navigable waters through hydrologically connected groundwater. Allowing a suit based on a hydrological connection to proceed is clearly in conflict with the legislative intent of the House of Representatives and Senate as shown by congressional reports coinciding with the CWA's enactment. Further, the plain text of the CWA shows that pollutants fall under CWA jurisdiction only when introduced directly into navigable waters. Allowing the direct hydrological connection theory not only undermines Congress's

intent but also nullifies existing legislation and creates uncertainty for states and energy operators alike.

Even if this Court gives merit to the unprecedented hydrological connection theory, ComGen is still not liable under the CWA. The CWA regulates the discharge of pollutants from a point source to navigable waters. A point source is defined to be a conveyance, meaning it is a method or instrument involved in the transportation of potential pollutants. Clearly the ash ponds at issue in this case do not fit the statutorily defined meaning of a point source. Congressional legislation and cannons of statutory interpretation show that the impoundment at issue is not a type of point source contemplated by the Clean Water Act.

Additionally, FERC was justified in issuing an order accepting ComGen's FERC filing under §205 of the FPA to recover the costs ComGen would incur to comply with the injunctive relief imposed by the district court. FERC articulated a satisfactory and reasonable decision after conducting three days of evidentiary hearings that focused closely on the factual issues at hand. ComGen adequately met its burden of proving that the utility rate increase is both just and reasonable, which caused FERC's approval of the proposed revisions. FERC made a reasonable connection between the facts presented and the decision made. Following a very narrow standard of review, deference is owed to FERC's evaluation and ultimate decision of approving ComGen's increased rates. Because FERC prudently assessed the implications of ComGen's proposed increase, and ultimately found that the increased rates were both just and reasonable, we ask the Court to affirm.

SCCRAP's position in the FERC proceeding is confiscatory and denies ComGen of rates sufficient to yield a reasonable return on its property. ComGen may have a fair return on the value of its property which is to include its present costs at the time of ratemaking; not solely the

cost base at the time of purchase. SCCRAP's proposal disregards ComGen's present costs to abolish or in the alternative significantly reduce the amount to which ComGen may recover. SCCRAP's position in the FERC proceeding therefore constitutes a taking inconsistent with the Fifth and Fourteenth Amendments of the United States Constitution.

## ARGUMENT AND AUTHORITIES

***Standard of Review***. De novo review applies to the district court's interpretation of the Clean Water Act. *Nw Envtl. Def. Ctr. V. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1326 (2013); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). "A petitioner's challenge to Federal Energy Regulatory Commissions conclusion . . . that recovery of costs . . . is not unduly discriminatory, merits arbitrary and capricious review." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000).

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

The Clean Water Act was enacted by Congress in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, Congress expressly acknowledged its policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id.* at §1251(b). A CWA claim is established by proving: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v.* Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). The CWA grants the federal government and private citizens the right to sue polluters when the five requirements are established. However, questions arise when the pollution is not directly added to navigable waters but are added to the governed waters using

groundwater as a conduit. *See, e.g.*, *Hawai'i Wildlife Fund v. Cty. Of Maui*, 881 F.3d 754 (9th Cir. 2018).

Legislative records shed light on Congress's view of whether the CWA governed pollution transmitted from source to navigable waters. Congressional records reflect that Congress considered adopting federal guidelines for regulating groundwater pollution, but the Legislature rejected several bills covering groundwater regulation because "the jurisdiction regarding groundwaters is so complex and varied from State to State." S. Rep. No. 92-414, (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3739.

Additionally, at conception of the Clean Water Act, the acting EPA administrator requested that Congress grant the EPA authority over groundwater. *Water Pollution Control Legislation-1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. On Pub. Works*, 92nd Cong. 230 (1971). The House of Representatives voted to deny the administrator's request to expand the CWA's reach, and as a result, denied federal authorities the ability to regulate groundwater pollution. 118 Cong. Rec. 10669 (1972) (34 in favor, 86 opposed). The legislative history shows that Congress was not ignorant to the connection between navigable waters and groundwater, but Congress left the regulation of groundwater pollution to the states. *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271–72 (5th Cir. 2001). One year after the enactment of the current CWA, the EPA's general counsel unequivocally stated that "the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters, "and clarified that "[d]ischarges into ground waters are not included." *Exxon Corp. v. Train*, 554 F.2d 1310, 1320 n.1 (5th Cir. 1977).

Despite this legislative history, numerous complaints have been filed across the country for pollution of groundwater that eventually, due to an alleged hydrological connection, enters

navigable streams governed by the Clean Water Act. Straying from precedent, the EPA has developed the terminology "direct hydrological connection" to identify for purposes of the CWA whether there is a clear connection between the discharge of a pollutant and navigable waters. *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding* Operations, 66 Fed. Reg. 2960, 3015 (proposed Jan. 12, 2001) [CAFOs Standards]. Three courts of appeals have interpreted the CWA's reach regarding groundwater, and unsurprisingly, a circuit split has arisen between the sister circuits. *See Hawai'i Wildlife Fund,* 881 F.3d at 754; *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).

In *Kentucky Waterways Alliance v. Kentucky Utilities Company*, the Court of Appeals for the Sixth Circuit faced a groundwater issue similar to the one in the present suit. 905 F.3d 925 (6th Cir. 2018). There, the defendant, a utility company, burned coal to produce energy. *Id.* at 927. The company then stored the leftover coal ash in two man-made ponds. *Id.* at 928. The plaintiffs contended that harmful chemicals in the coal ash were contaminating the groundwater, which in turn contaminated a nearby lake. *Id.* The plaintiffs alleged a violation of the Clean Water Act for the pollutants entering the lake from the hydrologically connected groundwater. *Id.* The district court rejected the plaintiff's legal contention that the CWA covers pollution of that sort. *Id.* at 932.

On appeal, the court had to determine whether the hydrological connection theory proffered by the plaintiffs was sufficient to convey standing for a citizen-suit under the CWA. *Id.* Under the theory, groundwater is a medium through which pollutants pass before being discharged into navigable waters. *Id.* at 933. The court ruled that the CWA's text foreclosed any hydrological

connection theory. *Id.* at 934. The Sixth Circuit first found that the CWA's guidelines, or effluent limitations, did not support the suggested theory. *Id.* The CWA defines effluent limitations as restrictions on the amount of pollutants that may be "discharged from point sources *into* navigable waters." *Id.* (citing 33 U.S.C. § 1362(11)). The court found that the term "into" indicated a direct connection or point of entry, and thus, for a point source to discharge into navigable waters, it must dump directly into the waters governed by the CWA. *Id.* The court also noted, "when the pollutants are not coming *from* a point source; they are coming from groundwater, which is a nonpoint-source conveyance. The CWA has no say over that conduct." *Id.*

Conversely, prior to the Sixth Circuit's ruling above, the Fourth Circuit reversed a district court's dismissal of a CWA violation based on an alleged hydrological connection in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d at 645. In *Upstate,* thousands of gallons of gasoline spilled out of a ruptured pipeline and entered the groundwater beneath. *Id.* at 643. The plaintiffs alleged that the pollutants were seeping into navigable waters due to the connected groundwater. The court found that the CWA was not limited to discharges of pollutants directly from a point source to navigable waters. *Id.* at 648.

Considering the decision in *Upstate,* the Sixth Circuit rejected the interpretation in the Fourth Circuit's opinion noting that not requiring a direct connection from the point source to navigable streams would be untenable due to the Resource Conservation & Recovery Act ("RCRA"). *Ky. Waterways All.*, 905 F.3d at 937. "Reading the CWA to cover groundwater pollution due to a direct hydrological connection would upend the existing regulatory framework." *Id.* The court noted the RCRA explicitly exempts any pollution subject to the CWA, and if the court read the CWA to cover pollution via hydrological connections, it would

remove coal ash from RCRA's coverage. *Id.* at 938. Under the RCRA the EPA has issued formal rules that cover coal ash storage and treatment. The court held that finding coal ash with a hydrological connection to navigable water would remove the ponds from coverage under the RCRA, and the court declined to interpret the CWA to nullify the EPA's rules and large portions of the RCRA. *Id.* "Our task is not 'merely [to find] a reasonable interpretation, but the best one.'" *Id.* (quoting *United States v. Zabawa*, 719 F.3d 555, 560 (6th Cir. 2013)).

Similarly, here the pollution is alleged to have contaminated the groundwater under the impoundment operated by ComGen. R. at 5. Like in *Kentucky Waterways*, the alleged pollution is not being dumped directly into waters governed by the Clean Water Act. R. at 5. The pollution, if any, moves from the ash pond into the underlying groundwater, and only after the pollutants travel through the groundwater do they reach Fish Creek and the Vandalia River. R. at 6.

Finding that the CWA also applies to discharges into groundwater that is alleged to be hydrologically connected to surface water would interfere with many laws and regulations and subject parties like ComGen to overlapping, and even contradictory, discharging, operating, monitoring, reporting, and permitting requirements. It also would wholly disregard the obvious intentions of Congress to exclude groundwater from the CWA. Remediation of groundwater is already regulated by multiple state and federal law enforcement regimes. *See* 42 U.S.C. §§ 6901, *et seq.*; 42 U.S.C. §§ 9601, *et seq.* Because this Court's job is to interpret the intention of Congress, given all factors, this Court should find that the proper interpretation of the CWA does not allow for regulating groundwater pollution regardless of any alleged hydrological connection.

## II. THE COAL ASH IMPOUNDMENT DOES NOT CONSTITUTE THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE.

If this Court determines that the Clean Water Act is inapplicable to the contamination of navigable waters when the toxins are introduced via hydrologically connected groundwater, no further inquiry is warranted. However, even if this Court allows liability based on an alleged hydrological connection, ComGen is not liable because the seepage of arsenic from the ash pond does not constitute the discharge of a pollutant from a point source.

The CWA is inapplicable to the facts presented before this Court because the Act restricts regulation to pollutants emerging from a point source. 33 U.S.C. §1311(a). Specifically, the Act prohibits the unauthorized "discharge of any pollutant" into navigable waters. *Id.* Under the CWA, the discharge of a pollutant is defined as the "addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(11). The CWA defines "point source" as "any discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* at §1362(14) (emphasis added); *see also Appalachian Power v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (concluding that "point source" pollution does not include "unchanneled and uncollected surface waters"). At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, conveyance. "Conveyance" is a well-understood term; it requires a channel or medium—*i.e.*, a facility—for the movement of something from one place to another. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018) (citing *Webster's Third New International Dictionary* 499 (1961)).

Despite adopting a broad interpretation of the CWA's jurisdictional reach in *Upstate*, the Fourth Circuit denied an environmental activist group's attempt to place liability on an energy producer in *Sierra Club*. In *Sierra Club*, the defendant, Dominion Energy, harvested energy at its coal-fired power plant in Chesapeake, Virginia. *Id.* at 405. The plant produced coal ash as a by-product of the coal combustion that occurred during energy production. *Id.* Through groundwater monitoring, Dominion Energy detected arsenic in the groundwater in early 2002. *Id.* at 406. The energy producer began a corrective action plan to stop the pollution, but the Sierra Club commenced an action under the citizen-suit provision of the CWA. *Id.* The district court found that rainwater or groundwater were leaching arsenic from the coal ash in the landfill and polluting the groundwater, which carried the arsenic into navigable waters. *Id.* Further, the district court determined that the landfill and settling ponds constituted point sources as defined by the CWA, and because of this finding, the court concluded that Dominion was liable for the pollutants. *Id.*

On appeal, the Fourth Circuit disagreed with the conclusions of the district court. *Id.* The court found that the landfill and ponds were not created to convey the coal ash and did not function in that manner. *Id.* at 411. The court stated that the landfill could not be characterized as a discrete point nor did it function as a conveyance. *Id.* "If no such conveyance produces the discharge at issue, the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater." *Id.* (emphasis supplied). The court held that because the landfills were not point sources as defined in the CWA, the lower court erred. *Id.*

Analogously, the case presented shares many traits as the ash ponds in *Sierra Club*. Both of the energy producers stored the coal ash in the ponds/landfills for the purpose of forever

disposing of the byproducts. R. at 4. Also, ComGen has shown the pollution does not run directly into the navigable waters of Fish Creek and the Vandalia River, only reaching their banks upon dispersion through the intermediary groundwater. R. at 4. Most importantly, the ponds are not methods of conveyance for the arsenic laced coal ash but are its final resting place. R. at 4. ComGen in no way uses the ponds to transport the coal ash, and because of this fact, the landfills are not point sources as contemplated by the CWA.

Faced with the identical issue of whether coal ash pond was a point source, the Sixth Circuit came to the same conclusion in *Kentucky Waterways*. *Ky. Waterways All.*, 905 F.3d at 934 n.8. "Coal ash ponds are not conveyances—they do not 'take or carry [pollutants] from one place to another.'" *Id.* (citing *Convey*, American Heritage Dictionary). The court adopted the reasoning of *Sierra Club*, stating while arsenic from the coal ash stored on the defendant's site was found to have reached navigable waters, that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source. *Id.*

Few courts have found that coal ash ponds can constitute a point source under the definition supplied by the Clean Water Act. Generally, the courts that have found a coal pond to be a point source do so by methods that are often conclusory and lacking any actual support for the damaging assumption. For example, A North Carolina district court held that the byproduct landfills could constitute a point source in *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D.N.C. 2015). The court did so based solely on the allegation they were conveying pollutants. *Id.* The court offered no support for its baseless conclusion, only expressing that the ponds were confined and discrete conveyances. *Id.* The canon of *ejusdem generis* states that "the general term must take its meaning from the specific terms in which it appears." *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 691 F.3d 821, 833 (6th

Cir. 2012). Clearly this statutory cannon of construction applies to the definition of point source. The definition and examples of point sources share the common variable of being methods of transporting chemicals from one place to another. If coal ash ponds were meant to be included in the definition of point source, one would expect other methods to permanently dispose of waste such as incinerators and landfills to also be present. However, as the definition reflects, that is not the situation presented to this Court.

The text, structure, and history of the Clean Water Act show that only discharges from discernable, confined, and discrete conveyances i.e. point sources are actionable under the Act. Plaintiff's attempts to convert an ash pond into a point source are unnecessary to bridge any regulatory gap that would leave coal ash pollution unregulated. As mentioned above, Congress left groundwater regulation to the States. Of note, Congress strengthened the regulation of coal-ash byproducts recently by authorizing the EPA to enforce the standards set out in the RCRA. 42 U.S.C. § 6924(o). Characterizing an ash impoundment as a point source would bring so-called discharges emanating from the pond outside the scope of that rule. *See* 42 U.S.C. § 6903(27) (expressly excluding discharges governed by the CWA's permitting system). These rules in the RCRA were promulgated to regulate facilities just like this one. *See, e.g.*, 80 Fed. Reg. 21,396-97. Stretching the definition of point source to include the diffuse migration of coal combustion residuals through groundwater is reversible error.

## III. ALTERNATIVELY, FERC RIGHTFULLY ISSUED AN ORDER ACCEPTING COMGEN'S FERC FILING UNDER SECTION 205 OF THE FEDERAL POWER ACT TO RECOVER THE COSTS COMGEN WOULD INCUR TO COMPLY WITH THE INJUNCTIVE RELIEF IMPOSED BY THE DISTRICT COURT.

In its FERC filing, ComGen proposed revisions to its' FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement) to recover over a 10-year period the cost of complying with the lower court's order. R. at 8. ComGen estimated

that it would cost $246 million to comply with the District Court's injunctive relief. To cover the cost, ComGen proposed to increase customer bills in each jurisdiction by about $2.15 per month in November 2019, and average households across in each jurisdiction would see bills rise by about $3.30 per month for the 10-year amortization period. R. at 8. Under the FPA, it is part of FERC's duty to declare "unlawful" any rate or charge if it is not "just and reasonable." *Alabama Electric Cooperative, Inc. v. Federal Energy Regulatory Com.*, 684 F.2d 20, 26 (D.C. Cir. 1982). After evidentiary review, FERC approved ComGen's filing, thereby acknowledging that ComGen's increased rates met the "just and reasonable" standard. This Court should to defer to FERC's evaluation, and affirm FERC's order accepting ComGen's proposed rates.

### A. FERC Did Not Act Arbitrarily and Capriciously in Issuing an Order Accepting ComGen's Proposed Rates.

FERC articulated a satisfactory and reasonable decision for issuing an order accepting ComGen's proposed rates. The arbitrary and capricious standard requires that an agency's decision be both reasonable, and reasonably explained. *NorthWestern Corp. v. FERC*, 884 F.3d 1176, 1179 (D.C. Cir. 2018). FERC complied by conducting three days of evidentiary hearings to help form a sound and educated decision about increasing ComGen's utility rates. The evidentiary hearings focused on the limited factual issues and included testimony from both ComGen and SCCRAP. R. at 11. FERC employed its expertise in evaluating complex market conditions and articulated a satisfactory explanation for its ultimate decision without acting arbitrarily or capriciously. If the agency's decision is reasonable and reasonably explained, Courts have historically afforded great deference to FERC in its ultimate decisions. In *FERC v. Electric Power Supply Association*, the Supreme Court of the United States held:

> A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, the court must uphold a rule if the agency has "examined the relevant considerations and articulated a satisfactory

> explanation for its action, including a rational connection between the facts found and the choice made . . . . And nowhere is that more true than in a technical area like electricity rate design.

*FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 685, 782 (2016).

Here, the Court should defer to FERC's evaluation because FERC proved to rely on a prudent examination of relevant factual information. After diligent evidentiary evaluation, FERC concluded that that affirming ComGen's increased rates was necessary to prevent potential constitutional violations and essential in ensuring that utilities can recover in rates the costs of environmental cleanups.

### B. FERC Was Justified in Accepting ComGen's Proposed Rates Because the Rates Were Both Reasonable and Just.

ComGen must prove that its proposed rate increase is both just and reasonable. FERC's decision to approve ComGen's revised rates validates that ComGen met that burden. FERC's primary responsibilities under the FPA are to ensure that the rates, terms and conditions of wholesale electric sales by public utilities are just and reasonable and not unduly discriminatory. 16 U.S.C. § 824(b). As previously mentioned, ComGen's proposal would increase customer bills by about $3.30 per month in average households over 10 years. R. at 8. By increasing its rates, ComGen would recover the cost of complying with the district court order, which is estimated to be $246 million. *Id*. The proposed increase of $3.30 per month does not indicate an "unduly discriminatory" rate to the consumer. On the other hand, it would be unjust and unreasonable to jeopardize the financial integrity of a utility company, especially when there is a longstanding ratemaking principle provided for the ability to recover costs associated with compliance with legal and regulatory requirements in rates. According to the testimony submitted by ComGen in the FERC proceeding, disallowing recovery of all or a substantial portion of the $246 million in remediation costs would effectively undercut ComGen's financial soundness. R. at 10. FERC

agreed, and reasoned that the financial impact of such an outcome would likely raise constitutional violations for ComGen. After weighing the benefits and burdens of increasing the utility rate, FERC recognized the importance and necessity of approving ComGen's rate revisions. As illustrated in their FERC filing, ComGen provides a just and reasonable rate and charge for public utility services without unjust discrimination. ComGen's FERC filing could only have unduly discriminatory affects if it was not approved. Conclusively, FERC was justified in accepting ComGen's proposed rates because the rates were both reasonable and just.

Moreover, increased costs can be just and reasonable if the costs are warranted. 16 U.S.C. § 824(e). In *Advanced Energy Mgmt. All. v. FERC*, this Court explained, "decision-making occurs where the FERC weighs competing views . . . and intelligibly explains the reasons for making that choice." 860 F.3d 656, 659 (D.C. Cir. 2017). This Court further stated that FERC does not have to find net savings, which means FERC can rely on important non-cost reasons for approving ComGen's proposal. *Id.* at 10. That is exactly what FERC did when evaluating the rate increases.

FERC employed a cost-benefit analysis framework in analyzing ComGen's proposal. On one hand, FERC agreed in principle with SCCRAP's argument and found that charging Vandalia Power and Franklin Power with the full remediation costs would represent a "windfall" of sorts to ComGen's shareholders. R. at 11. FERC even concurred that ComGen's shareholders should bear a proportionate share of the remediation costs corresponding to the coal ash accumulated in the Little Green Run Impoundment during the period the Station operated as a merchant plant. R. at 12. However, despite FERC's reservations, it maintained that on balance, ComGen's revised rates were just and reasonable. This Court has maintained that FERC has broad discretion to balance competing concerns when deciding whether a proposed rate is just and reasonable.

*Advanced Energy Mgmt. All.*, 860 F.3d at 659. The Court asserts that if the total effect of the rate order cannot be said to be unjust and unreasonable, then the reviewing court will defer to FERC's finding. *Id.* at 657. Although FERC acknowledged that affirming ComGen's proposed rates might render unjust or unreasonable consequences, the total effect of the increased rate is still just and reasonable. FERC's decision also emphasized as a matter of policy the importance of ensuring that utilities can recover in rates the costs of environmental cleanups to promote environmental protection. R at 12. This Court should defer to FERC's evaluation of the relevant considerations and affirm the judgment.

## IV. SCCRAP'S POSITION IN THE FERC PROCEEDING—TO DISALLOW THE RECOVERY IN RATES OF ALL OR A PORTION OF THE COSTS INCURRED BY COMGEN IN REMEDIATING THE LITTLE GREEN RUN IMPOUNDMENT—IS AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Property rights are embedded within the fabric of our constitution as a fundamental right to which the government must not infringe upon without due process of law and for which just compensation must be owed. The Fifth Amendment provides in pertinent part that: "No person shall be deprived of property without due process of law." U.S. Const. amend. V. The Fourteenth Amendment provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

### A. SCCRAP's Proposal to Deny ComGen of all or 80.5% of the Remediation Costs Is Confiscatory and Deprives ComGen of Rates Sufficient to Yield a Reasonable Return on the Value of Its Property Used During a Time in Which Its Services Are Rendered to the Public.

"Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory,

and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923). "There must be a fair return upon the reasonable value of the property at the time it is being used for the public." *Id.*

In *Bluefield*, plaintiff, a public utility company, furnished water to the inhabitants of Bluefield, West Virginia. *Id*. at 683. The defendant, Public Service Commission of the State, ordered fixed rates to the utility company pursuant to state statutory authority. *Id*. The fixed rates put a cap on the amount on which the company was entitled a return. *Id*. at 684. In determining the rates for plaintiff, the Commission did not consider the fluctuation in value over the years of the utility company. *Id*. at 689. The fixed rate would only allow for the utility company a return of merely 6%. *Id*. at 695. The utility company instituted proceedings to set aside the order alleging the fixed rates deprived them of their property without just compensation and without due process of law congruent with the equal protection clause. *Id*. at 683. The State Supreme Court of West Virginia denied plaintiff's relief and plaintiff brought the case before the United States Supreme Court on a writ of error. *Id*. The United States Supreme Court reversed the order upholding the fixed rates and concurred with the court in *Minnesota Rate Cases*, (1913) 231 U.S. 454 that: "The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." *Id*. at 691. The United States Supreme Court found that a fair and just consideration of the facts were not made in determining the valuation of the utility company's property to accord proper rates and that a "rate of return of 6% upon the value of the property is

substantially too low to constitute just compensation for the use of the property employed to render the service." *Id*. at 695.

Here, as in *Bluefield*, the rates proposed by SCCRAP (3.2% or 3.6% in the alternative) are confiscatory and deprive ComGen of property in violation of the Fourteenth Amendment. As in *Bluefield*, ComGen furnishes an essential utility provided to the inhabitants of a city[s] to benefit the public. Like the public utility company in *Bluefield*, ComGen experienced a fluctuation in costs which lead to an increase in the valuation of its company. Just as in *Bluefield*, ComGen seeks to amend its rates to reflect the cost base of the company to maintain financial integrity and assure confidence in its financial soundness. Although the facts differ slightly from *Bluefield*, the law as applicable in *Bluefield Water* is pertinent to and applicable to the issue raised by ComGen here. In *Bluefield*, the commission fixed rates insufficient to allow the public utility to yield a reasonable return on the value of its property when it was being used to render services. Here, SCCRAP's position in the FERC proceeding—opposing FERC's authorization of ComGen's proposal to recover remediation costs—essentially denies ComGen the ability to yield a just and reasonable return on the value of its property over a 10-year period. Additionally, as in *Bluefield*, SCCRAP only recognized the original cost base and failed or refused to recognize in its proposed rate the fair value of ComGen's property which includes the expenses to rectify the Little Green Run Impoundment.

Upon looking at the facts in the light most favorable to Appellee, SCCRAP, the position taken by SCCRAP in the FERC proceeding is incongruent with the Fifth and Fourteenth Amendments of the United States Constitution and thus constitutes a taking.

### B. SCCRAP's Proposal Wholly Disregards Present Costs to ComGen and Ignores Items Charged by the Utility as Operating Expenses.

ComGen may have a fair return on its property consistent with a reasonable value at the time in which it is being used for the public. As the United States Supreme Court explained:

> It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. . . . The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

*Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Com*., 262 U.S. 276, 287–89 (1923).

In that case, appellant, Southwestern, adjusted its rates for services with the Postmaster General increasing charges for installation and moving instruments. *Id*. at 282. appellee, Public Service Commission of Missouri (Commission), conducted a hearing with Southwestern to determine why the rates as fixed by the Postmaster General should be continued. *Id*. Southwestern produced sufficient evidence that the current valuation of its property was consistent with maintaining these rates. *Id*. However, the Commission in its own evaluation of the property accorded no weight to the enhanced costs of maintaining business. *Id*. at 287. Upon conclusion of the hearing the Commission ordered Southwestern to reduce its service rates and discontinue charges. *Id*. at 282.

The State Supreme Court upheld the Commission's orders. On appeal, the United States Supreme Court reversed the judgment upholding the Commission's order holding that Southwestern may have a fair return upon the reasonable value of its property when it was being used for the public. *Id*. at 287. The Court noted the Commission failed to consider increased

costs since the date of purchase and that value is to be placed on property with the time of rate inquiry. *Id*.

Here, like *Southwestern*, ComGen, a utility provider, adjusted its rates to reflect its present costs to ensure a fair return upon the property which it dedicates to public service. Just as the Commissioner in *Southwestern*, SCCRAP seeks to significantly decrease or abolish ComGen's FERC approved rates. The rates approved by the FERC allocate ComGen's costs in a manner consistent with keeping a harmonious balance between the ratepayers and shareholders. Although there is sufficient evidence that ComGen's cost to maintain and continue business has increased significantly, SCCRAP declines to accord any weight to the present costs, just as the Commission failed to do in *Southwestern*. ComGen, like *Southwestern*, may have a fair return upon the reasonable value of its property.

SCCRAP's proposal excluding ComGen's present costs is confiscatory in nature and denies ComGen the right to receive a fair return on its property. SCCRAP's position in the FERC hearing thus amounts to a taking inconsistent with the Fifth and Fourteenth Amendments of the United States Constitution.

## CONCLUSION

This Court should REVERSE the judgment of the district court be reversed. Alternatively, this Court should AFFIRM the decision of the Federal Energy Regulatory Commission.

Respectfully submitted,

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TEAM 14
ATTORNEYS FOR INTERVENOR

## Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company 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 5, 2018.

Respectfully submitted,

*Team No. 14*