C.A. No. 18-02345

In the United States Court of Appeals for the District of
Columbia Circuit

Commonwealth Generating Company,
Appellant,

v.

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

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

v.

Federal Energy Regulatory Commission,
Respondent,
Commonwealth Generating Company
Intervenor.

On Appeal from the U.S. District Court for the District of Columbia: D.C. No. 17-01985

On Appeal from the Federal Energy Regulatory Commission: Docket ER-18-263-000

Brief for Appellee/Petitioner Stop Coal Combustion Residual Ash Ponds

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Team #16
Counsel for Appellee/Petitioner

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Jurisdictional Statement

This appeal is consolidated from the judgment in two cases involving the same parties and factual circumstances. The parties are Stop Coal Combustion Residual Ash Ponds (SCCRAP) and Commonwealth Generating Company (ComGen).

D.C. No. 17-01985 culminated in an order by the United States District Court for the District of Columbia granting SCCRAP's request for an injunction against ComGen. The district court had jurisdiction pursuant to 33 U.S.C. § 1365(a), which grants citizens a private cause of action under the Clean Water Act. This Court would have jurisdiction on appeal pursuant to 28 U.S.C § 1291; however, ComGen filed the appeal on July 16, 2018, which is 31 days after the District Court issued its order on June 15, 2018. ComGen's appeal is consequently not timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Nonetheless, SCCRAP's argument as appellee is given below.

Docket ER-18-263-000 is an order by the Federal Energy Regulatory Commission denying a rehearing of an Order Accepting Commonwealth Generating Company's Revised Rate Schedules (Docket ER-18-263-000). This Court has jurisdiction over the appeal pursuant to 16 U.S.C § 825l(b), because Commonwealth Generating Company is located within the District of Columbia Circuit.

Statement of the Issues Presented

1. Under the Clean Water Act, did the U.S. District Court for the District of Columbia correctly decide that discharge of pollutants from a coal ash pond into navigable waters via hydrologically connected groundwater violated federal statutory law?

2. Under the Clean Water Act, did the U.S. District Court for the District of Columbia correctly decide that the Little Green Run Impoundment is a point source regulated by the Act, when arsenic was found to have reached navigable waters by leaching from the Impoundment?

3. Under the process-oriented "hard look" method of reviewing agency action, did FERC employ reasoned decision-making based upon substantial evidence in the record when approving ComGen's rate adjustment proposal, and did FERC clearly articulate a rational connection between the facts and the choice it made when explaining its decision?

4. Is it an unconstitutional taking under the Fifth and Fourteenth Amendments for FERC to require ComGen to bear the consequences of arsenic seepage from the Little Green Run Impoundment by disallowing recovery through rate adjustment of all or some of the costs associated with remediating the impoundment?

Statement of the Case

As early as 2002, the poisonous element arsenic was detected in Vandalia's groundwater near the coal ash disposal site Little Green Run Impoundment. (R. 5.) Commonwealth Generating Company (ComGen) is the operator of the Vandalia Generating Station whose coal combustion residuals, *i.e.*, coal ash, is disposed in the Little Green Run Impoundment (R. 3-4). ComGen ostensibly attempted to remedy the pollution problem in 2006. (R. 5.) However, in 2017 there were high levels of arsenic in the Vandalia River, which, along with Fish Creek, is fed by and feeds into the groundwater around the Little Green Run Impoundment. (R. 5-6.) A number of local citizens who feel directly affected by this pollution have membership in Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP), a national environmental and public interest organization. (R. 5.) SCCRAP brought a citizen suit against ComGen under the Clean Water Act in December 2017, asking the court to hold ComGen accountable for violating the Act by discharging a pollutant into navigable waters. (R. 7.)

This case is a consolidation of two appeals to the United States Court of Appeals for the District of Columbia. The appeals come to this Court from two different proceedings that share the factual background of arsenic seeping into the groundwater from the Little Green Run Impoundment due to an improperly welded liner installed in 2006. (R. 6.) ComGen stated that the seepage only occurred at times of heavy rainfall. *Id*. Nevertheless, the contaminated groundwater in turn polluted the waters of Fish Creek and Vandalia River. *Id*.

The Little Green Run Impoundment east of the Vandalia Generating Station was formed by the construction of a dam. (R. 4.) ComGen uses the impoundment to dispose of coal combustion residuals (CCRs) containing potential pollutants such as mercury, cadmium, and arsenic. (R. 3.)

SCCRAP brought suit against ComGen in the U.S. District Court for the District of Columbia. The District Court found as fact that arsenic was reaching the nearby Fish Creek and Vandalia River because of the arsenic seeping from the coal ash of the Little Green Run Impoundment into the groundwater and on into Fish Creek and Vandalia River through their hydrological connection to the groundwater. (R. 7-8.) The court accordingly found ComGen liable for violating the Clean Water Act. *Id*. The violation fell under § 1311(a) of the Act, which prohibits unauthorized discharging of pollutants into navigable waters. (R. 7.) The court ordered ComGen to address and remediate the pollution problem it was causing by excavating and relocating the Little Green Run Impoundment to a fully lined facility. (R. 8.)

The first of the consolidated appeals is ComGen's challenge to the District Court's decision, on the theory that discharging pollutants into navigable waters through hydrologically connected groundwater is not covered by the Clean Water Act. (R. 8.) ComGen also challenges the court's inclusion of the Little Green Run Impoundment as a "point source" of pollution under the Act. *Id*. The appeal was filed on July 16, 2018, 31 days after the order was entered by the court on June 15, 2018. (R. 7-8.)

At the same time that ComGen appealed the District Court's decision, it also submitted a request to the Federal Energy Regulatory Commission, asking to revise its rates so as to recover the cost of complying with the District Court's order from Vandalia Power and Franklin Power. (R. 8.) The recovery from Vandalia Power and Franklin power would be based on the unit power service agreements between them and ComGen, with fifty percent of the cost allocated to each. *Id*. SCCRAP intervened in that proceeding, asserting that utility consumers should not have to pay for ComGen's negligence. (R.9) Rather, SCCRAP asserts that the shareholders who share the proceeds when ComGen is successful should face the consequences of ComGen's choices

and actions here. (R. 10.) ComGen, in response, posited that being required to bear the burden of their actions, as SCCRAP urges, would threaten ComGen's financial stability to the point of being an unconstitutional taking under the Fifth and Fourteenth Amendments. (R. 10.)

FERC approved ComGen's proposed rate revision, albeit with minor adjustments taking into account the arguments set forth by SCCRAP. (R. 11.) SCCRAP sought and was denied a rehearing. (R. 12). The second case in this consolidated appeal is SCCRAP's appeal for judicial review by this Court of the FERC decision. (R. 12.) SCCRAP, ComGen, and FERC jointly moved to have the actions consolidated. (R. 12.)

Summary of the Argument

For all four legal questions presented, this Court should find in favor of SCCRAP for the following reasons:

First, because the primary goal of the Clean Water Act (the "Act") is to "restore and maintain the . . . integrity of the nation's waters," and surface waters (including navigable waterways) receive significant flows from groundwater, pollution coming from hydrologically connected groundwater is actionable under the Act. Although the Act does not include groundwater in the definition of "navigable water," courts have held that if a direct connection between groundwater and navigable waters exist, plaintiffs are entitled to bring a claim under the Act. Furthermore, polluters should not be allowed to subvert the intent of Congress in drafting the act by polluting groundwater directly rather than surface water, thereby avoiding the regulation on a technicality when a hydrologic connection will eventually lead to the navigable waters being polluted from the point source via the groundwater.

Second, the seepage of arsenic from the coal ash pond constitutes the discharge of a pollutant from a "point source" as defined by the Act, and therefore violates § 402. The term "point source" means any discernible, confined and discrete conveyance." 33 U.S.C § 1362(14). The Act goes on to set forth a non-exhaustive list of examples: "including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." The language "including, but not limited to" would indicate that a coal ash pond that is generating pollutants should be considered along with the other examples. Furthermore, the Act notes only two exceptions, asserting that the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." Considering that the Little Green Run Impoundment is not an agricultural facility, it cannot be included in the list of exclusions, and should be considered a point source for pollutants and therefore regulable.

Third, FERCs decision to approve the revised rate schedule was arbitrary and capricious, because (1) ComGen failed to properly monitor the effectiveness of the corrective action during the 2006-2017 period, (2) the terms of ComGen's proposal violated the matching principle of utility ratemaking, and (3) authorizing ComGen's proposal would represent a windfall to ComGen's shareholders that ComGen should itself bear. In each of these instances, FERC failed to form a rational connection between the facts found and the choice made, *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962), and instead violated the relationship between benefits and burdens, unfairly placing additional costs on customers.

Finally, SCCRAP's position to disallow recovery in rates does not rise to an unconstitutional taking, because under the police power the state may regulate health and safety. And since the governmental land-use regulations do not deny the shareholders any economically

viable use, they should not be deemed a taking of the affected property. Furthermore, since "retroactive ratemaking" is generally unallowable under law, and FERC's decision to allow ComGen to adjust the rate schedule to charge current customers for costs incurred for past operations represents retroactive ratemaking, it should be prohibited.

Argument

I. THE CLEAN WATER ACT REGULATES DISCHARGE OF POLLUTANTS SUCH AS ARSENIC INTO NAVIGABLE WATERS VIA HYDROLOGICALLY CONNECTED GROUNDWATER, BECAUSE THIS COMPORTS WITH THE PURPOSES OF THE CLEAN WATER ACT.

This Court should support the goals of the Clean Water Act by making accountable those who pollute any navigable waters of the United States by contaminating the groundwater that is hydrologically connected to such waters. Skirting the Clean Water Act by claiming one did not pollute navigable waters, when the effect of polluting hydrologically connected groundwater is the same, should not be tolerated.

Questions of statutory interpretation are reviewed *de novo* by this Court. *U.S. v. Cordova*, 806 F.3d 1085, 1098 (D.C. Cir. 2015).

Congress has declared that a main purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Congress has expressed a desire not only to clean polluted waters but also to maintain the cleanliness of unpolluted waters and waters that, although once polluted, have been cleansed and restored. To that end, Congress included in the Clean Water Act a mandate for a "major research and demonstration effort . . . to eliminate the discharge of pollutants into the navigable waters . . . ." *Id*. The choice of words here is instructive. The intent was not merely to reduce the discharge of pollutants into the nation's waters, but to eliminate it entirely. Therefore, any

discharge of a pollutant into navigable waters, directly or indirectly, falls under the censure of the Act.

Although groundwater itself is not included in the definition of "navigable waters" under the Clean Water Act, *see Rapanos v. United States*, 547 U.S. 715, 732-34 (2006), the Act would lose effect if entities could escape liability by polluting navigable waters indirectly through groundwater rather than through direct dumping. The U.S. Geological Survey has noted that groundwater is "an important source of surface water." W.M. ALLEY, ET AL., U.S. GEOLOGICAL SURVEY CIRCULAR 1186, https://pubs.usgs.gov/circ/circ1186/html/gen_facts.html. Furthermore, groundwater has its own flow paths, which it moves along until it ultimately "discharges" into waters such as rivers, streams, and so forth. *Id*. In fact, the USGS estimates that the contribution from groundwater to all U.S. streamflow "may be as large as 40 percent." *Id*. The USGS notes further that groundwater also constitutes "a major source of water to lakes and wetlands." *Id*.

Accordingly, a "direct hydrological connection between ground water and navigable waters" states a claim for pollutant discharge into groundwater under the Clean Water Act. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018). In *Upstate*, conservation groups brought a citizen suit under the Clean Water Act after a gasoline pipeline burst in South Carolina. *Id*. at 638. Hundreds of thousands of gallons of gasoline had spilled from the ruptured pipeline and seeped into nearby waterways through the groundwater. *Id*. The Fourth Circuit held that a plaintiff alleging a "direct hydrological connection between ground water and navigable waters," through which a discharged pollutant travels, may state a claim under the Clean Water Act. *Id*. at 651. *See also Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir.

2005); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F.Supp.3d 428 (M.D.N.C. 2015).

Although it is true that some other courts have held that discharging pollutants into groundwater does not fall under the regulatory rubric of the Clean Water Act, facts in those circumstances were distinguishable. See, e.g., *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). In *Village*, the action was to stop construction of a Target warehouse near the village. *Id*. at 963. The warehouse had a retention pond and the objectors feared pollution would leach into the groundwater. *Id*. The court in *Village* looked to the reasoning in *Exxon Corp. v. Train*, in which the Environment Protection Agency's ability to regulate waste disposal into deep wells was considered. 554 F.2d 1310, 1312 (5th Cir. 1977). However, "[t]he Seventh Circuit relied on the reasoning of *Exxon* . . . but it made no comment on the *Exxon* court's caveat that its reasoning was only intended to apply to *isolated* groundwater." Thomas L. Casey, Comment, *Reevaluating "Isolated Waters": Is Hydrologically Connected Groundwater "Navigable Water" Under the Clean Water Act?*, 54 Ala. L. Rev. 159, 161 (2002) (emphasis added). Isolated groundwater cannot affect the "navigable waters" that fall under the Act. And because isolated patches of groundwater are also not navigable waters themselves, it is reasonable to recognize that they do not fall within the regulatory scope of the Clean Water Act. This should not affect the analysis of hydrologically connected groundwater, which cannot be contaminated without the contamination reaching the navigable waters the Act was promulgated to protect.

And although a somewhat dismissive attitude toward hydrologic connection seems to be found in the decision in *Rapanos*, that was in the context of defining whether wetlands were included in the definition of "navigable waters." 547 U.S. at 716. The Court was reasonable in

determining that a hydrological connection does not equate to wetlands being "adjacent" to open "waters of the United States." *Id.* at 716-717. This is a separate question from the pollution of navigable waters via hydrologically connected groundwater, the allowance of which would nullify much of the effectiveness of the Clean Water Act.

The pollution of Fish Creek and Vandalia River by arsenic was a violation of the "chemical, physical, and biological integrity" of U.S. water. It is a matter of fact before this Court that the Little Green Run Impoundment leached arsenic that reached the nearby creek and river via the groundwater. (R. 8.) The discharge of the pollutant came from the impoundment due to the improperly welded seam of its liner. (R. 6.) Because the Clean Water Act seeks to entirely eliminate the discharge of pollution into the nation's waters, allowing ComGen to evade responsibility for actions that effectively discharged arsenic into nearby navigable waters would violate the Act. Accordingly, this Court should hold that the pollution of Fish Creek and Vandalia River traceable to ComGen's Little Green Run Impoundment was actionable.

The surface water of Fish Creek and Vandalia River is inextricably tied with the groundwater that feeds and is fed by it. By polluting the groundwater that is hydrologically connected to the creek and river, ComGen effectively dumped the pollution generated by its plant into those waters. And since Fish Creek and Vandalia River are navigable waters regulated by the Clean Water Act, ComGen violated the Act by discharging arsenic into those waters. Irrespective of the route the arsenic took to reach the creek and river, the end result is the same, and is expressly against the purpose of the Act. This is so even though groundwater and navigable waters can be conceptualized as distinct. Pollution via hydrologically connected groundwater thus falls under the authority of the Act, because groundwater is wedded to and an extension of the surface water to which it is hydrologically connected.

As with the spilled gasoline in *Upstate Forever*, the arsenic contaminating Fish Creek and Vandalia River has moved through hydrologically connected groundwater to reach the open waters at issue. Although leached arsenic is not as obvious as hundreds of thousands of gallons of gasoline, the pollutant is harmful to waters, and therefore people, that were meant to be protected by the Clean Water Act. Ignoring more subtle methods of contaminating our national waters will leave the Act without force. If the Act cannot be leveraged by concerned citizenry because of a technicality, there will be no incentive for actors in this field to "play by the rules" and control their discharge or properly obtain a permit, leaving any demand for accountability of potential pollutant dischargers without teeth. Circuits such as the Fourth Circuit have recognized the logical importance of tracing contamination back to the actor that caused it, regardless of whether the contamination happened via direct dumping or dumping into hydrologically connected groundwater. Therefore, this Court should be persuaded by decisions such as that in *Upstate Forever*, and hold that the discharge of arsenic from the Little Green Run Impoundment via the hydrologically connected groundwater is grounds for a claim under the Clean Water Act.

Unlike *Exxon* as cited by the Seventh Circuit in *Village*, the groundwater at issue here is not isolated. Thus, the reasoning of the Seventh Circuit is at odds with the facts of the present situation. While isolated groundwater falls under neither the language nor the purpose of the Clean Water Act, hydrologically connected groundwater is not truly distinct from the bodies of water it affects. Just as one would not claim that the portion of an iceberg hidden beneath the water is not truly part of the iceberg, hydrologically connected groundwater should not be understood as factually separate from the more visible water to which it is connected. Pollution in groundwater that is hydrologically connected to regulated bodies of water will inevitably end

up in those regulated bodies of water. Therefore, this Court should hold that pollution of navigable waters via hydrologically connected groundwater is actionable.

Furthermore, the concern in the present case is different from that discussed in the *Rapanos* decision. There is no claim about wetlands here. There is no debate regarding the definition of "navigable waters" here. Fish Creek and Vandalia River are uncontested examples of navigable water, and, unlike in *Rapanos*, it is the actual pollution of open waters through the hydrologically connected groundwater, not the regulation of wetlands, which is at issue. The definition of a wetland and the difficult question of where wetlands fall under the Act, especially when it is debatable whether they affect open waters, is a separate question from the issue of pollution traveling to navigable waters through the hydrologically connected groundwater. It is not the issue before court. The difficulty in defining wetlands seen in *Rapanos* should not have an adverse effect on the protection of creeks and rivers that fall under the Clean Water Act.

Therefore, this Court should ensure the continuing effectiveness of the Clean Water Act by holding that polluting Fish Creek and Vandalia River with arsenic via hydrologically connected groundwater is a violation of the Act.

II. THE COURT SHOULD HOLD THAT THE LITTLE GREEN RUN IMPOUNDMENT IS A "POINT SOURCE" ACCORDING TO THE CLEAN WATER ACT, BECAUSE OF THE LANGUAGE OF THE ACT ITSELF AND TO PROTECT THE ABILITY OF THE ACT TO EFFECTUATE ITS PURPOSE.

This court should uphold the District Court's decision that the Little Green Run Impoundment is a "point source" under the Clean Water Act. And therefore, by leaching arsenic into the Vandalia river from the impoundment, ComGen is discharging a pollutant into navigable waters without a permit, in violation of section 402 of the Act.

The Clean Water Act forbids any discharging of pollutants unless the responsible entity obtains a permit. 33 U.S.C §§ 1311(a), 1342. The Supreme Court has recognized that Congress in passing the Clean Water Act intended to assert broad federal authority toward the goal of protecting the nation's water. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985). To that end, the Court noted Congress's assertion that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Id.* at 133, citations omitted. In *Riverside*, the Court was considering the definition of "navigable waters" when considering whether the filling of wetlands without permission from the Army Corps of Engineers was a violation of the Act. *Id*. at 121. The Court, in deferring to the construction of the term by the Corps, was looking to the greater purpose and point of the Act. *Id*. at 132. While it is true that in the later plurality opinion of *Rapanos* the Court gave limits to the definition of "navigable waters," the Court did not repudiate its decision in *Riverside* and continued to recognize that terms used in the Clean Water Act may have meanings that conflict with their ordinarily understood definitions. 547 U.S. at 731.

According to the language of the Clean Water Act, "the term 'point source' means any discernible, confined and discrete conveyance." 33 U.S.C § 1362(14). The Act goes on to set forth a non-exhaustive list of examples: "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*. The Act notes only two exceptions, asserting that the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id*.

The principle of *noscitur a sociis* indicates that "a word is known by the company it keeps." *Yates v. U.S.*, 135 S.Ct. 1074, 1085 (2015). Therefore, words included in a list

exemplifying a certain term will illuminate the more precise meaning of the term in that particular context. *U.S. v. Williams*, 553 U.S. 285, 294 (2008). In Williams, the Court came to a conclusion about the proper definitions to assign to the words "promotes" and "presents" by examining the words they were listed with. The Court decided that "'[p]romotes,' in a list that includes 'solicits,' 'distributes,' and 'advertises,' is most sensibly read to mean the act of recommending. . . ." *Id.*

Accordingly, the D.C. Circuit has previously acknowledged that, despite use of the word "conveyance" in the definition, which ordinarily may connote something mobile, a point source nevertheless can be geographically fixed and stationary. *American Frozen Food Institute v. Train*, 539 F.2d 107, 116 (D.C. Cir. 1976). The court discussed the requirement of using the "best available technology" to limit effluents from point sources under the Clean Water Act, and expressly interpreted "new plant construction" as "new point sources."

ComGen has allowed the discharge of pollutants without obtaining a permit. ComGen's statement regarding seepage occurring when there is heavy rain indicates that it was aware of the discharge, and yet did not take steps to come into compliance with the Clean Water Act. (R. 6.) Similar to the definition of "navigable waters" in the Supreme Court's decision in *Riverside*, the definition of "point source" in the present case deserves to be defined such that the purpose of the Act is not thwarted, but given effect. Although the word "conveyance" may, in ordinary parlance, suggest something that actively transports, the definition here encompasses more than the traditional understanding in order to fully control pollutants at their source. Like the broad definition given by the Court in *Riverside*, this more extended definition better supports the purposes of the Act than the narrower, everyday meaning. And because the source of the arsenic is known to be the Little Green Run Impoundment (R. 8.), this court should support the purposes

of the Act by recognizing the impoundment as a point source that should be regulated to disallow discharging pollutants without a permit.

Moreover, the definition of "point source" in the Clean Water Act on its face discourages a reading that follows the more traditional sense of the word "conveyance." The Act includes in its list of examples of conveyances a "concentrated animal feeding operation." Concentrated animal feeding operations are stationary facilities, just as the Little Green Run Impoundment is a stationary, geographically fixed facility.

Accordingly, as in Williams, the principle of *noscitur a sociis* should be applied here, leading to the inclusion of the Little Green Run Impoundment as a "conveyance" and thus a "point source" under the Clean Water Act.

Furthermore, the decision in *American Frozen Food* shows that this court has previously held that fixed structures—plants—are point sources under the Clean Water Act despite the use of the word "conveyance" in the definition. In that decision, this Court noted the important requirement for employing the best technology to prevent point sources from discharging pollutants that would end up contaminating regulated waters. This relates directly to the situation with the Little Green Run Impoundment in the case at bar. Since a faulty welding job and lining at Little Green Run Impoundment led to a leak and seepage that was not dealt with for years (R. 7-8), this Court should acknowledge that the best possible technology was not employed there. Consequently, the discharge of pollution from the point source, *i.e.*, the Little Green Run Impoundment, without a permit violates the Clean Water Act.

III. THIS COURT SHOULD REVERSE FERC'S DECISION TO APPROVE COMGEN'S REVISED RATE SCHEDULES AS ARBITRARY AND CAPRICIOUS, BECAUSE THE AGENCY WEIGHTED NON-COST FACTORS TOO HEAVILY IN ITS DECISION AND DID NOT FULLY ACCOUNT FOR THE DELETERIOUS EFFECTS OF ITS DECISION ON ENVIRONMENTAL PROTECTION EFFORTS.

"As an administrative agency, FERC is subject to the constraints of the Administrative Procedure Act and consequently is forbidden from acting in a way that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815 (D.C. Cir. 1998). When reviewing agency action under the arbitrary and capricious standard, courts are to review whether the Commission examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962). Agency action is set aside as arbitrary and capricious when the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm.*, 463 U.S. 29, 43 (1983). "FERC bears the burden of explaining the reasonableness of any departure from a long-standing practice, and any facts underlying its explanation must be supported by substantial evidence." *Pub. Serv. Comm'n of New York v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987). Although judicial review of FERC's ratemaking determinations is "highly deferential," *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994), courts only defer to the Commission's decision if the record demonstrates that it "made a reasoned decision based upon substantial evidence in the record[.]" *Id.* Furthermore, the path of [the Commission's] reasoning must be clear." *Id.* at 182.

A. The Commission erred by offering an explanation for its decision that runs counter to the evidence before it.

The Commission's decision to authorize ComGen's proposed rate adjustment plan is not merely unsupported by substantial evidence contained in the record—the decision is thoroughly *contradicted* by substantial evidence found in the record. Among the Commission's findings that contradicted its decision are (1) that ComGen failed to properly monitor the effectiveness of the corrective action during the 2006-2017 period; (2) that the terms of ComGen's proposal violated the matching principle of utility ratemaking; and (3) that authorizing ComGen's proposal would represent a windfall to ComGen's shareholders and that ComGen should thus itself bear a proportionate share of the remediation costs.

In spite of these official findings and its statutory mandate to ensure rates are "just and reasonable," the Commission nevertheless approved ComGen's plan. The Commission put forth two reasons purporting to justify its decision: (A) the Commission feared rejecting the proposal could possibly jeopardize ComGen's financial integrity, and (B) the Commission believed it important to promote environmental protection. Neither reason stems from the Commission's congressional mandate to ensure rates are just and reasonable.

(A) Fears of jeopardizing ComGen's financial integrity

This Court has interpreted the statutory phrase "just and reasonable" as meaning "rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital." *ExxonMobil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) (emphasis added).

Acknowledging that this definition merely "begs the question of which costs are "proper[,]" this Court in *ExxonMobil* helped to clarify that financial losses that create negative externalities for partners constitute a "proper cost" from which a company could appropriately

seek recovery via a revised rate proposal. *Id.* at 951–53. In *ExxonMobil*, the Commission found it "just and reasonable" to grant a company which operated petroleum-transporting pipelines an income tax allowance on the rationale that the company's partners had "incurred actual or potential tax liability on their distributive share of the partnership income." *Id.* at 951. This Court on review upheld the Commission's determination, implicitly finding that a public utility's desire to compensate for the unfair losses incurred by contractual partners constitutes a "proper cost" justifying revised rates. *Id.* at 953.

ExxonMobile does not support the conclusion that ComGen's proposal in the case at bar represents a "proper cost." Whereas the company in ExxonMobil sought approval to adjust its rate schedule in order to provide equitable compensation for its contractual partners, ComGen sought FERC approval of a revised rate plan which shifts remediation costs stemming from its own violation of federal law on to its contracted partners—Vandalia Power and Franklin Power. Seeking to alter the rate schedule in order to divert the severe costs of remedying one's own violation of environmental regulations onto one's contractual partners is surely not a "proper cost" given that the Commission itself expressly determined that approving ComGen's proposed rate changes would violate the "matching principle" of utility ratemaking, a principle which preserves the relationship between benefits and burdens.

Moreover, the Commission's failure to independently verify ComGen's financial claim is itself grounds for remand. See *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007). Although the unit power service agreements entered into by ComGen and Vandalia and Franklin Power allocates the costs of achieving compliance with the district court order entirely between the latter two entities, "[t]he bare fact that the agreements set compensation at a percentage of fixed or variable costs does not support the conclusion that the rates contained in

the agreements are just and reasonable when the Commission lacks data concerning the generators' costs." *Id.*. The court in *NSTAR* thus remanded the case because the Commission merely relied on the utility's purported financial status in finding its proposal "just and reasonable," a proposition whose only supporting evidence was the utility's say-so. The lack of any "effective monitoring by the Commission itself in the form of independent review of cost data[]" proved dispositive of the issue. *Id.*

The circumstances are precisely the same here, as the record shows that the Commission merely relied on ComGen's word that anything less than an approval could possibly spell its financial ruin, and thus approved the proposal without investigating the veracity of ComGen's claims.

(B) Policy of promoting environmental protection

Even were it proper for the Commission to consider factors outside the scope of its congressional authorization, the Commission's justification that approving ComGen's proposal helps promote environmental protection is still legally insufficient, as the Commission in the record failed to connect or explain how ensuring utilities recover costs of environmental cleanup promotes environmental protection. See *State Farm*, 463 U.S. at 43 (1983).

In *NEPCO v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), the court reviewed a decision by the commission to allocate consolidated tax savings to shareholders of a company engaged in exploration and development investments, which was premised on the commission's belief that there existed a need to encourage such investments. The court found remand to be necessary, however, because there was nothing in the record indicating that the tax savings allocated were

generated by such investments, “or that allocation of those savings to shareholders would produce such investments.” *Id.* at 1348.

Likewise, the Commission’s failure in the case at bar to provide any evidence or explanation for how approving ComGen’s proposal promoted environmental protection also requires the court to reverse and remand for further agency consideration.

B. <u>The Commission erred by relying on factors which Congress had not intended for it to consider.</u>

(A) Consideration of the importance of promoting environmental protection

The Commission justified ComGen’s proposed rate plan on the policy ground that such would be in harmony with the policy of promoting environmental protection. It reasoned that utilities tasked with environmental cleanup projects should be able to recover their costs, and that enabling utilities to recover the costs of environmental cleanup would help achieve that end.

The Commission acted in an arbitrary and capricious manner inasmuch as it justified its decision on the grounds that it would help promote environmental protection, a consideration clearly outside the scope of its congressional mandate to make ratemaking decisions which are “just and reasonable.” *See State Farm*, 463 U.S. at 43.

Although in some circumstances the Commission may properly consider non-cost factors when making a ratemaking determination, such factors cannot alone sustain an agency’s decision, and “it is doubtful that non-cost factors can sustain a decision by [the Commission] which is unsupported by sound cost data.” *Consumers Union of U. S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 660 (D.C. Cir. 1974). Moreover, “reliance on non-cost factors has been endorsed by the courts primarily in recognition of the need to stimulate new supplies of natural gas in interstate commerce.” *Id.* ComGen’s rate proposal was, obviously, not motivated by a

need to produce new sources of electricity, and the Commission's focus on non-cost factors like environmental protection is an arbitrary and capricious deviation from its congressional mandate.

(B) Considerations of possible future takings claim

The legal deficiency of the Commission's decision-making process is further shown by the fact that it also based its decision to authorize the proposal on a concern for avoiding hypothetical litigation from a potential ComGen constitutional challenge. Rather than simply following its statutory command by authorizing only those rate plans which are just and reasonable, FERC instead based its determination on a desire to avoid the speculative problem of a potential Fifth Amendment takings challenge brought against them by ComGen. There is not one line in the record that shows any attempt by the Commission to connect its desire to avoid future litigation with its statutory obligation to ensure rate plans are just and reasonable.

ComGen speculated that a disapproval of their proposal could *possibly* lead to their financial demise, which could then *potentially* give rise to a Fifth Amendment taking issue.

The Commission found persuasive ComGen's argument that, if it didn't grant its request for an adjusted rate plan, then ComGen could *possibly* face the threat of going under in subsequent years (due to the self-inflicted costs incurred from violating federal law), and that if this turned out to be the case, ComGen *might* consider bringing a Fifth Amendment takings claim, which in turn *might* result in the Commission being found to have violated the Constitution. Simply put, the causal chain which the Commission relied upon is linked together by speculative consideration upon speculative consideration. Congress authorized the Commission to utilize its expertise and experience in ratemaking to ensure that all rates are just and reasonable; Congress did not intend for the Commission to consult its crystal ball or

undertake a Fifth Amendment regulatory takings analysis when considering whether rates are just and reasonable.

The Commission's decision to authorize ComGen's proposal was arbitrary and capricious because it based its decision on a policy consideration nowhere found in the organic statute, and on fears about a speculative constitutional challenge, rather than whether the increase would be just and reasonable.

C. The Commission entirely failed to consider the deleterious effects its decision may have on environmental protection efforts.

The Commission has failed to consider that its decision will have the opposite intended effect of discouraging environmental protection.

The reason ComGen is tasked with an environmental cleanup project is because it was found to have been negligent in ensuring that its facilities met the safety standards required by federal law. ComGen thus sought to avoid having to bear the heavy remediation cost by shifting it upon its contractual partners. The Commission approved ComGen's adjustment proposal on the theory that utilities must be ensured that they can recover the cost of environmental cleanup because of the importance of promoting environmental protection. However, the Commission appears to have completely failed to consider the incentives that such a determination fosters.

The approval of ComGen's proposal signals to similarly situated entities that they need not be vigilant in ensuring that they are complying with environmental standards, for they will be able to recover any environmental cleanup costs imposed on them through adjusted rates guaranteed by the Commission. This essentially grants those who fail to meet environmental standards a get-out-of-jail-free card that removes the deterrent effect of those regulations.

For the above reasons, this Court should overturn the FERC decision and grant a new hearing to consider the matter through the proper analytical scope.

IV. SCRRAP'S POSITION TO DISALLOW RECOVERY IN RATES FOR ENVIRONMENTAL REMEDIATION IS NOT AN UNCONSTITUTIONAL TAKING, BECAUSE THE GOVERNMENT MAY REGULATE UTILITIES TO PROTECT THE HEALTH AND WELFARE OF THE PUBLIC, SO LONG AS THIS IS NOT DONE IN AN ARBITRARY OR CAPRICIOUS WAY.

A. ComGen shareholders have received both substantive and procedural due process, therefore there is no unconstitutional taking.

Both the Fifth and Fourteenth Amendments to the United States Constitution carry a guarantee that individuals cannot be deprived of life, liberty, or property without due process of law. The Fifth Amendment declares "nor shall any person . . . be deprived of life, liberty or property without due process of law." U.S. Const. amend. V, § 1. In a similar fashion, the Fourteenth Amendment also states that "[n]o 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 law." U.S. Const. amend. XIV, § 1.

The question then becomes what types of state action constitutes "due process." When determining whether a person (or corporation) has received due process, courts generally look to two factors: the first is procedural due process, and the second is substantive due process. In either case, the standard that has been set by the Supreme Court is the consideration as to whether the takings decision is "arbitrary and unreasonable." The issue of regulatory takings arises from the interaction between exercise of the traditional police power and exercise

of eminent domain. The police power is the inherent state government power to do what is reasonably necessary to promote and protect public health, safety, welfare and morals[1].

In this case, the facts surrounding the coal ash pond remediation demonstrate that requiring shareholders to bear the cost of remediation does not constitute a taking. Governmental land-use regulation that denies the property owner any economically viable use is deemed a taking of the affected property. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). However, in the case of ComGen, FERC would not be taking the land at all, which remains under the control of the utility, can still be used, and continues to generate revenue moving forward. The taking (if one does in fact exist) furthers a legitimate state interest in health and safety, and does not deny the owners economically viable use of the land. Because these criteria are met, FERC may require ComGen to cover the cost of cleanup without any violation of the Constitution. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

B. The decision to force current customers to pay remediation costs is arbitrary and capricious, and is not allowable.

As a general rule, administrative agencies are allowed to make regulatory decisions regarding their area of specialization using an "arbitrary and capricious" standard under the Administrative Procedure Act (APA). Arbitrary and capricious is a legal ruling wherein an appellate court determines that a previous ruling is invalid because it was made on unreasonable grounds or without any proper consideration of circumstances. The APA requires that to set aside agency actions that are not subject to formal trial-like procedures, the court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not

[1] https://www.law.cornell.edu/wex/police_powers

in accordance with the law." 5 U.S.C. § 706(2)(A). To determine whether a decision meets this standard, the court should consider whether there was clear error of judgment—an action not based upon consideration of relevant factors and thus is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law—or if it was taken without observance of procedure required by law. *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 379 (9th Cir. 1992).

The initial decision by FERC to pass along the costs of environmental remediation is arbitrary and capricious for the following reasons.

First, the coal ash pond remediation is a result of past operations, and current customers should not have to shoulder the cost for earlier activity. It is not only possible but highly likely that many current customers were not even receiving the benefits of the power production at the time the coal ash ponds were created, and therefore should not be required to pay for the cleanup efforts. Allowing a rate increase to cover the costs of past damage amounts to "retroactive ratemaking," which is generally prohibited by law. Retroactive ratemaking occurs when a utility attempts to collect in the current year revenues to compensate for prior under recoveries.[2] Since the rate hike is being used to compensate for cleanup costs that occurred in the past, this activity falls squarely within this rule and should not be allowed.

Second, the utility acted irresponsibly in operating its waste disposal processes, and therefore should not be given the opportunity to have others pay for its negligent behavior. FERC "also agreed in principle with SCCRAP's argument regarding the "matching principle" of utility ratemaking, and found that charging Vandalia Power and Franklin Power (and, in turn, their

[2] https://definedterm.com/retroactive_ratemaking

ratepayers) with the full remediation costs would represent a "windfall" of sorts to ComGen's shareholders, inasmuch as they received the benefits of the revenues produced by the output from the Vandalia Generating Station from 2000 through 2014, and thus should bear a proportionate share of the remediation costs." (R. 10.)

Third, when the utility has gains or profits, the shareholders benefit from these increases, but the current ratepayers do not. It is fundamentally unfair to allow one group to participate in the profits of running the business, but not be required to share in the cost of cleanup (which is passed along to customers). Since the shareholders not only reaped the benefits of the utility when the coal ash ponds were created, but continue to do so now, they should also be required to cover the costs of the situation that created the profit in the first place.

Fourth, if the utility it not required to shoulder the cost of its own environmental cleanup, there will be no incentive in the future to operate more cleanly, since a rate hike passed along to customers will remove any negative incentive for cleaner operations. FERC has a responsibility to ensure that future utility operations have incentive to protect the environment, and the decision to allow a rate hike removes this incentive.

C. As quasi-government agencies, utilities are subject to takings from regulatory bodies.

Unlike members of the general public, utilities face a different (and higher) standard with regard to takings. Because of the nature of the business in which they engage and the public's interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies. *See Atlantic Coast Line R.R. v. Corporation Comm'n*, 206 U.S. 1, 19 (1907) (citing *Chicago, B. & Q. R.R. v.*

Iowa, 94 U.S. 155 (1877)). *See also Denver & R.G. R.R. v. Denver*, 250 U.S. 241 (1919); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

Therefore, this Court should hold that preventing ComGen from recovering, through rate adjustments, the costs of remediating the pollution caused by their operations is not a taking under the Fifth and Fourteenth Amendments of the U.S. Constitution.

Conclusion

To ensure the effectiveness of the Clean Water Act in protecting the nation's waters, this Court should hold that polluting surface waters via hydrologically connected groundwater is an actionable offense under the Act. This Court should also hold that a coal ash impoundment that releases pollutants that seep to groundwater and thereby reach navigable waters is a "point source" under the Clean Water Act, and that such discharge of pollutants is thus a violation of § 402 of the Act. Therefore, the order by the United States District Court for the District of Columbia granting injunctive relief to Stop Coal Combustion Residual Ash Ponds against Commonwealth Generating Company should be upheld.

The Federal Energy Regulatory Commission weighted non-cost factors too heavily in its decision to approve Commonwealth Generating Company's revised rates schedules, while not fully recognizing the possible harm its decision could do to environmental protection efforts. Moreover, disallowing recovery in rates for environmental remediation is not an unconstitutional taking, because it falls under the government's ability to regulate utilities to protect the public's health and welfare. Accordingly, the order by the Federal Energy Regulatory Commission denying a rehearing of the Order Accepting Commonwealth Generating Company's Revised Rate Schedules should be overturned and a rehearing scheduled.

Certificate of Service

Pursuant to *Official Rule IV*, Team Members representing Stop Coal Combustion Residual Ash Ponds certify that our Team No. 16 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. 16