No. 18-02345

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

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STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),
Appellee-Petitioner,

v.

COMMONWEALTH GENERATING COMPANY,
Appellant-Intervenor

_____

On Appeal from the United States District Court for the District of Columbia,
D.C. No. 17-01985

and

On Petition for Review of Orders of the Federal Energy Regulatory Commission, Docket ER-18-263-000

_____

BRIEF OF STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP), APPELLEE-PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS & GUIDELINES

LEGISLATIVE MATERIALS

SECONDARY AUTHORITY

JURISDICTIONAL STATEMENT

The final judgment of the district court was entered on June 15, 2018. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The Commonwealth Generating Company ("ComGen") filed a timely appeal to this Court on July 16, 2018. This Court has jurisdiction to review the district court's order under 28 U.S.C. §1291.

The Federal Energy Regulatory Commission ("FERC") entered its order on October 10, 2018 and denied a petition for rehearing on November 30, 2018. Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed a timely petition for review to this Court on December 3, 2018. Under 16 U.S.C. § 825*l*(b), this Court has jurisdiction to review FERC's order. This Court issued an order consolidating the two appeals on December 28, 2018.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act; (2) whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source; (3) 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; and (4) 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

The Little Green Run Impoundment (LGRI) in Mammoth, Vandalia contains 38.7 million cubic yards of dangerous coal waste, which has been polluting the Fish Creek and Vandalia River with arsenic for at least sixteen years. R. at 4-5. The Commonwealth Generating Company (ComGen) operates the LGRI.

The Little Green Run Impoundment's Pollution of Surface Waters

ComGen's parent company, Commonwealth Energy (CE), built the LGRI in the 1990s to dispose of coal combustion residuals, also known as coal ash—the toxic byproducts of CE's coal-fired Vandalia Generating Station. R. at 3-4. The coal ash stored in the LGRI contains mercury, cadmium, and arsenic. *Id.* This surface impoundment, formed by a 395-foot-tall dam, has an EPA "high hazard" designation. R. at 5.

In 2002, CE began detecting arsenic in the groundwater near the LGRI, at levels exceeding state limits. *Id.* The Vandalia Department of Environmental Quality (VDEQ) approved a 2005 corrective plan to mitigate this hazardous groundwater pollution. *Id.* The plan required installation of a high density polyethylene (HPDE) geomembrane liner on the LGRI's west embankment. *Id.* Unlike the LGRI's other three sides, the west embankment was not constructed entirely of compacted clay—rather, its downstream slope was constructed of bottom ash. *Id.* CE installed the liner in 2006. *Id.*

Eleven years later, in March 2017, local activists detected arsenic pollution in the Vandalia River. *Id.* A VDEQ investigation revealed that an improperly welded seam in the LGRI liner caused arsenic leachate to pool at the downstream toe of the west embankment and channeled the leachate via groundwater to the navigable waters of the Fish Creek and Vandalia River, particularly when heavy rainfall accelerated this seepage. R. at 6. FERC later found that "ComGen failed to properly monitor the effectiveness of the corrective action during the 2006-2017 period, which likely would have revealed the problem" sooner. R. at 11.

The District Court Ruling

In December 2017, Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP), an environmental organization with a chapter in Mammoth, filed suit against ComGen in the U.S.

District Court for the District of Columbia under the citizen-suit provision of the Clean Water Act. R. at 7. Enacted in 1972, the Clean Water Act (CWA) prohibits "any person" from adding "any pollutant to navigable waters from any point source," unless otherwise authorized by federal or state permits. 33 U.S.C. §§ 1311(a), 1362(12). While Vandalia operates a CWA permitting program under 50 U.S.C. § 1342(b)-(c), nothing in the record suggests that ComGen's permit authorized it to add arsenic to the Fish Creek and Vandalia River via groundwater. R. at 6-7. On June 15, 2018, after a bench trial, the district court found ComGen liable for ongoing violations of the CWA, holding that "the CWA applies to discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced," and that the LGRI was a point source because it "channels and conveys arsenic directly into the groundwater and thence into the surface waters" through "discrete mechanisms." R. at 8 (citing Opinion at 10, 12). The district court ordered ComGen to excavate all of the LGRI's coal ash and relocate it to a "competently lined" facility, concluding that only closure by removal could fully prevent additional contamination of navigable waters. *Id*. ComGen appealed to this Court on July 16, 2018. *Id.* The estimated cost of complying with the district court's order is $246 million. *Id*. at 9.

FERC's Rate Order

ComGen, a wholly-owned subsidiary of CE, is a regulated electric wholesaler selling exclusively to Vandalia Power Company and Franklin Power Company, electric retailers also owned by CE. R. at 3-4. CE formed ComGen in 2014 in order to purchase the Vandalia Generating Station from an unregulated CE subsidiary and move the station into the regulated market. *Id.* As a regulated wholesaler, ComGen sells to retail power companies at rates that are subject to FERC approval. ComGen entered the regulated market in November 2014, *id.* at 4,

twelve years after discovering the LGRI's arsenic seepage was first discovered, and eight years after the faulty lining was installed.

In July 2018, ComGen filed with FERC proposed increases to its rate schedules in order to recover from consumers the $246 million in anticipated cleanup costs. R. at 8-9. SCCRAP intervened in the FERC proceeding, arguing that ComGen's shareholders, not its ratepayers, should bear the cost of the imprudence that precipitated the CWA violation. *Id*. at 9-10. At most, SCCRAP argued, ratepayers should cover 19.5 percent of the costs, or about $48 million, which corresponds to the amount of time the Vandalia Generating Station has operated on the regulated market. *Id*. at 9. ComGen argued that absorbing these costs would lower its effective rate of return on equity from 10 percent to 3.2 percent (if it absorbed all of the costs) or 3.6 percent (if it absorbed 80.5 percent). *Id.* at 10-11. Despite being wholly owned by CE, ComGen claimed that this reduction would threaten its financial integrity by hurting "its ability to raise capital on reasonable terms." *Id.* at 11.

In October 2018, after a hearing, FERC approved ComGen's request to pass along the entire $246 million cost to its ratepayers, contingent on this Court approving the district court's ruling. R. at 11. FERC provided three justifications for its rulings: (1) ComGen should not be held "strictly liable" for the subcontractor failing to competently weld the LGRI liner in 2006, *id.*; (2) based on ComGen's testimony, FERC believed that denying the rate increase would "jeopardize" ComGen's "financial integrity" and therefore raise Fifth and Fourteenth Amendment issues, *id.* at 12; and (3) utilities should be able to recover cleanup costs from ratepayers "as a means of promoting environmental protection," *id.*

On November 9, 2018, SCCRAP sought a new hearing, which FERC denied on November 30, 2018. R. at 12. SCCRAP petitioned this Court for review on December 3, 2018.

On December 21, 2018, this Court granted the parties' motion to consolidate the actions. *Id.*

SUMMARY OF THE ARGUMENT

The district court was correct in holding that ComGen violated the CWA. As identified by this Court, a CWA violation has five required elements: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (emphasis in original). ComGen does not dispute that the LGRI is responsible for *adding pollutants* that reached the *navigable waters* of the Fish Creek and Vandalia River. Thus the sole CWA issues on appeal are (1) whether the "to" and "from" requirements are met when pollutants pass through connected groundwater in between, and (2) whether the LGRI has acted as a point source. The CWA's plain language and comprehensive purpose support answering both issues in the affirmative.

A majority of courts, including the Fourth and Ninth Circuit Courts of Appeals, have joined the EPA in holding that the CWA applies to surface water pollution via hydrologically connected groundwater. *See, e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018); *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). The Supreme Court has rejected the notion that the CWA only covers discharge "directly from" point sources going "directly to" navigable waters, as no directness requirement appears in the CWA's text or is suggested by its legislative history. *Rapanos v. United States*, 547 U.S. 715 (2006).

Similarly, a majority of courts has classified structures similar to the LGRI as point sources, given that many landfills, sediment basins, and coal ash impoundments act as "discernible, confined and discrete conveyance[s]" of pollutants. 33 U.S.C. § 1362(14). The LGRI fits the plain meaning of those terms, even more so than other facilities that the CWA's legislative history and the EPA's interpretation classify as point sources. While the Resource

Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, also regulates coal ash impoundments, those regulations do not displace CWA liability when pollutants reach navigable waters.

FERC's approval of ComGen's rate increase was "arbitrary" and "capricious" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and should be set aside. In reaching its conclusion, FERC failed to "articulate a satisfactory explanation for its action . . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Specifically, with regard to its environmental protection rationale, FERC did not explain how allowing utilities to recover cleanup costs would protect the environment more effectively than requiring utilities to absorb those costs. Nor did FERC explain why these putative environmental benefits should outweigh the financial interests of ratepayers, which is FERC's primary statutory responsibility. *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) ("[I]t is clear that the principal purpose of [the FPA] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices.")

FERC also failed to make two factual inquiries required by this Court's decision in *Washington Gas Light Co. v. Baker*, 188 F.2d 11 (D.C. Cir. 1950): into ComGen's capital costs, *id.* at 16, and into whether investors had already been compensated for the risk of incurring environmental cleanup costs, *id*. at 19. As a result, FERC's decision lacks the "substantial evidence" necessary to survive judicial review. *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

Finally, requiring ComGen to absorb its cleanup costs would comply with the Takings Clause of the Fifth Amendment. As this Court held in *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181 (D.C. Cir. 1987), "[a] regulated utility has no constitutional right to a profit, and a company that is unable to survive without charging exploitative rates has no entitlement to

such rates." By passing along costs that are "unnecessary," *NAACP*, 425 U.S. at 666, ComGen's proposed rate increase would fail to be "just and reasonable," and rejecting it would therefore be constitutional, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 607 (1944).

ARGUMENT

I. Surface water pollution via hydrologically connected groundwater *is* actionable under the Clean Water Act

As the district court, several courts of appeals, and the EPA have recognized, the text and purpose of the CWA support its application to surface water pollution via hydrological connected groundwater. The expansive statute does encompass intermediary conveyances, without imposing the limitations that ComGen asks this Court to announce.

A. The CWA's plain meaning

The CWA prohibits unpermitted "addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). Under the plain meaning of this provision, the "to"–"from" pathway remains intact when groundwater acts as an intermediary.

This Court reviews a district court's statutory interpretation *de novo. United States v. Wishnefsky*, 7 F.3d 254, 256 (D.C. Cir. 1993). This analysis begins with the "ordinary meaning" of the statute's text, often with reference to "dictionaries in use when Congress enacted" the statute. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). When describing movement, the plain meaning of "to"—unlike "directly to"—allows for passage through an intermediary medium. The word "to" indicates "movement toward," as in "drove to the city." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2401 (1961). A driver who passes through another location on the way is still driving *to* the city. Similarly, while arsenic from the LGRI passed through groundwater before reaching the Fish Creek and Vandalia River, it still constitutes a discharge "to" navigable waters—thereby falling under the prohibition of the CWA.

Similarly, the plain meaning of "from" allows for intermediary conveyances. This Court has recognized that "from" indicates "the source or original or moving force of something . . . the place of origin, source, or derivation." *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1125 (D.C. Cir. 2013) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 913 (1981). The original publication of that dictionary also defines "from" as indicating a "starting point" where a movement "has its beginning"—it is appropriate to say that people "set out from town," even when town is no longer their most recent location. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 913 (1961). Arsenic originating in the LGRI is a pollutant "from" that source. The intermediary conveyance of the groundwater does not change that fact.

This language creates no requirement that discharge be *directly* to navigable waters or *directly* from a point source, as the Supreme Court has acknowledged. In *Rapanos v. United States,* Justice Scalia emphasized that the CWA's plain language "does not forbid the 'addition of any pollutant *directly to* navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715, 743 (2006) (plurality opinion) (quoting 33 U.S.C. § 1362(12)(A)). The CWA therefore applies even when pollutants "do not emit 'directly into' covered waters, but pass 'through conveyances' in between"—like groundwater. *Id.* (citation omitted). Courts have embraced this "indirect discharge rationale" since "the time of the CWA's enactment." *Id.* Yet in seeking to avoid liability, ComGen asks this Court to discover a new jurisdictional limitation, absent from the CWA's text. This Court should follow *Rapanos* by refusing to "read[] nonexistent requirements into the Act" and upholding CWA jurisdiction over the LGRI's pollution of surface waters. *Id.* at 778 (Kennedy, J., concurring).[1]

[1] While the *Rapanos* court split 4-1-4, all nine Justices supported a broad reading of the CWA's jurisdiction. The plurality specifically rejects redefining "to" as "directly to." 547 U.S. at 743. Justice Kennedy concurred to support broader jurisdiction than the plurality. *Id.* at 778. Justice Stevens' dissent calls for an even larger CWA scope, urging "deference to . . . the evident breadth of congressional concern for protection of water quality." *Id*. at 799 (citation omitted).

B. The CWA's purpose

The CWA's overarching purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The statute went so far as to declare a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." § 1251(a)(1). Allowing ComGen to pollute the Fish Creek and Vandalia River via groundwater would be starkly inconsistent with that ambitious goal.

The CWA's legislative record is full of references to its broad scope. Senator Cooper, for example, described it as among the "most comprehensive" environmental bills ever considered in Congress and as capable of achieving a "complete cleanup of our Nation's waters." 1 Cong. Research Serv., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess., at 189-90 (1973) (hereinafter "Leg. Hist."). Views on the CWA's comprehensiveness "were practically universal." *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.12 (1981) (citing 1 Leg. Hist. 343 (Rep. Young); *id.*, at 350 (Rep. Blatnik); *id.*, at 374 (Rep. Clausen); *id.*, at 380 (Rep. Roberts); *id.*, at 425 (Rep. Roe); *id.*, at 450 (Rep. Reuss); *id.*, at 467 (Rep. Dingell); *id.*, at 481 (Rep. Caffery); 2 *id.*, at 1302 (Sen. Cooper); *id.*, at 1408 (Sen. Hart). These statements decisively show that "it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible . . . ." *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985). Accordingly, the Supreme Court has interpreted the CWA's legislative record to leave "no room" for restrictions imposed by "federal common law." *City of Milwaukee*, 451 U.S. at 319. This Court should not narrow a statute with a Congressionally-intended scope broad enough to include surface water pollution via hydrologically connected groundwater.

Moreover, this legislative history specifically rejects a direct discharge requirement. Senator Muskie, in presenting the CWA's Conference Report, explained that the "definition of 'discharge'" includes both "direct *and indirect* discharges into the navigable waters." 1 Leg. Hist. at 178 (emphasis added). As Muskie was the Chairman of the Senate Subcommittee

responsible for the CWA and "perhaps the Act's primary author," his definition is persuasive authority. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977). Similarly, a bill co-sponsor and House conferee described as "quite clear" that the CWA, "in defining the term 'discharge of a pollutant,' does not in any way contemplate that the discharge be *directly* from the point source to the waterway." 1 Leg. Hist. at 255 (Rep. Dingell) (emphasis added). It is equally clear that the CWA applies to arsenic discharge from the LGRI to the Fish Creek and Vandalia River, even though that discharge also passes through groundwater.

The EPA has also long recognized that this legislative history cuts against allowing a "ground water loophole," which would contradict Congress' "understanding of the hydrologic cycle" and goal of controlling pollutants "at the source." Nat'l Pollutant Discharge Elimination Sys. Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3016 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122 and 412) (citing 2 Leg. Hist. at 1945). The EPA has been clear and consistent on this issue, having "repeatedly [taken] the position that the CWA can regulate discharges to surface water via ground water . . . ." *Id.* The district court was correct to adopt the EPA's longstanding view that the CWA applies to discharge like that of the LGRI, which conveys pollutants "via groundwater [with] a direct hydrological connection to surface water." Revised Nat'l Pollutant Discharge Elimination Sys. Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper, 73 Fed. Reg. 70418, 70420 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts. 9, 122, and 412).[2]

[2] In 2018, the EPA requested comment on whether that longstanding interpretation should be revised or clarified—but the request arose in response to "mixed case law" and does not diminish the weight of decades of agency consistency. Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126, 7128.

Congress intended no distinction between point source discharge that reaches surface waters immediately and the LGRI's discharge via hydrologically connected groundwater. This Court should uphold CWA jurisdiction, consistent with the comprehensive reach of the statute.

C. Most courts of appeals agree

While this Court has not previously addressed the issue, sister circuits have consistently held that discharge through the intermediary medium of groundwater can be actionable under the CWA. The district court's decision has the support of appellate case law in the Second, Fourth, Ninth, and Tenth Circuits, and of district courts in the First, Third, Eighth, and Eleventh Circuits.

Two of the most relevant and recent cases come from the Ninth Circuit and the Fourth Circuit. The Ninth Circuit held that CWA liability attaches when pollutants conveyed via groundwater "are fairly traceable" from the original point source, and the pollutant amounts "reaching navigable water are more than *de minimis*." *Haw. Wildlife Fund v. Cty. Of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). This decision noted the "persuasive value" of Justice Scalia's plurality opinion in *Rapanos*, agreeing that the CWA does not impose a "direct connection" requirement. *Id.* at 748. Moreover, such a requirement would limit CWA jurisdiction to "cases where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch," a limitation inconsistent with the CWA's purposes and decades of application. *Id.*

Similarly, the Fourth Circuit noted that allowing "a short distance of soil and ground water" to "defeat a claim" would undermine the CWA's purpose—under such an interpretation, "polluters easily could avoid liability" by discharging through a groundwater intermediary. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 652 (4th Cir. 2018). *Upstate Forever* adopted the EPA's interpretation that the CWA covers discharges to groundwater with a "direct hydrological connection" to navigable waters. *Id.* at 651. Under either standard—the Ninth Circuit's "fairly traceable" and "more than *de minimus*" pollution level

inquiry, or the "direct hydrological connection" inquiry of the Fourth Circuit, EPA, and district court—CWA liability would attach to the LGRI's arsenic seepage.[3] ComGen does not dispute that the arsenic reaching the Fish Creek and Vandalia River is directly traceable to the LGRI.

The Second Circuit and Tenth Circuit have also recognized that indirect discharge can be actionable under the CWA. *See Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 n.26 (2d Cir. 2005) (upholding EPA authority under the CWA "to impose groundwater-related requirements on a case-by-case basis"); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188-89 (2d. Cir. 2010) (upholding CWA liability for spraying pesticides into air above waterways, even if such discharge was "indirect"); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (upholding CWA liability for discharge onto fields that, like groundwaters, convey pollutants into navigable waters); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1146 (10th Cir. 2005) (interpreting the CWA not to require *direct* discharge, but rather a "link between discharged pollutants and their addition to navigable waters"); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (upholding CWA liability for pollutants traveling to navigable streams via intermediary "underground aquifers").[4] These holdings all support applying the CWA to the LGRI's discharge via groundwater.

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[3] Significant arsenic pollution of the Fish Creek and Vandalia River has been undisputedly traced to the LGRI, meeting the Ninth Circuit's standard, and the district court found that the LGRI discharges arsenic to groundwater with a direct hydrological connection to surface water, meeting the Fourth Circuit and EPA's standard. R. at 8.

[4] District courts in the Second and Tenth Circuits have applied this rationale to hydrologically connected groundwater. *See, e.g., Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) ("the Tenth Circuit's expansive construction of the Clean Water Act's jurisdiction[] . . . foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters"); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *Mut. Life Ins. Co. of N.Y. v. Mobil Corp.*, No. 96-1781, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985).

In addition to that appellate support from four circuits, district courts in the First, Third, Eighth, and Eleventh circuits have reached similar conclusions. *See Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 180 (D.P.R. 2009) ("Congress intended to regulate the discharge of pollutants that could affect surface waters . . . whether it reaches the surface water directly or through groundwater"); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013) (allowing a CWA claim to proceed because "plaintiffs have alleged that groundwater is hydrologically connected to surface water"); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1320 (S.D. Iowa 1997) (holding that the CWA "regulates any pollutants that enter [surface] waters either directly or through groundwater"); *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1366 (M.D. Ga. 2017) (agreeing with a "majority of district courts" in holding that "the CWA prohibits the discharge of pollutants that reach "navigable waters" through hydrologically connected groundwaters"). This Court should join a "majority of courts" in holding "that the CWA does cover connected groundwater" like the hydrological path between the LGRI and the Vandalia River. Allison L. Kvien, *Is Groundwater that Is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 Minn. J.L. Sci. & Tech. 957, 962 (2015).

A few courts have excluded some groundwater discharge from CWA liability, but only when addressing a different question: whether *unconnected* groundwaters themselves fall under CWA jurisdiction. For example, one Eighth Circuit district court concluded that "Congress did not intend to include *isolated* groundwater as part of the 'navigable waters.'" *Patterson Farm, Inc. v. City of Britton*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998) (emphasis added) (quoting

Wash. Wilderness Coalition v. Hecla Mining Co., 870 F.Supp. 983, 989 (E.D. Wash. 1994)).[5] Fifth and Seventh Circuit courts have applied similar reasoning. *See United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (holding that the CWA does not cover discharge "into underground waters *which have not* been alleged to flow into or otherwise affect surface waters") (emphasis added); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (rejecting CWA jurisdiction over groundwater with only a "indirect, remote, and attenuated connection" to surface water); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (rejecting CWA jurisdiction over ponds draining into groundwater with a mere "possibility of a hydrological connection" to surface water). These "isolated groundwater" cases are readily distinguishable from the LGRI's pollution of surface waters via directly connected groundwater.

Only a divided panel of the Sixth Circuit has explicitly held that pollution to surface water via hydrologically connected groundwater is not actionable under the CWA, in two cases decided together. *See Ky. Waterways All. v. Ky. Utilities Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018). Both decisions relied on a misreading of the CWA's text. Their analysis borrowed language providing for permit restrictions on the amount of pollutants "discharged from point sources *into* navigable waters." 33 U.S.C. § 1362(11) (emphasis added). By announcing that the "term 'into' indicates directness," they claimed the CWA should never apply when intermediary mediums are present. *Tenn. Clean Water Network*, 905 F.3d at 444 (citing *Ky. Waterways All.*, 905 F.3d at 934). This interpretation disregards the warning of the Supreme Court's *Rapanos* plurality against imposing directness requirements that are absent from the CWA's text. 547 U.S. at 745. Moreover, even if a court accepts the Sixth Circuit's dubious redefinition of "into" as "directly into," that language

[5] Notably, *Hecla* distinguishes "isolated/nontributary groundwater" from groundwater with a "hydrological connection" to surface waters, which *is* covered by the CWA. 870 F.Supp. at 990.

is limited to the definition of "effluent limitations"—whereas citizens can bring CWA actions for *any* violation of the statute, meaning any unpermitted "addition of any pollutant to navigable waters from any point source." § 1362(12)(A). Judge Clay was correct to dissent from the Sixth Circuit's creation of a "gaping regulatory loophole" with "no textual or logical foundation." *Tenn. Clean Water Network*, 905 F.3d at 449 (Clay, J., dissenting).

II. The Little Green Run Impoundment was a "point source"

This Court reviews questions of statutory interpretation *de novo*. *Wishnefsky*, 7 F.3d at 256. It should find that the district court was correct in classifying the LGRI as a "point source" under the CWA, given that the impoundment "channels and conveys arsenic" from "one location" where ComGen collected and concentrated coal ash. R. at 8 (citing Opinion at 12). The CWA's text and purpose support that conclusion, and courts have repeatedly classified structures analogous to the LGRI as point sources. While coal ash impoundments are also regulated by the Resource Conservation and Recovery Act ("RCRA"), that statute does not displace the CWA.

A. The LGRI is a "conveyance" that is "discernible," "confined," and "discrete"

The CWA defines a point source as "any discernible, confined and discrete conveyance . . . ." 33 U.S.C. § 1362(14). Though the statute does not further define those terms, their plain meanings are well-understood. A conveyance is a "channel or medium" 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); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 291-92 (1976)). The LGRI creates a downward hydraulic gradient that channels coal waste to the impoundment's low point and through a faulty seam.[6] It thus "*conveys* arsenic directly into the groundwater," as the district

[6] The EPA warns that the "hydraulic head" of large impoundments can cause "rapid leaching" of pollutants. 80 Fed. Reg. 21,302, 21,328 (Apr. 17, 2015) (codified at 40 C.F.R. pt. 257).

court held. Opinion at 12 (emphasis added). This conveyance is "discernible" because it has been "detect[ed]" by a VDEQ investigation that left no doubt as to the source of the seepage. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 644 (1961). And while the impoundment spans seventy-one surface acres, it is nevertheless "confined" (meaning held "within bounds") by four embankments, with the seepage path itself limited to a "discrete" (meaning "individually distinct") seam at the downstream toe of the west embankment. *Id* at 476, 647.

The CWA's point source definition explicitly includes but is "not limited to" any "conduit," "discrete fissure," or "container." 33 U.S.C. § 1362(14). The LGRI is a container that confines coal ash in a discrete location, discernibly channeling arsenic to ground and surface waters. It thus functions as a conveyance well within the CWA's jurisdiction.

B. The LGRI falls within Congress' conception of a "point source"

During CWA floor debate, Congressional leaders provided paradigmatic examples of point and nonpoint sources. This legislative history indicates that the point source category is "extremely broad." *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (determining Congress intended point sources to encompass "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States"). The LGRI falls within that broad definition, and is readily distinguishable from the nonpoint source examples, which involve diffuse, unchanneled, and untraceable runoff.

Senator Muskie classified "man-made" conveyances like the LGRI as point sources, as distinct from nonpoint source "natural runoff." 2 Leg. Hist at 1299. Similarly, he characterized "agricultural runoff" as a nonpoint source and suggested runoff from "construction sites," "streets," and "parking lots" was too difficult to "intercept" and "control" to be a point source. *Id.* at 1314-15. In contrast, the arsenic seepage from the LGRI would have been intercepted by a

working liner. Senator Dole described a nonpoint source as "one that does not confine its polluting discharge to one fairly specific location." *Id.* at 1294. The LGRI *does* confine its discharge to a specific location: the downstream toe of the west embankment. Unlike nonpoint source "fertilizer runoff," which occurs diffusely over undefined areas, the LGRI creates a "conduit" for point source discharge of arsenic. *Id.*

In Section 507 of the Water Quality Act of 1987, Congress amended the definition of point source to explicitly include a "landfill leachate collection system." Pub. L. No. 100-4, 101 Stat. 7, 78 (1987). This "confirmed" the EPA's view that such systems are point sources because "they *channel* runoff from landfills." Nat'l Pollutant Discharge Elimination Sys. Permit Regs., 54 Fed. Reg. 246, 247 (Jan. 4, 1989) (to be codified at 40 C.F.R. pt. 122.2) (emphasis added). As the district court held, the LGRI similarly "channels" arsenic. R. at 8 (citing Opinion at 12). Both landfill leachate collection systems and coal ash impoundments with leaking seams convey pollutants, and both are properly understood as point sources.

C. Most courts classify structures similar to the LGRI as point sources

Courts consistently distinguish between nonpoint source pollution that arises from "dispersed activities" and "cannot be traced to any identifiable point of discharge," and point source pollution that has been "collected, channeled, and discharged" by a single defendant. *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 744-45 (9th Cir. 2018) (citations omitted). The LGRI alone collected, channeled, and discharged arsenic to surface waters. The fact that rainwater accelerated the seepage does not absolve ComGen of responsibility. Like the Ninth Circuit, the Fifth Circuit classifies sediment basins where defendants "initially collected or channeled pollutants" as point sources—even though "gravity flow of rainwater" also fueled the conveyance. *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980); *see also Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321 (D.

Or. 1997) (classifying a pond with "purposefully collected" pollutants as a point source, despite the help of "rain water and gravity" in moving pollutants to groundwater").

District courts have also classified facilities similar to the LGRI as point sources, including other coal ash impoundments that are "leaking pollutants into the groundwater." *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D.N.C. 2015); *see also United States v. Alpha Nat. Res., Inc.*, No. 2:14–11609, 2014 WL 6686690, at *1 (S.D. W. Va. Nov. 26, 2014) (holding that coal mining "impoundments and settlement ponds" can "qualify as point sources"); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *5 (N.D. Ala. Aug. 20, 2013) (holding that a landfill discharging contaminated leachate to groundwater "may constitute a point source"); *Wis. Res. Prot. Council, Ctr. for Biological Diversity v. Flambeau Min. Co.*, 903 F. Supp. 2d 690, 711 (W.D. Wis. 2012) ("A point source discharges pollutants by conveying, releasing, spilling, overflowing, seeping or *leaching* the pollutants into navigable waters,") (emphasis added); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F.Supp. 1300, 1319 (S.D. Iowa 1997) (noting that an "entire facility or industrial plant may be a point source.").

In contrast, courts characterizing nonpoint source pollution have emphasized its diffuse, unchanneled nature. The Fifth Circuit held that oil seepage dispersed over land was a nonpoint source—the mere "generalized assertion" that some seepage "*eventually* reaches groundwater" or "still *later may reach* navigable waters" was insufficient. *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001) (emphasis added). The Seventh Circuit categorized as a nonpoint source a former dam site, whose current owner was doing "nothing whatsoever," but suggested liability could attach if defendants "pile silt on the riverbank and deliberately allow rainfall to wash it" into surface waters. *Froebel v. Meyer*, 217 F.3d 928, 938-39 (7th Cir. 2000); *see also Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995)

(classifying seeps through "shallow subsurface water" as nonpoint sources because they were natural and "[d]efendants had nothing to do with their creation."); *Beartooth All. v. Crown Butte Mines*, 904 F.Supp. 1168, 1173 (D. Mont. 1995) (holding that nonpoint sources are "limited to uncollected runoff water that is difficult to ascribe to a single polluter."). These cases are distinguishable from the LGRI's independent, active channeling of coal ash through a seam.

D. The Fourth Circuit's interpretation should not apply

In 2018, the Fourth Circuit Court of Appeals became the first court to classify coal ash piles and ponds as nonpoint sources. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (hereinafter "*Dominion*").[7] That decision is unpersuasive authority for two reasons. First, the facts are distinguishable. Unlike the discharge from the precise point of liner failure at the LGRI's west embankment, *Dominion* involved a "generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula." *Id.* at 411. Thus even the Fourth Circuit's overly narrow interpretation could be reconciled with identifying the LGRI as a discernible, confined and discrete conveyance.

Second, this Court should not extend a minority view that relies on a misunderstanding of the interplay between the CWA and RCRA. *Dominion* reversed a classification of the coal ash piles and ponds as point sources, referencing "the distinctions Congress made between the Clean Water Act and the RCRA." *Id.* at 412. But the only evidence cited to explain such "distinctions" is the fact that "[i]n 2016, Congress amended the RCRA specifically to require that operators of coal ash landfills . . . obtain permits incorporating the EPA's regulations" of CCR disposal. *Id.*

[7] The Sixth Circuit, in dicta, has also indicated that it would not treat coal ash ponds as point sources. *Ky. Waterways All*, 905 F.3d at 934 n.8 ("Plaintiffs . . . contend that the coal ash ponds are point sources. We doubt the correctness of that position.); *Tenn. Clean Water Network*, 905 F.3d at 449 n.2 (Clay, J., dissenting) ("The majority declines to reverse the district court's other finding that a coal ash pond is a point source . . . but suggests disagreement in a footnote.")

(citing 42 U.S.C. § 6945(d)). Because of that amendment, the *Dominion* court saw no issue with placing coal ash impoundments "outside the scope of the Clean Water Act's regulation," since RCRA permits issued by the EPA and the States could stop CCR releases to groundwater from "slip[ping] through the regulatory cracks." *Id.* at 411.

However, isolated groundwater pollution is not at issue here. And while RCRA standards may *typically* have the additional benefit of preventing pollutants from reaching surface waters, that result is not inevitable. As the EPA has explained, RCRA's "CCR rule establishes minimum national criteria" related to "the disposal units themselves"—whereas "the Clean Water Act addresses instances in which there are discharges to the jurisdictional waters of the United States . . . ." EPA, *Relationship Between the Resource Conservation and Recovery Act's Coal Combustion Residuals Rule and the Clean Water Act's Nat'l Pollutant Discharge Elimination Sys. Permit Requirements* (July 18, 2018), https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule. Thus CWA liability for the LGRI's pollution does not vanish merely because RCRA standards are operating in parallel. The statutes are not mutually exclusive as the *Dominion* court suggests, but rather mutually reinforcing. *See, e.g.*, 40 C.F.R. § 261.4 (explaining that RCRA applies to "industrial wastewaters while they are being collected" or "stored," with the CWA applying when navigable waters are polluted by the "actual point source discharge."). The CWA can and must still apply given the undisputed fact that the LGRI is channeling arsenic to surface waters.

III. FERC's decision was arbitrary and capricious

Under the Administrative Procedure Act, this Court must set aside a federal agency's action that was "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). An action is arbitrary or capricious if the agency fails to sufficiently explain its reasoning, *Motor Vehicle Mfrs. Ass'n v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), or if the action is unsupported by "substantial evidence," *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

While failing to meet *either one* of these standards would require a remand for a new hearing, FERC's approval of ComGen's rate increases *fails both*. First, because the Federal Power Act ("FPA") requires that rates be "just and reasonable," 16 U.S.C. § 824d(a), any "unnecessary or illegal" costs must be excluded, *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 666 (1976). Cleanup costs resulting from an imprudent CWA violation are "unnecessary," and allowing ComGen to recover them goes against FERC's mandate under the Federal Power Act ("FPA"). Second, FERC failed to make two factual inquiries required by this Court's precedents: into ComGen's capital costs, *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 16 (D.C. Cir. 1950), and into whether investors had already been compensated for the risk of incurring environmental cleanup costs, *id*. at 19.

A. FERC did not sufficiently explain its reasoning

In reaching its decision, FERC was required to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). In reviewing FERC's explanation, this Court "must determine whether the agency adequately considered the factors relevant to choosing a rate that will best serve the purposes of the statute," *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983), such that there is "more than a remote relation" between the action and FERC's statutory mandate, *Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar*, 491 F.2d 31, 33 (D.C. Cir. 1974).

Aside from its erroneous constitutional conclusion, *see infra* Part IV, FERC's only justifications for approving ComGen's rate increase were that the increase would "promot[e] environmental protection," R. at 12, and that ComGen should not be held strictly liable for its incompetently welded lining, R. at 11. FERC's reasoning was insufficient on both counts.

(i) "Environmental protection" justification

FERC's "environmental protection" rationale was insufficiently explained. Specifically, FERC did not explain how allowing utilities to recover cleanup costs would protect the environment more effectively than requiring utilities to absorb those costs. Indeed, this Court's precedents, and common sense, suggest the opposite is true—requiring public utilities to absorb the costs of its unlawful conduct *deters* that conduct. In fact, this Court has expressed concern that excluding litigation costs from recovery may actually *over-deter* utilities who take calculated cost-saving actions that could draw litigation. *See Iroquois Gas Transmission Sys., L.P. v. FERC*, 145 F.3d 398, 401 (D.C. Cir. 1998); *Mountain States Tel. & Tel. Co. v. FCC (Mountain States II)*, 939 F.2d 1035, 1047 (D.C. Cir. 1991). ComGen's CWA violation did not result from a calculated cost-saving measure, so this concern does not apply. But requiring ComGen to absorb its cleanup costs would have a similar deterrent effect. It would, for example, encourage ComGen to "properly monitor the effectiveness" of its environmental remediations, which FERC found the company had failed to do for a full eleven years. *See* R. at 11. Especially in light of this factual finding, FERC failed to sufficiently explain how absolving utilities from the costs of their costly environmental violations would best protect the environment.

Moreover, even if its environmental rationale were well-grounded, FERC did not adequately explain why these putative environmental benefits should outweigh the financial interests of ratepayers, which is FERC's primary statutory responsibility. *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) ("[I]t is clear that the principal purpose of [the

FPA] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices.") FERC further weakened its position by admitting that its decision "would represent a 'windfall' of sorts to ComGen's shareholders" at the expense of ratepayers. R. at 11. While FERC may consider environmental questions, *see NAACP*, 425 U.S. at 670 n.6, this Court has found that a "generic" "interest in compliance with environmental and safety laws" was not enough to justify over-deterring utility actions that could benefit ratepayers financially. *Iroquois Gas*, 145 F.3d at 401. Here, the same principle applies. FERC's generic assertion of "environmental protection" is insufficient to justify imposing $246 million in cleanup costs on ratepayers, especially when those costs did not result from an effort to save ratepayers money.

(ii) "Strict liability" justification

FERC further justified its decision by claiming that ComGen should not be strictly liable for its faulty lining, which was installed incompetently by a subcontractor. R. at 11. This implies that denying ComGen's cost recovery would be tantamount to imposing a strict liability standard. This runs counter to FERC's conclusion that ComGen "failed to properly monitor the effectiveness of the corrective action during the 2006-2017 period, which likely would have revealed the problem with arsenic seeping through the imperfect weld in the liner." R. at 11. ComGen very well could have avoided the substantial cost of fully excavating the LGRI if it had performed proper monitoring. If so, even a more permissive negligence standard would require ComGen to absorb some of its cleanup costs. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "negligence" as "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . ."). At minimum, FERC should have attempted a "rational connection" between these two conclusions. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

B. FERC's decision was unsupported by "substantial evidence"

FERC's approval of ComGen's rate increase was not based on "substantial evidence in the record," *Washington Gas*, 188 F.2d at 15, and was therefore arbitrary and capricious, *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007); *see also Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (requiring FERC to make "findings of fact . . . concerning the consequences of [its] rate order"). Under the FPA, ComGen had the burden to prove that its proposed rate increase would be just and reasonable, 16 U.S.C. § 824d(e), after balancing the company's financial integrity against the interests of its ratepayers, *see Jersey Cent.*, 810 F.2d at 1180. In considering whether ComGen had met this burden, FERC was required to make at least two factual inquiries: into ComGen's capital costs, *Washington Gas*, 188 F.2d at 16, and into whether investors had already been compensated for the Vandalia Generating Station's environmental liability risks, *id.* at 19. FERC failed to make either inquiry.

(i) ComGen's capital costs

First, FERC was required to analyze "the capital costs of the business, such as service on the debt and dividends on the stock, in light of returns on investments in other enterprises having a similar risk factor." *Washington Gas*, 188 F.2d at 16. This study must be based on "substantial evidence in the record," *id.* at 15, and not be "so vague and devoid of meaning as to render judicial review a perfunctory process," *id.* at 16 (quoting *Colo. Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 605 (1945)). In addition to facilitating judicial review, a detailed study is also important because whether a rate of return is "reasonable" may fluctuate based on "changes affecting opportunities for investment . . . and business conditions generally." *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693 (1923).

Here, the evidence in the agency record was far from substantial. Without considering any of ComGen's capital cost data, let alone data from similarly risky investments, FERC

concluded that denying the rate increase would threaten ComGen's financial integrity. This premature conclusion was based only on the projected decrease in ComGen's rate of return—from 10 percent to between 3.2 and 3.6 percent. In *Washington Gas*, this Court invalidated a similar finding by the District of Columbia Public Utility Commission. The Commission had concluded, without inquiring into a utility's capital costs, that a rate of return of less than 4 percent was "inadequate to maintain the Company in a sound financial position." 188 F.2d at 16. This Court held that more was required of the Commission—that without further inquiry, its conclusion was "devoid of substance" and must be set aside. *Id.* The same is true here.

(ii) Effects on consumers

Second, FERC was required to consider whether ComGen's proposed rate increase would be exploitative of consumers. *See Jersey Cent.*, 810 F.2d at 1180. This required, at minimum, an inquiry into whether ComGen's investors had previously been compensated for the risk of sustaining environmental cleanup costs of the kind ComGen seeks to recover. *See Washington Gas*, 188 F.2d at 19-20. If this risk had already been taken into account—for example, in ComGen's approved rate of return, or in the valuation of the property figured into its rate base—then recovering the cleanup cost from ratepayers would be exploitative. "[T]he investor would be paid for the occurrence of the very eventuality the risk of which he had been consciously carrying and for which he had already been paid. . . . The result would clearly violate the consumer interest against 'exorbitant' rates." *Id.* at 20. This would render the rate increase automatically unjust, regardless of ComGen's financial integrity. *See Jersey Cent.*, 810 F.2d at 1180-81 ("[A] company that is unable to survive without charging exploitative rates has no entitlement to such rates.").

FERC's record is silent on this question, which is enough to render its decision arbitrary and capricious. *See Washington Gas*, 188 F.2d at 19-20. Nevertheless, two facts suggest that

ComGen's investors have probably been compensated already for the Vandalia Generating Station's environmental cleanup risk. First, at the time that FERC approved the sale of the station to ComGen in November 2014, the EPA had given the LGRI a "high" hazard rating. R. at 5. This is likely either to have reduced the price that ComGen paid for the station or figured into the rate of return approved by FERC. Second, this Court has noted that "fines and penalties for violations of mandatory reliability standards and environmental regulations are generally charged directly to the utility, not passed through to customers via rate increases." *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 583 (D.C. Cir. 2018). This practice suggests that investors are compensated for the risks of environmental violations in other ways. *See Washington Gas*, 188 F.2d at 20 (noting the common practice not to include obsolete property in a utility's rate base makes it "seem[] likely . . . that investors have been compensated for the risk of obsolescence"). If so, allowing ComGen to recover its cleanup costs would be unjust. At minimum, FERC must consider this possibility on the record. Failing to do so renders its decision arbitrary and capricious.

IV. SCCRAP's proposals would comply with the Takings Clause

Despite FERC's insufficient record, the facts show that either of SCCRAP's proposals—for ComGen to absorb 100 percent or, alternatively, 80.5 percent of its cleanup costs—would comply with the Fifth Amendment's Takings Clause. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").[8] Regardless of the effect on a utility's financial integrity, a rate order that prevents an exploitative or unnecessary cost

[8] The Fifth Amendment's Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). Thus this analysis applies equally to the constitutionality of any actions taken by state public utility commissions. As a federal agency, FERC's action are not bound by the Fourteenth Amendment. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm't*, 483 U.S. 522, 542 n.21 (1987).

being imposed on consumers is necessarily constitutional. FERC's contrary interpretation is entitled to no deference.

A. ComGen "has no constitutional right to a profit"

In *Federal Power Commission v. Hope Natural Gas Co.*, the Supreme Court held that a rate that is "just and reasonable" is necessarily constitutional. 320 U.S. 591, 607 (1944) ("Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former."). And a "just and reasonable" rate is one that considers both the interests of ratepayers as well as the financial integrity of the utility. *Hope*, 320 U.S. at 603 ("[T]he fixing of 'just and reasonable' rates[] involves a balancing of the investor and the consumer interests."). As such, "[a] regulated utility has no constitutional right to a profit, and a company that is unable to survive without charging exploitative rates has no entitlement to such rates." *Jersey Cent.*, 810 F.2d at 1181 (citing *Market Street Ry. v. R.R. Comm'n*, 324 U.S. 548 (1945)); *see also Hope*, 320 U.S. at 603 ("[R]egulation does not insure that the business shall produce net revenues.") (quoting *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 590 (1942)).

In *NAACP v. Federal Power Commission*, the Supreme Court interpreted "just and reasonable" to mean that FERC must "allow only such rates as will prevent consumers from being charged any unnecessary or illegal costs." 425 U.S. at 666. Consequently, a decision by FERC to reject rates that reflect unnecessary costs would be constitutional, regardless of the effect on ComGen's financial integrity.

(i) ComGen's cleanup costs are "unnecessary" under *NAACP*

ComGen's cleanup costs are unambiguously "unnecessary" under *NAACP*. In that case, the Court held that costs arising from a regulatee's unlawful employment discrimination,

including court-ordered backpay, could not be recovered from ratepayers. 425 U.S. at 668. This was because the cost was "unnecessary" and could have been avoided if the utility had complied with Title VII of the Civil Rights Act of 1964. In the instant case, ComGen's cleanup costs resulted from its violation of the CWA, 33 U.S.C. § 1311(a), and are likewise "unnecessary."

While this Court has found that some *litigation costs* stemming from unlawful activity may be recovered from ratepayers, it noted that those costs should *not* be borne by ratepayers if the underlying conduct "had no *ex ante* prospect of benefiting them." *Iroquois Gas,* 145 F.3d at 401 (seeing "no reason why ratepayers should bear [these] expense[s]"); *see also Mountain States II*, 939 F.2d at 1043 ("[T]he FCC may disallow any expense incurred as a result of carrier conduct that cannot reasonably be expected to benefit ratepayers."). Nothing in the agency record indicates that ratepayers benefited from CE's construction of an impound prone to leach arsenic or its installation of an improperly welded lining. But even if those actions saved money, the savings would not have benefited ComGen's ratepayers, since the savings would have been realized before the Vandalia Generating Station began serving the retail market in 2014. Furthermore, these precedents are specific to litigation costs, and for good reason. "[L]awsuits are a recurring fact of life in operating a business . . . ." *Iroquois* Gas, 145 F.3d at 402 (quoting *Mountain States Tel. & Tel. Co. v. FCC (Mountain States I),* 939 F.2d 1021, 1034 (D.C. Cir. 1991)). By contrast, ComGen's $246 million cleanup cost is far from a normal operating expense.

(ii) Costs can be "unnecessary" without resulting from intentional wrongdoing or even negligence

Even if ComGen did not violate the CWA intentionally or negligently, its cleanup costs are still "unnecessary." The Court in *NAACP* did *not* hold that an "unnecessary" cost can result only from intentional wrongdoing or negligence. Indeed, the Court had previously concluded that

an employer can violate Title VII by using employment practices that have a discriminatory effect, even without a discriminatory purpose. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."). The key issue for the Court was that the cost was superfluous. *See NAACP*, 425 U.S. at 668 ("[W]hen a company complies with a backpay award resulting from a finding of employment discrimination . . . it pays twice for work that was performed only once. The amount of the backpay award, therefore, can and should be disallowed as an unnecessary cost in a ratemaking proceeding.") ComGen's violation of the CWA likewise makes its cleanup costs "unnecessary," regardless of whether ComGen was otherwise negligent.

B. FERC's contrary interpretations deserve no deference

Courts, not federal agencies, interpret the Constitution. Normally, courts will defer to an agency's reasonable interpretation of a *statute* it administers, so long as Congress has explicitly or implicitly "left a gap for the agency to fill . . . ." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). But constitutional interpretations are reviewed *de novo*, and FERC's erroneous interpretation deserves no deference.

In addition, because the Supreme Court definitively interpreted the FPA's "just and reasonable" standard in *NAACP*, FERC's contrary interpretation should not be given deference even as a matter of statutory interpretation. When a pre-*Chevron* judicial interpretation is definitive, that interpretation must control. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 486-90 (2012). In *Home Concrete*, the Court held that a pre-*Chevron* Supreme Court opinion interpreting a tax statute, *Colony, Inc. v. Comm'r*, 357 U.S. 28 (1958), invalidated a later contrary interpretation by the Treasury Department. This was because the *Colony* opinion had indicated "that Congress had 'directly spoken to the question at hand,' and thus left '[no] gap

for the agency to fill.'" *Home Concrete*, 566 U.S. at 489 (quoting *Chevron*, 467 U.S. at 842-43) (alteration in original).

The case against agency deference is even stronger here. In *Home Concrete*, the Court found that the *Colony* opinion left no room for agency interpretation, even though *Colony* had acknowledged that the tax statute was "not 'unambiguous.'" *Home Concrete*, 566 U.S. at 482 (quoting *Colony*, 357 U.S. at 33). In *NAACP*, the Court's interpretation of the FPA was even more definitive: "The Commission *clearly* has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs," *NAACP*, 425 U.S. at 668, as well as "*any* unnecessary or illegal costs," *id*. at 666 (emphasis added). The Supreme Court's pre-*Chevron* interpretation of the FPA in *NAACP* is therefore controlling, and FERC's contrary reading deserves no deference.

CONCLUSION

For the foregoing reasons, Appellee-Petitioner requests that this Court: (1) uphold the district court's order granting injunctive relief; and (2) reverse FERC's determination that disallowing ComGen's recovery in rates of remediation costs would be unconstitutional, vacate FERC's approval of the revised FERC Rate Schedule Nos. 1 and 2 as arbitrary and capricious, and remand this matter to FERC with instructions to issue an order consistent with its statutory obligations to set just and reasonable rates.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellee-Petitioner certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 4, 2019.

Respectfully submitted,

Team No. 2.