IN THE UNITED STATES COURT OF APPEALS FOR

THE

TWELFTH CIRCUIT

	)	
COMMONWEALTH GENERATING COMPANY,	)	
	)	
Appellant	)	
	)	Case No. 18-02345
v.	)	
STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),	)	
	)	
Appellee	)	
	)	
	)	

BRIEF FOR APPELLEE

Team 7
Attorneys for Appellee
STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP)

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Statement of Jurisdiction

The district court and this Court have subject matter jurisdiction over this case pursuant to 28 U.S.C. Section 1291 (final decisions of district courts) and 28 U.S.C. Section 1296 (review of certain agency actions). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1291(a)(1) because Commonwealth Generating Company ("ComGen") appealed a final order entered by the district court on June 15, 2018 which granted injunctive relief against ComGen. ComGen filed the initial appeal of the final order of the district court on July 16, 2018. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1296(a)(1) because Stop Coal Combustion Residual Ash Ponds ("SCCRAP") appealed a final order entered by the Federal Energy Regulatory Commission ("FERC") on November 30, 2018 which granted a rate revision for ComGen and denied a rehearing request by SCCRAP. SCCRAP filed the appeal of the final order of FERC on December 3, 2018.

Statement of 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 in violation of §311(a) of the Clean Water Act.

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.

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

This is an appeal of the district court's grant of injunctive relief under the Clean Water Act and an appeal of FERC's approval of a rate increase under the Federal Power Act. R. at 1. ComGen operates the Vandalia Power Station and Little Green Run Impoundment. R. at 3-4. ComGen is wholly owned by Commonwealth Energy ("CE") and began operating the facilities in 2014. R. at 3. Prior to 2014, CE owned and operated the facilities through another subsidiary and sold the electricity generated by the facilities competitively for a period of 13 years. R. at 3-4.

Problems at the Little Green Run Impoundment began shortly after the facility's initial operation in 2001. R. at 4-5. Arsenic began leaching from the Impoundment in 2002 and the Vandalia Department of Environmental Quality ("VDEQ") directed that a geomembrane be installed at the site to eliminate the arsenic leak. R. at 5. However, the installation proved ineffective because of an improper welded seam in the geomembrane. R. at 6.

In 2017, water quality monitoring detected elevated levels of arsenic in the Vandalia River. R. at 5-6. An investigation by the VDEQ determined that the arsenic leaked from the ComGen's Little Green Run Impoundment through the improperly installed barrier and down the bank of Fish Creek. *Id.* SCCRAP petitioned the district court for relief under a Clean Water Act after arsenic leaked from the Little Green Run Impoundment into Fish Creek and Vandalia River. R. at 7. The district court granted SCCRAP's petition for injunctive relief under the Clean Water Act and found that the Act applied to discharges of pollutants into hydrologically-connected waters and that the Little Green Run Impoundment was a point source. R. at 8. ComGen now appeals the district court's grant of injunctive relief. R. at 7-8.

After the district court's ruling, ComGen petitioned FERC for a rate increase to compensate for the costs of complying with the district court's ruling. R. at 8-9. SCCRAP protested the rate filing. R. at 10. FERC granted ComGen's proposal to return ComGen to the previously approved

10% rate of return, but FERC suspended the effective date of the rate increase pending the disposition of ComGen's appeal of the district court's ruling. R. at 11-12.

In its decision, FERC determined that denial of the rate would result in a rate of return of 3.2% to ComGen and such a rate of return would jeopardize ComGen's financial integrity and potentially create an unconstitutional taking. R. at 12. However, the FERC also found that ComGen "failed to properly monitor the effectiveness" of the original corrective action of installing the geomembrane. R. at 11. The FERC noted that its decision represented a "windfall" for ComGen's shareholders, but rejected SCCRAP's argument that the increase was unfair and unreasonable because it would make the consumers of Franklin and Vandalia bear the costs of an issue that arose in 2002 even though they did not utilize electricity from the facilities until 2014. R. at 9-12. After the decision was announced, FERC denied SCCRAP's petition for a rehearing. *Id.* SCCRAP now appeals FERC's approval of the rate increase. *Id.*

On December 21, 2018, the Court granted a joint motion to consolidate both appeals. *Id.*

Summary of the Argument

ComGen violated the Clean Water Act by allowing the discharge of arsenic from the Little Green Run Impoundment into Fish Creek and the Vandalia River. The plain meaning of the Clean Water Act necessarily includes hydrologically connected ground waters within its scope. Congress' purpose would be subverted with a court holding that allowed polluters to escape liability by polluting over a large area or discharging a pollutant onto the ground feet from navigable waters. When a facility that is designed to collect and store a pollutant discharges that pollutant into navigable waters by way of improper construction, the facility is a point source within the meaning of the Clean Water Act.

Furthermore, the FERC acted arbitrarily and capriciously when it approved a rate increase for ComGen to recover the costs of the clean-up of ComGen's arsenic pollution. The FERC found that ComGen negligently operated the Little Green Run Impoundment. Their decision provides a windfall to ComGen, its owners, and its investors. Their decision was neither just nor reasonable.

Denial of a rate increase to compensate ComGen for the costs of cleaning up their own pollution is not an unconstitutional taking. ComGen is not constitutionally entitled to profit at the same rate of return as their previously approved rate.

Argument

ComGen violated the Clean Water Act by unlawfully discharging arsenic from the Little Green Run Impoundment into Fish Creek and the Vandalia River. The district court correctly found ComGen liable for the prohibited discharge of a pollutant into navigable waters. However, the FERC ignored this fault and acted arbitrarily and capriciously when it approved a rate increase to compensate ComGen for the costs of remediating their pollution. The Court should not victimize the people of Vandalia and Franklin twice-over by forcing them to pay for the clean-up while ComGen, its owners, and its investors have previously reaped rewards from their negligent operation of the Little Green Run Impoundment.

The Court should uphold the district court's grant of injunctive relief for ComGen's violation of the Clean Water Act. The Court should also vacate FERC's approval of a rate increase that unjustly rewards ComGen, its owners, and its investors for negligent operation of the Little Green Run Impoundment. First, the plain meaning of the Clean Water Act necessitates the inclusion of hydrologically connected groundwater within its scope. Second, the Little Green Run Impound is a point source within the meaning of the Clean Water Act. Third, FERC acted arbitrarily and capriciously by approving a rate increase for ComGen despite finding that ComGen was at fault for leaking arsenic into Fish Creek and the Vandalia River. Finally, ComGen is not constitutionally entitled to profit at the same rate of return as their previously approved rate. An unconstitutional taking would not occur if ComGen was denied full recovery for the costs of the clean-up of their pollution.

I. THE DISTRICT COURT CORRECTLY FOUND THAT ARSENIC POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT AND THAT THE LITTLE GREEN RUN IMPOUNDMENT IS A POINT SOURCE.

Congress enacted the Clean Water Act (the "Act") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1987). A

prohibited discharge of a pollutant under the Clean Water Act has five elements: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source. *Nat. Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). The district court found that all elements were present in this case and that ComGen violated the Clean Water Act. ComGen only appeals that the Clean Water Act does not apply to hydrologically connected waters and that the Little Green Impoundment is not a point source within the meaning of the Clean Water Act.

A. *The District Court Correctly Found That Arsenic Pollution Via Hydrologically Connected Groundwater is Actionable Under the Clean Water Act.*

ComGen discharged arsenic into Fish Creek and the Vandalia River through hydrologically connected groundwater, a fact that is not in dispute. With its appeal, ComGen asks the Court to reverse the decision of the District Court simply because the arsenic from the Little Green Impoundment traveled through a tributary before reaching surface waters. This result would be opposite the plain meaning of the Act, the interpretation of the EPA, and the intent of Congress in enacting this legislation. Instead, the Court should affirm the decision of the District Court on this issue and find that surface pollution that travels through hydrologically connected groundwater violates the Act.

1. The plain meaning of the Clean Water Act clearly includes surface water pollution through hydrologically connected groundwater.

Under the CWA, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311 (1995). The discharge of a pollutant is simply, "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362 (2014). *Any* addition of *any* pollutant by *any* person does not give any hint that indirect methods might be excluded. Indeed, it gives the opposite impression – that such methods necessarily be included.

The vast weight of persuasive authority agrees with this interpretation of the plain meaning. Writing for the plurality in *Rapanos,* Justice Scalia noted that the Act 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." *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (emphasis added). While the Supreme Court in *Rapanos* fractured on other grounds, no Justice disagreed with him on this point.

The Ninth Circuit relied on *Rapanos* to find that surface water pollution through hydrologically connected groundwater violates the Act. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 752 (9th Cir. 2018). In *Hawai'i Wildlife Fund*, a wastewater treatment facility disposed of certain pollutants in wells. *Id.* at 742. These wells mixed with groundwater, which eventually ended up in the Pacific Ocean. It its summary the Ninth Circuit put it simply: "At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly." *Id.* at 752.

The Fourth Circuit also relied on the plain meaning in finding that a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649 (2018). In *Upstate Forever*, a gas pipeline ruptured and the resulting spill seeped into the groundwater which was hydrologically connected with navigable waters. *Id.* at 638. In addition to relying on the opinions in *Rapanos* and the *Hawai'i Wildlife Fund*, the Fourth Circuit also noted that the Act only requires a discharge to come *from* a point source. *Id.* at 650. Defining *from* as a "starting place or a beginning," the Fourth Circuit noted that any other interpretation would effectively and unreasonably require a seamless channel of any pollutants to navigable waters. *Id.*

Only the Sixth Circuit finds the plain meaning argument unconvincing. *Ky. Waterways All. v. Ky. Utilities Co.*, 905 F.3d 925, 936 (6th Cir. 2018). In holding against allowing for liability through a hydrological connection, Judge Suhrheinrich found that the term "into" conveys directness – and "leaves no room for intermediary mediums." *Id.* at 934. Of course, we can use the same dictionary as Judge Suhrheinrich and come to the opposite result. "Into" can also mean "to the state, condition, or form of" with the given example of "got into trouble." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2018). Certainly, getting into trouble involves at least one intermediate act. Colloquially, we know that if someone says "I am going into the office," they probably also mean that they are going to get into a car, drive on a highway, and park in a garage. Clearly, reliance on "into" as ground for narrowly construing the Clean Water Act is a precarious position indeed, and one in which the Sixth Circuit stands entirely alone.

The weight of persuasive precedent shows that the plain meaning of the Clean Water Act clearly allows for ComGen to be held liable for arsenic introduced to navigable waters through a hydrological connection.

2. The EPA consistently interprets the Act to include liability where a hydrological connection exists.

The EPA, as the federal agency tasked with enforcing the Act, decades ago recognized that the Act cannot be read to exclude point source discharges that reach surface waters through groundwater where the "discharges are effectively discharges to the directly connected surface waters." Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 C.F.R. 64876-01 (1991).

The EPA has consistently interpreted the Act to cover any hydrological connection. "Groundwater may be affected by the NPDES program when a discharge of pollutants to surface

waters can be proven to be via groundwater." Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000, 62 C.F.R. 20177-01 (1997).

The EPA's position warrants respectful consideration. *See Wis. Dept. of Health and Family Services v. Blumer*, 534 U.S. 473, 497 (2002); *United States v. Mead Corp.*, 533 U.S. 218 (2001). Were this an agency action, deference might be appropriate to the EPA's interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984). That is not the case here. However, although this is a citizen-suit, the EPA's interpretation should still be persuasive in light of their experience and traditional role in enforcing the Clean Water Act.

3. Congress clearly intended to exercise the breadth of its Commerce Power in enforcing the Act.

Congress' intent in enacting the Act was not incremental improvement – it was aggressive and designed to be all-purpose. *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). "It is the national goal that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1) (1987). It seems clear that reading the Act narrowly in order to preclude pollutants that are discharged through a hydrological connection would be inapposite.

ComGen asks the Court to ignore text, the weight of persuasive precedent, and legislative purpose in order to hold the company blameless for the undisputed pollution of Fish Creek and the Vandalia River. ComGen's argument hinges on the idea that, by virtue of transit through groundwater, their actions are absolved of all liability under the Act. As a general matter, there is rarely a reward for taking a more circuitous route to accomplish a crime. The court should not reward the indirect route here, and deny ComGen's appeal on this issue.

B. *The District Court Correctly Found That the Little Green Run Impoundment Is a "Point Source" under the Clean Water Act.*

A "point source" is "*any discernible, confined* and *discrete conveyance, including* but not limited to *any* pipe, *ditch, channel*, tunnel, *conduit* . . . [or] *discrete fissure* . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(12) (2014) (emphasis added). Point sources under the Clean Water Act have been recognized broadly. *See, e.g., Hawai'i Wildlife Fund*, 886 F.3d at 737 (wells leaking pollutants into groundwater which flowed into ocean were point sources); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (fertilizer spraying vehicles as well as pipes and swales running from fields); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980) (mining overburden placed in piles then carried away by rain through naturally occurring ditches may be point source when miners collected or channeled runoff) *and Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (reserve sump could be point source, even where overflow resulted from excess rain or snow). A point source need not directly discharge into a navigable water nor must a polluting discharge come directly from a point source. *Upstate Forever*, 887 F.3d at 650 (citing *Rapanos*, 547 U.S. at 743). Moreover, a "point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The key characteristic of a point source is that the source is a discernible, confined and discrete conveyance.

In the Ninth Circuit, wastewater wells are point sources where pollution flows from the wells through unknown, underground pathways to discrete, coastal discharge points. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 741-49 (9th Cir. 2018). The *Hawai'i Wildlife Fund* court rejected an argument that pollution must flow directly from a point source into navigable waters for the Clean Water Act to apply to a discharge. *Id.* at 746-47. The wells were discrete as

pollution sources and the path from the wells to the ocean was a discernable conveyance—in that case traced with dye tests. *Id.* at 746-47. The court did note, however, that the actual conveyance of pollution to navigable waters must be discernable, as it was in this case because of tracer dye, for the pumps to be considered point sources. *Id.* at 749. Therefore, if a source transmits pollution in a discernible, confined, and discrete manner, then that source may be a point source even if the exact transmission path is unknown.

In the Fourth Circuit, a burst, underground pipeline is also a point source when gasoline flows from the pipe through groundwater passing through "various natural formations . . . including 'seeps, flows, fissures, and channels'" into local waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d at 644. Relying on the plain language of the Clean Water Act and the plurality opinion from *Rapanos*, the *Upstate Forever* court reasoned that a polluting discharge need not flow directly into navigable waters to qualify as a point source. *Id.* at 649-50. A showing that a point source was the starting point of pollution and that pollution flows through underground water to navigable water was sufficient to state a discharge claim under the Clean Water Act. *Id.* at 650-51. The *Upstate Forever* court did not, however, note that such a claim must show a "clear connection between the discharge of a pollutant and navigable waters." *Id.* at 651. Such a connection must be determined on a factual basis that considers "time and distance" and "geology, flow, and slope." *Id.* Because the pollution was traceable from the ruptured pipeline to navigable waters, the court found that burst pipeline was a point source under the Clean Water Act. *Id.* at 651-52. Groundwater transmission does not insulate a pollution source from classification as a point source if a factual determination reveals that discharge from the source is clearly connected to navigable waters.

In a distinguishable case, *Sierra Club v. Virginia Electric & Power Co.*, coal ash landfill and settling ponds that leeched arsenic into nearby streams were not point sources because arsenic was diffused by rainwater into a large area of groundwater and such a generalized seepage could not be characterized as a "discernible, confined, discrete conveyance." 903 F.3d 403, 409-412 (4th Cir. 2018). The court noted that in this context, the settling ponds and landfill were "static recipients of the precipitation and groundwater that flowed through them." *Id.* at 411. . Because the "diffuse seepage . . . was a generalized, site-wide condition," the court found that the landfill and settling pounds could not be considered as a conveyance and consequently were not point sources of pollution as defined in the Clean Water Act. *Id.* Thus, a source that diffuses a pollutant as a generalized, site-wide condition is not a point source because the conveyance is not discernible, confined, or discrete.

Likewise, in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, filled-in coal ash ponds were not point sources when selenium seeped through groundwater into local water bodies. 905 F.3d at 930-38 (6th Cir. 2018). In reaching this finding, the court rejected that polluted ground water could itself be a point source. *Id.* at 932-33. Although the court found that groundwater could convey pollutants, the court noted that groundwater was a "diffuse medium that seeps in all directions, guided only by the general pull of gravity." *Id.* at 933. In this case, the flow of underground groundwater could not be traced readily and, thus, could not be considered discernible, confined, and discrete. *Id.* Thus, the court concluded that polluted groundwater itself could not be considered a point source. *Id.* On similar grounds, underground porous rock could not be considered as a point source. *Id.* at 934. Finally, the court foreclosed the filled coal ash ponds as point sources themselves because the selenium passed into an intermediary that was not a point source before reaching waters governed by the Clean Water

Act. *Id.* at 934-36. While "intermediary point sources do not break the chain of CWA liability," pollutants passage into a nonpoint source did. *Id.* at 936. Therefore, if a source conveys a pollutant into an intermediary where the transmission of the pollutant is no longer discernable, confined, or discrete, then that source may not be a point source.

1. Under the plain meaning of the Clean Water Act, the Little Green Run Impoundment is a "point source" because it is a discernible, confined, and discrete conveyance.

ComGen erroneously argues that the Little Green Run Impoundment is not a point source because there is no "conveyance." This argument is inconsistent with the facts of the case, as noted by the District Court's decision. Under the Clean Water Act a "conveyance" includes "any pipe, ditch, channel, tunnel, conduit . . . [or] discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(12) (2014). A "conveyance" is something that "bears from one place to another." *Kentucky Waterways Alliance*, 905 F.3d at 933. Here the improperly installed barrier bears arsenic from the Impoundment to groundwater. Thus, the Impoundment is a conveyance. "Discernible" means "capable of being 'recognize[d] or identif[ied] as separate or distinct.'" *Id.* Here, the movement of arsenic from the Impoundment to ground water is discernible because the arsenic flows though specific faulty welds in the barrier, and thus can be recognized distinctly. "Discrete" means "constitute[es] a separate entity." *Id.* The flow of arsenic from the Impoundment is discrete because the flow is distinct—the arsenic seeps through the barrier at the improper weld, pools at the toe of the Impoundment, and then flows down the bank to the Fish Creek. "Confined" means "limited to a particular location." *Id.* Because of the distinctive path that the arsenic follows, the flow of arsenic from the Little Green Run Impoundment is also confined. That is, the arsenic only flows through the distinct conduit that begins at improperly welded barrier. Thus, under the plain meaning of the Clean Water Act, the

Little Green Run Impoundment is a discernible, confined, and discrete conveyance and, therefore, is a point source.

2. The district court's determination that the Impoundment was a point source is consistent with Clean Water Act jurisprudence.

The Little Green Run Impoundment is more like the wells in *Hawai'i Wildlife Fund* and the underground pipeline in *Upstate Forever* than the coal ash ponds in *Sierra Club* and *Kentucky Waterways All.* First, the Little Green Run Impoundment is an active conduit of arsenic and not simply a static body because the seepage occurs through a failure in construction—an improperly welded seam. When a system designed to retain and confine pollutants fails "because of flaws in the construction . . . with resulting discharge . . . the escape of liquid from the confined system is from a point source." *Sierra Club v. Abston Constr. Co.*, 620 F.2d at 46 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979)).

The coal ash ponds in *Sierra Club* and *Kentucky Waterways Alliance* did not represent a conduit through which pollution was transmitted to navigable waters because there was no known path from the ponds to navigable waters. Instead, discharge emerged from the coal ash ponds in *Sierra Club* and *Kentucky Waterways Alliance* through a generalized seepage to groundwater. There was no failure construction in either *Sierra Club* or *Kentucky Waterways Alliance.* The Little Green Run Impoundment, on the other hand, has an improperly installed barrier that creates a specific breech and a specific pathway through which arsenic flows. This breech created a conduit through which arsenic flows to navigable waters and is not comparable to a generalized seepage caused by precipitation alone or caused through other natural, ambient processes. In this way, the Impoundment is most akin to the burst pipeline in *Upstate Forever* because a pollutant contained by a barrier is transmitted through a specific point of breakage.

Second, arsenic flows from the Little Green Run Impoundment in a readily identifiable channel to navigable waters. That is, the transmission of arsenic from the Impoundment to navigable waters is discrete, discernable, and confined. In *Sierra Club*, the coal ash ponds only transmitted pollutants through generalized seepage into groundwater which was neither discrete nor had a discernable pathway to navigable waters. Similarly, in *Kentucky Waterways Alliance*, the transmission of pollutants from the coal ash ponds to navigable waters was not discernable or discrete because dye tests could not confirm the groundwater's flow.

However, the Little Green Run Impoundment leaks arsenic through a known conduit—an improperly welded seam on a barrier—and travels a visible path from the Impoundment through channels in the soil to Fish Creek. The flow from the Impoundment is discrete, confined to the contours of the channel in the soil, and discernable to the naked eye. Unlike *Hawai'i Wildlife Fund*, specialized dye tests are not even necessary to ascertain the connection of the Impoundment to Fish Creek. The VDEG investigation revealed that the arsenic collects in pools at the toe of the Impoundment and flows through "indentations or grooves in the soil . . . down the embankment towards Fish Creek." This readily apparent conduit of arsenic from the Impoundment to the Fish Creek stands in stark contrast the unproven and tenuous connection of the coal ash ponds and navigable waters in *Sierra Club* and *Kentucky Waterways Alliance*.

3. Passage of Arsenic through Intermediaries Does Not Alter the Impoundment's Classification as a Point Source.

The passage of the arsenic leak into the pool at the foot of the Impoundment and down grooves in the bank to Fish Creek likewise does not defeat ComGen's liability. "The Act 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." The pool and grooves in the bank are also point sources because each is a discrete, discernible, and confined conveyance. The pool and

grooves in the bank from the Impoundment to Fish Creek are "conduits" and "channels" that carry the arsenic and are therefore conveyances. Additionally, pool and grooves in the bank are discernible, confined, and discrete because they are readily apparently, restricted to specific paths, and move the arsenic from the Impoundment to Fish Creek. Thus, there is a continuous chain of point sources transmitting arsenic from the Impoundment to Fish Creek. Therefore, even if the Court adopts the theory espoused in *Kentucky Waterways Alliance*, which would require a continuous chain of point sources to navigable waterways, the Impoundment would still be a point source.

Additionally, it is immaterial to the classification of pool and grooves in the bank as point sources that the pool of seepage and grooves in the bank are not man-made. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d at 45 ("Nothing in the [Clean Water] Act relieves [operators of a facility] from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water.") The *Rapanos* court also endorsed this position. *See Rapanos*, 547 U.S. at 743. (plurality opinion) (taking no exception to lower courts which "held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between."). Thus, even if the strictest interpretation of the Clean Water Act is applied, the Impoundment would remain a point source.

Under any standard, the Little Green Run Impoundment is a point source. ComGen has committed an unlawful discharge of a pollutant by adding arsenic from the Little Green Run Impoundment, a point source, to Fish Creek and Vandalia. The arsenic pollution flows from the

Little Green Run Impoundment from a breech in a barrier, down a creek bank into Fish Creek, and then to the Vandalia River. Subsequently, the Court should affirm the lower court's decision and find that ComGen is violating § 1311(a).

II. FERC'S DECISION TO APPROVE RATE SCHEDULE NO. 1 AND REVISED FERC RATE SCHEDULE NO. 2 WAS ARBITRARY AND CAPRICIOUS.

The Court should vacate the FERC's approval of Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 because there was not a rational connection between the facts found and the choices made. The FERC allowed ComGen to pass on losses incurred because of its negligence while creating a windfall for ComGen's shareholders, all in order to promote environmental protection. This is impermissibly outside of the FERC's activating statute and is arbitrary and capricious.

Under the Administrative Procedure Act, the Court can vacate FERC ratemaking decisions that are arbitrary or capricious. 5 U.S.C. §706 (1966). FERC ratemaking decisions will be upheld unless the Commission has failed to articulate a rational connection between the facts found and the choices made. *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007). It is unimportant whether the substantial evidence or arbitrary and capricious standards are applied here, because the result will be the same. *See United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

A. *The FERC should not allow ComGen to pass on losses due to its negligence.*

The FERC made a factual finding 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. ComGen is not permitted to include negligent losses in the operating expense used to calculate their rate. *Panhandle Eastern Pipe Line Co. v. FERC*, 777 F.2d 739, n.7 (D.C. Cir. 1985) (citing *West Ohio*

Gas Co. v. Public Utilities Commission of Ohio, 294 U.S. 63, 68 (1935)). FERC made a factual finding that established negligence on the part of ComGen, then allowed them to include the costs of this negligence in the resulting rate schedules. This is arbitrary and capricious.

B. *The FERC cannot provide a windfall to ComGen shareholders because of a desire to promote environmental protection.*

The FERC must ground its reasons for approving or not approving the rate in its activating statutes. *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007). "All rates [. . .] shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824(d) (2015). Just and reasonable rates are those yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital." *ExxonMobil*, 487 F.3d at 951.

The FERC found that charging Vandalia Power and Franklin Power with the full remediation costs would represent a windfall of sorts to ComGen's shareholders. In order to avoid that windfall, the FERC found that the costs should be distributed proportionally. Such a proportional distribution would be a just result, and would comply with the FERC's activating statutes. However, instead of compliance, the FERC approved the unjust rate schedule. In order to justify this result, the FERC emphasized that, as a matter of policy, it was important to ensure utilities are able to recover in rates the cost of environmental cleanups as a means of promoting environmental protection. Reaching a result that is patently against the FERC's activating statute in order to fulfill a goal not in the FERC's activating statute is arbitrary and capricious.

In this matter, the Court should not allow the FERC to approve a windfall for ComGen's shareholders while the utility company passes on its losses due to negligence. The FERC in this matter ignored its purpose and reached a result that was unreasonable and not based on the facts found. The Court should find the FERC's action arbitrary and capricious and vacate the ruling.

III. FERC'S DENIAL OF RECOVERY OF CLEAN-UP COSTS THROUGH A RATE DECISION IS NOT AN UNCONSTITUTIONAL TAKING. COMGEN IS NOT CONSTITUTIONALLY ENTITLED TO EARN A FIXED PROFIT, LET ALONE EARN THE 10% RATE OF RETURN FROM THE PREVIOUSLY APPROVED RATE.

A rate lower than ComGen's currently approved rate-of-return is not an unconstitutional taking. First, ComGen is barred from recovering negligent and wasteful costs through their rate. The cost of a second remediation of the Little Green Run Impoundment is only necessary because of ComGen's failure to properly supervise the contractor who completed the original remediation in 2006. Second, a 3.2% rate of return is not unfair or unreasonable under the circumstances.

A. *ComGen is prohibited from recovering the cost of the Little Green Run Impoundment's remediation because ComGen "failed to properly monitor the effectiveness of the corrective action."*

Utilities are not permitted to include "negligent or wasteful" losses in the operating expense used to calculate their rate. *Panhandle Eastern Pipe Line Co. v. FERC*, 777 F.2d at n.7 (citing *West Ohio Gas Co.*, 294 U.S. at 68). The FERC found that ComGen "failed to properly monitor the effectiveness of the [2006] corrective action," and thus ComGen failed to detect or mitigate the arsenic leak from 2006 through 2017. Although there is a presumption that utilities incur costs in good faith, ComGen's failure to monitor the effectiveness of the first remedial effort overrides that presumption. *See West Ohio Gas Co.*, 294 U.S. at 68. Because ComGen is prohibited from recovering wasteful and negligent expenses through its rate, a denial of a rate increase to account for recovery of the remediation costs cannot be an unconstitutional taking.

B. *ComGen is not entitled to recover the costs of remediating the Little Green Run Impoundment for a second time because a 3.2 percent rate of return is not unfair or unreasonable.*

Under the Federal Power Act, the Federal Energy Regulatory Commission is charged with ensuring that public utilities' rates are just and reasonable, and not discriminatory.

16 U.S.C. § 824(d) (2017). Even if recovery of the remediation expenses were permissible generally, denying ComGen's recovery of the expenses through a rate increase would not be an unconstitutional taking under the Fifth and Fourteenth Amendment. The "total effect" of the 3.2 percent rate is neither unjust nor unreasonable. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

Determining a "just and reasonable" rate requires "a balancing of the investor and the consumer interests." *Hope*, 320 U.S. at 603. To prevent an unconstitutional taking, the rate of return for a utility should be "reasonably sufficient to assure confidence in the financial soundness of the utility" and "adequate . . . to maintain and support its credit and enable it to raise the money necessary." *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 693 (1923); *Hope*, 320 U.S. at 603. No single methodology must be used by a public utility commission to determine fair and reasonable rates. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) ("The Constitution within broad limits leaves the States free to decide what rate setting methodology best meets their needs in balancing the interests of the utility and the public."). Finally, public utilities have "no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield*, 262 U.S. at 693. *See also FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level.").

A state utility commission does not unconstitutionally take a utility's property by rejecting the utility's inclusion of uncompleted nuclear projects in a new rate. *Duquesne*, 488 U.S at 310-16. The Court reasoned that the "end result" standard articulated by the *Hop*e Court did not require a specific methodology to calculate a fair and reasonable rate. *Id.* at 316. Since

the utility did not face a loss of "financial integrity" and the utility did not demonstrate that the reduced rate failed to adequately compensate investors, the utility commission's rate decision was valid. *Id.* at 311-12.

A utility's rate of return of approximately 3.27 percent is not necessarily unjust or unreasonable. *Hope*, 320 U.S. at 605-06. Because the rate or return equated to a return on investment of approximately 9 percent, the *Hope* Court concluded that the rate set by the utility commission would allow the utility to "operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed," despite the "meager" return when calculated as a percentage of the base. *Id.* at 605.

If ComGen was denied recovery of the Little Green Run Impoundment clean-up costs through a rate increase, ComGen would earn a rate of return of approximate 3.2 percent. This rate is very slightly lower than the rate of return the Court validated in *Hope.* Rate of return is not the standard for constitutional taking. Instead, ComGen must demonstrate that the end result of the rate is so low as to disrupt ComGen's financial integrity and interfere with ComGen's ability to raise capital on reasonable terms.

Moreover, a 3.2 percent rate of return properly balances the interests of ComGen's investors and consumers. ComGen is a wholly-owned subsidiary of Commonwealth Energy (CE). CE incorporated ComGen for the purpose of "purchasing" Vandalia Generating Station from another CE-owned subsidiary Commonwealth Energy Solutions (CES). CES operated the Vandalia Generating Station since its construction in the 1990s until CES sold the plant to ComGen in 2014. After taking over operation of the Vandalia Generating Station and Little Green Run impoundment in 2014, CE-owned ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company, which are also both

owned by CE. CE and its owners have benefited from the rates earned by the Vandalia Generation Station since its initial operation. Risk is a component of rates. It is not unfair or unreasonable that an expense, which was created by years of the Station's operation and enabled years of rates for CE, should now fall to the financial beneficiaries of the Station's operation. Like *Duquesne,* where a utility was not entitled to recover costs of nuclear project, ComGen, CE, and their investors are not entitled to be made completely whole for the consequences of their negligent monitoring of the Impoundment.

In *Ameren Services Co. v. FERC*, this court noted that utilities are "entitled to a return that is sufficient to ensure that new capital can be attracted," but that investors "invest in entire enterprises, not just portions thereof." 880 F.3d 571 (D.C. Cir. 2018). The proper context view the impact of disallowing recovery of remediation costs in rates is not the financial impact on ComGen, but on CE. CE is the owner of ComGen and ComGen is but one of many enterprises that CE owns and operates. Investors invest in CE, not ComGen. In this case the investor's interest is spread across the entire span of CE and across all of its returns, including those earned while CES operated the Vandalia Generation Station. While the FERC found that ComGen would be not maintain its financial soundness if forced to bear the full costs of the remediation, the FERC did not contextualize the end result in light of CE.

Moreover, consumers have a particularly strong interest in this case. Through rates, consumers have already paid CE for the 2006 remediation of the Little Green Run Impoundment. Franklin and Vandalia consumers suffered pollution and contamination of their environment due to ComGen's failure to monitor the arsenic seepage at the Impoundment. Further, Vandalia Power Company and Franklin Power Company's customers only began to use and directly benefit from the Vandalia Power Station in 2014. It would be unfair and unreasonable to force

consumers to suffer the consequences of CE's failures and then pay ComGen and CE to fix those failures. Considering the balance of the investor and consumer interests in this case, a 3.2 percent rate of return is not unreasonable or unfair. Additionally, the end result of the rate decision needs to be put in context of the financial impact on CE, not just ComGen.

ComGen is not entitled to recover the costs of the Little Green Run Remediation because the costs are being incurred as a result of their failure to properly monitor the initial remediation effort. The 3.2 percent rate of return is not an unconstitutional taking because it is not so low was to be unreasonable or unfair. ComGen and CE will profit reasonably despite being denied recovery for the clean-up cost. Considered in the context of CE, ComGen's rate decision will not prevent ComGen or CE from maintaining their financial integrity or obtaining capital.

Conclusion

The Court should uphold the district court's grant of injunctive relief for ComGen's violation of the Clean Water Act. The plain meaning of the Clean Water Act necessitates the inclusion of hydrologically connected groundwater. Any other interpretation would subvert Congress's purpose and create a loophole that would allow polluters to escape liability by discharging onto the ground within sight of navigable waters. Additionally, the Little Green Run Impoundment is a point source within the meaning of the Act. There is not dispute that the Impoundment is the source of the pollution and the path that the pollution travels from the Impoundment to Fish Creek is apparent.

The Court should also vacate FERC's approval of a rate increase that unjustly rewards ComGen, its owners, and its investors for negligent operation of the Little Green Run Impoundment. FERC ignored their own finding that ComGen was negligent for the discharge in their approval of the rate increase. Their finding is unjust and victimizes the people of Vandalia and Franklin a second time. Moreover, ComGen's argument that denial of recovery for the costs

of the clean-up would amount to an unconstitutional taking is without merit. ComGen is not entitled to profit off their own misdeeds.

Certificate of Compliance (Brief)

Pursuant to *Official Rule* III.C.9, Stop Coal Combustion Residual Ash Ponds (SCCRAP), certifies that its brief contains 30 pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No.7*, and the *Team Members* of *Team No*.7 have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 7

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds (SCCRAP) certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2018.

Respectfully submitted,

Team No. 7