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

Commonwealth Generating Company, *Appellant*	)	
v.	)	Case No. 18-1221
Stop Coal Combustion Residual Ash Ponds (SCCRAP) *Appellee*	)	

Team 12
Representing SCCRAP

February 4, 2019

Circuit Rule 28(a)(1) Certificate

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Rulings Under Review

1. *Commonwealth Generating Company v. Stop Coal Combustion Residual Ash Ponds (SCCRAP)*, D.C. No. 17-01985 (2018);

2. *FERC Revised Rate Schedules Nos. 1 and 2*, Docket ER-18-263-000 (2018).

C. Related Cases

There are no other petitions for review for the District Court for the District of Columbia decision or the revised FERC rate orders.

/s/ *Team 12*
Team 12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This case responds to the U.S. District Court for the District of Columbia's granting of injunction relief against Commonwealth Generating Company (ComGen) and seeks review of FERC's denial of rehearing in Docket ER-18-263-000, accepting Commonwealth Generating Company's revised Rate Schedule Nos. 1 and 2.

In December of 2017, Stop Coal Combustion Residual Ash Ponds (SCCRAP) filed a citizen-suit in the U.S. District Court for the District of Columbia against ComGen for violating provisions of the Clean Water Act. 33 U.S. § 1311(a). The district court had jurisdiction to adjudicate SCCRAP's citizen-suit under 33 U.S.C. § 1365. On June 15, 2018 the district court found ComGen's Little Green Run Impoundment was leaching arsenic into navigable waters. The court entered a final order, granting SCCRAP's injunction and ordering ComGen to fully excavate the coal ash from the impoundment and relocate it to another facility. ComGen filed a timely appeal in the Circuit Court for the District of Columbia.

In addition to the appeal of the district court's order, ComGen filed a revised rate schedule to the Federal Energy Regulatory Commission (FERC) on June 16, 2018. ComGen is permitted to make such filings under § 205 of the Federal Power Act. The revised rate would permit ComGen to recover the costs of complying with the court-mandated cleanup. SCCRAP timely intervened, contesting ComGen's revised rate. On October 10, 2018, FERC issued its decision, allowing ComGen to fully recover its cleanup costs over a ten-year period. On November 9, SCCRAP petitioned FERC for a rehearing, which FERC denied on November 30, 2018. SCCRAP filed an appeal of FERC's denial and decision in the Circuit Court of Appeals for the District of Columbia. This appeal was timely filed subject to 16 U.S.C. § 825l(b).

In order to consolidate the two closely-linked appeals, ComGen, SCCRAP, and FERC jointly filed a motion to the D.C. Court of Appeals to consolidate the two appeals. This Court granted the motion.

STATEMENT OF THE ISSUES PRESENTED

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act when it is discharged from a fairly traceable point source.
2. Whether seepage of arsenic from a coal ash impoundment constitutes the discharge of a pollutant from a point source in violation of §402 of the Clean Water Act (33 U.S.C. §1342) when it passes through groundwater to navigable waters.
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 when FERC ignored their own factual findings and conclusions in favor of the utility's financial integrity.
4. Whether SCCRAP's position in the FERC proceeding, to disallow the recovery in rates incurred by ComGen's mismanagement of the Little Green Run Impoundment, constitutes an unconstitutional taking under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

Factual Background

Commonwealth Generating Company (ComGen) is a wholly-owned subsidiary of Commonwealth Energy (CE), and owner of the Vandalia coal-fired generating station. As part of Vandalia's operation, coal ash is collected and disposed in the Little Green Run Impoundment, an on-site surface impoundment. ComGen's permits require routine groundwater monitoring. In 2002, ComGen began to detect elevated levels of arsenic and notified Vandalia Department of Environmental Quality (VDEQ) of these heightened levels. ComGen then developed and implemented a corrective action plan, as required by their permits. VDEQ approved the

corrective plan in 2005. Pursuant to the plan, ComGen installed a geomembrane on the west embankment of the Little Green Run Impoundment in 2006. ComGen's permits continued to require routine monitoring of the groundwater surrounding the Little Green Run Impoundment.

In March of 2017, Vandalia Waterkeeper detected elevated levels of arsenic in the Vandalia River. Subsequent internal analyses suggestion the source of the arsenic was from the Little Green Run Impoundment. Subsequently, Vandalia Waterkeeper filed a complaint with VDEQ. Upon review by VDEQ, the agency determined that the geomembrane liner was improperly installed and lead to pooling and seepage during significant rainfall events. In December of 2017, SCCRAP brought suit against ComGen, alleging the pooling and seepage from the Little Green Run Impoundment violated the Clean Water Act.

Procedural Findings

The District Court found that that rainwater and groundwater were "leaching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater," transporting the arsenic into navigable waters. It further found, as fact, that arsenic was reaching Fish Creek and the Vandalia River in this fashion. When discussing whether this constituted a conveyance the court stated:

> ComGen built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River.

Based on these facts, the District Court found that ComGem was liable for continuing violation of §1311(a).

In light of the district court's findings, discussed above, that ComGen was required to implement remediation measures, ComGen submitted a filing to FERC under § 205 of the Federal Power Act to recover, from Vandalia Power and Franklin Power, the costs of complying

with the order. FERC approved this filing, allowing ComGen to recover the estimated $246 million from the retail customers of Vandalia Power and Franklin Power over a 10-year amortization period. This recovery would lead to an increased customer bill in each jurisdiction by about $2.15 per month in November 2019, and average households would see bills rise by about $3.30 per month for the 10-year period.

FERC, after three days of evidentiary hearings, approved the rates proposed by ComGen, subject to a compliance filing by ComGen confirming that the injunctive relief imposed by the District Court withstood judicial review and that ComGen would be required to implement the required remedial action. However, FERC accepted many of the arguments presented by SCCRAP. While agreeing that ComGen should not be held strictly liable for the incompetent actions of the subcontractor, FERC found that ComGen failed to monitor the effectiveness of the corrective action during the 2006-2017 period, which would have likely revealed the arsenic seepage issue. Further, FERC accepted the "matching principle" and that allowing full recovery of the remediation actions would represent a "windfall" to ComGem's shareholders, who benefited from the Vandalia Generating Station from 2000 through 2014, and thus the shareholders should bear a proportionate share of the remediation action. However, FERC ultimately accepted ComGen's testimony that the financial impact of disallowing recovery would likely raise jeopardize the financial integrity of ComGem, potentially raising constitutional issues under the Fifth and Fourteenth Amendments.

SUMMARY OF THE ARGUMENT

The District Court was correct in finding that ComGen is in violation of 33 U.S.C. § 1311(a) when the discharge of arsenic from their impoundment moves through hydrologically connected ground water to Fish Creek and the Vandalia River. Appendix 1 at 7–8. This finding is

congruent with other districts courts that have found surface water pollution via hydrologically connected groundwater actionable under the CWA. When a discharge is made by a "direct" or "fairly traceable" point source through hydrologically connected groundwater, it can be said that the groundwater is merely the transitory conduit for the violation. The groundwater is neither the point source nor navigable waters. This view is consistent with the stance taken by the Supreme Court in *Rapanos v. U.S.*, stating the act does not disallow the "addition of any pollutant *directly* to navigable waters from any point source," but the "addition of any pollutant *to* navigable waters." *Rapanos v. U.S.* 547 U.S. 715, 743 (2012) (plurality opinion). The Court looked to lower courts findings that the "discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id*. Thus, seepage of arsenic from ComGen's impoundment constitutes a discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act (33 U.S.C. § 1342) when it passes through groundwater to navigable waters.

As SCCRAP supports, above, the District Court found ComGen to be liable for the release of pollutants from the Little Green Run Impoundment and ordered ComGen to implement corrective action estimated at $246 million. FERC's approval allowing ComGen to recover these costs of compliance from ratepayers was arbitrary and capricious because FERC ignored their own factual findings and conclusions in favor of the utility's financial integrity. The Federal Power Act requires that all rates charged are just and reasonable; therefore, such costs should be borne by ComGen and the shareholders who caused the pollution. Additionally, FERC ignored its own factual findings that the imprudent monitoring and supervision of the impoundment lead to the continuous release of arsenic into the ground and that the matching

principle of utility ratemaking is an appropriate mechanism to pass the costs on to those who received the benefits. In blatant disregard for such findings, the decision by FERC to allow the pass through of cost should be found to be arbitrary and capricious and reversed and remanded to FERC for further consideration of the factual findings. Finally, allowing the cost of pollution or noncompliance to be passed on to ratepayers is bad public policy because it allows utilities to avoid their obligations and ethical and social responsibilities.

FERC would not violate the Takings Clause of the Fifth and Fourteenth Amendments if they disallow the rates to be passed on to ratepayers. ComGen's assertion that the Constitution requires the rates to be passed through fails for two distinct reasons. First, the Constitution requires an opportunity for shareholders to make a reasonable rate of return. However, this does not guarantee a certain level of profits in all situations. Due to ComGen's own mismanagement of the Little Green Run Impoundment, they can be required to remediate their assets. The end result of this remediation would lower the rate of return, but the total effect of the order would still be within the zone of reasonableness, and therefore pass constitutional muster. Second, the Court has held that assets that are lost to market forces cannot be artificially propped up by the Constitution. ComGen acquired a risky, uncompetitive coal-fired generating plant that needs large-scale remediation. To pass the cost of remediation onto consumers would be at odds with the Court's previous holdings. For these two reasons, FERC may assign remedial costs to ComGen without violating the Constitution.

ARGUMENT

I. SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT.

The Clean Water Act (CWA) is a powerful statute with the monumental mandate from Congress that "the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C.

§ 1251(a)(1). The District Court correctly found that ComGen violated 33 U.S.C. § 1311(a) of the CWA when arsenic discharges from their impoundment. This discharged moves through hydrologically connected groundwater, ultimately polluting Fish Creek and the Vandalia River. Appendix 1 at 7–8. Section 301 of the CWA prohibits "the discharge of any pollutant" except as allowed under state- or EPA- administered regulatory programs. 33 U.S.C. § 1311(a).

Previous courts conclude that surface water pollution via hydrologically connected groundwater are actionable under the CWA, by adopting the understanding that the groundwater is acting as a conduit or transport of the pollution. This conduit theory is supported by the plain meaning of the statute, its purpose, and EPA and judicial interpretations.

Review of the requirements of the CWA is *de novo,* as previously determined by this Court. *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 396 (D.C. Cir. 2017).

A. The Clean Water Act's broad jurisdiction supports liability through the conduit theory.

Congress's mandate in the CWA makes clear that "the discharge of pollutants into the navigable waters be eliminated," and required strict liability for polluters. 33 U.S.C. § 1251(a)(1); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). Accordingly, remedial efforts engaged in good faith do "not ipso facto establish the absence of federal jurisdiction over a citizen suit." *American Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir. 2005). To find a § 301 violation, the following elements must be met: (1) the discharge of a pollutant; (2) from a point source; (3) to a navigable water; (4) by a person; and (5) without a permit. 33 U.S.C. § 1311(a). The CWA defines these elements individually. *Id.* at § 1362. The following discussion focuses on the first three elements at issue in this case.

The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," and is a term of art under the statute. 33 U.S.C.

§ 1362(12); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The CWA further defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

"Navigable waters" is defined as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court interprets "navigable waters" as more than waters that are navigable-in-fact. *Riverside*, 474 U.S at 106. For example, navigable waters include some wetlands and hydrologically connected environments. *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (plurality opinion). The Court and the EPA have alternately made clear that isolated non-navigable waters and isolated groundwater are not within the statute's jurisdiction. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). 40 C.F.R. § 122.2(2)(v) (2018) (exempt groundwater from definition of jurisdictional waters under CWA).

The conduit theory is consistent with the CWA's principle that a polluter is liable for indirect discharges. Under the conduit theory, courts have found that groundwater is neither a point source nor a navigable water, but a "conduit" between the two. *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018); *Northern Cal. River Watch v. Mercer Fraser Co*., 2005 WL 2122052 (N.D.Cal. Sept. 1, 2005); *Greater Yellowstone Coal. v. Larson*, 641 F.Supp.2d 1120, 1138 (D.Idaho 2009); *Northwest Envtl. Def. Ctr. v. Grabhorn*, Inc., 2009 WL 3672895 (D.Or. Oct. 30, 2009); *Sierra Club v. Colo. Ref. Co*., 838 F.Supp. 1428, 1434 (D.Colo. 1993); *Sierra Club v. Virginia Elec. & Power Co.*, 145 F. Supp. 3d 601, 607 (E.D. Va. 2015). In these cases, pollutants enter navigable waters and are "traced [back] to . . . identifiable point[s] of discharge," and therefore are subject to § 402 under the plain language of the CWA. *Trustees for*

Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984). These courts found that a polluter may be liable under the CWA for indirect discharges that pass through groundwater.

In cases adopting conduit theory, the courts recently considered two major factors: whether discharges from known point sources must be directly conveyed into navigable waters and for how long after the discharge can it be traced back to the source. In *Hawai'i Wildlife Fund*, the County of Maui was found in violation of the Act when reclamation injection wells discharged wastewater into groundwater that flowed out to the Maui shores and into the ocean. *Haw. Wildlife Fund*, 886 F.3d at 749. While the court in *Kinder,* found that when a pipeline spills oil into groundwater hydrologically connected to navigable waters, it is liable for the continued migration of its spill, even if the pipe is no longer releasing oil. *Kinder*, 887 F.3d at 641.

Courts have found that there is nothing inherent about groundwater or surface water conveyances that requires distinguishing between these conduits under the CWA. *Id*. Thus when either type of waterway is a conduit through which pollutants reach navigable waters, there has been the "addition of [a] pollutant to navigable waters." 33 U.S.C. § 1362(12)(A); *Haw. Wildlife Fund*, 886 F.3d at 737. Both courts found that discharges to groundwater that had direct hydrological connections to navigable waters are actionable.

ComGen's impoundment, like the pipeline, should not escape liability when rainwater spills through is crevasses into groundwater. The VDEQ report states that the seepage appears to have been active for many years without change. Appendix 1 at 6. The lower court findings further found that this rainwater carried arsenic from the impoundment to navigable waters. Appendix 1 at 7. Like in *Kinder* and *Hawai'i*, this Court should find the continued migration of pollutants directly to navigable waters is a continuing violation of the CWA.

1. The text of the CWA supports coverage of indirect discharges such as the seepage of arsenic from ComGen's coal ash impoundment.

Courts must look first to the language of the statute. *Bullcreek v. Nuclear Regulatory Comm'n*. *359* F.3d 536, 541 (D.C. Cir. 2004). The plain meaning of the CWA language supports liability for indirect discharges of pollutants. The CWA prohibits the discharge of pollutants "*to* navigable waters"—not the discharge of pollutants *directly into* navigable waters. *Rapanos*, 547 U.S. at 743 ("[T]he CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters . . . ."); *Kinder*, 887 F.3d at 650.

Previous courts clarified the CWA "does not require a discharge directly to navigable waters, neither does the Act require a discharge directly from a point source." *Kinder*, 887 F.3d at 650. Further, "from" is defined as "used as a function word *to indicate a starting point* of a physical movement." (emphasis added) *From*, MERRIAM-WEBSTER DICTIONARY (Feb. 2, 2018). This highlights that the CWA covers more than direct discharges. Justice Scalia explains this reasoning in plurality opinion of *Rapanos*:

> 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." Thus, . . . lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the CWA], even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Rapanos, 547 U.S. at 743 (plurality opinion) (emphasis in original) (citations omitted). The plain reading of the CWA's text extends liability to point sources when groundwater carries pollutants from an initial point source *to* a navigable surface water. Winter et al., USGS, Circular 1139 at 66, *Ground Water and Surface Water: A Single Resource* 1 (1998). Therefore, the conduit theory requires a NPDES permit for the discharge of pollutants to tributary or hydrologically connected groundwater. Non-tributary or isolated

groundwater would still fall outside CWA's jurisdiction because there would be no resulting discharge to a navigable water. This maintains that non-tributary groundwater remains under the authority of individual states, respecting the balance of federalism. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001) (noting that courts agree the CWA does not encompass non-tributary groundwater).

2. Excluding discharges to hydrologically connected groundwater would frustrate the purpose of the Clean Water Act.

When Congress passed the CWA, it enacted a broad mandate that would be frustrated if courts chose to narrowly interpret the statute by drawing an arbitrary distinction regarding the passage through groundwater. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act eliminates the unpermitted "discharge of pollutants into navigable waters." *Id.* Excluding liability when pollutants touch tributary groundwater would frustrate the purpose of the CWA. *Virginia Elec.*, 247 F. Supp. 3d at 762 (stating the CWA "would be defeated if the CWA's jurisdiction did not extend to discharges to [tributary] groundwater").

Both legislative history and previous judicial interpretations support the conclusion that the CWA should cover all discharges of pollutants into navigable waters, even those that are connected via groundwater. Senator Muskie, the Senate sponsor and champion of the bill, stated in the post-conference debate: "These [goals] are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the nation." 118 Cong.Rec. 33, 693 (1972); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 179–80 (D.C. Cir. 1982). Further, this Court previously supported the understanding that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent

permissible under the Commerce Clause of the Constitution." *Natural Res. Def. Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975).

This Court should uphold the lower court's findings that liability under the CWA exists when a discharge from a point source moves through groundwater to navigable waters. To find the Act requires otherwise would be tantamount to imposing something not anticipated by Congress: that discharges would have to be twice channelized before jurisdiction would be found. *Waterkeeper All., Inc. v. E.P.A.*, 399 F.3d 486, 511 (2d Cir. 2005). For instance, if the Court found discharges from a point source passing through groundwater would have to be recollected in order to find liability, a clear loophole would exist for polluters. Pollutants that are introduced to navigable waters are harmful to the entire ecosystem. It does not matter whether discharges were made from a pipe above ground or through an unseen broken seal below an impoundment. What is most important is that "fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams" due to this point source pollution. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001).

3. Preambles to NPDES regulations demonstrate the EPA's interpretation supports the conduit theory.

The EPA has directly acknowledged its jurisdiction over discharges to groundwater with a hydrological connection to navigable waters in the preambles of several CWA regulations. 40 C.F.R. § 122–24 (2018); 40 C.F.R. § 131.1 et seq. (2018); 40 C.F.R. § 412.1 et seq. (2018). In the Confined Animal Feeding Operation regulation, the EPA supported its previous assertions and added that the Agency "has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via groundwater can constitute a discharge subject to the Clean Water Act." 40 C.F.R. § 122 and 412 et seq. (2018).

Many courts utilize the EPA's preambles in interpreting the CWA, especially when considering the complexity of the regulatory programs. *Kinder*, 887 F.3d at 651; *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002). The court in *Wilderness Coal* looked to the preamble to find the EPA's explanation for requiring NPDES permits for discharges which may enter surface water via groundwater. *Washington Wilderness Coal. v. Hecla Mining Co.,* 870 F. Supp. 983, 990–91 (E.D. Wash. 1994). The EPA has specifically stated in the following regulation that, "discharges to [tributary groundwater] are regulated because such discharges are effectively discharges to the directly connected surface waters." 40 CFR § 131.8 (2018). The district court rejected the opinion that the NPDES preambles are merely a "collateral reference to a problem." *Wilderness Coal*, 870 F. Supp. at 990–91 (quoting *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 966 (7th Cir. 1994)). Instead, the court found the preambles to be a convincing statement of policy. Here too, the Court should recognize these writings as Agency directives.

B. Courts have determined direct and fairly traceable discharges from a point source via hydrologically connected ground water are actionable under the Clean Water Act.

For courts to establish liability under the CWA for indirect discharges, they must find that pollutants were carried in a "direct" and "fairly traceable" manner. *Kinder*, 887 F.3d at 652 (requiring a "direct" hydrological connection); *Hawai'i Wildlife Fund*, 886 F.3d at 749 (requiring pollutants be "fairly traceable from the point source to a navigable water"). The Court found liability when wetlands adjacent to navigable waters (in-fact) are themselves navigable because of their direct hydrological connection. *Riverside*, 474 U.S. at 139. The ability to trace pollutant discharges from a discrete conveyance makes seepage like ComGen's discernable from nonpoint source pollution, which is diffuse and often takes the form of runoff not regulated by the CWA.

Buresh, James C., *State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control*, 95 YALE L. J. 1433, 1434 (1986).

Previous courts have found that connection via groundwater is not a mere diffuse discharge, and therefore covered under the CWA's jurisdiction. The District Court of North Carolina reasoned that if the CWA applies to direct discharges into a navigable water, it should also apply to people whose discharges of "those same pollutants into a man-made settling basin . . . and then allow[] those pollutants to seep into the river via the groundwater." *Northern Cal. River Watch*, 2005 WL at *2. In this current case, the lower court found that ComGen was "indeed leaching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater, which carried the arsenic into navigable waters." Appendix 1 at 6–7. The Court found this connection to be "direct, immediate, and can generally be traced." *Id.* Under the direct and traceable standard, this Court should find ComGen liable under the CWA.

II. SEEPAGE OF ARSENIC FROM A COAL ASH IMPOUNDMENT THAT PASSES THROUGH GROUNDWATER TO NAVIGABLE WATERS CONSTITUTES THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF § 402 OF THE CLEAN WATER ACT (33 U.S.C. § 1342).

Under § 402, the EPA and approved state environmental agencies may issue permits that allow facilities to discharge pollutants at set levels. 33 U.S.C. § 1342. The NPDES program creates the federal permitting scheme and approval process for State Pollutant Discharge Elimination System (SPDES) programs. To gain EPA approval on a SPDES program, the state must be at least as stringent as the federal program. *Id*. When an entity pollutes waters without a permit, or in violation of one, they are subject to enforcement action by the EPA or state. *Id*. at § 1365. Citizen suits are also permissible through the CWA. *Id*.

ComGen would like to skirt this liability by contending that the impoundment is not a conveyance rising to the level of a point source. This Court should affirm liability because the

impoundment is a point source under the Act's definitions and its traceable seepage is an ongoing violation of § 402.

A. ComGen's coal ash impoundment is a confined and discrete conveyance of arsenic.

To find CWA liability, the EPA or approved agency must determine "whether pollutants [are] discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." *Sierra Club v. Abston Constr.*, 620 F.2d 41, 45 (5th Cir. 1980). This is true of all violations because a point source must be a "discrete conveyance." 33 U.S.C. § 1362(14). The Fifth Circuit found when "[s]ediment basins dug by the miners and designed to collect sediment are . . . point sources . . . even though the materials [are] carried away from the basins by gravity flow of rainwater." *Id*. Further, if materials were "at least initially collected or channeled" gravitational flow constituted discharge. *Abston,* 620 F.2d at 45.

The act of collecting or channeling water along with pollutants was the qualifying factor in identifying a point source. *Id*. The addition of rainwater flowing with gravity into navigable waters was found to be within CWA jurisdiction. *Id*. In the present case, ComGen "built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," where it "channels and conveys arsenic directly into the groundwater." Appendix 1 at 7. The lower court concluded that this groundwater was hydrologically connected to the Vandalia River. *Id*. In essence, the Little Green Run Impoundment is a discrete conveyance from the coal ash impoundment to navigable waters due to the hydrologically connected groundwater.

B. Seepage of ComGen's traceable pollutants to Fish Creek and Vandalia River after rainfall is an ongoing violation of § 402 of the Clean Water Act.

The holder of a SPDES permit is subject to enforcement by the administering state agency for failure to comply with the conditions of the permit. 33 U.S.C. § 1319. The holder of a SPDES permit is subject to both federal and state enforcement action for failure to comply. *Id.* at

§§ 1319, 1342(b)(7). In the absence of federal or state enforcement, a group or individual may bring a citizen suit against any company "alleged to be in violation of" the conditions of either a federal or state NPDES permit. *Id.* If the citizen prevails, the court may order injunctive relief. *Id.* at § 1365(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, Inc., 484 U.S. 49, 52–53 (1987). *Gwaltney* also requires a violation must be ongoing in order for there to be standing. *Id*. Therefore, an entity with a continuing violation is in noncompliance with their permit constituting a violation of the Act. *Id.* at § 1342(h); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000).

The Court found that "to be in violation" requires citizen-plaintiffs to allege a state of either continuous or intermittent violation with a "reasonable likelihood" the polluter will do so again in the future. *Gwaltney*, 484 U.S. at 57. For example, the polluter in *Gwaltney* continually fell out of compliance with their permits. *Id*. at 380. These violations were so frequent (over 100 violations) the court found the reasonable likelihood threshold had been met. *Id*. at 386. This was upheld even though the company would correct the problems after each violation. *Id*. at 380.

ComGen's improperly installed liner seeps arsenic into navigable waters during times of rain accumulation. Appendix 1 at 6. As the state report showed, this has been going on for years without change and without the affirmation of this Court, it will continue. *Id.* The Court should find that seepage of arsenic from a coal ash impoundment constitutes the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act when it passes through groundwater to navigable waters.

Distilled, this case is about preventing ComGen from doing indirectly what it cannot do directly. *Hawai'i Wildlife Fund*, 886 F.3d at 752. It would be impermissible to allow ComGen to

discharge from its impoundments into tributaries of navigable waters and it should not be allowed to do so indirectly to avoid liability.

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

Upon the district court's finding that ComGen was found guilty of violating the Clean Water Act, ComGen immediately petitioned FERC to allow the costs of pollution remediation to be passed on to rate payers pursuant to their revised schedules. FERC's analysis for who should absorb the costs of remediation followed well-established reasoning. Appendix 1 at 8–12. However, even though FERC's opinion thoroughly backed the conclusion that ComGen should bear the costs of remediation, FERC arrived at an inappropriate, alternative conclusion when it placed the importance of a utility's financial integrity over the interests of ratepayers. Appendix 1 at 11–12. Such a gross departure from reasoned decision-making would lead to the conclusion that FERC's decision is arbitrary and capricious, a standard necessary to overturn an agency's decision, and therefore should be vacated and remanded for further consideration of the relevant findings.

A. Pursuant to the Federal Power Act, the FERC is statutorily required to ensure that all rates charged for the sale of electric energy are "just and reasonable."

The principle of "just and reasonable" arises in many economic regulatory statues at both the state and federal level. Specifically, the Federal Power Act ("FPA"), which governs FERC, states that:

> Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, *the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract* to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. § 824e (emphasis added). Just and reasonable phrases, in the economic regulatory context, are interpreted as having no fixed meaning. *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984) (finding that just and reasonable has "no intrinsic meaning applicable alike to all situations"). The just and reasonable standard requires that the Commission interpret and weigh facts specific to each case when making rate decisions. However, we are able to turn to the court's interpretation of "just and reasonable" in the context of other statutes to give it meaning. The Natural Gas Act (NGA) provides a parallel statute which uses the "just and reasonable" standard. This Court has previously stated that "judicial interpretations of the FPA and NGA may be followed interchangeable[ly]." *Maine v. FERC*, 854 F.3d 9, 20 (D.C. Cir. 2017).

In *City of Chicago v. FPC*, the court indicates that the primary purpose of the NGA is to protect consumers. *City of Chi. v. FPC*, 458 F.2d 731, 750–51 (D.C. Cir. 1971). While a regulator must balance between producer and consumer interests, the Commission must inquire into whether a rate is just and reasonable to the consumer, "low enough so that exploitation by the producer is prevented." *Id.* Therefore, this court must determine whether the proposed rate increase of $2.15 and $3.30, over 10 years, should be passed along to consumers or borne by the producer, ComGen, whose lack of care resulted in the ongoing leakage of arsenic.

Because rates must be just and reasonable, any increase in rates must be meticulously scrutinized, keeping in mind the alarming nature for such a suggested increase. The ongoing matter is the result of years of inattentive inaction by ComGen. Appendix 1 at 9. SCCRAP concedes that ComGen is entitled to receive a rate of return; however, such a benefit should only be recognized in the face of reasonable and prudent investments for the benefit of the customer in Franklin and Vandalia. The real remediation debate should be between ComGen, the

shareholders, and the contractor hired to build the impoundment, not the consumers who played no role in the matter. This court should find that any rate increase related to the injunctive relief issued is not of the "just and reasonable" nature.

B. FERC departed from established precedent when it allowed ComGen to recover the cost of remedying its incompetent implementation of the corrective plan from utility ratepayers, thus constituting an arbitrary and capricious decision.

Administrative Procedures Act (APA) § 706 directs courts to "hold unlawful and set aside" agency action contrary to the Constitution, in excess of statutory authority, and taken without observance of procedural requirements. *See* 5 U.S.C. § 706. Section 706(2)(a) also directs courts to review the legality of agency action under the standard: "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Id.* The court will set aside a FERC decision only if it is arbitrary and capricious or otherwise contrary to law. While FERC, as the specialized subject-matter agency, receives a level of deference in their decision making, the courts may vacate the decision as arbitrary and capricious when it finds FERC departed from established precedent without a reasoned explanation. *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007). In making such a determination, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

FERC departed from established precedent when they openly accepted many of the arguments presented by SCCRAP, but ultimately ignored these findings in the face of concerns of ComGen's future financial integrity. Appendix 1 at 11–12. FERC reached 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. Appendix 1 at 11. Additionally, FERC agreed with the "matching

principle" of utility ratemaking, and found that charging Vandalia Power and Franklin Power (and, in turn, their ratepayers) with the full remediation costs would represent a "windfall" to CE and ComGen's shareholders. Appendix 1 at 10–11. The shareholders received the benefits of the revenues produced by the output from the Vandalia Generating Station from 2000 through 2014. *Id*. Therefore, ComGen should, at minimum, bear a proportionate share of the remediation costs corresponding to the coal ash accumulated in the Little Green Run Impoundment. *Id.*

1. Under the prudency principle of utility rate making, ComGen should be precluded from recovering from ratepayers any of the costs of remedying its incompetent implementation of the corrective plan prescribed by VDEQ in 2006.

The prudency principle of utility rate making establishes that the costs and expenses of imprudent action may be disallowed through ratemaking proceedings. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989). Utilities, as a monopolistic industry, must act prudently if they wish to seek recovery of the associated costs from the ratepayers. In order to prove that a utility acted prudently, it must show that it "went through a reasonable decision-making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner." *Re Cambridge Elec. Light Co., Re Commonwealth Elec. Co., Massachusetts Attorney Gen.*, 86 P.U.R.4th 574 (Sept. 3, 1987).

In contention are the actions, or lack thereof, beginning in 2002 when CE began to detect arsenic in the groundwater at the Vandalia Generating Station which led to the need for corrective action in 2005, and subsequent remediation. Appendix 1 at 5–6. It was found that the Little Green Run Impoundment HDPE geomembrane liner was inadequately welded, resulting in arsenic seepage into groundwater and nearby navigable waters. Appendix 1 at 5–6. Employee error is found to be imprudence if the utility failed to prepare and oversee its workers. Specifically, in *Baltimore Gas & Electric Co.*, the Maryland Public Service Commission found

that the utility's management procedures and supervision did not conform to the strict standards necessary to work on nuclear power plants when mechanics left rags in pipes, leading to an outage. *Baltimore Gas & Electric Co.*, 1989 Md. PSC LEXIS 85, *20–22. Finding imprudence in oversight, the Commission disallowed costs for replacement power. *Id.* In the present case, CE's, and subsequently ComGen's, management and supervision failed to conform to the strict standards necessary to work within the utility space when it incompetently constructed and failed to properly monitor the effectiveness of the impoundment. This court should find that the costs of relocating the facility, pursuant to the injunctive relief, were due to imprudent utility management practices, and therefore should be disallowed in customer rates.

Further, a statute or commission can constitutionally disallow prudent costs under the "used and useful" and "utility bears the risk" approaches. The circumstances before highlight a scenario where imprudent decisions lead to prudent reactions. SCCRAP concedes that the district court's removal and relocation of the coal ash impoundment is used and useful, under energy regulation principles, as a means of preventing further pollution while allowing for future operation of the Vandalia Generating Station. An intervenor to *Duquesne Light Co. v. Barasch* suggested, and the Court disagreed, that the Constitution requires recovery of prudent costs, regardless of the economic effect of a disallowance. *Duquesne Light*, 488 U.S. at 299. The Court held that the Constitution will not insulate a utility from uneconomic outcomes, such as market forces, obsolescence, or bad luck, even when the utility is acting prudently. *Id.* at 301–02. Under this theory, ComGen should not be allowed to recover the costs even though they are now prudent actions. Prudent remedial actions do not allow recovery when stemming from previous imprudent inaction. Therefore, FERC's failure to accept their own factual findings, that ComGen

failed to properly monitor the impoundment, and substitute a wrongful judgement provides this Court with the ability to find the decision arbitrary and capricious.

2. Alternatively, Vandalia Power and Franklin Power should not bear the full cost of the "closure-by-removal" corrective action as it violates the "matching principle" of utility rate making, which preserves the relationship between benefits and burdens.

Requiring Franklin and Vandalia ratepayers to bear 100% of the costs of the corrective action violates the "matching principle" of utility ratemaking. The matching principle, which preserves the relationship between benefits and burdens, is a function of determining just and reasonable rates with a goal that the rates charged for electricity should reflect the costs of providing it. Recently, this court found a FERC decision to be arbitrary and capricious when it failed to apply the matching principle to high-voltage power lines producing significant regional benefits. *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1260-61 (D.C. Cir. 2018).

If this Court finds FERC is allowed to recover the costs of the injunctive remedy, Vandalia Power and Franklin Power should only pay for their share of the costs in relation to their benefits. The Little Green Run Impoundment has been collecting coal ash since 2000, 14 years before ComGen executed the unit power service agreements. Pursuant to the matching principle, only about 19.5% of the $248 million in the costs of the corrective remedy, or about $48 million, is fairly allocable to Vandalia Power and Franklin Power. Appendix 1 at 9. The remaining $198 million should be borne by ComGen's shareholders given that the Vandalia Generating Station was a merchant plant for about 80.5% of the time the plant has been in operation. *Id.* FERC agrees the matching principle is applicable in this case because of the benefits of the revenue that shareholders earned, thus they should bear a proportionate share of the remediation costs. Appendix 1 at 11–12. FERC arbitrarily and capriciously ignored their own

assessment of the matching principle when it accepted ComGen's testimony that the impact of such an outcome could jeopardize the financial integrity of ConGem. Appendix 1 at 12.

This court should find that FERC acted arbitrarily and capriciously when it failed to apply the matching principle of utility rate making to the current matter.

C. Allowing costs of noncompliance or pollution to be passed on to rate payers is bad public policy because it allows utilities to avoid their obligations and ethical and social responsibilities.

Laws and regulations regarding pollution are put into effect in an effort to protect human health and the environment. Allowing utility companies or any type of entity to pass the costs of noncompliance with certain regulations or standards will reduce the effectiveness of such regulations, force consumers and the environment to bear the burden of pollution, and may actually incentivize utilities to pollute because they will get the dual benefit of the extra revenue without having to face any of the consequences of cleanup.

FERC defends their decision to allow full cost recovery by emphasizing the importance of ensuring that utilities are able to recover, in rates, the costs of environmental cleanups as means of promoting environmental protection. Appendix 1 at 11–12. This approach takes a reactive view of the issue. However, this reasoning fails to consider the possibility that this could lead to more environmental issues because the industries will pass the costs of clean up along to ratepayers and ignore appropriate or beneficial *preventative* solutions. Studies suggest that proactive environmental management lead to a better environmental performance, proactive business entities also tend to be more effective and efficient. Kyungho Kim, *Proactive versus Reactive Corporate Environmental Practices and Environmental Performance*, SUSTAINABILITY, (Jan. 3, 2018). Promoting environmental protection and saving costs both could have been accomplished with proper monitoring and oversight of the impoundment during the period of the

pollution. Effective monitoring could have caught the problem early or even prevent it entirely, thus saving the environment from further harm and ComGen from the cost of remediation.

Support for the notion that utilities, not ratepayers or the environment, should bear the costs comes from a landmark case decided by this Court, *Ohio v. United States DOI*. *Ohio v. United States DOI*, 880 F.2d 432 (D.C. Cir. 1989). In the wake of widespread environmental devastation, the court held that companies responsible for pollution were forced to pay the full costs of restoring the environment to its original condition, not just the lesser, "market value." *Id.* In making this determination, the court looked at Congress' intent and the statutes purpose to analyze the statute in question, ultimately determining that "expecting the taxpayers to pick up the rest of the tab… is contrary to a basic purpose of the CERCLA natural resource damage provisions -- that polluters bear the costs of their polluting activities." *Id.* at 444–45. One of the most robust environmental statutes, CERCLA, intends that the polluters should bear the costs of their polluting activities. Here, we are dealing with a utility that caused environmental harm and is forced to remedy their harm. This Court has accepted the simple principle that SCCRAP presents today, the polluter should pay for their polluting activities.

Many courts further support the "polluter pays" principle of environmental law, which stands for the premise that "polluters must pay for the cost of restoring the value of the site damaged by their own activities and those impacted by the damage." *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res.*, 431 P.3d 752 (Haw. 2018) (Wilson, M., dissenting) (citing various courts that have applied the polluter pays principle).

Finally, the record shows that the District Court did not issue any civil, monetary penalties against ComGen because of the "associated costs of the injunctive relief." Appendix 1

at 8. This implies that the court intended ComGen to bear the burden and costs of the harm they caused. Such language would suggest that if the court believed ComGen would not take on the costs associated with the injunctive relief, they would have assessed some form of civil, monetary penalties. Any decision allowing costs to be passed on is in direct conflict with the intent of the District Court. Therefore, this Court should affirm the district court's decision while disallowing the costs of the injunctive remedy to be passed on to utility ratepayers.

IV. FERC's disallowance of the costs of ComGen's remediation through the proposed rate schedules is constitutional under the Fifth and Fourteenth Amendments.

At the core of regulated entities is the basic principle of striking a balance between the consumer and the investors. This balance teeters in a zone of reasonableness, where rates are neither "less than compensatory" nor "excessive" *Farmers Union*, 734 F.2d at 1502. In this context, the Fifth and Fourteenth Amendments guarantee that the government may not set rates so low as to take shareholder's investments without just compensation. U.S. CONST. amend. V & XIV; *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 951 (1944); *Permian Basin Area Rate Cases,* 390 U.S. 747, 582 (1968). As Justice Brandies stated:

> The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return.

Missouri Ex Rel Southwest Bell Co. v. Pub. Serv. Comm'n of Mo., 262 U.S. 276, 290 (1923) (Brandeis, J., concurring). Of importance, this passage highlights the Constitutional mandate: an *opportunity* for a fair return. There is no constitutional guarantee that a utility earns a competitive rate of return in all instances. If a utility mismanages their assets, as ComGen did, the rate may effectively be lowered due to the utility's actions. Because FERC gave ComGen an opportunity to earn a competitive rate of return, but through ComGen's own mismanagement and changes in

the marketplace, FERC may disallow the recovery in the rate without violating the Takings Clause of the Fifth and Fourteenth Amendments. Additionally, ComGen acquired an unprofitable coal-fired power plant, and there is no constitutional guarantee requiring regulators or a court to strap costs to rate payers because market forces have made the plant uncompetitive.

A. ComGen is not constitutionally guaranteed to earn a reasonable rate of return due to utility mismanagement

1. The Fifth Amendment protects investors, to insure there is an *opportunity* for a "reasonable" rate of return

The Constitution protects against rates of return that may be so 'unjust' as to be confiscatory. *Duquesne Light,* 488 U.S. at 301. The Court's underlying principle requires that the rates afford sufficient compensation to investors, but allows regulators wide latitude in their rate setting. *Id.* at 308. While rates of return are determined on a case-by-case basis, the Court's overarching principle states that a fair rate of return is one that "enable[s] the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Hope*, 320 U.S. at 605. The Court further explains a rate of return would not violate the Constitution as long as it allows for a rate that would be similar to "other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 693 (1923). When deciding if a rate falls within this zone of reasonableness, the rate must be viewed in its entirety. *Hope*, 320 U.S. at 602. If the total effect of the rate order cannot be "unjust and unreasonable, judicial inquiry" need not go further. *Id.* So long as the regulation's end result does not jeopardize the financial integrity of the utility, the regulation will not violate the Constitution.

In addition to the financial integrity test of *Hope*, Courts have emphatically stated that the Constitution does not guarantee a full rate of return for all situations. The D.C. Circuit highlights this sentiment in *Jersey Central Power & Light v. FERC.* In that case, the utility prudently spent

$397 million on a nuclear plant before abandoning its plans. *Jersey Central Power & Light v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987). The circuit court overruled FERC's previous policy, finding that internalizing costs on a prudent plant does not inherently violate the Constitution. *Id.* In their opinion, the court concluded that "the Fifth Amendment does not provide utility investors with a haven from the operation of market forces." *Id.* The Constitution does not inherently require the pass-through of all utility costs. The court determined that the policy would not seriously impact the financial integrity of the utility, and finding that it did not, the court concluded it did not violate the Constitution. Similarly in *Duquesne Light*, the Supreme Court followed the D.C. Circuit's reasoning, finding that not all prudent costs constitutionally entitle the utility to recovery. *Duquesne Light*, 488 U.S. at 311. Simply because some costs are put on the shareholders does not trigger a constitutional violation. In this case, ComGen had an opportunity to earn a reasonable rate of return on their investment, satisfying the constitutional guarantee. Therefore, ComGen's subsequent mismanagement of their investment does not then constitutionally entitle them to recovery self-borne costs in their rate base.

2. The Fifth Amendment does not completely shelter investors from subsequent costs stemming from company mismanagement.

While the Constitution does allow for an *opportunity* for a reasonable rate of return, mismanagement of a utilities' assets does not then automatically permit the utility to pass on recovery to consumers. Regulators attempt to give a "fair" rate of return on smart investments, "thus to mimic natural incentives in competitive markets." *Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 486 (2002). If an investment performs better than anticipated, the utility retains the surplus of benefits. Conversely, if a utility's investment is ill advised, or under performs, the regulator may require the costs to be internalized, mimicking a competitive market. *Jersey*

Central Power, 810 F.2d at 1181. If an entity underperforms, or is imprudently managed, a rate may be lowered without treading into unconstitutional territory.

As seen in this case, ComGen was given the opportunity for a reasonable rate of return on their investment. The Commission set their initial rate of return at a stellar 10.0 percent return on equity. Appendix 1 at 10. However, only after ComGen did not properly oversee the installation and monitoring of their investment, did the court require remedial measures. Due to their own imprudence and missteps the district court required remediation. The Constitution does not insure a highly attractive rate of return. The current reduction is within the permissible "zone of reasonableness" because the outcome still allows for ComGen to earn a positive rate of return while protecting consumers from unnecessary price increases.

3. FERC will not violate the "end result" test in *Hope* if it requires ComGen to absorb the costs of remediation.

ComGen will be able to maintain its financial integrity even if FERC does not allow ComGen to recover costs for complying with the district court's injunction. As stated in *Hope*, the rate must be viewed in its entirety, and the end result of the order must permit the company to operate successfully, maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed. *Hope*, 320 U.S. at 602–605. If FERC does not allow for ComGen's recovery to be passed to the consumers, ComGen's return on equity would drop from 10.0% to 3.2% (or 3.6% in the alternative). This drop does not jeopardize ComGen's operation or ultimate financial integrity. There is nothing in the record to suggest that ComGen would lose its ability to attract capital from its parent corporation. ComGen will still operate at a positive rate of return. The shareholders will still be compensated. While it may be less than anticipated, the Court explained in *Duquesne Light*, the Constitution does not inherently require recovery of costs. See, e.g., *Duquesne Light*, 488 U.S. 299; *Jersey Central Power*, 810 F.2d at 1181. Further,

FERC recognized that full remediation costs would represent a "windfall" to ComGen's shareholders. Appendix 1 at 11. The "end result" test of *Hope* does not require a windfall of benefits to a utility simply because ComGen alleges potential financial integrity issues.

B. <u>ComGen's acquisition of an unprofitable coal-fired plant bars recovery on remediation simply because its value has been lost to market forces.</u>

ComGen should shoulder the costs of the $248 million dollar excavation because the unprofitable generating plant has lost value due to market forces. As stated in *Jersey Central Power*, the Constitution does not provide a barrier from market forces for regulated entities. This opinion fits squarely within the *Market Street Railway* jurisprudence. In *Market Street Railway*, the company argued that a reduction in their rates was an unconstitutional taking. However, the Court strongly stated that the internal deterioration and external competition had overtaken the usefulness of the business. *Market Street Railway Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 554 (1945). In closing, the Court articulated that the Takings Clause is applied to prevent governmental destruction of existing economic values. It cannot be applied to "insure values or to restore values that have been lost by the operation of economic forces." *Id.* at 567.

In the present case, ComGen acquired an unprofitable coal-fired generating plant. It is well known that this operation creates large amounts of coal combustion residuals and must be stored in impermeable impoundments. These measures must be taken because the EPA found that leaking contaminants from these sources can have serious health effects on the environment and public health. 40 C.F.R. § 257, 261 (2018). Additionally, the EPA designated the Little Green Run Impoundment as one of the 63 impoundments (roughly 10 percent of all impoundments) with a high hazard rating. Appendix 1 at 5. These facts highlight the risk of owning and operating a coal combustion residuals impoundment, and the potential for extraordinary costs due to potential compliance and remediation.

When ComGen acquired the Vandalia generating station in 2014, the coal industry had undergone rapid changes. Coal-fired generating facilities had become less profitable in addition to being exposed to high risk. By acquiring the Vandalia plant, ComGen understood that there may be risks associated with the coal residue and impoundment. These risks were not only theoretical; in 2002 CE began to detect arsenic in the groundwater exceeding their permit allotments. Appendix 1 at 5. Through their implementation plan, CE installed a geomembrane in order to bring the impoundment back into compliance. *Id*. Their permits still required routine monitoring, in order to ensure that that geomembrane was properly functioning. *Id*.

Following *Market Street*, ComGen's Vandalia plant carried lots of risk in the changing marketplace. ComGen may not artificially retain Vandalia's value in light of changing market forces. ComGen incorrectly states that it would be a constitutional violation to have the company absorb the costs when the plant lost its value because of its environmental risks and costs.

CONCLUSION

This Court should affirm the lower court's findings that the seepage from ComGen's impoundment through groundwater into navigable waters is a violation of the CWA. In determining that FERC's decision to allow the costs of the injunctive remedy to be passed on to ratepayers was arbitrary and capricious, SCCRAP asks this Court to remand the revised rates to FERC for further consideration of the factual findings.

Respectfully Submitted,

/s/ Team 12

Stop Coal Combustion Residual Ash Ponds

Dated: February 4, 2019

Certificate of Service

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

Respectfully submitted,

/s/ Team 12

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

Commonwealth Generating Company, *Appellant*	)	
v.	)	Case No. 18-1221
Stop Coal Combustion Residual Ash Ponds (SCCRAP) *Appellee*	)	

APPENDIX

Appendix 1: Factual Background

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18-02345
ORDER

Commonwealth Generating Company,

Appellant,

-v.- D.C. No. 17-01985

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Appellee,

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Petitioner,

-v.-

Federal Energy Regulatory Commission, Docket ER-18-263-000

Respondent,

Commonwealth Generating Company

Intervenor.

This case involves an appeal to the United States Court of Appeals for the District of Columbia Circuit from orders in two separate proceedings:

1. An order by the United States District Court for the District of Columbia granting the request of petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) for injunctive relief against Commonwealth Generating Company (ComGen).
2. An order by the Federal Energy Regulatory Commission (FERC) denying rehearing in Docket ER-18-263-000. Petitioner SCCRAP takes issue with the decision of FERC denying rehearing of the Order Accepting Commonwealth Generating Company's Revised Rate Schedules.

ComGen appealed the decision of the District Court to this Court and contemporaneously commenced a rate proceeding at FERC to recover under its FERC-

approved unit power service agreements the costs it would incur to comply with the injunctive relief imposed by the District Court. SCCRAP intervened in the FERC proceeding in opposition to ComGen's rate filing. Upon FERC's issuance of an order accepting ComGen's proposed rates, SCCRAP appealed FERC's decision to this Court. Because both actions involve common parties (ComGen and SCCRAP) and common issues (liability under the Clean Water Act for pollution from the Little Green Run Impoundment owned and operated by ComGen), SCCRAP, ComGen, and FERC jointly filed a motion in this Court to have the actions consolidated for decision. On December 21, 2018, this Court granted the motion.

It is hereby ordered that SCCRAP and ComGen[1] brief the following issues:

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 §402 of the Clean Water Act (33 U.S.C. §1342).
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.

SO ORDERED

Entered this 28th Day of December, 2018

Judge Samuel L. Wotus

[1] FERC will not be represented in this case for the purposes of the briefs and oral argument. Participants will represent SCCRAP and ComGen.

Factual Background

A. Coal Ash Impoundment Ponds

Coal combustion residuals (CCRs), commonly known as coal ash, are byproducts of the combustion of coal at electric generating plants. There are several different types of materials produced including, (1) fly ash, a very fine, powdery material composed mostly of silica made from the burning of finely ground coal in a boiler, (2) bottom ash, a coarse, angular ash particle that is too large to be carried up into the smoke stacks so it forms in the bottom of the coal furnace, (3) boiler slag, molten bottom ash from slag tap and cyclone type furnaces that turns into pellets that have a smooth glassy appearance after it is cooled with water, and (4) flue gas desulfurization material (FGD), a material leftover from the process of reducing sulfur dioxide emissions from a coal-fired boiler that can be a wet sludge consisting of calcium sulfite or calcium sulfate or a dry powered material that is a mixture of sulfites and sulfates.[2]

Coal ash contains contaminants like mercury, cadmium and arsenic associated with cancer and various other serious health effects. Coal ash is disposed of in wet form in large surface impoundments and in dry form in landfills. According to the Environmental Protection Agency (EPA), without proper protections, these contaminants can leach into groundwater and can potentially migrate to drinking water sources, posing significant public health concerns.[3]

CCRs are one of the largest industrial waste streams generated in the United States. In 2012, more than 470 coal-fired electric utilities burned over 800 million tons of coal, generating approximately 110 million tons of CCRs in 47 states and Puerto Rico.[4] CCRs can be disposed in off-site landfills, or disposed in on-site landfills or surface impoundments. In 2012, approximately 60 percent of the CCRs generated were disposed in surface impoundments and landfills, with the vast majority disposed in on-site disposal units, including more than 735 active on-site surface impoundments, averaging more than 50 acres in size with an average depth of 20 feet. The Little Green Run Impoundment, owned and operated by ComGen, is one such on-site surface impoundment; it is located adjacent to the Vandalia Generating Station.

B. Commonwealth Generating Company

Commonwealth Generating Company (ComGen) is a wholly owned subsidiary of Commonwealth Energy (CE), a multistate electric utility holding company system providing electric service at retail and wholesale rates in nine states (including Vandalia and its neighboring state of Franklin). ComGen was incorporated by CE in the District of Columbia in 2014 to purchase the Vandalia Generating Station from Commonwealth Energy Solutions (CES), a wholly owned, unregulated subsidiary of CE that formerly owned thirteen merchant electric generating

[2] EPA, Frequent Questions about the 2015 Coal Ash Disposal Rule, available at https://www.epa.gov/coalash/frequent-questions-about-2015-coal-ash-disposal-rule
[3] *Id.*
[4] *Id.*

plants.[5] In 2014, CE announced its intention to reduce its exposure to competitive wholesale markets by either selling off its merchant plants to independent power producers, or moving them into the regulated rate base of CE's retail electric companies operating in nine states. The sale of the Vandalia Generating Station in 2014 to ComGen was part of the latter strategy.

In November 2014, following the regulatory approval of ComGen's acquisition of the Vandalia Generating Station, ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company under which the electrical output of the Vandalia Generating Station would be sold 50% to Vandalia Power and 50% to Franklin Power. Vandalia Power, a wholly owned subsidiary of CE with its principal place of business in Mammoth, Vandalia, is a corporation organized and existing under the laws of Vandalia; it is engaged in generating, transmitting, and distributing electric energy to the public in northern and eastern Vandalia and a portion of southwestern Franklin, and is a public utility under Section 201 of the Federal Power Act (FPA). Franklin Power, a wholly owned subsidiary of CE with its principal office in Capital City, Franklin, is a corporation organized and existing under the laws of Franklin; it is engaged in the generation, transmission, and distribution of electric power to the public in eastern Franklin and is a public utility under Section 201 of the FPA.

Because the unit power service agreements are wholesale transactions in interstate commerce (i.e., transactions between utilities), the agreements are subject to FERC jurisdiction under the FPA. The unit power service agreement between ComGen and Vandalia Power is designated as ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement), while the unit power service agreement between ComGen and Franklin Power is designated as ComGen's FERC Rate Schedule No. 2 (Franklin Agreement).

C. The Vandalia Generating Station and the Little Green Run Impoundment

In the late 1990s, CE formed CES as part of its commitment to becoming a major energy supplier in the emerging competitive wholesale power markets. Shortly thereafter, CES commenced development of the Vandalia Generating Station, which consists of two 550 megawatt (MW) coal-fired units (for a total capacity of 1100 MW) located near Mammoth, Vandalia on the Vandalia River. Vandalia Unit Nos. 1 and 2 commenced commercial operation in 2000 and 2002, respectively.

CCRs produced by the Vandalia Generating Station are disposed in the Little Green Run Impoundment, which was formed by the construction of a dam across Green Run, immediately east of the Vandalia Generating Station. The dam has a current height of 395 feet from toe to crest, with a top elevation of 1,050 feet above sea level. The impoundment formed by the dam covers approximately 71 surface acres and currently contains approximately 38.7 million cubic yards of solids, mainly CCRs and coal fines and waste

[5] The electrical output from merchant power plants is typically sold into the wholesale markets, and the owners of such plants bear the risk of whether the price received in the wholesale market covers the cost of their operation. In contrast, regulated power plants are typically owned by retail electric utilities that recover the operating costs of their operation (including a return on investment) from captive retail electric customers through the ratemaking process at state public utility commissions (PUCs).

material removed during the coal cleaning process. The effluent from the Little Green Run Impoundment flows south and enters Fish Creek before entering the Vandalia River.

The Little Green Run Impoundment was included in EPA's listing of coal ash impoundments; based on EPA's listing as of March 2014, the Little Green Run Impoundment is one of 63 electric industry coal waste impoundments in the United States with a "high" hazard rating. With a current height of 395 feet from toe to crest, the Little Green Run Impoundment has the highest existing dam structure among the coal waste dams listed by EPA.

D. Stop Coal Combustion Residual Coal Ash Ponds

Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP) is a national environmental and public interest organization based in Washington, D.C. SCCRAP has members located throughout the states of Franklin and Vandalia. Its chapter in the town of Mammoth includes several citizens who allege they are directly affected by the environmental impacts associated with the Little Green Run Impoundment.

Beginning in 2015, SCCRAP commenced a two-pronged initiative targeted at coal ash impoundments across the United States. First, SCCRAP filed lawsuits under the Clean Water Act and/or Resource Conservation and Recovery Act (RCRA) against the owners and operators of coal ash impoundments found to be responsible for pollutants leaking into groundwater. Second, SCCRAP intervened in utility ratemaking proceedings before state public utility commissions (PUCs) and FERC to challenge rate recovery of expenses associated with polluting coal ash impoundments.

E. The Release of Pollutants from the Little Green Run Impoundment

Through groundwater monitoring that was required by permits issued by the Vandalia Department of Environmental Quality (VDEQ), CES began in 2002 to detect arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. (Arsenic leaches from coal ash when water passes through it.) As required by its permits, CES notified VDEQ and began developing and implementing a corrective action plan with VDEQ to mitigate the pollution. VDEQ approved the corrective plan in 2005. Under the corrective plan, CES installed a high density polyethylene (HDPE) geomembrane liner on the west embankment of the Little Green Run Impoundment in 2006. (The embankments on the north, east, and south sides of Little Green Run are homogeneous embankments constructed of compacted clay, while the west embankment is constructed of a 15-foot-wide compacted clay lining on the upstream slope with the remainder of the embankment constructed of bottom ash.)

During routine monitoring of the water quality, Vandalia Waterkeeper[6] in March 2017 detected elevated levels of arsenic in the Vandalia River. Subsequent analysis by

[6] Vandalia Waterkeeper is a local chapter of the Waterkeeper Alliance, which is an environmental NGO focused on clean water. The Waterkeeper Alliance claims to have "more activists on the water than any other

Vandalia Waterkeeper suggested that the source of the arsenic was the Little Green Run Impoundment; rainwater and groundwater were leaching arsenic from the coal ash in the impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River. Vandalia Waterkeeper filed a complaint with the VDEQ, which commenced an investigation. That investigation showed that a seam in the HDPE geomembrane liner installed in 2006 was inadequately welded, resulting in seepage that pooled at the downstream toe of the west embankment. According to the VDEQ report:

> "The seep occurs at a low point in the foundation topography and appears to have been active for many years without significant change. The seep runs clear at a slow rate and there is no evidence of internal erosion of dam materials. ComGen stated that the seepage occurs only when there is significant rainfall, and that it dries up within a few weeks of the precipitation event. Although the downstream slope was observed to be in generally good condition, the seepage had caused some erosion and indentations or grooves in the soil as it made its way down the embankment towards Fish Creek."

VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14.

Legal Background

A. The Clean Water Act

The Clean Water Act was enacted in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To those ends, the Act prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise authorized by the Act. *Id.* §1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* §1362(12). The term "point source," in turn, means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." *Id.* §1362(14).

As recognized in §1311(a), the Act provides for the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specified effluent standards. In 50 U.S.C. §1342(a), the Act established the National Pollutant Discharge Elimination System (NPDES), under which EPA may "issue a permit for the discharge of any pollutant" provided that the authorized discharge complies with the effluent standards specified in the permit or otherwise imposed by the Act. Through that system, the EPA also shares regulatory authority with the States, and a State can elect to establish its own permit

organization in the world, patrolling and protecting 2.69 million square miles of rivers, lakes, and coastal waterways." https://waterkeeper.org/

program, subject to EPA approval. *Id*. §1342(b)-(c). When a State elects to establish its own program, the EPA suspends its federal permit program and defers to the State's, allowing the state discharge (SPDES) permit to authorize effluent discharges under both state and federal law. (The states of Vandalia and Franklin have elected to implement permitting programs under the Clean Water Act.)

B. The Federal Power Act

Enacted in 1935, Title II of the Federal Power Act (FPA) provides FERC with jurisdiction over the actions of a "public utility," which is defined by the FPA as "any person who owns or operates facilities subject to the jurisdiction of the Commission," i.e., "any person who owns or operates" facilities for "the transmission of electric energy in interstate commerce," and "to the sale of electric energy at wholesale in interstate commerce." 16 US.C. §824(b). FERC's primary responsibilities under Title II of the FPA are to ensure that the rates, terms and conditions of wholesale electric sales by public utilities are just and reasonable and not unduly discriminatory (*Id*. §824d) and to remedy rates that it finds are unjust, unreasonable, or unduly discriminatory (*Id*. §824e). FERC's rate authority provides it with jurisdiction over tariffs filed by electric utilities operating in interstate commerce.

Because ComGen engages in the sale of electric energy at wholesale in interstate commerce – by virtue of its unit power service agreements with Vandalia Power Company and Franklin Power Company, respectively, through which it provides electricity for resale by these utilities to their retail customers – it is a "public utility" under the FPA, and thus must file its tariffs with FERC for approval under §205 of the FPA (16 US.C. §824e).

Procedural Background

A. ComGen's Appeal from the District Court Ruling

1. SCCRAP's District Court Action

In December 2017, SCCRAP filed suit against ComGen in U.S. District Court for the District of Columbia under the citizen-suit provision of the Clean Water Act, alleging that ComGen was violating U.S.C. §1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters. Under the Clean Water Act, the discharge of a pollutant is defined to mean the "addition of any pollutant to navigable waters from any point source." Id. § 1362(12). According to SCCRAP's complaint, the Little Green Run Impoundment qualified as a point source from which arsenic seeped, polluting the groundwater around ComGen's Vandalia Generating Station which was "hydrologically connected" to Fish Creek and the Vandalia River, carrying arsenic to navigable waters.

2. The District Court's Decision

Following a bench trial, the District Court on June 15, 2018 issued its order finding that rainwater and groundwater were indeed leaching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater, which carried the arsenic into navigable waters. Because the court determined that the Impoundment constituted a "point source" as defined by the Clean Water Act, it found ComGen liable for ongoing violations of

§1311(a). The District Court rejected ComGen's argument that §1311(a) of the Clean Water Act did not cover the seepage of arsenic from coal ash into the groundwater, concluding that the Act did indeed cover discharges into groundwater that had a "direct hydrological connection" to navigable waters such that the pollutant would reach navigable waters through groundwater. And it found as fact that arsenic was reaching Fish Creek and the Vandalia River in that manner. According to the court's opinion, "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."[7]

The court also rejected ComGen's argument that the Little Green Run Impoundment was not a point source because it was not a "conveyance." According to the court's opinion:

> "ComGen built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River."[8]

As a remedy, the court ordered ComGen to "fully excavate" the coal ash in the Little Green Run Impoundment (38.7 million cubic yards in total) and relocate it to a "competently lined" facility that complies with the EPA's Coal Combustions Residual (CCR) rule. Although acknowledging that the burden of closure by removal "may be great," the court stated that it was "the only adequate resolution to an untenable situation that has gone on for far too long." Because of the costs associated with the injunctive remedy, the court did not assess civil penalties against ComGen.

3. ComGen's Appeal

From the District Court's orders, ComGen filed this appeal on July 16, 2018 challenging the court's conclusions that (1) the Clean Water Act regulates discharges into navigable waters through hydrologically connected groundwater, and (2) the Little Green Run Impoundment constitutes a "point source" under the Clean Water Act.

B. SCCRAP's Appeal of FERC's Decision

1. ComGen's FERC Filing

Contemporaneously with its appeal of the District Court's decision, ComGen on July 16, 2018 submitted a filing to FERC under §205 of the Federal Power Act to recover from Vandalia Power and Franklin Power the costs of complying with the District Court order (i.e., to "fully excavate" the 38.7 million cubic yards of coal ash in the Little Green Run Impoundment and relocate it to a new facility that complies with EPA's CCR rule). The filing consisted of proposed revisions to ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement) to recover over a 10-year period the cost of achieving compliance with the district court order, which ComGen estimated to be $246 million in its FERC rate filing. Under the unit power service agreements, this cost is allocated 50% to Vandalia Power and 50% to Franklin Power. Upon approval by

[7] Opinion at 10.
[8] *Id*. at 12.

FERC, the costs allocated to each affiliate under the unit power service agreements would be recovered from each utility's retail customers. (The costs become FERC-approved rates that are flowed through to retail customers, and state PUCs have no authority to disapprove such recovery once approved by FERC.) ComGen's proposal would increase customer bills in each jurisdiction by about $2.15 per month in November 2019, and average households across in each jurisdiction would see bills rise by about $3.30 per month for the 10-year amortization period.

2. SCCRAP's Challenge to ComGen's FERC Filing

SCCRAP intervened in the FERC proceeding, and filed a protest in opposition to ComGen's filing. SCCRAP had two primary bases for its opposition to rate recovery. First, SCCRAP argued that under the prudence principle of utility ratemaking, ComGen should be precluded from recovering from utility ratepayers any of the costs of remedying its incompetent implementation of the corrective plan prescribed by VDEQ in 2006. According to SCCRAP's written testimony in the FERC proceeding, had ComGen exercised a standard of care consistent with prudent utility practice in implementing the corrective plan prescribed by VDEQ in 2006, there would have been no seepage of the arsenic into the groundwaters surrounding the Little Green Run Impoundment, and thus no basis for imposing the corrective action – at an estimated cost of $246 million – required by the District Court's injunction. Rather than passing these costs through to Vandalia Power and Franklin Power ratepayers under the applicable FERC rate schedules, SCCRAP urges that ComGen's shareholders be required to bear the consequences of ComGen's imprudence.

Second, in the event FERC agrees in principle with ComGen's filing to flow through the cleanup costs to Vandalia Power and Franklin Power (and, in turn, to their retail customers in Vandalia and Franklin), SCCRAP takes issue with forcing Vandalia Power and Franklin Power to bear the full cost of the "closure-by-removal" corrective action. SCCRAP points out that the 38.7 million cubic feet of coal ash currently contained in the Little Green Run Impoundment was accumulated over a period of 18 years – since the first of the Vandalia units achieved commercial operation in 2000 – and for the vast majority of that period, the Vandalia Generating Station was a merchant plant, the output from which was sold into the wholesale market to customers other than Vandalia Power and Franklin Power. Only the coal ash produced by the Vandalia Generating Station's operation since November 2014 – when ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company, respectively – are properly allocable to these utilities (and, in turn, their retail customers). According to the written testimony submitted by SCCRAP during the FERC proceeding, only about 19.5% of the $246 million in the costs of the corrective "closure-by-removal" remedy, or about $48 million, is fairly allocable to Vandalia Power and Franklin Power collectively, with the remaining $198 million being borne by ComGen's shareholders (given that the Vandalia Generating Station was a merchant plant for about 80.5% of the time the plant has been in operation). SCCRAP submits that requiring Vandalia Power and Franklin Power to bear 100% of the costs of the corrective action would violate the "matching principle" of utility ratemaking, which preserves the relationship between benefits and burdens (i.e., the customers who benefited from electricity production from the Vandalia Generating Station should bear the burdens of the costs associated with producing

that electricity). As stated by SCCRAP, 80.5% of the coal ash in the Little Green Run Impoundment is attributable to electricity produced when the Vandalia Generating Station was a merchant plant, and therefore the same percentage of remediation costs should be borne by the ComGen shareholders, who benefited from the revenue from electricity sales during the period from 2000 through November 2014.

In response to SCCRAP's protest, FERC suspended ComGen's rate filing[9], and set the matter for an evidentiary hearing to take testimony on the limited factual issues raised in SCCRAP's protest, with the remainder of the issues to be resolved based on the parties' written submissions.

In response to SCCRAP's arguments in the FERC proceeding, ComGen claimed that its implementation of VDEQ's corrective plan in 2006 was consistent with prudent utility practice, and that it cannot be held strictly liable for the failure of the weld in the seam of the HDPE liner. ComGen asserts that it exercised due care in retaining a competent subcontractor to implement the VDEQ-prescribed corrective plan at the Little Green Run Impoundment, and that it is entitled to a presumption of managerial competence in performing its routine utility operations. ComGen submits that this presumption is not overcome by the simple fact of a failure in the HDPE liner, which it does not dispute was the source of the seeping of arsenic into the groundwaters surrounding the Little Green Run Impoundment.

With respect to the application of the "matching principle," ComGen argues that the relevant fact is the time at which the violation of the Clean Water Act was alleged: SCCRAP's action was commenced in December 2017, well after ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company. And the remediation costs will be incurred during the term of the unit power service agreements with Vandalia Power and Franklin Power, making the costs properly allocable to these utilities under the express terms of the unit power service agreements, as implemented through ComGen's FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2, respectively. ComGen submits that if the District Court's injunction is upheld, it will be required as a matter of law to comply with the prescribed "closure-by-removal" plan, and longstanding ratemaking principles provide for the utility's ability to recover costs associated with compliance with legal and regulatory requirements in rates.

Finally, ComGen asserts that the relief requested by SCCRAP, if granted, would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. According to the testimony submitted by ComGen in the FERC proceeding, disallowing recovery of all or a substantial portion of the $246 million in remediation costs would effectively erase the majority of its profits over the proposed 10-year recovery period for the remediation costs. Rather than earning the 10.0% return on equity authorized by FERC in ComGen's most recent rate proceeding at FERC (in 2016), its actual earned return over this period would fall to 3.2% if, as SCCRAP proposes, the entire amount is disallowed. (The actual earned return would be 3.6% under SCCRAP's alternative proposal to disallow

[9] The proposed rate schedules, by their terms, would have become effective 60 days after filing, or on September 15, 2018.

$198 million, or 80.5% of the remediation costs.)[10] This level of profits, according to ComGen, would fail to properly balance the interests of ratepayers and ComGen's shareholders, maintain its financial integrity, and assure confidence in the its financial soundness, thereby undercutting its ability to raise capital on reasonable terms. ComGen points out that these are the constitutional standards for setting "just and reasonable rates" enunciated by the U.S. Supreme Court in *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923) and *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944), as well as the "end results" test articulated in the *Hope* case.

In its briefing to FERC, SCCRAP responded by claiming that ComGen is not constitutionally entitled to earn a reasonable rate of return in the face of utility mismanagement. Rather, SCCRAP submits that the role of FERC is to insulate ratepayers from the consequences of management's imprudent decisions by requiring shareholders to bear a portion, if not all, of the costs of remediation. In response to ComGen's claims about the impact of such a decision on its financial integrity, SCCRAP points out that ComGen's sole shareholder is CE, which saddled ComGen at the outset with an unprofitable coal-fired power plant that CE "put on the backs of Vandalia's and Franklin's ratepayers" through a "creative" corporate restructuring and the unit power service agreements.

3. FERC's Decision

On October 10, 2018, following three days of evidentiary hearings in September focused on the limited factual issues, FERC issued its decision approving the rate revisions proposed by ComGen. FERC allowed the proposed rates to become effective, subject only to a compliance filing by ComGen confirming that the injunctive relief imposed by the District Court withstood judicial review and that ComGen would be required to implement the required remedial action.[11] Notwithstanding that outcome, however, FERC accepted in principle many of the arguments advanced by SCCRAP. With respect to the imprudence of ComGen's implementation of VDEQ's corrective action in 2006, FERC agreed with ComGen that it should not be held strictly liable for the actions of its subcontractor in failing to competently weld the HDPE liner in 2006. But FERC reached 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. FERC also agreed in principle with SCCRAP's argument regarding the "matching principle" of utility ratemaking, and found that charging Vandalia Power and Franklin Power (and, in turn, their ratepayers) with the full remediation costs would represent a "windfall" of sorts to ComGen's shareholders, inasmuch as they received the benefits of the revenues produced by the output from the Vandalia Generating Station from 2000 through 2014, and thus should bear a proportionate share of the remediation costs

[10] In the ratemaking process, if FERC approves inclusion of the $246 million as part of ComGen's cost of service under the unit power service agreements, it would be recovered from Vandalia Power Company and Franklin Power Company, respectively, and in turn from their ratepayers following retail rate proceedings at state PUCs. On the other hand, if FERC excludes all or any portion of the $246 million from recovery under the unit power service agreements, the under-recovery is necessarily borne by ComGen's shareholders (which in this case is Commonwealth Energy (CE)). Expenses that are incurred but not recovered in rates would contribute to ComGen's inability to earn its allowed return.

[11] Under the ratemaking mechanism proposed by ComGen and approved by FERC, ComGen would recover the actual remediation costs at the completion of the remediation, amortized over the subsequent 10-year period.

corresponding to the coal ash accumulated in the Little Green Run Impoundment during the period the Station operated as a merchant plant. At the end of the day, however, FERC accepted ComGen's testimony that the financial impact of such an outcome would likely jeopardize the financial integrity of ComGen and therefore raise constitutional issues under the Fifth and Fourteenth Amendments. FERC's decision emphasized as a matter of policy the importance of ensuring that utilities are able to recover in rates the costs of environmental cleanups as a means of promoting environmental protection.

SCCRAP promptly sought rehearing of FERC's decision on November 9, 2018 and, upon FERC's denial of rehearing by order issued on November 30, 2018, pursued judicial review with its petition to the D.C. Circuit Court of Appeals on December 3, 2018. In its appeal, SCCRAP claims that 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 further challenges FERC's finding that it would be an unconstitutional taking if FERC had adopted SCCRAP's position and disallowed the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment. Because SCCRAP's appeal of the FERC decision and ComGen's appeal of the U.S. District Court's decision for the District of Columbia involve common parties (ComGen and SCCRAP) and common issues (liability under the Clean Water Act for pollution from the Little Green Run Impoundment owned and operated by ComGen), SCCRAP, ComGen, and FERC jointly filed a motion in the D.C. Circuit Court of Appeals to have the actions consolidated for decision. On December 21, 2018, the D.C. Circuit granted the motion, and issued a subsequent order on December 28, 2018 setting forth the issues to be briefed and argued on appeal.

[NOTE: No decisions or documents dated after December 28, 2018 may be cited either in briefs or in oral arguments.]