IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

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

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT/INTERVENOR

Team No. 15

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had original jurisdiction over this case pursuant to 33 U.S.C. § 1365 (2018) because this civil action arose under 33 U.S.C. § 1342 (2018), a federal statute governing the discharge of pollutants into navigable waters. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (2018) as an appeal from the final judgment of the district court, and pursuant to 16 U.S.C. § 825l(b) (2018) as an appeal of an order of the Federal Energy Regulation Commission. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2018.

STATEMENT OF THE ISSUES PRESENTED

I. Is surface water pollution via hydrologically connected groundwater actionable under the Clean Water Act?

II. Does seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitute the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act?

III. Was the decision of the Federal Energy Regulatory Commission (FERC) to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 arbitrary and capricious?

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

STATEMENT OF THE CASE

This case arose out of a complaint filed by Vandalia Waterkeeper to the Vandalia Department of Environmental Quality (VDEQ) after detecting elevated levels of arsenic in the Vandalia River that were suggested to come from the Little Green Run Impoundment (Impoundment). Subsequent investigation shows that a seam in a high-density polyethylene geomembrane liner installed in 2006 was inadequately welded. In December 2017, SCRAPP 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 the prohibition against unauthorized discharges of pollutants into navigable waters.

After conducting a bench trial, the district court on June 15, 2018 held that leached arsenic from the coal ash in the Impoundment polluted groundwater, which carried the arsenic to navigable waters. The court determined that the Impoundment was a point source as defined by the Clean Water Act, and therefore found ComGen liable for ongoing violations of the Act. It concluded that the Act does cover discharges into groundwater that have a direct hydrological connection to navigable waters such that the pollutant would reach navigable waters through groundwater. Furthermore, the court found that arsenic was reaching Fish Creek and the Vandalia River in this manner. The court ordered ComGen to fully excavate the coal ash in the Impoundment and relocate it to another facility. It did not assess civil penalties against ComGen.

ComGen filed a timely notice of appeal from the district court's final judgment on July 16, 2018. On the same day, ComGen 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 proceeding. FERC then accepted ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule

No. 2 on October 10, 2018. SCCRAP sought a rehearing on November 9, 2018 of FERC's order approving ComGen's proposed rates, which FERC denied by order on November 30, 2018. SCRAPP sought review with this Court on December 3, 2018. Since both appeals involve common parties and issues, SCCRAP, ComGen, and FERC jointly filed a motion to have the actions consolidated for decision. This Court granted the motion on December 21, 2018, and the appeals are now before this Court.

SUMMARY OF THE ARGUMENT

This case is about the scope of the Clean Water Act involving coal ash impoundments used by electric utility companies that provide a valuable service to the community. Commonwealth Generating Company (ComGen) used the Little Green Run Impoundment (Impoundment) to store coal combustion residues containing arsenic, a common practice in the industry. Although elevated levels of arsenic were detected in navigable waters of the area, the Clean Water Act does not apply in this case because the Act does not cover surface pollution via hydrologically connected groundwater. The arsenic is also not sufficiently connected to the navigable waters. Discharge from a point source did not occur because neither groundwater nor the Impoundment are point sources as defined by the Act. Groundwater is neither discernible, discrete, nor confined, and the Impoundment cannot be considered a conveyance.

Even if this Court finds ComGen to be liable under the Clean Water Act, it should defer to the judgment of the Federal Energy Regulatory Commission, which approved revised rate schedules in order for ComGen to have the resources to meet its environmental obligations and continue to provide a service to the public. FERC's determination was not arbitrary and capricious because it applied the proper doctrine to modify a rate affecting the public interest and it made a rational connection between its findings and the remedy chosen. This Court cannot

substitute its own judgment, and the inquiry should end there because SCRAPP did not allege that the total effect of the rate is unjust and unreasonable or an excessive burden. Furthermore, imposing an alternative rate would risk the financial viability of ComGen, be confiscatory, contravene policy favoring competitive wholesale generation, and amount to a taking under the Fifth and Fourteenth Amendments.

In light of the aforementioned factors, this court should reverse the judgment of the district court and find that there was no violation of the Clean Water Act. Alternatively, this Court should affirm FERC's approval of ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2.

ARGUMENT

I. SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS NOT ACTIONABLE UNDER THE CLEAN WATER ACT BECAUSE THE ACT DOES NOT COVER INDIRECT DISCHARGES, AND EVEN IF IT DID, THE LEAKED ARSENIC IS NOT SUFFICIENTLY CONNECTED TO FISH CREEK OR THE VANDALIA RIVER.

The Clean Water Act prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise permitted. 33 U.S.C. §1251(a) (2018). Pollutant as defined by the Act includes "industrial, municipal, and agriculture waste discharged into water." 33 U.S.C. §1362(6) (2018). Navigable waters include "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7) (2018). Discharge of pollutant means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12) (2018). Absent the discharge of a pollutant directly from a point source to navigable waters, the Clean Water Act is not implicated. *See Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018). Indirect discharge of a pollutant to navigable waters does not fall within the scope of the Clean Water

Act. Even if indirect discharges were to fall within the Act, the indirect discharge must be sufficiently connected to the navigable water. *See Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018). The Environmental Protection Agency (EPA) may issue a permit under the Act, or a State can establish its own permitting program with the approval of the EPA. 33 U.S.C. §1342(b)-(c) (2018). Under the latter, the EPA would defer to the State's permitting scheme under state and federal law.

Here, SCCRAP alleges that arsenic leaked from the Little Green Run Impoundment (Impoundment) and entered Fish Creek and the Vandalia River. Although, under this claim, arsenic is a pollutant that entered navigable waters, it did not do so directly from a point source. Rather, arsenic first inadvertently leaked into groundwater despite preventative measures, and only later entered a navigable water. This kind of indirect discharge is at best minimally connected to the Impoundment, and not the kind of significant connection necessary to support the theory of surface pollution via hydrologically connected groundwater. Furthermore, the EPA has delegated the authority to implement permitting programs to the states of Vandalia and Franklin. As contemplated by the Act, this defers to the states of Vandalia and Franklin the judgment of whether a state discharge permit is required for effluent discharges under both state and federal law. Therefore, it is a matter for the state program to resolve, not the courts.

A. Standard of Review

The district court's decision for conclusions of law should be reviewed *de novo*. *See United States v. Phillip Morris USA*, 566 F.3d 1095 (D.C. Cir. 2009) (citing *SEC v. Wash. Inv. Network*, 475 F.3d 392 (D.C. Cir. 2007)). The decision to issue an injunction should be reviewed for abuse of discretion. *Id.* Findings of fact should not be set aside unless they are clearly erroneous. *Id.* This Court should review the decision of the district court to issue an injunction

for abuse of discretion because this Circuit has not yet made a determination into the hydrologic connection argument and how the U.S. Supreme Court has interpreted the language of discharge of a pollutant in the Act. Also, this Court should review whether there is a hydrologic connection *de novo* as a matter of law. Furthermore, the district court's finding may be clearly erroneous because other Circuits have said that the connection between a point sources and navigable waters needs to be sufficient, and the evidence in the records does not point to this level of connection.

B. Leaking of Arsenic from the Little Green Run Impoundment to Fish Creek and the Vandalia River Does Not Fall Within the Scope of the Clean Water Act because It is Not a Direct Discharge.

Under the Clean Water Act, when a pollutant is "discharged from point sources into navigable waters," the pollutants need to go directly from the point source to the navigable water. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018). In its prior Clean Water Act jurisprudence, the U.S. Supreme Court has applied a strict textual reading of the Act. *See Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the central issue was whether certain wetlands fell within the scope of the Clean Water Act. *Id.* There, the Court rejected the Army Corps of Engineer's broad interpretation of the phrase, "waters of the United States," in favor of a strict textual interpretation to say that wetlands are included if they "bear the 'significant nexus' of physical connection, which makes them as a practical matter indistinguishable from waters of the United States." *Id.* at 755. *See also Riverside Bayview Homes*, 474 U.S. 121 (1985) (which used a physical connection between wetlands and navigable waters). The Court used the dictionary definition of "waters" to say that they "include only relatively permanent, standing, or flowing bodies of water," *Rapanos*, 547 U.S. at 732, and pointed out that the language of the Act includes the "channels and conduits that typically carry

intermittent flows" within the definition of "point source," as distinct from navigable water. *Id.* at 735.

This construction is appropriate because of the concern in *Rapanos* with intruding into the domain of the states. The Court considered the stated objective of the Act to "recognize, preserve, and protect the primary responsibilities and rights of the States… to plan the development and use… of land and water resources…." *Id.* at 737 (citing 33 U.S.C. § 1251(b)). Under this guise, "the waters of the United States" was not "a 'clear and manifest statement' from Congress to authorize an unprecedented intrusion into traditional state authority" as land use-regulation." *Id.* at 738. *See also Solid Waste Agency v. United States Army Corps of Eng'Rs*, 531 U.S. 159 (2001).

On the one hand, the *Rapanos* plurality said that "the Act "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters." *Rapanos*, 547 U.S. at 743 (citing *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004)). However, other circuits have taken this quote out of context, beyond the intended scope of the Act. *See Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 936 (6th Cir. 2018) (where the court says that Justice Scalia's reference to "conveyance" makes clear he only wanted to say that intermediary point sources do not break the chain of liability; it was not a position on non-point source to point-source pollution). *See also Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (relying on the same reasoning as *Ky. Waterways*).

The Sixth Circuit has held that liability under the Clean Water Act does not extend to hydrologically connected discharges. *See Ky. Waterways*, 905 F.3d at 925; *see also Tenn. Clean Water Network*, 905 F.3d at 436. In *Ky. Waterways*, a utility company burned coal to produce energy. *See Ky. Waterways*, 905 F.3d at 925. The resulting coal ash was combined with water

and stored into nearby man-made ponds, where the ash was intended to remain permanently. *Id.* Instead, the plaintiffs in that case argued that the chemicals in the coal ash contaminated groundwater and the nearby lake. *Id.* at 927. The court appropriately used a strict construction of the language of the Act to hold that the Clean Water Act does not extend liability to pollution that reaches surface waters via groundwater. *Id.* It used the dictionary definition of the word "into" to say that "into" refers to a point of entry and does not leave room for intermediary mediums between a point source and the navigable water. *Id.* at 934. In so doing, the court rejected the idea that the absence of the word "directly" in the language of the Act meant that pollutants can also travel through non-point sources. *Id.* Similarly, the Sixth Circuit also reversed a district court opinion ordering the Tennessee Valley Authority to fully excavate the coal ash in its ponds because the district court had erroneously concluded that liability extended to discharges through hydrologically connected groundwater where the connection is "direct, immediate, and can generally be traced." *See Tenn. Clean Water Network* at 441.

Here, a strict textual reading of the Clean Water Act, like that used in *Rapanos*, demonstrates that arsenic did not go directly from a point source into navigable waters. Rather, it inadvertently leaked from the Impoundment into groundwater, and only later was the arsenic alleged to reach Fish Creek and the Vandalia River. In concluding that a "hydrologic connection" existed, the district court abused its discretion and erroneously applied the kind of broad interpretation of the language of the Act that *Rapanos* specifically rejected. *Rapanos* used the dictionary definition of "water" to say that the Clean Water Act only covers certain wetlands. So too should this Court employ a strict reading of the Act.

In *Ky. Waterways* and *Tenn. Clean Water Network*, the Sixth Circuit employed just the kind of analysis contemplated by the U.S. Supreme Court in *Rapanos*. Like here, the defendants

in those cases stored residual coal ash from energy production into nearby man-made ponds, intending for the coal ash to remain there permanently. The pollutant also inadvertently leaked into the groundwater and reached nearby navigable waters. This Court should also use the strict construction of the Act used in those cases when concluding that the dictionary definition of the word "into" did not leave room for intermediary mediums between a point source and navigable waters. *Tenn. Clean Water Network* rejected the lower court's opinion that liability extended to discharges through hydrologically connected groundwater where the connection is "direct, immediate, and can generally be traced." So too should this Court reject the same kind of erroneous conclusion reached by the district court. Doing so would be truer to Congress' intent and the EPA's promulgation of a rule specifically addressing coal ash residuals suggests that the Resource Conservation and Recovery Act may be the more applicable statutory authority in this kind of a case, rather than the Clean Water Act.

SCCRAP may argue that *Rapanos* supports the hydrologic connection theory, but this is due to an incomplete reading of the opinion. Specifically, they argue that the Impoundment only needs to convey the arsenic to the navigable waters, without needing to be the direct connection. However, the Sixth Circuit has appropriately applied a narrow reading of the Clean Water Act to say that this kind of argument stretches the language in *Rapanos* beyond the scope of the Act. The reference to "conveyance" was only meant to state that intermediary *point sources* do not break the chain of liability, with no mention of *non-point sources*. As applied here, the conveyance must also be a point source. Reading the Act to include indirect discharges via a non-point source would be tantamount to going beyond the scope of the Act.

Thus, this indirect discharge should not fall within the scope of navigable waters covered under the Act.

C. Even if the Clean Water Act does cover Indirect Discharges, the Leaking Arsenic from the Little Green Run Impoundment is Not Included because It is Not Sufficiently Connected to Fish Creek or the Vandalia River.

Indirect discharges of pollutants from a point source must be sufficiently connected to navigable waters in order to fall within the Clean Water Act. *See Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018) (*citing Hawai'i Wildlife v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018)). The assessment of a hydrologic connection is fact-based, taking into account time and distance, as well as geology, flow, and slope. *See Upstate Forever*, 887 F.3d at 651 (internal citations omitted). A pollutant's traceability in measurable quantities is also a relevant factor. *See id.* (citing *Hawai'i Wildlife* (where the court said that a claim for indirect discharge must show that the pollution is "fairly traceable" to the point source). *See also Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133,1140 n.4 (noting that non-point source pollution is "not traceable to a single, identifiable source or conveyance").

Here, the Vandalia Department of Environmental Quality report said that seepage of arsenic occurred at a "slow rate" with "no evidence of internal erosion of dam materials" and would only result from significant rainfall events, with very limited duration. R. at 6. Even though "some erosion and indentations or grooves in the soil" were found going down the embankment toward Fish Creek, it was not shown to be a substantial amount. *Id.* These factors put together surely are not enough to amount to a significant connection between the seepage at the Impoundment and Fish Creek, let alone the Vandalia River. Even in a case supporting the hydrologic theory, *Upstate Forever* remanded to the lower court to determine whether seepage had occurred over a distance of 1000 feet or less through soil and groundwater. Likewise here, there is not enough information to conclude whether seepage occurred over such a short distance.

Nor does the record support the contention that the arsenic was fairly traceable to the Impoundment. Unlike in *Hawai'i Wildlife* where a joint group that included the U.S. EPA conducted a Tracer Dye Study to assess the hydrologic connection, no such study was conducted here. Therefore, there is insufficient evidence to show that the arsenic from the Impoundment was sufficiently connected to Fish Creek and the Vandalia River, and even less evidence to conclude that it was fairly traceable as well.

II. SEEPAGE OF ARSENIC FROM LITTLE GREEN RUN IMPOUNDMENT THAT PASSES THROUGH GROUNDWATER TO FISH CREEK AND THE VANDALIA RIVER DOES NOT CONSTITUTE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF § 402 OF THE CLEAN WATER ACT.

For the Clean Water Act to govern the discharge of a pollutant, the pollutant must be added to navigable waters from a point source. 33 U.S.C. §1362(12) (2018). A point source is "any discernible, confined, 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) (2018). If a source is not a discernible, confined, and discrete conveyance, then it is not a point source. *See Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018). A conveyance must introduce the pollutant from the source to navigable waters. *See Upstate Forever*, 887 F.3d at 637. Here, groundwater is not a point source because while it may be a conveyance, it is not discernible. confined, or discrete. Nor should the Little Green Run Impoundment be considered a point source, because it is not a conveyance. It does not introduce or channel a pollutant to navigable waters.

A. Standard of Review

Appellate review of a district court's statutory interpretation is *de novo*. *See Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014). This Court should review the issue of whether the groundwater or the Impoundment are point sources *de novo* because in its opinion, the district court interpreted what it means to be a discernible, discrete, and confined conveyance per the definition of point source in the Clean Water Act.

B. Leakage of Arsenic Through Groundwater to Fish Creek and the Vandalia River Does Not Constitute Discharge of a Pollutant From a Point Source Because Groundwater is Not Discernible, Discrete, or Confined.

For something to be a point source, it needs to be discrete, discernible, and confined. Discernible means having the capacity of being identified as a distinct thing. *See Ky. Waterways*, 905 F.3d at 933 (where the court uses the dictionary definition of the word in its construction). To be discrete, it must be "constitute a separate entity or consist of distinct elements." *See id.* And for it to be confined, it must be "limited to a particular location." *See id.* Groundwater is neither confined nor discrete, but rather a "diffuse medium that seeps in all directions, guided only by the general pull of gravity." *See id*. (citing *26 Crown Assocs. v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 U.S. Dist. LEXIS 106989 (D. Conn. July 11, 2017). Nor is groundwater discernible. *See id.* (where the court says that "while dye traces can roughly and occasionally track the flow of groundwater, they do not render groundwater 'discernible'"). If a source is not a discernible, discrete, and confined conveyance, then it is not a point-source. *See id.* Non-point source pollution comes from "many dispersed activities over large areas," "is not traceable to any single discrete source," and is hard to regulate due to its "diffuse nature." *See Hawai'i Wildlife v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018) (citing *Ecological Rights Found. v. Pac. Gas & Elec. Co.,* 713 F.3d 502, 508 (9th Cir. 2013)).

Here, the groundwater carrying arsenic to Fish Creek is neither confined nor discrete. This is because it is not limited to one particular location, but rather spreads out. Only the effluent from the Impoundment was said to flow south toward Fish Creek, not all the groundwater. R. at 6. It also cannot be readily identified as a distinct thing and is not made up of distinct elements. On the one hand, the arsenic was leached by rainwater and groundwater, which resulted in contaminated groundwater. R. at 6. Yet these elements cannot be isolated separately in such a way as to make groundwater distinctly identifiable. Nor is the groundwater here discernible. Whereas in *Hawai'i Wildlife* dye traces were used to assess the path of the pollutant, here no such effort was made. The elevated levels of arsenic were only measured at the Vandalia River. R. at 6. Later investigation showed a problem with the geomembrane liner at the Impoundment. *Id.* Even though the record indicates some kind of analysis to suggest the arsenic came from the Impoundment, it lacks details surrounding the scope and results of that analysis. And even if dye traces were used, it would not suffice to make the groundwater here discernible because dye traces have their limits. *See Ky. Waterways*, 905 F.3d at 933. Thus, the groundwater here is neither discrete, confined, nor discernible.

C. Leakage of Arsenic from the Little Green Run Impoundment is Not Discharge From a Point Source Because the Impoundment is Not a Conveyance of Arsenic to Navigable Waters.

A point source needs to convey a pollutant to navigable waters. *See South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004). Convey means "to bear from one place to another; "to transfer or deliver." *See Ky. Waterways*, 905 F.3d at 933 (citing the dictionary definition of the word convey). Under the Clean Water Act, to be a "conveyance or addition," "a point source must *introduce* the pollutant into navigable water from the outside world, that is any place outside the particular body of water to which pollutants are introduced."

See Upstate Forever v. Kinder Morgan Energy Partners, 887 F.3d 637, 656 (4th Cir. 2018) (dissenting, Floyd) (citing *Catskill Mts. Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (emphasis in original). The conveyance must be by gravitational or nongravitational means. *See Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980) (where the court said that gravity flow "may be part of a discharge if the miner at least initially collected or channeled the water or other materials). *See also Sierra Club v. Va. Elec. & Power Co.*, 247 F.Supp.3d 753, 763 (E.D. Va. 2017) (where the court also focused on whether "human action" had the effect of channeling or collecting).

Here, a strict construction of conveyance shows that the Little Green Run Impoundment did not introduce or channel the arsenic to navigable waters. Vandalia Generating Station used the Impoundment to *permanently hold* coal combustion residues from energy production. R. at 4. It did not serve as a temporary repository for the coal ash before it was born, transferred, or delivered to another place. *Id.* An unintended leak in the geomembrane liner of the Impoundment should not amount to a transfer of the pollutant to navigable waters or an introduction of the pollutant to navigable waters. The district court said that a leak was enough, because ComGen built the Impoundment to store coal ash and its pollutants, so this is supposed to effectively collect and channel the pollutant into navigable waters. R. at 8.

However, the cases that addresses channeling or collecting are distinguishable from the facts here. In *Hawai'i Wildlife*, the county installed four wells at a wastewater treatment plant and used them to inject large quantities of treated effluent for disposal. *Hawai'i Wildlife v. Cty. of Maui*, 881 F.3d 754, 758 (9th Cir. 2018). The effluent eventually reached the Pacific Ocean. *Id.* In that case, it was not disputed whether the wells were point sources, and the record showed that the County chose to inject the effluent into the wells *knowing* it would indirectly affect

coastal waters. *Id.* Here, a transitory geomembrane liner leak that only occurs during heavy precipitation events is much less severe. R. at 6. The intent is also different. The county in *Hawai'i Wildlife* knew from the beginning that at least some effluent would reach navigable waters. The same is not true here because the purpose of the Impoundment was to *permanently store* the coal ash and its pollutants. R. at 8.

The facts in *Sierra Club v. Va. Elec. & Power Co.* are slightly more favorable to the appellee, but they are still distinguishable. 247 F.Supp.3d 753 (E.D. Va. 2017). There, the power company also created a repository for the coal ash and the leached arsenic contaminated groundwater. *Id.* Yet in that case, the court specifically pointed out that the repository "also ha[d] the effect of changing the original flow path of any precipitation, because the 3 million tons of coal ash ha[d] changed the geography of the peninsula, thereby channeling the flow of contaminated water." *See id.* at 763. Here there is "no evidence of internal erosion of dam materials" and only "some" erosion further down the embankment. R. at 6. This cannot be held in the same vein as changing the geography of the area.

Therefore, the Little Green Run Impoundment is not a point source because it does not convey pollutants to navigable waters.

III. THE COURT SHOULD NOT DISTURB THE FEDERAL ENERGY REGULATORY COMMISSION'S (FERC) RATE DETERMINATION BECAUSE THERE IS A STRONG PRESUMPTION AGAINST REVIEW, FERC ARTICULATED ITS REASONING, AND SCCRAP DID NOT MEET ITS HEAVY BURDEN.

A. Standard of Review

Courts afford FERC (the Commission) great deference in setting rates because the "just and reasonable" standard "is obviously incapable of precise judicial definition." *See e.g.*, *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554, U.S. 527, 532 (2008)

(citations omitted). The Court's deference derives from §701 of the Administrative Procedure Act ("APA"), which limits judicial review under the APA where agency action is committed to agency discretion by law. *See Webster v. Doe*, 486 U.S. 592, 599 (1988). "The Federal Power Act . . . vests in the [Commission] exclusive jurisdiction over wholesale sales of electricity in the interstate market," *Hughes v. Talen Energy Mktg.*, LLC, 136 S. Ct. 1288, 1291 (2016), and therefore courts review the Commission's determination of just and reasonable rates under the arbitrary and capricious standard, *see Louisiana PSC v. Fed. Energy Regulatory Comm'n*, 860 F.3d 691, 694 (D.C. Cir. 2017). This standard does not allow the Court to substitute its own judgment for that of the agency or make any determination as to whether its choice was the best choice. *Id*. The arbitrary and capricious standard is "highly deferential" and "presumes the validity of agency action." *See Transmission Access Policy Study Group v. Fed. Energy Regulatory Comm'n*, 225 F.3d 667, 714 (D.C. Cir. 2000).

B. FERC Did Not Act in an Arbitrary and Capricious Manner Because It Properly Exercised Its Discretion Under the Mobile-Sierra Doctrine to Modify a Rate Where It Would Have an Adverse Effect on the Public Interest and It Articulated a Rational Connection Between Its Findings and Its Remedial Choice.

1. FERC Properly Exercised Its Discretion Under the Mobile-Sierra Doctrine to Modify a Rate Where It would have an Adverse Effect on the Public Interest.

Under the *Mobile-Sierra* doctrine, bilateral contracts for electricity are presumed just and reasonable and may not be disturbed by the Commission for improvident bargaining unless the contracts would produce a rate "so low to adversely affect the public interest—as where it might *impair the financial ability of the public utility to continue its service*, cast upon other consumers an excessive burden, or be unduly discriminatory." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 533 (2008) (quoting *Fed. Power Comm'n v.*

Sierra Pacific Power Co., 350 U.S. 348, 352-353 (1956)) (emphasis added). Where the parties have not contracted around this doctrine, *Mobile-Sierra* stands as the default. *See id.* at 534. The Federal Power Act ("FPA") defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission." 16 U.S.C. § 824(e) (2018). ComGen and thus Vandalia Generating Station is a public utility for the purposes of this discussion which entered into bilateral contracts for wholesale power absent illegality, and therefore the *Mobile-Sierra* doctrine applies to the generator and its contracts. R. at 4 and 7.

According to the Supreme Court, the *Mobile-Sierra* doctrine works to incentivize parties to enter and conclude contracts, in part to hedge against market volatility. *See Morgan Stanley*, 554 U.S. at 547. The Court worried in *Morgan Stanley* that permitting a rule allowing parties to exit such contracts in response to mere market fluctuations would contravene the incentive, and therefore held that FERC may only upset the presumption that contracts are just and reasonable upon finding that they adversely affect the public interest for reasons which include jeopardizing the financial viability of the supplier and thus its ability to serve the ratepayers. *Id.* In the present case, FERC made such a finding by weighing SCCRAP's concerns against the interest in ComGen's financial viability. R. at 11-12. Upending this determination could have a chilling effect on bilateral contracting in direct contradiction to the Supreme Court's intention. Where non-market risks—in this case the negligence of a sub-contractor—must be absorbed in the face of financial ruin, parties would have little incentive to lock into contractual liabilities that may trigger damages even into bankruptcy. Since FERC properly applied *Mobile-Sierra* doctrine and articulated its reasoning, the Court cannot find that it acted in an arbitrary and capricious manner.

2. FERC Articulated a Rational Connection Between Its Findings and Its Remedial Choice and the Court May Not Substitute Its Own Judgment.

The Commission's remedial choice will stand where it "examined the relevant data and articulated… a rational connection between the facts found and the choice made" *See Louisiana PSC v. Federal Energy Regulatory Comm'n*, 860 F.3d 691, 694 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Throughout its rate proceeding, FERC heard evidence, made findings of fact, and considered arguments from both sides. R. at 11-12. The Commission agreed with elements of each side, such as ComGen should not be held strictly liable for its sub-contractor, but that the damage would likely have been less severe had the utility properly monitored the corrective action plan. R. at 11. While FERC agreed that the matching principle of ratemaking would have prevented a perceived windfall to ComGen's shareholders, it ultimately approved passing through the remediation under the *Mobile-Sierra* doctrine as evidenced through its concern for the financial integrity of the utility and other policy considerations within its area of expertise. R. at 12.

The decision to pass through environmental remediation costs in ComGen's rate structure necessarily intertwines with the Commission's concern for the financial viability of ComGen and its ability to remain in service to ratepayers. Such a determination touches more than just FERC's authority to ensure just and reasonable rates and speaks implicitly to matters of reliability as well. While matters of constitutional interpretation are the domain of the courts, FERC's financial viability rationale can be reasonably seen as exercising its reasoned judgment within its industry expertise. Though it did not articulate the nuance of its justification, a fear for the financial viability of ComGen reasonably indicates the Commission made a judgment, in its discretion as a market and reliability regulator, that a bankruptcy risked Vandalia Generating

Station not being available to service demand, which would harm ratepayers and the grid at large. The level of detail need not be so exacting so long as the Commission articulated a reasonable connection between its factual findings and its remedial choice. Here, the Commission articulated a finding that the financial impact of remediation "would likely jeopardize the financial integrity of ComGen" as part of its decision to allow recovery. R. at 12. Therefore, FERC did not overstep into the authority of the Court but rather operated reasonably within the bounds of its authority to ensure reliable service at just and reasonable rates.

Furthermore, the Commission articulated another important policy goal to ensure that industry actors remain responsible for damages to the environment while in service to ratepayers. R. at 12. By linking this policy objective with its fears about setting precedent where utilities could not recover these non-market externalities, FERC implicitly weighed the reasonably foreseeable two-fold harm that would arise from bankruptcies of this sort. First and admittedly tangential to its expertise, the Commission worried funds would be lacking to clean up after the industry's environmental consequences. R. at 12. Second and squarely within its expertise, FERC implicitly acknowledged the harm that would arise to the public interest if investors retreated from the industry as a result of this bar to recovery. Where the Commission articulated a rational connection between its findings and remedial choice, in this case weighing important policy considerations that would harm future ratepayers, the Court should give deference to the agency's balancing and hold that its decision was not arbitrary and capricious. Since the Court "may not substitute [its] own judgment for that of the Commission" or make any determination as to whether the Commission's choice was the best choice, *Louisiana PSC v. Federal Energy Regulatory Comm'n*, 860 F.3d 691, 694 (D.C. Cir. 2017), and since all relevant factors were

given consideration, the Court should find that FERC did not act in an arbitrary and capricious manner and defer to its order.

C. SCCRAP Does Not Allege that the Total Effect of the Rate is Unjust and Unreasonable or an Excessive Burden so the Court's Inquiry Must End.

The Supreme Court established in *Hope* that the Commission is not bound to use any particular method and that the relevant inquiry into just and reasonable rates is not of the method of calculation but the end result. *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944). "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Id.* Both of SCCRAP's arguments challenge the *method* FERC used but fail to assert that the *total effect* is unjust and unreasonable under *Hope* or an excessive burden under *Mobile-Sierra* (emphasis added). R. at 9-11. Since the Supreme Court requires the Commission to apply the *Mobile-Sierra* presumption to bilateral contracts, *Morgan Stanley*, 544 U.S. at 544-45, upon accepting or amending the rate to be just and reasonable under FPA § 205, the burden should shift from the Commission to any complainant under § 206 to show that the rate is unjust or unreasonable. *See* 16 U.S.C. § 824e(b). This Court characterizes the burden to show that FERC's policy judgments were arbitrary and capricious as "heavy." *See Transmission Access Policy Study Group v. Fed. Energy Regulatory Comm'n*, 225 F.3d 667, 714 (D.C. Cir. 2000). SCCRAP fails to meet this heavy burden as established in *Hope* because it challenges the Commission's rate order by method instead of total effect, and this Court should not inquire further than whether FERC acted in an arbitrary and capricious manner. Since the foregoing shows that FERC did not act in such a manner, judicial inquiry is at an end.

IV. IMPOSING A RATE WHICH RISKS THE UTILITY'S FINANCIAL VIABILITY CONSTITUTES A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CONTRAVENES IMPORTANT MATTERS OF POLICY.

A. Standard of Review

In *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n* where this Court opined on an alleged taking from a FERC rate order, the Court recounted that the Supreme Court in *Hope* set aside a more searching review of the Commission's rate orders for the more deferential "arbitrary and capricious" standard when, at a fair hearing, the Commission reviewed and applied the facts presented in their entirety and the end result could not be said to be unjust or unreasonable. *See Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168, 1175-76 (D.C. Cir. 1987). The Court concluded that weighing the takings issue was for the regulator and not for judges. *Id.* at 1194. Since the Commission, at a fair hearing, made findings of fact favorable to both sides and considered all the evidence, R. at 11-12, this Court should review FERC's rate order under the arbitrary and capricious standard.

B. Disallowing Recovery for All of the Remediation Costs would be a Taking under the Fifth and Fourteenth Amendments because the Rate would Depress the Return on Equity to a Confiscatory Level.

This case raises concerns about who bears the costs of unforeseen, non-market risks in a regulated utility setting. While the nature of regulated or merchant generation appears to draw a clear line for imposing liability, the incorporation of ComGen into CE's rate base—by the nature of wholesale rates being passed through to load-serving entities as approved by FERC—inherently places issues of equity in competition with matters of policy. Absent plausible allegations of fraud or illegality, the Court should give deference to the Commission's expert

judgment in setting rates that balance the Supreme Court's tests for non-confiscatory, just and reasonable rates with the policy objectives of Congress as carried out through the agency.

1. The Total Effect of the Rate Must Not Be Confiscatory or It Violates the Fifth and Fourteenth Amendments.

The Supreme Court established affirmatively that a rate set by FERC can be so low as to constitute a taking under the Fifth and Fourteenth Amendments. "Th[e] partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment." *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). The Court went on to say that "the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory." *Id.* Though the Commission is free to set a higher rate, in *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, the Supreme Court held that "the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense." *See Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). The Court in *Duquesne* therefore held that "[i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne*, 488 U.S. at 308.

The Court in *Duquesne* believed that just and reasonable rates necessarily fall within the constraints of the Constitution, and the balancing of the interests rests squarely with the legislative power or its agents. *See id.* at 316 (stating "[t]he Constitution within broad limits leaves the States [in this case FERC] free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public"); *id.* at 314 ("[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties"). SCRAPP challenges the Commission's method, but the Supreme Court reaffirmed in *Duquesne* that FERC

is not bound by any one method or combination of methods and that it is only the "total effect of the rate order" which must be just and reasonable. *Id.* at 310.

2. The Return on Equity Cannot Be Depressed to the Point of Compromising Financial Integrity and to do so may Contravene Policy Favoring Competitive Wholesale Generation.

A rate order which does not allow recovery of all or most of the remediation costs constitutes a taking because it depresses the return on equity to investors to a confiscatory level in violation of the Fifth and Fourteenth Amendments. The Supreme Court held that "[o]ne of the elements always relevant to setting the rate under Hope is the return investors expect given the risk of the enterprise." *Duquesne*, 488 U.S. at 314; *see also Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("[R]eturn to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks"); *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693 (1923) ("A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties").

Though SCCRAP claims that the Constitution does not protect ComGen's right to earn a reasonable rate of return, R. at 11, precedent clearly shows otherwise. In *Hope* the Court held that "[t]here is no constitutional requirement that an owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it," *Hope*, 320 U.S. at 606, while also noting that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a

meager return on the so-called "fair value" rate base, *id.* at 605. Having done away with choosing a particular method for rate-making, these seemingly competing statements are best read to mean that although the Constitution may not guarantee a return on equity at a particular level, the "just and reasonable" mandate requires that investors obtain enough to stay in service. Subsequent courts affirmed this interpretation in *Jersey Central* and *Duquesne*.

The *Duquesne* Court found that a reduction in revenue of about 0.5% or a corresponding reduction in return on equity would not trigger a constitutional taking, particularly noting that no party had alleged such reduction would jeopardize the financial integrity of the company. *Duquesne*, 488 U.S. at 312. In the present case, SCCRAP proposed a reduction in return on equity approximating seven percent, which is drastic by comparison and made more so in light of the counterargument that such reduction would cause financial ruin.

Forcing wholesale generators to remain in the market at uncompetitive returns will have a chilling effect on merchant generation. "The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks." *Duquesne*, 488 U.S. at 315. However, the Court should read the law with consideration for the industry's shift to deregulate generation since *Duquesne*. A return on equity that might have been reasonable in a regulated market is not necessarily reasonable in a deregulated environment. Forcing a regulated utility, which is risk averse, to absorb the unforeseen risks of a merchant acquisition that it thought at the time to be prudent might have a chilling effect on investment in competitive wholesale generation.

If independent power producers lose the ability to successfully exit their investments by consequence of regulated utilities' hesitancy to buy assets with unknown environmental

liabilities which jeopardize their financial integrity, then competitive wholesale markets will stagnate. A regulated utility may tend to pay more for an asset because it enjoys insulation from market risks at a lower return on equity. This creates an incentive for independent power producers to invest capital in risky merchant markets because it offers them, usually through exit, a comparably higher rate of return. Without the risk protection of regulated utilities, competitive markets may not thrive successfully. Even though this case involves a utility reorganizing merchant assets into its regulated rate base, setting a precedent of strict liability may reasonably be expected to contravene the public policy objectives of competitive wholesale markets.

Therefore, absent a showing that CE deliberately absorbed Vandalia into the rate base to cover up the environmental liability and to avoid chilling investment in merchant generation, the Court should treat the risk-return equation the same over the course of the matter. Either the owner of Vandalia during the recovery period should be able to earn a return on the asset comparable to that of its merchant owner because that best reflects investors' risk at the time the incident occurred, or ComGen should be allowed to flow through the cost of remediation to reflect CE's risk expectation when it absorbed Vandalia into the rate base. Both options keep with the constitutional objective of the Fifth Amendment of safeguarding the economic use of private property when taken for public necessity.

3. Forcing ComGen to Absorb All or Most of the Cost of Remediation does not Pass the Penn. Central Test.

In his concurrence in *Jersey Central*, Judge Starr argued that to satisfy *Hope*'s end result test, the Commission must consider whether the rate order or prior agency action worked a taking under the Fifth Amendment. *See Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168, 1189 (D.C. Cir. 1987). A taking from investors occurs when an unreasonable balance is struck between the promise of "universal, non-discriminatory

service and protection from monopolistic profits" in exchange for "a level of stability and in earnings and value less likely to be attained in the unregulated . . .sector." *Id.*

The judge suggested that while prudence in investments is relevant to the reasonable balance, it cannot be the only consideration to satisfy the demands of the Fifth Amendment. *Id.* at 1190. The used and useful rule is a similar safeguard for the ratepayers, and the two rules taken together prevent ratepayers from paying for mistakes of management or things which provide no benefit to them. *Id.* Furthermore, the judge noted that the rules principally work to constrain building of unneeded capacity and prevent management from being "bailed out from conditions which government did not force upon it." *Id.* Furthermore, in *Permian Basin* the Supreme Court explained that the "Commission's responsibilities include the protection of future, as well as present, consumer interests." *Permian Basin Area Rate Cases*, 390 U.S. 747, 798 (1968).

In this case, the company did not recklessly invest in used and useful property, but may potentially incur costs to remain in service to future ratepayers, costs which are imposed by the government and which fall under the regulations which derive from the promise to provide service to the public. When CE absorbed ComGen into its rate base, the generator necessarily entered this public-private contract of the regulated utility with all the attendant obligations to serve present and future ratepayers subject to the regulation of FERC. While "the Fifth Amendment does not provide utility investors with a haven from the operation of market forces," *see Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 590 (1942), the Court should reasonably conclude that precedent shows the market forces being referred to are really just fluctuations in demand which fall squarely within the Commission's rate-making power to make

"pragmatic adjustments" and do not include one-off events like contractor negligence. *See Hope*, 320 U.S. at 602.

The concurrence in *Jersey Central* concluded that the Commission has "broad latitude" in balancing investor and ratepayer interests. *Jersey Central*, 810 F.2d at 1191. Even though the concurrence opined that investors and ratepayers should share the burden of the unused investment in a nuclear power plant, it reasoned this because it would be unfair to subject the ratepayers to monopolistic prices. *Id.* Since SCCRAP makes no claim that FERC's rates are monopolistic or that the end result is unjust and unreasonable, there can be no cause to share this burden under Judge Starr's approach.

In discussing how the Commission might analyze the takings issue, the concurrence preliminarily applied the three prongs of the Penn. Central test[1] and found the facts leaned heavily toward the utility where the extent of the economic value was large, pushing the company to the edge of bankruptcy and impeding its ability to attract capital, and where regulation threatened to interfere with the reasonable investor-backed expectations of utility investors who view such investments as safe. *Id* at 1192. The opinion did not find that the third factor weighed very strongly in the utility's favor, but in the current case, the character of the government works to impose an externality that investors should not have expected to be a financial risk. ComGen took the prudent steps to comply with its environmental obligations and could not reasonably have believed they would be held responsible for the negligence of a subcontractor, let alone trigger a CWA violation where the coal ash impoundment was not directly connected to "waters of the United States" such that any leak in the membrane could be seen to trigger a disputable violation of the CWA. Even if the Court is not fully persuaded by this

[1] *See generally Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

last point, it is noteworthy that the *Jersey Central* court did find the first two factors alone to be favoring in its outcome. In those respects, ComGen stands in the same situation as the utility in *Jersey Central*.

Since a large reduction in return on equity would be confiscatory to the point of financial ruin and a reasonable application of the *Penn. Central* test strongly favors ComGen, and where the Court may only review the agency's action as arbitrary and capricious, the Court should respect FERC's consideration that to deny recovery would trigger a constitutional taking.

C. The Court should not Consider the Assets of ComGen's Parent Company When Balancing Investor and Public Interest Because There is No Legal Reason to Pierce the Corporate Veil.

Under D.C. Circuit law the corporate veil may not be pierced by the Court unless the party seeking to do so can show "that there is (1) unity of ownership and interest, and (2) use of the corporate form to perpetrate fraud or wrong, or other considerations of justice and equity justify it." *See Estate of Raleigh v. Mitchell*, 947 A.2d 464, 470 (D.C. Cir. 2008). Even though SCCRAP indicated in its briefing to FERC that CE "saddled ComGen at the outset with an unprofitable coal-fired power plant," they do not directly allege that ComGen was undercapitalized, R. at 11, which would be the only reasonable way to establish the first prong of the test from the record. Even if the Court were to accept that the first prong was met in this case, no allegation of fraud or wrongdoing exists in the record that could satisfy the second prong. The Court should take judicial notice that companies regularly create nested corporate structures as a legal form of risk management and should demand particular pleadings before seriously considering piercing the corporate veil between ComGen and its parent company.

The record makes clear that ComGen bought Vandalia Generating for the purpose of reducing CE's exposure to market risk, R. at 4, using legal and proper methods of risk

management within the boundaries of corporate law. SCCRAP has not alleged any impropriety in this purchase or pleaded that CE established ComGen with the intent to undercapitalize a known environmental exposure and defraud ratepayers. For the foregoing reasons, the Court should not consider the assets of ComGen's parent company in this matter.

CONCLUSION

For the above reasons, ComGen requests that this Court overturn the district court's decision finding a violation of the Clean Water Act. In the alternative, ComGen requests that this Court affirm FERC's approval of ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2.

Respectfully submitted,

Dated: February 4, 2019 *Team No. 15*

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 15