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

D.C. No. 17-01985 and Docket ER-18-263-000

COMMONWEALTH GENERATING CO.

Appellant,

and

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP)

Appellee,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Consolidated Petitions of Review of the District Court's Decision and FERC Approved Rate Schedules Under Section 205 of the Federal Power Act

BRIEF OF STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP)
Appellee/Petitioner

Oral Argument Requested

Team No. 26

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STATEMENT OF JURISDICTION

On July 16, 2018, Commonwealth Generating Company ("ComGen") appealed the decision of the District Court finding violations of the Clean Water Act ("Act") and granting Stop Coal Combustion Residual Ash Ponds ("SCCRAP") injunctive relief. This court has jurisdiction over appeals from all final decisions of the United States district courts pursuant to 28 U.S.C. §1295. In response to the District Court's Order granting injunctive relief via environmental remediation, ComGen submitted revised rate schedules to recover the cost of compliance and though SCCRAP intervened in opposition, the Federal Energy Regulatory Commission ("FERC") granted approval. On December 3, 2018, SCCRAP timely petitioned this Court to review FERC's decision pursuant to the Federal Power Act ("FPA"). 16 U.S.C. § 825l (b). The petitions are consolidated for prompt review and resolution of the issues by this court.

STATEMENT OF THE ISSUES

I. Whether surface water pollution via a hydrological connection is a violation subject to action under the Clean Water Act.

II. Whether arsenic that seeped from a negligently maintained coal ash impoundment and subsequently passed through groundwater to navigable waters constituted the discharge of a pollutant from a point source in violation of the Clean Water Act.

III. Whether FERC's approval ComGen's revised rate schedules after they were revised to shift the burden of remediation costs from shareholders to consumers was arbitrary and capricious.

IV. Whether disallowing recovery of all or a portion of remediation costs incurred by ComGen to remediate the non-compliant Little Green Run impoundment is an unconstitutional taking contrary to the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

I. Facts

Commonwealth Generating Company ("ComGen") is a subsidiary of Commonwealth Energy ("CE"), which is a multi-state electric utility holding company operating in nine states to provide electricity at retail and wholesale rates. R. at 3. ComGen was incorporated in 2014 in order to purchase the Vandalia Generating Station ("Vandalia Station") from Commonwealth Energy Solutions ("CES"), which is a separate unregulated subsidiary also owned by parent company CE. *Id*. Along with the incorporation of ComGen in 2014, CE announced it would seek to reduce exposure to competitive wholesale markets and its sale of the Vandalia Station to ComGen, a retail company, was key to achieving that goal because ownership of the station by a retail company would allow for recovery of operating costs from retail customers. *Id*. at 4.

The Vandalia Station was developed by CES in the 1990's and is composed of two 550-megawatt coal-fired units located on the Vandalia River. *Id*. The units, Vandalia Unit Nos. 1 and 2 began operating commercially in 2000 and 2002. *Id*. The process of burning coal at the station generates coal combustion residuals ("CCRs"), which are then disposed of in an impoundment known as the Little Green Run Impoundment ("the Green Run Impoundment"). *Id*. CCRs are the byproducts of coal burning and contain contaminants such as mercury, cadmium, and arsenic associated with cancer and other harmful health effects. *Id*. at 3. The CCRs are disposed of in wet form in large surface impoundments, and effluent from the Green Run Impoundment flows south and enters Fish Creek, and subsequently the Vandalia River. *Id*. at 5. If not properly protected the

pollutants in the waste can leach into groundwater and threaten drinking water safety, which is a major public health issue. *Id*. at 3. There are more than 735 active coal ash surface impoundments in the nation generating 110 tons of CCRs that must be monitored. *Id*.

The Green Run Impoundment contains approximately 38.7 million cubic yards of solids, mainly coal combustion residuals ("CCRs") and was generated was created by the construction of a dam nearby. The Green Run Impoundment is included on the Environmental Protection Agency's ("EPA") listing of coal ash impoundments and is one of 63 electric industry coal ash impoundments with a "high" hazard rating. *Id*. at 5. The dam height measures 395 feet and is the highest existing dam structure of all those listed by EPA. *Id*.

In 2002, CES's required groundwater quality monitoring revealed a leak of toxic arsenic at the Green Run Impoundment with levels exceeding state standards. *Id*. The Vandalia Department of Environmental Quality ("VDEQ") required ComGen to implement a corrective action plan to mitigate the pollution and the plan was approved in 2005. Corrective action included installation of a high-density liner on the impoundment to prevent future leaks, which was completed in 2006. *Id*. In 2017, the Vandalia Waterkeeper detected high levels of arsenic in the Vandalia River and it was later determined that an inadequate weld in the liner led to the leak. *Id*. at 5-6. According to VDEQ's report the seep appeared to have been active for many years and ran clear at a slow rate without any evidence of internal dam erosion. *Id*. ComGen claimed that the seep occurred only with significant rainfall and cleared over the weeks following a rain event. *Id*.

In November of 2014 ComGen's acquisition of the Vandalia Station was approved and ComGen established unit power service agreements with Vandalia Power Company and Franklin Power Company under which the electrical output from the Vandalia Station would be divided 50% to each company. *Id*. at 4. These unit power service agreements are wholesale transactions in interstate commerce, transactions between utilities, and thus subject to jurisdiction of the Federal Energy Regulatory Commission ("FERC"). *Id*. The agreements are designated as FERC Rate Schedule 1 (Vandalia Agreement) and FERC Rate Schedule 2 (Franklin Agreement). *Id*.

Stop Coal Combustion Residual Ash Ponds (SCCRAP) is a national environmental and public interest organization with citizen members who are residents directly impacted by the negative environmental effects of the Green Run Impoundment. *Id*. at 5. SCCRAP seeks to address environmental pollution from coal ash impoundments by filing suit under the Clean Water Act ("CWA") or the Resource Conservation and Recovery Act ("RCRA") against owners of impoundments found to be leaking pollutants that pollute groundwater. *Id*. In addition to filing citizen suits, SCCRAP intervenes in ratemaking proceedings before the states and FERC to challenge recovery of expenses associated with polluting impoundments through rates. *Id*.

II. Procedural History

In December 2017, SCCRAP filed suit against ComGen in the United States District Court for the District of Columbia alleging that ComGen violated 33 U. S .C. § 1342. *Id*. at 7. On June 15, 2018, the District Court issued its order finding that the coal ash in Green Run Impoundment was leaking arsenic, which polluted the groundwater and carried the arsenic to navigable waters. *Id*. The Court determined the Green Run

Impoundment constituted a point source under the CWA, and thus ComGen was liable for ongoing violations. *Id*. The court concluded that the Act covers the discharge of arsenic into groundwater with a "direct hydrological connection" to navigable waters, in this case Fish Creek and the Vandalia River. *Id*. at 8. To remediate what the District Court deemed "an untenable situation that has gone on for far too long", the Court ordered ComGen to fully excavate the Green Run Impoundment and relocate the coal ash waste to a facility that complies with the EPA's CCR rule. *Id*.

On July 16, 2018, ComGen filed an appeal challenging the District Court's conclusions that the CWA regulates discharges to navigable waters through a hydrological connection to groundwater, and that the Green Run Impoundment constituted a point source under the CWA. *Id*. Along with its appeal of the District Court's remediation order ComGen filed a rate revision with FERC under Section 205 of the Federal Power Act to recover from Vandalia Power and Franklin Power remediation costs associated with excavating and relocating the Green Run Impoundment to comply with the District Court's ruling. *Id*.

ComGen's revisions to FERC Rate Schedule No. 1 and No. 2 seek to recover an estimated $246 million over a 10-year period to comply with the District Court's order and divide the costs equally among Vandalia Power and Franklin Power. These costs would ultimately be recovered from each utility's retail customers. *Id*. at 9. SCCRAP intervened in ComGen's rate filing, arguing that ComGen is precluded from recovering costs from ratepayers based on the prudence principle of utility ratemaking. *Id*. SCCRAP also protests ComGen's requested relief, contending that it is a violation of the matching principle to require that ratepayers bear the full remediation costs. *Id* at 10. SCCRAP also

disputes ComGen's assertion that requiring CE's shareholders to bear the costs of remediation constitutes an unconstitutional taking under the Fifth and Fourteenth Amendments. *Id*. On October 10, 2018, FERC issued its decision to approve ComGen's revised rate schedules and on November 9, 2018 SCCRAP immediately sought rehearing of the decision. *Id*. at 11-12. FERC denied the request for rehearing on November 30, 2018 and on December 3, 2018 petitioned this Court judicial review of FERC's decision to approve the rate schedules. *Id*. at 12.

SUMMARY OF THE ARGUMENT

SCCRAP agrees with the District Court's finding that surface water pollution with a direct hydrological connection to groundwater is an actionable violation of the CWA. This finding is consistent with the statutory language set forth in 33 U.S.C. §1362 prohibiting the discharge of pollutants to navigable waters, which means the addition of any pollutants to navigable waters from point sources. The District Court's decision is based on sound legal precedent and an interpretation of the provisions of the CWA that accords with the purpose of protecting the Nation's waters.

In reaching this conclusion, the District Court also properly held that the Green Run Impoundment is a point source as defined by the CWA because it is a discernable, confined, and discrete area used by ComGen to dispose of coal ash waste. The CWA covers the unintentional discharge of pollutants that reach navigable waters, even in situations where the discharge traveled to navigable waters via groundwater. The prohibitions of the CWA do not become void merely because pollutants enter groundwater before being conveyed to navigable waters. As a point source the Green Run

Impoundment channels and conveys pollutants through surface waters to navigable waters in violation of the CWA.

The fact that the discharge of pollutants was unintentional and natural erosion contributed to the discharge does not negate the fact that the Green Run Impoundment is a point source. The discharge of pollutants from groundwater may occur either by gravitational or non-gravitational means and where there is a direct hydrological connection from a point source to navigable waters a violation of the CWA results. Evidence shows that such a connection exists between the Green Run Impoundment and the Vandalia River, thus this court should uphold the District Court's ruling that the Green Run Impoundment discharged arsenic into navigable waters via a hydrological connection through groundwater in violation of the CWA.

FERC's approval of ComGen's revised rate schedules is unduly discriminatory towards ratepayers and unduly burdensome on Vandalia Power and Franklin Power. FERC acted arbitrary and capricious in approving the rate schedule because the agency provided no just and reasonable justification for giving ComGen the opportunity to receive remedial costs for their negligence. If ComGen had applied prudent utility practice in overseeing the corrective plan and monitored the effectiveness of the liner intended to contain the Green Run Impoundment's contaminants, the issue would have been detected sooner. Once the issue was discovered ComGen could have prevented the pollutants from detrimentally impacting the environment, and remediation could have been less expensive to fix the issue since ComGen would have addressed it right away.

If this court upholds FERC's decision to allow ComGen to recover its remediation expenses, the rate schedules should be revised so that Vandalia Power and Franklin

Power are responsible only for costs associated with their operations since the approval of their unit power service agreements with ComGen. This court should also revise the schedule to ensure consumers are not bearing the full remediation costs, especially considering that ComGen shareholders enjoyed the majority of the benefits from the Vandalia Generating Station's operations and the current customers did not. In accordance with the matching principle, ComGen's remediation costs should be borne by CE's shareholders given that it was these shareholders who generated profits. Approval of rate schedules allowing ComGen to pass on remediation expenses to ratepayers is unjust and burdensome, and passing the expense to Vandalia Power and Franklin Power could impair the ability of the companies to continue providing service to the public.

ComGen's claim that holding the shareholders responsible for the remediation costs would result in an unconstitutional taking contrary to the Fifth and Fourteenth Amendments is unwarranted because ComGen is not entitled to a reasonable rate of return in light of the mismanagement of the Green Run Impoundment. Since it was ComGen's mismanagement that caused the need for remediation of the site, and thus led to additional expenses for the company ComGen should not be allowed to recoup these expenses. Furthermore, a takings claim cannot be sustained because the economic impact to ComGen of paying for the remediation would be justified in light of the circumstances, and disallowing full rate recovery maintains the proper balance between ComGen's shareholders and ratepayers. Therefore, this Court should vacate FERC's decision to approve the revised Rate Schedules Nos. 1 and 2.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CWA.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. §1251(a). In working to meet this goal, the Act prohibits the "discharge of any pollutant by any person" into navigable waters in a manner unauthorized by the Act. 33 U.S.C. §1311(a). The term "discharge of a pollutant" is defined by the Act as "any addition of any pollutants to navigable waters from any point source". 33 U.S.C. §1362 (12). Courts have held that the Act is not limited to intentional or foreseen direct additions, but also extends to indirect or accidental additions including those that may result from an act of God. *SED Inc. v. City of Dayton*, 519 F.Supp. 979 (1981) (citing *U.S. v. Earth Science, Inc.,* 599 U.S. 368, 374 (10th Cir. 1979)). This interpretation prevents polluters from evading CWA authority when actions relating to their activities may not have been intentional, but their mere existence led to a discharge in violation of the act. Furthermore, discharges that do not flow directly into a navigable water body nevertheless reach navigable waters by another indirect means are also considered violations.

To constitute a CWA violation, pollutants must be released by a point source, which the statute defines 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.A. § 1362 (14). Courts have interpreted the definition of "point source" under the Act broadly to include "any identifiable conveyance from which pollutants might enter waters of United

States". *U.S. v. Lambert*, 915 F. Supp. 797 (1996) (citing *United States v. Earth Sciences Inc*., 599 F.2d. 386, 373 (1979)).

In applying a broad interpretation, courts have found "point source" to include bulldozers and other earth moving equipment, depressions formed along ditches due to a landowner's purposeful ditching activities, trucks and helicopters used to spray pesticides, and coal ash lagoons at a coal-fired power plant where the lagoons were designed to hold accumulated coal ash waste in liquid form. *U. S. v. Lambert,* 915 F.Supp. at 802.; *N.C. Shellfish Growers Ass'n v. Holly Ridge Associates, LLC,*278 F. Supp. 2d. 654 (2003); *Peconic Bay Keeper Inc. v. Suffolk County*, 600 F.3d. 180 (2010); *Yadkin Riverkeeper Inc. v. Duke Energy Carolinas LLC*, 141 F.Supp.3d. 428 (2015).

Under 33 U.S.C. §1311 pollutants may not be discharged to navigable waters in a way not authorized by the act, and such authorization comes in the form of a National Pollutant Discharge Elimination System (NPDES) permit, which allows discharges subject to certain controls and amount limitations. 33 U.S.C. §1342. A violation of the permitting system occurs when polluters fail to obtain a permit or discharge pollutants at a level beyond what their permit allows. 33 U.S.C. §1342 (a)(1).

A. A direct hydrological connection with proven traceability of pollutants from a discharging point source to navigable waters constitutes a violation of the CWA.

As discussed in the preceding section, a CWA claim for violation of NPDES permitting requirements arises when the following elements are present: (1) a pollutant has been (2) added (3) to navigable waters (4) from (5) a point source. *National Wildlife Federation v. Consumers Power Inc.,* 862 F.2d 580, 583 (D.C. Cir. 1988). For a discharge through groundwater to constitute a violation of the Act, there must be a clear and direct connection between the point source and the navigable waters. *Upstate*

Forever v. Kinder Morgan Energy Partners LP, 887 F.3d 637, 651 (4th Cir. 2018) (referencing EPA's developed term "direct hydrological connection"). Directness of a hydrological connection is determined by considering factors including time and distance, geology, flow, and slope. *Id*. Thus, once a plaintiff alleges such a connection exists there must be a fact-specific finding of traceability of the pollutants in measurable quantities. *Id*.

In the case of the Little Green Run Impoundment there is no dispute that the arsenic leaching into groundwater and contaminating nearby water bodies occurs due to a direct hydrological connection. Vandalia Waterkeeper conducted analysis demonstrating the connection from the impoundment to the Vandalia River, which was confirmed by VDEQ in its report stating that the impoundment's effluent flows south connecting to Fish Creek and subsequently reaching the Vandalia River. There is significant slope due to the height of the dam. The report also noted there is no evidence of internal erosion of dam materials, which rules out the only other potential source and indicates that the arsenic comes from the Green Run Impoundment and not from the dam. Based on this evidence a sufficient direct hydrologically connection has been demonstrated linking the discharged arsenic from the impoundment to the Vandalia River.

B. The CWA does not require that discharges to navigable waters be direct, thus indirect discharges through the conduit of groundwater are not exempt from regulation.

In addition to the concept of a direct hydrological connection that can be traced from a point source to a navigable water body, the fact that the Act does not require discharges be made directly to navigable waters to constitute a violation further supports the District Court's ruling. Justice Scalia noted in *Rapanos v. U.S.* that, "the Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source'

but rather, the 'addition of any pollutants to navigable waters'". *Rapanos v. U.S.,* 547 U.S. 715, 743-744 (2006) (further noting that federal courts have held that discharges of pollutants naturally washing downstream likely violate 1311(a)). Thus federal courts have disputed the notion that the CWA applies only to "direct" discharges to navigable waters. (*Id*.).

Indirect discharges from point sources can also exist where pollutants are discharged to areas near navigable waters and eventually end up in the water. (*See Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994) (defendant's manure spreading activities which caused pollutants to reach nearby waters constituted discharge of pollutant under the Act); (See also) Furthermore, "from" merely indicates a starting point or cause of an alleged discharge. *Upstate Forever v. Kinder Morgan Energy Partners LP*, 887 F.3d 637, 643 (2018). A point source can be the starting place for a discharge, however that starting place does not have to be the means that conveys the discharge directly to navigable waters. (*Id*.)

The logical result of the direct hydrological connection between the Little Green Run Impoundment and the Vandalia River is a discharge to navigable waters, whether direct or indirect. Ignoring this connectivity would create a massive regulatory loophole and incentivize polluters who could seek to disregard permitting requirements and avoid liability for their discharges by allowing pollutants to seep into groundwater. *Kentucky Waterways Alliance v. Kentucky Utilities Co.,* 905 F.3d 925, 941-942 (4th Cir. 2018). Based on statutory interpretation by the courts on the issue of indirect discharges, the seepage of arsenic from the Little Green Run impoundment constitutes a discharge of pollutants in violation of the CWA because the discharges reach navigable waters

through hydrologically connected groundwater. The seepage of arsenic constitutes a violation of the act regardless of the fact that the discharge was indirect.

C. The CWA differentiates between point and non-point source pollution based on a concept of traceability and acknowledges the difficulty of tracing non-point source pollution.

The CWA distinguishes point source pollution from non-point source pollution, the latter being pollution referred to as runoff that arises from many dispersed activities over vast areas and is not traceable to a single distinguishable source because it is diffuse and difficult to regulate. *Hawai'i Wildlife Fund v. Cty. of Maui* 886 F.3d 737 (2018). Generally, case law holds that such runoff constitutes non-point source pollution unless it is collected, channeled, and discharged through a point source. *Id*. When such collection has occurred the source of resulting pollution can be ascertained, which rebuts any assertion that discharges are difficult to trace back to an origin. In observance of the intent and structure of the Clean Water Act, pollutants released from identifiable point sources must be regulated. *U.S. v. Earth Science Inc.,* 599 F.2d 368, 373 (10th Cir. 1979).

It is undisputed that discharges from the Little Green Run impoundment into surface water are proven to have reached navigable waters through a hydrological connection and are indirectly polluting navigable waters. There is no question as to the origin of the arsenic detected in high levels, which flows to Fish Creek and is ultimately discharged into the nearby Vandalia River. Ignoring this connectivity and finding the discharges exempt from liability disregards the purpose of the CWA and creates a regulatory loophole that will greatly diminish the ability to stop polluters from negligently allowing discharges to seep into surface water and eventually poison the Nation's water sources. Therefore, the District Court was correct in finding that the CWA

covers the discharge of pollutants that reach navigable waters through ground or surface waters via a direct hydrological connection.

II. THE DISTRICT COURT PROPERLY FOUND THAT ARSENIC THAT SEEPS FROM COAL ASH IMPOUNDMENTS AND PASSES THROUGH GROUNDWATER TO NAVIGABLE WATERS CONSTITUTES A DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF THE ACT.

The congressional intent of the CWA is to protect communities from harmful pollutants, therefore the Act prohibits the discharge of any pollutant, from any point source, into navigable waters. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). The Act establishes the National Pollutant Discharge Elimination System ("NPDES"), which grants the EPA and States the authority to establish and issue permits that coincide with the effluent standards of the Act. 50 U.S.C § 1342(a). Vandalia Power and Franklin Power have implemented permitting programs under the Act.[1] As previously discussed, the Act governs the addition of pollutants from point sources to navigable waters. 33 U.S.C. § 1362(12). The Green Run Impoundment is considered a point source under the Act because it is a specific location utilized by ComGen for the purposes of transporting pollutant discharges from Vandalia Generating System.

A. Green Run is a central, discernable location being utilized by ComGen to contain and dispose the discharge from the Vandalia Generating Station.

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[1] When a state establishes its own program, EPA suspends its federal permit program and allows states to authorize effluent discharge. Sierra Club v. Va. Elec. & Power Co., 903 F.3d 403, 407 (4th Cir. 2018).

[2] The dissent disagrees with the 2-3 majority opinion, stating that the Act covers added pollutants to navigable waters from any point source, and the ". . . majority' approach defeats the [Act]'s purpose by opening a gaping regulatory loophole: polluters can avoid [Act] liability by discharging their pollutants into groundwater." Kentucky Waterways at 943.

[3] "[O]nly unlawful if the pollutants to navigable waters come from point sources." 33 U.S.C. §1311(a).

[4] "The vast majority of takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property. *See, e.g.*, Thomas J. Miceli & Kathleen Segerson, *Compensation for Regulatory Takings: An Economic Analysis with Applications* 15 (1996) ("Most takings cases since *Pennsylvania Coal* have

Courts have consistently held that discernable, confined, and discrete is based on whether a designated area was intended to act as a facilitator of toxic discharges and that any discharge could be traced back to that specific location. *see Hawai'i Wildlife*; *see Trs. for Alaska v. Envtl. Prot. Agency*, 749 F.2d 549 (9th Cir. 1984); *see Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013). Groundwater is to not be considered a separate point source from the intended point source it is connected to. In *Kentucky Waterways*, the court erred in deciding that groundwater is not a conveyance because it is neither discernable, confined, or discrete. *Kentucky Waterways* at 934. The court incorrectly viewed the issue as whether groundwater is a point source conveyance, instead of analyzing whether groundwater connected to a point source is a conveyance.[2] *see Kentucky Waterways*. Groundwater, however, is an intermittent channel connected to Green Run that is used to transport discharge to navigable waters.

The Act cover's Green Run as a point source because it is a known, restricted entity used by ComGen for pollutant disposal. Discernable is defined as being "recognize[d] or identif[ied] as separate or distinct." *Kentucky Waterways* at 933 (quoting *Discern*, Webster's Third New International Dictionary, Unabridged. 2018. Web. (17 Jan. 2019). Discrete either "constitut[es] a separate entity" or "consist[s] of distinct . . . elements." *Id*. *Discrete*, Websters. Confined means to be "limited to a particular location." *Id*. *Confined*, Websters. Green Run, confined by 395 feet from toe to crust, is a known separate area from VGS intended for discharge disposal.

[2] The dissent disagrees with the 2-3 majority opinion, stating that the Act covers added pollutants to navigable waters from any point source, and the ". . . majority' approach defeats the [Act]'s purpose by opening a gaping regulatory loophole: polluters can avoid [Act] liability by discharging their pollutants into groundwater." Kentucky Waterways at 943.

The Green Run Impoundment, being a central, confined location, is intended to pool VGS's discharge. In *Hawai'i Wildlife*, the County utilizes four wells to dispose wastewater into the Pacific Ocean. *Id*. at 742. The EPA conducted a study on the wells and made a conclusory determination that discharge in the Pacific Ocean was coming directly from the wells. *Id*. at 743. The Court labeled the wells as discrete areas collecting and injecting pollutants into the Pacific Ocean. *Id*. The Court further noted that the County constructed the wells for the sole purpose of transporting discharges, and the wells are discernable since pollutants in the Pacific Ocean is expressly traced back to the wells. *Id*. Similarly, ComGen employed Green Run as a disposal area for collecting discharges from VGS. ComGen has been aware, since at least 2002, of Green Run's disposal connection to Fish Creek and Vandalia River, further supporting the consensus that ComGen used Green Run to transport discharge into navigable waters. VDEQ's report also verifies the link between Green Run and Vandalia River when it detected arsenic in Vandalia River that was directly traceable to the discharge in Green Run. In accordance with the Act and precedent, Green Run is a discernible, confined and discrete location Comgen uses for disposal purposes of pollutants.

B. As a point source, Green Run conveys arsenic to navigable waters via groundwater in violation of the Act.

The steady flow of groundwater from the Green Run Impoundment is considered a conveyance even though it is not a fixed tool. For a point source to act as a conveyance, it need simply channel a pollutant to navigable waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). There is no requirement of a specific instrument intended to be used as a conduit, such as a ditch or pipe, to fit the concept of a conveyance under the statutory definition of point source. *Sierra Club v.*

Abston Construction, 620 F.2d. 41, 45 (5th Cir. 1980) (referencing *Earth Sciences*). Furthermore, though the definition of point source is limited to "any discernable, confined, or discrete conveyance", it is still broad enough to include an impoundment of pollutants that have been channeled or collected. *Sierra Club* at 45 (referencing *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Point sources are not distinguished by the kind of pollution created or by the types of activities creating the pollution, but by whether pollutants reach water through a defined, discrete conveyance. *Trustees for Alaska* at 558 (citing *Earth Sciences* at 373). Thus, under the CWA the Green Run Impoundment is a conveyance.

Even though the arsenic discharge was due to a combination of a flaw in Green Run's infrastructure and excessive rainfall, courts have upheld that unintentional discharge of pollutants is governed by the Act so long as the discharge is directly linked to a point source.[3] *see Rapanos v. United States* at 743, court ruled that pollutant discharges do not need to be made directly from a point source; *see Upstate Forever* at 650, court stated "a point source is the starting point or cause of a discharge under the [Act], but that starting point need not also convey the discharge directly to navigable waters." In *Upstate Forever*, the court ruled that the Act governed discharge from a pipeline, qualified as a point source that ruptured and seeped discharge in the groundwater that led to navigable waters. *Upstate Forever* at 644. Likewise, the arsenic discharge stemmed from an imperfect structure in Green Run, which leaked into the groundwater that flowed to the Vandalia River.

[3] "[O]nly unlawful if the pollutants to navigable waters come from point sources." 33 U.S.C. §1311(a).

The unintentional stream of groundwater from the Green Run Impoudment is also not a requirement to be a conveyance. Conveyances of pollution formed either as a result of natural erosion or by material means may fit the statutory definition of a conveyance. *Abston Construction* at 45. In *Abston Construction*, the court analyzed whether pollutants were discharged from a "discernable, confined, and discrete conveyance(s)," either by gravitational or non-gravitational means. *Id*. Miners in *Abston Construction* used landfill and ponds to store coal ash, yet arsenic was detected in navigable waters due to precipitation leaching pollutants from the groundwater. *Id*. The court concluded the stream of groundwater acts as a conveyance because "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. The fact that arsenic leakage only occurs when there is significant rainfall and is due to a structural error in Green Run's embankment is moot. ComGen utilizes Green Run to transfer discharges from the VGS to an outside source. Also, whether ComGen intended any pollutants to end up in navigable waters is irrelevant, for ComGen knew any discharge put in Green Run would flow into Fish Creek and the Vandalia River.

The discharge of a pollutant does not need to be intentional, for the act applies to accidental spillage from a point source. *Earth Sciences* at 374 ("The Act would be severely weakened if only intentional acts were proscribed"). In *Earth Sciences*, an unusual amount of snow melting caused pumps to overflow, resulting in the discharge of a pollutant into a creek. *Id*. The court ruled that although the course of excessive liquid is rainfall, this is not the kind of general runoff considered to be from nonpoint sources

under the Act. *Id*. Ultimately, the court decided that even unintentional discharge of pollutants from a system designed to catch runoff during period of excess melting fits the statutory definition of a point source. *Id*. Green Run's unintentional leakage of arsenic therefore does not forfeit the area from being considered a point source. In conclusion, as discussed in Section I of this brief, groundwater is hydrologically connected to Green Run and the navigable waters and thus ComGen's disposal of arsenic is in violation of the Act.

III. FERC'S DECISION TO APPROVE COMGEN'S REVISED RATE SCHEDULES WAS ARBITRARY AND CAPRICIOUS, HOWEVER, IF THE COURT UPHOLDS THE LOWER COURT'S RULING THEN THE REVISED RATE SCHEDULES MUST BE ADJUSTED SO RATEPAYERS ARE NOT BEARING THE FULL COSTS OF REMEDIATION.

FERC has jurisdiction of a public utility "over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce." Cal. PUC v. FERC, 879 F.3d 966, 970 (9th Cir. 2018) (citing 16 U.S.C.S. §824(a)-(b)). In accordance with Title II of the FPA, ComGen is a public utility because they are operating a facility for "the transmission of electric energy in interstate commerce," and "to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(b). FERC thus has jurisdiction over ComGen's unit power service agreements with Vandalia and Franklin because the agreements are for the sale of electric energy at wholesale in interstate commerce. FERC's primary focus is to protect ratepayers from unduly discriminatory wholesale electric sales and ensure such sales are just and reasonable. 16 U.S.C. §824(b). In this instance, FERC did not shield ratepayers from the unduly burdensome posed by ComGen's revised rate schedule. FERC's

reasoning for approving the schedule did not justify how unjust and unreasonable it is towards consumers. The schedule ultimately has consumers paying for remedial costs of a benefit they did not enjoy.

A. FERC acted arbitrary and capricious in approving ComGen's revised rate schedules by providing no just and reasonable justification that offsets ComGen's negligence in maintaining the Green Run Impoundment.

FERC found that ComGen failed to properly monitor the effectiveness of the corrective plan, yet FERC approved ComGen's revised rate schedule for purposes of maintaining the integrity of the company. Court's review FERC's ratemaking decisions to determine whether it acted "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 825l (b), *see also Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." Cal. PUC at 973 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016)). Court's must analyze "the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Elec Power Supply at 782 (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A court's review is based upon the "grounds upon which . . . the record discloses that [the agency's] action was based." Cal PUC at 973 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

FERC's approval was arbitrary and capricious because their justification does not coincide with its findings nor its primary responsibility of ensuring wholesale electric sales are just and reasonable to consumers. In analyzing rate schedule, Courts apply the

Mobile-Sierra doctrine, which is that FERC must presume that a rate set by "a freely negotiated wholesale-energy contract" meets the statutory "just and reasonable" requirement. *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008). "The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." *Id*. at 530. The court's decision in *Morgan Stanley* made clear that the *Mobile–Sierra* public interest standard is not an exception to the statutory just-and-reasonable standard; it is an application of that standard in the context of rates set by contract. *Id*.

ComGen did not conduct prudent utility practice by failing to oversee the corrective plan from 2006 through 2017. A public utility may recover costs from consumers if it acted prudently in incurring those costs, and where it acted imprudently in incurring the costs, they may not be recovered. *Violet v. F.E.R.C.*, 800 F.2d 280, 282 (1st Cir. 1986). The prudence of the investment must be judged by what a utility's management knew, or could have known, at the time the costs were incurred. *Id*. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management, or that of another jurisdictional entity, would have made, in good faith, under the same circumstances, and at the relevant point in time. *Id.* at 283.

FERC agrees that had ComGen properly monitored the corrective plan then the liner malfunction would have likely been discovered. Had ComGen applied standard of care in monitoring the water quality then the remedial costs to fix their error would not be as much as it is now. In *New England Power*, New England Power Company ("NEP") sought to recover expenses from its customers after its investment in Boston Edison

Company's project failed. *31 F.E.R.C. P61*, 047, 61080, 1985 FERC LEXIS 3217, *2 (F.E.R.C. April 11, 1985). The court ruled NEP's conduct in incurring its costs was prudent, for NEP monitored the success of the project and acted in good faith by attempting to provide better services for its customers, even though the venture was unsuccessful. *Id*. ComGen argues that they should not be strictly liable because they exercised due care in hiring a subcontractor to implement the corrective plan. Even if ComGen had applied due care in the hiring process, ComGen did not carry on its duties by monitoring the work after it had been completed. The purpose of the corrective plan was to ensure arsenic was not seeping into the navigable waters. Similar to *New England Power*, a reasonable utility company would have observed the progress of the plan by testing navigable waters frequently. ComGen was lax in monitoring Green Run, and their negligence caused the toxic pollution to infest the water more than it should if ComGen had properly conducted its business operations. FERC has provided no reasonable justification for allowing ComGen to recover, from its ratepayers, remediation expenses stemming from ComGen's own negligence in failing to monitor VGS's operations

B. If this court upholds FERC's approval of ComGen's revised rate schedules, this court must revise the schedules so that Vandalia Power and Franklin Power do not bear the full remediation costs in violation of the matching principle.

Vandalia, Franklin and its ratepayers should not be responsible for remedial costs associated with a service it neither produced nor received, and forcing the parties to bear such a burden seriously harms the public and the utility's ability to continue its service. A contract rate is not just and reasonable if it seriously harms the consuming public. Morgan Stanley at 545-546. Court's have considered a rate to be seriously harmful if the

rate "'might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.'" Id. at 533 (quoting *Federal Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348*, at 354-355 (1956)). The revised rate scheduled poses a major burden on both Vandalia Company and Franklin, as well as its consumers, because in retrospect ComGen would be forcing all three parties to pay for remedial costs that do not reflect a time properly allocable to when the parties were producing or enjoying the service.

Vandalia and Franklin should only pay for utility costs properly allocable to its operations with ComGen. Coal ash in Green Run has accumulated over a period of 18 years, yet Vandalia Generating Station and Franklin Generating Station did not begin producing coal ash under the unit power service agreement with ComGen until 2014. Out of the $246 million associated with the remedial costs, only about 19.5%, or $48 million, is fairly allocable to Vandalia and Franklin. The remaining $198 million should thus be covered by ComGen's shareholders, who happened to enjoy the service provided before the unit power service agreement became effective. Forcing Vandalia and Franklin to shell out a massive amount of money to pay for remediation of an issue that was before both began operations with ComGen would be highly detrimental to both corporations. There is a hefty difference between the $48 million Vandalia and Franklin should owe and the $246 million ComGen is selfishly demanding. If either corporation were to pay for expenses not allocable to its services then it could negatively impact its financial ability to continue its service.

Customers should not bear the burden of fixing an error associated with a service that they did not even receive. Utility ratemaking is based on the matching principle,

which is that ratepayers are charged with the costs of producing the service they receive. *Town of Norwood, Mass v. F.E.R.C.*, 311 U.S. App. D.C. 306, 380-381 (1995). In *Electric Consumers*, the court ruled that a rate design charging high-load customers for services low-load customers receive is discriminatory and preferential. *Elec. Consumers Res. Council v. Fed. Energy Regulatory Com.*, 747 F.2d 1511, 1515 (1984). The court's ruling is that there is no legally sufficient reason for charging customers a rate that does not accurately reflect the costs of serving them. *Id*. Similarly, not all of the waste generated and held in Green Run is attributable to those customers who would have to pay, yet ComGen shareholders benefited from profit earned during the time waste costs accumulated. Charging consumers to pay for a service they did not receive is discriminatory towards the ratepayers, yet preferential towards ensuring ComGen's shareholders are satisfied. Also, FERC's claim that allowing recovery of remediation promotes environmental protection is illogical because if companies know they can recover remediation costs from ratepayers then they will not take adequate steps to use best environmental procedures to prevent against toxic spills. FERC's claim would only make sense if costs were attributed to prevention and acquiring better equipment to operate the discharge stations efficiently.

IV. DISALLOWING RECOVERY OF ALL OR A PORTION OF THE COSTS OF COMGEN'S REMEDIATION EXPENSES DOES NOT CONSTITUTE A TAKING CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS.

The U.S. Constitution prohibits the taking of private property for public use without just compensation. U.S. Cons. V. cl. 4. This takings clause is made applicable to the states through the Fourteenth Amendment. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 536 (2005). The Federal Power Act mandates that rates set by FERC must be just

and reasonable. 16 USC Section 824(b). Ratemaking is an application of the government's police power that may reduce the value of the property being regulated, but this fact alone does not make the regulation a taking contrary to law. *Federal Power Commission v. Hope Natural Gas Co.* 320 U.S. 591, 602 (1944). Ultimately, the overall impact of the rate order is the most important consideration in whether rates are unjust or unreasonable. *Id* at 602. Rates must be sufficient to "yield a reasonable return on the value of the property used at the time it is being used to render the service" or they may be deemed unjust, unreasonable, and confiscatory. *Bluefield Waterworks v. Public Service Commission*, 262 U.S. 679, 690 (1923).

The main goal of the court in evaluating a regulatory takings claim is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Rose Acre Farms, Inc. v. U.S.,* 559 F3d. 1260, 1266 (D.C. Cir. 2009) (citing *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539, 2005). Furthermore, the Supreme Court has assessed the economic impact of a regulatory taking, most predominantly in terms of lost value rather than lost profits. *Rose Acre Farms, Inc. v. U.S.,* 559 F.3d 1260, 1268-1269 (2009)[4]. In applying the legal tests set out in court precedent, ComGen fails to demonstrate a viable takings claim under the Fifth and Fourteenth Amendments.

[4] "The vast majority of takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property. *See, e.g.,* Thomas J. Miceli & Kathleen Segerson, *Compensation for Regulatory Takings: An Economic Analysis with Applications* 15 (1996) ("Most takings cases since *Pennsylvania Coal* have generally applied some form of Holmes's diminution of value standard."). When the Supreme Court has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits. *See, e.g., Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)(approximately 100% diminution in value); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct.

A. ComGen's failure to prudently manage the Little Green Run impoundment resulted in a decrease in property value that negates a claim that it is constitutionally entitled to earn a reasonable rate of return.

ComGen claims that the resulting level of profits remaining after payment of remediation costs would be insufficient to balance the interests of ratepayers and shareholders, maintain its financial integrity, and would hinder its ability to raise capital from investors on reasonable terms. To substantiate this claim ComGen relies upon the constitutional standards for just and reasonable rates provided by the Supreme Court in *Bluefield Waterworks & Imp. Co. v. Public Services Commission of West Virginia*, which states that rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory. 262 U.S. 679, at 690 (1923). Whether a rate "yields such a return as to not be confiscatory depends upon circumstances, locality, and risk". *Id*. at 693.

Key to the Supreme Court's analysis of ratemaking is the concept of fair valuation. In *Bluefield Waterworks & Imp. Co.* the court found that the Commission failed to give proper valuation to the property by disregarding appropriate factors including higher costs of construction and improvement and the purported valuation as determined by the company's valuation engineer and as a result the court found that the rates set by the Commission did not afford a fair return on investment to the company. *Id*. Furthermore, there must be a fair return upon the value of that which companies employ for the public, value must be determined as of the time when the inquiry is made regarding the rates, and valuation must be based on a reasonable judgment affording proper consideration of all relevant facts. *Id*.

114, 71 L.Ed. 303 (1926)(75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394, 405, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (87.5% diminution in value)."

ComGen has requested to revise its approved rate schedules to recoup costs of compliance with the District Court's order to remediate the contamination on its property, which is the direct result of its failure to properly monitor the effectiveness of the state mandated corrective action. Had ComGen prudently monitored the impoundment after the discovering the leak of toxic pollutants the issue would have been discovered years ago preventing the need for remediation. The property being used to provide service for the public is decreased in value due to the contamination that must be resolved through what will be a costly clean up process. Fair value must be determined as of the time the property is being used to render service according to the *Bluefield* standards, which for ComGen means that the contamination costs reducing the profitability of its operations must be considered in valuation. Further, the remediation costs incurred by ComGen that decrease the overall value of the property are of a different nature than the expenses addressed in Court precedent because they do not relate to maintenance and operation of the facility, but relate to clean up due to mismanagement. These are not the sort of costs that must be considered in ratemaking.

ComGen's profit margin will be decreased because it allowed the impoundment to deteriorate to a contaminated site requiring remediation under the law to continue generating profits. This decrease in profits is a direct result of ComGen's improper maintenance and oversight of its property. ComGen failed to manage the impoundment efficiently and catch the leak of pollutants early on, thus as a result of its negligence and failure to prevent further deterioration ComGen cannot now be allowed to claim entitlement to a rate enabling substantial profits. Under these circumstances ComGen has

failed to demonstrate that the rate of return after paying remediation costs will not be sufficient based on the value of its property.

B. A mere reduction in the value of ComGen's property does not render the payment of remediation expenses by the shareholders invalid because the overall impact of a rate disallowing recovery complies with the "end results" test.

It is undisputed that the remediation costs resulting from ComGen's negligence will decrease their profits in the coming years, however this does not mean the company should not be held accountable for the entirety of the expense. In *Federal Power Commission v. Hope Natural Gas* the Supreme Court articulated that though the fixing of prices may lead to reduction in the value of the property being regulated, the fact that the value is reduced does not render the regulation invalid. 320 U.S. 591 (1944). The Court went on to state that ratemaking involves a process of 'pragmatic adjustments' to account for circumstances surrounding the rate, and regulation does not ensure that businesses shall produce net revenues. *Id* at 602-603. Ultimately, the impact of the rate order is the most important consideration and must not be unjust and unreasonable. *Id*. FERC's approval of rate schedules must be consistent with the statutory goal of effectively controlling public utilities by curbing abusive practices, and regulating the business of transmitting and selling electric power in interstate commerce. *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 758 (1973).

The circumstances requiring ComGen to seek an increase in rates led to the financial strain of remediation costs, which resulted solely from the imprudence and negligence of ComGen failing to maintain and inspect its property. Considering that the Little Green Run Impoundment is listed as one of the EPA's most hazardous coal ash dam sites ComGen should have taken utmost care by conducting regular inspections of

the impoundment to ensure the contaminants on the property were contained. This is particularly true considering the fact ComGen has known since 2006 that a repair to the impoundment had been made and required monitoring. ComGen has not demonstrated that it cannot pay remediation costs and maintain operations, even if profits will not meet the margins initially anticipated.

Valuation of the property used for serving the public must be based on reasonable judgment after considering the totality of facts surrounding the ratemaking. In this instance, ComGen has been remiss in monitoring the corrective action to prevent pollutants from seeping from the impoundment, and has exercised questionable business practices to create a structure that would allow it to shield the shareholders from losses relating to its business operations. Considering that the public policy reasons of corporate accountability to the environment and fairness to ComGen's ratepayers favor disallowing recovery, the resulting return on investment after shareholders payment of the remediation costs is reasonable. Placing the burden of remediation costs on the shareholders is proper because ComGen's carelessness is the ultimate cause of any loss of profits and the resulting burden of remediation costs should not be borne by customers.

If FERC allows ComGen to recoup the entirety of the remediation expenses from its ratepayers, the Commission will have failed to properly balance the interests of the ratepayers and shareholders because ultimately the shareholders will reap a windfall by profiting from the use of the property when the coal ash waste was generated, and avoiding liability for the costs of that use. Overall, the end result of approving the proposed changes to the rate schedules is not just and reasonable to the ratepayers and

rewards utility mismanagement. This result is not in line with FERC's purpose and duties under the Federal Power Act.

C. Requiring ComGen's shareholders to bear full or partial expense of the remediation costs does not constitute a Fifth Amendment taking under the Penn Central factors set out by the Supreme Court.

Generally, takings jurisprudence provides no specific formula, however the Supreme Court has established factors to be applied on a case-by-case basis. *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978). Ultimately, where a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking under the factors enumerated in *Penn Central. M & J Coal,* 47 F.3d at 1154. Regulatory actions are generally considered per se takings where the government requires an owner to suffer permanent and physical invasion of property, or regulations completely deprive an owner of all economically beneficial use of their property. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 528 (2005).

The *Penn Central* factors specify factors to determine when a taking contrary to law has occurred and they include: (1) the economic impact of the regulation upon the claimant, (2) the extent to which the regulation interferes with investment backed expectations (3) the character of the government action and whether there is an adjustment of burdens and benefits of economic life. *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* factors must be applied to determine whether a regulatory taking similar to a traditional physical taking has occurred. In considering economic impact courts must consider whether the impact is best measured by decline in value or a decrease in profits caused by government restrictions, and

consideration of only a profits-based approach affords limited guidance and hinders fact-finding that allows for a complete and fair assessment of economic factors. *Rose Acre Farms, Inc. v. U.S.,* 559 F.3d 1260, 1269 (2009). Additionally, a focus on only the diminution in rate of return is difficult to assess because diminution in return is relative and depends on the magnitude of the starting margin. *Id*. at 1269.

1. The economic impact to ComGen is justified considering the expenses result from utility mismanagement.

Though the injunctive relief granted by the District Court has an economic impact to ComGen, it is not substantial considering the company has reaped significant profits through operating despite its environmental offenses. Furthermore, the impact would be felt by the shareholders of Commonwealth Energy as the holding company of ComGen, which would be proper in light of Commonwealth Energy's efforts to avoid financial repercussions through its creative corporate restructuring. Since the shareholders reaped the benefits of the Vandalia Station's operations during the period from 2000 to 2014 when the waste was produced, it is appropriate that the shareholders bear the burden through paying the remediation costs.

2. Payment of the remediation expenses does not interfere with any valid investment backed expectations of ComGen's.

In applying the second factor, disallowing recovery does not significantly interfere with any investment backed expectations because in this instance ComGen has failed to ensure proper facility maintenance and operation, and thus could not expect that their business operations would not lead to any remediation related costs. The reality of managing coal ash impoundments is that they pose a substantial risk of leaking or otherwise releasing hazardous pollutants that will require clean up. This is particularly true considering that the Little Green Run impoundment is know to be a major

environmental hazard. Now that the inevitable is a reality, ComGen cannot claim interference with the expectations of their investment, as environmental spills are a risk taken with operating coal fired electric plants.

3. The character of government action, in this case FERC disallowing recovery of the remediation expenses, is a valid exercise of police power and properly adjusts burdens and benefits.

Considering the character of the government action and proper balancing of benefits to ComGen and burdens to the ratepayers, the interests of the public and the environment must weigh more heavily than the interest of Commonwealth Energy's shareholders. Even if held liable for the remediation costs ComGen receives the benefit of continuing operations and generating profits, even if the profits are not at the rate of return preferred. Disallowing recovery from the ratepayers does not interfere with ComGen's interest in providing a public benefit for a profit and its property interest is preserved because its operations will continue. The ratepayers in turn will not be held liable for expenses remediating past operational mismanagement that they did not receive any benefit from, and the environment benefits because industry will be held accountable for environmental clean up that furthers the objectives of the law. This outcome strikes a proper balance and allows government regulation by FERC to ensure just and reasonable rates, as required by the Federal Power Act.

CONCLUSION

For the reasons stated above, this court should uphold the District Court's finding that ComGen is liable under the CWA for the arsenic leaching from rainwater and groundwater held in the Green Run Impoundment and subsequently conveyed to the Vandalia River in violation of 33 U.S.C. 1342. This court should further uphold the

District Court's finding that the Green Run Impoundment does indeed constitute a point source that conveys pollutants to navigable waters. The District Court's interpretation of these issues is in line with both the statutory text, consistent with congressional intent, and in accord with precedent established by case law. Finally, this court should vacate FERC's approval of rate schedules including remediation costs because disallowing the costs will not be a taking under the Fifth and Fourteenth Amendments due to the circumstances of ComGen's imprudence. ComGen is not entitled to a reasonable rate of return due to utility mismanagement and any decision to allow recovery of the remediation costs fails to properly balance the interests of investors and ratepayers.