UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
**C.A. No. 18-02345**

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| **Commonwealth Generating Company**, *Appellant*, | * | D.C. No. 17-01985 |
| -v.- | * | |
| **Stop Coal Combustion Residual Ash Ponds,** *Appellee,* | * | |
| **Stop Coal Combustion Residual Ash Ponds,** *Petitioner*, | * | Docket ER-18-263-000 |
| -v.- | * | |
| **Federal Energy Regulatory Commission,** *Respondent,* | * | |
| **Commonwealth Generating Company** *Intervenor*. | * | |

**COMMONWEALTH GENERATING COMPANY APPELLATE BRIEF**

# *Team No. 3*

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## STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia had original jurisdiction over the subject matter of this case pursuant to 28 U.S.C. § 1331 and the Clean Water Act (CWA), 33 U.S.C. §§1251 *et seq*. The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to hear an appeal from the final judgment of the district court pursuant to 28 U.S.C. § 1291. ComGen filed a timely motion for appeal on July 16, 2018, before the parties jointly filed a motion in this Court to have the actions consolidated for decision.

## STATEMENT OF THE ISSUES ON APPEAL

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.

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

3. Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.

4. Whether disallowing the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment is an unconstitutional taking under the Fifth and Fourteenth Amendments.

## STATEMENT OF THE CASE

This case presents for review an order of the United States District Court for the District of Columbia granting the request of appellee Stop Coal Combustion Residual Ash Ponds (SCCRAP) for injunctive relief against appellant Commonwealth Generating Company (ComGen) and presents for review Federal Energy Regulatory Commission's (FERC) order

denying rehearing for Docket ER-18-263-000 denying SCCRAP's request for rehearing of Order Accepting Commonwealth Generating Company's Revised Rate Schedules.

## STATEMENT OF FACTS

In March 2017, Vandalia Waterkeeper (Waterkeeper), an environmental NGO, discovered high levels of arsenic in the Vandalia River. R. at 5. Waterkeeper concluded that Little Green Run Impoundment (Impoundment), which houses coal combustion residuals (CCRs) produced at the Vandalia Generating Station (Station), was the source of the arsenic and that rainwater and groundwater, mixed with coal ash in the impoundment, were carrying the arsenic into Fish Creek and Vandalia River, both of which qualify as navigable waters under the Clean Water Act. *Id.* at 6. After making this discovery, Waterkeeper filed a complaint with the Vandalia Department of Environmental Quality (VDEQ), which proceeded to investigate the owner of the Impoundment, Commonwealth Generating Company (ComGen). *Id.*

The investigation revealed a seam in the high-density polyethylene (HDPE) geomembrane liner that had resulted because of inadequate welding when it was created in 2006. *Id.* at 5. Because of the liner's failure, seepage pooled at a low point of the west embankment of the impoundment during times of significant rainfall, usually drying within a few weeks. *Id.* Commonwealth Energy Solutions (CES), a wholly owned, unregulated subsidiary of Commonwealth Energy (CE), and former owner of the Station, installed the HDPE liner on the west embankment of the Little Green Run Impoundment, after, in 2002, CES began detecting arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. R. at 3, 5.

The Impoundment's west embankment is constructed of bottom ash and a 15-foot-wide compacted clay lining on the upstream slope, while the remaining embankments on the north, east, and south sides are homogeneous embankments built from compacted clay. *Id.* at 5. The

height of the Impoundment's dam structure is 395 feet from top to bottom, covering approximately 71 surface acres and containing approximately 38.7 million cubic yards of CCRs, coal fines, and waste material. *Id.* at 4-5.

ComGen is subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (FERC) because ComGen sells electric energy at wholesale in interstate commerce. *Id.* at 7. It is a public utility under the Federal Power Act (FPA) and must file tariffs with FERC for approval under § 205 of the FPA. *Id.* ComGen's has unit power agreements with both Vandalia Power Company and Franklin Power Company. *Id.*

SSCRAP filed a complaint against ComGen in the U.S. District Court for the District of Columbia, alleging a violation of the CWA. *Id.* The court found ComGen liable for violations of the CWA, concluding that the CWA covers pollutants that reach navigable waters through groundwater that has a "direct hydrological connection." *Id*. at 7-8. The court also held that the Impoundment constituted a point source. *Id.* at 7. The court ordered ComGen to remove all 38.7 million cubic yards of coal ash from the Impoundment and relocate it to a facility in compliance with the EPA's Coal Combustions Residual Rule. *Id.* at 8. The court recognized the immense burden of this process and did not assess civil penalties against ComGen. *Id.*

To bear the costs of removing the 38.7 million cubic yards of coal ash, ComGen sought to recover from Vandalia Power and Franklin Power the costs of complying with the order and submitted a filing to FERC pursuant to § 205 of the FPA. *Id.* ComGen proposed in its filing that revisions be made to its FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement). *Id.* These revisions would allow ComGen to recover the estimated $246 million that it would cost to comply with the district court's order over a ten-year period. *Id.* The costs, which would be split 50-50 between Vandalia and Franklin, would be

recovered from each utility's retail customers at an increased average cost of $3.30 per month over the ten-year period. *Id.* at 9.

SCCRAP intervened in ComGen's FERC proceeding. *Id.* FERC temporarily suspended ComGen's rate filing and allowed for an evidentiary hearing to take testimony on the issues presented by SCCRAP. *Id.* at 10. But despite this postponement, FERC accepted ComGen's taking claims under the Fifth and Fourteenth Amendments and decided to approve the rate revisions proposed by ComGen because disallowing the 246-million-dollar remediation cost would lower the previously approved 10% return on equity to 3.2%, jeopardizing the financial health of ComGen *Id.* at 11. However, FERC required that ComGen subject itself to a compliance filing making clear that the district court's injunctive relief was upheld and that ComGen would have to comply with the court's required remedial actions. *Id.* SCCRAP sought rehearing of FERC's decision but upon denial of rehearing, appealed to the D.C. Circuit Court of Appeals. *Id.* at 12. ComGen also appealed the decision of the district court. *Id.* SCCRAP, ComGen, and FERC jointly filed a motion for consolidation decision. *Id.* The Circuit Court granted the motion on December 21, 2018. *Id.*

## SUMMARY OF THE ARGUMENT

ComGen asks that this Court reverse the District Court's order that ComGen remove approximately 38.7 million cubic yards of coal ash from its Little Green Run Impoundment. ComGen has not added pollutants from a point source to navigable water in violation of the Clean Water Act. 33 U.S.C. § 1311(a). Instead, seepage from its impoundment entered unchanneled groundwater and made its way to navigable water. The District Court, despite the plain language and legislative history of the CWA erroneously accepted the hydrologic connection theory and held that ComGen discharged pollutants into navigable water without a NPDES permit.

ComGen did not add pollutants to navigable water from a point source because the groundwater that carried arsenic from ComGen's coal ash impoundment to the navigable water was not a point source. Additionally, groundwater is not regulated as a navigable water under the NPDES permitting program, as both the plain language and history of the statute indicate. Because this groundwater is not a point source, the pollution did not enter navigable water *from* a point source, but rather from a nonpoint source regulated by the state and not the federal government. The legislative history indicates a congressional intent to preclude groundwater from being treated as a navigable water and regulated under the NPDES permitting program. The hydrologic connection theory eliminates the important point-nonpoint source distinction and ignores Congress's intent.

Even if this Court upholds the hydrologic connection theory, there is still no point source from which pollutants were added to navigable water, since coal ash impoundments are not point sources. *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018). The impoundment in question was not designed, nor does it function, as a "discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). Its sole function is not to convey coal ash material, but rather to store it. Because this impoundment is not a point source, pollutants have not been added to navigable waters from a point source in violation of the NPDES permitting program of the CWA.

ComGen also asks this court to uphold the Federal Energy Regulatory Commission's (FERC) order denying rehearing on FERC's Order Accepting Commonwealth Generating Company's Revised Rate Schedules due to the fact that imposing a 246-million-dollar financial burden on ComGen for the cleaning the Little Green Run Impoundment is a taking under the Fifth and Fourteenth amendments. R. at 9. This burden would lower the 10% rate, which had been deemed "just and reasonable" by FERC, to 3.2% over the next 10 years. *Id.* at 10. This

would constitute a taking because it would, "fail to properly balance the interests of ratepayers and ComGen's shareholders, maintain its financial integrity, and assure confidence in the its financial soundness, thereby undercutting its ability to raise capital on reasonable terms." *Id.* at 11.

Additionally, in order to overturn FERC's decision, that decision must be deemed arbitrary and capricious. Under this standard, the, "FERC's decisions will be upheld as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made." *See ExxonMobil Oil Corp. v. F.E.R.C.,* 487 F.3d 945, 951 (D.C. Cir. 2007). FERC's given reason for its decision is that (1) imposing the full burden on ComGen would threaten its financial integrity and (2) FERC believes that allowing utilities to recover in rates base for the costs of environmental cleanup can be used as a, "means of promoting environmental protection." R. at 12.

## ARGUMENT

### I. THE DISTRICT COURT INCORRECTLY HELD THAT COMGEN DISCHARGED POLLUTANTS INTO NAVIGABLE WATERS BECAUSE GROUNDWATER IS NOT A "POINT SOURCE," NOR IS IT REGULATED UNDER THE NPDES PERMITTING PROGRAM OF THE CWA, AS THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE ACT MAKE CLEAR.

The district court incorrectly held that ComGen discharged pollutants into navigable waters because groundwater is not a point source, nor is it regulated under the NPDES permitting program.

The Clean Water Act prohibits the "discharge of any pollutant by any person" into navigable waters without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a). Under this permitting program, the EPA may "issue a permit for the discharge of any pollutant" so long as the authorized discharge meets the effluent standards specified in the permit or the CWA generally. 33 U.S.C. § 1342(a). Discharge of a pollutant, as

defined by the CWA, occurs when any pollutant is added to navigable waters from any point source. 33 U.S.C. § 1362(12).

The CWA requires a NPDES permit when each of the following elements are present: '1) a *pollutant* must be 2) added 3) to navigable waters 4) from 5) a point source.'" *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). The District Court erred in holding that these elements had been met because groundwater does not fall under the NPDES permitting program, nor does it constitute a point source from which pollutants are added to navigable waters. Because the ultimate question, whether the CWA regulates pollution via hydrologically connected groundwater, is one of law, the Court reviews *de novo*. *See Nebraska HHS v. United States HHS*, 340 F. Supp. 2d 1, 21 (D.C. Cir. 2004).

The CWA defines point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). For groundwater to be discernible, it "must be capable of being 'recognize[d] or identif[ied] as separate or distinct.'" *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018) (quoting *Discern*, Webster's Third New International Dictionary, Unabridged. 2018. Web. 22 Aug. 2018.). To be discrete means to "constitut[e] a separate entity" or "consist[] of distinct . . . elements." *Id.* (quoting *Discrete*, Webster's Third New International Dictionary, Unabridged. 2018. Web. 22 Aug. 2018). Finally, it must be confined, meaning "limited to a particular location." *Id.* (quoting *Confined*, Webster's Third New International Dictionary, Unabridged. 2018. Web. 22 Aug. 2018). Groundwater, because of its diffuse character, does not meet any of these conditions and thus cannot constitute a point source. *See Ky. Waterways All.*, 905 F.3d at 933; *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 U.S. Dist. LEXIS 106989 at *8 (D. Conn. July 11, 2017).

Not only is groundwater not discrete, confined, and discernible, but Congress, in writing the CWA intentionally distinguished "point sources" from "nonpoint sources of pollution" and included groundwater in the latter category. *See Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"). A nonpoint source of pollution is "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Several examples of nonpoint sources of pollution include runoff from fields, crops, construction sites, and mines. *See* 33 U.S.C. § 1314(f).

The regulation of nonpoint source pollution is left to the states exclusively, and the NPDES permitting scheme of the CWA has no authority over such pollutants. *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009) (stating that the statute indicates a distinction between point and nonpoint sources and that the CWA leaves "the regulation of nonpoint source pollution to the states"); *Gorsuch*, 693 F.2d at 165-166; *Appalachian Power Co.*, 545 F.2d at 1373 ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [CWA] to regulate only the former."). Congress's intent to regulate point sources is manifested in the fact that "while Congress could have defined a 'discharge' to include generalized runoff…it chose to limit the permit program's application to the… [point source] category." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 656 (4th Cir. 2018) (Floyd, J., dissenting) (quoting *Or. Nat. Desert Ass'n v. United States Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008)). Pursuant to § 304 of the CWA, the EPA is prevented from regulating these nonpoint sources, instead being clearly

limited to analyzing, studying, and making suggestions regarding them. *See Appalachian Power Co*., 545 F.2d at 1373 n.68.

Groundwater, because of its diffuse character and dispersal over widespread areas, is a nonpoint source of pollution, rather than a point source. *See Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005) ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to the NPDES permitting."); *Northwest Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source…"); *Cordiano,* 575 F.3d at 220-21 ("In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."); *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 444 (6th Cir. 2018) ("The CWA has no say over [groundwater]."); *cf.* Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. Envtl. L. & Litig. 179, 191 (2000) ("Although storm water runoff is generally a nonpoint source of water pollution, Congress recognized in 1987 that much storm water is actually collected and channeled before reaching waterways, such as in city drain systems.").

Thus, when pollutants enter navigable water via groundwater, "they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance." *Tenn*. *Clean Water*, 905 F.3d at 444. For there to be the discharge of a pollutant, the pollutant must reach navigable water "by virtue of a point source conveyance." *Ky. Waterways All.*, 905 F.3d at 934 (holding that discharging pollutants into groundwater is not a violation of the CWA). But when pollutants enter navigable water via nonpoint sources, the

CWA has no authority over these activities, which are left solely to the discretion of the states to regulate. *See id.*; *Appalachian Power Co.*, 545 F.2d at 1373 n.68.

The question next becomes whether groundwater is subjected to the NPDES permitting scheme as a navigable water. The NPDES scheme's application is limited to discharges "to navigable waters," which are defined by the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7), § 1362(12). However, Congress did not intend to treat groundwater as navigable waters, referring to both groundwater and navigable water separately and individually throughout the CWA. *See* 33 U.S.C. §§ 1252(a) ("The Administrator shall…prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters…"); 1256(e)(1) (establishing procedures to compile and analyze data on "the quality of navigable waters and to the extent practicable, ground waters…"). In fact, groundwater is mentioned nowhere in the sections governing NPDES permitting.

A number of Circuits have recognized this distinction and held that groundwater is not navigable water under the CWA. *See Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters."); *Town of Norfolk v. United States Army Corps of Eng'rs*, 968 F.2d 1438, 1450-51 (1st Cir. 1992) (agreeing with the Corps' defining "waters of the United States" to exclude groundwater and refer only to surface waters); *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977).

In coming to this conclusion, each of these Courts has recognized that the legislative history of the CWA shows the clear intent of the legislature to prevent groundwater from being regulated under the CWA. *See Vill. of Oconomowoc Lake*, 24 F.3d 962, ("The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed

adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated…"); *Exxon Corp.*, 554 F.2d at 1322 (quoting *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 227 (1976)) ("In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because 'it is contrary to congressional intentions.'"); *Rice*, 250 F.3d at 271-72 (reaffirming the view that the CWA does not cover groundwater).

This legislative history clearly indicates Congress's intent to exclude the regulation of groundwater from the NPDES permitting program. This is demonstrated by the fact that several bills brought before the Senate Committee would have authorized the establishment of "Federally approved standards for groundwaters." S. Rep. No. 92-414, at 73 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3739. The Committee noted the link between groundwater and navigable water in its rejection of these bills, but chose not to establish federal standards for groundwater because "the jurisdiction regarding groundwaters is so complex and varied from State to State." *Id*.

In the course of the House's deliberation, it was proposed specifically that groundwater be included in CWA's protections, but despite this, "all evidence suggests that "the House, like the Senate, thought the bill would leave control of groundwater pollution exclusively to the states." *See Exxon Corp.*, 554 F.2d at 1329; 118 Cong.Rec. 10666 (1972), 1. *Leg.Hist.* 589 (remarks of Rep. Aspin). Now, because non-navigable water is not regulated under the CWA, the states are left with regulatory authority over pollution that enters groundwater. *See Tenn. Clean Water Network*, 905 F.3d at 439; *Rice*, 250 F.3d at 271-72.

In the case at hand, surface water seeped from a coal ash impoundment into groundwater that then made its way to navigable water. R. at 7-8. However, this pollution did not require an

NPDES permit because the pollutants were not "added to navigable waters from a point source." *Gorsuch*, 693 F.2d at 165. Because groundwater is not a point source, *see Tenn. Clean Water Network*, 905 F.3d at 444, the pollutants, instead, entered navigable water from a *nonpoint source*, which falls under the regulation of the state and not the CWA. *See Cordiano,* 575 F.3d at 221. Since groundwater also does not constitute a navigable water, *see Town of Norfolk*, 968 F.2d at 1450-51, at no point were the pollutants added *from* a point source into navigable waters.

The Fourth and Ninth Circuits, however, have come to different conclusions, upholding the hydrological connection theory, as did the District Court. R. at 8; *see also Upstate Forever*, 887 F.3d at 637; *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). These Courts relied on notions of the CWA's "purpose" in holding that a "direct hydrological connection" to navigable waters was sufficient to justify requiring a permit, while ignoring the very sources of that purpose; the plain language of the statute and the legislative history. *See, e.g.*, *Hawai'i Wildlife Fund*, 886 F.3d at 751; *Kinder Morgan*, 887 F.3d at 652 (stating that allowing polluters to avoid liability by discharging into groundwater before reaching navigable waters "would greatly undermine the purpose of the [CWA]"). This approach eviscerates any distinction between point and nonpoint sources, a distinction Congress purposefully included in the CWA, and instead treats groundwater as an unclassified "medium through which pollutants pass before being discharged into navigable waters." *Ky. Waterways All.*, 905 F.3d at 933. Furthermore, the hydrological connection theory completely ignores the principles of federalism that the legislative history indicates Congress was trying to preserve when it left regulation of nonpoint sources and groundwater to the states. The state of Vandalia has already implemented a permitting program of its own that is better suited to manage the complexities of this issue. R. at 7. Upholding the hydrological connection theory would usurp the state of the regulatory authority that uncontestably belongs to it.

## II. THE DISTRICT COURT INCORRECTLY HELD THAT A COAL ASH IMPOUNDMENT CONSTITUTES A "POINT SOURCE" IN VIOLATION OF 33 U.S.C. § 1311(A).

Even if the Court finds that coal ash seepage into navigable waters through hydrologically connected groundwater is regulated under the CWA, the District Court erred in holding that ComGen's coal ash impoundment is a point source under the CWA. Because the facts "are not significantly in dispute," the question of whether a coal ash impoundment constitutes a point source is one of law, and subject to *de novo* review. *Nebraska HHS*, 340 F. Supp. 2d at 21.

As mentioned, *supra*, the CWA regulates discharges from 'any discernible, confined and discrete conveyance.'" 33 U.S.C. § 1362(14). A conveyance "requires a channel or medium – i.e., a facility – for the movement of something from one place to another." *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018); *see also Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 842 n.8 (9th Cir. 2003) ("Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation."); *Shanty Town Assocs. LP v. EPA*, 843 F.2d 782, 785 n.2 (4th Cir. 1988); *Sierra Club v. Abston Constr.*, 620 F.2d 41, 47 (5th Cir. 1980) ("Although the point source definition excludes unchanneled and uncollected surface waters, surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution." (citations and internal quotation marks omitted)).

To convey something is to "transport or carry" it from "one place to another." *Convey*, American Heritage Dictionary; *see also Convey,* Merriam-Webster Dictionary ("[T]o bear from one place to another.") As the Second Circuit noted, a "conveyance" "evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Labs., Inc*., 3 F.3d 643, 646 (2d Cir. 1993).

But a coal ash impoundment does not in any way fit this definition, since it does not transport the coal ash but only stores it. *See Ky. Waterways All.*, 905 F.3d at 935 n.8 ("A point source, by definition, is a 'conveyance'… ash ponds are quite the opposite; they are designed to *store* coal ash in place."); *Va. Elec. & Power Co.*, 903 F.3d at 410-11 (stating that the non-polluted water moving through piles of coal ash and transferring arsenic into the soil was the only conveying action that took place and holding that this was not a "point source").

The Fourth Circuit, in *Va. Elec. & Power Co.*, despite accepting the hydrological connection theory, rejected the notion that a coal ash impoundment constituted a point source because the "[CWA]'s definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance." 903 F.3d at 410. Despite the fact that coal ash accumulations mixed with rainwater led to the pollution of navigable waters, it was clear to the Court that the impoundments were not created to convey the arsenic that leaked into the groundwater, nor did they function as such. *See id.* at 411. Instead, the conveyance in this scenario was the rainwater itself, not the impoundments, which "certainly were not discrete conveyances." *Id.* In that instance, rainwater and groundwater flowing through the soil were the true means by which the arsenic was conveyed. *See id.* The ponds could not be characterized as discrete points or conveyances because, "like the rest of the soil at the site," they were "static recipients of the precipitation and groundwater that flowed over them." *Id.*

In the case at hand, the district court erred in holding that the coal ash impoundment constituted a point source. The impoundment in question does not convey arsenic into the groundwater, as the district court claimed, but, as in *Va. Elec. & Power Co.*, 903 F.3d at 411, rainwater and groundwater leached arsenic from the coal ash and polluted the groundwater that eventually reached navigable waters, R. at 6. and "[b]road though [the] definition [of point source] may be… it does not include unchanneled and uncollected surface water." Appalachian

Power Co., 545 F.2d at 1373. Supposing that seepage from the impoundment could be considered a "conveyance," it would still not meet the statutorily defined requirements that a point source be "discernible, confined, and discrete," 33 U.S.C. 1362(14), as this seepage "runs clear," only occurs at times of significant rainfall, and is not confined to one limited area. R. at 6. Moreover, as established *supra*, the pollutants are not being added to navigable water, but groundwater, which is a nonpoint source non-navigable water. *See Vill. of Oconomowoc Lake*, 24 F.3d at 965.

Because a coal ash impoundment is itself not a "discernible, confined or discrete conveyance," 33 U.S.C. 1362(14), and because unchanneled groundwater is specifically regulated as a nonpoint source, there is no point source from which the pollutant was added to navigable water. *Gorsuch*, 693 F.2d at 16. Therefore, the requirements of the NPDES permitting program are unmet, and ComGen is not in violation of the CWA.

## III. FERC CORRECTLY APPROVED AND DENIED REAHEARING FOR COMGENS REVISED FERC RATE SCHEDULE NO. 1 AND REVISED FERC RATE SCHEDULE NO. 2 BECAUSE ITS ORIGINAL DECISION WAS NOT ARBITRARY AND CAPRICIOUS.

### A. MATCHING PRINCIPLE

Under the "matching principle," ComGen ought not to pay for the 246-million-dollar regulatory burden because FERC did not adequately balance the benefits and cost savings afforded to customers if ComGen is able to recover costs through its rate base. R. at 9.

The central tenant of the matching principle is that, "costs should be borne by those who benefit from them." *See Gulf Power Co. v. FERC*, 983 F.2d 1095, 1100 (D.C. Cir. 1993). (Holding that FERC's decision to prevent a utility from passing contract buyout costs to consumers was arbitrary and capricious because it, "failed to take into account the significant

extent to which Gulf's customers benefitted from the buyout," which included, 4 million dollars in savings).

In *Gulf Power*, the court determined that, even though the contract buyouts were not "directly assignable to the cost of fuel," in the end it still helped consumers by lowering their costs by 4 million. *Id.* The court noted that, "Gulf chose to negotiate an end to the unprofitable contracts and enter into new contracts at lower prices." *Id.* In that case, the court determined that because Gulf saved its customers money, they ought to be able to pass costs along to them.

This is similar to the instant case because here, FERC also failed to consider the costs and benefits that consumers will gain if ComGen is able to pass on costs to its consumers. As already determined by FERC, if ComGen is forced to internalize the entirety of the cleanup cost, ComGen may become financially unstable. R. at 12. If FERC is correct in its determination, then ComGen may not be able to fulfill its responsibility to local consumers as it may go bankrupt. If ComGen were to go bankrupt due to this excessive burden, a number of negative consequences will occur. First, Vandalia Power Company and Franklin Power Company will still need to get electricity from somewhere, and the loss of a major generating station (in the form of Vandalia Generating Station) will most likely force the power companies to buy electricity elsewhere for a higher rate. Second, even if Vandalia Generating Station is purchased by another entity, it will not change the fact that someone will have to pay for the cost of cleanup. This could either be the consumers (as it is now) or it could be the company that buys the generating station. If Vandalia Generating Station is not purchased by another company, potentially due to the environmental costs the company will immediately incur with the purchase, then there will be no entity who will be able to pay for the cleanup costs. If the current plan established by FERC is not overturned customers will have to pay, "$2.15 per month in November 2019, and average households across each jurisdiction would see bills rise by about $3.30 per month for the 10-year

amortization period." R. at 9. When the instability caused by the threat to ComGen is compared to the $3.30 increase in cost for consumers, it becomes apparent that it is within the consumers financial interest to pay for the extra costs, even if they were not using the generating station while it was polluting. *Id.*

B. PRUDENCE / ARBITRARY CAPRICIOUS

Even if the court finds that ComGen was imprudent in managing the leak, under the arbitrary and capricious standard of review, the court ought to defer to FERC's determination that ComGen should be able to pass along the cost of cleanup to its customers.

According to the court, "FERC's decisions will be upheld as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made." *See ExxonMobil Oil Corp. v. F.E.R.C.,* 487 F.3d 945, 951 (D.C. Cir. 2007). Additionally, it is important to note that when reviewing FERC's ratemaking determinations, the court is "particularly deferential to the Commission's expertise' with respect to ratemaking issues." *Id.* The reason that deference is given to FERC in ratemaking is because, "The 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." *See Duquesne Light Co. v. Barasch*, 109 S.Ct. at 619.

Congress has afforded the agency the task of balancing the competing interests of all parties, which can be extremely difficult. *See Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C.Cir.1984) (Where the court held that, "the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion.")

What matters is the ultimate determination. As noted by the court, "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be

unreasonable, judicial inquiry ... is at an end." *See Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591, 602 (1944).

The reasoning provided by the agency is sufficiently connected to the facts in order to meet the highly deferential arbitrary and capricious standard of review. First, the agency has determined that, if the 246-million-dollar burden was placed on ComGen, this 68% drop in its rate could jeopardize the financial health of the utility. R. at 9. This could affect reliability and hurt customers. Second, the agency would like to give companies the opportunity to clean up environmental damage when it occurs. *Id.* at 12. FERC has made the policy determination that if utilities, "are able to recover in rates the costs of environmental cleanups," this could be used as a "means of promoting environmental protection." *Id.* In making its decision, FERC balanced both the financial health of the utility, and the environmental concerns of the community in order to determine that preventing ComGen from passing along its rates would not be in the interest of the public, ComGen, or the environment. *Id.*

## IV. FERC CORRECTLY DETERMINED THAT TO DISALLOW THE RECOVERY OF 264-MILLION-DOLLARS IN THE RATE BASE IS AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE IT WOULD THREATEN THE FINANCIAL STABILITY OF COMGEN.

Imposing the full 246-million dollar burden on ComGen would lower the "just and reasonable rate" set by FERC by 68% over a ten year period. This would constitute a taking under the Fifth and Fourteenth Amendments. R. at 9.

In regard to ratemaking, the central principle is that a taking has occurred when a rate is so low that it eliminates the property's value, essentially taking the property away from the owner without due process of law. *See Covington & Lexington Turnpike Road Co. v. Sandford,* 164 U.S. 578, 597 (1896) (Holding that, "A rate is too low if it is 'so unjust as to

destroy the value of [the] property for all the purposes for which it was acquired," which, "practically deprive[s] the owner of property without due process of law.") In order to determine whether or not a regulatory action that effects a ratemaking constitutes a taking, the Supreme Court has held that courts must look to whether or not the "end result" of the ratemaking is "just and reasonable." *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). This means that what is important is not the methodology used in determining the rates, but the adequacy of the rates themselves.

In order to determine whether the final rates are adequate, the court looks to whether the rates are so low that they would be deemed "confiscatory" and therefore jeopardize the financial health of the utility. *See Duquesne Light Co. v. Barasch,* 488 U.S, 299, 310-12 (1989) (Where the court held that FERC's regulatory action did jeopardize the financial health of the utility and therefore did not constitute a taking because, the utility was permitted to make an, "11.64% overall return on a rate base of nearly $1.8 billion," and the, "$35 million investment in the canceled plants comprises roughly 1.9% of its total base," and, "The denial of plant amortization will reduce its annual allowance by 0.4%.")

Rates will be considered to jeopardize the financial health of the utility if (1) they leave the utility, "insufficient operating capital," or (2) impede the utilities, "ability to raise future capital," or (3) if the profits left for the utility are, "inadequate to compensate current equity holders for the risk associated with their investments." *Id.*

One of the ways that FERC's ratemaking can jeopardize the financial health of the utility is if it excludes a sufficiently burdensome cost from a rate base. *See Fitchburg Gas & Elec. Light Co. v. Dep't Of Pub. Utilities,* 467 Mass. 768, 777 (2014) (Holding that, "A confiscatory rate can result from the improper exclusion of a cost or item from the rate base.") *See also, Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (Where the court held that,

denying the plaintiff the ability to include a 397 million dollar Nuclear Plant investment into its rate base was "almost certainly" a taking because, "the company has been shut off from long-term capital, is wholly dependent for short-term capital on a revolving credit arrangement that can be cancelled at any time, and has been unable to pay dividends for four years.")

In *Duquesne*, the court found that a 1.9% and 0.4% reduction in a rate base of 11.64% (which constitutes a 19.75% drop) was not a taking because the regulatory actions did not jeopardize the financial health of the utility. The burden in the instant case is more severe because, in this case, the financial burden imposed on ComGen would be a 6.8% drop from the 10% that FERC originally determined to be just and reasonable. When compared to the 19.75% drop in the rate base in Duquense, ComGen will be losing 48.25% more then Duquense Light lost due to FERC's decision.

In *Jersey City*, the court found that stopping the utility from including a 397-million-dollar investment into its rate base would almost certainly jeopardize the financial health of the utility. In that case, the court looked to the fact that the company did not have access to long-term capital, was entirely dependent on unreliable short-term capital, and had not been able to pay four years worth of dividends. That case is similar to the instant case because, if this court overturns FERC's decision, ComGen will have to pay 246 million dollars to clean up the Little Green Run Impoundment which will jeopardize the financial stability of the company, and "assure confidence in the its financial soundness, thereby undercutting its ability to raise capital on reasonable terms." R. at 12. In the instant case, FERC has made the determination that the imposition of this burden on ComGen will jeopardize the financial stability of the utility because this burden will drop the rate base from 10% (which FERC found to be "just and reasonable") to 3.2% over the next ten years. *Id.* at 10. This represents a 68% drop for the next ten years of operation. As FERC has determined, paying 246 million dollars, and losing nearly 70% of the

just and reasonable rate base, will make it difficult for ComGen to operate in the future. *Id.* at 9. Therefore, preventing ComGen from recovering costs through its rate base is a confiscatory taking.

## CONCLUSION

For the reasons set forth above, this Court should reverse the district court's holding.

**Certificate of Service**

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

Respectfully submitted,

*Team No.* 3