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

Commonwealth Generating Company *Appellant*	)	
	)	Case No. 18-02345
v.	)	
Stop Coal Combustion Residual Ash Ponds (SCCRAP) *Appellee*	)	

Team Number 6

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Columbia entered judgment on June 15, 2018. R.7. Appellant timely filed this appeal on July 16, 2018. R.8. This Court granted the motion on December 21, 2018. R.2. This Court has jurisdiction under 10 U.S.C. § 950g (2018).

The Federal Energy Regulatory Commission ("FERC") issued its decision approving the rate revisions proposed by Appellant on October 10, 2018. R.11. FERC denied rehearing by order issued on November 30, 2018. R.12. Appellee timely pursued judicial review with its petition to this Court on December 3, 2018, which was granted on December 21, 2018. R.12. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2018).

STATEMENT OF THE ISSUES PRESENTED

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.
2. Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes a discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act (33 U.S.C. §1342 (2018)).
3. Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.
4. Whether SCCRAP's position in the FERC proceeding – to disallow the recover 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

A. The Parties

The appellant in this case is Commonwealth Generating Company ("ComGen"), a wholly owned subsidiary of Commonwealth Energy ("CE"). R.3. CE is an electric utility holding company providing electric service at different rates in nine states, including Vandalia and its neighboring state of Franklin. *Id*. "ComGen was incorporated by CE in the District of Columbia in 2014 to purchase the Vandalia Generating Station from Commonwealth Energy Solutions (CES), a wholly owned, unregulated subsidiary of CE that formerly owned thirteen merchant electric generating plants." R.3. In November 2014, ComGen's acquisition of the Vandalia Generating Station was approved and ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company. R.4.

Vandalia Power and Franklin Power are wholly owned subsidiaries of CE, and are corporations organized and existing under the laws of Vandalia and Franklin, respectively. R.4. The two corporations are engaged in the generation, transmission, and distribution of electric power, and are public utilities under Section 201 of the Federal Power Act ("FPA"). *Id*. Vandalia Power cover the public in northern and eastern Vandalia, and a portion of southwestern Franklin, while Franklin Power covers the public in eastern Franklin. The power service agreements are subject to FERC jurisdiction under the FPA because the unit power service agreements are wholesale transactions. *Id*. The unit power service agreement between ComGen and Vandalia Power is designated as ComGen's FERC Rate Schedule No. 1 ("Vandalia Agreement"), and the agreement between ComGen and Franklin Power is designated as ComGen's FERC Rate Schedule No. 2 ("Franklin Agreement"). *Id*.

CE formed CES in the late 1990s in an effort to become a major energy supplier in the emerging competitive wholesale power markets. R.4. CES consequently developed the Vandalia

Generating Station, located near Mammoth, on the Vandalia River. *Id*. Vandalia Generating Station produces coal combustion residuals ("CCRs"), commonly known as coal ash, as a byproduct of the coal combustion during the electricity generation process. R.3. Coal ash contains contaminants like mercury, cadmium and arsenic, which are associated with cancer and various other serious health effects. *Id*. Coal ash can be disposed of in wet form in large surface impoundments, or in dry form in landfills. *Id*. Without proper protections, these pollutants can seep into the groundwater, and potentially "migrate to drinking water sources, posing significant public health concerns." R.3.

The Little Green Run Impoundment ("the Impoundment"), owned and operated by ComGen, is a surface impoundment located adjacent to the east of the Vandalia Generating Station. R.3. The Impoundment was formed by the construction of a dam across Green Run. R.4. The dam is 395 feet from toe to crest, with a top elevation of 1,050 feet above sea level. *Id*. The Impoundment formed by the dam contains approximately 38.7 million cubic yards of solids, mainly CCRs. *Id*. "The effluent from the Little Green Run Impoundment flows south and enters Fish Creek before entering the Vandalia River." R.4. EPA included the Impoundment on its list of coal ash impoundments. R.4. As of March 2014, the "Impoundment is one of 63 electric industry coal waste impoundments in the United States with a 'high' hazard rating." R.4.

The Appellee in this case is Stop Coal Combustion Residual Coal Ash Ponds ("SCCRAP"), a national environmental and public interest organization based in Washington, D.C. R.5. SCCRAP has members located in both Franklin and Vandalia, and its chapter in Vandalia includes several citizens who were directly affected by the environmental impacts associated with the Little Green Run Impoundment. *Id*.

In 2015, SCCRAP filed lawsuits under the Clean Water Act ("CWA" or "the Act") and Resource Conservation and Recovery Act ("RCRA") against the owners and operators of coal ash impoundments found to be responsible for pollutants leaking into groundwater. R.5. Additionally, "SCCRAP intervened in utility ratemaking proceedings before state public utility commissions (PUCs) and FERC to challenge rate recovery of expenses associated with polluting coal ash impoundments." *Id.*

B. The Pollution

The Vandalia Department of Environmental Quality ("VDEQ") issued permits to ComGen that required groundwater monitoring. R.5. In 2002, ComGen began to detect arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. R.5. Subsequently, ComGen notified VDEQ and began developing and implementing a corrective action plan, to mitigate the pollution. *Id*. ComGen installed a lining on the west embankment of the Little Green Run Impoundment in 2006. *Id.*

In March 2017, Vandalia Waterkeeper detected elevated levels of arsenic in the Vandalia River, and performed a deepener analysis of the river. *Id*. The analysis suggested that the source of the arsenic was the Impoundment due to rainwater and groundwater that were "leaching arsenic from the coal ash in the impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River." R.6. Vandalia Waterkeeper then filed a complaint with the VDEQ, resulting in an investigation. *Id*. The investigation showed that ComGen inadequately installed the lining, resulting in seepage that pooled at the downstream toe of the west embankment. *Id.*

According to the VDEQ report:

> The seep occurs at a low point in the foundation topography and appears to have been active for many years without significant change. The seep runs clear at a slow rate and there is no evidence of internal erosion of dam materials. ComGen stated

> that the seepage occurs only when there is significant rainfall, and that it dries up within a few weeks of the precipitation event. Although the downstream slope was observed to be in generally good condition, the seepage had caused some erosion and indentations or grooves in the soil as it made its way down the embankment towards Fish Creek.

R.6; VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14.

C. Procedural History

The United States District Court for the District of Columbia granted SCCRAP's request for injunctive relief against ComGen. R.1. However, SCCRAP took issue with FERC's decision denying rehearing of the Order, in Docket ER-18-263-000, accepting Commonwealth Generating Company's Revised Rate Schedules. *Id*. ComGen appealed the decision of the District Court, and commenced a rate proceeding at FERC to recover the costs it would incur to comply with the injunctive relief imposed by the District Court. R.8. "SCCRAP intervened in the FERC proceeding in opposition to ComGen's rate filing." R.9. SCCRAP also appealed FERC's order accepting ComGen's proposed rates. *Id*. SCCRAP, ComGen, and FERC jointly filed a motion in this Court to consolidate the actions. R.2. On December 21, 2018, the United States Court of Appeals for the District of Columbia Circuit granted the motion. R.12.

SUMMARY OF THE ARGUMENT

The Clean Water Act forbids the discharges of pollutants through ground water that is hydrologically connected to navigable waters. ComGen violated the Clean Water Act by producing and disposing coal combustion residuals in the Little Green Run Impoundment through a dam across Green Run. The Little Green Run Impoundment seeps arsenic into the groundwater around ComGen's Vandalia that is hydrologically connected to Fish Creek and the Vandalia River, which are navigable waters. ComGen has violated the Clean Water Act because ComGen's coal ash disposal has caused Vandalia River to exhibited high levels of arsenic,. More

specifically, the seepage of arsenic from the little green run impoundment violates the section 402 of the Clean Water act because it constitutes a discharge of a pollutant, without a permit. The Little Green Run Impoundment is a "point source," as defined under the Clean Water Act because it channels and conveys arsenic directly into the groundwater that leads to surface waters. The coal ash pond is a point source because it allows for the pollutants to seep into the groundwater and flow to Vandalia River and Fish Creek, by way of the gravitational pull.

In regards to ComGen's revised FERC rates' schedule no.1 and schedule no. 2, ComGen should be precluded from recovering from utility ratepayers any of the costs of the corrective action required by the District Court's injunction. ComGen's corrective action is the result of negligent remediation of a pre-existing Clean Water Act violation, which indicates imprudence. ComGen's negligent remediation of its past violation caused further environmental degradations. Therefore, the environmental recovery cost should not feed into the rate calculation. Additionally, FERC's decision to approve the rates was arbitrary and capricious because FERC ignored that Congress did not intend litigation cost to be a factor considered in a prudence review for ratemaking, and because FERC considered total revenue instead of only considering return on equity.

Finally, ComGen will not suffer from an unconstitutional taking under the Fifth and Fourteenth amendments if barred from increased rates to mitigate its cost to recovery for the Little Green Run Impoundment. The standard to establish a rightful rate is a return on equity. If the rate of return on investment is just and reasonable, it is considered lawful. Thus, the analysis to establish a taking considers a utility's operation and capital expenses. Because ComGen is purporting to recover costs through customer rates from its failed corrective action, these costs

fall under investment or operating expense established in a Takings Clauses analysis. Thus, ComGen will not be deprived of their property without just compensation.

ARGUMENT

I. COMGEN IS IN VIOLATION OF THE CLEAN WATER ACT BECAUSE DISCHARGES OF POLLUTANTS THROUGH GROUND WATER THAT IS HYDROLOGICALLY CONNECTED TO NAVIGABLE WATERS FALL WITHIN THE PROTECTIONS OF THE ACT.

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 (2018) *et seq*., to restore and maintain "chemical, physical and biological integrity of Nation's waters." 33 U.S.C. § 1251(a) (2018). Except in possession of a permit pursuant to Sections 402 and 404 Act, the discharge of any pollutant by any person is unlawful. § 1311(a). Pursuant to Section 502 of the Act, "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means…any addition of any pollutant to navigable waters from any point source…" § 1362(12). Further, the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container…from which pollutants are or may be discharged." § 1362(14).

A. Standard of Review

Courts of Appeal review "whether injunctive relief is just and proper under an 'abuse of discretion standard.'" *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850 (5th Cir. 2010).

B. Pollution Via Groundwater that is Hydrologically Connected to Navigable Waters is Actionable Under the Clean Water Act.

ComGen violated the Clean Water Act by allowing the Little Green Run Impoundment to seep arsenic into the groundwater around ComGen's Vandalia Generating Station which is "hydrologically connected" to Fish Creek and the Vandalia River, carrying arsenic to navigable waters. The EPA developed the phrase "direct hydrological connection" to identify "whether there is a clear connection between the discharge of a pollutant and navigable waters when the

pollutant travels through ground water." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018). "[P]roof of a hydrological connection between a man-made settling basin and a water of the United States is sufficient to bring discharges from such a basin within the purview of the CWA." *N. Cal. Riverwatch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, at *17 (N.D. Cal. Sep. 1, 2005). "[A]pplying the CWA to point-source pollution traveling briefly through groundwater before reaching a navigable water promotes the CWA's primary purpose." *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 449 (6th Cir. 2018) (Clay, J. dissenting).

In *Upstate Forever v. Kinder Morgan Energy Partners*, gallons of gasoline spilled from a ruptured pipeline, seeping into nearby waterways that then travelled into navigable waters. *Upstate Forever*, 887 F.3d at 641. Two conservation groups brought a citizen suit against Kinder Morgan alleging violation of the Clean Water Act for polluting navigable waters without a permit. *Id*. The 4th Circuit reversed the district court's ruling, and held that this was a valid claim for a discharge of a pollutant under the Clean Water Act. *Id.* at 641-42. The Court pointed out that the Supreme Court has expanded the definition of "navigable waters," and thus "waters of the United States," to mean more than just waters that are navigable-in-fact, but also to include "wetlands and related hydrological environs." *Id*. at 643. *See also Rapanos v. United States*, 547 U.S. 715, 730-31, 735 (2006) (plurality opinion) (observing that navigable waters include more than traditionally navigable waters and may include certain wetlands); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) ("Congress chose to define the waters covered by the Act broadly.").

In *N. Cal. Riverwatch v. Mercer Fraser Co*, a California non-profit brought suit against Mercer Fraser Company, alleging violations of the Clean Water Act by concrete production

plants, and the wash water the plants release into "onsite man-made settling basins." No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, at *1-2. The Defendant argued that the settling basins were not point sources, nor were they "waters of the United States" or "tributaries." *Id*. at *6. "The Court [found] that the regulations of the CWA do[es] encompass the discharge of pollutants from wastewater basins to navigable waters via connecting groundwaters." *Id*. at *7. The District Court explained that because of the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (2018), it would not make sense for the Act to prohibit someone from polluting through a pipe into a riverbank, "but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, at *8-9. *See also Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit.")

Further, the dissent in *Tenn. Clean Water Network v. TVA* provide an intriguing analysis to the hydrological connection theory. In *Tenn. Clean Water Network*, TVA operates a coal-fired electricity plant that disposes of CCRs through a series of unlined coal ash ponds, right next to a river. 905 F.3d at 438. Though TVA has a permit to discharge some of the coal combustion water into the river through a pipe, other wastewater is "discharged through leaks from the ponds through the groundwater into the Cumberland River." *Id.* The 6th Circuit held that the Clean Water Act was "not the proper legal tool of correction." *Id.* at 447. However, the dissenting judge pointed out that the Clean Water Act "does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters; a plaintiff must simply

show that the defendant 'add[ed] . . . any pollutant *to* navigable waters *from* any point source.'" *Id*. at 448 (Clay, J. dissenting). *See also* 33 U.S.C. §§ 1362(12)(A) (2018) (emphases added), 1365(a), 1311(a). Further, Judge Clay emphasized that "applying the CWA to point-source pollution traveling briefly through groundwater before reaching a navigable water promotes the CWA's primary purpose." *Id*. at 449 (Clay, J. dissenting).

In the present case, ComGen owns the Vandalia Generating Station ("the Station"), which produces a great number of coal combustion residuals ("CCRs") as byproducts of the combustion of coal at the electric generating plant. R.4. These CCRs are then disposed of in the Little Green Run Impoundment ("the Impoundment"), which was formed by the construction of a dam across Green Run, immediately east of the Station. R.4. The Vandalia River has exhibited high levels of arsenic, which is linked directly to the Impoundment, where arsenic from coal ash has seeped into the groundwater, and then carried into the Fish Creek and Vandalia River. R.5-6.

Similar to the ruptured pipeline in *Upstate Forever*, this leak is due to an inadequately welded liner in the high density polyethylene ("HDPE") geomembrane liner of the Impoundment. R. 6. There is a direct hydrological connection between the polluted groundwater by the Impoundment and the navigable waters, as evident by the erosion in the soil of the downstream slope of the Impoundment. R.6, 8. *See also Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 45 (5th Cir. 1980) (holding that conveyances of pollution formed either as a result of natural erosion or by material means may subject the operators of the mine to liability under the Clean Water Act). This connection is direct because of the little space between the pond and the ground, and thus the groundwater. In *Upstate Forever*, the 4th Circuit found that a very short distance from the pipe was enough to show a direct hydrological connection. 887 F.3d at 652. If that short distance was enough for the 4th Circuit, than the direct hydrological connection

between the Impoundment's discharge into the groundwater and Fish Creek is actionable under the Clean Water Act because of this expanded definition of "waters of the United States."

The coal ash ponds at the Impoundment are similar to the settling basins at dispute in *Mercer Fraser Co*. and the coal ash ponds in *Tenn. Clean Water Network.* Just like settling basins, coal ash ponds are man-made piles that allow for an electricity generating station, like the Vandalia Generating Station, to concentrate coal ash and its subsequent pollutants into one location. R.8. From that one location, the pollutants go directly into the groundwater and surface waters. R.8. If the courts can find that the hydrological connection between a settling basin, the groundwater, and the navigable waters is enough to find protection under the Clean Water Act, it appears reasonable that this Court find the same connection with ComGen's coal ash pond.

As SCCRAP has proven an actual, direct, immediate, and traceable hydrological connection between the pollution from the coal ash ponds into the groundwater to the elevated levels of arsenic in the Vandalia River, the Court should find this to be in violation of the Clean Water Act.

II. THE SEEPAGE OF ARSENIC FROM THE LITTLE GREEN RUN IMPOUNDMENT CONSTITUTES A VIOLATION OF SECTION 402 OF THE CLEAN WATER ACT.

Section 301 of the Clean Water Act allows for the establishment of effluent standards and for the issuance of permits to come into compliance with those standards. 33 U.S.C. § 1311 (2018). Subsequently, the National Pollution Discharge Elimination System ("NPDES") gives the EPA the authority to issue permits for the discharge of pollutants, based on compliance with effluent standards. § 1342(a). Further, a polluter can violate the statute in three different ways: (1) by exceeding the limitations of a proper permit, or (2) discharging pollutants without a permit, or (3) due to a discharge for which one could not have obtained a permit. *Upstate Forever*, 887 F.3d at 642. Through the NPDES program, "the EPA shares regulatory authority

with the States, and a State can elect to establish its own permit program." R.6-7; *see also* 33 U.S.C. § 1342(b)-(c) (2018). States can then regulate discharges through the issuance of permits under both state and federal law. *Id.* Taking the relevant provisions together, a polluter violates the Clean Water Act when it does not obtain an appropriate permit and "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source." *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 744 (9th Cir. 2018).

A. Standard of Review

Courts of Appeal review "whether injunctive relief is just and proper under an 'abuse of discretion standard.'" *Overstreet*, 625 F.3d at 850.

B. The Little Green Run Impoundment is Considered a Point Source Under the Clean Water Act.

ComGen violated the Clean Water Act because the seepage of arsenic from the Little Green Run Impoundment constitutes "a discharge of a pollutant," without a permit, in violation of Section 402 of the Clean Water Act. The issue at hand is not whether this is a discharge, because it is undisputed that arsenic, a pollutant, has been added to the Vandalia River, a navigable water. R. 5. The issue at hand is that the Little Green Run Impoundment is a "point source," as defined under the Clean Water Act because it channels and conveys arsenic directly into the groundwater that leads to surface waters. "The plain language of the CWA requires only that a discharge come 'from' a 'point source.'" *Upstate Forever,* 887 F.3d at 650. "Just as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, neither does the Act require a discharge directly from a point source." *Upstate Forever*, 887 F.3d at 650. *See also* 33 U.S.C. § 1362(12)(a) (2018). "[A]n indirect discharge from a point source to a navigable water" meets the requirements of Clean Water Act liability. *Haw. Wildlife Fund*, 886 F.3d at 747.

As discussed above, *Upstate Forever v. Kinder Morgan Energy Partners* involved a gasoline spill from a ruptured pipeline, which then seeped into nearby waterways that then travelled into navigable waters. *Upstate Forever*, 887 F.3d at 641. The 4th Circuit reversed the district court's ruling, and held that this was a valid claim for a discharge of a pollutant under the Clean Water Act. *Id*. at 641-42. The Court discussed the precise language of the Clean Water Act in its analysis. *Id*. at 650. "The word 'from' [in the CWA definition of point source] indicates 'a starting point: as (1) a point or place where an actual physical movement. . . *has its beginning*.'" *Id*. (quoting Webster's Third New International Dictionary 913 (Philip Babcock Gove et al. eds., 2002) (emphasis added)). The 4th Circuit acknowledged that under the plain meaning of the word "from," a point source is the starting point of a discharge under the Act, "but that starting point need not also convey the discharge directly to navigable waters." *Id*. *See also Abston Constr. Co.,* 620 F.2d at 45 ("Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials.").

In *Waterkeeper All., Inc. v. United States EPA*, the 2nd Circuit reviewed "the permitting requirements and effluent limitation guidelines promulgated by the EPA in its attempt to regulate the emission of water pollutants from so-called concentrated animal feeding operations ("CAFOs")." *Waterkeeper All., Inc. v. United States EPA*, 399 F.3d 486, 492 (2d Cir. 2005). CAFOs emit effluents into the surface waters, and the EPA established a rule that CAFOs must apply for NPDES permits for all land application discharges. *Id*. at 496. *See also League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192-93 (9th Cir. 2002) (holding that discharges through the air is considered point source pollution and thus requires an NPDES permit). The 2nd Circuit acknowledged the importance of simplifying the

words of the Act and not "impos[ing] a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them." *Id*. at 511.

Further, in *Haw. Wildlife Fund v. Cty. of Maui*, the County of Maui violated the Clean Water Act by discharging pollutants from its wells into the Pacific Ocean without a NPDES permit. *Haw. Wildlife Fund,* 886 F.3d at 742. The wells had become the County's primary means for disposing effluent into both groundwater and the Pacific Ocean. *Id*. The 9th Circuit found this to be a valid claim for a Clean Water Act violation for many reasons, one of which being that "the pollutants here enter navigable waters and can be 'traced [back] to identifiable point[s] of discharge,' '[the wells] are subject to NPDES regulation, as are all point sources' under the plain language of the CWA." *Id*. at 744 (quoting *Trs. for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984)). The 9th Circuit also pointed out the definition of "nonpoint source pollution" as "'pollution . . . [that] arises from many dispersed activities over large areas,' 'is not traceable to any single discrete source,' and due to its 'diffuse' nature, 'is very difficult to regulate through individual permits.'" *Id*. (quoting *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013)).

Finally, in *Ky. Waterways All. v. Ky. Utils. Co.,* Kentucky Utilities Company stores leftover coal ash in two man-made ponds. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 927-28 (6th Cir. 2018). Two environmental conservation groups claimed that chemicals from the ash contaminated the groundwater, and then contaminated a nearby lake. *Id*. at 928. The 6th Circuit held that this was an issue better resolved by the Resource Conservation and Recovery Act ("RCRA") rather than the Clean Water Act, claiming that "while coal ash is stored and treated in the coal ash ponds, RCRA governs; [but] once the ash pond wastewater is discharged by way of a point source to navigable waters, the CWA kicks in." *Id*. at 929. This 6th Circuit

case is analogous to *Sierra Club v. Va. Elec. & Power Co*, in which the 4th Circuit held that landfills and settling ponds that stored coal ash did not constitute "point sources." *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 406 (4th Cir. 2018).

Applying the reasoning of *Upstate Forever*, the Impoundment is considered a point source because the coal ash ponds are the starting point of the discharge of arsenic into Fish Creek and the Vandalia River. R.6. CCRs, byproducts of the combustion of coal at electric fathering plants, contain contaminants, like the arsenic found in the Vandalia River. R.3. The arsenic, therefore, gathers in the coal ash ponds of the Little Green Run Impoundment before seeping into the groundwater and ultimately ending up in navigable waters. R.4-5. As a result, these coal ash ponds are the starting point of the discharge, with the Vandalia River and Fish Creek being the end result. R.6. Just as the 4th Circuit can accept that the collection of pollutants that then flow, as a result of gravity, into a navigable water is considered a point source discharge, this Court should see that ComGen collected the coal ash and then allowed for the effluents to seep into the groundwater, by way of the gravitational pull, making the coal ash ponds a point source. *Abston Constr. Co.,* 620 F.2d at 45; R.4-5.

Further, the Impoundment can be considered a point source because the pollution is not nonpoint source pollution, as discussed in *Haw. Wildlife Fund*, as the arsenic pollution in the Vandalia River is directly traceable to the single, discrete source of the coal ash ponds of the Little Green Run Impoundment. R.5-6. This also supports the fact that this case is distinguishable from *Ky. Waterways All.* and *Va. Elec. & Power Co.* because though these cases did not find a violation of the Clean Water Act, the reasoning is contradictory to the present case. In *Ky Waterways*, the 6th Circuit claimed that groundwater could not be considered a conveyance because it is not "discrete" or "discernible." 905 F.3d at 933. However, it was

established in the present case that the source of arsenic in pollution in the Vandalia River came from rainwater and groundwater leaching arsenic from the Impoundment. R.6. The fact that the pollution can be directly traced back to the Impoundment proves that the groundwater is both "discrete" and "discernible."

Further, in *Va. Elec. & Power Co.,* the 4th Circuit held that even though coal ash ponds are not point sources directly, "[t]he [Clean Water Act] regulates the discharge of arsenic into navigable surface waters through hydrologically connected groundwater," as discussed above. 903 F.3d at 409. So, even if this Court finds that the coal ash ponds of the Little Green Run Impoundment are not point sources in themselves, this arsenic pollution seeping from the ponds in the groundwater that is hydrologically connected to navigable waters would still be a violation of Section 402 of the Clean Water Act.

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

The Federal Power Act ("FPA") authorizes FERC with jurisdiction over the transmission and sale at wholesale of electricity in interstate commerce. 16 U.S.C. § 824(a)-(b) (2018). FERC reviews all rates within its jurisdiction to ensure that they are "just and reasonable." *Id.* § 824d(a). The Commission and the courts have understood this requirement to incorporate a "cost-causation principle" such that the rates charged for electricity reflect the costs of providing it. *See Ala. Elec. Co-op., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982). To determine whether rates are "just and reasonable", FERC may, on its own or upon the commencement of a third-party complaint, investigate whether an existing rate is lawful. *Id.* § 824e(a). This is referred to as a "Section 206" proceeding. The complainant bears the burden of proof to demonstrate that a rate is unjust or unreasonable. *Id.* § 824e(b); *see also*, *e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 860

F.3d 691, 695 (D.C. Cir. 2017). FERC must set a "just and reasonable" rate if it finds that a rate is unlawful. *Id.* § 824e(a). A public utility may apply for a rate change in a "Section 205" proceeding, and again FERC determines whether the proposed rate is lawful. *Id.* § 824d(d)-(e). If the public utility seeks to increase the rate, it bears the burden of proof to demonstrate that the increase is just and reasonable. *Id.* § 824d(e).

A. Standard of Review

Under the APA, "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2018). This standard is applied to FERC orders. *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009). "The court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 415 (1971). While the court's "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Id.* at 416. The court's review must be based on the whole administrative record before the agency at the time of its decision. *Id.* at 420. Based on the administrative record, the agency must examine the relevant data and provide sufficient explanation for its action based on a "rational connection between the facts found and the choice made." *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1982). In determining whether an agency rule is arbitrary and capricious, a court normally looks to whether the agency has

> 1) relied on factors which Congress has not intended it to consider, 2) entirely failed to consider an important aspect of the problem, 3) offered an explanation for its decision that runs counter to the evidence before the agency, 4) or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. Although this standard of review is a narrow one, a court does not substitute its judgment for that of the agency. *Id.* Because of technical and policy- based determinations, FERC judgment is entitled to judicial respect. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014). FERC's findings of fact are conclusive if supported by substantial evidence. 16 U.S.C. § 825*l* (2018).

B. Under the Prudence Principle of Utility Ratemaking, ComGen should be precluded from Recovering from Utility Ratepayers any of the Costs of the Corrective Action Required by the District Court's Injunction.

Prudent investment ratemaking provides a return upon the amount prudently invested in the utility by its stockholders; in other words, the original cost minus any imprudent investments that should not be a burden on the public. *See Mo. ex rel. S.W. Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 & n.1 (1923) (Brandeis, J., concurring). "Prudent investment" is a term of art taken from the prudent investment method of ratemaking theorized by Justice Brandeis in a concurrence. *See id.* at 289. The prudent investment theory provides for a return upon capital prudently invested by the utility based on historical cost principles, not upon present value of utility property that was used and useful in providing service. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir 1987). The prudent investment standard is measure by "[t]he thing devoted by the investor to the public use is not specific property... but capital embarked in the enterprise." *S.W. Bell*, 262 U.S. at 290 (Brandeis, J., concurring).

The cost of corrective action required by the district court's injunction does not benefit the ratepayers and not a prudent investment to include in rates. "[R]ecoverability to all litigation expenses that resulted in an adverse final judgment . . . in any federal statutory case, [is imprudent] unless the regulated company could show that ratepayers benefited from the underlying activity. *Iroquois Gas Transmission Sys., L.P. v. FERC*, 145 F.3d 398, 401 (D.C. Cir. 1998) (*citing Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1039 (D.C. Cir. 1991)). In

Iroquois Gas, the court found "serious doubt as to the prudence" of litigation expenses that "grew out of criminal and civil violations." *Id.* There, the gas company was civilly and criminally liable for Clean Water Act violations during the construction of a pipeline. *Id.* at 399. This court declined to follow an irrebuttable presumption that litigation costs were imprudent. *Id.* (noting policy implications of investor and consumer interest in environmental compliance costs). Ultimately, the court remanded to FERC for consideration of the prudence of such litigation expenses for ratemaking purposes. *Id.* at 403.

There is a significant distinction between *Iroquois Gas* and this case. There, the company entered settlement agreements for violations of the Clean Water Act. *Id.* These costs were not included in the rate, but the company requested litigation expenses to be included. *Id.* In this case, ComGen has already paid the initial environmental compliance cost as a part of the VDEQ approved corrective action plan in 2005. R.5. Although the current litigation arises out of a new CWA violation, the corrective action is the result of negligent remediation of a pre-existing CWA violation. This key difference indicates imprudence. The initial remediation efforts in the VDEQ corrective action plan may well have the indicia of a prudent investment, but based on the successful application of the plan. What has happened instead is a negligent installation and monitoring effort which imprudently caused further environmental degradations. This cost of negligence is by its very nature an imprudent cost that should not be borne by rate payors.

Similarly, in *Grand Council of Crees v. FERC*, 198 F.3d 950 (D.C. Cir. 2000), this court noted that environmental costs associated with developing and operating a facility whose rates were subject to Commission regulation under sections 205 and 206 of the FPA could potentially be recovered through the facility's wholesale rate, even though the Commission does not regulate the underlying environmental issues. *Id.* at 957. In *Crees*, this court reviewed prior

FERC decisions to conclude that certain environmental compliance was "beyond the Commission's authority to consider under sections 205 and 206 of the Federal Power Act." *PSI Energy, Inc*, 55 FERC 61,254 (1991). Ultimately the court held that "environmental issues posed by construction and operation of energy facilities will invariably be reviewed under other provisions; if those reviews (or other forces such as liability risks or firm commitment to environmental quality) cause the utility to incur costs, such costs would feed into the Commission's normal rate calculation." *Crees*, 198 F.3d at 957 (citing *Iroquois Gas*, 124 F.3d 398).

This environmental recovery cost is this case should not feed into the rate calculation. Remediation at the Little Green Run impoundment is not a cost related to a commitment to environmental or liability. The cost of remediation is not a siting or planning cost related to the construction and operation of an energy facility. These costs are retrospective repair costs resulting from negligent attempts at environmental compliance. ComGen should not be able capitalize on its own incompetence. Providing ComGen with an opportunity to recover these costs from customers disincentivizes proactive environmental compliance. This dangerous public policy should be given strong consideration by the court.

FERC's decision to recover the cost of corrective action required by the District Court injunction into customer rates was arbitrary and capricious. FERC accepted many of the arguments advanced by SCCRAP. R.11. By approving recovery, FERC ignore the intent of Congress to consider just and reasonable rates. Congress did not intend litigation cost to be a factor considered in a prudence review for ratemaking. In reviewing ComGen's testimony, FERC also ignored an important aspect of the problem by considering total revenue instead of only considering return on equity. R.10. This is an important aspect because the Court in *Hope*

specifically noted that the end result test considers only return on investment and not actual earned return. *Hope*, 320 U.S. at 605. FERC ignored all of the arguments put forth by SCCRAP that they originally agree with based on a conclusion that is contrary to the evidence of financial testimony by ComGen. For these reasons this court should vacate the approval of rate recovery by FERC and remand to the Commission to set a just and reasonable rate.

IV. DISALLOWING THE RECOVERY IN RATES OF ALL OR A PORTION OF THE COSTS INCURRED BY COMGEN IN REMEDIATING THE LITTLE GREEN RUN IMPOUNDMENT IS NOT AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. amend. V. Government regulation of rates is constitutional "when private property is devoted to a public use." *Munn v. Illinois*, 94 U.S. 113, 130 (1876). If regulated utility rates do not "afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). Regulated rates must be "just and reasonable" to satisfy the constitutional standard. *Id.* Just and reasonable rates must provide a utility the opportunity for a fair return on investment. *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). Any rate that does not allow a fair value of return on investment is a confiscatory taking under the Constitution. *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1941). Fair rates should allow a "company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed." *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

In *Hope*, the Supreme Court established the "end results" test finding "it 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." *Id.* at 602. Takings analyses are "essentially ad

hoc, factual inquiries," *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), making the precedential effect of prior decisions a narrow comparison. Including the cost private property that is "used and useful" is simply one of several permissible tools of ratemaking . . . that need not be . . . employed in every instance." *Jersey Power*, 810 F.2d at 1175. In the D.C. Circuit, the "used and useful" standard is not a part of the constitutional standard for ratemaking. *Wash. Gas & Light Co. v. Baker*, 188 F.2d 11, 18-19 (D.C. Cir. 1950). Ultimately, calculating "'just and reasonable' rates involves a balancing of the investor and the consumer interests." *Hope*, 320 U.S. at 603. Protecting investor interests focuses on the return on investment and not on a utilities actual return. *Hope*, 320 U.S. at 605; *Jersey Cent.*, 810 F.2d at 1181.

The financial facts in this case are nearly identical to those in *Hope*. There, a gas company argued a multi-million-dollar annual return was not "just and reasonable." *Hope*, 320 U.S. at 605. The Court scoffed at this proposition state that "rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base." *Id.* ComGen is authorized to earn a 10% return on equity. R.10. They claim their actual return would fall to 3.2% if the entire amount is disallowed and 3.6% if the alternative proposal is allowed. *Id.* This assertion is not only the same laughable argument attempted in *Hope*, but it also applies the wrong standard for determining whether a rate is constitutionally fair and reasonable. This is a key error. The guaranteed rate of return is a return on equity and not a total earned return. Many factors contribute to a utility's actual profits. The question for constitutionality is not whether a business is profitable overall but whether the rate of return on investment is just and reasonable. *Hope*, 320 U.S. at 605; *Jersey Cent.*, 810 F.2d at 1181.

Another similar case is *NAACP v. FPC*, where the Supreme Court held that the Commission was authorized to exclude from rates those costs that result from discriminatory practices just like "any other illegal, duplicative, or unnecessary labor costs." 425 U.S. 662, 668 (1976). The Court considered a hypothetical in which a utility would be unable to include in the rates backpay owed to a worker as part of a Title VII employment discrimination lawsuit. *Id.* The facts in this case are analogous to ComGen's attempt to pass unlawful costs into the rate. The interpretation of takings analysis considers a utility's operation and capital expenses as the "property" from which they cannot be deprived by unjust rates. The cost of remediating a failed corrective action does not fit into the category of investment or operating expense due Takings Clause treatment. In *NAACP*, the hypothetical labor cost associated with unlawful discrimination was treated as duplicative "double earning." *NAACP*, 425 U.S. at 668. ComGen already has the allowance to collect the infrastructure cost of environmental compliance in the original corrective plan. Allowing them to re-collect repair costs that were the result of negligence rewards bad behavior rather than protects unconstitutional taking.

This result would set a dangerous precedent in public policy. FERC incorrectly concluded that denying the cost would create a policy that disfavors environmental compliance. R.10. However, their position creates a policy that disfavors responsible maintenance of compliance in favor of negligent practices and cheaper construction that poses environmental risk. If this rate is allowed to stand, future utilities will see an opportunity to avoid diligent compliance and risk catastrophic failure because they are guaranteed to double collect on the cost of cleanup caused by negligence. This policy would set a dangerous precedent.

Disallowing rate recovery of the corrective action is not an unconstitutional taking under the *Hope* "end result" standard of interpreting just and reasonable rates. Upon a finding by this

court that there is no taking, FERC must set a rate that does not include remediation costs. FERC essentially agreed with every one of SCCRAP's arguments, yet chose to defer to ComGen's own testimony that there was an unconstitutional taking. R.12. Furthermore, the risk of investor return here should be noted as minimal in comparison to the typical shareholder relationship of a utility. There is only one shareholder here, CE, the parent company who sold the coal fired plant to ComGen in an attempt to insulate themselves from unprofitable plants in order to collect losses through a ratemaking proceeding. R.11. This "creative corporate restructuring" tactic is another reason to disfavor the policy of allowing this rate to include remediation costs. ComGen is not being deprived of their property without just compensation and should not be allowed to recover these costs through customer rates.

CONCLUSION

For all of the policy reasons stated, the prevailing law, and the facts in this case; SCCRAP respectfully asks that this court vacate the FERC decision and remand for ratemaking that is just and reasonable. SCCRAP further requests this court affirm the lower court’s granting of injunctive relief.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 6