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

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| **COMMONWEALTH GENERATING COMPANY,** *Appellant,* | ) | |
| v. | ) | |
| **STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),** *Appellee,* | ) | |
| | ) | C.A. No. 18-02345 |
| **STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),** *Petitioner,* | ) | |
| v. | ) | |
| **FEDERAL ENERGY REGULATORY COMMISSION,** *Respondent,* | ) | |
| **COMMONWEALTH GENERATING COMPANY,** *Intervenor.* | ) | |

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PETITION FOR REVIEW OF
THE DISTRICT COURT'S RULE
AND FERC'S DECISION

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# BRIEF FOR APPELLANT/INTERVENOR

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Team No. 24

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## JURISDICTIONAL STATEMENT

This case involves two separate proceedings, which this Court granted a petition for review and consolidation on December 21, 2018. Record ("R.") at 12. First, Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed suit against Commonwealth Generating Company ("ComGen") in the U.S. District Court for the District of Columbia in December 2017 (D.C. No. 17-01985). R. at 7. The District Court issued its final ruling in favor of SCCRAP on June 15, 2018. R. at 7. ComGen filed this appeal on July 16, 2018. R. at 8. The District Court had jurisdiction over this claim pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). This Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1291.

Second, ComGen also submitted a filing to the Federal Energy Regulatory Committee ("FERC") under Federal Power Act ("FPA") section 205 to recover from Vandalia Power and Franklin Power the costs of complying with the District Court order on July 16, 2018 (Docket ER-18-263-000); SCCRAP intervened. R. at 8. FERC issued its decision approving the rate revisions proposed by ComGen on October 10, 2018. R. at 11. SCCRAP sought rehearing of FERC's decision on November 9, 2018, which was promptly denied on November 30, 2018. R. at 12. SCCRAP petitioned this Court for review of FERC's decision on December 3, 2018. R. at 12. FERC has jurisdiction over this claim pursuant to 16 U.S.C. § 824(a). This Court has jurisdiction over this claim pursuant to 28 U.S.C. §1292.

## STATEMENT OF ISSUES PRESENTED

I. Under the Clean Water Act, is surface water pollution via hydrologically connected groundwater actionable, when the Act only provides jurisdiction over navigable waters, which do not include man-made retention ponds that hold solid waste?

II. Under Clean Water Act §1342, does the seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters, constitute the discharge of a pollutant from a point source, when the pollution does not directly and discretely discharge into navigable water from a distinct location?

III. Under Section 824(d) of the Federal Power Act, was FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 arbitrary and capricious, when FERC found the rate revisions to be just and reasonable, and its decision was supported by substantial evidence that the rate revision was necessary for ComGen to continue its operation?

IV. Under the Fifth and Fourteenth Amendments to the United States Constitution, is disallowing the recovery in the rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment an unconstitutional taking, when ComGen would no longer be rendered an economically viable public utility?

## STATEMENT OF THE CASE

This case arises from two separate proceedings, which have now been consolidated for decision. R. at 1. The first is an appeal from an order by the United States District Court for the District of Columbia granting SCCRAP's request for injunctive relief against ComGen. R. at 1. The second is the review of an order by FERC denying the rehearing of the Order Accepting ComGen's Revised Rate Schedule. R. at 1.

## I. Statutory and Regulatory Background

### A. The Clean Water Act

The Clean Water Act ("CWA") provides "the discharge of any pollutant [into navigable waters] by any person shall be unlawful," unless otherwise authorized by the Act. 33 U.S.C. § 1311(a). The CWA specifies that the "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "The term 'navigable waters' means the waters of the United States." 33 U.S.C. § 1362(7). Further, the term "point source" is defined as "any discernable, 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).

The CWA also established the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342(a). Under the NPDES the Environmental Protection Agency ("EPA") "may ... issue a permit for the discharge of any pollutant" into navigable waters. 33 U.S.C. § 1342(a). However, the authorized discharge still must comply with the effluent standards detailed in the permit or otherwise specified by the CWA. 33 U.S.C. § 1342(a). Under the NPDES system, regulatory authority is shared between the EPA and the States. 33 U.S.C. §§ 1342(b)-(c). With EPA approval a state can choose to establish and enforce its own permitting system. 33 U.S.C. § 1342(b)-(c). In the case at hand, the states of Vandalia and Franklin have chosen to administer independent permitting programs. R. at 6.

### B. The Federal Power Act

The Federal Power Act ("FPA") delegates to FERC the power of regulation over the actions of public utilities. 16 U.S.C. § 824. The FPA defines a public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission." 16 U.S.C. § 824(b). This

"appl[ies]to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . . . ." Under the FPA, FERC has the duty to "ensure that "[a]ll rates and charges [from] any public utility . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable . . ." and not unduly discriminatory. 16 U.S.C. § 824d. Further, FERC must remedy any rates that it determines are unjust, unreasonable or unduly discriminatory. 16 U.S.C. § 824e.

**II. Factual Background**

Commonwealth Energy ("CE") is a multistate electric utility company, which operates in the states of Vandalia and Franklin. R. at 3. CE is the parent company of ComGen and Commonwealth Energy Solutions ("CES"). R. at 3. In 2014 ComGen acquired the Vandalia Generating Station. R. at 4. Following this acquisition "ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company." R. at 4. Under this agreement 50% of the electricity produced at the Vandalia Generating Station would be sold to Vandalia Power (FERC Rate Schedule No. 1) and the other 50% would be sold to Franklin Power (FERC Rate Schedule No. 2). R. at 4.

The Vandalia Generating Station is located near the Vandalia River. R. at 4. Coal combustion residuals (CCR's), also known as coal ash, produced by the Vandalia Generating Station are disposed of in the Little Green Run Impoundment, immediately east of the generating station. R. at 4. The Little Green Run Impoundment was formed by the construction of a dam across Green Run. R. at 4. "Through groundwater monitoring that was required by permits issued by Vandalia Department of Environmental Quality ("VDEQ"), ComGen began in 2002 to detect arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards." R. at 5. "As required by its permits, ComGen notified VDEQ and began developing and

implementing a corrective action plan with VDEQ to mitigate the pollution." R. at 5. VDEQ approved the corrective plan in 2005. R. at 5. In 2006, pursuant to the corrective plan, "ComGen installed a high density polyethylene (HDPE) geomembrane liner on the west embankment of the Little Green Run Impoundment." R. at 5.

In March 2017, a water activist group detected levels of arsenic in the Vandalia River, through the process of routine water quality monitoring. R. at 5. It was "suggested that the source of the arsenic was the Little Green Run Impoundment." R. at 6.

## III. Procedural Background

### A. ComGen's Appeal from the District Court Ruling

SCCRAP brought suit against ComGen in the U.S. District Court for the District of Columbia in December 2017. R. at 7. SCCRAP's claim was brought under the citizen-suit provision of the CWA. R. at 7. SCCRAP alleged that ComGen violated 33 U.S.C. § 1311(a). R. at 7. Specifically, SCCRAP alleged "the Little Green Run Impoundment qualified as a point source from which arsenic seeped, polluting the groundwater around ComGen's Vandalia Station which was 'hydrologically connected' to Fish Creek and the Vandalia River, carrying arsenic to navigable waters." R. at 7.

The District Court ruled in favor of SCCRAP on June 15, 2018. R. at 7. Further, "the court ordered ComGen to fully excavate 38.7 million cubic yards of coal ash in the Little Green Run Impoundment and relocate it to a competently lined facility that complies with the EPA's Coal Combustion Residual (CCR) rule." R. at 8. ComGen promptly appealed to this court on July 16, 2018. ComGen challenges the findings that "(1) the CWA regulates discharges into navigable waters through hydrologically connected groundwater and (2) the Little Green Run Impoundment constitutes a point source under the CWA." R. at 8.

**B. SCCRAP's Appeal of FERC's Decision**

ComGen also submitted a filing to FERC on July 16, 2018. R. at 8. ComGen sought to recover the costs of complying with the District Court order from Vandalia Power and Franklin Power. R. at 8. "The filing consisted of proposed revisions to ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement) to recover over a 10-year period the cost of achieving compliance with the district court order, which ComGen estimated to be $246 million in its FERC rate filing." R. at 8. Under these agreements' this cost would be evenly distributed between Vandalia Power and Franklin Power, then flowing to each utility's retail customers. R. at 9. "ComGen's proposal would increase customer bills in each jurisdiction by about $2.15 per month in November 2019, and average households across in each jurisdiction would see bills rise by about $3.30 per month for the 10-year amortization period." R. at 9.

"SCCRAP intervened in the FERC proceeding and filed a protest in opposition to ComGen's filing." R. at 9. SCCRAP argued that ComGen should not be permitted to recover the costs of remediation from utility ratepayers. R. at 9. Additionally, SCCRAP asserted that even if "FERC agrees in principle with ComGen's filing to flow through the cleanup costs to Vandalia Power and Franklin Power . . . forcing Vandalia Power and Franklin Power to bear the full cost of the 'closure-by-removal' corrective actions" would violate the matching principle of utility ratemaking. R. at 9.

ComGen rejects all of SCCRAP's arguments and asserts "its implementation of VDEQ's corrective plan in 2006 was consistent with prudent utility practice and that it cannot be held strictly liable for the failure of the weld in the seam of the HDPE liner." R. at 10. Further, "ComGen exercised due care in retaining a competent subcontractor to implement the VDEQ

corrective plan at the Little Green Run Impoundment." R. at 10. Regarding the "matching principle," ComGen asserts the cost of remediation can be properly allocated to Vandalia Power and Franklin Power, as these costs will be incurred during the term of their unit power service agreements. R. at 10.

ComGen also asserts that to disallow recovery of the $246 million remediation would "effectively erase the majority of its profits over the proposed 10-year recovery period." R. at 10. Instead of "earning the 10.0% return on equity authorized by FERC . . . the actual earned return over this period will fall to 3.2%." R. at 10. This level of profits would be insufficient to "properly balance the interests of the ratepayers and ComGen's shareholders, maintain its financial integrity, and assure confidence in [] its financial soundness, thereby undercutting its ability to raise capital on reasonable terms." R. at 11. Thus, "ComGen asserts that the relief requested by SCCRAP, if granted, would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution." R. at 10.

FERC issued its decision approving ComGen's proposed rate decisions on October 10, 2018. R. at 11. SCCRAP sought rehearing of FERC's decision on November 9, 2018. R. at 12. FERC denied SCCRAP's request on November 30, 2018. R. at 12. SCCRAP filed a complaint to this court on December 3, 2018. R. at 12.

## SUMMARY OF THE ARGUMENT

Broad statutory provisions still have limitations. Since the enactment of the Clean Water Act, courts have struggled to find a balance between the intent of Congress and regulatory overreach. Under section 1342, Congress specifically sought to address discharges from point sources into navigable waters. This type of statutory construction speaks to the intent of Congress. Congress understood that contamination of groundwater could affect navigable waters; however,

Congress decided to address groundwater contamination and discharges from nonpoint sources through other provisions of the CWA and statutes like the Resource Conservation and Recovery Act. Because it is clear that Congress did not intend to regulate groundwater pollution and discharges from nonpoint sources under the CWA, neither of SCCRAP's claims are actionable under the CWA.

Regulatory agencies are required to balance the interests of consumers with those of investors. Under section 824 of the Federal Power Act, FERC is required to determine whether rates are just and reasonable, and not unduly discriminatory. Further, the common law Hope principle requires FERC to account for the end results of rate determinations which allows for a fair rate of return on the invested capital of a public utility. In order for this Court to find that FERC has failed to account for all of the necessary factors in making its rate determination, SCCRAP must prove that there is virtually no evidence in the record to support FERC's rationale for approving ComGen's revisions of Rate Schedule No. 1 and Rate Schedule No. 2.

Investors are entitled to a fair rate of return on investments. Specifically, a public utility is entitled to ask for a fair return upon the value of that which it employs for the public convenience. Without a sufficient return on value, courts will make the determination that the rates are unconstitutional because they deprive the public utility of its property without compensation in violation of the Fifth and Fourteenth Amendments. Without allowing ComGen to recover in rates the costs of remediating the Little Green Run Impoundment, ComGen would no longer be able to attract capital investments, and thus would likely cease its operations. Such an action would result in an unconstitutional taking.

## ARGUMENT

### I. BECAUSE CONGRESS DID NOT INTEND FOR THE CLEAN WATER ACT TO COVER GROUNDWATER, THE JURISDICTIONAL REACH CANNOT BE EXTENDED BEYOND THE PLAIN MEANING OF THE ACT TO INCLUDE MAN-MADE RETENTION PONDS WHICH HOLD SOLID WASTE.

Since its enactment, the jurisdictional reach of the CWA has been unclear. In a series of Supreme Court cases, culminated in the *Rapanos v. United States* decision, the Court sought to define the jurisdictional reach of the CWA and understand the intent of Congress. Because the Court has held that contamination of isolated, non-navigable waters is not actionable under the CWA, this Court must dismiss SCCRAP's claims based due to lack of jurisdiction.

#### A. The CWA Does Not Provide Jurisdiction Over the Little Green Run Impoundment, a Coal Ash Pond, Because the CWA Only Provides Jurisdiction Over Navigable Waters.

Because coal ash ponds are not navigable waters as defined by the CWA, the Little Green Run Impoundment is outside of the jurisdictional reach of the CWA. The Little Green Run Impoundment is an isolated, non-navigable, man-made coal ash pond and is therefore not a "water of the United States." Congress intended to address coal ash ponds through other federal regulations, such as the Resource Conservation and Recovery Act. Because Congress did not intend to include isolated, non-navigable tributary waters in the definition of "navigable waters," SCCRAP's claim is not actionable under the CWA.

The CWA defines "navigable waters" as "waters of the United States . . . ." 33 U.S.C. § 1362(7). The term "navigable" illustrates the importance of what Congress intended when it specified the jurisdictional reach of the CWA: its traditional jurisdiction over waters that were or had been navigable in fact, or which could reasonably become navigable. *See*, *e.g.*, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-8. If the intent of Congress is clear, this Court

"must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

In *United States v. Riverside Bayview Homes, Inc.* ("*Bayview Homes*"), the Court was asked to determine if a wetland which was adjacent to a "navigable water" was within the CWA's jurisdiction. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Supreme Court held that the CWA provided jurisdiction over the defendant's land, which was saturated and within the category of a wetland, "provided that the saturation is sufficient to and does support wetland vegetation." *Id.* at 129-130. Based on this finding, the Court ruled that the wetland was included in the "waters of the United States" and included within the scope of the Corps' jurisdiction over "navigable waters." *Id.* at 131.

The Supreme Court, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), held that the Migratory Bird Rule does not provide permit jurisdiction to the Corps over isolated, non-navigable waters of the United States. *Solid Waste Agency of N. Cook Co. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). The Court began its analysis by explaining that the CWA grants the U.S. Army Corp of Engineers ("Corps") the authority to issue permits "for the discharge of dredged or fill material into the navigable water[s]" of the United States. *Id.* at 162. Based on that authority, the Corps issued regulations broadly expanding the term "navigable waters" to include intrastate lakes, rivers, stream, wetlands, and similar bodies of water. *Id.* Applying the rationale articulated in *Bayview Homes*, the Court held that there is no such nexus between the ponds at the fill site and a navigable waterway. *Id.* at 167. Because there may be migratory birds present on the isolated waters, it is insufficient to grant CWA permit authority to the Corps. *Id.*

In *Rapanos v. United States*, the Supreme Court further explored CWA protections for non-navigable tributaries and their adjacent wetlands. *Rapanos v. United States*, 547 U.S. 715 (2006). Specifically, the *Rapanos* Court addressed whether the unauthorized filling of wetlands on three sites in Michigan was actionable under the CWA. *Id.* Writing for the plurality, Justice Scalia opined that "waters of the United States" may be extended beyond traditional navigable waters to include "only those relatively permanent, standing or flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 732 (quoting *Water*, *Webster's New International Dictionary of the English Language* (2nd ed. 1955)). The plurality opinion noted that "the discharge into intermittent channels of any pollutant that naturally washes downstream likely violated [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* at 743. Because the property at issue is only intermittently saturated with water from rainfall, it did not fall under the jurisdiction of the CWA. *Id.* Ultimately, Justice Scalia concluded the CWA did not apply to the defendant's parcel of land which was intermittently saturated with rainwater. *Id.*

Here, as distinguished from *Bayview Homes*, any seepage from the Little Green Run Impoundment into groundwaters is not actionable under the CWA. The Court in *Bayview Homes* found CWA jurisdiction over a natural wetland which could support vegetation. Here, the Little Green Run Impoundment is not a natural wetland, but rather a man-made storage container, which holds solid waste. Because the Little Green Run Impoundment cannot support vegetation and is not a natural wetland, SCCRAP's claim is not actionable under the CWA.

Similar to the holding in *SWANCC*, the CWA does not provide jurisdiction over non-navigable isolated waters. In *SWANCC*, the Court declined to extend the jurisdiction of the CWA

to isolated fill ponds which did not provide a clear connection to navigable waters. Here, the isolated coal ash pond does not provide any clear connection to any navigable waterway. Moreover, there is no significant nexus between the Little Green Run Impoundment and the navigable waters of the Vandalia River and Fish Creek. Because there is a *possibility* that a hydrological connection between groundwater and surface water exists, it is insufficient to conclude that an isolated man-made holding container, which has no significant nexus to surface waters, is actionable under the CWA.

Here, as in *Raponos*, the Little Green Run Impoundment is a non-navigable retention pond which stores solid waste. Water does not flow directly out of or into the pond and there is no continuous surface connection to bodies that are "waters of the United States." To classify a man-made, non-navigable, isolated pond as a navigable water would extend the jurisdictional reach of the CWA and would contradict the judicial precedent. Because the Supreme Court has declined to expand the jurisdictional reach of the CWA to include non-navigable waters which may become intermittently saturated with rain water, this Court must find that surface water pollution via hydrologically connected groundwater is not actionable under the CWA.

Because the CWA does not provide jurisdiction over the pollution of surface waters via hydrologically connected groundwaters, SCCRAP's claim must be dismissed. The Supreme Court precedent has held that isolated, non-navigable tributary waters are not "navigable waters," and therefore, this claim is not actionable under the CWA.

### B. The Courts of Appeals Agree That There is Not a "Hydrological Connection" Exception in the Clean Water Act.

The District Court rejected ComGen's argument that Section 1311(a) did not cover the seepage of arsenic from coal ash into the groundwater. R. at 7. Reaching this conclusion required

the district court to find that the CWA covered discharges into groundwater which have a "direct hydrological connection" to navigable waters. However, this "hydrological connection" exception is contrary to court of appeals precedent.

For purposes of determining CWA jurisdiction, the only non-traditional waters covered by the CWA are "those wetlands with a continuous surface connection to bodies [of water] that are 'waters of the United States' in their own right." *Rapanos*, 547 at 741. Congress did not intend for the CWA to "extend federal regulatory and enforcement authority over groundwater contamination." *Kelley ex rel Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985). Instead, "such authority was to be left to the states." *Id.* Where an administrative interpretation of a statute invokes the outer limits on Congress' power, courts expect a clear indication that Congress intended that result. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Seventh Circuit in *Village of Oconomowoc Lake v. Dayton Hudson Corp* ("*Oconomowoc Lake*") held that liability under the CWA does not include pollutants "seep[ing]" into "local groundwaters." *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). The court acknowledged that *all* groundwaters *could* be considered under the CWA, however the Act does not attempt to establish that power to its fullest extent. *Id.* (emphasis added). Further, the CWA does not assert authority over groundwaters, "just because the[y] may be hydrologically connected with surface waters." *Id.* at 965. The court noted that "[t]he omission of ground waters from the regulations [wa]s not an oversight." *Id.* For these reasons, the court refused to extend the scope of the CWA jurisdiction to include ". . . artificial ponds that drain into ground waters." *Id.* at 966.

The Fifth Circuit in *Rice v. Harken Exploration Co.* ("Rice"), rejected plaintiff's hydrological connection theory, holding that the possibility of a hydrological connection between groundwater and a river is not sufficient to provide jurisdiction under the CWA. *Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001). In light of Congress's decision not to regulate ground waters under the CWA, the court was reluctant to construe the Oil Pollution Act in such a way as to "apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272. The court held, a "body of water is protected under the Act only if it is actually navigable . . . ." *Id.* at 270. Ultimately, the court held "that ground waters are not protected waters under the CWA." *Id.* at 269.

Here, compared to *Oconomowoc Lake*, the CWA does not assert authority over groundwaters just because there may be a hydrological connection between the Little Green Run Impoundment and surface waters. Further, the Little Green Run Impoundment is an artificial pond, therefore, liability under the CWA must not be extended to include the seepage of pollutants into groundwater which *may* be hydrologically connected to surface waters. To find that the CWA provides authority of groundwaters would oppose the intent of Congress.

Here, as in *Rice v. Harken Exploration Co.*, SCCRAP's hydrological connection theory must fail. The possibility of a hydrological connect between groundwater and a river is not sufficient to provide jurisdiction under the CWA. Further, Congress did not intend to into include groundwaters under the protections on the CWA. As compared to *Rice*, the groundwater beneath the Little Green Run Impoundment is not a navigable body of water. Because there is not a clear connection between the pollution found in the Vandalia River and Fish Creek, this Court must find

that the possibility of hydrological connection is not sufficient to find SCCRAP's claim actionable under the CWA. To find SCCRAP's claim actionable would be contrary to the intent of Congress.

Pollution reaching surface water via hydrologically connected groundwater is not actionable under the CWA. Groundwater *may* provide a connection to traditional navigable surface waters; however, in this case, SCCRAP has failed to show there is a direct connection between the Little Green Run Impoundment and the Vandalia River and Fish Creek. Because groundwaters are not considered navigable waters, and because Congress did not intend to include the protection of groundwaters under the CWA, this Court must find that ComGen is not in violation of the CWA.

## II. COMGEN IS NOT IN VIOLATION OF SECTION 1342 OF THE CLEAN WATER ACT, BECAUSE A SEEP DOES NOT MEET THE STATUTORY DEFINITION OF A POINT SOURCE UNDER SECTION 1362

Seepage from the Little Green Run Impoundment that passes through groundwater into navigable waters does not qualify as the discharge of a pollutant from a point source because such a discharge is not discernible, confined, or discrete under the plain meaning of section 1362 of the CWA. Further, the Courts of Appeals are in agreement that the term "point source" does not apply to pollutants which pass through groundwater to navigable waters. Because Congress did not include discharges from groundwater into navigable waters under section 1362, this Court must find that ComGen is not in violation of CWA section 1342.

The Clean Water Act allows for the "discharge of pollutants" into navigable waters, under the National Pollutant Discharge Elimination System. 33 U.S.C. § 1342(a). Under Section 1362(12) of the CWA, the term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 1362(14) defines a "point source" as "any discernible, confined, and discrete conveyance, including . . . any

pipe, ditch, channel, tunnel, conduit, well, discrete fissure, contained, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362.

In reviewing an agency's interpretation of the statute which it administers, a court first looks to whether Congress has spoken to the precise question at issue. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). If Congress's intent can be understood from the plain language of the statute, then that intent must be given effect. *Id*. If the statute speaks to the precise question at issue, the court must follow the statute's instructions. *Id*.

In *Kentucky Waterways Alliance v. Kentucky Utilities Company*, plaintiffs alleged that the chemicals found in two man-made coal ash ponds were "contaminating the surrounding groundwater," which in turn was contaminating a nearby lake. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 928 (6th Cir. 2018). Plaintiffs argued that "groundwater is a point source in that it amounts to a network of conduits through which pollutants flow." *Id.* at 932. The Sixth Circuit rejected this theory finding that "neither groundwater nor the karst through which it travels is a point source . . ." as defined by the CWA. *Id.* at 933. The court emphasized that a point source must be "'discernible, confined, and discrete.'" *Id.* (quoting 33 U.S.C. § 1362(14)). Based on the plain meaning of the statute, the court concluded that groundwater is not discernible, confined, or discrete, and that "[b]y its very nature, groundwater is a 'diffuse medium' that seeps in all directions . . .." *Id.* The Sixth Circuit concluded that "[o]ne cannot look at groundwater and discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels." *Id.*

In *Froebel v. Meyer*, plaintiff alleged the defendants violated section 402 of the CWA when silt and other fill materials from a deconstructed dam were discharged into navigable waters. *Froebel v. Meyer*, 217 F.3d 928, 932 (7th Cir. 2000). The Seventh Circuit acknowledged that a

dam *could* meet the statutory definition of point source; however, in order to meet that definition, there must be "outlets from the dam itself, such as spillways, pipes, and valves." *Id.* at 937 (emphasis added).

The Ninth Circuit in *Greater Yellowstone Coalition v. Lewis*, ("*Yellowstone*") also addressed the issue of whether groundwater seepage met the statutory definition of a point source, under the CWA. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2010). In *Yellowstone*, plaintiffs argued that a mining company violated the CWA when it failed to obtain a permit which allowed the discharge of pollutants through a seep in a coal pit into groundwaters. *Id.* at 1152-53. The court noted that a discharge can occur when some water seeps through the cover and into the pits containing waste rock. *Id.* at 1153. This type of discharge, however, does not qualify as a point source "because there is no confinement or containment of the water." *Id.* Therefore, "pits that collect waste rock do not constitute point sources within the meaning of the CWA." *Id.*

The Fourth Circuit, in *Sierra Club v. Va. Elec. & Power Co.*, addressed the issue of whether seeps from a man-made coal ash pond qualified as a discharge within the meaning of the CWA. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018). The court concluded

> "that while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters — having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters — that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source."

*Id.* at 410. Further, the court stated that coal ash ponds "from which arsenic diffusely seeped, can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act." *Id.* at 412. For these reasons, the Fourth Circuit held that the scope of the permitting

scheme of CWA section 1342 did not apply to the discharge of a pollutant from a non-point source. *Id.* at 414-15.

In this case, as in *Ky. Waterways*, the Little Green Run Impoundment does not function as a point source. The conveyance of pollutants into groundwater through a seep is not discernable, discrete or confined. Similar to the facts in *Ky. Waterways*, there is not a clear location from which the seep in the Little Green Run Impoundment is conveying pollution into navigable waters. Here, SCCRAP has failed to show that a seep meets the definition of a point source under the section 1362, therefore this Court must find that ComGen is not in violation of section 1342.

Similar to *Froebel*, the Little Green Run Impoundment could qualify as a dam; however, there are no features on the Little Green Run Impoundment which allow its contents to be discharged through an outlet, spillway, pipe, or valve. Because the Little Green Run Impoundment does not discharge pollutants from a discernable, discrete, or confined conveyance, this Court must hold that seepage from a coal ash pond does not qualify as a point source under CWA section 1362 and therefore ComGen is not in violation of the CWA.

Here, as in *Yellowstone*, the discharge of pollutants through a seep in a coal ash pond into groundwaters and then into navigable waters does not meet the statutory definition of a point source. The Little Green Run Impoundment discharges pollutants, but it does so as a nonpoint source. Because seepage of pollution from the Little Green Run Impoundment through groundwater into navigable waters is not a point source, this Court must find that ComGen is not in violation of section 1342 of the CWA.

Here, as in *Sierra Club v. Va. Elec. & Power Co.*, a simple causal link between pollution from the Little Green Run Impoundment to other surface waters does not violate section 1342 of the CWA. Section 1342 specifically requires that discharges derive from a point source. Because

the Act narrowly defines the term "point source," and the word "seep" is not included in that definition, ComGen in not in violation of section 1342. SCCRAP must show a direct point source discharge between the Little Green Run Impoundment and the Vandalia River and Fish Creek. Here, SCCRAP has failed to do so, therefore this Court must find that ComGen has not violated section 1342 the CWA.

SCCRAP's claim that seepage of pollutants from the Little Green Run Impoundment through groundwater to navigable waters is without merit. Section 1362(14) of the CWA expressly defines the term "point source" and the term "seep" is not included in that definition. This Court must not expand that definition beyond the plain meaning of the statute. For these reasons, this Court must find that ComGen is not in violation of Section 1342 of the CWA.

## III. FERC REASONABLY EXERCISED ITS AUTHORITY UNDER SECTION 824(D) OF THE FEDERAL POWER ACT WHEN IT GRANTED COMGEN'S RATE REVISION REQUEST BASED ON THE APPLICABILITY OF THE HOPE PRINCIPLES.

FERC has acted reasonably and within the scope of its statutory authority when it made its decision to approve ComGen's rate revision request. Section 824d of the FPA expressly requires FERC to ensure that the rates and terms and conditions of wholesale electric sales by public utilities are just and reasonable, and not unduly discriminatory. Here, FERC acted reasonably when it made it considered the end result of the rate increase.

Under the Hope principle, FERC is "not bound to the use of any single formula or combination of formulae in determining rates" when it interprets the phrase "just and reasonable." *Fed. Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944). "Just and reasonable" rates should "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Id.* at 605. The "end result" test

articulated in *Hope* specifies the following conditions which allow for a fair rate of return on the invested capital of a public utility:

> (1) it should be sufficient to maintain the financial integrity of the utility;
> (2) it should be sufficient to compensate the utility's investors for the risks assumed; and
> (3) it should be sufficient to enable the utility to attract needed new capital.

*Id.* at 602.

Courts must determine if the agency's findings are "reasoned inferences from substantial evidence." *Memphis Light, Gas and Water Division v. FPC,* 504 F.2d 225, 236 (D.C.Cir. 1974). FERC's decision may be reversed only if this Court finds FERC's actions to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Further, "FERC's judgment about utilities' reasonable expectations [are] precisely the type of policy assessment to which [the court] owe[s] great deference." *Transmission Access Policy Study Grp. v. FERC,* 225 F.3d 667, 702 (D.C. Cir. 2000).

The Court in the *Permain Basin Area Rate Cases*, ("*Permain Basin*") reviewed FPC orders which set regional rates for gas producers. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). *Permain Basin* affirmed the principles articulated in *Hope,* stating that a court reviewing a rate order must assure itself both that "each of the order's essential elements is supported by substantial evidence" and that

> the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks that they have assumed, and yet provide appropriate protection to the relevant public interest . . . .

*Id.* at 968. Applying the "end result" test articulated in *Hope*, the Court held that "the record before the Commission contained evidence sufficient to establish that the . . . rates, as adjusted, will maintain . . . the industry's credit and continue to attract capital." *Id.* at 812.

In *Anaheim, Riverside, Banning, Colton & Azusa v. Federal Energy Regulatory Com.*, ("*Anaheim*"), the petitioners, sought review of FERC's decision to approve an increase of wholesale electric power rates of a utility company. *Anaheim, Riverside, Banning, Colton & Azusa v. Fed. Energy Regulatory Com.*, 669 F.2d 799 (D.C. Cir. 1981). In its discussion regarding rate return, this Court applied the *Hope* principle, holding that a "12.75% rate of return was shown to be consistent with that yielded on equity investments in enterprises determined to be of a comparable risk . . ." *Id.* at 803. Because FERC's decision was "appropriately supported by the evidence," consistent with the *Hope* ratemaking principles, and adequately balanced the consumer interests with that of the utility's investors, this Court ultimately upheld FERC's approval of the utility company's wholesale rate increase. *Id.* at 804.

Here, as in *Permain Basin*, FERC provided its reasoning and methodology for why it approved ComGen's rate increase. Without the necessary investments and capital, ComGen will not be able to provide power to consumers. FERC recognized this issue and did exactly what the *Hope* principle requires it to do: balance the utility's interest and the public's interest. Because Congress left a broad gap for FERC to fill and because FERC is not bound by a single method for calculating rates, this Court must find that FERC has not acted arbitrarily. Specifically, FERC emphasized that as a matter of policy, it was important to allow utilities to recover the costs of environmental cleanups as a means of promoting environmental protection. R. at 11.

Here, as in *Anaheim*, FERC's decision to allow ComGen to increase the Rate Schedules No. 1 and No. 2 was appropriately supported by the evidence. FERC stated that approval of the

rate increase was contingent upon the District Court's injunctive relief withstanding judicial review. R. at 11. Further, FERC agreed that ComGen should be liable for a portion of the remediation costs; however, to deny ComGen the ability to recover the costs of remediation through rate increases would likely jeopardize the financial integrity of ComGen. R. at 11. FERC also explained that as a matter of policy, it is important to allow utilities to recover the costs of environmental cleanups as a means of promoting environmental protection. R. at 11. Because FERC provided substantial evidence to support its decision to approve ComGen's rate increase, FERC has not acted arbitrarily.

Because FERC has acted reasonably and has offered evidence in support of its decision, this Court must uphold FERC's approval of ComGen's Rate Schedule No. 1 and No. 2. To disallow ComGen's rate increase would violate the principles articulated in *Hope* and would certainly result in the deprivation of ComGen's ability to remain an economically viable public utility.

## IV. A DECISION TO DISALLOW THE RECOVERY IN RATES OF THE COSTS INCURRED BY THE REMEDIATION OF THE LITTLE GREEN RUN IMPOUNDMENT IS AN UNCONSTITUTIONAL TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Under the Fourteenth Amendment, "no state shall deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. If utility rates do "not afford sufficient compensation, the State has taken the use of utility property without paying just compensation," and therefore violates the Fifth and Fourteenth Amendments. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). Ultimately, a public utility is "entitled to ask [for] a fair return upon the value of that which it employs for the public convenience." *Smyth v. Ames*, 169 U.S. 466, 547 (1898).

In *Bluefield Water Works v. Public Service Commission*, the Supreme Court addressed the issue of whether disallowing a utility company to increase its rates would result in the deprivation of the company's property without due process. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923). The Court held that in order for rates to be constitutional, they must be "sufficient to yield a reasonable return on the value of property used, at the time it is being used to render the service. . . ." *Id.* at 690. Rates which are not sufficient to yield such a return are "unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment." *Id.*

Here, as in *Bluefield*, if FERC were to disallow the recovery in rates for all or a portion of the costs incurred by the remediation of the Little Green Run Impoundment, the financial integrity of ComGen would be severely compromised. R. at 12. A decrease from a 10.0% return on equity to a 3.2% would not protect ComGen's financial integrity. R. at 10. Such a compromise would likely result ComGen not being able to attract necessary capital and fairly compensate investors for the risks that they have assumed. Without acquiring the necessary capital, ComGen will likely not be able to continue its operation. To deprive a utility of its ability to remain economically viable without providing just compensation is in an unconstitutional taking under the Fourteenth Amendment.

As a public utility, ComGen in entitled to ask for a fair rate of return on its investments. Without allowing a rate increase to recover the cost of its operations, ComGen will not be able to continue its operations due to a lack of capital investments. This Court must find that to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment would be an unconstitutional taking in violation of the Fifth and Fourteenth Amendments.

## CONCLUSION

For the foregoing reasons, this Court should find that Issue I is not actionable under the CWA. Next, this Court should find that seepage from the Little Green Run Impoundment does not qualify as a point source, therefore ComGen is not in violation of section 402 of the CWA. This Court should uphold FERC's decision to approve ComGen's revised Rate Schedule No. 1 and Rate Schedule No. 2 request, finding that FERC's decision was not arbitrary and capricious. Finally, this Court should enter a determination with respect to Issue IV that to disallow the recovery in rates of the costs incurred by ComGen in remediating the Little Green Run Impoundment would violate the takings clause under the Fifth and Fourteenth Amendments.

Respectfully submitted,

*Team No. 24*

## CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing *Team No. 24* 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, 2018.

Respectfully submitted,

*Team No. 24*