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

COMMONWEALTH GENERATING COMPANY,
APPELLANT,
-V.- C.A. NO. 18-02345
STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),
APPELLEE

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),
PETITIONER,
-V.-
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

COMMONWEALTH GENERATING COMPANY,
INTERVENOR

Consolidated appeal from Decision by the United States District Court for the District of Columbia

&

Order by the Federal Energy Regulatory Commission

Brief of Appellant-Intervenor

Commonwealth Generating Company

Team No. 18

Table of Contents

Table of Authorities

Cases **Page**

Constitutional Provisions **Page**

Statutes **Page**

FERC Decisions **Page**

Other Sources **Page**

Jurisdictional Statement

Regarding issues I and II, the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, insofar as the complaint alleged claims arising under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* This Court has appellate jurisdiction under 28 U.S.C. § 1291, as the district court entered a final judgment on July 15, 2018, and defendants, ComGen, filed a timely notice of appeal on July 16, 2018. (R. 7-8).

In regard to issues III and IV, the Federal Energy Regulatory Commission has proper jurisdiction under the Federal Power act to regulate the "transmission of electric energy in interstate commerce" and the sale of electric energy at wholesale in in interstate commerce." 16 U.S.C. §824(b). Due to ComGen's agreements with Vandalia Power and Franklin Power, it is a public utility within the meaning of the law and is required to have its rates filed and approved by FERC. (R. 7). The rate at issue was filed for review with FERC on July 16, 2018. (R. 8). FERC's decision on the rate was reached after evidentiary hearing on October 10, 2018 and rehearing was denied on November 30, 2018. (R. 12). Appeal of this order was timely filed with this Court on December 3, 2018. (R. 12).

This Court has proper jurisdiction to review the FERC decision for two reasons. First, an appeal of a final FERC order regarding the federal regulation and development of power is properly heard in the D.C. Court of Appeals. 16 U.S.C. §825l(b). Further, due to the central constitutional question presented by issue IV, this dispute arises under the Constitution of the United States and this Court has jurisdiction under 28 U.S.C. §1331.

Issues Presented

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

II. Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of §311(a) of the Clean Water Act.

III. 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.

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

Summary of the Case

ComGen is a subsidiary of Commonwealth Energy, a multistate electric utility holding company providing vital electricity services at both the retail and wholesale level in nine states. (R. 3). In 2014, Commonwealth Energy was working to reduce costs lost through the competitive wholesale energy market and developed a plan to ensure financial stability by bringing more operations into the regulated retail sector; as part of these reorganization efforts, Commonwealth subsidiary ComGen purchased the Vandalia Generating Station. (R. 3-4). The Vandalia Generating Station was an operation built by a separate Commonwealth Energy subsidiary and brought online from 2000-2002. (R. 4). After regulatory approval of the acquisition, ComGen entered into service agreements with Vandalia Power Company and Franklin Power Company. (R. 3-4). These agreements are subject to FERC's jurisdiction under the Federal Power Act. (R. 3-4).

CCRs (Coal Combustion Residuals), commonly known as Coal Ash, are necessary byproducts of using coal to create electric energy at power generating plants. (R. 3). They are one of the largest, most common industrial waste sources in the United States. (R. 3). There are various types of ash produced through this process that may contain toxic contaminants that may prove hazardous to some potential drinking-water sources in the absence of proper handling and mitigation. (R. 3). CCRs can be properly disposed of in off-site landfills, on-site landfills, or surfaces impoundments. (R. 3).

In 2012, 60% of CCRs were disposed of in on-site landfills and surface impoundments. (R. 3). The Little Green Run Impoundment is one such site; this on-site, surface impoundment is located adjacent to the Vandalia Generating Station owned. (R. 4-5). This impoundment was formed by constructing a dam across Green Run east of the Vandalia Station. (R. 4). This dam

is 395 tall and the top is over 1000 feet above sea level. (R. 4). Currently, it covers 71 surface acres and contains 38.7 million cubic yards of solids. (R. 4). These solids are mostly CCRs, Coal fine, and waste removed during the coal cleaning process. (R. 4-5).

Toxin levels exceeding Vandalia Water Quality standards were first discovered during routine testing in 2002 as part of the permitting process. (R. 5). The elevated levels were properly reported, and a corrective plan was approved by the Vandalia Department of Environmental Quality in 2005. (R. 5). As part of this corrective action plan, a high-density geomembrane liner was installed at the site in 2006 to contain any toxins from the waste. (R. 5).

Several years later, an NGO focused on water protection unfortunately discovered elevated levels of toxins through routine testing. (R. 5-6). Further testing suggested that toxins were leaching from coal ash stored at the Little Green Run site, causing water pollution. (R. 6). After a Vandalia Department of Environmental Quality investigation, it was determined that improper welding had created a faulty seam in the protective liner at Little Green Run had allowed seepage. (R. 6).

SCCRAP, a national environmental and public interest organization based out of Washington D.C., began to challenge impoundments for the disposal of CCRs by mounting lawsuits against operators under RCRA and the CWA, as well as through intervening in FERC proceedings, in 2015. (R. 5). SCCRAP claims that members in the city of Mammoth impacted by environmental waste from the Little Green Run Impoundment. (R. 5).

Procedural Background

1. SCCRAP District Court suit

SCCRAP filed against ComGen under the citizen-suit provisions of the Clean Water Act, alleging a violation of CWA provisions prohibiting the discharge of any pollutant to a navigable

waterway. (R. 7). SCCRAP argued that the Little Green Run Impound was a point source that allowed seep to groundwater hydrologically connected to Fish Creek and ultimately the Vandalia River. (R. 7). Despite ComGen's position that the CWA does not extend to groundwater seepage, the District Court concluded that ComGen was in violation and the site was a point source under the meaning of the CWA due to the hydrological connection to navigable waters via groundwater. (R. 7-8). The Court ordered ComGen to full excavate the coal ash at the site and relocate it to a "competently lined" facility complying with EPA regulations. (R. 8). Following this order, ComGen filed appeal seeking review on issues one and two before this Court. (R. 8).

2. SCCRAP FERC appeal

In addition to appealing the district court order regarding the Little Green Run Site, ComGen filed with FERC to adjust rates and recover from Vandalia Power and Franklin Power the costs associated with complying with the District Court order. (R. 8). ComGen estimated the cost of compliance at $246,000,000. (R. 8). This cost in the FERC filing is allocated equally to Vandalia and Franklin. (R. 8). Customers of each would see rate adjustments to cover the considerable costs associated with excavating the site. (R. 9). SCCRAP intervened in the FERC proceeding and argued that ComGen should not be granted the requested changes because:

1. Under the prudence principle of utility ratemaking, ComGen should not be able to recover costs associated with incompetent implementation of the 2006 corrective plan; and in the alternative,

2. Franklin Power and Vandalia Power should not have to bear the full cost of remedying accumulation that has accrued since 2000 when both parties only entered into their contract in 2014; instead, SCCRAP argued that under the matching principle of utility ratemaking, Franklin

Power and Vandalia Power would only be equally responsible for 19.5% of the costs incurred by ComGen in complying with the District Court order. (R. 8).

After SCCRAP's intervention, FERC suspended the ComGen rate filing and set the matter for hearing on the issues raised by SCCRAP. (R. 10).

ComGen maintains that the company acted prudently in securing a subcontractor to complete the repairs in 2006 and that recovering the full-cost from Franklin Power and Vandalia Power would not violate the matching principle because the suit was filed after the agreements with Franklin Power and Vandalia power were executed; furthermore, the full cost of the removal will be incurred during the agreements. (R. 10). Additionally, ComGen argued that granting the relief requested by SCCRAP would violate the 5th and 14th amendments, because an unconstitutional taking would occur as a result of erasing ComGen's profits for the next decade. (R. 10-11). Such an action would not balance the interests of shareholders and ratepayers, would undercut the ability to raise capital on reasonable terms, and would run afoul of the tests for just and reasonable rates and the end result test. (R. 11).

Following evidentiary hearings on the matter, FERC issued a decision approving the rate revisions proposed by ComGen. (R. 12). The approval would only become effective in the future subject to a compliance filing to confirm that the decision of the District Court withstands judicial review and the remedial action must be implemented. (R. 12).

SCCRAP sought rehearing and, after rehearing was denied, sought judicial review of the decision. (R. 12). In its petition for review SCCRAP alleges that FERC's decision was arbitrary and capricious and further challenges. (R. 12). Further, SCCRAP challenges the FERC decision regarding whether refusal to grant ComGen's requested rate would be an unconstitutional taking. (R. 12).

Due to the common issues and parties in both actions, ComGen, SCCRAP, and FERC filed a joint motion to consolidate the actions for decision. The D.C. Circuit Court of appeals granted this motion. (R. 12).

Summary of the Argument

SCRAPP's claim fails to meet the five necessary elements of a successful Clean Water Act claim. Accordingly, we ask this court to reverse the district court's opinion regarding Clean Water Act liability because: (1) Groundwater is not a navigable water of the United States under the judicially created expansion of the CWA through a hydrological connection; and (2) the Little Green Run is not a point source.

Groundwater is not covered in the permitting process, despite its relativity to a navigable water. The plain language of the clean water act simply does not extend to attenuated hydrological connections. Furthermore, the statute differentiates between groundwater and navigable waters on various occasions, providing further indication that the act has a different formulation than the district court of what waterways qualify to invoke CWA jurisdiction. The concept of a hydrological connection is a mere judicial expansion upon the plain language and intent of the CWA. The lack of explicit statutory authorization for regulating a hydrological connection has led to a circuit split regarding the issue presented by this case. Additionally, the cooperative federalism model of the CWA would be disrupted by a definitive finding that the CWA extends to mere hydrological connections. This would significantly strain the federal administrative system by expanding federal jurisdiction over water pollution issues beyond the original narrow definition.

Additionally, the Little Green Run is not a point a source because it fails to meet the definition's requirements. In order to be a point source, there are three requirements that must be met. The Coal Ash at Little Green Run fails to meet the requirements for to be considered a point source because it is not a conveyance and does not convey pollutants. It also not a discrete source in the traditional sense of point source regulation and deeming this Coal Ash Impound a

point source would create a floodgates problem that our legal system is not prepared to handle, given that the majority of coal ash waste is stored in sites similar to that at Little Green Run.

In regard to the Federal Energy Regulatory Commission decision, it is incredibly important to remember that a rate determination requires technical and industry knowledge to make a fair and accurate decision. Because of the highly specialized nature of this industry, Courts generally owe great deference to the administrative agency and its findings on the proper electricity rate. The high burden that must be met to determine regulatory action to be arbitrary and capricious is not met in this case. FERC did not exercise clear error in judgement, nor what there an abuse of discretion or act not in accordance with the law. FERC acting reasonably and in line with accepted regulatory matching principles because the costs that ComGen will face in remediating the site will be incurred during the time period where a service contract has already been agreed upon. Further, the even split amongst the retail customers is absolutely necessary to continue to provide electricity service. However, even when ratemaking is not specialized in nature, it involves policy decisions necessary to the mission of regulation. FERC's decision to encourage utilities to engage in environmental protection is not barred by the Federal Power Act. Further, the relief sought by SCCRAP could still not be granted because it would violate established constitutional law.

The United States Constitution guarantees that persons are protected from deprivations of their property without due process of law. A Corporation, such as ComGen, is a person within the meaning of the constitution and is entitled to its property interest in earning a just and reasonable rate on the electricity it generates and sells. Not providing this just and reasonable rate would amount to an unconstitutional taking. In a line of Supreme Court jurisprudence, it is clear that this just rate can be determined by considering a number of factors and interests –

factors that were before FERC in reaching its decision in this matter and interests ComGen seeks to protect through this rate filing.

To run afoul of the constitutional commands articulated in the relevant jurisprudence would make a rate unduly confiscatory and result in an unconstitutional taking. The relief sought by SCCRAP would indeed violate these principles and cause ComGen to suffer an unconstitutional deprivation. Therefore, FERC was correct in its assessment of ComGen's rate filing and SCCRAP's requested relief.

Argument

I. There is no action for groundwater pollution that is hydrologically connected to surface water under the Clean Water Act.

A. *The plain language within the CWA does not support an attenuated "hydrological connection."*

The premier issue in this case in this case derives from statutory construct, a legal issue subject to de novo review. *United States v. Hardman,* 927 F. 3d 1116, 1120 (10th Cir. 2002). Congress enacted the Clean Water Act ("CWA") in 1972 with the general goal to prevent, reduce, and eliminate pollution in the nation's waters in on order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a)(1). However, this act is limited to the navigable waters of the United States. 33 U.S.C. § 1362(7). In order to monitor pollutants entering the navigable waters, the act establishes the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342. Parties are allowed to apply for a permit with the Administrator for discharges to the navigable waters. 33 U.S.C. § 1342(a). States are invited to administer their own permitting procedure for the navigable waters subject to the Administrator's approval. 33 U.S.C. § 1342(b-c). Both Vandalia and Franklin have opted into this program. R. 7. This means that unless the Administrator, or state equivalent, issues a NPDES permit, then "the discharge of any pollutant by any person is unlawful." 33 U.S.C. § 1311(a). Furthermore, the act defines a discharge of a pollutant as, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). This Court interpreted this in *National Wildlife Federation, et. al v. Gorusch* to mean that, "[a] [Clean Water Act] claim comes to life when five elements are present: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." 693 F.2d 156, 165 (D.C. Cir. 1982). This is the exhaustive list under the CWA. If one element is absent, then the States would have sole

jurisdiction over the act. The issue presented deals directly with the third element of a successful CWA claim—"to navigable waters."

The CWA differentiates navigable waters and groundwater on multiple occasions throughout the statute. For example, in 33 U.S.C § 1254(a)(5), the act requires states to prepare comprehensive programs for water pollution control for navigable waters and ground waters. Another example is found in 33 U.S.C. § 1314(a)(2), which mandates, the conditions for federal funding of state pollution control programs on the establishment of monitoring and data collection for the quality of navigable waters and to the practicable extent groundwaters. This indicates that the two bodies of water are not similar; rather, the two classifications are different water bodies. Furthermore, the EPA website specifically states that "[t]he CWA does not specifically address contamination of groundwater resources." (United States Environmental Protection Agency, https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities, last visited on Jan. 30, 2019). The CWA act does not make any reference to a hydrological connection that would enable federal jurisdiction.

The CWA prohibits the discharge of pollutants "to the navigable waters from any point source." 33 U.S.C. § 1362(12). The district court held that the CWA extends its jurisdiction to "discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced." R. 10. The "hydrological connection" language is a judicially created expansion of the CWA that would indicate all pollutant discharges from a point source remain covered under the CWA so long as it ultimately enters a navigable water body despite moving through a non-point source. However, this language is absent in the CWA and it should not be considered.

B. *The Circuit Courts are split amongst the absent statutory authorization.*

Groundwater is not a navigable water of the United States; nor is it a point source. 33 U.S.C § 1254(a)(5); 33 U.S.C. § 1256(e)(1); 33 U.S.C. § 1314(a)(2). The Circuit Courts are split on the extent to which groundwater is protected under the CWA. Some courts have chosen to expand federal jurisdiction by stating that the groundwater serves a mediary between the point source's discharges to the navigable water. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). While this theory is often referred to as a conduit theory, it is misleading because a point source's definition includes the word conduit, yet groundwater is not a "discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). Meanwhile, other courts have chosen a more textual adoption of the CWA, rejecting the hydrological connection theory and limited its jurisdiction to exclude federal jurisdiction under the CWA. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th. Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018).

The Supreme Court has not adopted conduit theory, nor has this Court. This Court should reject the conduit theory because it does not fall within the limited jurisdiction of the CWA as a matter of law. *Hawai'i Wildlife Fund* and *Upstate Forever* – two cases that adopted a conduit theory - *rest* on the argument that the CWA only forbids the addition of any pollutant to a navigable water from any point source and does not limit itself only to direct polluters. *Hawai'i Wildlife Fund* at 748; *Upstate Forever* at 649-650. However, this belief misrepresents the intention of the plurality opinion in the *Rampanos v. United States,* 126 S.Ct. 2208 (2006). In *Rampanos,* the Supreme Court considered whether the kinds of connected waters, specifically

wetlands and intermittent streams, are covered by the CWA as "navigable waters." Justice Scalia wrote in his plurality opinion that "[t]he Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" *Id.* at 743, 126 S.Ct. 2208 (quoting 33 U.S.C. § 1362(12)(A)) (emphasis removed). While in a vacuum, this argument would appear on its face to hold that both direct and indirect pollution could be held within the meaning of the "from any point source" under the plain language cannon of statutory interpretation. However, this interpretation ignores the fact that CWA restricts the amount of pollutant that may be "discharged from point sources into navigable waters." § 1362(11).

The plain English canon of statutory interpretation often will turn on dictionary definitions when ambiguity exists. At issue here in this context is the word "into." The Oxford English Dictionary (2d ed. 1989) states that "into is, 'Expressing motion to a position within a space or thing: To point within the limits of; to the interior of; so as to enter.'" This definition indicates that "into" requires the pollutants origin be from the point source at the beginning of the discharge. Here, the alleged point source is too far attenuated from the navigable water to be considered an entrance under the plain English meaning of the word into.

Justice Scalia's stress on the absence of the word "directly" is to ensure that when a pollutant travels through multiple point sources before entering the navigable water it is still covered under the CWA. *Rampanos.* at 743. Moreover, Justice Scalia's opinion in *Rampanos* supports that he is referring to multiple point sources as he continues to write that "[T]he discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [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.* Justice Scalia's use of the

word "conveyances," is referring to discharges through a point source because it is the very definition of a point source in 33 USC § 1362(14). This determination of a point source remains uncontradicted. Therefore, this Court should adopt the appropriate analysis of Justice Scalia's plurality opinion in *Rampanos* and reject the "conduit theory."

Recent appellate court decisions from the Sixth Circuit support the proper analysis of Justice Scalia's plurality opinion in *Rampanos.* *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th. Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018). In both of these cases, the court dealt with groundwater pollution linked to coal ash disposal. In both cases, the court found that the defendant was not liable, stating:

> ". . .[the] discharging pollutants into the groundwater and the groundwater is adding pollutants to" the Cumberland River. . 'But groundwater [itself] is not a point source. Thus, when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance. The CWA has no say over that conduct." *Id.*

For this reason, any alleged leakages into the groundwater are not a violation of the CWA. *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (quoting *Kentucky Waterways Alliance*) (emphasis added). These decisions fit squarely within the proper analysis of *Rampanos* and the Court should refer to this for persuasion because the facts of these cases are on point with this case.

There is no legal basis that can support the hydrological connection between the Little Green Run impoundment and the Vandalia river. Here, the discharges are entering through the groundwater, a non-point source. To determine otherwise would exceed the congressional limitations placed on CWA authority.

C. *The hydrological connection theory interrupts the cooperative federalism between the States and the Federal government.*

The overall general purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA § 101(a). If Congress is to achieve those means, then it must be able to hold that party accountable. In this instance, Congress limited its jurisdiction to only point sources that discharge into a navigable water. Congress intentionally dedicated this groundwater control to the States. Groundwater pollution is determined by the land topography and is not directly ensuring that it will end up into a navigable water. By invoking the CWA here, Stop Coal Combustion Residual Ash Pounds ("SCCRAP") is asking the Court to enforce something that is currently being monitored by the Vandalia Department of Environmental Quality ("VDEQ"). R. 5. The citizen suit provision in the CWA does not grant this Court the authority to enforce a state permit for a discharge into a non-navigable water. 33 U.S.C. § 1335.

II. The Little Green Run Impoundment is not a point source pursuant to the Clean Water Act definition in § 1362 and recent jurisprudence.

A. Coal Ash Impoundments are not a point source under the Clean Water Act because they are not a discernible, confined, and discrete conveyance as required under § 1362.

As this Court previously held in *National Wildlife Federation, et. al v. Gorsuch*, "[a] [Clean Water Act] claim comes to life when five elements are present: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." 693 F.2d 156, 165 (D.C. Cir. 1982). Pursuant to this exhaustive list under the CWA, a plaintiff cannot establish liability under this act absent any one of these elements. ComGen's second issue raised in this appeal deals with

the fourth and fifth elements of a CWA act claim. According to the CWA a point source is a (1) discernible, (2) confined and (3) discrete conveyance. 33 U.S.C. § 1362(14) (emphasis added). In order for a source to be considered a point source, all three of the conditions must be met. In reviewing the lower court findings on this point, the standard of review for legal questions remains de novo, while factual questions are afforded a clear error standard of review. *United States v. Hardman* at 1287.

The district court erroneously held that the Little Green Run Impoundment met the required conditions. It found that because ComGen built the impoundment to hold coal ash residuals in a man-made pond, this structure caused the pollutants to enter into the groundwater and surface waters. R. 12. Contrary to the District Court's opinion, the Little Green Run impoundment is not a conveyance, but that it is merely a storage for the coal ash. The Little Green Run Impoundment "discharges" are not something that is enforceable under the CWA because they happen without the active effects of the impoundment and due to situations beyond ComGen's control. NPDES permits are designed to account for this type of discharge. There is nothing that ComGen can do to limit the rainfall that accumulates and percolates into the groundwater. This is the natural process of a storm.

In a recent Fourth Circuit opinion, the court upheld the finding that a discharge that enters a navigable water through the groundwater is actionable under the CWA. See *Sierra Club v. Virginia Electric & Power Company* 903 F.3d 403 (4th Cir. 2018). However, in that same decision, the court held that a coal ash impoundment is not a point source under the CWA because it is not a conveyance. *Id.* at 410. This court looked towards the Webster's dictionary to determine what exactly a conveyance is. Here they found that a conveyance is a well-understood term; it requires a channel or medium—*i.e.*, a facility—for the movement of something from one

place to another. *Id.*; *see also Webster's Third New International Dictionary* 499 (1961). To put it simply this would require the impoundment to actively move the coal ash into the groundwater. The court found that it is not the facility that moves the coal ash but the rain water that diffuses into the soil and groundwater. *Id.* at 411. This case is directly analogous to the issue presented by the Little Green Run site. Both impoundments "conveyance" is not caused by the movement from the facility but rather from the accumulation of rainfall that naturally enters the groundwater. An independent expert witness has noted the arsenic phenomenon's primary source is the rainwater. R. 6 Absent the rain, the arsenic would not leach into the groundwater. Therefore, this Court should adopt the reasoning from *Virginia Electric & Power Company* and find that Little Green Run impoundment is not a point source because it does not convey the pollutants.

B. The Little Green Run is not a discrete mechanism and adopting this viewpoint would create a flood gate issue.

The District Court incorrectly stated in its opinion that the Little Green Run impound is essentially, "[a] discrete mechanism [] that convey[s] pollutants from the Vandalia Generating Station to the Vandalia River." R. 8. Even though the impoundment is discrete in a sense that it can be located, it is a merely a surface feature near the Vandalia Generating Station. R. 3. Commonwealth Energy Solutions ("CES") developed the Little Green Run Impoundment through a dam construction. It serves as an on-site storage for coal ash. R. 3. When the coal ash leeches into the groundwater, it is moving through the rain water. This is no different than a pollutant moving across a parking lot or a field that is next to a facility. This is a natural movement of particles that is specifically excluded in the CWA. If this Court found that the CWA does include this type of movement, then it will open up the door to exponentially more federal litigation. Virtually all business owners, shopping center owners, and even farmers would

find themselves at the mercy of the CWA for runoff that may have occurred on their property. This is going far beyond the Congressional intent of the limited CWA.

The Little Green Run cannot control the seepage because it is not actively controlling the release of the coal ash. Rather, Little Green Run simply seeks to mimic the best possible storage conditions to minimize ash and toxin movement, as demonstrated by previous cooperation with VDEQ and the installation of the membrane liner. This release rate remains nothing more than uncontrollable, natural seepage that would be occurring even more if it was an unlined impoundment. If the Court does not find in favor of ComGen on this matter and asserts that ComGen maintained control of the site, then the number of individuals required to get VDEQ permits this would drastically expand creating an additional burden that may distract from the core goal of environmental and human-health protections.

III. The Federal Energy Regulatory Commission did not act arbitrarily or capriciously when it approved Rate Schedules No. 1 and No. 2.

A. Courts have given great deference to an agency's expertise in determining whether an action was arbitrary or capricious.

Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission of the Federal Energy Regulatory Commission (FERC), appellate court's review of whether a particular rate design is just and reasonable is highly deferential; nonetheless, such review is not an empty gesture, as FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record, and the path of its reasoning must be clear. *See Sithe/Independence Power Part., L.P. v. F.E.R.C.*, 165 F.3d 944 (D.C. Cir. 1999). A court's standard of review is particularly deferential under Federal Power Act (FPA) when Federal Energy Regulatory Commission (FERC) is involved in the highly technical process of ratemaking. *Transcontinental*

Gas Pipe Line Corp. v. F.E.R.C. 518 F.3d 916 (D.C. Cir. 2008), *citing* Federal Power Act, § 313(b), 16 U.S.C.A. § 825l(b).

In order to show that an action was arbitrary and capricious, there should be: (1) a clear error of judgment, (2) an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or (3) otherwise not in accordance with law or if it was taken without observance of procedure required by law. *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992). FERC satisfied the standard for review under *Ohio Valley Water Co. v. Borough of Ben Avon* to provide a fair opportunity for submitting the utility's claims of confiscation to a judicial tribunal for a determination upon its own independent judgment as to both the law and the facts. *Ohio Valley* was satisfied when, in response to SCCRAP's protest, FERC suspended ComGen's rate filing, and set the matter for an evidentiary hearing to take testimony on the limited factual issues raised in SCCRAP's protest, with the remainder of the issues to be resolved based on the parties' written submissions.

> *B. The rates charged by ComGen through the Vidalia and Franklin Power Companies are just and reasonable under the "matching" principle because the discovery of the issue occurred after the commencement of service.*

In upholding the Commission's application of the "matching" principle articulated by this Court, courts have recognized that because rolled-in costing assumes that each customer in an integrated system "enjoys the benefits of the transmission system as an integrated whole," it makes sense to hold "each customer ... responsible for an indivisible portion of the transmission system losses imposed upon the system by the configuration of the group of customers using it at any one time." *Sithe/Independence Power*, 165 F.3d at 949, *quoting Northern States Power Co. v. F.E.R.C.*,30 F.3d 177, 182 (D.C. Cir. 1994).

Both the discovery of the elevated levels of arsenic by Vandalia Waterkeeper and the commencement of the action against Commonwealth Generation occurred well after the commencement of power service agreements with Vandalia and Franklin Power Companies. (R. 4, R. 5). Since the violation occurred after the commencement of service, it is reasonable for the ratepayers of Vandalia and Franklin Power Companies to pay for the increase in rates because they will be recipients of the benefits and burdens of the necessary improvements, thus making the rates just and reasonable under the "matching" principle. *Id.*

C. The rates are just and reasonable because they account for actual expenses necessary for the continued service to ratepayers

In 1991, FERC upheld rates reflecting increases in O&M costs because they were costs legitimately incurred by Southeastern, and thus appropriately included in its revenue requirement. *See United States Department of Energy - Southeastern Power Administration*, 55 FERC ¶ 61,016, at 61,045-46 (1991). Similarly, FERC refused to find Southeastern's rates arbitrary, capricious or in violation of law or applicable regulations where, *inter alia*, the rates did not over collect revenues). *United States Department of Energy - Southeastern Power Administration*, 36 FERC ¶ 61,079, at 61,198 (1986). SCCRAP's action was commenced in December 2017, well after ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company. The remediation costs will be incurred during the term of the unit power service agreements with Vandalia Power and Franklin Power, making the costs properly allocable to these utilities under the express terms of the unit power service agreements, as implemented through ComGen's FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2, respectively. If the District Court's injunction is upheld, it will be required as

a matter of law to comply with the prescribed "closure-by-removal" plan, and longstanding ratemaking principles provide for the utility's ability to recover costs associated with compliance with legal and regulatory requirements in rates.

D. Alternatively, FERC's decision to approve rates was within its power to make policy judgments, which lies at the core of its regulatory mission and thus is not arbitrary or capricious

Even when FERC has deviated from its own methodology in ratemaking, courts have given deference to the body's decision when the ratemaking was not technical in nature and involved policy judgments. *Transmission Agency of N. Cal. v. F.E.R.C.*, 628 F.3d 538, 543 (D.C. Cir. 2010) citing *Alcoa Inc. v. FERC,*564 F.3d 1342, 1347 (D.C. Cir. 2009). Nonetheless, the Commission must respond to objections and address contrary evidence in more than a cursory fashion. *628 F.3d at 544, citing NorAm Gas Transmission Co. v. FERC,*148 F.3d 1158, 1163–65 (D.C.Cir.1998). FERC satisfied this requirement when it suspended ComGen's rate filing and heard the matter in a three-day evidentiary hearing to take testimony on the limited factual issues raised in SCCRAP's protest. R. 10.

In reviewing the Commission's assertion of jurisdiction under the FPA and its interpretation of a Commission-approved contract, the court applies the two-step analysis offered under *Chevron, U.S.A., Inc. v. NRDC,*467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See S. Cal. Edison Co. v. FERC,*502 F.3d 176, 181 (D.C.Cir.2007); *Transmission Agency of N. Cal. v. FERC,*495 F.3d 663, 673 (D.C.Cir.2007). The first step of this analysis is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *id.*at 842–43, 104 S.Ct. 2778.

While relevant statutes provide that rates must be "just and reasonable," no definition is given to specify what constitutes such a standard. 16 U.S.C. § 824d (a). Under the second step of *Chevron*, because Congress gives a delegation of authority to FERC to regulate the "area of issue," *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C.Cir.2005), or ratemaking for public utilities, FERC's interpretation of this statute is entitled to deference, so long as it is reasonable. *See Village of Bergen v. FERC*, 33 F.3d 1385, 1389 (D.C.Cir.1994).

While FERC's decision did not rest on the "matching principle" as it has articulated in previous decisions, the approval of the rates was based on a decision of policy not precluded by statute. As the Commission states, failing to approve the rate adjustment for Vandalia and Franklin Power Companies would implicate constitutional issues under the Fifth and Fourteenth Amendments and would have detrimental policy effects to the environment. R. 12. The matching principle is not a dispositive formula for ratemaking, as courts have considered the Supreme Court's statement that ratemaking bodies are not bound to "any single formula or combination of formulas" and that if the Commission's order "produces no arbitrary result, [the court's] inquiry is at an end." *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037 (1942). Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (U.S. 1942). Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. *Id.* Given that denying approval would necessarily implicate issues of constitutionality and would have a detrimental effect to

other interstate utilities on environmental cleanups, FERC's rate approvals are nonetheless reasonable under the Federal Power Act, thus meeting the second prong of the *Chevron* test.

IV. Granting the relief sought by SCCRAP would amount to an unconstitutional taking in violation of the Fifth and Fourteenth Amendments.

As a preliminary matter, it is important to note that "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *United States v. Hardman* at 1124 (10th Cir. 2002) citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 112 (1998) (Stevens, J., concurring) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)); *Jean v. Nelson*, 472 U.S. 846 (1985). Should this Court feel it imperative to reach the constitutional questions presented by this case, the appellant-intervenor would urge the Court to consider a policy of deference to the administrative agency findings. Despite this requested deference, it is true that the standard of review for a legal question is de novo. *United States v. Hardman* at 1120.

A. SCCRAP seeks unconstitutional relief and FERC reached the proper decision as required by the constitution and established jurisprudence.

The Fifth Amendment to the United States Constitution provides "…nor shall private property be taken for public use without just compensation." USCS Const. Amend. 5. This language is "the exact limitation on the power of the government to take private property for public uses." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). Similarly, the Fourteenth Amendment provides "...nor shall any State deprive any person of life, liberty, or property, without due process of law." USCS Const. Amend. 14.

A corporation, including providers of highly regulated services, are persons under the meaning of the Fourteenth amendment, and as such are entitled to protection from deprivation of property without due process of law. *Smyth v. Ames,* 169 U.S. 466, 522 (1898) citing *Santa*

Clara County v. Southern Pacific Railroad, 118 U.S. 394, 96, *Charlotte, Columbia & Augusta Railroad v. Gibbes,* 142 U.S. 386, 391, and *Gulf, Colorado & Santa Fe Railway v. Ellis* 165 U.S. 150, 154.

The property interest at stake in this matter is one of economic significance: the right of ComGen to charge the rate it is constitutionally entitled to – one which is just and reasonable to maintain the value of the company. *See Bluefield Water Works v. Public Service Comm'n,* 262 U.S. 679 (1923) and *Federal Power Comm'n v. Hope Natural Gas,* 320 U.S. 591 (1944). A company seeking to be compensated at a just rate is not unusual; rather, the Supreme Court has recognized a remedy when the government has engaged in "establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies," and went on to note establishing a rate that practically destroys the value of the property of companies amounts to "depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." *St. Louis & S. F. R. Co. v. Gill,* 156 U.S. 649, 657 (1895).

Regulatory takings of private company property have been the subject of scrutiny for a number of years. In *Smyth v. Ames* a state law fixed the rates a railroad corporation could charge for its services and the stakeholders sought to have that law recognized as unconstitutional. 169 U.S. 466, 518 (1898). Upon examining the income and anticipated earnings numbers for the companies involved, the Court found that the rates at issue would have amounted to a deprivation of the "just compensation" secured to the companies by the constitution. Id at 547. The *Smyth* Court acknowledged the lack of evidence to demonstrate that the operating expenses of the railroad were being falsely inflated and found "the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." Id. Similar to the railroad

companies in *Smyth*, ComGen is entitled to a fair return on the value it employs for the public convenience. Furthermore, FERC cannot deprive the company of this value through an unjustly low rate, or an unconstitutional taking will have occurred.

B. When employing the end results test, it is apparent that FERC has exercised fair and enlightened judgment in approving ComGen's requested rate plan, thereby guaranteeing the company the constitutionally required fair return on value.

In *Fed. Power Com. v. Hope Nat. Gas Co.*, the Court made the important observation that the "end result" could not be condemned. 320 U.S. 591, 603 (1944). By testing whether the end result was the proper outcome, the Court left the door open to multiple considering multiple factors when determining a just and reasonable rate; explicitly, the Court stated, "the rate-making process under the Act, i. e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests." Id. This balancing of investor and consumer interests is exactly what ComGen hopes to effectively do by maintaining the expected profits by charging an elevated, yet reasonable, rate in the wake of the district court's decision regarding the Little Green Run site (R. 11).

Further, the fact that ComGen is a wholly owned subsidiary of another company is irrelevant in light of *Hope Nat. Gas Co.* (R. 11). Similar to ComGen, Hope was a wholly owned subsidiary of a larger company – a fact that the Court acknowledged before finding it was still important to "maintain the financial integrity of the company" in determining the proper rate. *Fed. Power Com. V. Hope Nat. Gas Co.* at 604-04. Additionally, when applying the end result methodology, the *Hope Nat. Gas* Court considered the risk of similar businesses to determine what was a reasonable rate. Id. In sum, the Court concluded "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." Id at 605 (emphasis added).

Further, the inquiry into the appropriateness of the rate should take into account "all relevant facts" and be determined by the use of "fair and enlightened judgment." *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n,* 262 U.S. 679, 692 (1923). FERC did just that when determining what the appropriate rate is for ComGen in light of the required remediation; FERC considered: (1) the potential impacts to the financial integrity of ComGen, (2) the importance of incentivizing environmental remediation as a form of environmental protectionism, and (3) the information submitted to the Commission by SCCRAP and ComGen at an Evidentiary Hearing. (R. 11-12). After considering these facts, as well as jurisprudential precedent from the United States Supreme Court, FERC exercised fair and enlightened judgment when deciding that the relief sought by SCCRAP would run afoul of the constitution. Id. The rate granted was just and reasonable

C. SCCRAP is incorrect in arguing that ComGen was imprudent and would receive a windfall from the required rate - to determine otherwise would violate constitutionally established principles.

In support of the proposition that ComGen should not be entitled to additional compensation through the revised rates requested with FERC, SCCRAP argues that ComGen behaved imprudently and there would be a windfall to ComGen if these costs were granted without employing some form of matching principles. (R. 8-10). However, ComGen attests via affidavit that they indeed behaved as a prudent operator when they had the lining installed by a qualified contractor. (R. 9). It is not unusual to allow for a utility to recover the amount prudently invested through the rates charged to consumers. *See - Chicago v. Fed. Power Com.,* 385 F.2d

629, (D.C. Cir. 1967), *S.C. Generating Co. v. Fed. Power Com.,* 249 F.2d 755 (4th Cir. 1957). Absent a showing that it was inherently imprudent for ComGen to hire a qualified contractor to install the lining, it is perfectly acceptable for this cost to be passed on to the rate-payer through the charged rates. It would even seem that not doing so could be confiscatory and would possibly rise to the problematic level and scenario posed by creating a confiscatory rate that would violate the principles of *Smyth, Hope Nat. Gas Co.,* and *Bluefield Water Works.*

In regard to the matching principle, it is true that the basis for many transactions is equity. This matching principle is the idea that each customer enjoys the benefits of the system as a whole, so each customer should be required to be responsible for a portion of the losses of the system. *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 949 (1999) citing *N. States Power Co. (Minn.) v. FERC*, 30 F.3d 177, 182 (1994). In this case, even employing the end result test, the matching principle is ideally supported by the rate ComGen proposed. Coal Ash can propose a significant health risk. (R. 3). Little Green Run is a high-risk site. (R. 5). Toxic chemicals from the Little Green Run site have started to seep into groundwater in the area. (R. 5-6). The Little Green Run site has been used for disposal since 2000. (R. 4). Given these facts, those who have received energy generated by the Little Green Run facility have received benefits from it. Further, even if they have not received benefits for the full eighteen years the plant has been in operations, they receive benefits now that will cease should ComGen fail financially. Additionally, the residents in the area have a vested interest in the clean-up effort for the benefit of their water supply and it is not unreasonable that they should bear some of the costs of the mitigation. The consumers paying the expense in this case will be receiving the direct benefits of relocation and clean-up of the site. This provides further support for the FERC rate

determination and is in line with the considerations that may be taken into account in determining a constitutionally acceptable rate.

D. FERC reached the proper decision in classifying the relief sought by SCCRAP as that which would amount to an unconstitutional taking.

Regulators and rate-making have a direct, beneficial impact on protecting the consumers from the somewhat inherently monopolistic nature of energy generation. Out of recognition of this reality, regulatory bodies are given the jurisdiction to act and determine the just and reasonable rates that will be charged to rate-payers. However, this is not an unfettered license and the regulator is still limited by the constitutional outer limits of due process. There cannot be an unconstitutional taking, even in the power generation context. The rate charged must be just and reasonable and must fall within the outer limits of fairness set in *Smyth.* In order to effectively determine whether an approved rate falls within this zone of acceptable regulation, one must look to the end result test and consider all of the relevant facts. In this case, FERC engaged in all of the relevant considerations and reached the appropriate end result. Further, FERC was correct in its assessment that granting the relief sought by SCCRAP would result in an unconstitutional taking.

Conclusion

For the foregoing reasons, we ask that the D.C. Circuit reverse the decision of the District Court since the Clean Water Act regulates discharges into navigable waters and the Little Green Run Impoundment does not constitute a point source under the Clean Water Act. Similarly, we ask that the Circuit Court affirm the rate approval granted by the Federal Energy Regulatory Commission as granting the approval was not arbitrary or capricious. Furthermore, we ask that this Court recognize the relief sought by SCCRAP would amount to a constitutional violation and uphold the FERC findings.

Appendix A

Certificate of Service

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

Respectfully Submitted,

Team No. 18