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

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

On Consolidated Appeal from the Order by the United States District Court for the District of Columbia, Granting Injunctive Relief to Appellee/Respondent, and the Order by the Federal Energy Regulatory Commission, Denying Rehearing of the Order Accepting Appellant/Intervenor's Revised Rate Schedules.

BRIEF FOR THE APPELLANT/INTERVENOR

Team No. 30

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Other circuit court cases — page(s)

District court cases — page(s)

State court cases — page(s)

Constitutional provisions — page(s)

Statutes — page(s)

Regulations page(s)

Other authorities page(s)

STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia Circuit (trial court) had jurisdiction over the civil action brought by Stop Coal Combustion Residual Ash Ponds (SCCRAP) pursuant to 33 U.S.C. § 1365(a) (2012). The Federal Energy Regulatory Commission (FERC) had jurisdiction to approve Commonwealth Generating Company's (ComGen) revised rate schedules pursuant to 16 U.S.C. §§ 824d(d) and 824e(a) (2012). The Orders by the trial court (filed June 15, 2018, R. at 7) and FERC (filed October 10, 2018, R. at 11) were both final. FERC denied rehearing on November 30, 2018. R. at 12. ComGen filed a timely Notice of Appeal on July 16, 2018. R. at 8. SCCRAP filed a timely Notice of Appeal on December 3, 2018. R. at 12. This Honorable Court obtains jurisdiction over this matter with respect to the District Court's Order pursuant to 28 U.S.C. § 1291 (2012), and with respect to FERC's Order pursuant to 16 U.S.C. § 825l (2012). On December 21, 2018, this Honorable Court consolidated both actions for decision. R. at 12.

STATEMENT OF THE 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 § 402 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 AMENDMENT.

STATEMENT OF THE CASE

A. Statement of the Facts.

In the late 1990's Commonwealth Energy (CE) (a multistate energy holding serving nine states, including Vandalia and Franklin) formed Commonwealth Energy Solutions (CES) (a wholly owned and unregulated subsidiary of CE) in order to serve as a major energy provider in the wholesale market. R. at 3-4. ComGen is a wholly owned subsidiary of CE. R. at 3. CES sold the Vandalia Generating Station to ComGen as part of its strategy to move its merchant plants under the control of CE's regulated rate base retail electric companies. R. at 3-4.

In November 2014, after approval of acquisition of the Vandalia Generating Station, ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company under which the electrical output of the generating station would be split evenly between the two. R. at 4. Both power companies are incorporated under the laws of their respective states and are public utilities under Section 201 of the Federal Power Act (FPA) (codified at 16 U.S.C. § 824). R. at 4. The power service agreement between ComGen and Vandalia Power is designated as ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement), while the unit power service agreement between ComGen and Franklin Power is designated as ComGen's FERC Rate Schedule No. 2 (Franklin Agreement). R. at 4.

Vandalia Generating Station is located near the town of Mammoth along the Vandalia River. R. at 4. It consists of two 550-megawatt coal fired units. R. at 4. Coal Combustion Residuals (CCR) are stored in the Little Green Run Impoundment (Green Run Impoundment), which is an impoundment of water on Little Green Run. R. at 4. The outflow from this impoundment flows south into Fishing Creek, which in turn feeds into the Vandalia River. R. at 5.

In 2002, CES detected concentrations of arsenic in the groundwater near the Green Run Impoundment which exceeded Vandalia's groundwater standards, and self-reported to the Vandalia Department of Environmental Quality (VDEQ). R. at 5. Cooperating with VDEQ, CES developed a corrective action plan which placed a high-density polyethylene (HDPE) geomembrane liner and compact clay on the embankments of the impoundment. R. at 5.

In 2017, the Vandalia Waterkeeper (an environmental non-governmental organization) detected elevated levels of arsenic in the Vandalia River. R. at 5. VDEQ conducted further investigations and found that a seep occurs at a low point in the foundation's topography and appears to have been active for many years without significant change. R. at 6. The seepage occurs only when there is significant rainfall and dries up within a few weeks of the precipitation event. R. at 6.

B. Statement of the Procedural History.

SCCRAP brought this action against ComGen in the trial court, contending that the seepage from the Green Run Impoundment into the groundwater constituted "addition of [a] pollutant to navigable waters from [a] point source," under 33 U.S.C. § 1362. R. at 7. The trial court conducted a bench trial and, on June 15, 2018, found for SCCRAP on the basis that groundwater constitutes "navigable waters" when it shares a "direct hydrological connection" to navigable waters. R. at 8. The trial court found, the Green Run Impoundment was polluting the groundwater which later plumed into a navigable waterway. R. at 7. The trial court ordered injunctive relief in the form of total excavation and relocation of the Green Run Impoundment. R. at 8. Acknowledging that this imposed a "great" burden on ComGen, the trial court declined to assess damages. R. at 8. ComGen timely appealed. R. at 8.

On July 16, 2018, ComGen submitted rate schedules to FERC, proposing revisions to its Vandalia and Franklin Agreements (Rate Schedules No. 1 and 2, respectively), which would allocate the cost of complying with the trial court's Order to Vandalia and Franklin Power over a 10-year period. R. at 8. The "express terms" of the unit power service agreements provide that remediation costs arising during the term of the unit power service agreements are "properly allocable" to Vandalia and Franklin Power. R. at 10. SCCRAP intervened and challenged ComGen's proposed rate schedules under the prudence and matching principles of utility ratemaking. R. at 9. ComGen estimated the costs of compliance with the trial court's Order to be $246 million dollars, R. at 8, and contended that an unconstitutional taking would occur if the proposed rate schedules were disallowed because lower rates would not:

- properly balance the interests of ratepayers [and] shareholders,
- maintain [ComGen's] financial integrity[,]
- assure confidence in [ComGen's] financial soundness, [and]
- [allow ComGen] to raise capital on reasonable terms.

R. at 11. In contrast, ratepayers would only see a raise in approximately $2.15-3.30 per month during the 10-year period. R. at 9. FERC held three days of evidentiary hearings and considered and weighed all of ComGen's and SCCRAP's arguments. R. at 11. Although it agreed "in principle" with many of SCCRAP's arguments, R. at 11, FERC implemented ComGen's proposed rate schedules because it accepted ComGen's testimony that disallowing the rates would "jeopardize the financial integrity of ComGen," and concluded that "ensuring that utilities are able to recover . . . the costs of environmental cleanups" through their rates, was vital to "promoting environmental protection." R. at 12. FERC denied SCCRAP's petition for rehearing on November 30, 2018. SCCRAP then appealed. R. at 12.

On December 21, 2018, this Honorable Court granted the parties' Joint Motion To Consolidate The Actions For Decision. R. at 12.

SUMMARY OF THE ARGUMENT

This Honorable Court should reverse the trial court's Order of injunctive relief because the Clean Water Act (CWA) only regulates discharges to "Waters of the United States" (WOTUS). Groundwater is excluded from the definition of WOTUS by both agency rule and caselaw, and is thus outside of the regulatory authority of the CWA. Because groundwater is beyond the CWA's regulatory authority, the trial court erred by granting injunctive relief.

Further, neither the groundwater nor the Green River Impoundment are point sources under the CWA and are thus outside of the Act's permitting and regulatory authority. As such the discharge of arsenic in the case at bar is not subject to the CWA and the trial court's Order of injunctive relief was erroneous and should be reversed.

With respect to FERC's Order, this Honorable Court should affirm because FERC is an expert agency whose orders carry a presumption of validity and the end result of FERC's Order in this case is not unreasonable. In fact, it is necessary to preserve the financial integrity of ComGen.

Alternatively, the methods FERC employed achieved an appropriate balance between the interests of ComGen and its ratepayers. FERC was correct to conclude that it is vital to encourage utilities to facilitate environmental cleanup by allowing utilities to shift those costs to ratepayers. It is fitting that ratepayers pay the costs of providing service to them and here, reclamation of the Green Run Impoundment is a necessary cost of the continuing viability of their power source.

Finally, because ComGen's financial integrity is at stake, this case is fully at the constitutional "margin" and this Honorable Court should affirm FERC's Order because it is necessary to prevent an unconstitutional taking.

ARGUMENT

I. The Trial Court's Order Should Be Reversed Because Groundwater Is Not a WOTUS Under The CWA.

The Trial Court Erred by determining that groundwater is within the regulatory purview of the CWA.

In reaction to many water quality concerns across the Nation, including at least one combustion of a river, Congress enacted the Federal Water Pollution Control Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 501 (2d Cir. 2017). The act is commonly referred to as the CWA. *Id*. Congress defined the goal of the CWA as the "[r]estoration and maintenance of chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2012). In many respects, the CWA has been tremendously successful at reducing waterborne pollutants and restoring the Nation's waterways. *Catskill Mountains*, 846 F.3d at 501. However, as waterways became cleaner and safer, presumably requiring *less* protection, the CWA grew in regulatory scope to include any puddle where a mallard might spend the night. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 164 (2001) (rejecting the 1986 definition of WOTUS as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines").

The CWA operates by forbidding the discharge of a pollutant without a permit. 33 U.S.C. § 1311. The Act then defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." § 1362(12). The CWA also defines navigable waters as WOTUS. § 1362(7). Thus, these sections read together indicate that a violation of the CWA occurs when "(1) a pollutant [is] (2) added (3) to [WOTUS] (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

The precise definition of WOTUS has varied greatly. For decades prior to the creation of the CWA, the United States Supreme Court has defined the term "navigable waters" as those which are navigable in fact. *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (citing *Daniel Ball*, 77 U.S. 557, 563 (1870). Early interpretations of the CWA adopted this "navigable in fact" standard as the outer limit of the CWA's jurisdiction. *Rapanos*, 547 U.S. at 723-24. The District Court for the District of Columbia has opined that this definition was too narrow and enjoined its implementation as inconsistent with the CWA. *See id*. at 724 (citing *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975)). The Army Corps of Engineers then adopted a far broader regulation which carried the scope of the CWA beyond stream banks to the very limit of Congress's commerce power. *Rapanos*, 547 U.S. at 724.

This expanded power continued until 2001, when the CWA was used to exert control over isolated ponds which had formed in manmade gravel pits. *Solid Waste Agency*, 531 U.S. 167. The Amy Corps of Engineers considered the gravel pits to be WOTUS due solely to the presence of migratory birds on the small bodies of water. *Id*. at 174. The Supreme Court found that the migratory bird rule exceeded the express authority of the CWA. *Id*. Five more years passed before the scope of WOTUS was again considered by the Supreme Court in a case addressing CWA authority over wetlands as WOTUS. *Rapanos*, 547 U.S. at 729. Specifically, the Court determined whether wetlands adjacent to tributaries which feed into traditionally navigable waters can properly be considered WOTUS. *Id*. Justice Scalia, speaking for the plurality, stated:

> the waters of the United States includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." *See* Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Id. at 739 (some quotations omitted). In his concurring opinion, Justice Kennedy concluded that wetlands which have a significant nexus to navigable waters are WOTUS. *Id*. at 787 (Kennedy, J., concurring). In order to clarify *Rapanos*'s effect on the CWA, the Army Corps of Engineers and the EPA issued a guidance document in 2007 defining WOTUS as navigable waters and non-navigable waters which have a significant nexus to navigable waters. *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 36-37 (D.C. Cir. 2015).

This lack of cohesion between Supreme Court cases, and between the Justices themselves, prompted the Army Corps of Engineers to promulgate the WOTUS Rule. *See* Clean Water Rule: Definition of [WOTUS], 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (codified at 33 C.F.R. § 328.3 (2018)). *See also S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 961 (D.S.C. 2018). The WOTUS Rule was intended to be a final rule defining the scope of waters protected by the CWA as WOTUS. *See* Clean Water Rule: Definition of [WOTUS], 80 Fed. Reg. at 37,054. Section 328.3 of the WOTUS Rule sets forth the definition of WOTUS to be used in the CWA and its implementing regulations. § 328.3(a). Section 328.3(b) of the Rule states, "[t]he following are not [WOTUS] even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section[.]" § 328.3(b). This Section explicitly excludes, "[w]aste treatment systems . . . designed to meet the requirements of the [CWA]" and groundwater from the definition of WOTUS. § 328.3(b)(1) & (5). Thus, groundwater and waste treatment systems operating under a National Pollution Discharge Elimination System (NPDES) permit are excluded from the regulatory scope of the CWA under most circumstances. *Id*. Only waters that are defined under § 328.3(a)(1)-(3) as WOTUS withstand this exemption. § 328.3(b). Section 328.3(a)(1)-(3) concerns waters which are navigable in fact, interstate waters, or territorial seas. § 328.3(a)(1)-(3). Taken in its entirety, this regulation establishes that

groundwater and waste treatment systems which are not navigable, interstate, or territorial seas, are never to be considered WOTUS for the purpose of the CWA.

Although this rule is well-defined, its application has proven contentious. *Pruitt*, 318 F. Supp. 3d at 961. Challenges to the WOTUS Rule were brought throughout the Nation and consolidated in one proceeding in the United States Court of Appeals for the Sixth Circuit. *See id.* The Sixth Circuit found that they had original jurisdiction over the claims and issued a stay of the WOTUS Rule's enforcement. *Id*. Contemporaneous to these proceedings, the United States District Court for the District of North Dakota issued a preliminary injunction against the enforcement of the WOTUS Rule which was effective in thirteen states. *Id*. However, because of the Sixth Circuit's ruling, most other pending district court opinions were either administratively closed or dismissed. *Id*. The Supreme Court heard the subsequent appeal and found that the Sixth Circuit did not have original jurisdiction. *Id.* at 962. As a result, the nationwide stay of the WOTUS Rule's enforcement was vacated, leaving the District of North Dakota's injunction intact in thirteen states. *Id*.

During the course of these lawsuits, President Trump issued an executive order (*see* Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the [WOTUS] Rule, Exec. Order No. 13,778, 82 Fed. Reg. 12,497, 12,497 (Feb. 28, 2017)), which instructed the Administrator of the EPA and the Assistant Secretary of the Army to review the WOTUS Rule for consistency with administrative policy. *Pruitt*, 318 F. Supp. 3d at 962. As a result, these agencies issued another rule suspending the effective date of the WOTUS Rule until 2019. *Id*. The United States District Court for the District of South Carolina subsequently held that this suspension did not comply with the Administrative Procedure Act and enjoined enforcement of the suspension nationwide. *Id*. at 969. The suspension has since been vacated by the United

States District Court for the Western District of Washington. *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 W.D. Wash. LEXIS 199358, at *19-20 (Nov. 26, 2018).

In the case at bar, the trial court erred in its finding that the groundwater around the Green River Impoundment is within the purview of the CWA. The CWA was enacted to address a very serious problem facing the Nation's waterways. It does so by preventing unpermitted discharges into waters of the United States. In its goal of cleaning and preserving the Nation's waterways, the CWA has been largely effective. The CWA however, has been wrought with agency over-reach well beyond the waters of the United States, even infringing upon land of the United States. The Supreme Court has held in a series of cases that WOTUS is not an unbridled jurisdictional hook, rather it is a specific limitation on what waterways and wetlands are within the jurisdiction of agency control under the CWA. *See, e.g.*, *Rapanos*, 547 U.S. at 723-24. Similar to the lower courts' errors in *Solid Waste Agency*, the trial court here erred in determining that groundwater could be considered WOTUS.

The alleged 'waters' that ComGen is discharging into, consists of soils which are not otherwise defined as wetlands or marshes, but rather as groundwater. R. at 4. According to VDEQ, there is a fault in the liner of the Green Run Impoundment which allows contaminants to pool beneath it. R. at 4. Then, when there are significant rain events, this contamination is carried through a seep that occurs at a low point in the foundation of the impoundment and runs in the direction of a navigable waterway, where this seep enters the groundwater. R. at 4. From the groundwater, the contaminants after several years, have found their way to a navigable waterway. Nonetheless, the trial court, in apparent reliance on Justice Kennedy's concurrence in *Rapanos*, found that this particular groundwater had a significant nexus to waters which are

navigable in fact, thus making the groundwater itself WOTUS. The standard set in *Rapanos* however, in not applicable to the case at bar. 547 U.S. at 787 (Kennedy, J., concurring).

Although the decision in *Rapanos* was fractured, its scope was limited to determining when a *wetland* may be properly considered WOTUS. Although sharing some similarities, wetlands and groundwater are not synonymous. 33 C.F.R. § 328.3(c)(4) (defining wetlands as "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"). It was thus erroneous for the trial court to apply *Rapanos* to consider the groundwater near the Green River Impoundment as WOTUS. Further, *Rapanos* is not the current standard to determine WOTUS in Vandalia.

The WOTUS Rule was promulgated to alleviate the very confusion that case law had created. It may have been enjoined nationwide, but both its national enjoinment and the subsequent rule which suspended the WOTUS Rule have been defeated through jurisdictional and administrative challenges. What remains is a specific list of states that have attained a stay from the WOTUS Rule under their respective federal district courts. Vandalia is *not* one of those states.

Because the WOTUS Rule does apply in Vandalia, so does its exclusion of groundwater from the definition of WOTUS. The WOTUS Rule's exclusion states that groundwater, even if it would otherwise be WOTUS under certain circumstances, is *never* WOTUS unless it is navigable in fact, interstate waters, or territorial seas. Because the groundwater transporting the seep to the navigable waters is not itself navigable, an interstate water, or a territorial sea, it is not WOTUS. *See* 33 C.F.R. § 328.3(a); § 328.3(b)(1) & (5).

Because the groundwater near the impoundment is not WOTUS, this Honorable Court should reverse the trial court's erroneous holding that discharges into groundwater is actionable under the CWA.

II. The Trial Court's Order Should Be Reversed Because Seepage From A Coal Ash Impoundment That Passes Through Groundwater To Navigable Waters Does Not Constitute The Discharge Of A Pollutant From A Point Source And Is Not A Violation Of Section 402 Of The CWA.

a. The Green Run Impoundment is not a point source and is thus not within the regulatory purview of the CWA.

The trial court erred in holding that seepage from a coal ash impoundment is properly considered a discharge from a point source under the CWA. The CWA only applies to discharges to WOTUS. Additionally, the CWA only regulates point source discharges. Because the Green Run Impoundment is not a point source, the trial court erred in ordering injunctive relief against ComGen under Section 1311(a) of the CWA.

In order to show a violation of the CWA, there must be "(1) a pollutant (2) added (3) to [WOTUS] (4) from (5) a point source." *Nat'l Wildlife Fed'n*, 693 F.2d at 165. A point source is then defined as, "any discernible, confined[,] and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C § 1362(14). In other words, they are "[i]dentifiable locations where pollutants enter a water body." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 214 (D.D.C. 2011). If a pollutant enters a waterway in any means other than a point source, then it is a non-point source, and beyond the federal regulatory authority of the CWA. *Id*. Because such non-point source discharges are beyond CWA control, they do not require a NPDES permit issued under Section 402 of the CWA (codified at 33 U.S.C. § 1342).

Serv. Oil v. EPA, 590 F.3d 545, 551 (8th Cir. 2009) (citing *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005)).

Coal ash impoundments have not squarely been addressed as point sources by this Honorable Court, but other circuit courts have taken this question into consideration. The United States Court of Appeals for the Fourth Circuit opined in *Sierra Club v. Va. Elec. & Power Co.*, that the definition of "point source" is focused around the word conveyance. 903 F.3d 403, 410-11 (4th Cir. 2018). In making this determination, the court held that a conveyance is not a *passive* movement from one area to another but is the *facilitative* movement from one area to another. *Id*. at 411 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)). The Fourth Circuit elucidated that where contaminates are leached from static accumulations of coal ash in a coal ash impoundment and then carried to groundwater through the infiltration of rainwater, the *impoundment itself was not a point source*. *Sierra Club*, 903 F.3d at 411. Specifically, the court stated that the coal ash impoundments "were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example. Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing diffusely through the soil." *Id*.

Here, a nearly identical situation is present. Coal ash is being stored in the bottom of a water impoundment, constructed to do just that. R. at 4. Due to a fault in the liner beneath the coal ash, some rainwater is able to percolate through the coal ash and through the liner, carrying contaminants with it. R. at 4. After settling beneath the liner, the rainwater, along with some contaminants, finds its way from the impoundment through a seep during unusually heavy rain events. R. at 4, 7.

The trial court found that these inadvertent occasional seeps were enough to bring the Green River Impoundment itself within the definition of a point source. This however is contrary to case law which has addressed this precise situation. *Sierra Club*, 903 F.3d at 411. The conveyance itself is not the impoundment, but rather the rainwater which carries the contaminants to the groundwater. Because the Green River Impoundment is not conveying any material, it cannot be a point source under the CWA. The *true* conveyance here is the rainwater which percolates through the impoundment. Because rainwater is not "discernable," it also cannot properly be classified as a point source under the CWA. 33 U.S.C. § 1362(14). Because neither the impoundment itself nor the rainwater can be considered an unpermitted point source under Sections 301 and 402 of the CWA (33 U.S.C. §§ 1311 & 1342), the trial court erred by ordering injunctive relief against ComGen under 33 U.S.C. §1311(a).

b. The groundwater itself is not a point source and is thus not within the regulatory purview of the CWA.

The trial court further erred by ordering injunctive relief against ComGen for "discharges" from the Green River Impoundment into WOTUS through groundwater. Under the CWA, pollutants must be deposited *into* WOTUS *from* a point source in order to constitute a CWA violation. Because groundwater is not WOTUS nor is it a point source, ComGen did not violate the CWA.

A violation of 33 U.S.C. §1311(a) occurs where there is an unpermitted addition of "(1) a pollutant (2) added (3) to [WOTUS] (4) from (5) a point source." *Nat'l Wildlife Fed'n*, 693 F.2d at 165. A strict reading of these requirements precludes the argument that pollutants can move from a point source, to a non-point source, then to a water categorized as WOTUS. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 934 (6th Cir. 2018). Such a theory of liability is known as the hydrologic connection theory. *Id*. Proponents of this position often turn to the

Supreme Court's decision in *Rapanos* where Justice Scalia, writing for the plurality, announced that under the CWA, pollutants need not be discharged directly into navigable waters via the original point source. 547 U.S. at 743-44.

This portion of the Supreme Court's plurality opinion is taken out of context in order to support an expanded reading of what constitutes a point source under the CWA. *Ky. Waterways All*, 905 F.3d at 936. When the Supreme Court addressed the lack of the word "directly" in the CWA, it was referring to the possibility of having multiple point sources in a chain of conveyances between the source of the contaminant and WOTUS. *Id*. The Court did not hold that a point source could be in violation of the CWA simply by virtue of contaminants reaching WOTUS though a non-point source. *Id*. Thus, only where the intermediate conveyance is another point source, can liability be predicated on the hydrologic connection theory of the CWA. *Id*.

Groundwater is "subsurface water that tends to migrate from high elevation to low elevation." *Id*. at 931. On the other hand, point sources as defined by the CWA are "discrete," "discernable" conveyances. 33 U.S.C. § 1362(14). Because of its diffuse nature, courts have held groundwater to be a non-point source in most instances. *See Ky. Waterways All*, 905 F.3d at 936 (holding that groundwater is a non-point source); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (opining that groundwater is not a point source); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 459 (E.D. Pa. 2015) (holding that the addition of contaminants through groundwater was a non-point source). Thus, because groundwater is not a point source, any pollutants which reach WOTUS through groundwater are not actionable as a violation of 33 U.S.C. § 1311(a), and no NPDES permit would be required for such discharges under section 1342. *See, e.g.*, *Tenn. Clean Water Network*, 905 F.3d at 444.

In the case at bar, the trial court found that the Green River Impoundment violated the CWA because there was a hydrologic connection between the Green River Impoundment and WOTUS (evidenced only by the migration of contaminants from one to the other). R. at 8. Under this theory, the groundwater itself must be considered a point source in order to comply with the Supreme Court's decision in *Rapanos*.

The seep, which carries rain water and contaminants from the impoundment towards the navigable waterways, enters the groundwater sometime before it actually enters into the navigable waters. R. at 7. From here the contamination is allowed to percolate with the stochastic flow of the groundwater until it eventually infiltrates the river through the riverbed. R. at 7.

While the question is novel to this Honorable Court, its novelty does not transcend CWA jurisprudence in general. Multiple courts have held that groundwater cannot properly be considered a point source under the CWA. *See, e.g.*, *Ky. Waterways All*, 905 F.3d at 936. Because this groundwater is not a point source, it is by definition a non-point source. For that reason, it interrupts the chain of point sources as described by Justice Scalia in the *Rapanos* plurality. Because there is no chain of point sources, the contaminants released form the Green River Impoundment are not being added *to* a WOTUS *from* a point source. Further still, because groundwater is not WOTUS unto itself, any discharge from the impoundment to the nearby groundwater is not a discharge of a pollutant *to* WOTUS and is thus beyond the regulatory scope of both 33 U.S.C. §§ 1311 and 1342.

Because the impoundment itself is not a point source, and the groundwater near it is neither a WOTUS nor a point source, the trial court erred in granting relief under 33 U.S.C. § 1311(a). For the forgoing reasons we respectfully request that this Honorable Court reverse the trial court's Order.

III. FERC's Order Should Be Affirmed Because It Is Necessary To Preserve ComGen's Financial Integrity And Does Not Impose An Exorbitant Burden On Ratepayers.

This Honorable Court should affirm FERC's Order because FERC correctly determined that it is necessary to sustain ComGen's financial integrity after considering all of the evidence.

Under the Federal Power Act, FERC is tasked with ensuring that rates charged by public utilities are "just and reasonable." 16 U.S.C. § 824d(a). FERC's discretion is "deliberately broad[,]" *Wash. Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950), because rate design is "technical and involve[s] policy judgments at the core of FERC's regulatory responsibilities." *Me. Pub. Util. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006). *See also Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944) (describing FERC's rate orders as "product[s] of expert judgment [carrying] a presumption of validity"). Thus, "[FERC] may formulate its own standards," *Baker*, 188 F.2d at 15, and is "not bound to the use of any single formula or combination of formulae in determining rates." *Hope*, 320 U.S. at 602.

a. FERC's approval of the revised rate schedules was the product of FERC's expert judgment and had a just and reasonable result.

Because of the great deference owed to FERC, this Honorable Court reviews to determine whether the "end result" of FERC's rate orders, rather than its chosen and applied standard, is arbitrary and capricious. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1176 (D.C. Cir. 1987) (quoting *Hope*, 320 U.S. at 602). *See also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007) (quoting 5 U.S.C. § 706(2)(A) (2012)).

Under the "end-result" test, the "consequences" of a rate order must equitably balance both investor and consumer interests. *Jersey*, 810 F.2d at 1176 (quoting *Hope*, 320 U.S. at 602). The investor interest is "the financial integrity of the company," which requires "enough revenue" to pay expenses, pay dividends, and foster market confidence to maintain credit and

attract capital. *Id.* Generally, "a regulated utility is allowed to recover from ratepayers *all* of its expenses . . . ." *NEPCO Mun. Rate Comm. v. Fed. Energy Reg. Comm'n*, 668 F.2d 1327, 1335 (D.C. Cir. 1981) (emphasis added), *cert. denied, New Eng. Power Co. v. Fed. Energy Reg. Comm'n.*, 457 U.S. 1117 (1982). Moreover, it is reasonable for ratepayers to "share" in the risk of the "facilities intended to benefit them." *Nat. Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1167 (D.C. Cir. 1985). Conversely, the consumer interest is protection from "exorbitant rates." *Jersey*, 810 F.2d at 1177 (quotation omitted). On appeal, this Honorable Court's responsibility is "not to supplant [FERC's] balance of these interests with one more nearly to its liking, but instead to assure itself that [FERC] has given reasoned consideration to each of the pertinent factors." *Id.* (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968)). Affirmance is required, "as long as [FERC] has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Wis. Pub. Power*, 493 F.3d at 256 (quotation omitted).

Here, FERC appropriately weighed the interests of ComGen vis-à-vis those of its ratepayers. *NEPCO*, 668 F.2d at 1335. Disallowing the proposed rate schedules would have "erase[d] the majority of [ComGen's] profits," and rendered it unable to pay its "shareholders, maintain its financial integrity, [or] assure confidence in [its] financial soundness[.]" R. at 10-11. This outcome clearly vitiates ComGen's interests under the "end result" standard. *See Hope*, 320 U.S. at 602. The prior rates would have seriously jeopardized ComGen's financial integrity and it is unlikely that it would have been able to pay expenses, pay dividends, maintain credit, or attract capital. *See id.*; R. at 11. As FERC correctly concluded, ComGen "should not be held strictly liable for the actions of its subcontractor in failing to competently weld the HDPE liner . . . ." R. at 11. In 2002, a separate CE subsidiary itself detected elevated arsenic levels,

immediately notified VDEQ, and took swift remedial action R. at 5-6. ComGen itself is entitled to a presumption of managerial competence that it too will handle the current pollution with equal commitment and efficiency. As FERC correctly emphasized, ComGen's access to the funding necessary to carry out this task cannot be restricted. R. at 12. To promote environmental protection, utilities must be "able to recover in rates the costs of environmental cleanups . . . ." R. at 12. Otherwise, utilities would be discouraged from discovering and/or publicly acknowledging pollution when it occurs.

In contrast, SCCRAP presents no evidence to indicate that an increase of $2.15-3.30 per month, R. at 9, poses an "exorbitant" burden on ComGen's ratepayers. *Jersey*, 810 F.2d at 1177 (quotation omitted). Thus, the end result which FERC's Order achieved is reasonable. *Hope*, 320 U.S. at 602. Additionally, it is reasonable that ComGen's ratepayers shoulder the cost of preserving the power facility that "benefit[s] them." *Nat. Gas Pipeline*, 765 F.2d at 1167. It is not remarkable that the ratepayers are tasked with paying the expenses of their very own power utilities. *NEPCO*, 668 F.2d at 1335. This is especially so where the "express terms" of the contracts make the costs "properly allocable to [the] utilities . . . ." R. at 10, which are then necessarily forwarded on to the ratepayers.

SCCRAP's argument that FERC's decision violated the prudence and matching principles, R. at 9, misapprehends the broad discretion FERC enjoys in applying whichever standards it chooses. *See Hope*, 320 U.S. at 602; *Baker*, 188 F.2d at 15. It is not the standards, but the end result which counts, and here that end result is fair. *Jersey*, 810 F.2d at 1176. *See also Wisconsin v. Fed. Power Comm'n*, 303 F.2d 380, 386 (D.C. Cir. 1961) ("Whether [FERC] should have preceded its ultimate conclusion [with] an intermediate conclusion of justness and reasonableness . . . seem[s] to us to be [an] immaterial quer[y]. The important feature is that

[FERC] . . . decided the critical substantial issue, rationally and upon detailed findings of basic facts upon an ample record."), *aff'd* 373 U.S. 294 (1963).

SCCRAP's argument that FERC's decision was arbitrary and capricious because it approved ComGen's rate schedules while simultaneously expressing broad agreement with SCCRAP, R. at 11-12, is also unavailing: "A balancing of policy objectives is not synonymous with inconsistency [but rather a] path between competing policy objectives[.]" *NEPCO*, 668 F.2d at 1333. FERC carved such a path in this case, and the fact that it substantially set forth SCCRAP's advanced arguments in its decision, R. at 11-12, explicates that "the record evidence was reviewed and the involved equities were weighed." *Id.* at 1334. That is all that is required. *Id.*

Because maintaining ComGen's financial integrity is a "satisfactory explanation" for FERC's decision, *Wis. Pub. Power*, 493 F.3d at 256 (quotation omitted), this Honorable Court should not "supplant [FERC's] balanc[ing] of these interests," but should instead affirm FERC's decision. *Jersey*, 810 F.2d at 1177 (quotation omitted).

b. FERC's approval of the revised rate schedules comports with both the used and useful principle and the matching principle of utility ratemaking.

While acknowledging that FERC is free to adopt *any* method of valuation (so long as the end result is reasonable), *NEPCO*, 668 F.2d at 1333, this Honorable Court has recognized that the "general rule" is the "used and useful" principle: "current rate payers should bear only legitimate costs of providing service to them." *Id.* This principle has a flexible meaning, with "widely recognized exceptions and departures," especially when there are "countervailing public interest considerations" such as the "reliability of future service." *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 332 (D.C. Cir. 1985) (quotations omitted). Accordingly, this Honorable Court permitted ratepayers to shoulder construction costs of utility plants *not yet built* because

the ratepayers "derive[d]" a "present benefit—assurance of adequate future service[.]" *Mid-Tex*, 773 F.2d at 346. Consonant with this flexible standard, state courts have permitted present ratepayers to shoulder environmental cleanup costs of pollution of facilities no longer in use, even where the pollution occurred in the distant past. *See In re Application of Duke Energy Ohio, Inc.*, 82 N.E.3d 1148, 1151 (Ohio 2017) (where the remediation expenses "were a necessary and current cost of doing business"); *In re Request of Interstate Power Co.*, 559 N.W.2d 130, 133, 134 (Minn. Ct. App. 1997) (noting that the sites were "used and useful at the time of pollution," and that it was "not possible for the then ratepayers to pay the cleanup costs") *aff'd*, 574 N.W.2d 408 (Minn. 1998).

The same is true of the matching principle of utility ratemaking which prescribes that "customers who pay the expense receive the tax benefit associated with that expense." *Pub. Sys. v. FERC*, 709 F.2d 73, 76 (D.C. Cir. 1983). Under this principle, the proper rate matches the utility's cost to render service "*at the time [the utility is] render[ing] that service . . . .*" *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 690, 691 (1923) (emphasis added). *See also id.* (". . . [W]e concur . . . that the value of the property is to be determined as of the time when the inquiry is made regarding the rates."); *Town of Norwood, Mass. v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995) (standing for the proposition that the matching principal is furthered when "current customers" are charged for "present" costs). Moreover, "some violation of the matching principle is acceptable when ratemaking conventions involving future expenses change." *Norwood*, 53 F.3d at 381. Thus, the Supreme Court has allowed future costs to be borne by current customers when the rate was "too low to constitute just compensation for the use of the property." *Bluefield*, 262 U.S. at 680.

Here, the costs of corrective action are properly allocated to the ratepayers under both the used and useful principle and the matching principle because the ratepayers are deriving a "present benefit" from ComGen's services. *Mid-Tex*, 773 F.2d at 346. *See also Bluefield*, 262 U.S. at 690; *Norwood*, 53 F.3d at 381. In order to continue providing the benefit, ComGen must implement the mandated environmental cleanup. R. at 8. Thus, the remedial action is a "necessary and current cost of doing business," *Duke Energy*, 82 N.E.3d at 1151, that is necessarily paid in order that the ratepayers may continue to enjoy electricity. Under this Honorable Court's precedent (and consonant state court precedent), it is simply irrelevant that the pollution occurred in the past. *See Mid-Tex*, 773 F.2d at 346, *Duke Energy*, 82 N.E.3d at 1151, *Interstate Power*, 559 N.W.2d at 134.

Additionally, SCCRAP's argument that current ratepayers should not shoulder the portion of the cost attributable to pollution occurring while different customers were being serviced is not reasonable. R. at 9. SCCRAP proposes no method for properly apportioning the coal ash between current and former ratepayers and it would likewise be impossible to accurately determine how to divide costs between current and former ratepayers. R. at 9. Nor is SCCRAP's argument consistent with the law. The proper time for evaluation of rates is *now*, when the costs are realized and must be paid. *See Bluefield*, 262 U.S. at 690, 691, *Norwood*, 53 F.3d at 381.

Moreover, in the instant case there are "countervailing public interest considerations" that counsel against strict application of either principle. *Mid-Tex*, 773 F.2d at 332 (quotation omitted). *See also Norwood*, 53 F.3d at 381. Because ComGen's "financial integrity" would be jeopardized, R. at 11, the ratepayers' "reliability of future service [would] also [be] in doubt[.]" *Mid-Tex*, 773 F.2d at 332 (D.C. Cir. 1985) (quotation omitted). Additionally, the policy

enunciated by FERC of providing incentives for utilities to take responsibility for environmental cleanup, R. at 12, also counsels in favor of placing the costs of the cleanup on current ratepayers.

Because FERC considered all of the evidence and reached a conclusion that appropriately balanced the competing interests, this Honorable Court should affirm.

IV. FERC's Order Should Be Affirmed Because Disallowing The Recovery Of The Costs Of Remediating The Green Run Impoundment In Whole Or In Part Constitutes An Unconstitutional Taking Under The Fifth Amendment.

This Honorable Court should affirm FERC's Order because any other result would be an unconstitutional taking under the Fifth Amendment.

The Takings Clause of the Fifth Amendment prohibits the taking of private property for public use, "without just compensation." U.S. Const. amend. V. Analogously, the government cannot conscript a utility's services for the public benefit "without reward." *Smyth v. Ames*, 169 U.S. 466, 524 (1898). Rates set by FERC are deemed confiscatory when they do "not afford sufficient compensation[.]" *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). *See also Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (stating that FERC cannot fix rates that are so low as to be "confiscatory in the constitutional sense"). Although the methods for valuing "sufficient compensation" have historically varied (*compare Smyth*, 169 U.S. at 546, *with Nat. Gas Pipeline*, 315 U.S. at 588), the "inquiry[] will always be an embarrassing question." *Smyth*, 169 U.S. at 546. Precisely for this reason, the Supreme Court ultimately adopted the end result test. *See Hope*, 320 U.S. at 602 ("it is the result reached not the method employed which is controlling"); *Barasch*, 488 U.S. at 310 ("Today we reaffirm these teachings of *Hope* . . . .").

The constitutional standard "coincides" with the statutory standard. *Jersey*, 810 F.2d at 1175 (quoting *Nat. Gas Pipeline*, 315 U.S. at 586). Thus, a taking occurs at the "margin[],"

Barasch, 488 U.S. at 310, where a rate "threaten[s]" a utility's "financial integrity." *Verizon Commc'n, Inc. v. FCC*, 535 U.S. 467, 524 (2002) (quotation omitted). However, "[t]he Constitution does not bind rate-making bodies to the service of any single formula," and agencies are free to "make the pragmatic adjustments which may be called for by particular circumstances." *Nat. Gas Pipeline*, 315 U.S. at 586. "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Hope*, 320 U.S. at 602.

Here, there is no dispute that should recovery of the rates be disallowed, ComGen's financial predicament is dire. R. at 10-11. In fact, ComGen has asserted that it would be unable to raise capital or "properly balance the interests of ratepayers and [its] shareholders[.]" R. at 11. Thus, this case is fully at the constitutional margin, *Barasch*, 488 U.S. at 310, and disallowing ComGen's recovery of the rates would be a taking in contravention of the Fifth Amendment.

Therefore, FERC's Order was absolutely necessary and must be upheld. SCCRAP's alternative argument for reduced disallowance rather than total disallowance, evidences discontentment with a portion of the rate order. R. at 9. But unless the "total effect of the rate order" is unjust or unreasonable, judicial inquiry . . . is at an end." *Hope*, 320 U.S. at 602. SCCRAP cannot argue that the total effect of the Order is unjust or unreasonable because that Order is necessary for ComGen, for shareholders, and for consumers. R. at 10-11. Even if the allegation that ComGen might have exercised greater care in monitoring the liner is accepted, R. at 11, that does not justify violation of ComGen's constitutional rights.

For all of these reasons, this Honorable Court should affirm FERC's Order.

CONCLUSION

This Honorable Court should reverse the trial court's Order of injunctive relief against ComGen because groundwater is neither WOTUS nor a point source and thus is not within the regulatory purview of the CWA and does not require a permit under the NPDES permitting program.

Moreover, this Honorable Court should affirm FERC's approval of ComGen's revised rate schedules because they were the end result of FERC's broad discretion and were necessary to avoid an unconstitutional taking.

CERTIFICATE OF SERVCE

Pursuant to Official Rule IV, *Team Members* representing ComGen 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. 30