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

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

SCCRAP'S BRIEF

Team No. 4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

JURISDICTIONAL STATEMENT

I. THE DISTRICT COURT'S DECISION

The District Court exercised federal question jurisdiction over the claims brought by Stop Coal Combustion Residual Ash Ponds ("SCCRAP") against Commonwealth Generating Company ("ComGen") under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). On June 15, 2018, the District Court issued its order. On July 16, 2018, ComGen timely filed this appeal—which is within thirty days following the District Court's order. This Court has jurisdiction to review the District Court's order under 28 U.S.C. § 1291.

II. FERC'S RATE REVISION DECISION

Under the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC") has jurisdiction over wholesale energy transmissions in interstate commerce. 16 U.S.C. § 824(a). Because ComGen entered into agreements with Vandalia Power Company ("Vandalia Power") and Franklin Power Company ("Franklin Power") to offer wholesale energy distribution in multiple states, ComGen's sales are subject to FERC jurisdiction.

On July 16, 2018, ComGen filed a proposed rate revision to FERC. FERC issued its decision approving ComGen's rate revisions on October 10, 2018. Within thirty days of FERC's decision, SCCRAP sought rehearing of the decision on November 9, 2018. On November 30, 2018, FERC issued an order denying SCCRAP's rehearing.

An aggrieved party may appeal a FERC order to the D.C. Circuit Court of Appeals "by filing in such court, within sixty days, after the order of [FERC] upon the application for rehearing, a written petition praying that the order of [FERC] be modified or set aside in whole or in part." 16 U.S.C. § 825l(b). SCCRAP timely filed a petition for review to this Court on

December 3, 2018—within sixty days of FERC's order. ComGen was incorporated in District of Columbia in 2014. R. at 3. Therefore, this Court has jurisdiction to review FERC's order.

STATEMENT OF THE ISSUES

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.
2. Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of § 1311(a) of the Clean Water Act.
3. 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 a constitutional taking under the Fifth and Fourteenth Amendments.
4. 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.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

The Clean Water Act's ("CWA") objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To realize this objective, Congress prohibited the "discharge of toxic pollutants in toxic amounts" and established the National Pollutant Discharge Elimination System ("NPDES"). *Id.* §§ 1251(a)(3); 1342. NPDES is a permitting system that regulates the discharge of pollutants into navigable waterways. *Id.* § 1342.

Under the CWA, it is unlawful for anyone to discharge pollutants from a point source into navigable waters without or in violation of an NPDES permit. 33 U.S.C. 1311(a). A "discharge" is defined broadly to incorporate "*any addition* of *any pollutant* to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). A "point source" is also defined expansively: "any discernible, confined and discrete conveyance, including *but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container… from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added). "Navigable waters" are simply defined as "waters of the United States" (or "WOTUS"). *Id.*§ 1362(7). The Supreme Court has interpreted WOTUS to include not only waters that are navigable in fact (such as lakes, rivers, streams, and oceans), but additionally wetlands and other water bodies bearing a "continuous surface connection" to those navigable waters. *See Rapanos v. United States*, 547 U.S. 715, 743 (2006).

B. The Federal Power Act

In 1935, Congress expanded the FPA to regulate all interstate sales of electricity. 16 U.S.C. § 824(a). The FPA "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," and it was therefore in the public interest to regulate energy sales at the federal level. *Id.*

The FPA created Federal Power Commission to exercise jurisdiction over the regulated actions of interstate energy utilities. *Id.* § 824(b)(1). This agency was later dissolved and its duties were transferred to FERC. *See* Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

The FPA declares that all rates charged by public utilities "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a). If a power company wishes to change the rates it charges its customers, the

power company must file notice with FERC. *Id.* § 824d(d). On its own initiative, or upon receiving a complaint, FERC then has the authority to hold a hearing on the "lawfulness of such rate," including whether the proposed rate is "just and reasonable." *Id.* § 824d(e).

II. FACTUAL BACKGROUND

Commonwealth Energy ("CE") is a multistate holding company whose subsidiaries provide electric service at retail and wholesale rates to customers in nine states. Record at 3–4. In the late 1990s, CE formed Commonwealth Energy Solutions ("CES") to become a major supplier in wholesale power markets. R. at 4. CES is a wholly owned and unregulated subsidiary of CE. R. at 3. CES developed the Vandalia Generating Station (the "Station"), near Mammoth, Vandalia on the Vandalia River. R. at 4. The Station began commercial operation in 2000. R. at 4. From 2000 to 2014, CES sold the electricity produced at the Station to the wholesale market—not Vandalia Power and Franklin Power. R. at 4.

The Station produces energy using two coal-fired units. R. at 4. Generating energy from coal produces coal combustion residuals ("CCRs" or "coal ash"). R. at 3. Coal ash contains mercury, cadmium, and arsenic—toxic chemicals that can cause cancer and various other serious health effects. R. at 3. Coal ash is typically stored in landfills or mixed with water and stored in surface impoundments. R. at 3. According to the Environmental Protection Agency ("EPA"), the toxic chemicals from coal ash can leach into groundwater, potentially contaminating drinking water sources. R. at 3. Arsenic can leach into groundwater when rain passes through coal ash sludge. R. at 5. Hence, improperly stored coal ash poses significant public health risks. R. at 3.

Since 2000, coal ash produced at the Station has been discarded into the Little Green Run Impoundment (the "Impoundment"). R. at 4. The Impoundment is an on-site surface impoundment, located adjacent the Station. R. at 3. The Impoundment is about 71 surface acres and contains about 38.7 million cubic yards of coal ash sludge. R. at 4. The Vandalia Department

of Environmental Quality (VDEQ) issued a permit to CES to operate the Station—which requires CES to monitor the groundwater adjacent to the Impoundment. R. at 5.

In 2002, CES detected arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. R. at 5. Pursuant to its permits, CES notified VDEQ of the violation and began planning and implementing a corrective action plan to address the arsenic pollution from the Impoundment. R. at 5. VDEQ approved the corrective plan in 2005. R. at 5. In 2006, under the corrective plan, CES installed a high-density polyethylene geomembrane liner ("HDPE liner") on the west embankment of the Impoundment. R. at 5.

In 2014, CE announced its intention to secure more reliable profits by by moving its merchant plants from competitive wholesale markets into the regulated retail market. R. at 4. Utilities that sell the electrical output to wholesale markets bear the risk of the free market's price fluctuations. R. at 4. On the other hand, utilities that sell energy to retail markets can recover operating costs and returns on investment from captive retail customers. *Id.* Utilities that sell to retail markets are regulated because they enjoy a natural monopoly. *Id.*

To enter the retail market, CE incorporated ComGen so that ComGen could purchase the Station from CES. R. at 3. ComGen has owned and operated the Station and Impoundment since 2014. R. at 4. ComGen is a wholly owned subsidiary of CE. R. at 3.

In 2014, ComGen entered into power service agreements with Vandalia Power and Franklin Power, where ComGen would sell 50% of the Station's electrical output to Vandalia Power and 50% to Franklin Power. R. at 4. The unit power service agreement between ComGen and Vandalia Power is ComGen's FERC Rate Schedule No. 1; the unit power service agreement between ComGen and Franklin Power is ComGen's FERC Rate Schedule No. 2. R. at 4. Vandalia Power and Franklin Power are wholly owned subsidiaries of CE. R. at 4.

Since 2014, the EPA has classified the Impoundment as "high hazard"—one of only 63 high hazard impoundments nationwide. R. at 5. In March 2017, eleven years after CES installed the HDPE liner, the Vandalia Waterkeeper (a nonprofit organization) detected elevated levels of arsenic in the Vandalia River. R. at 5. Subsequent analysis from the Vandalia Waterkeeper indicated that the Impoundment had been leaching arsenic into the surrounding groundwater. R. at 5–6. The groundwater then channeled the arsenic into nearby Fish Creek and Vandalia River. R. at 6. Fish Creek is a tributary to Vandalia River, and both are navigable waters. *Id.*

Vandalia Waterkeeper filed a complaint with the VDEQ, which commenced an investigation. R. at 6. VDEQ's investigation showed that a seam in the HDPE geomembrane liner installed in 2006 was inadequately welded, resulting in seepage that pooled at the bottom of the HDPE-lined embankment. R. at 6. ComGen stated that the seepage occurs when there is significant rainfall. R. at 6. VDEQ reported that the seepage has "been active for many years without significant change." VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14. The seepage "caused some erosion and indentations or grooves in the soil as it made its way down the embankment towards Fish Creek." *Id.* The arsenic from the Impoundment entered the Fish Creek and then the Vandalia River. R. at 6.

III. PROCEDURAL HISTORY

A. The District Court and its Ruling

On December 2017, SCRAAP filed suit against ComGen in the U.S. District Court for the District of Columbia under the citizen-suit provision of the CWA. R. at 7; *see* 33 U.S.C. § 1365. SCCRAP alleged that ComGen violated 33 U.S.C. § 1311(a), which prohibits the unauthorized discharge of any pollutant into navigable waters. R. at 7. According to SCCRAP's complaint, the Impoundment qualified as a point source from which arsenic was discharged. R.

at 7. SCCRAP alleged that the arsenic polluted the groundwater that was hydrologically connected to navigable waters: Fish Creek and Vandalia River. R. at 7.

On June 15, 2018, the District Court issued an order finding that ComGen discharged arsenic into groundwater from the Impoundment, and the arsenic was channeled into navigable waters via the groundwater. R. at 7. The District Court held that ComGen violated 33 U.S.C. § 1311(a) because ComGen discharged a pollutant from a point source, i.e., the groundwater, without an NPDES permit. R. at 7–8.

Critically, the District Court held that "the CWA applies 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. at 8; *SCCRAP v. Commonwealth Generating Co.*, D.C. No. 17-01985, slip op. at 10 (D.D.C. June 15, 2018) [hereinafter *Opinion*]. The District Court found that the Impoundment constituted a conveyance and, thus, a point source because "ComGen built coal ash piles… in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters." R. at 8; Opinion at 12. Therefore, the court found that the Impoundment is a "discrete mechanism[] that conveyed pollutants from the [] Station to the Vandalia River." Opinion at 12.

Remedy. The District Court ordered ComGen to fully excavate the coal ash from the Impoundment and relocate it to a completely lined facility in compliance with EPA's CCR rule. R. at 8. The court acknowledged that the burden of closure by removal "may be great," but "the only adequate resolution to an untenable situation that has gone on for far too long." R. at 8. Therefore, because of the costs associated with the injunctive remedy, the court did not assess civil penalties against ComGen. R. at 8.

Appeal. On July 16, 2018, ComGen filed an appeal challenging the District Court's conclusions that (1) the CWA regulates discharges into navigable waters through hydrologically connected groundwater, and (2) the Impoundment constitutes a "point source" under the CWA. R. at 8.

B. The FERC Adjudication

After receiving the District Court's order, on July 16, 2018, ComGen submitted a filing to FERC under section 205 of the FPA to recover the costs of complying with the District Court's order from Vandalia Power and Franklin Power. R. at 8. ComGen sought to recover the full costs of excavating the 38.7 million cubic yards of coal ash in the Impoundment and relocating it to a new facility that complies with EPA's CCR rule. R. at 8. ComGen estimated the costs to be $246 million. R. at 8.

To recover the costs over a 10-year period, ComGen proposes to revise its FERC Rate Schedule No. 1 and FERC Schedule No. 2. ComGen proposes to allocate 50% of the costs to Vandalia Power and 50% to Franklin Power, i.e., $123 million to each company. R. at 8.

In turn, Vandalia Power and Franklin Power would recover the costs from their retail customers. R. at 8–9. State public utility commissions cannot intervene on behalf of their citizens to prevent such a recovery once FERC has approved the rate. R. at 9. ComGen's proposal would increase customers' bills by $2.15 per month in November 2019. Average households would see bills rise by $3.30 per month during the 10-year amortization period. R. at 9.

SCCRAP intervened in the FERC proceeding by filing a protest in opposition to ComGen's filing. R. at 9. FERC held an evidentiary hearing to take testimony on the issues raised by SCCRAP. R. at 10. SCCRAP argued that, if ComGen had exercised a standard of care consistent with prudent utility practice, there would have been not have been seepage of arsenic into the groundwater and thus no basis for imposing corrective action. R. at 9. ComGen does not

dispute that the Impoundment is the source of the arsenic seeping into the groundwater because of a leak in the HDPE liner. R. at 10. Therefore, SCCRAP asserted that ComGen's sole shareholder CE should bear the consequences of ComGen's imprudence. R. at 9.

Between 2000 and 2014, the Station was a merchant plant and sold its energy on the wholesale market to entities other than Vandalia Power and Franklin Power. R. at 3–4, 9. In 2014, ComGen executed the power service agreements with Vandalia Power and Franklin Power. R. at 4, 9. SCCRAP observed that Vandalia Power and Franklin Power only contributed to the production of coal ash for about 19.5% of the time that the Impoundment has been in operation; therefore, only 19.5% of the cleanup costs (about $48 million) are attributable to Vandalia Power and Franklin Power. R. at 9. The remaining 80.5% of coal ash is attributable to customers who purchased electricity from the Station when it was a merchant plant. R. at 9. Therefore, SCCRAP asserted that forcing Vandalia Power's and Franklin Power's ratepayers to bear 100% of the cleanup cost would violate the matching principle. *Id.*

ComGen claims that disallowing recovery for all or a substantial portion of the $246 million in remediation costs would effectively erase most of its profits over the proposed 10-year recovery period. R. at 10. If ComGen were to recover the full cleanup costs, it would receive a 10% return on its equity; whereas if ComGen does not recover any of the costs, it would receive a 3.2% equity return. R. at 10–11. However, if ComGen receives the partial recovery based on SCCRAP's alternative proposal, ComGen would earn a 3.6% return. *Id.*

Following three evidentiary hearings, FERC approved ComGen's requested rate revision on October 10, 2018. R. at 11. FERC agreed with ComGen that it should not be held strictly liable for the actions of the subcontractor who failed to competently weld the HDPE liner. R. at 11. Nonetheless, FERC reached a factual finding that ComGen failed to properly monitor the

effectiveness of the corrective action during the 2006-2017 period—which likely would have revealed the problem with arsenic seeping through the crack in the HDPE liner. R. at 11. FERC found that full cleanup costs would represent a windfall to ComGen's shareholder, CE. Therefore, ComGen should bear a proportionate share of the cleanup costs. R. at 11.

However, FERC ultimately decided that the financial impact of bearing a proportionate share of the costs would jeopardize the financial integrity of ComGen and raise constitutional issues under the Fifth and Fourteenth Amendments. R. at 12. FERC relied on a policy rational that, to promote environmental protection, utilities should be able to recover the costs of environmental cleanups by increasing their rates. R. at 12.

Within thirty days, SCCRAP sought rehearing of FERC's decision on November 9, 2018. R. at 12. FERC denied the rehearing on November 30, 2018. R. at 12. SCCRAP appealed FERC's decision to approve ComGen's revised rates to the D.C. Circuit Court of Appeals, claiming that the decision was arbitrary and capricious. R. at 12.

SCCRAP, ComGen, and FERC then jointly filed a motion in the D.C. Circuit Court of Appeals to have the actions consolidated. R. at 12. On December 21, 2018, the D.C. Circuit granted the motion. R. at 12.

SUMMARY OF THE ARGUMENT

This case concerns the storage of coal ash generated from the Vandalia Generating Station, a coal-fired power plant. This Court must consider whether the Clean Water Act applies to discharges emanating from coal ash when the pollutant travels through groundwater to reach navigable waters. The District Court held that ComGen violated the CWA because the Impoundment leached arsenic into the Fish Creek and Vandalia River through hydrologically connected groundwater. ComGen does not dispute that the arsenic is a pollutant; that Fish Creek

and Vandalia River are navigable waters; or that the Impoundment is the source of the arsenic. On appeal, ComGen raises two legal challenges to the District Court's ruling that 1) the Impoundment is a point source; and 2) that the CWA applies to the discharge of pollutants to navigable waters through hydrologically connected groundwater.

The District Court correctly found that the Impoundment was a point source and that the CWA applies to the discharge of pollutants to navigable waters through hydrologically connected groundwaters. The court's findings fit within the statutory definitions of a point source in the CWA and within the common interpretation of the terms in case law, including the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715, 743 (2006). ComGen's arguments rest entirely on the Sixth Circuit's improper interpretation of the CWA. *See Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018).

Under the plain meaning and statutory purpose of the CWA, the CWA regulates indirect discharges through groundwater when there is a direct hydrological connection between groundwater and navigable waters. Congress' goal was to protect the quality of the nation's waters. 33 U.S.C. § 1251(a). To allow a short distance of soil to prevent a polluter from being held liable would defeat the CWA's statutory purpose. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 652 (4th Cir. 2018) (citing 33 U.S.C. § 1311(a)). The District Court's findings comport with the CWA's plain meaning and the interpretation of most courts. Therefore, this Court should affirm the District Court's findings.

Based on its factual findings, the District Court ordered ComGen to relocate the coal ash from the leaking impoundment into a competently lined facility. In response, ComGen filed a proposed rate revision to FERC that would allow ComGen to recover these cleanup costs from

ratepayers. ComGen argued that, if FERC did not allow it to recover the full costs of the cleanup, FERC's previously approved rate (which was just and reasonable) would result in a taking.

Under the FPA, FERC has a statutory mandate to ensure that all regulated utility rates are "just and reasonable." 16 U.S.C. §§ 824d, 824e. Under the plain meaning of FPA, ratepayers should not have to bear ComGen's cleanup costs when ComGen's liability rose from ComGen's imprudent management practices because it would be patently unfair and unjust to the ratepayer. Ratepayers should especially not have to bear the full burden of ComGen's imprudence when the energy the ratepayers used only contributed to 19.5% of the coal ash in the Impoundment. FERC found that ComGen had acted imprudently and that allowing it to recover full costs would constitute an economic windfall for ComGen. Thus, FERC found that ComGen's new rate would violate the matching principle. Nevertheless, FERC disregarded these findings and approved ComGen's rate revisions to recover the cleanup costs.

On appeal, SCCRAP raises two arguments: 1) Disallowing ComGen from recovering full or partial cleanup costs is not a taking; and 2) FERC acted arbitrarily and capriciously by approving ComGen's rate schedule. First, ComGen does not have a right to recover cleanup costs because ComGen's imprudence caused arsenic to leach into navigable waters—allowing recovery would violate the prudence principle. Thus, FERC incorrectly presumed that preventing ComGen from recovering cleanup costs would implicate a takings issue. Second, FERC ignored its factual findings and did not offer a reasoned basis to support its contradictory decision. Instead, FERC concluded—without providing any evidence—that SCCRAP's proposed rate would jeopardize the financial integrity of ComGen and raise a constitutional issue. Therefore, this Court should vacate and remand FERC's decision as arbitrary and capricious.

ARGUMENT

I. COMGEN VIOLATED THE CLEAN WATER ACT BY DISCHARGING ARSENIC INTO FISH CREEK AND THE VANDALIA RIVER WITHOUT AN NPDES PERMIT.

For an unlawful discharge of a pollutant to be actionable under the CWA, "five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). At issue before this Court are the second and fifth elements. This Court should affirm the well-reasoned holding of the District Court and find that (A) when a pollutant is "added" to navigable waters via groundwater with a direct hydrological connection to navigable waters of the United States, it is actionable under the CWA; and (B) the crack in the Impoundment, and the Impoundment itself, meet the statutory definition of a "point source."

A. An Unlawful Discharge Via Hydrologically Connected Groundwater is Actionable Under the Clean Water Act

Whether water pollution through hydrologically connected groundwater is actionable under the CWA is an issue of first impression for the D.C. Circuit. The Fourth and Ninth Circuits have held that pollution carried into navigable surface waters via groundwater is actionable because it is consistent with the plain meaning of the statute and the CWA's remedial purpose. *Upstate Forever*, 887 F.3d at 652–53; *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). The Sixth Circuit, however, has rejected the theory based on a flawed interpretation of the CWA. *Kentucky Waterways All.*, 905 F.3d at 932–33. This Court should adopt the proper interpretation of the CWA articulated by the Fourth and Ninth Circuits.

Under the plain language and purpose of the CWA, discharges travelling through groundwater are actionable if the discharges are "fairly traceable" to a discernible point source. *Upstate Forever*, 887 F.3d at 652–53; *Hawai'i Wildlife Fund*, 886 F.3d at 744.

First, based on the plain language of the CWA, the discharge of a pollutant must come from a discernible point source. *See* 33 U.S.C. § 1362(14) ("point source means any discernible, confined and discrete conveyance"). The CWA "does not require a discharge [to be] directly [added] to navigable waters." *Upstate Forever*, 887 F.3d at 650 (citing *Rapanos*, 547 U.S. at 743; 33 U.S.C. § 1362(12)(A)). In other words, a discharge does not "need [to] be channeled by a point source until it reaches navigable waters." *Id.* at 651. The CWA regulates "*any* addition of *any* pollutant to navigable waters … from *any* [discernible] point source." 33 U.S.C. §§ 1362(12)(A); 1362(14) (emphasis added). For a court to require that a discharge to "be seamlessly channeled by point sources until the moment the pollutant enters navigable waters," would ignore the plain language of the CWA. *Upstate Forever*, 887 F.3d at 650.

Second, requiring a pollutant to be "seamlessly channeled" from the point source until it enters the navigable waters would "greatly undermine the purpose of the [CWA]." *Id.* at 652. The CWA seeks to protect and restore "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA "establishes a regime of zero tolerance for unpermitted discharges of pollutants." *Upstate Forever*, 887 F.3d at 652 (citing 33 U.S.C. § 1311(a)). As the Fourth Circuit eloquently observed, "if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters. Such an outcome would greatly undermine the purpose of the Act. " *Id.* at 642.

The Sixth Circuit, on the other hand, refused to enforce the CWA when discharges enter navigable waters via groundwater. *Kentucky Waterways All.*, 905 F.3d at 934. The Sixth Court found that "the phrase 'into' leaves no room for intermediary mediums to carry the pollutants." *Id.*; *see* 33 U.S.C. § 1362(11). According to the Sixth Circuit, groundwater cannot be a point

source because groundwater is diffuse "by its very nature"; and, because the CWA only applies to discharges from point sources, the CWA does not apply. *Id.* at 933.

However, there are two major flaws with the Sixth Circuit's reasoning: First, the court focused on whether groundwater was a point source when it should have analyzed groundwater as a medium between the point source and navigable waters. Second, the court ignored the CWA's remedial purpose.

Groundwater can act as an additional medium through which pollutants pass as indirect discharges. *See Upstate Forever*, 887 F.3d at 651; *Hawai'i Wildlife Fund*, 886 F.3d at 747. Indirect discharges through groundwater are the "functional equivalent" of direct discharges if there is a "direct hydrological connection between the groundwater and navigable waters." *Hawai'i Wildlife Fund*, 886 F.3d at 749; *see also Upstate Forever*, 887 F.3d at 651. The Ninth Circuit reasoned that pollutants "fairly traceable from the point source to a navigable water" were actionable because the plain language of the CWA requires the court to interpret it as such. *Hawai'i Wildlife Fund*, 886 F.3d at 749. The CWA prohibits the "addition of any pollutant to navigable waters"; the CWA does not prohibit "addition of any pollutant *directly* to navigable waters from any point source." *Id.* at 748 (quoting *Rapanos*, 547 U.S. at 743 (emphasis in original) and 33 U.S.C. §§ 1311(a), 1362(12)(A)).

The direct hydrological test is consistent with the purpose of the CWA according to the Second Circuit, Fifth Circuit, Supreme Court, and the EPA. The Second Circuit and Fifth Circuit have also indicated that indirect discharges from a point source to a navigable water are actionable under the CWA. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir 1980); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118–19 (2d Cir. 1994). In *Rapanos*, the Supreme Court supported the Second Circuit's "indirect discharge"

theory. 547 U.S. at 744 (citing *Concerned Area Residents for Environment*, 34 F.3d at 118–19). The Court also acknowledged that discharges into "intermittent channels" violate the CWA, "even if the pollutants discharged from a point source do *not* emit *directly* into covered waters, but pass through conveyances in between." *Id.* at 743 (citation omitted). Interpreting the CWA, the EPA has adopted the direct hydrological connection test to regulate the discharge of pollutants into navigable waters—whether the pollutants reach the navigable waters directly or through groundwater. *See* 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001) ("the Clean Water Act [applies] to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water."); 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998) ("NPDES permitting program [] regulate[s] discharges to surface water via groundwater where there is a direct and immediate hydrologic connection.").

In sum, the Second Circuit, Fourth Circuit, Ninth Circuit, the Supreme Court, and the EPA have interpreted the CWA to regulate indirect discharges into navigable waters of the United States. Only the Sixth Circuit has erroneously interpreted the CWA to allow a "short distance of soil and groundwater" to not enforce pollutant discharges. *Upstate Forever*, 887 F.3d at 652. Therefore, this Court should affirm the district court's decision and subject indirect discharges that enter navigable waters through groundwater to the CWA when "there [i]s a direct connection between the [point source] and the navigable water." *Hawai'i Wildlife Fund*, 886 F.3d at 747 (citing *Concerned Area Residents for Environment*, 34 F.3d at 119).

In *Hawai'i Wildlife Fund*, Maui County owned and operated a wastewater treatment facility that was injecting pollutants into underground wells, which then discharged into groundwater connected to the Pacific Ocean. *Id.* at 742. The Ninth Circuit held the County liable for the indirect discharges under the CWA because "the County discharged pollutants from a

point source" and "the pollutants were fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." *Id.* at 749. Tests demonstrated that there was an "undeniable connection" between the point source and navigable waters that were half a mile away. 886 F.3d at 747.

In *Upstate Forever*, gasoline spilled from a cracked underground pipeline. 887 F.3d at 643. The Fourth Circuit held that the CWA regulated discharges from the ruptured pipeline—a point source—that ultimately entered navigable waters via groundwater, as long as the groundwater is "sufficiently connected to navigable waters" and "the connection between point source and navigable waters" is "clear." *Id.* at 651.

In the case at bar, the District Court found that the Impoundment released arsenic into groundwater, which then carried the arsenic into nearby navigable waters. Opinion at 12. The District Court stated that the "connection [between the Impoundment and the navigable waters] is direct, immediate, and can generally be traced." *Id.* This finding is undisputable as the arsenic left clear "grooves" in the ground as it left the Impoundment. *Id.* The District Court found that there was a direct hydrological connection between the Impoundment and Fish Creek—a navigable waterway. *Id.* As in *Hawai'i Wildlife Fund*, there is an "undeniable connection" between the Impoundment and the navigable waters. *See* 866 F.3d at 747.

The District Court's findings of fact are entitled to deference from this Court "unless they are clearly erroneous." *United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1109 (D.C. Cir. 2009). The findings are plainly established in the record; therefore, they are not clearly erroneous. Thus, this Court should defer to and adopt the District Court's findings—that the Impoundment had a direct hydrological connection with navigable waters. Accordingly, under

the widely accepted hydrological connection test, this Court should render the discharges actionable under the CWA.

B. Both the Impoundment and the Crack Meet the Statutory Definition of a Point Source Under Section 502 of the CWA

The CWA defines a "point source" as "any discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container… from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The CWA's terms share a "common denominator," which reflects Congress' intent in broadly defining point sources. *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 449 n.2 (Clay, dissenting). Congress could not reasonably list every single possible thing used to convey a pollutant; therefore, it expressly qualifies the list of terms with "including but not limited to." *See* 33 U.S.C. § 1362(14).

Therefore, the Impoundment is a point source for two reasons: First, the Impoundment is a "container" and the crack in the Impoundment is a "discrete fissure," which are listed examples of point sources in Section 502 of the CWA. Second, Congress intended for EPA to regulate any identifiable conveyance" discharging pollutants as a point source.

First, the terms listed in Section 502 of the CWA plainly classify the Impoundment and the crack as point sources. Courts have found that the "touchstone for finding a point source is the ability to *identify* a discrete facility from which pollutants have escaped." *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994) (emphasis added); *see Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980); *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds collecting waste from industrial landfill are point sources); *Fishel v. Westinghouse Elec. Corp.*, 640 F. Supp. 442, 446 (M.D. Pa. 1986) (overflowing lagoons are

point sources); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981) (overflowing ponds are point sources). Further, the common denominator of the terms is that they are "man-made defined area[s] where [waste] *collects*." *Tenn. Clean Water Network*, 905 F.3d at 449 n.2 (Clay, dissenting) (emphasis added).

In *Hawai'i Wildlife Fund*, the Ninth Circuit—applying the plain meaning of a point source under Section 502—held that wastewater treatment wells were a point source because the pollutants at issue could be "traced back to identifiable points of discharge," and the wells "collect[ed] and inject[ed]" pollutants into the groundwater. 886 F.3d at 745. Nonpoint sources, unlike wells, are "diffuse" and "not traceable to any single discrete source." *Id.* Hence, diffuse sources—i.e., free-flowing and unchanneled runoff coming from an unidentifiable source—would not meet the definition of point source. *Id.* On the other hand, collected waste that discharges pollutants from a discrete, identifiable location is a point source. *Id.* An impoundment certainly meets these qualities because utilities collect coal ash into an identifiable location; therefore, an impoundment is a point source.

On the other hand, the Fourth Circuit decided that coal ash storage ponds are not point sources because slurry ponds are not "discernible, confined, and discrete conveyance[s]." *Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018) (citing 33 U.S.C. § 1362 (14)) [hereinafter *VEPCO*]; *cf. Abston Constr. Co.*, 620 F.2d at 45 (holding that leaks from eroded "spoil piles" and overflows from sediment basis were discharges from a point source). In *VEPCO*, the Fourth Circuit misinterpreted the application of the term "conveyance." According to the court, since a coal ash pond is not designed to convey anything and do not convey a measurable amount of a pollutant, then coal ash ponds are not the type of "point sources" that Congress intended to regulate in the CWA. 903 F.3d at 410–11.

However, the Fourth Circuit's interpretation of the CWA runs contrary to the plain meaning of the CWA in two ways. *See Tenn. Clean Water Network*, 905 F.3d at 449 n.2 (criticizing the definition of "conveyance" that the Fourth Circuit used in *VEPCO* as ignoring other statutory definitions). First, while a coal ash pond may not be a pipe or channel, a coal ash pond is readily identifiable as a "container" or "discrete fissure." 33 U.S.C. § 1362 (14). A coal ash impoundment is a "container" under the CWA because its primary purpose is to store and be on-site disposal. Furthermore, a crack in an impoundment is a "discrete fissure." The Merriam-Webster dictionary defines a fissure as a "narrow opening or crack…" Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/fissure (last visited Feb. 3, 2019). Either way, a coal ash impoundment or a crack in an impoundment meet the statutory definition of a point source. *See* 33 U.S.C. § 1362 (14).

Second, Congress broadly defined a point source to achieve the CWA's purpose of preventing water pollution. *See, e.g.*, *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("[T]he concept of a point source was designed to further [the purposes of the CWA] by embracing the *broadest possible definition of any identifiable conveyance* from which pollutants might enter the waters of the United States.") (emphasis added). In *Earth Sciences*, the Tenth Circuit held that "[w]hen [the system] fails because of flaws in the construction…, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source." *Id.* at 374. The Tenth Circuit rejected the argument that overflow from a reserve sump system was not a point source because the limited view of a "point source" was inconsistent with the purpose of the CWA. *Id.* at 373.

Here, VDEQ and the District Court found that "ComGen built" the Impoundment to "concentrate the coal ash, and its constituent pollutants in one location." Opinion at 12. Further,

the District Court found that the Impoundment was a "discrete mechanism[] that convey[s] pollutants from the [] Station to the Vandalia River." *Id.* The District Court's findings are supported by the fact that the levels of arsenic in the Vandalia River spiked when the Station began to operate its coal-fired units. Indeed, ComGen has not disputed that the Impoundment is the source of the arsenic that seeped into the groundwater. Based on "many years" of steady flow "without significant change," the District Court found a measurable amount of arsenic leached from the crack of the Impoundment. Further, based on the "erosion and indentation in the soil" and ComGen's own admittance, the District Court easily identified that the Impoundment was the source of the arsenic.

Thus, the District Court made the proper conclusions of law based on the record before it: The Impoundment is a point source. This Court should acknowledge the plain meaning of the CWA, follow multiple circuits' interpretation of what constitutes a point source, and affirm the District Court's well-reasoned ruling.

II. FERC'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE FERC DID NOT RELY ON THE FACTS AND INCORRECTLY PRESUMED THAT DISALLOWING THE RATE CHANGE WAS AN UNCONSTITUTIONAL TAKING

Under the FPA, FERC has a statutory mandate to ensure that all regulated utility rates are "just and reasonable." 16 U.S.C. §§ 824d, 824e. Although the appellate standard of review is deferential to FERC's decision, this Court must set aside a FERC decision if the rate is "outside the zone of reasonableness." *Pacific Gas & Electric v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) [hereinafter *PG&E*]. The zone of reasonableness is "bounded on one end by investor interest and the other by the public interest against excessive rates." *Id.* (citing *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1176–77 (D.C. Cir. 1987)). In reviewing ratemaking decisions, courts must consider "whether or not the end result of [FERC's] order constitutes a reasonable balancing, based on factual findings, of the investor interest in

maintaining financial integrity… and the consumer interest in being charged non-exploitative rates." *Jersey Central*, 810 F.2d at 11778.

To determine if a new rate is just and reasonable, FERC relies on competing principles: the used and useful principle; the matching principle; and the prudence principle. Under the use and useful principle, rates can only incorporate investments made by the utility into capital expenditures that are "used and useful" to current ratepayers. *Public Sys. v. FERC*, 709 F.2d 73, 80 (D.C. Cir. 1983). The matching principle is related to the used and useful test and provides that "equity demands that customers who pay [an] expense receive the tax benefit associated with that expense." *Id.* at 76. The used and useful principle and matching principle safeguard ratepayers from being "saddled with the results of management's defalcation or mistakes" of utilities. *Id.* at 80.

The prudence principle, on the other hand, focuses on the utility companies' economic interest. The prudence principle dictates that the rates should incorporate capital investments for the utility, as long as an investment was exercised prudently. *Jersey Central*, 810 F.2d at 1190. The prudence principle allows utilities to recover costs associated with those investments, even if the capital is not "used and useful" to current ratepayers. *Id.* at 1190.

The three principles operate to prevent FERC from committing a regulatory taking—that is, to protect utilities' and ratepayers' property from being "taken" by an unjust rate. *Id.*; see *Federal Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 600–01 (1944) (upholding as constitutional the consideration of "prudent investment" in setting a just and reasonable rate).

Here, FERC determined that the ComGen mismanaged their facility by allowing arsenic to leach from their Impoundment for 12 years. FERC also found that approving a new rate would allow ComGen to receive an economic windfall at the expense of ratepayers. This Court should

vacate and remand FERC's order because: (A) Reducing ComGen's rate of return does not constitute an unconstitutional regulatory taking because ComGen cannot claim recovery for expenses generated by its own imprudence; and (B) Because FERC decision to approve ComGen's proposed rate revision is unsupported and contrary to the evidence, FERC's decision was arbitrary and capricious.

A. Disallowing any or all recovery from ComGen is not an unconstitutional taking

Appellate courts review whether FERC's ratemaking decisions will result in unconstitutional takings. *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 689 (1923). A taking from investors "occurs when a regulated rate is confiscatory," i.e., the rate "unreasonably [] favor[s] ratepayer interests at the substantial expense of investor interests." *Jersey Central*, 810 F.2d at 1189 (Starr, J., concurring). Whether a rate is confiscatory "depends upon circumstances, locality and risk" and "must be determined… [with] regard to all relevant facts." *Bluefield*, 262 U.S. at 693, 690. Rates that are "not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory." *Id.* at 690 (emphasis added).

To determine a "fair" compensation for a utility's "taken" property, courts consider the "actual legitimate cost" by calculating the value of the property, the cost of construction, as well as the appreciation and depreciation of the property over time. *Hope*, 320 U.S. at 596; *see Bluefield*, 262 U.S. at 691–92. The Court reasoned that this analysis conforms to constitutional requirements. *Hope*, 320 U.S. at 607. FERC did not give the requisite weight to the factors required by *Bluefield* and *Hope* to determine a just and fair rate return. In considering the rate revision, FERC considered the ComGen's financial integrity and the possibility of a legal claim; FERC did not consider the costs to determine the value of the property. Hence, FERC has likely failed to make a proper analysis of a just and reasonable rate for ComGen.

Moreover, rates of return are usually set just above inflation. *See* Leonard S. Hyman et al., *America's Electric Utilities: Past, Present, and Future* 255–56 (8th ed. 2005). FERC may adjust a utility's rate return to be higher to reward and incentivize the utility to continue efficient measures. Alternatively, FERC may impose lower rates on utilities for mismanaging their company. *See In Re Citizens Utilities Co.*, 769 A.2d 19 (Vt. 2000).

In 2018, the average rate of return on equity was 9.53%. Edison Electric Institute, *Rate Case Summary: Q3 2018 Financial Update* 1 (2018). However, utilities may experience much lower rates of return when a company mismanages its facilities. For example, in 2013, the average rate of return was 9.77%. Lincoln Davies et al., *Energy Law and Policy* 329 (1st ed. 2014). Yet, Duke Energy settled on a 4.79% return on equity in an Ohio rate case because the Ohio commission disallowed Duke from recovering facility relocation costs. *Id.*; Edison Electric Institute, *Rate Case Summary: Q4 2013 Financial Update* 8 (2013).

FERC found that ComGen imprudently implemented the corrective plan and failed to monitor the groundwater. As such, ComGen was responsible for the arsenic discharges that continued for more than nine years. Moreover, ComGen took on the risks of storing coal ash on-site in the Impoundment—which they owned and operated.

ComGen argues that FERC previously granted ComGen a 10% return and, as such, FERC has essentially promised ComGen a 10% return going forward. However, "[a] rate of return may be reasonable at one time and become too high… by changes [in]… business conditions." *Bluefield*, 262 U.S. at 693. In this case, ComGen's imprudence has changed its business conditions. Thus, while a 10% return was reasonable before ComGen's imprudence, a 3.6% and 3.2% return are the new reasonable rates of return.

ComGen further argues that a 3.2% and 3.6% return jeopardizes its financial integrity and that of its sole shareholder CE. ComGen clings to the language in *Bluefield* that establishes that a company's return must be "reasonably sufficient to assure confidence in the financial soundness of the utility." 626 U.S. at 692–93. However, there are two issues with this argument.

First, utilities have "no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Id.* A 3.2% and 3.6% return is still a reasonable return to assure confidence in its financial soundness, maintain, and support its credit, and able to raise money necessary for the proper discharge of its duties.

Second, ComGen fundamentally misinterprets *Bluefield* and *Hope*. The Court in *Bluefield* and *Hope* only intended for utilities to be compensated for the value of the property being used for public service (as though the government were confiscating it under the Fifth Amendment). *Jersey Central*, 810 F.2 at 1191–93 (Starr, J., concurring). Utilities should not be compensated for liability incurred by the utilities' imprudence. *See id.*

ComGen was entitled to fair compensation, which might at one point have been a 10% return rate, for the properties that they used to serve the public. However, when ComGen's imprudence created its liability, the state did not "take" property from ComGen. Instead, ComGen took imprudent actions, like a bad investment or poor management, which in turn decreased ComGen's profitability. The Court did not intend ratepayers to compensate companies for poor management decisions. *See Bluefield*, 262 U.S. at 693 ("The return should be reasonably sufficient to assure confidence… under efficient and economical management…"); *Hope*, 320 U.S. at 603 (establishing the end result test that requires courts to consider the prudence of utilities' investments).

Therefore, a return of 3.6% or 3.2% is reasonable and not a confiscatory rate or a taking protected by the Fifth and Fourteenth Amendment.

B. FERC's Approval of ComGen's Rate Revisions was Arbitrary and Capricious Because the Decision Is Contrary to their Findings which were Based on Substantial Evidence

Appellate courts review FERC's ratemaking decisions under the arbitrary and capricious standard. *PG&E*, 306 F.3d at 1115; *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42–43 (1983) [hereinafter *State Farm*]. Under this standard, courts' scope of review is "narrow," and courts should defer to agencies' factual findings. *State Farm*, 463 U.S. at 43. Nonetheless, "an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012).

An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156, 209–10 (D.C. Cir. 1988) (quoting *State Farm*, 463 U.S. at 43) [hereinafter *NRDC*]. An appellate court must overturn an agency action where the agency "has entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency*, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (emphasis added). An agency must "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 43. Otherwise, an agency "can become a monster which rules with no practical limits on its discretion." *Id.* Therefore, an appellate court must set aside a FERC decision if the approved rate is "outside the zone of reasonableness" and "unsupported by substantial evidence." *PG&E*, 306 F.3d at 1113–14.

In *PG&E*, this Court vacated and remanded a rate schedule that FERC approved because FERC did not provide a justification for how or why it reached its decision. *Id.* at 1121, 1114.

FERC tried to argue that it generally used the prudence principle to assess rates within the zone of reasonableness. *Id.* at 1117. However, there was nothing in the record showing that FERC conducted and applied the prudence analysis when it approved the utility's rate. *Id.* Therefore, because FERC did not base its decision on evidence or reason, this Court held that FERC's decision was arbitrary and capricious.

Like *PG&E*, FERC's decision to approve ComGen's proposed rate schedule was arbitrary and capricious because it was unsupported by substantial evidence and ran counter to FERC's own factual findings.

First, FERC made a factual finding that ComGen failed to properly monitor the implementation of the corrective plan. If ComGen had properly and prudently monitored the Impoundment, ComGen could have discovered and addressed the problem before arsenic leached into navigable waters. However, ComGen did not monitor its Impoundment—which was full of toxic chemicals such as mercury and cadmium and classified as one of the nation's "high" hazard impoundments. Instead, ComGen allowed arsenic to leach into navigable waters for over 12 years. Though FERC did not think that ComGen should be held strictly liable for the subcontractor's actions, FERC found ComGen responsible for failing to notice the discharges.

FERC should have reached the logical conclusion that rewarding ComGen for its negligence violates the prudence principle—because the cleanup costs or the investment of relocating its coal ash sludge to a competently lined facility is based on ComGen's imprudent actions. However, FERC failed to make a "rational connection between the facts found and the choice made." *NRDC*, 859 F.2d at 209–10. Instead, FERC overlooks its finding and, without reason, allows ComGen to recover cleanup costs. Thus, FERC acted arbitrarily and capriciously.

Second, FERC found that ComGen's proposed rates violated the matching principle because it would create an economic "windfall" to ComGen's sole shareholder, CE. CE wholly owns ComGen, Franklin Power, Vandalia Power, and CES. Between 2000 and 2014, CE and CES sold the Station's energy to the wholesale market (not Vandalia Power's and Franklin Power's ratepayers) and filled the Impoundment with 80.5% of the coal ash sludge. In 2014, when CE wanted to enter the rate market (which is a natural monopoly), CE created ComGen to sell their energy to Vandalia Power's and Franklin Power's ratepayers. The ratepayers then contributed to 19.5% of the Impoundment's coal ash. Yet, ComGen is demanding that the ratepayers pay for 100% of the Impoundment's clean up costs.

At the expense of the ratepayer, ComGen and CE want to fully benefit from the revenues produced by the Station—without sharing in the cleanup costs of their imprudence. Average households would see bills rise by $3.30 per month for a 10-year period. As FERC reasonably found, this rate violates the matching principle because it saddles ratepayers with ComGen's cleanup costs when ratepayers will not even benefit from the expense. However, despite these findings, FERC allowed ComGen to recover the full cleanup costs through the new rates. This decision is patently unsupported and contrary to the evidence in front of FERC. Therefore, FERC acted arbitrarily and capriciously.

Third, FERC meagerly attempts to support its decision by pointing to ComGen's testimony that the financial impact of bearing their cleanup costs would (1) jeopardize its financial integrity and (2) raise a takings issue. However, this cursory justification is unsupported by the evidence. First, ComGen did not present any evidence to FERC to support a finding that its financial integrity is at risk. Even if not allowing ComGen to recover all or a substantial portion of the cleanup costs would effectively erase *most* of its profits, ComGen would still make

a profit—earning a 3.6% to 3.2% return on equity. Second, as discussed above, ComGen cannot claim that the rate is a regulatory taking because ComGen's own imprudence created the liability. Thus, FERC can impose a lower rate of return to prevent ComGen from profiting from its imprudent practices. Therefore, because FERC's decision is not supported by the evidence, FERC's decision is arbitrary and capricious.

Lastly, FERC improperly considered ComGen's bottom line more favorably than the public's interest in setting the "just and fair" rates. *See State Farm*, 463 U.S. at 51–56. The FPA requires FERC's "ultimate" decisions to be affected "with [] public interest." 16 U.S.C. § 824(a); *see Hope*, 320 U.S. at 611 ("The primary aim of [giving the Federal Power Commission broad powers to set "just and reasonable" rates] was to protect consumers against exploitation at the hands of natural gas companies."). However, FERC failed to give public interest the proper weight when it decided to approve ComGen's rate revisions. Instead, at the expense of the ratepayer, FERC allowed ComGen to recover its full cleanup costs. FERC focused on ComGen's bottom line and weighed ComGen's interest more heavily than the public's interest. In doing so, FERC violated its statutory duty to affect its ultimate decision "with a public interest." Thus, FERC did not engage in reasoned decisionmaking, and FERC's decision was arbitrary and capricious. Therefore, this Court should remand the case.

CONCLUSION

The District Court correctly held that ComGen violated the CWA because the Impoundment leached arsenic into the Fish Creek and Vandalia River through hydrologically connected groundwater. The District Court properly determined that the Impoundment met the statutory definition of a point source under the CWA, as the Impoundment is an "identifiable" point source where ComGen "collected" waste. Alternatively, the crack in the Impoundment also

meets the statutory definition of a point source because it is a "discrete fissure" through which ComGen discharged arsenic into navigable waters. Therefore, this Court should affirm the District Court's well-reasoned holding and uphold the District Court's order to compel ComGen to clean up the coal ash sludge from its faulty Impoundment.

On the other hand, FERC's decision was arbitrary and capricious because FERC ignored its factual findings and did not offer a reasoned basis to support its contradictory decision. FERC found that ComGen was imprudent and would receive an economic windfall if allowed to recover its full cleanup costs from ratepayers. These findings were supported by substantial evidence. Yet, FERC accepted ComGen's testimony "that the financial impact of [bearing even the proportionate share of cleanup costs] would likely jeopardize the financial integrity of ComGen" and would constitute a regulatory taking. Thus, FERC approved ComGen's proposed rate revisions.

However, requiring ComGen to bear its proportionate share of the cleanup costs does not constitute an unconstitutional taking. A taking requires a rate to be unjust and unreasonable to the utility. However, ComGen's imprudence created its liability. Under the prudence and matching principle, ratepayers cannot be saddled with a utility's liability for imprudent practices. Therefore, there is no constitutional taking.

FERC disregarded its own well-founded factual findings. The factual findings, alone, would render either of SCCRAP's proposed rates (3.6% or 3.2%) just and reasonable. FERC must make a reasoned decision, or FERC must give a logical and supported reason for why it approved ComGen's new confiscatory rates. Yet, FERC did not explain its reasoning and did not base its decision on the evidence. Therefore, FERC's decision was arbitrary and capricious, and this Court should revoke and remand FERC's decision.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds 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. 4