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

**C.A. No. 18-02345**

**Team Number 20**

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

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## Statement of Jurisdiction

Plaintiff, Stop Coal Combustion Residual Ash Ponds (SCCRAP), filed the complaint in the U.S. District Court for the District of Columbia on December, 2017. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. Sections 1331 and 1391. The district court's federal question jurisdiction was based on alleged violations U.S.C. §1311(a). Following a bench trial, the District Court on June 15, 2018 issued a final finding that Defendant, Commonwealth Generating Company (ComGen) was liable for ongoing violations of §1311(a). Defendant/ Appellee ComGen appealed under D.C. No. 17-01985. This Court has appellate jurisdiction under 28 U.S.C. § 1291, as the district court entered final judgment on June 15th, 2018, and plaintiffs timely filed a notice of appeal on June 16th 2018.

ComGen submitted a filing to FERC under §205 of the Federal Power Act to recover from Vandalia Power and Franklin Power the costs of complying with the District Court order on July 16th, 2018. Intervenor/SCCRAP intervened in the FERC proceeding, and filed a protest in opposition. Intervenor/SCCRAP intervened by filing a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures. 18 CFR § 385.214 (2008). On October 10, 2018, FERC issued its decision approving the rate revisions. SCCRAP sought rehearing of FERC's decision on November 9, 2018. FERC denied rehearing by an order issued on November 30, 2018. FERC had jurisdiction under FPA Sections 205(a), 16 U.S.C. §824(d). Petitioner/SCCRAP pursued judicial review with its petition to the D.C. Circuit Court of Appeals on December 3, 2018 under Docket ER-18-263-000. This court has jurisdiction to review the final order from FERC pursuant to FPA Section 313(b), 16 U.S.C. §825l(b). Petitioner/SCCRAP's petition for judicial review was timely as it was filed on within sixty days of FERC issued final order pursuant to FPA Section 313(b), 16 U.S.C. §825l(b). Intervenor/ComGen intervened by filing a motion to intervene

pursuant to Rule 214 of the Commission's Rules of Practice and Procedures. 18 CFR § 385.214 (2008).

## Statement of the Issues Presented

1. Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.
2. Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of §311(a) of the Clean Water Act.
3. Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.
4. Whether SCCRAP's position in the FERC proceeding – to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment – is an unconstitutional taking under the Fifth and Fourteenth Amendments.

## Statement of the Case

On December 2017, Stop Coal Combustion Residual Coal Ash Ponds ("SCCRAP") filed suit in the U.S. District Court for the District of Columbia under the citizen-suit provision of the Clean Water Act ("CWA") against the Commonwealth Generating Company ("ComGen"). p. 7. SCCRAP was alleging that ComGen was violating U.S.C. §1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters by a point source. p. 7. SCCRAP alleged that the arsenic seeping from ComGen's Little Green Run Impoundment next to the

Vandalia generating station was a point source which polluted the groundwater which was in turn carried to Fish Creek and Vandalia river, thus carrying arsenic to navigable waters. p. 7.

Following a bench trial, the District Court on June 15, 2018 issued its order finding that rainwater and groundwater were indeed leaching arsenic from the coal ash in the impoundment and carrying the arsenic to navigable waters. p. 7. The court ordered ComGen to "fully excavate" 38.7 million cubic yards of the coal ash and relocate it to a "competently lined" facility which complies with the Environmental Protection Agency's Coal Combustion Residual Rule. p. 8. The District Court did not assess civil penalties against ComGen because of the costs associated with the injunctive remedy. p. 8.

Contemporaneously with its appeal of the District Court's decision, ComGen on July 16, 2018 submitted a filing to the Federal Energy Regulatory Commission ("FERC") under §205 of the Federal Power Act. p. 8. The filing was to recover from the ComGen-owned Vandalia Power and Franklin Power the costs of complying with the District Court order. p. 8. The filing consisted of proposed revisions to ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement). R.8. ComGen's proposal would increase customer bills in each jurisdiction by about $2.15 per month in November 2019, and average households across in each jurisdiction would see bills rise by about $3.30 per month for the 10-year amortization period. p. 9.

SCCRAP intervened in the FERC proceeding, and filed a protest in opposition to ComGen's filing. p. 9. In response to SCCRAP's protest, FERC suspended ComGen's rate filing, which would have become effective sixty days after filing, or on September 15, 2018. p. 10. FERC set the matter for an evidentiary hearing to take testimony of the limited factual issues raised in SCCRAP's protest. p. 10.

On October 10, 2018, following three days of evidentiary hearings in September, 2018, FERC issue its decision approving the rate revisions proposed by ComGen. p. 11. SCCRAP promptly sought rehearing of FERC's decision on November 19, 2018 and, upon FERC's denial of rehearing by order issued on November 30, 2018, pursued judicial review. p. 12. SCCRAP petitioned the D.C. Circuit Court of Appeals on December 3, 2018 to review whether ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious and, further challenged FERC's finding that it would be an unconstitutional taking if FERC had adopted SCCRAP's position and disallowed the recovery rates of all or a portion of the remediation costs ComGen incurred. p. 12.

Because SCCRAP's appeal of the FERC decision and ComGen's appeal of the U.S. District Court's decision for the District of Columbia involve common parties and common issues, SCCRAP, ComGen, and FERC jointly filed a motion in the D.C. Circuit Court of Appeals to have the actions consolidated for decision. p. 12. On December 21, 2018, the D.C. Circuit granted the motion, and issued a subsequent order on December 28, 2018 setting forth the issues to be briefed and argued on appeal. p. 12.

Commonwealth Energy ("CE") is a multi-state electric utility holding company that provides electric service at retail and wholesale rates. p. 3. In 2014, CE incorporated ComGen to purchase the Vandalia Generating Station from Commonwealth Energy Solutions ("CES"), a wholly owned, unregulated subsidiary of CE. p. 3. Vandalia Generating Station consists of two 550 megawatt (MW) coal-fired units and is located near Mammoth, Vandalia on the Vandalia River. P. 4. Vandalia Unit Nos. 1 and 2 began operating in 2000 and 2002, respectively. p. 4. Coal combustion residuals (CCRs) produced by the station are disposed of in the Little Green Run Impoundment, which was formed by the construction of a dam across Green Run, immediately east of the Vandalia Generating Station. p. 5. The impoundment is approximately 71 surface acres and

currently contains approximately 38.7 million cubic yards of solids, mainly CCRs and coal fines and waste material removed during the coal cleaning process. p. 4-5.

In 2002, CES conducted groundwater monitoring. CES detected arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. p. 5. CES notified the Vandalia Department of Environmental Quality (VDEQ) and began developing and implementing a corrective action plan with VDEQ to mitigate the pollution. p. 5. Under the corrective plan, CES worked with a subcontractor to install a high density polyethylene (HDPE) geomembrane liner on the west embankment of the Little Green Run Impoundment in 2006. p. 5.

In March, 2017, Vandalia Waterkeeper determined that rainwater and groundwater were leaching arsenic from the Little Green Run Impoundment and filed a complaint with the VDEQ. p. 5. The VDEQ investigated and found that a seam in the HDPE geomembrane liner installed in 2006 was inadequately welded. p. 6. They found that this seem was the only source of the leak and there was no internal erosion in the impoundment as a result. p. 6. The VDEQ report indicated that the seepage only occurs when there is significant rainfall and that it dries up within a few weeks of the precipitation event. p. 6.

## Argument

### I. THE DISTRICT COURT ERRED WHEN IT HELD SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS ACTIONABLE UNDER THE CLEAN WATER ACT.

The Clean Water Act (the "CWA" or "Act") was enacted in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2018). The CWA makes it unlawful for facilities, to discharge pollutants from a point

source into traditional "navigable waters," without a permit. 33 U.S.C. § 1311(a) (2018). While it is certain that the CWA was intended to cover "navigable waters," defined as "waters of the United States," there is no explicit provision on authority over groundwater. 33 U.S.C. § 1362(7) (2018). Courts and the EPA do agree that isolated groundwater is not covered by the CWA, and several courts have held the CWA's jurisdiction does not cover groundwater that is hydrologically connected to navigable waters. *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925, 936 (6th Cir. 2018); *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 514-15, 520 (2d Cir. 2005).

A. Standard of Review

Whether the District Court erred by holding that surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act is a question of law. This court reviews legal questions *de novo*. *United States v. Microsoft Corp*., 253 F.3d 34, 50 (D.C. Cir. 2001).

B. Surface Water Pollution Via Hydrologically Connected Groundwater Is Not Actionable Under the Clean Water Act Because There Is No Authority Under the Plain Meaning of the Statute.

The trial court erred when it held that surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act and held ComGen liable for discharging a pollutant. p. 2. Here, the District Court issued its order "finding that rainwater and groundwater were indeed leaching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater, which carried the arsenic into navigable waters." p. 7. However, this finding is not

recoverable under the CWA because court interpretation and legislative history show that the theory of hydrologically connected groundwater is not within the plain meaning of the statute.

*Rapanos v. the United States* is a Supreme Court case in which the court interpreted for the first time what "waters of the United States" meant, in the context of adjacent wetlands. 547 U.S. 715, 715 (2006). *Rapanos* found that wetlands that were only connected to "waters of the United States" by hydrological connections, were not themselves sufficient to be considered "waters of the United States. Id.

> [O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the [CWA]. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of Riverside Bayview, and thus lack the necessary connection to covered waters.

*Id*. at 742. The court found that an adjacent channel must itself contain a water of the United States. *and* the wetland must have a continuous surface connection with that water. This would make it difficult to determine where the "water" ends and the "wetland" begins. *Id*. Here, while the adjacent channels Fish Creek and the Vandalia River are considered waters of the United States, there is no continuous surface connection because the seepage occurs intermittently during periods of significant rainfall. p. 6.

Furthermore, in *Rapanos*, the Supreme Court noted that "[t]he [CWA] does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" *Id*. at 743. Supporters of the hydrological connection theory use Justice Scalia's quote to indicate his support of the hydrological connection theory because it would show a direct source of pollution is not necessary to establish a connection the surface water. *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018). The 6th circuit, however, found that Justice Scalia discussed the absence of the word

"directly" from § 1362(12)(A) of the CWA to explain that "pollutants which travel through multiple point sources before discharging into navigable waters are still covered by the CWA." *Id* at 925, 926

> [T]he discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." (emphasis omitted). Justice Scalia's reference to "conveyances"—the CWA's definition of a point source—reveals his true concern. He sought to make clear that intermediary point sources do not break the chain of CWA liability.

*Id* at 926, This shows that the pollutants intermittently seeping from Little Green Run Impoundment are not coming from a point source at all and are not passing through any conveyances, i.e. intermediary point sources. Therefore, this discharge is not protected by the CWA.

Some courts which accept the hydrological connection theory rely heavily on the CWA's stated purpose of "restoring and maintaining ... the Nation's waters." 33 U.S.C. § 1251(a) (2018); *Hernandez v. Esso Standard Oil Co.,* 599 F. Supp. 2d 175, 180 (D.P.R. 2009). *Hernandez* accepted the hydrological connection theory on the rationale that "since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit." Id at 180. (quoting Wash. Wilderness Coal. v. Hecla Mining Co., 870 F.Supp. 990 (E.D. Wash. 1994)). The 6th circuit held that this reliance on one line of the CWA is "misguided" because this is "just one of the CWA stated purposes." *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925, 936, 937 (6th Cir. 2018). In fact, another prominent portion of the CWA is that it is in place to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources." 33 U.S.C. § 1251(b) (2018); *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d

925, 936, 937 (6th Cir. 2018). This indicates that a significant goal of the CWA is to promote federalism and preserve states interests in protecting surface waters as they see fit. Therefore, this court should find that in order to preserve federalism and promote an important goal of the CWA, surface water pollution via hydrologically connected groundwater is not actionable under the CWA. It should be left up to the states to best determine how to address this issue.

C. The Legislative History Indicates That Groundwater Was Never Meant to Be Covered by The Clean Water Act.

There is evidence in the legislative history of the CWA that Congress chose an outer limit to the statute's power and never intended for it to cover groundwater. Specifically, the legislative history shows that Congress denied establishing federal standards for groundwater pollution. Senate members proposed bills that would "provide authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations." S. Rep. No. 92-414, at 3739 (1971). The Committee did not adopt such bills because "the jurisdiction regarding groundwater's is so complex and varied from State to State." Id. The House of Representatives also denied federal regulation of groundwater. At a hearing on the CWA, the Environmental Protection Agency (EPA) administrator asked Congress to grant the EPA authority over groundwater "to maintain a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table." Water Pollution Control Legislation (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. on Pub. Works, 92nd Cong. 230 (1971). Representative Leslie Aspin spoke in front of the House committee on public works and said that the CWA would "virtually exempt the subject of groundwater pollution from the purview of Federal study and regulation." Hearings on H.R. 11896 before the H. Comm. on Pub. Works, 92nd

Cong., 1st Sess. 727 (1971). The House committee on public works did not adopt any language addressing groundwater. Id. Aspin then proposed an amendment to the CWA to "bring ground water into the subject of the bill" and the House overwhelmingly rejected this amendment. 118 Cong. Rec. 10666, 10669 (1972) (remarks of Rep. Aspin). Several courts have used this rejection by congress denying the establishment of federal standards for groundwater pollution shows that congress did not intend for groundwater pollution to be covered by the CWA. *Umatilla Water Quality Protective Ass'n, v. Smith Frozen Foods, Inc.,* 962 F. Supp. 1312, 1318-19 (D. Or. 1997); *Exxon Corp. v. Train,* 554 F.2d. 1310, 1327-30 (5th Cir. 1977). "We think, however, that the legislative history [including the Aspin Amendment] demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater." *United States v. GAF Corp.,* 389 F. Supp. 1379, 1383-84 (S.D. Tex. 1975). Due to this rejection by multiple courts, in this instance, the court should consider the intentions of congress when determining whether groundwater is covered by the CWA.

This court should find that surface water pollution via hydrologically connected groundwater is not actionable under the CWA. There is no authority under the plain meaning of the statute, the case law indicates that courts have not interpreted the CWA in this way and this was not the intent of congress when the enacted the CWA.

## II. THE DISTRICT COURT ERRED WHEN IT HELD THE SEEPAGE OF ARSENIC FROM THE COAL ASH IMPOUNDMENT THAT PASSES THROUGH GROUNDWATER TO NAVIGABLE WATERS CONSTITUTES A DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF § 402 OF THE CLEAN WATER ACT.

As stated in the previous section, the Clean Water Act (the "CWA" or "Act") was meant to restore and maintain the "chemical, physical and biological integrity of Nation's waters" by

regulating what a company is able to release into a body of water. 33 U.S.C. § 1251(a) (2018). The goal of the CWA is achieved by a permitting system that makes "the discharge of any pollutant by any person shall be unlawful" without an approved permit. *Id.* § 1311. To reduce the ambiguity, the CWA includes a definition section which defines the individual elements of § 301(a). *Id.* § 1362; *see National Federal Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2018). In order for a defendant to be found liable under the CWA, the plaintiffs need to show evidence of *all* the elements or else it is not a violation of the Act. *National Wildlife Federation*, 693 F.2d at 165 (emphasis added).

A. Standard of Review

Whether the district court erred in finding that the seepage of arsenic from the coal ash impoundment that passes through groundwater to navigable waters constitutes a discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act is a question of law. This court reviews legal questions *de novo*. *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

B. A Coal Ash Impoundment That Passes Through Groundwater to Navigable Waters is Not a Point Source Under the Plain Meaning of the Clean Water Act.

The issue on appeal is dependent on whether or not "seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable water" is considered to be a point source. p. 2. A "point source" is 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (2018). The coal ash impoundment should not be considered a point source because it is not in the same category as those found in the statute. A non-point source is not regulated through § 301 of the CWA because that section states that only point sources require permits to discharge. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). The terms listed in the Act as point sources "evoke images of physical structures…that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *U.S. v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). In *Plaza Health Laboratories, Inc.*, the court held that a human being could not be considered a point source because it is not included in the plain language of the statute and would be too broad of an interpretation of the statute. *Id*.

The court's first step should be to look directly at the wording of the statute in "all cases of statutory construction" in order to determine the level of ambiguity provided by Congress. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). The wording of the Act specifies that there are only certain conveyances which should be considered point sources and "the omission of ground waters from the regulations is not an oversight." *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 809-810 (E.D.N.C. 2014). There have been proposals by Congress in the past to add "groundwater" to the Act but those proposals were struck down and the Environmental Protection Agency ("EPA") has not released any regulations regarding groundwater. *Village of Oconomowoc Lake*, 24 F.3d at 965. The CWA states that it regulates Waters of the United States meaning that

there are waters not covered by the Act. *Id*. ("Waters *of the United States*" must be a subset of "water").

In the instant case, the only connection to navigable waters is that the coal ash impoundment is seeping into the groundwater which might possibly lead to a water of the United States. Under the plain language of the law, there is no point source to be found in this chain of events. Just because the pollutants navigated their way from the coal ash impoundment to the groundwater and eventually wound up in navigable waters "does not fulfill the Clean Water Act's requirement that the discharge be from a point source." *Sierra Club v. Virginia Electric & Power Company*, 903 F.3d 403, 410 (4th Cir. 2018). The Circuit court in *Virginia Electric & Power Company* engaged in an analysis about what a "conveyance" is precisely and how it is used in the CWA. *Id*. at 410-11. They reasoned that a conveyance "requires a channel or medium—i.e., a facility—for the movement of something from one place to another", implying purposeful direction. *Id*. A point source does not need to be the original source of the pollution but it needs to be the reason that it is conveyed into the navigable waters. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The current case involves no conveyance of any kind and there is no purposeful direction on the part of the Defendants.

Even if the plain language of the statute were ignored and the court chose to read § 301 of the CWA more broadly as to interpret groundwater as a conveyance, groundwater does not fit the complete description of a point source. Groundwater is not considered to be a "*confined and discrete* conveyance" and is instead a "diffuse medium" without a set direction. *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925, 933 (6th Cir. 2018) (emphasis added). Point source implies that there is form of entry where a defendant is sending pollutants directly into navigable water and can control their discharges which allows the permitting system to

regulate pollutants. *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436, 444 (6th Cir. 2018).

In all of the examples provided by the Act, there is a direction provided which implies that the pollutant is being directed. *Kentucky Waterways Alliance*, 905 F.3d at 933. Groundwater cannot be engineered to have a particular direction and was not directed to transport the arsenic towards the navigable waters. Gravity is the driving force behind groundwater because it is "subsurface water that tends to migrate from high elevation to low elevation." *Id*. at 931. It is clearly more similar to non-point sources where there is no discernible direction or specific point where the pollutant is being released from. *See Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013).

In *Kentucky Waterways Alliance*, the plaintiffs were concerned that pollutants from a coal ash pond which captured ash residue from a power plant was causing excess pollution in a nearby lake. 905 F.3d at 931. Pollutants from the coal ash impoundment were seeping into the groundwater and plaintiffs claimed that this constituted a point source. *Id*. In addition, the plaintiffs claimed that the issue was exacerbated by the fact that the groundwater flowed over karst terrain, which is soluble rock, and aided the pollutants to reach the navigable water. *Id*. at 934. The court rejected both of these arguments and stated that simply because the terrain increased the flow of the groundwater does not mean that it is any more of a point source. *Id*. The court also ruled that groundwater is not a point source because it is impossible to "discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels." *Id*.

Groundwater cannot be considered to be a point source in any interpretation of the phrase and it would be unfair to find that the Respondent is liable under the CWA. The CWA was passed in order to deter individuals from knowingly discharging pollutants into waters of the United States. The Respondent notified Vandalia Department of Environmental Quality (VDEQ) about

high arsenic levels in 2002 and installed a high density polyethylene (HDPE) geomembrane. p. 5. They should not be penalized for something that was out of their control.

**C.** Under The Holding in *Rapanos*, The Seepage from The Little Green Run Impoundment Would Not Be Covered Under the Clean Water Act Because the Flow Is Intermittent and There Is Only a Seepage When There Is "Significant Rainfall".

The seepage from the Little Green Run Impoundment should not be covered as a discharge under the CWA because the seepage only occurs when there is a significant rainfall and it dries up soon after the rainfall. p. 6. The CWA defines "navigable waters" as "waters of the United States" but this is not explained any further under the Act. 33 U.S.C. § 1362(7) (2018). The Supreme Court examined this phrase in *Rapanos v. U.S.* in order to determine which water bodies should be considered under the Act. 547 U.S. 715 (2006). The Army Corps of Engineers had an expansive view of what is considered under the Act but the Court was not willing to interpret it in such a way. *Id*. at 732. Justice Scalia reasoned that there was a distinction between "water of the United States" and "*the* waters of the United States", meaning that Congress had a specific intent when they drafted the wording of the Act. *Id* (emphasis added). When the Act states that only "the waters" of the United States are covered, it is a limiting clause which refers to particular bodies of water. *Id*. These select waters are those that are "relatively permanent, standing or flowing bodies of water" because those are the waters that are most affected by discharge of pollutants. *Id*. Under this interpretation, "ordinarily dry channels through which water occasionally or intermittently flows" would be excluded. *Id*. at 733. The plurality reasoned that none of the terms contained in the CWA account for "transitory puddles or ephemeral streams" which occasionally have some semblance of water in them. *Id*. Additionally, the CWA makes a categorical distinction between intermittent

flows and navigable waters in the definition of a point source. *Id*. at 735. The Supreme Court reasons that ditches and channels are passages through which "intermittent waters typically flow" and point sources discharge into navigable waters. *Id*. If these types of water bodies were considered the same under the Act, there would be a large overlap and the definitions would be fairly redundant. *Id*.

In the Little Green Run Impoundment, the seepage is located at a low elevation in the "foundation topography and appears to have been active for many years without significant change." VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14. ComGen was able to show that the "seepage occurs only when there is significant rainfall, and that it dries up within a few weeks of the precipitation event." *Id*. Following the plurality's reasoning in *Rapanos*, this would count as intermittent flow and should not be included under the CWA. 547 U.S. at 573. The Little Green Run Impoundment does not have a constant seepage problem and only leaks in very extreme circumstances. This means that the discharge is very limited and does not pose a significant hazard to any body of water.

The Little Green Run Impoundment should not be considered a point source and the seepage is not connected to navigable waters of any kind. Under both of these statutory interpretations, the claim should be dismissed because it is not covered under the Clean Water Act.

## III. FERC'S DECISION TO APPROVE COMGEN'S REVISED FERC RATE SCHEDULE NO. 1 AND THE REVISED FERC RATE SCHEDULE NO. 2 WAS NOT ARBITRARY AND CAPRICIOUS.

FERC's decision to revise ComGen's Rate schedule was not arbitrary and capricious because it was based on substantial evidence that was presented to them during the hearing. The Administrative Procedure Act (the "APA") details the levels of review that are available for agency

decisions depending on which type of process is being carried out by the agency. 5 U.S.C. § 706 (2018). The APA gives agencies a significant amount of discretion because they were created by Congress to represent the legislature's intent to regulate particular areas. The relevant level of review in the instant case is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706(2)(A). The Supreme Court ruled, "[t]he 'scope of review under the 'arbitrary and capricious' standard is narrow.'" *FERC v. Elec. Power Supply Ass'n,* 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." Id. In *State Farm*, the court reasoned that an agency's decision was not arbitrary and capricious if it "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm Mut. Auto. Ins. Co.* 463 U.S. at 43.

Administrative agencies such as FERC have expertise in the given field and a court should not substitute their judgement for that of the agency's because that would undermine the independence of the agency. The technical nature of ratemaking means that a higher level of deference should be given to the administrative agency due to their vast experience in the field. The Supreme Court held "nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)); *see also Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017) (upholding FERC approved rate method tied to resource performance).

A. Standard of Review

Whether FERC's decision to approve ComGen's revised rate schedule was arbitrary and capricious is a question of law and fact. In questions of law and fact, the standard of review depends on the "mix" of the question. *U.S. v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000). Where the facts "are not significantly in dispute, the issue is primarily a question of law and therefore review closer to the de novo standard is required." *Id.* Here, questions of law clearly are clearly dominant and therefore require review under the *de novo* standard.

B. FERC Is Afforded Deference to Make Decisions Concerning the Rates of Public Utilities Through the Federal Power Act. And FERC's Decision to Approve ComGen's Revised FERC Rate Schedule No. 1 And Revised FERC Rate Schedule No. 2 Was Not Arbitrary and Capricious.

§ 205(a) of the Federal Power Act grants FERC the authority to set "just and reasonable rates" for "any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." 16 U.S.C. § 824(d) (2018). §205(a) also grants FERC the power to declare "any such rate or charge that is not just and reasonable" to be unlawful. *Id*. Such declarations have been reviewed by this court under the arbitrary and capricious standard. *Mo. PSC v. FERC*, 234 F.3d 36, 40 (2000). To satisfy that standard, there must be "a rational connection between the facts found and the choice made" by the Commission. *Id*. FERC must "articulate the critical facts upon which it relies," and when it "finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to

resolve unknowns and the public policies behind those assumptions." *Id.* (quoting *Columbia Gas Transmission Corp. v. FERC*, 202 U.S. App. D.C. 291 (D.C. Cir. 1979)). In practice, the standard is highly deferential to the validity of FERC's declarations. Congress did not set out a "detailed mandatory procedural scheme" to govern FERC's review of rates, "apparently intend[ing] to leave the agency substantial discretion as to how to structure its review." *U.S. v. City of Fulton*, 475 U.S. 657, 670, (1986) (quoting 45 Fed. Reg. 79544, 79547 (Dec. 1, 1980)). FERC is able to set the rates and ensure that all possible costs are accounted for in the rate in order to "eliminate the possibility of the Government constantly ... playing catch-up in its attempt to secure an appropriate rate." *Id* at 668.

FERC considered evidence from both SCCRAP and ComGen over a period of three days. p. 11. During these evidentiary hearing, FERC acknowledged in principle several of SCCRAP's arguments concerning ComGen's implementations of VDEQ's corrective action and the "matching principle" of utility rulemaking. *Id*. However, the agency used the broad scope of deference granted to it by Congress to consider the overall purpose of a public utility ratemaking and find as a matter of policy for ComGen. Such policy decisions fit the overall grant of power afforded to agencies by Congress and therefore the Commissions' policy assessments are afforded "great deference" by the court. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000). The court cannot set aside decisions rendered by the administrative agency as long as they are based on the consideration of relevant factors" that Congress had intended them to do. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Through the Federal Power Act, Congress established that because the "sale of such energy at wholesale in interstate commerce is necessary in the public interest," FERC is permitted rely on its own policy assessment to regulate the utility industry. 16 U.S.C. § 824(a) (2018).

This decision was not arbitrary and capricious because as the Supreme Court has ruled FERC must be given substantial deference in cases involving ratemaking. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000). Further, in this instance, FERC provided a thorough and reasonable explanation for why it approved the rate change request from ComGen and the reasoning was a rational connection between the facts of this case and the decision that was issued. Primarily, FERC has interest in ensuring that ComGen does not solely bear the cost of remediation costs and consequently lose profits that would disrupt service or cause the organization to go out of business. "The financial impact of such an outcome would likely jeopardize the financial integrity of ComGen." p. 12. FERC did show that they considered SCCRAP's arguments that shareholders could suffer a "windfall," but determined that the financial integrity of ComGen outweighed the negative impact on the shareholders.

On appeal, this Court should find that FERC's decision to approve the rate revision request is not arbitrary and capricious. This Court has previously held that "The limits set by the Court are deliberately broad... So long as the public interest -- i.e., that of investors and consumers -- is safeguarded, it seems that the Commission may formulate its own standards." *Goodman v. Public Service Com.*, 497 F.2d 661, 665 (D.C. Cir. 1974). Due to the broad grant of deference granted to FERC, he facts here do not come close to exceeding the limits set by courts to the ratemaking deference granted to FERC by the legislature.

## IV. SCCRAP'S POSITION IN THE FERC PROCEEDING – TO DISALLOW RECOVERY IN RATES OF ALL OR A PORTION OF THE COSTS INCURRED BY COMGEN IN REMEDIATING THE LITTLE GREEN RUN IMPOUNDMENT – IS AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

The Fifth Amendment of the United States Constitution states that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. The Fourteenth

Amendment further states that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV. Together, these clauses form the basis for takings claims where any form of property is regulated to such an extent that takes total economic value or substantially harms investment backed expectations. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co v. New York City*, 438 U.S. 104 (1978). As held in *Pennsylvania Coal Co. v. Mahon*, regulation of private property by the state does not inherently invoke a taking, it is only when the state foes "too far [that] it will be recognized as a taking." 260 U.S. 412, 415 (1922). When applied to utilities, the United States Constitution "protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–08 (1989) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co.*, 488 U.S. at 308.

A. Standard of Review

Whether SCCRAP's position to disallow the recovery rate could be an unconstitutional taking is a question of law. "The appellate court reviews *de novo* the district court's legal conclusion that the constitutional rights allegedly violated existed and that they were clearly established as a matter of law at the time of the alleged violations." *Butera v. District of Columbia*, 235 F.3d 637, 647 (D.C. Cir. 2001).

B. Disallowing Recovery of The $246 Million in Remediation Costs Would Unconstitutionally Undercut ComGen's Viability.

ComGen's proposed annual rate was set in accordance with market forces in an effort to maintain sufficient profitability to ensure its viability over the recovery period. While a public utility is not entitled to profits as of right by the constitution, it is entitled to establish rates that will earn a return on the property. *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692, (1923). A public utility is not a company that solely acts on its own behalf and should be allowed to establish rates that allow it to survive similarly to "other business undertakings which are attended by corresponding, risks and uncertainties." *Bluefield Waterworks & Imp. Co.*, 262 U.S. at 692. Being that a public benefit is derived from the continued existence of a public utility, the utility should be allowed to maintain a profit which would ensure its continued financial health.

> Rates which 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, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.

*Id* at 690. Whether or not rates are sufficient is based on the utility's ability "...under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Id* at 693.

SCCRAP's proposal that the entire recovery amount be disallowed would result in irreparable harm to ComGen and the ratepayers it serves and goes against a main principle of utility ratemaking. ComGen's proposal to raise rates was not purely a mechanism to increase profitability. Neither was it the result of speculative business practice or the pursuit of ever higher profits. The utility's aim is the recovery of an unforeseen, but ordinary business expense that is relatively

common in the utility industry. The corrective action was a "prudent investment" that courts have consistently held to be reasonable and "...not in and of itself exploitative." *Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Com*., 810 F.2d 1168, 1181 (D.C. Cir. 1987). It was a carefully crafted proposal that balanced the interests of ratepayers and ComGen's shareholders to spread the cost of remediating the Little Green Run Impoundment over ten years. p. 11. To balance the interests between the two parties, ComGen proposed and FERC accepted, a 10.0% return on equity over the recovery period. p. 10. A reasonable 10.0% return in equity over 10 years allows for the financial viability of ComGen despite the heavy burden of absorbing a $246 million penalty while maintaining much needed utility service to the public. A total or a partial disallowance of 80.5%, as proposed by SCCRAP, would yield a 3.2% or 3.6% return on equity respectively every year for a period of 10 years. Such a drastic and unreasonable proposal would harm ComGen's financial integrity, fail to assure confidence in its financial soundness, thereby undercutting its ability to raise capital on reasonable terms. p. 11. Such damage would be a threat to ComGen's viability and would potentially deprive the area of a valuable utility company to service consumers and would therefore be unjust, unreasonable and confiscatory in nature.

C. The Annual Rate Proposed by ComGen Constitutes Just Compensation.

ComGen's proposed annual rate was set in accordance with market forces in an effort to maintain sufficient profitability to ensure daily operations over the recovery period. That is not to say that a utility can claim entitlement to arbitrarily set highly profitable rates. Notwithstanding speculative business decisions, a utility can reasonably raise rates to maintain its services to the public. Furthermore, the value of the property "is to be determined as of the time when the inquiry is made regarding the rates." *Willcox v. Consolidated Gas Co.* 212 U.S. 19, 41, 52, 29 (1909)."The

ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Minnesota Rate Cases*, 230 U.S. 352 at 434 (1913). There is no formula which indicates whether a rate increase is unreasonable and is both overly burdensome on the public and provides a financial windfall for the utility. In rate making, "there is no single cost-recovering rate, but a zone of reasonableness: 'Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.'" *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 278 (1976), (citing *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

The only issue which even rises to the level of debate is the reasonableness of the recovery rate and that is the case only because the courts have not created a formula for deciding whether a rate is reasonable. The closest the Supreme Court has come to adopting a definitive test for rate recovery is "the zone of reasonableness." *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 585 (1942). This "zone" does not have strict floor and ceiling for reasonableness. Instead, Courts have interpreted reasonableness on a case by case basis. In 1909, the Supreme Court held that a rate of 6 percent was reasonable and not confiscatory. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 48-50 (1909). In 1919, the Supreme Court ruled that a 6 percent return was confiscatory when the invested capital by the utility was taken into account going on to state that "annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future." *Lincoln Gas Co. v. Lincoln*, 250 U.S. 256, 268 (1919). The Supreme Court has held rates as high as 8.0% as being reasonable during an era when expenses were not nearly as high and before the existence of federal statutes like the Clean Water Act. (see *Brush Electric Co. v. Galveston*, 262 U.S. 443 (1923)). However, no court

would reasonably find that a 3.2% or even a 3.6% recovery rate is reasonable. SCCRAP's proposal therefore does not meet or even approach the lowest reasonable rate: the lowest possible rate which is not constitutionally confiscatory. *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974).

This Court should find SCCRAP's proposal to be an unconstitutional taking because the proposed rates do not offer sufficient compensation for a public utility to remain financially viable during the recovery period. Further, ComGen's rates were entirely reasonable because they balanced the interests of the shareholders as well the societal value of ComGen continuing to be able to discharge its public duties.

## Conclusion

Surface water pollution via hydrologically connected groundwater is not actionable under the Clean Water Act. Seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of §402 of the Clean Water Act (33 U.S.C. §1342). FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was not arbitrary and capricious. SCCRAP's position in the FERC proceeding – to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment – is an unconstitutional taking under the Fifth and Fourteenth Amendments.

**Appendix B**

## Certificate of Service

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 5, 2018.

Respectfully submitted,

*Team No. 20*