IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18-02345
ORDER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases

2002 U.S. Dist. LEXIS 15208
Washington Air Compressor Rental Co. v. National Union Ins. Co.,
165 A.2d 482
Wadley v. Aspillaga,
163 F. Supp.2d 1, 7 (D.D.C 2001)
Fed. Power Com. v. Hope Nat. Gas Co.,
320 U.S. 591 (1944)
Alabama Electric Cooperative, Inc. v. FERC,
684 F.2d 20 (D.C. Cir. 1982)
NextEra Energy Res., LLC v. FERC,
898 F.3d 14 (D.C. Cir. 2018)
Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Com.,
810 F.2d 1168 (D.C. Cir. 1987)
Mo. PSC v. FERC,
337 F.3d 1066 (D.C. Cir. 2003)
FPC v. Natural Gas Pipeline Co.,
315 U.S. 575 (1942)
AT&T v. FCC,
836 F.2d 1386 (D.C. Cir. 1988)

II. Statutes

28 U.S.C. §1331
28 U.S.C. §1391
33 U.S.C. §1342
33 U.S.C. §1311(a)
16 U.S.C. §824(e)
16 U.S.C. §824(d)
33 U.S.C. §1362(12)
33 U.S.C. §1362(7)
1 Federal Standards of Review § 1.01 (2018)
5 U.S.C. §706
33 U.S.C. §1251(a)
33 U.S.C. §1362(14)
33 U.S.C. §1319(b)

III. Other Authorities

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971)
S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966)
H. R. Rep. No. 1776, 89th Cong., 2d Sess., 21 (1966)
Restat 2d of Torts, § 409 (2nd 1979)
John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 Am. U. L. Rev. 775 (1998)
Richard A. Posner, "Natural Monopoly and Its Regulation," 21 Stanford Law Review 548 (1968)

JURISDICTIONAL STATEMENT

This court has subject matter jurisdiction pursuant to *28 U.S.C. §1331* by reason of federal question jurisdiction. All claims in this case are brought from questions arising out of either the Clean Water Act, a federal statute, or the decisions made by the Federal Energy Regulatory Commission (FERC), an executive agency.

The venue used for the first of two actions joined to created this case, the United States District Court for the District of Columbia, was proper pursuant to *28 U.S.C. §1391* since Commonwealth Generating Company (ComGen) is incorporated in the District of Columbia.

QUESTIONS PRESENTED

1. Whether the Clean Water Act creates a cause of action for any surface pollution that can be hydrologically connected to the source.
2. Whether discharge from a point source under *§402* of the Clean Water Act covers pollutant seepage from an on-site CCR disposal unit that, through indirect means, enters navigable waters. *33 U.S.C. §1342*.
3. Whether the FERC had "just and reasonable" basis for approving revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2. *Northern States Power Co. (Minn.) v. FERC*, 30 F.3d (D.C. Cir. 1994) at 180 (quoting *Town of Norwood v. FERC*, 295 U.S. App. D.C. 211, 962 F.2d 20, 22 (D.C. Cir. 1992)).
4. Whether barring a recovery in rates for all or a portion of the costs of the court-mandated environmental remediation of the Little Green Run Impoundment is an unconstitutional taking under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

I. Procedural History

This case was consolidated from two separate actions by the same parties and in regards to the underlying factual circumstances.

The first action is an appeal from an order issued by the United States District Court for the District of Columbia that granted injunctive relief for petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) against respondent Commonwealth Generating Company (ComGen) for violation of the Clean Water Act, 33 U.S.C. §1311(a).

The second action is an appeal from a regulatory order by the Federal Energy Regulatory Commission (FERC) denying rehearing of rate-setting case Docket ER-18-263-000. In that case FERC approved Revised Rate Schedules No. 1 and No. 2, which both increased the rates ComGen could charge Vidalia Power and Franklin Power in order to offset the cost of the injunction issued by the district court in the first action. SCCRAP intervened in the FERC action, but is the appellant for the current action; ComGen is intervening in this appeal.

Because the two actions share common parties and common issues, all three parties (ComGen, FERC, and SCCRAP) filed a joint motion to have the cases consolidated for a decision. This Court granted this motion on December 21, 2018 and issued written orders for the case on December 28, 2018.

II. Statement of the Facts

Production of energy from coal-fired electric generating power plants results in the creation of byproducts known as coal combustion residuals (CCRs), which contain a number of pollutants. These are in turn disposed of in wet or dry form via large surface impoundments or

landfills. Commonwealth Generating Company (ComGen), a wholly-owned regulated subsidiary of Commonwealth Energy (CE) is a multistate electric utility holding company which owns and operates such plants in the nine states including Vandalia and Franklin, and disposes of the necessary byproducts of its power-generation activity in on- or off-site landfills or surface impoundments. One such area is the Little Green Run Impoundment, formed by the construction of a dam across Green Run, located adjacent to the Vandalia Generating Station (VGS), and owned and operated by ComGen.

In November 2014, ComGen purchased the Vandalia Generating Station (VGS), a coal-fired unit in production since 2000 with dual units each generating 550MWs, from Commonwealth Energy Solutions, an unregulated subsidiary of CE. This sale was part of a strategic decision within CE to reduce its exposure to the competitive wholesale market, and through the implementation of two-unit power service agreements with subsidiaries Vandalia Power Company (VP) and Franklin Power Company (FP), allowed ComGen to incorporate the VGS within its regulatory agreement with the Federal Energy Regulatory Commission (FERC). Both subsidiaries are public utilities under §205 of the FPA. 16 U.S.C. §824(e). Under the terms of the sale, the electrical output generated from the plant is sold in equal quantities to VP and FP; where the pricing structure for the sale is determined by the FERC-regulated unit power service agreement between ComGen and VP - designated as FERC Rate Schedule No. 1, the agreement between ComGen and FP - designated as FERC Rate Schedule No. 2.

Under the Federal Power Act (FPA), FERC has jurisdiction over the actions of a public utility, and under §824(d), has the duty to ensure that wholesale electric sales by such utilities are just and reasonable and not unduly discriminatory. 16 U.S.C. §824(d).

Throughout the operation of the plant, groundwater monitoring allowed ComGen to identify elevated levels of arsenic in the groundwater. Consistent with its duties, it notified the Vandalia Department of Environmental Quality (VDEQ), and developed a corrective action plan to mitigate pollution, which was approved and implemented in 2006. Under the plan, a high density polyethylene (HDPE) geomembrane liner was installed on top of the dam as a corrective measure against potential leakage. In 2017, Vandalia Waterkeeper detected arsenic within the Vandalia River, and suggested that the source of the arsenic was the Little Green Run Impoundment, where CCRs had leached via rainwater and groundwater into the navigable waters of Fish Creek. The subsequent VDEQ report identified a broken seam in the HDEQ liner which permitted seepage downstream from the dam. The seepage only occurred under significant rainfall, and dried up within a few weeks. In addition, it was observed that the seepage caused some soil erosion as it flowed towards the creek.

The subsequent action by SCCRAP, a national environmental organization, was filed as part of a concerted effort to target producers of coal-based energy under §1311(a) of the Clean Water Act, alleging that in the absence of a permit, the rainwater-driven leach from HDEQ seam qualified as "point-source pollution" under the act, and polluted the groundwater surrounding the plant due to its "hydrological connection" to the creek. In the wake of the ruling by the District Court to excavate the 38.7 million cubic yards of CCR from the impoundment site, ComGen appealed the finding and submitted a filing to FERC to recover the estimated $246 million cost of compliance via amendments to the rate schedules of both Vandalia Power and Franklin Power, over a 10-year period from the utility's retail customers. This increase would translate to an estimated $3.30 monthly increase to the power bill of the retail customers over the 10-year amortization period. SCRAPP proceeded to intervene in the FERC hearing on the basis that

shareholders, not rate payers should shoulder the cost of the corrective action. The group argued that even if it was to be imposed on rate payers, only about 19.5% of the cost - proportional to the quantity of CCRs deposited since the purchase of the plant by ComGen and the implementation of the sale agreement between itself and Vandalia and Franklin Power - should be borne by retail customers - an assertion contested by ComGen on the grounds that the liability was incurred when the judgment was entered.

Following three days of evidentiary hearings, FERC issued its decision to approve the proposed rate revisions subject to a compliance filing by ComGen to reaffirm its implementation of the remedial action. While FERC accepted several arguments put forth by SCRAPP, it ultimately relied on the finding that an adverse decision would jeopardize the financial integrity of ComGen.

SUMMARY OF THE ARGUMENT

This Court should vacate the judgment by the D.C. District Court and should uphold FERC's approval of Revised Rate Schedules No. 1 and No. 2.

The D.C. District Court's ruling that ComGen violated §1311(a) of the Clean Water Act is incorrect as a matter of law and thus should be overturned by this court through its power of *de novo* review. Under the Clean Water Act, a discharge is in violation if it meets three requirements: 1) is valid pollutant under the Act; 2) comes from a point source as defined by the Act; and 3) is discharged into navigable waters. 33 U.S.C. §1311(a), §1362(12), §1362(7). The only dispute is the categorization of the seepage from the Little Green Run Impoundment that travels through groundwater pathways before allegedly contaminating Fish Creek and Vandalia River as discharge into navigable waters. The District Court held that hydrological connection between the point source and the surface contamination was acceptable so long as it was "direct,

immediate, and can generally be traced." *Opinion* at 10. This position should not be accepted because it runs contrary to controlling precedent, such as the Supreme Court's ruling in Rapanos about wetland connection to navigable waters, and because it raises public policy concerns for potential transgressors being able to know whether they are violating a major federal statute. *Rapanos v. United States*, 547 U.S. 715 (2006).

Moreover, even if this Court determines that the Little Green Run Impoundment does qualify as a §1311(a) violation, it should see fit to vacate the District Court's remedy. While courts do generally have discretion regarding administration of injunctions, the stated basis for the court's injunctive remedy neither takes into account the lack of irremediable damage nor the cost imposed on rate-payers by precluding ComGen from crafting a less costly but equally effective solution to the seepage.

The court should uphold FERC's approval of Revised Rate Schedules No. 1 and No. 2, which represent "just and reasonable" rates given the agency's thorough consideration of the factual record. The D.C. Circuit has consistently held that the decisions of a regulatory agency will be reviewed under an "arbitrary and capricious" abuse of discretion standard, under 5 U.S.C.S. §706(2)(A). The key consideration in this determination is the fair balancing of consumer and investor interests in rate decisions. FERC did not act arbitrarily or capriciously in approving the rate schedule revisions, because ComGen did not act in violation of the prudence principle of utility ratemaking in its implementation of the corrective plan, nor is there evidence of negligence on the part of ComGen in its selection of the subcontractor. Further, FERC weighed the interests of shareholders and ratepayers appropriately, under its duty to fairly balance such interests. *Fed. Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591 at 603 (1944). The

maintenance of the financial integrity of the utility weighed heavily in reaching FERC's conclusion, a justification which is within the authority and discretion of the regulatory agency.

The consideration of the financial integrity of the utility has significant economic policy justifications. It is in the interest of the entire market to prevent the increase the cost of borrowing and capital investment for a utility, which would be shouldered by the rate payer in the long run, adversely affecting reliability of service and creating possible environmental consequences if the utility is rendered unable to pay the cost of the remediation due to capital constraints exacerbated by its inability to pass on costs.

Finally, a legal judgment against an actor accrues when it becomes probable that a legal liability would be incurred. As SCRAPP's action against ComGen commenced after the acquisition of the VGS plant, the liability would be confined to ComGen's, rather than its predecessor's financials.

Denying regulated public utilities upside gains from business risks while forcing them to bear the costs of downside risks represents an unconstitutional taking under the 5th and 14th amendments. In *Hope*, the court emphasized that regulatory decisions are granted significant discretion, but they must be "just and reasonable," such that investors gain exposure to the business as a whole, rather than segments where upside gains are capped, yet downside risk is limited.

ARGUMENT

I. Standard of Review

For questions arising out of the first action in the D.C. District Court the standards of review are merely the ordinary standards of review taken by courts of appeal: clear error for findings of fact, *de novo* review for conclusions of law, and abuse of discretion for matters where trial courts have discretion. 1 Federal Standards of Review § 1.01 (2018).

The arbitrary and capricious standard applies to this Court's review of FERC's rate-setting determination per the Administrative Procedure Act, 5 U.S.C. §706. *See, e.g., Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). This standard of review is very narrow and is meant to preserve the discretion of the regulatory agency to whom substantive determinations such as rate-setting have been delegated. Indeed, D.C. Circuit has proven particularly keen to apply this deference to FERC: "...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.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. (2016) at 782 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist.* No. 1, 554 U.S. 527, 532 (2008)).

II. No cause of action exists under the Clean Water Act

A. The Clean Water Act does not generally create a cause of action for point sources that are merely hydrologically connected to surface contamination

While the Clean Water Act ("CWA") was written to be an effective tool against certain pollution pathways, it does not extend to create a cause of action for pollution whose only physical link to surface contamination goes through a groundwater linkage. The CWA was passed in 1972 with mandate "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Its passage reflected a growing national concern with the state of the nation's waterways—Americans had watched in awe just three years prior when the Cuyahoga River caught on fire after spending decades as the communal sponge soaking up the greater Cleveland area's flammable industrial effluent. To guard against the kinds of pollution that could lead to such environmental outcomes, the CWA created a national system to eliminate the discharge of pollutants. *Id.* §1342. It made it unlawful for anyone to "discharge any pollutant" into navigable waters, and it defined "discharge any

pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* §1311(a) and §1362(12).

This language in the statute is broad in some ways in that it specifies "any pollutant" by "anyone," but it also explicitly places a restraint on the type of water into which pollution may be actionable: the waters must be navigable. Navigable waters is defined in the statute as "the waters of the United States, including the territorial seas." *Id.* §1362(7). There is a wealth of case law further defining the threshold between navigable and non-navigable surface waters (*see, e.g. Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977)), but such distinction is immaterial in this situation: by definition only surface waters can be navigable. At face value this excludes as unlawful the discharge of pollution into a something other than surface water, and in 1994 the 7th Circuit agreed stating that "Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters." *Vill. Of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F. 3d 962, 965 (7th Cir. 1994). The question at hand now is whether, generally, discharge of a pollutant from a point source that ends up contaminating surface water through a groundwater connection can be covered under the "into navigable waters" language of the statute.

The D.C. Circuit has not ruled on this particular question, but there is significant persuasive authority from courts of other jurisdictions tending to show that a point source sharing a groundwater connection with contaminated surface water is insufficient to create a cause of action under the CWA. The District Court for the Eastern District of Kentucky recently established a useful framing for the different ways that groundwater hydrologically connected to surface water could fit under the auspices of the CWA.

> "There are three distinct reasons that hydrologically connected groundwater might be subject to regulation under the CWA. First, hydrologically connected groundwater could

> itself constitute a 'navigable water' under the CWA such that an adding a pollutant to hydrologically connected groundwater would constitute the discharge of a pollutant 'to navigable waters.' Second, hydrologically connected groundwater could constitute a 'point source' under the CWA such that discharging a pollutant to a 'navigable water' from hydrologically connected groundwater would constitute a discharge 'from any point source.' Third, hydrologically connected groundwater could constitute a non-point source conveyance that falls within the CWA even though it is itself neither a point source nor a navigable water."

Ky. Waterways Alliance v. Ky. Utils. Co., 303 F. Supp. 3d at 542 (E.D.K.Y. 2017). The first of these ways is nullified by intuition and a wealth of decisions in other jurisdictions ruling against the characterization of groundwater as a "navigable water." *See, e.g., Vill. Of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F. 3d 962, 965 (7th Cir. 1994); *Rice v. Harken Expl. Co.*, 250 F. 3d 264, 269 (5th Cir. 2001). The third line of reasoning is moot since under the CWA non-point source pollution is left to the states, and there is no available information about how Vandalia regulates this. *Or. Nat'l Res. Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987).

This leaves only the possibility that "hydrologically connected groundwater could constitute a 'point source' under the CWA such that discharging a pollutant to a 'navigable water' from hydrologically connected groundwater would constitute a discharge 'from any point source.'" *Ky. Waterways Alliance v. Ky. Utils. Co.*, 303 F. Supp. 3d at 542 (E.D.K.Y. 2017). However, this implication that groundwater could serve as a medium creating an uninterrupted conduit between the point source and the contaminated navigable water runs contrary to the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715. In *Rapanos*, respondent Army Corps of Engineers attempted to assert CWA jurisdiction over point source pollution into wetlands that would then flow into navigable waters. *Id.* at 720. The Court held that wetlands only fall under power of the CWA if they bear a "continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* At 742.

The Court's specification that the connection be on the surface is very important. Wetlands that do not share a surface connection with a nearby navigable body of water still in almost all circumstances connect into the same water table as that body of water. By specifying that the connection between the wetland (the conduit) and the recognized body of water must be on the surface the Court directly excluded this type of groundwater connection from CWA jurisdiction. This controlling precedent contradicts the D.C. District Court's finding that a discharge of pollutants that reach a navigable body of water exclusively through a groundwater conduit can be regulated under the CWA as long as the connection is "direct, immediate, and can generally be traced." *Opinion* at 10. The District Court's finding should be vacated by this court as a matter of law.

While authority from Supreme Court should be sufficient, it is also worth noting that there is a powerful policy justification for not extending CWA protections to point source pollution that only reaches surface waters through a groundwater connection. Water tables are more or less a continuum across huge regions of the country[1], and if this excessively inclusive interpretation were to be upheld and enforced then nearly every point source of pollution across the country could be characterized as unlawful under the CWA. This is true because for a given land area under which there is a continuous groundwater reservoir, such as an aquifer, each source of point source pollution located on that land that seep into the ground could be said to be hydrologically connected to each navigable body of water in the area. A woman who lives many miles away from the nearest navigable surface water and uses her backyard to store old industrial equipment could still be on the hook for violating the Clean Water Act if this definition were to

[1] Glantz, Michael, ed., The Ogallala Aquifer Depletion, 1989, Iowa State University, http://www.meteor.iastate.edu/gccourse/issues/society/ogallala/ogallala.html

be accepted. The District Court for the District of Connecticut had this concern in mind when they held that "any non-point-source pollution (such as ordinary surface run-off from the land into navigable waters) could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through non-point sources to come to rest in navigable waters." *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 U.S. Dist. LEXIS 106989 at 23-24.

The court below attempts to foreclose this line of argument by creating the "direct, immediate, and can generally be traced" test. *Opinion* at 10. Not only does this test falter against Supreme Court precedent, but it creates myriad issues of enforceability and administrability. Traceability, in an objective sense, is nearly always possible. Using tracer chemicals hydrologists could have the capacity to trace the leeched heavy metals from the aforementioned hypothetical automobile parts collector's yard to the faraway surface water through the groundwater pathway. In the subjective sense of actual notice, traceability can always be denied—especially with less sophisticated polluters. If the question is whether a polluter had actual notice of the particular groundwater connection between their point source discharge and the surface contamination, then there are few foreseeable scenarios where a polluter will feel incentivized to investigate the destinations of their pollution in order to gain such actual notice of traceability.

Moreover, the legislative history and intent of the CWA shows that its authors also worried about the implications of a constantly expanding definition of navigable waters. Congress knew that groundwater and the regulation surrounding it is "complex and varied," due in part to its ubiquitous and unobservable nature, and so they excluded it from consideration in the CWA. *S. Rep. No. 414, 92d Cong., 1st Sess.* 73 (1971), 2 Leg. Hist. 1491, U.S. Code Cong.

& Admin. News 1972, p. 3739. There were already plenty of ways in which a narrower interpretation of navigable waters (the one they intended) could ameliorate the then-rampant pollution of waterways, so they sought to avoid the controversies and overly complex questions of administration that could accompany broader definitions of navigable waters and instead leave that area of regulation to the states.

B. Groundwater-transported seepage from the Little Green Run Impoundment does not violate §1311(a) of the Clean Water Act, and even if it did, the trial court did not grant the proper remedy

1. The seepage at the Little Green Run Impoundment did not violate §1311(a)

In framing the type of pollution to which it applies, the Clean Water Act establishes several requirements that must be met in order to create a valid cause of action. These requirements are derived from how the CWA defines its terms. The Act prohibits the "discharge of any pollutant by any person." 33 U.S.C. §1311(a). Later, it specifies that "discharge of any pollutant" means "any addition of any pollutant to navigable waters from any point source." Id. §1362(12). The last important term to define from this growing web of definitions is "point source." Id. In §1362(14) the term 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… from which pollutants are or may be discharged."

These definitions leave three determinations to be made in order to prove that an alleged polluter violated the CWA (any one of which is vindicating if not made in the affirmative): 1) whether what was discharged qualifies as a "pollutant;" 2) whether the discharge came from a "point source;" and 3) whether the discharge was "into navigable waters." ComGen did not

violate §1311(a) of the Clean Water Act because while arsenic is a pollutant, and while the seepage from the membrane likely qualifies as a point source, the discharge did not occur into navigable waters, and thus fails the violation test.

ComGen concedes that arsenic constitutes a pollutant under the CWA.

ComGen concedes that even though it was unintentional and non-negligent, the pooling runoff from the Little Green Run Impoundment does likely constitute a point source under the CWA since courts have interpreted the definition of this term to be extremely broad and the broken weld is similar in kind to a discrete fissure.

The ComGen concedes the other two characterizations, they maintain that the discharge from the Little Green Run Impound was not into navigable waters. (See analysis in Section A.)

This Court should overturn the District Court's ruling that ComGen violated §1311(a) because the discharge from the rupture in the membrane was not into navigable waters, as the term has come to be defined.

2. The injunction issued by the District Court exceeds its statutory grant

Even if this Court rules that ComGen does fit the criteria for discharge of a pollutant into navigable waters set forward by §1311(a), the injunctive relief ordered by the District Court exceeds the directives of the statute from which it is deriving its injunctive authority. The civil enforcement portion of the Clean Water Act allows courts to issue injunctions that "restrain such violations" and "require compliance." 33 U.S.C. §1319(b). While injunctive relief is authorized, the District Court was still bound by established norms for how and when injunctions should be issued. In particular, the Supreme Court has spoken to the applicability of injunction in cases of CWA violations. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) the Court held that even though the Navy's discarding of munitions into the ocean in the course of weapons training

violated the CWA, an injunction was not an appropriate remedy since the discharge was not of high enough risk to make an injunction "'essential in order effectually to protect property rights against injuries otherwise irremediable.'" (quoting *Cavanaugh v. Looney*, 248 U.S. 453 (1919) at 456). In the *Weinberger* ruling that an injunction was not an appropriate remedy, the Court invoked its previous ruling in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), which held that the public interest must be taken into consideration when deciding to enjoin a violating party. *Weinberger v. Romero-Barcelo*, 456 U.S. (1982) at 312.

This analysis from the Supreme Court in mind, it is evident that the District Court erred in ordering ComGen to relocate the entirety of the Little Green Run Impoundment so as to stop what they viewed as a CWA §1311(a) violation. Even if the seepage violates §1311(a), the same result could have been achieved through an order that afforded more flexibility in solving the problem. If unexploded ordnance being dumped into communal waters near Puerto Rico was not the level of "irremedia[cy]" the Court thought injunction demanded, then it seems unlikely that a minor seepage that requires groundwater diffusion to even reach surface contamination is deserving of an injunction of this absoluteness. *Weinberger v. Romero-Barcelo*, 456 U.S. (1982) at 312; (quoting *Cavanaugh v. Looney*, 248 U.S. 453 (1919) at 456). If the discharge is a violation, then ComGen would need to stop it. But how they do that should be at their discretion. There very well may be a less expensive method for eliminating the seepage, but ComGen are precluded from exploring such an option by the District Court's order.

Further, this Court should pay close attention to the ways in which removing ComGen's potential to craft a cheaper solution controverts the Supreme Court's reasoning in *Pullman Co.* that the public interest should weigh heavily in judges' injunction considerations. 312 U.S. 496 (1941) at 500. Though this issue is being litigated in this case, there was at least a substantial

chance that some or all of the cost of eliminating the seepage would fall on the rate-payers—the public. By eliminating the possibility for ComGen to explore a cheaper solution, such as partially excavating to expose and fix the broken weld on the membrane, the District Court was passing on some significant expected cost onto the public without conferring any additional environmental benefits. If it is decided that the seepage is a violation, this Court should vacate the District Court's order and fashion a new remedy.

III. FERC did not err in permitting Appellant-Intervenor to pass the cost of the cleanup to its ratepayers

A. FERC's process for evaluating the rate change was not arbitrary and capricious

In its decision to approve ComGen's requested revisions to the FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement), FERC permitted ComGen to recover over a 10-year period the cost of compliance with the district court cleanup order. This decision was challenged by SCRAPP on two grounds: allegations that ComGen behaved imprudently in the installation of the HDEQ liner as part of the corrective action prescribed by VDEQ and thus should not be allowed to recover the costs from ratepayers, and that even in the event that FERC permits passing on remediation costs to ratepayers, only the proportion of CCR removal linked to the unit power service agreements with the Vandalia and Franklin Power Companies in the wake of the acquisition of the VGS plant by ComGen should be passed on to the payer. These arguments fail to take into consideration the standard of review applied to the decisions of a regulatory agency and the deference given to the policy justifications that back those decisions.

Under 5 U.S.C.S. § 706(2)(A), a court will review agency decisions under an "arbitrary, capricious, … abuse of discretion, or otherwise not in accordance with the law" standard, which

are mandatory standards for the scope of judicial review of a federal agency action. 5 U.S.C.S. § 706. One of the motivations of this guideline is to properly ensure separation of powers by balancing efficient agency action on one hand, while ensuring rationality and fairness on the other. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031 (1979). The DC Circuit has consistently ruled that ratemaking decisions by FERC will be reviewed under the "arbitrary and capricious" standard. *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (1996), and special deference will be given to agency decisions setting rates due to its expertise in this arena, given the "complex industry analyses and difficult policy choices," as long as the Commission takes into account the "relevant data and articulates a rational connection between the facts found and the choice made." Id. *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 at 35 (1983). The Supreme Court described that an agency ruling could be found arbitrary and capricious if the agency, in rendering its decision, relied on factors which were not intended to be considered by Congress, ignored important elements of the problem, or justified its decision by contradicting available evidence. *Id*. at 43. Even in these circumstances, the court held that in its review of agency decisions, a court should not "supply a reasonable basis" for an agency decision, and must uphold decisions even if opaque in their reasoning. *Id*. at 43, 44 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, at 196 (1947)). These precedents underscore that a review of Agency findings consider "substantial evidence as a whole" in the determination of whether such findings were arbitrarily made. *also Motor Vehicle Mfrs. Ass'n.*, 463 U.S. 29 at 44 (citing S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 21 (1966)). Thus, in the determination of whether a FERC rate-regulatory decision was arbitrarily or capriciously made, the court will scrutinize the entire record as well as the

Agency's reasoning in its final decision. In this case, the evidence on the record supports the finding that the cost of the remediation should be passed on to the ratepayers in full.

Based on the factual record, ComGen did not act in violation of the prudence principle of utility ratemaking in the implementation of the VDEQ corrective plan. The D.C. Circuit has found that employers or contractors are generally not liable for negligent acts of independent subcontractors. *Wilson v. Good Humor Corp.*, 757 F.2d 1293 at 1301 (1985); see also *Siegel v. Klingle Corp.*, 2002 U.S. Dist. LEXIS 15208, *Washington Air Compressor Rental Co. v. National Union Ins. Co.*, 165 A.2d 482 at 485, Restat 2d of Torts, § 409 (2nd 1979). However, the exception is not absolute, and is generally subject to scrutiny regarding the nature of the work performed and the involvement of the employer in the performance of the contracted duty. *Wadley v. Aspillaga*, 163 F. Supp.2d 1, 7 (D.D.C 2001). Exceptions generally fall under three general categories: negligence of employer in selecting the contractor, non-delegable duties of the employer, and work which is "inherently" dangerous. Restat 2d of Torts, § 409 comment b (2nd 1979). Generally, courts will find such an employer-employee relationship only when there is a direct supervisory control over the activities of the employee. "in the performance of the work, and the manner in which the work is to be done", and not where an employer does not have the resources and knowledge of the work as to garner responsibility for its performance. *Wilson*, 757 F.2d 1293 at 1301.

Considering the pertinent facts, it is clear that these exceptions do not apply in the instant case. ComGen assigned the installation of the HDPE membrane and exercised due care in the selection of an independent contractor to perform the work. There is no evidence of negligent selection, prior notice of incompetence, nor of ComGen exercising or retaining any control over the work, especially given the practical limitations of a power company in this arena.

Washington Air Compressor Rental, 165 A.2d 482, 485 (D.C. Cir. 1960). It is clear that ComGen was not "in the best position to identify, minimize and administer the risks involved in the contractor's activities." *Wilson*, 757 F.2d 1293 at 1301. Further, the mere failure of the HDPE liner does not, by itself, constitute evidence of negligence. Every installation, even when performed in compliance with relevant standards carries some risk of failure, and holding ComGen liable for that failure would effectively impose a strict liability standard upon the employer of a subcontractor. The determination of this issue is a matter of fact, and within its evidentiary proceedings, FERC agreed that no strict liability would be imposed on ComGen due to improper installation of the liner by an independent subcontractor. As the breach does not fall under the scope of ComGen's duties, the claim that the defective liner violates the prudence principle of utility ratemaking has no credence.

In reaching its final determination, FERC considered the entirety of factual record while weighing the interests of ratepayers and shareholders, as well as the market as a whole. The Supreme Court held in *Hope* that the rate regulator has the duty to balance varied interest in the determination of "just and reasonable" rates. In particular, the court emphasized the legitimate concerns of investors:

> "the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated … it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. *Cf. Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339 at 345-346. By that standard the return … should be commensurate with returns on investments in other enterprises having corresponding risks [and] sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276 at 291."

Fed. Power Com. v. Hope Nat. Gas Co., 320 U.S. 591 at 603 (1944). Here, the additional burden on the taxpayer is comparably slight, resulting in a net increase of $3.30 in monthly bills

for the duration of the 10-year amortization period. Imposing the liability upon the utilities directly however, would undercut actual earned returns from 10.0% to 3.2% - which would significantly impact the financial integrity of ComGen. In *Hope*, the Supreme Court allowed a comprehensive determination by the Federal Power Commission of permissible prices, through an assessment of comparable investments' rate of return (given similar risks) in the natural gas sector to withstand scrutiny on the reasonability of prices. *Id.*

In the instant case, similar factors were weighed and considered, including "a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions," like the development of the market, profit margins, dispersal of distribution networks, financial records, and ability to "attract capital upon favorable terms." *Id.* at 604-605. FERC's justification in the instant case considered similar factors in the evidentiary hearing set in response to the SCRAPP intervention—concluding that concerns over financial integrity weighed heavily in reaching its conclusion, after granting certain portions of SCRAPP's petition. This is within the authority and discretion of the regulatory agency, and under the standard laid forth above, does not constitute arbitrary and capricious decision-making.

Subsequent cases have reaffirmed the deference given to the regulatory commission's analysis of the complex factors influencing the imposition of rates within a given market. The DC Circuit Court of Appeals reaffirmed that "[a] just and reasonable rate must be fair both to the utility and to its customers: It "should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity" in *Alabama. Electric. Cooperative*, citing *Hope. Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20 at 27 (D.C. Cir. 1982). Recent decisions have also considered the use of reliability in the provision of services as an appropriate consideration in rendering rate decisions. *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14 (D.C.

Cir. 2018). The court has also reaffirmed the calculation of rates by considering the overall rate "necessary to preserve [the] company's access to capital markets and its financial integrity." *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Com.*, 810 F.2d 1168 (D.C. Cir. 1987). The Court found that FERC's failure to use the "end result standard articulated in *Hope* by failing to consider the financial interests of investors was arbitrary and capricious. *Id*. In *Mo. PSC*, the court reached a contrary decision, ruling a FERC decision to impose costs on ratepayers on the grounds of preserving financial integrity to be arbitrary and capricious. The critical issue here however, was not the decision to consider financial integrity (thus challenging the decision in *Hope*) but rather the agency's consideration of circumstances which it was certain could never materialize- financial collapse. *Mo. PSC v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003). Thus, this case further supports the Circuits position that financial integrity is a critical consideration in formulating rate decisions in this arena.

Ultimately it is the nature of the regulated monopoly that requires these considerations[2]. In an efficient market, ratepayer savings from forcing the utilities to absorb remediation costs would be reflected in the higher costs to the utility in accessing capital markets and to raising capital necessary to meet costs of operation.[3]

[2] For a discussion of the theory of regulating a natural monopoly, see Richard A. Posner, "Natural Monopoly and Its Regulation," 21 Stanford Law Review 548 (1968).

[3] McArthur states that the "inability to seek recovery of stranded costs could impair the financial ability of a utility to continue to provide reliable service. This will depend on the magnitude of stranded costs and the prospect or lack thereof for recovering such costs.... [which] could seriously erode a utility's access to capital markets, or could drive the utility's cost of capital to unprecedented levels. John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 Am. U. L. Rev. 775 (1998) *citing* Order No. 888, 61 Fed. Reg. at 21,642 & n.680. "The financial community commenters confirm our views in this regard.... [T]he prospect of a utility not recovering stranded costs could erode a utility's ability to attract capital and thus imperil its continued financial stability." *Id*. at 21,642.

This would adversely affect reliability of service (if proper maintenance becomes too expensive to the utility). Since the costs of capital expenditures are borne by ratepayers, the long run "savings" by forcing the utility to absorb remediation costs will be reflected in increases in rates to reflect higher costs and the increased cash-on-hand requirements that a company in a more precarious financial position would likely be required to show investors in order to remain an attractive investment. John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 Am. U. L. Rev. 775 (1998). Moreover, financial uncertainty can have real impact on the uninterrupted provision of power, and makes service interruptions due to a reduced ability to maintain its systems or possible liquidity strain more likely. In balancing the interests of ratepayers as per *Hope*, and administrative agency must also take into account reliability of service to users who rely on its uninterrupted provision, including hospitals, schools, local emergency services, and others for whom interruptions by themselves would impose additional externalities such as backup generator capacity, or lost services.

A ruling adverse to FERC's decision would also carry potential environmental consequences as well. By forcing the utility to bear the entire cost of the corrective action, the court would essentially force the utilities to perform a cost-benefit analysis between entering bankruptcy protection and complying with the order. By making the cleanup an economic decision where compliance threatens the financial integrity of the entity itself and overlooks the interests of shareholders as a whole, there is a real possibility that in order to meet its fiduciary duty to shareholders, the utility will incur additional costs, increased difficulty in maintaining its credit rating through higher leverage and increased cost to borrow and service its debts - challenges up to and including bankruptcy proceedings. Limitations on cash and the specter of

costly, lengthy, and onerous restructuring or bankruptcy proceedings will leave disposal sites unremediated, and contamination will continue to accumulate.

The purpose of allowing a regulated monopoly to operate in this market is to effectuate efficiency where the particularities of the market lead to the existence of a natural monopoly. Richard A. Posner, "Natural Monopoly and Its Regulation," 21 Stanford Law Review 548 (1968). By allowing the regulated monopoly to maintain a comparable rate of return, deadweight losses are minimized, forcing the company to consider potential investments through similar diligence analysis as a comparable firm in a competitive market. One implication is that the presence of similar profit margins within each type of industry forces the monopoly to make efficient capital investments, where the potential risks of an acquisition are calculated as part of the investment's price. In this view, the costs of the acquisition reflect a discount for the risk-adjusted likelihood of legal judgments that are foreseeable at the time of the acquisition. In any acquisition of a power plant with a sizeable on-site impoundment, the potential risks of environmental remediation (even when full compliance with regulation was effected) will necessarily be considered. Thus, by paying for the costs of such capital expenditures over the life of the utility, ratepayers are only charged risk-adjusted premia. In the event that such risks materialize, it makes sense to charge their costs to the ratepayer as well, as the net effect would, in an efficient regime, be the same. Any other decision by FERC would unfairly preference ratepayer interest over those of investors.

Finally, the argument that ratepayers should only be responsible for the cleanup costs of the CCRs deposited since the acquisition of the VGS plant by ComGen has no merit, because in accordance with GAAP principles, judgments are accrued when they are rendered (or probable), not when the infringing actions began. In this case, the suit was not commenced until after the

plant was acquired by ComGen- hence, any probability of settlement could only be included in the financials of ComGen, rather than its predecessor. Adopting SCRAPP's argument on this issue would introduce significant discretion and uncertainty into financial accounting of incurred costs and liabilities, and would not be in accordance with established rules. Uncertainty about when such conduct began, and whether a judgment will be rendered in the first place, support the assertion that for stability and consensus, such guidelines cannot be arbitrarily waived.

B. Denying public utilities the chance to profit from risks taken but allowing them to bear the costs represents an unconstitutional taking under the 5th and 14th amendments

The *Hope* test describes the instance at which a court has defined a rate as becoming unconstitutionally confiscatory. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, at 586 (1942) (citing *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Com.*, 810 F.2d 1168, 1175 (D.C. Cir. 1987)). In this instance, mandating that a utility bear downside risks to an investment while regulating their participation in upside investments represents an unconstitutional taking. In *AT&T v. FCC*, the court reiterated that a regulatory agency has the authority to employ a refund mechanism in conjunction with rate of return regulation guidelines under statutory authority. The court found however, such regulation must be exercised equitably and under the authority of statute. In particular, the rate regulation must be made in a manner to create "just and reasonable rates" under the agency directive, such that the "order viewed in its entirety" meets the guidelines under 16 U.S.C. §824(d) – such that investors gain exposure to the regulated unit as a whole, and not just in one or another of its business segments- incurring both

upside and downside costs. *AT&T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 at 602 (1944)).

CONCLUSION

For the aforementioned reasons, this Court should vacate the D.C. District Court's order and uphold FERC's approval of Revised Rate Schedules No. 1 and No. 2.

Respectfully submitted,

Team 8:

Attorneys for Appellant
COMMONWEALTH
GENERATING
COMPANY (COMGEN)