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

COMMONWEALTH GENERATING COMPANY, *Appellant*,	)	
v.	)	
STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP), *Appellee*,	)	
	)	C.A. No. 18-02345
STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP), *Petitioner*,	)	
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*,	)	
COMMONWEALTH GENERATING COMPANY, *Intervenor.*	)	

ON PETITION FOR REVIEW OF THE DISTRICT COURTS' RULE AND REVISED RATE SCHEDULES BY THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR APPELLEE/PETITIONER

Team No. 1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellee-Petitioner, Stop Coal Combustion Residual Ash Ponds ("SCCRAP"), seeks judicial review of the District Court's decision prescribing injunctive relief against Appellant-Respondent Commonwealth Generating Company ("ComGen"), as well as the approval by the Federal Energy Regulatory Commission ("FERC") of ComGen's proposed rate schedule revisions and denial of SCCRAP's petition for rehearing. The district court had jurisdiction in the former matter pursuant to 33 U.S.C. § 1365(a). FERC had statutory authority in the latter matter pursuant to 16 U.S.C. § 824*d*. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and the Federal Power Act ("FPA") Section 313, 16 U.S.C. § 825*l*.

STATEMENT OF THE ISSUES PRESENTED

1. Under the statutory requirements of the Clean Water Act, does "hydrologically connected groundwater" constitute regulatable sources when Congress has shown a clear legislative intent in protecting all interconnected aquatic systems?
2. Under 33 U.S.C. § 1342, does a groundwater channel that is permanently connected to navigable waters constitute a "point source" when courts have previously extended the definition to other non-navigable water sources?
3. Under the terms of the Administrative Procedure Act, are FERC's revised rate schedules for recoupment of environmental costs arbitrary and capricious when courts have stated that customers should only shoulder the burden of costs directly related to energy production?
4. Under the terms of the Federal Power Act, do "just and reasonable" rate schedules violate the Fifth and Fourteenth Amendment when the Supreme Court has determined such rates to be *prima facie* evidence of constitutionality?

STATEMENT OF THE CASE

Water pollution in the United States via coal-fired power plants represents one of the great environmental challenges of recent time. A significant portion of this pollution occurs in the form of coal combustion residuals ("CCRs"), commonly referred to as coal ash. Coal ash is formed as a result of the coal combustion process at electricity-generating plants across the country. In the past two decades alone, millions of cubic yards of coal ash have spilled into our nation's waters as a consequence of various structural failures, causing severe and irreparable harm to communities and local ecosystems. *See* Tennessee Valley Authority Office of the Inspector General, *Kingston (TN) Fossil Plant Ash Slide Interim Report*, at 3 (2009) (citing a spill of 5,400,000 cubic yards). This case concerns one such failure affecting citizens in the state of Vandalia.

In the late 1990s, Commonwealth Energy ("CE")—to which appellant-intervenors are a subsidiary of—began construction of the Vandalia Generating Station through a separate subsidiary, Commonwealth Energy Solutions ("CES"). This station consists of two 550-megawatt ("MW") coal-fired plants which began operations in 2000 and 2002, respectively. Coal ash produced by the facility is stored at the Little Green Run Impoundment, just east of the station.

In 2002, as part of groundwater monitoring required by the Vandalia Department of Environmental Quality ("VDEQ"), appellant-intervenors Commonwealth Generating Company ("ComGen") initially detected arsenic at levels that exceeded VDEQ standards. Under a corrective action plan developed in conjunction with VDEQ, ComGen installed a high-density polyethylene ("HDPE") geomembrane liner on the west embankment of the impoundment in 2006.

In 2014, ComGen became incorporated in the District of Columbia and subsequently purchased Vandalia Generating Station from CES. Following this acquisition, in November 2014, ComGen entered into power service agreements with the Vandalia Power Company and Franklin

Power Company. Under these agreements, the entire electrical output of Vandalia Station would be sold exclusively in equal halves to the Vandalia and Franklin companies, respectively. ComGen, having subjected itself to the federal laws governing interstate commerce, is now regulated in part by the Federal Energy Regulatory Commission ("FERC"). Of particular interest in this case, FERC calculates rate schedules between ComGen and its two buyers. These rate schedules reflect the utility costs that are then passed onto Vandalia and Franklin's consumers. In 2016, FERC authorized a 10.0% return on equity for ComGen's two rate schedules.

In March 2017, Vandalia Waterkeeper, a local environmental NGO, detected elevated levels of arsenic in the Vandalia River. Upon this discovery, the organization filed a complaint with VDEQ, alleging that the Little Green Run Impoundment was the source of the contamination. Following an investigation, VDEQ concluded that the arsenic originated from an improperly welded seam in ComGen's HDPE liner. This structural failure allowed arsenic to seep into the groundwater during periods of heavy rainfall, which then made its way into the neighboring Fish Creek and Vandalia River. R. 6 (citing VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14).

In December 2017, appellee-petitioners Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed suit against ComGen in the U.S. District Court for the District of Columbia, alleging that ComGen's failure to properly maintain its coal ash deposit violated 33 U.S.C. § 1311(a), which forbids the unlawful discharge of pollutants into navigable waters. After determining that the impoundment leak falls within the CWA's statutory purview, the District Court rightly concluded that ComGen was liable for damages caused by the company's negligence. The district court concluded, "the CWA applies to discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is direct,

immediate, and can generally be traced." R. 8 (citing Opinion at 10). As a consequence of its ruling, the District Court ordered ComGen to excavate and relocate the deposited coal ash to a facility complying with EPA CCR standards. *Id*.

Following this decision, on July 16, 2018, ComGen submitted to FERC a proposed revision of rate schedules for the Vandalia and Franklin power companies in order to recoup the costs associated with compliance with the District Court order. R. 8. These revisions, specifically designed to pass along the company's own penalty to consumers, would lead to significantly higher monthly bills for customers in both states until 2029 at the earliest. R. 9. SCCRAP then intervened and filed a protest in opposition to ComGen's FERC filing. In response to this protest, FERC suspended ComGen's filing and moved the issue to an evidentiary hearing.

After three days of hearings, on October 10, 2018, FERC approved ComGen's proposed rate schedule adjustments. This result was reached despite ComGen's own submitted testimony stating that the company would maintain a 3.2% return on equity under the original rate schedules. R. 10. In addition, FERC itself concluded that ComGen "failed to properly monitor the effectiveness of the [liner] during the 2006-2017 period, which likely would have revealed the problem…" *Id*. at 11. The only grounds on which FERC based its decision was an unfounded theory of regulatory taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 12. On November 9, 2018, SCCRAP sought a rehearing of FERC's decision, which was ultimately denied.

As a result of the aforementioned facts, SCCRAP now brings this present suit in the U.S. Court of Appeals for the District of Columbia Circuit. For the reasons that follow, the District Court's prescribed injunctive relief against ComGen should be affirmed and FERC's decision granting a revision of ComGen's rate schedules should be reversed.

SUMMARY OF THE ARGUMENT

Today, citizens in both Vandalia and Franklin find themselves in the throes of an environmental disaster – a disaster brought on solely as a result of sheer negligence on the part of Commonwealth Generating Company. Residential water supplies have been tainted by arsenic and other harmful pollutants, and it remains to be seen how these contaminants will affect both individuals and local ecosystems in the long-term. The court will consider two separate proceedings in this action. First, this Court will review the decision by the District Court granting SCCRAP's request for injunctive relief against ComGen. Second, the Court will consider whether FERC's decision to approve ComGen's revised rate schedules is in violation of the Administrative Procedure Act. Appellee's position with respect to each of these proceedings are discussed in turn.

The first set of issues in this case concern the prior ruling by the D.C. District Court. There, the court stated that ComGen's pollution of Fish Creek and the Vandalia River constituted actionable offenses under the Clean Water Act. The court provided two reasons for this determination. First, the District Court stated that the Act's scope extends to groundwater that has a "direct hydrological connection" to navigable waters. Second, the court concluded that the seepage of coal ash from the impoundment constitutes a "point source" as required by statute. The court was correct in these determinations for a number of reasons. First, the legislative history of the Clean Water Act shows that the traditional concept of "navigability" has long been abandoned in making this determination. Instead, court precedent has often considered whether there is physical interplay between waterways. In these situations, a non-navigable water may be considered actionable under the Clean Water Act. And while there may be a question as to whether "isolated" groundwater falls under the jurisdiction of the CWA, the facts of this case show a permanent connection between the groundwater affected and larger waterways downstream.

Therefore, the groundwater in this case constitutes an actionable source. Second, the District Court was correct in determining the impoundment to be a "point source" under the CWA. The tear which resulted in the bottom of the HDPE liner may best be described as a "fissure." Such features adhere to the traditional statutory interpretation of point sources. In addition, court precedent has firmly established the principle that pollutants may flow from non-point to point sources. Such pollutants are also actionable under the CWA so long as they are ultimately conveyed to waters via a point source.

Turning to the second proceeding being reviewed, courts have held that in order to pass the threshold standards of the Administrative Procedure Act, a company's rate order must reflect costs which are directly connected to energy production. Because environmental damage incurred as a result of negligence fails to meet this standard, FERC's revised rate schedules for ComGen are therefore arbitrary and capricious. With respect to the final issue for review, the Supreme Court has held that the "just and reasonable" rate test of the Federal Power Act establishes the standard for constitutionality under the Fifth and Fourteenth Amendments. Because SCCRAP's proposed rate orders reflect the principle laid out above (i.e. reflects costs only tied to energy production), a 3% return is therefore "just and reasonable" and an unconstitutional taking has *not* occurred. For the foregoing reasons, we ask that this Court affirm the ruling of the District Court and reverse FERC's revised rate changes.

ARGUMENT

I. Hydrologically connected groundwater is actionable under CWA because both the legislative history of the Act and contemporary EPA regulations demonstrate a clear intent to protect interconnected aquatic systems.

As shown below, the legislative history of the Clean Water Act places an emphasis on protecting interconnected aquatic systems. On its face, Section 404 of the Act states plainly that discharge permits must be obtained for materials released into "navigable waters." 33 U.S.C. § 1344. The Act goes on to define navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). It is this latter definition that courts have struggled to define with respect to groundwater. Specifically, courts have been split on the issue of whether groundwater that is "hydrologically connected" to waters of the United States falls within the jurisdiction of CWA. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (holding that the Clean Water Act did not extend to hydrologically connected groundwater); *see also McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1193-94 (E.D. Cal. 1988) (holding that hydrologically connected groundwater did fall under CWA).

In 1985, the Supreme Court indirectly addressed this question in its opinion in *U.S. v. Riverside Bayview Homes*. In that case, respondents owned 80 acres of marshy land on the shores of Lake St. Clair in Macomb County, Michigan. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985). As part of its preparation for a housing development, Riverside Homes began placing fill material on the property. *Riverside Bayview,* 474 U.S. at 124. Upon learning of this activity, the U.S. Army Corps of Engineers ("Corps") filed suit in district court, alleging that the property in question was subject to CWA's permit requirements. *Id*. Because Riverside had failed to obtain a permit pursuant to 33 U.S.C. § 1344 (CWA § 404), the Corps sought to enjoin the developers from placing fill material on the site. *Id.* The district court issued a decision in favor of the Corps, which was ultimately reversed by the Sixth Circuit. *Id.* at 125. Certiorari was granted by the Supreme Court at the request of the Corps. *Id.* at 126.

On appeal, the issue for the Court was whether the statutory purview of the CWA extended to certain types of wetlands described in final regulations previously issued by the Corps of Engineers. In those regulations, the Corps had expanded its definition of "waters of the United States" to include not only "navigable waters," but also "tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce." *Id.* at 123 (citing 40 Fed. Reg. 31320 (1975)). The Corps contended that its interpretation of the CWA extended to "adjacent wetlands" – that is, freshwater wetlands "adjacent to other covered waters." The Court was asked to first determine whether such an interpretation was appropriate, and if so, whether the Riverside Bayview property fell within the CWA's jurisdiction.

In its decision, the Supreme Court concluded that "adjacent wetlands" fall within the jurisdiction of CWA's statutory language. *Id.* at 139. To reach this decision, the Court considered two major factors: 1) Congressional intent; and 2) the hydrological effects of water pollution. By choosing to explicitly define navigable waters more broadly as "waters of the United States," the Supreme Court correctly asserts that the issue of navigability was "of limited import" to Congress when the original statutory language was adopted. *Id.* at 133. In addition, in 1977, Congress had an opportunity to expressly repudiate the Corps' wetland guidelines which had been published just two years prior. They did not. When the House proposed a more narrow definition of "navigable waters" that was at odds with the Corp's regulations, it was the Senate's more broad interpretation of the CWA that prevailed. *Id.* at 136-137. In the words of Senator Baker at the time, the legislation "[retained] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal

Water Pollution Control Act."[1] In other words, the guidelines prescribed by the Corps in its 1975 regulations were given an official green light by Congress.

With regard to the hydrological effects of water pollution, the Court in *Riverside* provided the following assessment of Congress's intent in drafting the 1972 Act:

> Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[water] moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the *source*.'

Id. at 133 (quoting S. Rep. No. 92-414, p. 77 (1972) (emphasis added). In addition, although the regulation at issue pertained to "wetlands," the Corps of Engineers was clear in its regulatory intent of focusing on the hydrological effects of pollution, rather than arbitrary topographical markers, stating, "The regulation of activities that cause water pollution cannot rely on…artificial lines…but must focus on all waters that together form the entire aquatic system." *Id.* (quoting Fed. Reg. 37128 (1977)). In *Riverside*, the Court firmly adopted the position that the Corps' considerations of hydrological effects was appropriate due to the widespread ecological impact of pollution involving such interconnected systems. For example, the Court accepted the Corps' conclusion that wetlands may play an important role in water filtration, purification, and maintenance of "significant biological natural functions." *Id.* at 134-135 (quoting 33 C.F.R. § 320.4(b). While the *Riverside* decision explicitly extended to wetland regulation, the Court's decision reflected an implicit statement on the importance of extending the CWA to interconnected ecological systems.

Five years after the *Riverside* decision, EPA published federal guidelines pertaining to the maintenance of storm water drainage systems. In its preamble to the NPDES Permit Application

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[1] *Id*. at 137 (quoting 123 Cong. Rec. 39209 (1977)); *see also id.,* at 39210 (statement of Sen. Wallop); *id.*, at 39196 (statement of Sen. Randolph); *id.,* at 38950 (statement of Rep. Murphy); *id.,* at 38994 (statement of Rep. Ambro).

Regulations for Storm Water Discharges, EPA provides an unequivocal answer as to its own interpretation of 33 U.S.C. § 1344. The Agency writes:

> [T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (*unless* there is a *hydrological connection* between the ground water and a nearby surface water body.

55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (emphasis added). Here, EPA explicitly asserts that hydrologically connected groundwater falls within the purview of Section 404 permits. This conclusion is consistent with the Supreme Court's determination in *Riverview* that federal regulations which protect interconnected aquatic systems are prima facie reasonable and should not be disturbed.

Applying the above facts to our present case, it is clear that ComGen's pollution of both the Vandalia and Fish Creek rivers are actionable under the language of the Clean Water Act. Although the groundwater at the impoundment is not "navigable" in the traditional sense, the Supreme Court itself has concluded that the principle of "navigability" is of little import, having been superseded by the broader definition of "waters of the United States." Furthermore, as demonstrated by the Supreme Court in *Riverside*, it is the potential *impact* on aquatic systems by which we should determine whether a body of water falls within the jurisdiction of CWA. This principle is reaffirmed in EPA's own federal regulations concerning NPDES permits. And while the Supreme Court has suggested a possible pullback of protections in subsequent decisions such as *Rapanos*, none of the decision's three opinions garnered a majority of justices. *See Rapanos v. United States,* 547 U.S. 715 (2006). Therefore, this Court must proceed under only that precedent which is binding.

For the reasons delineated above, hydrologically connected groundwater is actionable under the CWA. Both the history of CWA and EPA's own regulatory history all point in a direction

that favors broad protections of interconnected aquatic systems. Protection of these systems have been a critical factor in Supreme Court precedent, and full protection of these systems are only possible through the continued inclusion of hydrologically connected groundwater into CWA's statutory purview.

II. The pollutants' origin of deposition (i.e. the Little Green Run Impoundment) constitutes a regulatable "point source" within the meaning of 33 U.S.C. § 1362(14) because the deposit site exhibits the characteristics of a confined conveyance.

Seepage of arsenic from ComGen's coal ash Little Green Run Impoundment into groundwater that passes through to navigable waters constitutes a point source for purposes of and in violation of 33 U.S.C. § 1342. Because the coal ash impoundment constitutes a point source, this Court should affirm the District Court's decision and uphold the District Court's remedy of full excavation and relocation of the Little Green Run Impoundment.

The legislatively defined term "point source" includes the use of a "discrete fissure." *Id.* A basic dictionary-based definition of fissure is "a narrow opening or crack of considerable length and depth usually occurring from some breaking or parting." *See* "fissure." *Merriam-Webster.com*; https://www.merriam-webster.com (last accessed Feb. 2, 2019). Here, the failure of a weld in the geomembrane liner of the Little Green Run Impoundment pond created an opening or crack that occurred from the breaking of the weld. R. 6. The opening or crack in the geomembrane liner created a discrete fissure that allowed the leeching of arsenic to pass into groundwater that flowed naturally into navigable waters. Based solely upon the definitional basis, the Little Green Run Impoundment constitutes a "point source." Specifically, the CWA defines "point source" as follows:

> The term "point source" means 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) (2019).

The Supreme Court has previously held that 33 U.S.C. § 1342 does not require that a pollutant originate from the source in question, but only mandates that the pollutant pass through the point source. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). In *Miccosukee Tribe*, the South Florida Water Management District ("SFWMD") along with *amicus* arguments by the Federal Government claimed that the National Pollution Discharge Elimination System ("NPDES") was inapplicable because the pollutants were originating from another location and simply passing through the canal in question. *Id.* at 106. The Court directly addressed the issue of water sources that may fall into both point and non-point sources. The Court stated that the CWA "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the "point source" definition." *Id.* at 106. In *Miccosukee Tribe*, SFWMD developed and maintained a system of canals, levees, pumps and water impoundment areas to control rainwater and help prevent flooding. *Id.* at 99-100. The water control system funneled rainwater through a complex myriad of management channels in an attempt to control drainage. *Id.* at 100. An unpredicted issue arose from the concentration of rainfall, the rainwater collected pollutants caused by human activities along the way to and through the water system. *Id.* at 101. The primary pollutant gathered by the rainwater was phosphorus and when the water system reached it dumping point in the Everglades of Florida, the phosphorus caused ecological damages to the natural ecosystem. *Id*. Because the Court only reviewed based on summary judgment, the case was remanded back to the lower court. *Id.* at 112. Though the finalization of

the overall decision was not made, the Court did hold that waterways that act simply as a transfer for pollutants to navigable waters are actionable under 33 U.S.C. 1342 as point sources. *Id.* at 106.

The Supreme Court has also stated that "[b]y recognizing federal authority to act when offensive matter is discharged from any "point source," 33 U.S.C. § 1362(14), the government is authorized to prevent the *entry* of pollutants into navigable waters." *P.F.Z. Props., Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) (citing *U.S. v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974)). Additionally, *P. F. Z. Props.* elucidates that the purpose of the CWA is to prevent pollutants from entering into navigable waterways. *Id.*

Here, the Little Green Run Impoundment meets the definition of point source based both on the decision in *Miccosukee Tribe* and by the plain language of the statute itself. The pollutant that leeched into the groundwater (arsenic) was not caused by the impoundment itself. The impoundment served as a storage facility for the pollutant. When the geomembrane liner in the impoundment was breached due to a faulty weld, the pollutants were released into the groundwater system that was directly connected to navigable waterways. Because of the direct connection from the point source (i.e., ComGen's Little Green Run Impoundment) to the navigable waterways, the contamination of the navigable waterways is actionable against ComGen. For purposes of 33 U.S.C. § 1342, the seepage of arsenic from the Little Green Run Impoundment is a violation of the statute and does constitute the discharge of a pollutant from a point source.

Because the arsenic pollutant contamination from Little Green Run Impoundment is actionable under 33 U.S.C. § 1342, this Court should affirm the District Court's decision that ComGen violated the CWA and affirm the court ordered remedy to fully excavate and relocate the Little Green Run Impoundment.

III. FERC's approvals of ComGen's revised rate schedules are arbitrary and capricious in violation of the APA because the Commission violated the "end result" and "used and useful" principles of rate determination.

FERC's actions in approving the revised rate schedules to both Vandalia and Franklin Power represent clear violations of the Administrative Procedure Act ("APA") as interpreted by Supreme Court precedent.

Originally enacted by Congress in 1946, the APA establishes the formal procedures of judicial review for federal agency actions and rulemakings. Under the statutory language of the APA, reviewing courts are required to "hold unlawful and set aside agency action, findings, and conclusions found to be…*arbitrary*, *capricious*, an abuse of discretion, or otherwise not in accordance with law…." 5 U.S.C. § 706(2)(A) (emphasis added).

In 1984, the question of determining whether an agency action is "arbitrary" or "capricious" was directly addressed by the Supreme Court in *Chevron*. In that case, respondents had previously challenged a newly promulgated EPA regulation which modified the scope of "stationary sources" under the Clean Air Act Amendments of 1977. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 833, 840-841; *see also* 46 Fed. Reg. 50766 (1981). The modified regulation was subsequently struck down by this Court, followed by an appeal to the Supreme Court. *See Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982). On appeal, the Supreme Court echoed the standard set forth by Congress in the APA, stating that agency regulations must be given controlling weight, "*unless* they are arbitrary, capricious, or manifestly contrary to statute." *Chevron*, 467 U.S. at 844 (emphasis added). In reversing the D.C. Circuit's decision (i.e. upholding EPA's original definition of "stationary sources"), the Supreme Court cited the following interpretive test:

> If [the interpretation] represents a *reasonable* accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-383 (1961)). Because EPA's interpretation was based upon what the Supreme Court described as a "permissible construction," the agency's interpretation was upheld. *Id*. at 866.

One year prior to its decision in *Chevron*, the Supreme Court provided additional tests in determining whether an agency action may be considered arbitrary or capricious. In *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29 (1983), the Supreme Court addressed two major questions: First, the question of whether rescissions of agency actions should be held to the same standard of review as affirmative changes in course, and second, whether rescission of a national safety belt standard violated the "arbitrary and capricious" test prescribed in the APA. *See State Farm*, 463 U.S. at 41. In its decision, the Supreme Court first affirmed the principle that *all* agency actions are held to the same standard under the APA, both affirmative and rescinding. *Id*. Second, the Supreme Court held that an agency's rescission of a seatbelt standard violated the APA – the matter being remanded to the lower court for revision by the federal agency. *Id*. at 57. In reaching this conclusion, the Supreme Court stated that an agency action must be considered arbitrary and capricious if "[the agency] entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency…" *Id.* at 43. In addition, the Court stated the following:

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. <u>There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.</u> *Id.* at 41-42 (quoting *Atchinson v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)) (emphasis added).

One common thread that is seen among APA-related cases is an emphasis on legislative intent. One of the major questions before this Court today, therefore, is whether Congress intended for the Federal Power Act to permit the recoupment of costs associated with environmental mitigation on the part of negligent utility companies. And while the Supreme Court has not addressed the particular issue at hand, both the Supreme Court, as well as this Court, have laid out multiple tests concerning the types of expenditures that utility companies may recoup.

The Supreme Court first established what has become known as the "end result" test in the case of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In that case, the court was confronted with the task of determining whether a proposed rate change was "just and reasonable," as required by federal statute. 16 U.S.C. § 824*d*(a) (2019). In *Hope*, the Court articulated the following analysis:

> The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor *and the consumer interests*. Thus we stated in the Natural Gas Pipeline Co. case that 'regulation *does not* insure that the business shall produce net revenues.'

Hope, 320 U.S. at 603 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942)) (emphasis added). The Court also emphasized that it is the *impact* (i.e. the "end result") which determines whether a given rate is "just and reasonable," as explained below:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling….It is not theory *but the impact* of the rate order that counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquire under the Act is at an end.

Id. at 602. The standard of review articulated in *Hope* would be reiterated by the Supreme Court just one year later, with the Court describing the end result test as "a standard of finance resting on stubborn facts." *Colorado Interstate Gas Co. v. Federal Power Com.*, 324 U.S. 581, 605 (1945).

The end result test has been applied to numerous decisions in the D.C. Circuit, as well. In *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (1987), this Court stated that rate orders must "reasonably be expected to maintain financial integrity, attract necessary capital, and *fairly* compensate investors for the risks they have assumed…" *Jersey*, 810 F.2d at 1177 (quoting *Permian Basin Rate Cases*, 390 U.S. 747, 792 (1968) (emphasis added). In addition, orders must also "provide appropriate protection to the relevant public interests, both existing and foreseeable" and not lead to "arbitrary or unreasonable *consequences*." *Id.* (quoting *Permian Cases*, 390 U.S. at 800) (emphasis added).

In addition to the Supreme Court's "end result" test, this Court has traditionally recognized what is referred to as the "used and useful" principle. The D.C. Circuit applied this doctrine in the case of *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (1981). In that case, this Court provided the following standard in determining whether rate orders are "just and reasonable":

> The general rule recognized by this court is that expenditure for an item may be included in a public utility's rate base only when the item is 'used and useful' in providing service; that is, current *rate payers should bear only legitimate costs of providing service to them*.

NEPCO, 668 F.2d at 1333 (emphasis added). In evaluating the merits of SCCRAP's position, the aforementioned tests are the standards by which FERC's decision should be evaluated by this court.

With regard first to the "end result" test, there a number of facts which demonstrate that the end result of FERC's decision will strongly tilt the economic scale in favor of ComGen, rather than strike balance between the company and consumers. As stated in the Record, FERC previously determined that charging Vandalia and Franklin Power customers for the full remediation costs "would represent a *windfall*" to ComGen's shareholders. Record at 11 (emphasis added). To allow such a result would be at odds with this Court's previous principle of "fair"

compensation for company investors. In addition, it would be unjust and unreasonable to require Vandalia and Franklin Power customers to shoulder the burden of costs incurred as a result of another company's negligence. Had the company taken steps of so-called "prudent investment" (i.e. paying to have the impoundment regularly inspected and maintained), such expenses might reasonably be passed along to consumers. However, in this case, this Court is confronted with a company whose negligence has already been concluded by FERC. To hold customers responsible for ComGen's negligence is neither "just" nor "reasonable," the two standards to which we hold rate determinations accountable under the Federal Power Act. The revised rate schedules proposed by ComGen would violate this Court's principle of avoiding "unreasonable" consequences – i.e., forcing an innocent party to amortize the debt incurred by a separate delinquent party.

ComGen argues that if the proposed rate schedules were to not be adopted, the company's financial integrity, as well as its ability to raise capital, would be threatened. By drawing upon these concepts as articulated in *Hope*, ComGen hopes to avoid financial responsibility for its negligent behavior. However, there are two major points that must be drawn from the decision in *Hope*. First, the Supreme Court did not contemplate intervening factors such as negligence when determining whether the rate order in *Hope* was "just and reasonable." The determination by the Court was based on a purely economic analysis, and did not concern confounding variables such as environmental mitigation costs. Second, the Court declined to prescribe a set rate of return, instead emphasizing that a "just and reasonable" rate will vary on a case by case basis, even going so far as to say that the court does not have to guarantee net profits to the company. *See Hope*, 320 U.S. at 603. ComGen's position is therefore without merit in light of these two considerations.

Moving on to the "used and useful" test as articulated by this Court in *NEPCO*, it is clear that ComGen's proposed rate schedules run contrary to this most basic principle. This Court has

made fundamentally clear that rate payers should only pay for those costs that are related to providing electric service. By allowing ComGen to shift unrelated environmental remediation costs onto the consumer, FERC violates this Court's interpretation of the Federal Power Act.

For the reasons delineated above, FERC's approvals of both Rate Schedules No. 1 and No. 2 represent arbitrary and capricious determinations in violation of the APA and must be reversed.

IV. Disallowing recovery of remediation costs does not amount to a taking because SCCRAP's proposed rate schedules are "just and reasonable" and the Supreme Court has recognized that "just and reasonable" rate schedules are *prima facie* constitutional.

Rate schedules which satisfy the Federal Power Act's "just and reasonable" standard by definition must satisfy the constitutional guarantees of the Fifth and Fourteenth Amendments. Simply put, the "just and reasonable" test (from the perspective of the utility company and a proposed rate schedule's impact on it) *is* the test used by courts in reviewing whether an unconstitutional taking has occurred. If the rate is just and reasonable, then there is no taking.

The Supreme Court first articulated this position in its *Hope* decision. There, the Court made a veiled reference to the Fifth and Fourteenth Amendments, stating, "Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul to the former." *Hope*, 320 U.S. at 607. In other words, by creating the "just and reasonable" standard in the Federal Power Act, it was Congress which determined the threshold at which a rate order passes from the realm of constitutionality into the unconstitutional.

As previously laid out by the Supreme Court, the types of action that are permissible under the Fifth and Fourteenth Amendments may change depending on circumstances. This principle

was explained at length in the Court's decision in *Block v. Hirsh*, 256 U.S. 135 (1921). There, the Supreme Court was asked to determine whether a statute that allowed for the fixing of "fair and reasonable" rent prices in the District of Columbia amounted to an unconstitutional taking against landlords. *Hirsh,* 256 U.S. at 135. The Supreme Court held that it was not. In understanding the court's rationale, it's important to first consider historical context. Shortly after the end of World War I, Washington D.C. began to experience a severe housing shortage. *Id.* at 139. In order to fight back against landlords trying to monopolize on the situation Congress passed a statute in 1919 which established a commission for regulating rental prices. *Id.* at 153. Landlords strongly opposed the measure, because it prevented them from being able to fully capitalize on the situation. However, the Court explicitly rejected this argument, stating:

> A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change…It may be assumed that the interpretation of "reasonable" will deprive [the landlord] in part at least the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property…but…the policy of restricting [these profits] has been embodied in taxation and is accepted.

Id. at 157. In this decision, the Supreme Court crafted the position that lost profits are not dispositive in determining whether an unconstitutional regulatory taking has occurred. Instead, the standard applied in *Hirsh* was simply whether the rental rates imposed by the Commission were reasonable.

In today's case, this Court is addressing a similar question. As shown in *Hirsh*, Congress has the power to pass legislation which regulates an industry. In the case of *Hirsh*, the industry was the housing market. In this case, the industry is electric utilities. And while a shift from a 10% to a 3% rate on return could possibly be seen as unreasonable (that is to say, an unconstitutional taking) under normal circumstances, there are situations which would warrant such a change in

course. In *Hirsh*, the situation was public exigency; in this case, that situation is clear and documented negligence on the part of ComGen. As stated in *Hirsh*, the power to limit profits is a power that is recognized by the courts. Here, that power has clearly been delegated by Congress to the Federal Energy Regulatory Commission.

As stated in the Record, the relief requested by SCCRAP is not a permanent change in economic position. If adopted by this Court, SCCRAP's proposed rate schedule would only impact ComGen's rate of return during the 10-year recovery period. SCCRAP does not provide any input on what may constitute a "just and reasonable" rate of return in ten years' time after remediation is complete. This position strikes the same balance as articulated by the court in *Hirsh*. FERC's rate schedules must reflect a critical analysis of multiple factors, rather than simply the bottom line of a given company. In *Hirsh*, it's important to emphasize that the Supreme Court allowed for a decrease in profits as the result of a public exigency caused by *outside* forces. In this case, we are dealing with a much more simpler scenario, a public exigency created by *internal* forces – that is, an exigency caused by ComGen's own negligent behavior. If courts will take away profits in light of events outside of a party's control, is it not that much more reasonable to withhold profits from a company that creates the exigency itself?

For the reasons delineated above, the decision by FERC to approve ComGen's revised rate schedules should be struck down and the matter remanded to the agency for adequate revision.

CONCLUSION

Environmental destruction at the hands of a negligent corporation must not go unresolved. The categorical failure by ComGen to maintain its own waste storage facilities represents a serious breach of public trust and must be responded to accordingly. As explained above, both the

impoundment itself and its subsurface groundwater channels represent actionable point sources under the language of the Clean Water Act. Furthermore, FERC's decision to approve ComGen's revised rate schedules constitutes a clear violation of the Administrative Procedure Act when viewed in light of this Court's well-established "used and useful" principle for rate determination. Finally, the proposed rate schedules by SCCRAP do not amount to an unconstitutional regulatory taking when one considers the historical tradition of past profit-limiting actions prescribed by Congress. For the foregoing reasons, the decision of the District Court should be affirmed and FERC's approval of revised rate schedules should be reversed and remanded for further reconsideration.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds (SCCRAP) certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 4, 2019.

Respectfully submitted,

Team No. 1