C.A. No. 24-0682

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS,

Appellant,

v.

COMMONWEALTH GENERATING COMPANY,

Appellee,

On Appeal from the District Court for the Middle District of Vandalia

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Stop Coal Combustion Residual Ash Ponds, certifies:

1. Stop Coal Combustion Residual Ash Ponds, is a national environmental and public interest organization based in Washington D.C. and has no parent company.
2. There is no publicly held corporation that owns 10% or more of Stop Coal Combustion Residual Ash Ponds.

Dated: February 4, 2024
Respectfully submitted,

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JURISDICTIONAL STATEMENT

The District Court for the Middle District of Vandalia's subject-matter jurisdiction for this matter was under 28 U.S.C. § 1331, as the action arose under two federal statutes: the Clean Water Act and Resource Conservation and Recovery Act. Appellants appeal the final order dated October 31, 2024, from the District Court granting Commonwealth Generating Company's Motion to Dismiss, thus subject-matter jurisdiction of the United States Court of Appeals for the Twelfth Circuit is proper. 28 U.S.C. § 1291. The appeal for this matter was filed on November 10, 2024.

STATEMENT OF THE ISSUES

1. Under the United States Constitution does SCCRAP have standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment when SCCRAP alleges its members are unable to recreate in the Vandalia River due to ComGen's discharges of PFOS and PFBS and leaching CCRs from the Little Green Run Impoundment?
2. Whether SCCRAP can bring an "imminent and substantial endangerment" claim under RCRA, when SCCRAP alleges present harm to its member's recreational interest in the Vandalia River, and future harm to drinking water for the proposed housing development.
3. Under the Clean Water Act does ComGen violate its VPDES permit when it knowingly discharges PFOS and PFBS not listed in its permit for almost a decade despite denying the presence of PFOS and PFBS when specifically asked during the permit application process?
4. Under *Loper Bright* does the 12th Circuit owe deference to its previous decision adopting *Piney Run* (and its reasoning) when the decision is: of sound reasoning, easily workable,

relied upon, is consistent with other decisions, and developments since do not indicate a special justification?

STATEMENT OF THE CASE

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") respectfully request this Court prevent Commonwealth Generating Company ("ComGen") from continuing to disrupt: the health of the Vandalia River, SCCRAP members enjoyment of the Vandalia River, and the quality of the ground water in the surrounding area of The Little Green Run Impoundment. SCCRAP's purpose, among other things, is to protect public water from pollution by ensuring companies remove coal ash ponds instead of leaving toxic contaminants to pollute surrounding areas. (*See* Record ("*R.*") at 8.)

ComGen owns and operates a surface impoundment called The Little Green Run Impoundment adjacent to its Vandalia Generating Station located along the Vandalia River. (*R.* at 3). Coal Combustion Residuals ("CCRs") from the Vandalia Generating Station are stored in the unlined Little Green Run Impoundment. *Id.* at 5 ComGen's discharges pollutants via three outlets into the Vandalia River, a water of the United States. *Id.* at 4. The Vandalia Generating Station operates under a Vandalia Pollutant Discharge Elimination System ("VPDES") permit. *Id.* ComGen's VPDES permit, issued on July 30, 2020, covers all three outlets (Outlets 001, 002, and 003). *Id.* During the application process of the VPDES permit Vandalia Department of Environmental Protection's ("VDEP") deputy director asked a ComGen employee over email about possible discharges of PFOS and PFBS. *Id.* The ComGen employee informed the VDEP deputy director that neither PFOS or PFBS were known substances in ComGen's discharges. *Id.* Based on this information ComGen's VPDES permit did not include any mention, let alone limits, for PFOS and PFBS. *Id.*

In 2018, ComGen announced it would be closing Vandalia Generating Station in 2027. (*R.* at 4). Due to the closure plans ComGen began its "Permit Application for CCR Surface Impoundment" for Little Green Run Impoundment in December 2019. *Id* at 6. Despite thousands of comments in opposition to the closure permit and numerous individuals, including a member of SCCRAP, speaking in opposition to the closure permit at the public hearing, VDEP approved ComGen's plan to close the Little Green Run Impoundment in-place. *Id.* at 6-7. VDEP issued ComGen a Coal Combustion Residual Facility Permit (the "Closure Permit") in July of 2021. *Id.* at 7.

Because the Vandalia Generating Station is subject to a closure-in-place plan, ComGen was required to place thirteen ground water monitoring wells around the Little Green Run Impoundment in 2021. (*R.* at 7). Since their operation, the monitoring wells have reported annual levels of arsenic and cadmium above federal advisory levels and Vandalia's groundwater water quality standards. *Id.* at 8. It is likely that the impoundment has been polluting the ground water for at least five to ten years prior to the installation of the groundwater monitoring wells. *Id.*

SCCRAP has members located throughout Vandalia, including Mammoth, with a mission of having coal ash ponds removed to protect public water from pollutants. (*R.* at 8, 10). SCCRAP tested the water quality of the Vandalia River upstream and downstream of Outlets 001, 002, and 003, and found PFOS at 6 ppt and PFBS of 10 ppt in the mixing zone of Outlet 001. *Id.* at 9. The levels of PFOS and PFBS found in the mixing zone of Outlet 001 were not found 1 mile up stream of the outlet. *Id.* In the course of other litigation SCCRAP discovered that ComGen's reports of water quality levels at Outlet 001 going back to 2015 in almost all months found discharges of PFOS at 15 ug/L and PFBS at 35 ug/L. *Id.*

ComGen's closure plan is particularly concerning for SCCRAP as it will permanently leave 38.7 million cubic yards of CCRs in the continuously leaching, unlined Little Green Run Impoundment which sits below sea level. (*See R.* at 9, 5). Leaching contaminants from the impoundment have made ground water within 1.5 miles down gradient of the impoundment unsuitable for human consumption. (*R.* at 9). Due to the excessive levels of PFAS discharged into the Vandalia River and the arsenic and cadmium leaching from the impoundment, SCCRAP members in the town of Mammoth are no longer able to fish and recreate in the Vandalia River preventing their enjoyment of the river. (*R.* at 10).

Despite the pollution inflicted on the environment and the people of Vandalia from ComGen's conduct, the U.S. District Court for the Middle District of Vandalia granted ComGen's Motion to Dismiss. (*R.* at 13). The District Court found that there were ComGen was not subject to disclosure requirements for the discharge of PFOS and PFBS under the reasoning of *Atlantic States*, that SCCRAP did not have standing to challenge the Closure Plan, and that the facts plead did not support a RCRA imminent and substantial endangerment claim. (*R.* at 14). The District Court in granting ComGen's Motion to dismiss, mischaracterized the importance of precedent, incorrectly decided on the matters of standing in regard to traceability and redressability, and failed to acknowledge the substantial and imminent threat the ComGen impoundment poses to the people of Vandalia, and as such the District Courts holding should be reversed.

SUMMARY OF THE ARGUMENT

SCCRAP has standing to challenge ComGen's closure plan of the Little Green Run Impoundment, because SCCRAP members use and enjoyment of the Vandalia River and surrounding environment is greatly disrupted by the pollution CCRs in the Vandalia River and

surrounding ground water. The disruption of SCCRAP members use and enjoyment is redressable by ComGen's removal of the coal ash currently stored in the impoundment. All cases adjudicated by a court must have a controversy. Courts find that there is a controversy when a plaintiff shows an actual or imminent injury that is fairly traceable to the conduct of the defendant and a favorable court decision will redress the injury. An association can bring a suit for its members when its members would individually have standing, the purpose of the suit is germane to the organizations purpose, and the individual members do not need to participate in the lawsuit.

The District Court correctly held that SCCRAP alleged an injury in this matter. SCCRAP members' use and enjoyment of the Vandalia River and surrounding area are greatly diminished by the presence of CCRs in the groundwater as a result of leaching from the Little Green Run Impoundment. By leaving CCRs inside of the unlined impoundment the SCCRAP members' use and enjoyment of the Vandalia Reiver and surrounding environment will indefinitely be diminished. Arsenic and cadmium are leaching directly from the Little Green Run Impoundment owned and operated by ComGen as confirmed by their own groundwater monitoring wells. The SCCRAP members injuries from CCRs in the Little Green Run Impoundment are directly redressable by ComGen removing said CCRs from the impoundment.

The SCCRAP members individually have standing to challenge ComGen's Closure Permit. The purpose of the challenge is the protect public waters and the purpose of SCCRAP as an organization is to protect public waters as well, making this challenge germane to SCCRAP's purpose. Also, no individual member of SCCRAP is needed to participate in this lawsuit, because so long as one member of SCCRAP has standing, the entire organization has standing to challenge ComGen's Closure Permit.

The district court misapplied the reasoning of *Courtland* because the district court stated that a RCRA imminent and substantial endangerment claim requires endangerment to human health. However, to state a claim under RCRA one must prove either an imminent and substantial endangerment to human health *or* an imminent and substantial endangerment to the environment. (*emphasis added*). SCCRAP has determined that the contaminants from the Little Green Run Impoundment are beyond safe levels for human consumption endangering the environment of the Vandalia River if the impoundment were to flood.

To prove that an endangerment is imminent a plaintiff must only prove that there is a threat present, although the impact from that threat may only be felt later. The Little Green Run Impoundment is currently leaching CCRs and has been for five to ten years. At times the arsenic and cadmium levels from the impoundment have reached unsafe levels 1.5 miles down gradient from the impoundment. This presents an imminent risk of harm to a planned residential development that will be 1-mile down gradient from the impoundment. And due to the impoundment being unlined and below sea level the impoundment is at risk for breaches of containment and future flooding with the current closure plan.

An endangerment is substantial if it creates reasonable concern that someone or something would be exposed to harm without prevention. Groundwater near the impoundment is contaminated with unsafe levels of arsenic and cadmium and poses a serious risk to human health if consumed. However, the risk of flooding causing the CCRs to contaminate the surrounding area also creates a substantial endangerment. This contamination from the Little Green Run Impoundment into ground water surrounding the impoundment presents an imminent and substantial endangerment not only to the environment, but to human health thus satisfying all elements of a RCRA imminent and substantial endangerment claim.

ComGen's discharges of PFOs and PFBs are unpermitted discharges under the CWA because discharges of any pollutant into WoTUS are prohibited by the act. The CWA was passed to protect the nation's waters from discharges of pollutants. Any discharge into WoTUS without a permit is unlawful. Polluters can obtain permits, either from the EPA or a state agency, to shield them from liability under the CWA. The CWA broadly defines pollutants encompassing a wide range of possible pollutants. PFOS and PFBS are a man-made chemical used in household and industrial products. PFOS and PFBS are chemical waste as defined by the CWA. PFOS and PFBS are known to increase cancer risk, cause reproductive and developmental harm, and are difficult to remove from the environment. The EPA nor Vandalia have set effluent limitations on discharges of PFOS and PFBS as such by the plain text of the CWA there discharge is unlawful.

The District Court, in dismissing SCCRAP's claim that ComGen violated the CWA, abandoned Twelfth Circuit precedent. The District Court applied *Atlantic State*, instead of the established precedent of *Piney Run*. The District Court in its abandonment of established precedent cited the fact that *Piney* Run was decided based on the now overruled decision of *Chevron* and that the case was not on point. Courts in abandoning precedent must have a "special justification" for doing so. However, the Supreme Court as specifically stated that reliance on *Chevron* is not a "special justification." In *Piney Run*, the permit shield from the CWA was found to apply if the permit holder expressly complied with its permit and did not make any discharges of pollutants that were not in reasonable contemplation of the permitting authority at the time of the permit. However, in *Atlantic State*, the permit shield was found to apply so long as the permit holder complied with disclosure requirements.

In deciding if there is a special justification for departing from precedent the court has considered several factors including: the quality of the decisions reasoning, the workability of the

rule established by the decision, the overall reliance on the decision, developments since the prior decision, and the decisions consistency with other related decisions. The reasoning in *Piney Run* is sound because it was made based off of the wording and purpose of the CWA its self and the court had heard and considered the scope of the permit shield established by *Atlantic State*. The decision in *Piney Run*, is clear that a permit does not shield a polluter from pollutants that the agency could not have reasonable contemplated at the time of granting the permit.

The Twelfth Circuit's reliance and several other courts reliance on *Piney Run* with no substantive changes weighs towards there being no special justification for abandoning *Piney Run*. Also the rule set out by *Piney Run* is consistent with similar decisions. Also, of note when deciding if there is a "special justification" for abandoning *Piney Run* is the fact that not a single word of the permit shield statute in the CWA has changed since *Piney Run* was decided nor since the Twelfth Circuit adopted it. If this court abandons precedent and applies *Atlantic State* the court will defeat the purpose of the CWA by allowing polluters to pollute WoTUS purely by disclosing the pollution to the permitting authority. Since there is no "special justification" for abandoning *Piney Run*, and the application of *Atlantic State* would have drastic results this court should uphold *Piney Run*, as binding precedent.

ARGUMENT

Appeals of a Motion to dismiss are reviewed under a *de novo* standard. *Cook v. George's, Inc.*, 952 F.3d 935, 938 (8th Cir. 2020). SCCRAP is appealing the District Court's grant of ComGen's motion to dismiss on all claims, as such *de novo* review is proper. Under a *de novo* standard a reviewing court is not bound to defer to the lower court's determinations of law. *Gattineri v. Town of Lynnfield*, 58 F.4th 512, 514 n.2 (1st Cir. 2023).

I. SCCRAP has standing to challenge ComGen's coal ash closure plan because the pollutants from the impoundment prevent SCCRAP members from enjoying the Vandalia River and the issue is redressable by this court.

SCCRAP has standing to challenge ComGen's coal ash closure plan for the Impoundment because The Little Green Run Impoundment, owned by ComGen, causes SCCRAP member's injuries and is easily redressable by this Court. ComGen leaving the hazardous CCRs in the impoundment indefinitely harms SCCRAP member's recreational interest in the Vandalia River, because those CCRs leach into the ground water and may contaminate the river itself.

Article III, § 2 of the U.S. Constitution requires all cases adjudicated by a court contain a controversy. *See Friends of Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). Courts determine if there is a controversy by evaluating if the plaintiff has standing, *Id.* A plaintiff has standing when they show: a concrete injury that is "actual or imminent;" "is fairly traceable to the challenged action of the defendant;" and that a favorable court decision will redress the injury. *Id*. at 180-1. In *Laidlaw*, two plaintiffs previously recreated around the river; however, they stopped due to concerns about pollutants which had been discharged into the river by the defendant. *Id.* at 182. The U.S. Supreme Court held that those plaintiffs met the injury requirement because "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Id.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

For a plaintiff to show that an injury is fairly traceable, the plaintiff need not prove with "scientific certainty" that defendant and defendant alone was cause of the injury. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 257 (3rd Cir. 2005). In *Interfaith Cmty. Org.*, the

plaintiff's injury was found to be fairly traceable because defendant's waste disposal site leached substances that were carcinogenic to humans and toxic to the environment into surface water and groundwater. *Id.* at 252, 257. Also in *Interfaith Cmty. Org.*, the plaintiffs proved that the injury was redressable because an injunction would permanently end the plaintiff's endangerment from the waste site. *Id.* at 257.

SCCRAP brings this Citizen suit against ComGen under 42 U.S.C. § 6972, which provides that a person may bring suit "against any person, . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). An association can bring suit for its members when the members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of Earth, Inc.*, 528 U.S. at 181.

The District Court correctly found that SCCRAP successfully alleged an injury for standing. (*R.* at 14). SCCRAP members in the town of Mammoth are unable to use and enjoy the Vandalia River and its tributaries for recreation due to concerns for the levels of contaminants such as arsenic and cadmium released by the Little Green Run Impoundment. (*R.* at 10). As noted in *Laidlaw*, a decrease in recreational levels of one's environment is enough to meet the injury element for Constitutional Standing.

SCCRAP members' inability to use and enjoy the Vandalia River and surrounding area for fishing and recreational activity is directly caused by ComGen leaving all 38.7 million cubic yards of CCRs in the impoundment. ComGen's own monitoring wells year after year have

registered arsenic and cadmium levels above federal advisory levels and Vandalia's groundwater quality standards. (*R.* at 8). Due to these elevated levels of arsenic and cadmium SCCRAP members have restricted their recreational use of the surrounding area of the Impoundment and the Vandalia Generating Station. (*R.* at 10).

It is ComGen's plan to leave the impoundment full of CCRs, constantly and indefinitely polluting the groundwater and exposing the Vandalia River to possible contaminants, thus preventing the SCCRAP members from using and enjoying their environment. SCCRAP members do not need to prove that ComGen is the sole cause of their injury, only that their injury is fairly traceable to ComGen's conduct. It is more than fair to say that ComGen's actions are the cause of SCCRAP members injuries meeting the "fairly traceable" element of standing because ComGen's own monitoring wells have recorded the increased pollutant levels. SCCRAP members injuries caused by ComGen are redressable by ComGen removing the coal ash sludge from the impoundment instead of allowing it to sit indefinitely putting the members of SCCRAP at risk and polluting the surrounding environment with toxic chemicals such as arsenic and cadmium.

The individual members of SCCRAP are injured because they are unable to enjoy the surrounding environment of the Vandalia River, ComGen's plan to indefinitely leave their toxic coal ash in the impoundment being the direct cause of SCCRAP members injuries, and the member's injury are redressable by the removal of the coal ash. As such SCCRAP members have an individual standing to sue separate from their membership in SCCRAP. SCCRAP's purpose is to protect public water from pollution, as such the interest at stake here is protecting the public ground water and Vandalia River in the Mammoth through this action is germane to the organizations purpose. Finally, SCCRAP does not need any individual member to participate in

this action to proceed. As such, SCCRAP as an organization is a proper party to bring this action to court. Due to SCCRAP members' enjoyment of the environment being affected, ComGen being the cause of the diminished enjoyment for SCCRAP members, the diminished enjoyment being redressable by the removal of the coal ash, and finally SCCRAP having proper ability to represent its members SCCRAP has proper standing to challenge ComGen's Closure Plan for the Little Green Run Impoundment.

II. SCCRAP can pursue an imminent and substantial endangerment claim under RCRA because SCCRAP can prove that ComGen is a generator of solid or toxic waste and an owner of solid or toxic waste disposal site; that ComGen has contributed to the storage and disposal of solid or toxic waste in the Little Green Run Impoundment; and that the solid or toxic waste stored in the Little Green Run Impoundment poses an imminent and substantial threat to health and the environment.

In order to pursue an imminent and substantial endangerment claim a plaintiff must prove three elements. *See Intercity Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005). First, a plaintiff must prove that the defendant is, or has been, a generator of solid or hazardous waste or an owner or operator of a solid or hazardous waste storage, treatment, or disposal facility. *Id.* Second, a plaintiff must prove that the defendant is contributing, or has contributed, to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. *Id.* Third, a plaintiff must prove that the solid or hazardous waste *may* present an imminent and substantial endangerment to health or the environment. *Id*.; *see also* 33 U.S.C. § 6972(a)(1)(B).

It is undisputed that ComGen is both a generator of solid or hazardous waste covered under RCRA and an owner and operator of a solid or hazardous waste storage and disposal facility. (*R.* at 3-5). ComGen owns the Vandalia Generating Station which has operated since 1965. (*R.* at 4). ComGen's Vandalia Generating Station utilizes coal combustion to produce

electricity, and in turn produces CCRs covered under RCRA via the Coal Ash Rule. (*R.* at 4-5). It is also undisputed that ComGen has contributed to the handling, storage, and disposal of solid or hazardous waste covered under RCRA. *(R.* at 5-6). ComGen stores and disposes of CCRs from the Vandalia Generating Station in the Little Green Run Impoundment. *(R.* at 5).

The only element SCCRAP needs to prove in order to pursue an imminent and substantial endangerment claim is that the CCRs stored in the Little Green Run Impoundment may pose an imminent and substantial threat to health or the environment. These two can easily be satisfied for the reasons set out below.

(A) The federal district court incorrectly applied *Courtland* because that case only clarifies that a harm must be imminent and substantial to be actionable in claims for harm to the environment.

The federal district court for the Middle District of Vandalia incorrectly applied the reasoning in *Courtland*. The district court determined that *Courtland* found no cause of action for an imminent and substantial endangerment to the environment. (*R.* at 14). The district court in *Courtland* instead elaborated on the imminent and substantial endangerment requirement finding that the plaintiffs had failed to allege sufficient facts to prove that harm was imminent or substantial. *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 US Dis. LEXIS 174306, at 278-284 (S.D. W. Va. Sept. 28, 2023).

RCRA's citizen suit provision permits claims for imminent and substantial endangerment to the environment:

> "any person may commence a civil action on his own behalf against any person… who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste

> which may present an imminent and substantial endangerment to health *or the environment*." 42 U.S.C. § 6972(a)(1)(B)(*emphasis added*).

The term endangerment means a threatened or potential harm. *Parker v. Scrap Metal Processors, Inc.* 386 F.3d 993, 1015 (11th Cir. 2004). Actual harm is not necessary to pursue an imminent and substantial endangerment claim. *Id.*; *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1982). The harm must be imminent, meaning the harm threatens to occur immediately, although the effects may not be felt until later. That harm must also be substantial, meaning that there is a reasonable cause for concern that someone or something may be exposed to the risk of harm.

In *Courtland* the West Virginia District Court found that the plaintiff had failed to state an imminent and substantial endangerment claim under RCRA. *Courtland* at 279-282. The court reasoned that the plaintiffs had merely stated that contaminants were present in the groundwater or surface water on the site. *Id.* at 279. That, the court found, was insufficient to establish the danger was either imminent or substantial. *Id.* at 279-280. The issue in that case was not whether an imminent and substantial endangerment claim against the environment was permissible. The issue in that case was whether an imminent and substantial endangerment actually existed in the first place.

The true reasoning of the West Virginia District Court, if applied to SCCRAP, would have permitted an imminent and substantial endangerment claim for environmental harm. SCCRAP's claim includes more than "mere speculation" that there is an imminent and substantial endangerment reliant upon the existence of contaminants. SCCRAP alleges that contaminants exist beyond safe levels for human consumption, and that the Little Green Run

Impoundment poses a risk to the environment of the Vandalia River were flooding to occur. (*R.* at 9).

(B) SCCRAP can prove that the threat posed by CCRs in the Little Green Run Impoundment is an imminent endangerment because the impoundment is actively leaching CCRs into groundwater beyond levels safe for human consumption and is subject to flooding from the Vandalia River.

The CCRs disposed of in the Little Green Run Impoundment pose an imminent risk to human health and the environment, because the threat posed by the impoundment is present, although its effects may not be felt until later. *See Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1982). The Little Green Run Impoundment is currently leaching CCRs and has been for five to ten years. (*R.* at 8). In that time, levels of arsenic and cadmium have reached levels unsafe for human consumption up to 1.5 miles down gradient from the impoundment. (*R.*at 9).

An endangerment is imminent if it threatens to occur immediately. This "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." *Price v. United States Navy* at 1019). The only requirement is "that there must be a threat which is present *now*, although the impact of the threat may not be felt until later." *Meghrig v. K.f.c. W.,* 516 U.S. 479, 485-486 (1996)(quoting *Price v. United States Navy* at 1019)(*emphasis in the original*)). That threat cannot "remote in time, completely speculative in nature, or de minimis in degree." *Courtland* at 278 (*Internal quotations and citations omitted)*.

In *Interfaith*, the Third Circuit found an imminent endangerment for contaminated groundwater which had levels of chromium hazardous to human health and the containment plan implemented had been compromised by natural occurrences. *Interfaith* 399 F.3d at 262-263. The

cap that had been used on the Site failed to prevent discharges of contaminants into groundwater, and eventually into the river itself. *Id.* at 261-263.

The harm presented by CCRs in the Little Green Run Impoundment is imminent, because the risk of harm already exists although the effects of said harm may not be felt until later. The groundwater 1.5 miles downgradient of the Little Green Run Impoundment is contaminated beyond levels safe for human consumption. (*R.* at 9). This presents an imminent risk of harm, especially when the effects may be felt later in time with a planned residential development which will sit 1 mile downgradient from the Little Green Run Impoundment. *Id.* Additionally, the Little Green Run Impoundment is not currently lined nor sealed, and sits below sea level, thus placing the impoundment at risk for breaches of containment and future flooding with the current closure plan. (*R.* at 9).

(C) SCCRAP can prove that the threat posed by the CCRs stored and disposed of in the Little Green Run Impoundment is substantial because CCRs cause serious impacts to human health and the environment.

The threat posed by CCRs in the Little Green Run Impoundment are substantial, because the levels of arsenic and cadmium leaching into groundwater make it unsafe for human consumption. (*R.* at 9). Additionally, the unlined impoundment could be affected by flooding, hurricanes, and other weather events, because it sits below sea level. *Id.* This could result in more contaminants being released from the impoundment into surrounding waterways such as the Vandalia River. *Id.* SCCRAP's requested relief, that the current closure permit be revoked and a new permit be issued requiring the removal of contaminants from the Little Green Impoundment, would prevent any future harm.

An endangerment is substantial if it creates "reasonable cause for concern that someone or something may be exposed to risk of harm… should remedial action not be taken." *Burlington*

Northern & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1021 (10th Cir. 2007). Determinations under this standard are made in favor of protecting public health, because that is the goal of RCRA's citizen suit provision. *Id.* (citing *Interfaith*).

In *Courtland* the district court found that no substantial endangerment existed, because the harm was speculative. *Courtland* at 282-283. The court found that the plaintiffs had only alleged that contaminants existed in the groundwater, and that they had not alleged that the presence of said contaminants resulted in any harm to human health or the environment. *Id.* at 282-284. Additionally, the court stated that such determination was likely premature where the relief sought was a study on the harmful effects of the contaminants. *Id.* at 284.

SCCRAP alleges more than mere contamination in the groundwater and seeks relief which would prevent further contamination from leaching from the Little Green Run Impoundment. Here, the Little Green Run Impoundment has leached unsafe levels of arsenic and cadmium into groundwater which may be used for human consumption beginning in 2031. (*R.* at 9). Additionally, the Little Green Run Impoundment may be at risk to flooding as it sits below sea level and could contaminate the Vandalia River itself. (*R.* at 9). If a more adequate closure plan is issued, then contaminants could be removed from the site.

The CCRs pose a substantial risk to human health, because they have contaminated the ground water with unsafe levels of arsenic and cadmium. (*R.* at 9). This alone makes the threat posed by the Little Green Run Impoundment substantial. A new closure plan which removes contaminants and completely fills the impoundment would remove the risk entirely, rather than place such contaminants "out of sight" and therefore "out of mind."

III. ComGen's discharge of PFOS and PFBS are unpermitted discharges under the Clean Water Act, because the act broadly prohibits discharges of pollutants and the permit shield as defined in *Piney Run* does not protect undisclosed pollutants.

The Clean Water Act was passed in 1972 to protect the integrity of the nation's waters from discharges of pollutants. The Clean Water Act includes two permit processes for limiting the pollutants introduced into the nation's waters. These are effluent limitations established by the EPA, and the National Pollutant Discharge Elimination System ("NPDES") whereby states can establish their own effluent limitations on discharges of pollutants, and grant permits for discharges within EPA's effluent limitations. Vandalia has its own NPDES called the VDPES.

The statutory language of the Clean Water Act broadly prohibits discharges of pollutants into Waters of the United States. 33 U.S.C. § 1311(a). Unless effluent limitations are by either EPA or states under the NPDES. Some courts have adopted a "permit shield" approach to pollutants, which permits the discharge of uncategorized pollutants if they were not in the contemplation of a permitting authority, and disclosed by the owner of a point source.

(A) PFOS and PFBS are a pollutant under the Clean Water Act because the statutory definition of pollutant is broad and discharges of pollutants are generally prohibited unless an effluent limitation has been set for a particular pollutant.

PFOS and PFBS are a subset of PFAS, man-made chemicals used in household and industrial products since the 1940s.[1] These chemicals directly fall within the statutory definition of a pollutant, even if the EPA or Vandalia has not yet set effluent limitations on their discharge. Because no effluent limitations are set, the discharge of PFOS and PFBS is unlawful according to the plain text and meaning of the Clean Water Act.

[1] Environmental Protection Agency. *Our Current Understanding of the Human Health and Environmental Risks of PFAS*. EPA. https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas. Last modified Nov. 26, 2024.

> The Clean Water Act broadly defines pollutants as
>
> "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

This definition encompasses a wide range of possible pollutants for which effluent limitations may be set under 33 U.S.C. § 1311(b), and 33 U.S.C. § 1342(b). Effluent limitations are not mandatory and need only be established where technologically or economically feasible. 33 U.S.C. § 1311(b)(2)(A). Any discharge of pollutants without a permit under the Clean Water Act is unlawful. 33 U.S.C. § 1311(a).

The definition of a pollutant is not limited to those with established effluent limitations by the EPA or the states. The Fifth Circuit best stated this premise in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, (5th Cir. 1996). In that case, the court determined that "produced water," a byproduct of oil and gas extraction was a pollutant. *Cedar Point*, 73 F.3d at 568-569. The court reasoned that it is for courts to determine whether a pollutant fits the statutory definition in the absence of a set effluent limitation. *Id.* at 566. In those instances, if a pollutant fits the statutory definition, then the effluent limitation set is "zero." *Id.* at 567.

PFOS and PFBS are undoubtedly a chemical waste in the statutory definition of a pollutant under the Clean Water Act. It is a manmade chemical which causes serious harm to human health. PFAS are now known to increase cancer risks, cause reproductive and developmental harm, and are difficult to remove from the environment due to their durable nature.[1] In the instance that no effluent limitation has been set, as here, no discharge of such pollutants can be permissible as a violation of 33 U.S.C. § 1311(a).

(B) The Twelfth Circuit's precedent of *Piney Run* should be upheld because there is no "special justification" to warrant its replacement because the decision is well reasoned, workable, relied upon, and consistent with other decisions.

The Twelfth Circuit's binding precedent of *Piney Run* should be upheld because the interpretation of the permit shield defense is well reasoned, workable, relied upon, consistent with other decisions, and developments since the decision do not amount to a "special justification" for abandoning *stare decisis*.

United States Courts in making decisions are often bound by prior decisions of that court or courts of higher authority. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). This binding authority is referenced as *stare decisis*. *Id.* Courts follow *stare decisis* because it creates predictability and consistency across the court system. *Id.* The Supreme Court has stated that to depart from *stare decisis* requires a "special justification." *Allen v. Cooper*, 589 U.S. 248, 259 (2020). Factors that are used in determining if there is a special justification to depart from *stare decisis* include: the quality of the decisions reasoning, the workability of the rule established by the decision, the overall reliance on the decision, developments since the prior decision, and the decisions consistency with other related decisions. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018).

The Supreme Court recently in *Loper Bright Enters. v. Raimondo*, overturned *Chevron* Deference. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). In doing so the Court specifically noted it does "not call into question prior cases that relied on the *Chevron* framework." *Id.* The Supreme Court went on to further explain "Mere reliance on Chevron cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on Chevron is, at best, 'just an argument that the precedent was wrongly decided.'" *Id;* (quoting *Dickerson v. United States*, 530 U. S. 428, 443, (2000)).

The Supreme Court found that *Chevron,* was poorly reasoned because it was "fundamentally misguided" and questioned "if it was ever coherent enough to be called a rule at all." *Loper Bright Enters.,* 603 U.S. at 408. The Supreme Court also found *Chevron* to be unworkable because its rule used the word "ambiguity" which "has always evaded meaningful definition," and "is a term that may have different meanings for different judges." *Id. Chevron* was also found to fail for the factor of "reliance on decision" because it was subject to "constant tinkering," had "inconsistent application," and the Supreme Court themselves had "avoided deferring under *Chevron* since 2016." *Id.* at 410. The Supreme Court when considering the developments since a prior decision has considered both factual and legal developments. *Janus,* 585 U.S. at 924.

In 2018, the 12th Circuit adopted *Piney Run Pres. Ass'n v. Cnty. Comm 'rs of Carroll Cnty., MD* as precedent for interpreting the scope of 33 U.S.C. § 1342(k), commonly known as the "permit shield" defense. (*R.* at 14); *Piney Run Pres. Ass'n v. Cnty. Comm 'rs of Carroll Cnty., MD,* 268 F.3d 255, 259 (4th Cir. 2001) ("*Piney Run*"). However, the District Court in this matter disregard the Twelfth Circuit's adoption of *Piney Run* as binding precedent and applied *Atlantic States Legal Found v. Eastman Kodak Co.,* 12 F.3d 353 (2nd Cir. 1993) ("*Atlantic States*") for the scope of the permit shield defense.

In *Piney Run,* Piney Run Preservation Association sued the Commissioners of Carroll County, Maryland ("Commissioners") over discharges of heat into a stream. *Piney Run Pres. Ass'n* 268 F.3d at 259. The Commissioners had a permit for discharging in the stream but heat was not a discharge explicitly included in the permit. The *Piney Run,* court found the permit shield applied if a "(1) permit holder complies with the express term of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder does not make a discharge

of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted." *Id.* In determining the scope of the permit shield the court found that the language of the permit shield was ambiguous and that the Environmental Protections Agency's interpretation was reasonable. *Id.* at 267. In accordance with the legal theory at the time the court applied *Chevron* deference to the EPA's interpretation of the permit shield. *Id.* at 259. However, in determining the scope of the permit shield, the court heard arguments from the Commissioners that the permit shield defense prevented suit over pollutants not expressly listed in the permit. *Id.* The court also noted that the Clean Water Act's ("CWA") key section is "the discharge of any pollutant by any person shall be unlawful." *Id.* at 265.

The District Court in this manner, however, applied *Atlantic States Legal Found*. (*R.* at 14). In *Atlantic States*, Atlantic States Legal Found challenged Eastman Kodak Company's discharge of pollutants that were not listed in Kodak's discharge permit. *Atlantic States Legal Found*, 12 F.3d at 355. The *Atlantic States*, court found the scope of the permit shield to allow discharges of "pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *Id.* at 357. In determining the scope of the permit shield the *Atlantic States*, court deferred to the EPA's then implementation of the permit shield defense as dictated by *Chevron*. *Id.* at 358. The court specifically noted from an EPA Memo stating "it is impossible to identify and rationally limit every chemical, or compound present in a discharge of pollutants." *Id.* at 357.

The District Court in abandoning Twelfth Circuit precedent accepted ComGen's two arguments that *Piney Run* should be abandoned because it relied on *Chevron* deference to EPA guidance and that *Piney Run* was "not on-point" in this matter. (*R.* at 13-4). Both of these

arguments are inaccurate and not a "special justification" worth abandoning established precedent. (*R.* at 13). The Supreme Court in *Loper Bright,* specifically stated that "[m]ere reliance on Chevron cannot constitute a 'special justification' for overruling such a holding." *Loper Bright Enters.* 603 U.S. at 412. *Piney Run,* is directly on point as binging authority in this matter because it directly defines the scope of the permit shield of the CWA.

The reasoning behind the interpretation of the permit Sheild in *Piney Run*, supports the continued use its of precedent in this matter over *Atlantic State*. Both decisions were made under *Chevron,* and as such deferred to current EPA guidance. However, *Atlantic State,* purely relied on EPA guidance when discussing its reasoning for its interpretation of the permit shield rule. While *Piney Run,* not only directly considered the proposition put forth in *Atlantic State,* which was argued for by the defendants in *Piney Run,* but also considered the key piece of the CWA stating, "the discharge of any pollutant by any person shall be unlawful." *Piney Run Pres. Ass'n*, 268 F.3d at 265. The factor of the quality of the reasoning of a decision does not support a special justification for abandoning *Piney Run,* as precedent.

The Supreme Court in overturning *Chevron* specifically noted that the reasoning in *Chevron* was "fundamentally" unsound. *Loper Bright Enters.*, 603 U.S. at 408. No such argument can be made against *Piney Run*. *Piney Run* relied on EPA guidance and the CWA itself in a clear and concise manner. This is especially the case since the Supreme Court has specifically noted that relying on Chevron is not a "special justification." Due to both cases relying on *Chevron* in different parts, that cannot be a defining point in favor of *Atlantic State*. Also, *Piney Run*'s reliance on the CWA further supports *Piney Run*'s reasoning.

The workability of the rule set out by *Piney Run,* also weighs towards there being no "special justification" to abandon *Piney Run* and adopt *Atlantic State*. The Supreme Court in

Loper Bright Enters., found that *Chevron* was unworkable because it used the term "ambiguity" which could have different meaning for each judge. *Id.* The rule for the permit shield set forth in *Piney Run* has no such word though. The rule in *Piney Run*, is clear that a permit holder who complies with the terms of its permit and does not discharge a pollutant that was with in "reasonable contemplation of the permitting authority" when the permit was granted is protected from liability. *Piney Run Pres. Ass'n* 268 F.3d at 259.

Further court's reliance on *Piney Run* weights in favor of there being no "special justification" for abandoning *Piney Run*. In *Loper Bright* the Supreme Court found that *Chevron* was not relied upon because it had "constant tinkering" and the Court itself had avoided using the decision for eight years. *Loper Bright Enters.*, 603 U.S. at 410. However, in this case the rule set out by *Piney Run* appears to have been relied upon several times with no changes to its substance.[2] Including by this court in 2018 when *Piney Run*, was adopted as binding precedent in this Circuit. (*R.* at 12).

The rule set out by *Piney Run*, for the scope of the permit shield is consistent with other similar decisions. The Sixth Circuit in *Sierra Club v. ICG Hazard, LLC,* 781 F.3d 281, 288 (6th Cir. 2015), citing, among other things, *Piney Run* found that the permit shield defense applied for pollutants that were "within the reasonable contemplation of the permitting authority." While the Sixth Circuit did apply *Chevron* in its reasoning, as noted the Supreme Court has noted reliance on *Chevron* alone is not a "special justification" to depart from *stare decisis*.

[2] *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 288 (6th Cir. 2015); *Appalachian Voices v. Duke Energy Carolinas, LLC*, No. 1:17CV1097, 2018 U.S. Dist. LEXIS 226920, at *4 (M.D.N.C. Aug. 13, 2018); *S. Appalachian Mt. Stewards v. Zinke*, 279 F. Supp. 3d 722, 729 (W.D. Va. 2017); *Schneider v. Donaldson Funeral Home, P.A.*, 733 F. App'x 641, 647 (4th Cir. 2018); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1271 (D. Wyo. 2002)

Especially of note when considering legal developments since not only the Twelfth Circuits adoption of *Piney Run* but, since the decision of *Piney Run* is the fact that the wording of 33 U.S.C. § 1342(k) has not changed in anyway since the *Piney Run* decisions was made. Also due to the Supreme Court being very clear that a case relying on *Chevron*, is not enough to meet the "special justification" standard. If this Court were to rule that *Atlantic State* should be the prevailing rule in this jurisdiction over *Piney Run,* which was just made the controlling rule in 2018, without support from the factors of *stare decisis* or a "special justification" this court creates a dangerous precedent of applying different interpretations for like circumstance. The Supreme Court has stated that such a situation "'cannot stand as an every-day test for allocating' interpretive authority between courts and agencies." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 408 (2024) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U. S. 271, 283 (1988).)

This Court in 2018 found *Piney Run* to be the correct interpretation of 33 U.S.C. § 1342(k). (*R.* at 12). At that time this Court knew of the decision in *Atlantic State*, because it is cited multiple times in *Piney Run*. Despite that this Court looked at both decisions and came to the very sensible conclusion that *Piney Run* was the correct interpretation. The court did so despite each case being supported by EPA guidance resulting in two different interpretations. If the court today upholds the District Courts's decision of abandoning precedent without a "special justification" this court will allow polluters a free pass to contaminate U.S. waters with pollutants.

As noted in the District Court's decision it is impossible for the EPA to identify and limit every single pollutant. (*R.* at 13). However, *Atlantic State*'s view of the permit shield allows polluters to discharge any type of pollutant into our waters so long as they report it. In no other

area of the law are offenders allowed to get away with an offense on society by reporting themselves. It has been stated that "for every wrong there is a remedy." *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 174 (9th Cir. 1997). The CWA was enacted to protect the United States water from pollutants. *See Piney Run Pres. Ass'n*, 268 F.3d at 265. If this Court were to abandon *Piney Run* based on its reference of *Chevron* despite the Supreme Courts guidance the court will allow polluters to knowingly and purposely pollute the United States water all because they reported their actions to the EPA or a state agency. By upholding *Piney Run* this court will be upholding the remedy Congress has provided the United States in relation to the pollution of its waters and holding accountable polluters for their actions. SCCRAP respectfully request that this Court uphold its own precedent by applying *Piney Run*.

Under *Piney Run*, the discharge of PFOS and PFBS are a clear violation of the CWA and are not protected by the permit shield. The presence of PFOS and PFBS was not a reasonable contemplation of the VDEP because ComGen failed to disclose that they were discharging PFOS and PFBS despite being directly asked. While there is no special justification for this court to apply *Atlantic States* interpretation over *Piney Run*'s interpretation of the permit shield, if this court choses to do so the result is the same. Under *Atlantic States*, due to the failure of ComGen to disclose during the permitting process and during the life of the permit the process of PFOS and PFBS in its discharge ComGen is still in violation of the CWA and not protected by the permit shield.

CONCLUSION

In summary, SCCRAP has standing to challenge ComGen's Closure Plan under RCRA, and may pursue and imminent and substantial endangerment claim under RCRA. SCCRAP as an organization has members who frequent the Vandalia River for fishing and other recreational

purposes. Injury to a recreational interest is protected, and actionable so long as the injury is fairly traceable to the alleged misconduct and readily redressable by the courts. Here, SCCRAP's challenge to ComGen's Closure Plan would result likely result in a stricter Closure Plan to remove contaminants from the Little Green Run Impoundment and thus protect the Vandalia River and surrounding groundwater from future harm. The harm from the impoundment, owned by ComGen, was used to store CCRs which have leached into groundwater, and have substantially affected SCCRAP members' use and enjoyment of the Vandalia River through fears of contaminated water and fish.

Additionally, ComGen's discharge of PFOS and PFBS are an unpermitted discharge under the Clean Water Act, despite their claim of protection under the permit shield rule. *Piney Run* was not incorrectly decided, and the overturing of *Chevron* has no effect on its applicability here. Although, if either *Piney Run* or *Atlantic States* were applied, the permit shield would not protect ComGen, because they failed to disclose to VDEP the discharge of PFOS and PFBS.

SCCRAP respectfully requests that his court overrule the decision of the district court and remand the case so that SCCRAP may continue its claims to protect the integrity of Vandalia's waters and the health and safety of its people.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2025.

Respectfully submitted,

Team No. 22