C.A. No. 24-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS,
Appellants,

v.

COMMONWEALTH GENERATING COMPANY,
Appellee.

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

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APPELLEE'S BRIEF

Team No. 9

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JURISDICTIONAL STATEMENT

This is a case based on a question of federal law, concerning ComGen's lawfully obtained discharge permit pursuant to the Clean Water Act under 33 U.S.C. § 1251, as well as the Resource Conservation and Recovery Act under 42 U.S.C. § 6901. Because this is a question of federal law, the District Court for the Middle District of Vandalia had original jurisdiction for this case under 28 U.S.C.A. § 1331. On September 20, 2024, ComGen filed a motion to dismiss. (R. 13). On October 31, 2024, the district court granted the ComGen's motion to dismiss and issued its final order. (Id.) SCCRAP filed this appeal on November 10, 2024. (R. 15). Because this case is an appeal from the district court's final judgment in favor of ComGen, this Court has jurisdiction under 28 U.S.C.A. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Under the Clean Water Act, can ComGen assert the permit shield defense against an unpermitted discharge when it includes all required disclosures of specific pollutants pursuant to EPA and Congressional intent, but does not disclose two unregulated compounds that are not included in the formal permitting process?
2. Under *Loper Bright*, should this Court use its independent judgment when it interprets the provisions of the Clean Water Act and reject reasoning that gives deference to agency interpretations under the overturned *Chevron* doctrine?
3. Under Article III, does SCCRAP lack standing when it relies on injuries that are untraceable to the Impoundment closure plan and not redressible by the relief sought because the contaminants were present several years prior to the plan's implementation, and thus would continue to be present if the Impoundment remains open?

4. Under the Resource Conservation and Recovery Act, does SCCRAP fail to support an imminent and substantial endangerment claim when it only alleges an injury to the environment itself and does not show that there is a risk of injury to a living population other than a theory that a potential residential development, which may not be completed until after 2031, may be affected by contaminated groundwater not currently used for human consumption?

STATEMENT OF THE CASE

This case concerns the Commonwealth Generating Company's ("ComGen") lawful application for and implementation of a Vandalia Pollutant Discharge Elimination System Permit in accordance with the Clean Water Act ("the CWA"). It also concerns ComGen's compliance with Vandalia's version of the Environmental Protection Agency's ("EPA") Disposal of Coal Combustion Residuals from Electric Utilities, which governs the closure of surface impoundments used for coal combustion residuals disposal. Such impoundments are regulated under the Resource Conservation and Recovery Act ("RCRA"). (R. 5).

For over a century, nine states have relied on ComGen to provide reliable and affordable electricity to their homes and businesses. (R. 3, 4). ComGen operates numerous facilities in Vandalia, where more than 1,500 people rely on ComGen for employment. (*Id*.) In addition to keeping the lights on in Vandalia, ComGen has pioneered several environmental stewardship projects. (R. 4). One such project is its "Building a Green Tomorrow" program. (*Id*.) Launched in 2015, this program aims to retire ComGen's outdated coal-fired power plants and replace them with new facilities that will power Vandalia using clean, renewable energy sources. (*Id*.) ComGen has proven that a green tomorrow is more than a mere promise to the citizens of Vandalia; it has since opened five solar and two wind facilities, which provide the state with over

110 megawatts of sustainably generated electricity. (*Id*.) The program has successfully reduced ComGen's already competitive energy costs while reducing harmful emissions associated with coal-fired generation. (*Id*.) In 2018, ComGen announced that it would continue its commitment to sustainability by closing one of the oldest coal-fired plants in the state by 2027. (R. 4, 6).

The Vandalia Generating Station And Vandalia Pollutant Discharge Elimination System Permit

The Vandalia Generating Station ("the Station") in Mammoth, Vandalia has been in operation for nearly 60 years. (R. 4). The Station generates electricity by burning coal. (R. 3). Burning coal produces several by-products called coal combustion residuals ("CCRs"). (*Id*.) Commonly known as "coal ash," these CCRs are typically disposed of in one of two ways: either in "dry form" in a landfill, or in "wet form" in a surface impoundment. (*Id*.) CCRs that are produced at the Station are disposed of in the Little Green Run Impoundment. (R. 5).

The CWA prohibits discharging pollutants into the navigable waters of the United States, but also established the National Pollutant Discharge Elimination System ("NPDES"). (R. 10). The NPDES allows for entities to apply for a permit that authorizes "the discharge of any pollutant," as long as the discharge complies with the specific standards in the permit. (R. 11). The EPA empowers a state to "establish its own permit program." (*Id*.) The EPA approved Vandalia's own permitting program: the Vandalia Pollutant Discharge Elimination System ("VPDES"). (*Id*.) The Station has a VPDES Permit ("the Outlet Permit") for three outfalls, Outlets 001, 002, and 003, which flow into the nearby Vandalia River. (R. 4). The Outlet Permit expressly includes an extensive list of pollutants, along with limitations on how much of those pollutants may be discharged. (*Id*.) There is no mention of any limitations or monitoring requirements for PFOS nor PFBS in the Outlet Permit; in fact, there is no mention of these compounds in any portion of the formal permitting process. (*Id*.) Additionally, neither of these

compounds are mentioned in any regulations under the CWA, or under any other EPA regulations. (R. 9).

During an informal email to an unspecified ComGen employee, the deputy director of the Vandalia Department of Environmental Protection ("VDEP") briefly inquired about the unlisted PFOS and PFBS compounds. (R. 4). The deputy director vaguely mentioned "newer studies" that these compounds could possibly be present in certain by-products of coal combustion. (*Id*.) The unspecified employee did not know of the compounds' presence in any outfall discharge, and informed the deputy director accordingly. (*Id*.) The deputy director did not inquire any further. (R. 5). After the formal permit proceedings concluded, the Outlet Permit was approved on July 30, 2020, became effective on September 1, 2020, and does not expire until July 29, 2025. (R. 4).

The Little Green Run Impoundment And The Disposal Of Coal Combustion Residuals From Electric Utilities

Covering approximately 71 acres just east of the Station, the unlined Little Green Run Impoundment ("the Impoundment") is a surface impoundment for CCRs. (*Id*.) The Impoundment is formed by a dam that is 395 feet high and 1,050 feet above sea-level. (*Id*.) Because CCRs and other related wastes can result in materials such as cadmium, mercury, and arsenic, the Environmental Protection Agency ("EPA") has a rule for the Disposal of Coal Combustion Residuals from Electric Utilities ("the CCR Rule"). (R. 3, 5).

The CCR Rule regulates CCRs as solid waste under the Resource and Conservation and Recovery Act ("RCRA"). (R. 5). Under the Water Infrastructure Improvements for the Nation Act ("the WIIN Act"), the EPA may allow a state to administer its own CCRs permitting and enforcement program instead of the federal CCR Rule. (*Id*.) The state program is subject to the EPA's approval. (*Id*.) The EPA approved Vandalia's CCR permitting program ("the Vandalia Rule"), which has provisions that are identical to the EPA's CCR Rule. (*Id*.) Both the CCR Rule

and the Vandalia Rule require the owners of existing CCR surface impoundments to "prepare initial written closure plans" no later than October 17, 2016. (R. 6). Additionally, owners of impoundments that fall short of certain criteria must either invest into compliance or start the process of closing by October 31, 2020. (*Id*.) Instead of investing millions of dollars into an impoundment for a power plant that is set to close in just a few years, ComGen decided to initiate a closure-in-place plan in accordance with EPA and the Vandalia Rule. (*Id*.)

ComGen's initial written closure-in-place plan for the Impoundment was timely completed on October 17, 2016. (*Id*.) In December 2019, in accordance with the EPA's CCR Rule and the Vandalia Rule, ComGen submitted its initial "Permit Application for CCR Surface Impoundment" ("the Application"). (*Id*.) The VDEP gave the public notice of the Application in February 2019, and subsequently provided the opportunity for both oral and written comments. (*Id*.) The VDEP held a public hearing on March 30, 2021. (R. 7). After considering the public hearing record, thousands of written comments, and the requirements of the Vandalia Rule, the VDEP approved the Application and granted a "Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment" ("the Impoundment Permit") to ComGen. (*Id*.) The Impoundment Permit is valid until May 2031, and ComGen expects to spend over $1 billion to properly close the Impoundment within this timeframe. (*Id*.)

In 2019, ConGen took its first step towards closing the Impoundment by investing approximately $50 million into 13 groundwater monitoring wells. (*Id*.) The monitoring reports from the wells must be released each year. (R. 8). While there have been reports from 2021 that have recorded elevated levels of arsenic and cadmium, there is no evidence that either of these elements have reached any source of public drinking water, including the Vandalia River and groundwater wells. (R. 8, 9).

The Appellant

The appellant in this case is a public interest group called "Stop Coal Combustion Residual Ash Ponds" ("SCCRAP"). (R. 8). Part of SCCRAP's mission is to target those in the fossil fuel industry and push for a "transition to a cleaner, more sustainable energy supply that does not create harmful by-products." (*Id*.) SCCRAP has members across the nation, with a few members residing in Mammoth, Vandalia. (R. 8, 10).

SCCRAP collected a sample from close to ComGen's Outlet 001, one of the Station's outfalls on the Vandalia River. (R. 9). SCCRAP tested the sample for certain chemical parameters, including PFOS and PFBS. (*Id*.) The results displayed 6 ppt of PFOS and 10 ppt of PFBS. (*Id*.) These compounds were not present a mile upstream. (*Id*.) SCCRAP then obtained documentation from separate, unrelated litigation that mentions ComGen's 2015 monthly monitoring records. (*Id*.) The records included measurements of PFOS and PFBS. (*Id*.)

Procedural History Of The District Court's Case

Taking issue with both the approved impoundment closure plan and the omission of unregulated PFOS and PFBS in the Outlet Permit application process, SCCRAP filed a citizen suit against ComGen on September 3, 2024. (R. 12). First, SCCRAP alleged that because ComGen did not disclose the presence of the PFOS and PFBS compounds during the Outlet Permit process, it was in violation of the CWA. (*Id*.) The district court rejected SCCRAP's CWA violation claim and held that ComGen is protected under the CWA's permit shield. (R. 14). The court also agreed with ComGen's assertion that neither of these compounds are regulated under the CWA, and do not require disclosure in the VDEP formal permitting process. (*Id*.) SCCRAP relied on *Piney Run* to support its CWA claim, but the district court refused to adopt the case's reasoning. (*Id*.) Instead, the district court agreed with ComGen's assertion that because *Piney*

Run relies on *Chevron* deference, its reasoning is inconsistent with Loper Bright. (R. 13). The district court adopted the reasoning in *Atlantic States* instead, as *Chevron* agency deference was overturned by *Loper Bright*. (*Id*.)

Next, SCCRAP alleged that ComGen did not comply with the regulatory requirements for eliminating free liquids and preventing future water impoundment under RCRA. (R. 12). The district court held that SCCRAP failed to prove a violation of the Vandalia Rule for CCRs. (R. 13). The district court also held that SCCRAP did not have standing to challenge the Impoundment's closure plan. (R. 14). SCCRAP attempted to show that it suffered an injury-in-fact due to the "offensive" presence of PFOS and PFBS, as some of its members use the Vandalia River for recreational activities. (R. 10, 14). SCCRAP also argued it suffered an injury when some of its members added their names to the waiting list for a potential housing development that may possibly use water sourced from groundwater affected by the presence of arsenic and cadmium from the Impoundment. (R. 9). The future development, if approved, would not be completed until 2031 at the earliest. (*Id*.) The district court rejected both injury claims, stating that the injuries do not stem from the closing process of the Impoundment, nor the Outlet Permit application process. (*Id*.) The district court also found that the injuries were not traceable to ComGen's conduct and are not redressible. (R. 14).

Finally, the district court also rejected SCCRAP's claim of imminent and substantial endangerment to the environment under RCRA, explaining that it failed to prove any "endangerment or exposure pathway" to a living population. (*Id*.) On October 31, 2024, the district court rejected each of SCCRAP's claims. (R. 12). The court accordingly granted ComGen's motion to dismiss. (R. 13, 14).

STANDARD OF REVIEW

The standard of review for this case is *de novo* review. This appeal concerns several questions of federal law, including the Clean Water Act under 33 U.S.C. § 1251, the Resource Conservation and Recovery Act under 42 U.S.C. § 6901, and the standing requirements under Article III. An appellate court reviews a district court's interpretation of the Clean Water Act *de novo*. *Natural Resources Defense Council v. U.S. E.P.A.*, 542 F.3d 1235, 1241 (9th. Cir. 2008). An appellate court reviews a district court's interpretation of the Resource Conservation and Recovery Act *de novo*. *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1118 (9th Cir. 2017). An appellate court "reviews the legal arguments about a plaintiff's Article III standing *de novo*." *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 695 (7th Cir. 2018).

SUMMARY OF THE ARGUMENT

ComGen's discharge of PFOS and PFBS does not violate the Clean Water Act because these compounds fall entirely outside the VPDES permit framework. The permit shield protects ComGen from liability where, as here, it has fully complied with formal permitting requirements. While SCCRAP points to trace amounts of these compounds and an informal email exchange about their potential presence, neither creates permit obligations beyond the statutory scheme Congress established.

The Supreme Court's decision in *Loper Bright* fundamentally alters how courts must analyze permit requirements. By rejecting mandatory agency deference in favor of independent judicial interpretation, *Loper Bright* compels adoption of *Atlantic States'* practical framework over *Piney Run's* unworkable reasonable contemplation standard. Modern analytical techniques can detect compounds at parts per trillion – equivalent to one drop in 20 Olympic pools.

Requiring permit holders to anticipate and monitor every detectable substance would impose an impossible burden Congress never intended.

SCCRAP's RCRA claims fail because they cannot demonstrate either imminent endangerment or inadequacy of the closure plan. The expert testimony regarding potential groundwater contamination remains purely speculative, particularly given the absence of any evidence that contaminants have reached, or will soon reach, drinking water sources. The closure plan satisfies all regulatory requirements while implementing appropriate environmental safeguards.

Finally, SCCRAP lacks Article III standing to challenge the closure plan because its alleged recreational and aesthetic injuries stem from historical contamination that predates closure activities. As in *Mobile Baykeeper*, SCCRAP cannot establish that its injuries are fairly traceable to the challenged conduct or redressable through the requested injunctive relief. The district court's judgment should be affirmed.

ARGUMENT

I. ComGen's Discharge Is Not An Unpermitted Discharge Under The CWA Because There Is No Requirement To Disclose PFOS And PFBS In The Formal Permit Process.

The CWA prohibits the "discharge of any pollutant by any person" into the navigable waters of the United States. 33 U.S.C. § 1311(a). However, entities and individuals may apply for an NPDES permit; if the permit is approved, the permit holder may discharge certain pollutants pursuant to the limitations in the permit. *Southern Appalachian Mountain Stewards v. Red River Coal Co., Inc.*, 992 F.3d 306, 308 (4th Cir. 2021). Subject to EPA approval, a state may establish its own version of the NPDES permitting program. *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). The CWA's permit shield provision protects an NPDES permit holder from liability if its discharges comply with the permit's terms;

this includes liability from citizen suits. *Southern Appalachian Mountain Stewards*, 992 F.3d 306, 308 (4th Cir. 2021). It is not unlawful for a valid permit holder to discharge unlisted pollutants. *Atlantic States*, 12 F.3d at 354.

In this case, as explained below, ComGen did not violate the CWA. Its discharge of unlisted PFOS and PDBS does not constitute an unpermitted, unlawful discharge. The unlisted compounds were not part of the formal VPDES application process. Because ComGen complied with each requirement of its VPDES permit, it may assert the permit shield defense under the CWA. This reasoning is supported by the Second Circuit's holding in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co*. This Court should disregard SCCRAP's contention that this Court is bound to the reasoning in *Piney Run*, and embrace the reasoning in *Atlantic States* because *Piney Run* is irrelevant under *Loper Bright*.

A. ComGen is protected from liability under the Clean Water Act's permit shield defense.

The purpose of the permit shield is to give the permits finality. *Wisconsin Resources Protection Council v. Flambeau Min. Co.*, 727 F.3d 700, 706 (7th Cir. 2013). An NPDES permit holder may discharge unlisted pollutants, as long as they follow the necessary reporting requirements, and comply with any newly established limitations. *Atlantic States*, 12 F.3d at 357. An NPDES permit is meant "to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id*. at 357.

In *Atlantic States*, an environmental organization brought a citizen suit against Eastman Kodak Company under the CWA, alleging that the company was discharging pollutants that were not expressly listed in its State Pollutant Discharge Elimination System ("SPDES") permit. *Id*. at 354-55. The organization argued that the company's wastewater treatment facility released unpermitted pollutants into a local river and creek. *Id*. at 355. The company argued that the CWA

did not prohibit the discharge of unlisted pollutants, so long as the company complied with applicable reporting requirements. *Id*. at 357. The court held that the company had disclosed the presence of the chemicals at issue in its permit application; thus, it had complied with the state reporting standards. *Id*. Furthermore, it reasoned that the EPA had never interpreted the CWA to prohibit such discharges outright; instead, it allowed agencies to impose new limitations as necessary. *Id*. at 358. The court rejected the organization's claim, reasoning that the CWA's permitting scheme was designed to regulate the most harmful pollutants, while only requiring disclosure during the permit process for others, rather than imposing an absolute ban on all unlisted discharges. *Id*. at 360. Thus, the court held that the company complied with state permitting requirements and reporting obligations. *Id*. The company was shielded from liability under the CWA. *Id*.

Like the company in *Atlantic States*, ComGen complied with its state permitting requirements and reporting obligations. Vandalia has its own EPA-approved state permitting program– the VPDES. (R. 11). The Outlet Permit granted to ComGen included an extensive list of pollutants, along with limitations on how much of those pollutants may be discharged. (*Id*.) However, there was no mention of any limitations or monitoring requirements for PFOS or PFBS in the Outlet Permit. (*Id*.) There is no mention of these compounds in any portion of the formal permitting process. (*Id*.) The record here does not support a contention that the compounds are even regulated under the CWA. (R. 9). The deputy director of the VDEP did briefly ask about the unlisted PFOS and PFBS compounds in an informal email to an unidentified ComGen employee. (R. 4). The deputy director only made a vague reference to "newer studies" suggesting that these compounds might be present in certain CCRs. (*Id*.) Additionally, he did not communicate any changes in the formal permitting process, nor did he inform ComGen of any changes in

regulations. The ComGen employee was unaware of the compounds' presence in any outfall discharge and conveyed this to the deputy director. (*Id*.) No further inquiries were made by the deputy director. (*Id*.) Additionally, there are currently no monitoring requirements for PFOS or PFBS. (R. 9). While ComGen did have records of PFOS and PFBS discharges, these records were not required to be disclosed during the permitting process; the deputy director had the opportunity to inquire about the potential presence of PFOS or PFBS, but he did not do so. At no point did the deputy director, or any other VDEP employee, ask about PFOS or PFBS during the formal permit application process. If this disclosure was part of the formal process, the deputy director would have not inquired about it via an informal email.

For the foregoing reasons, ComGen should be protected from liability under the CWA's permit shield. ComGen complied with all formal permitting processes and required disclosures under the VPDES. Therefore, this Court should hold that ComGen did not violate the CWA. Accordingly, this Court should affirm the district court's final judgment in favor of ComGen.

B. This Court should reject the reasoning in *Piney Run*, adopt the reasoning in *Atlantic States*, and exercise independent judgement when interpreting the permit shield provisions of the Clean Water Act pursuant to *Loper Bright*.

When viewed through the clarifying lens of *Loper Bright*, it is evident that ComGen's permit shield defense should prevail. ComGem is protected under the permit shield because the PFOS and PFBS compounds were neither required disclosures, nor specifically contemplated pollutants under the regulatory scheme.

Historically, agencies were allowed to interpret ambiguous statutes with considerable discretion. *Chevron, USA v. Natural Resources Defense Council*, Inc., 467 U.S. 537 (1984). However, *Chevron* was overturned with *Loper Bright v. Raimondo*, 144 S.Ct. 2244 (2024). The Supreme Court endorsed the approach articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the weight to be given an agency's determination depends on the

‘‘thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’’ *Loper Bright*, 144 S. Ct. at 2259 (*quoting Skidmore*, 323 U.S. at 140). If the agencies demonstrate thoroughness, validity of reasoning, and consistency, then its expertise holds substantive weight. Under the doctrine of *stare decisis*, courts may depart from precedent when ‘‘the quality of the precedent’s reasoning, the workability of the rule it established . . . and reliance on the decision’’ weigh in favor of change. *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019). Following *Loper Bright*, courts should exercise independent judgment rather than defer to agency interpretations. *Loper Bright* 144 S. Ct. at 2270.

While statutory *stare decisis* may preserve some agency actions decided under *Chevron*, it does not apply here. This case requires judicial interpretation of permit requirements, rather than specific agency action. The change in interpretive methodology directly impacts how permit shield claims should be analyzed. The CWA’s permit shield framework, as interpreted by *Atlantic States*, recognizes that permits are intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. *Atlantic States*, 12 F.3d at 354. This interpretation acknowledges the practical impossibility of identifying and limiting every potential compound in discharges, particularly as testing methods become increasingly sophisticated.

In *Piney Run Pres. Ass’n v. Cnty. Comm’rs of Carroll Cnty. MD*, the Fourth Circuit’s analysis hinged on pollutants that were already part of the established NPDES permitting regime and specifically requested in permit applications. *Piney Run Pres. Ass’n v. Cnty. Comm’rs of Carroll Cnty. MD*, 268 F.3d 255, 259 (4th Cir. 2001). Unlike the pollutants at issue in *Piney Run*, PFOS and PFBS fall entirely outside the statutory and regulatory framework that governed

ComGen's VPDES permit process. (R. 4). The complete absence of PFOS and PFBS from the permit application, conditions, and final permit underscores that these substances fall outside the regulatory framework. (*Id*.) The Supreme Court has repeatedly rejected the notion that statutory silence automatically confers interpretive authority on administrative agencies. *Loper Bright*, 144 S. Ct. at 2255 (*emphasizing* that ''statutory silence on an issue does not necessarily constitute a delegation to fill gaps or resolve ambiguities'' and ''silence alone cannot generate interpretive authority'').

Just as silence in a statute does not confer interpretive authority on agencies, silence in a permit cannot create affirmative monitoring obligations for unregulated compounds. *Atlantic States'* supports that the regulatory scheme is clear: the permit is intended to identify and limit the most harmful pollutants, while leaving the control of the vast number of other pollutants to disclosure requirements. *Atlantic States,* 12 F.3d at 357. To hold otherwise would transform the permit shield from a source of regulatory certainty into an endless quest to identify and monitor an ever-expanding universe of unregulated compounds. (*see E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977)).

Although SCCRAP identifies trace amounts of PFOS and PFBS in Outlet 001's mixing zone, these minimal concentrations of unregulated compounds cannot invalidate the permit shield. (R. 9). The VPDES permit, which already sets limits for ''a wide array of pollutants, including selenium, aluminum, pH, temperature'' and other regulated substances, reasonably excludes the countless other compounds that might be detected with modern testing methods. (R. 4). This critical distinction demonstrates precisely why *Atlantic States'* framework is more appropriate and superior to an unworkable, outdated standard.

SCCRAP may argue that the informal email exchange between ComGen and VDEP about PFAS compounds demonstrates these substances were contemplated under *Piney Run's* framework. (R. 4). This argument fails for several reasons. First, informal communications cannot create binding permit obligations. *Natural Resources Defense Council*, 542 F.3d at 1235. Second, a mere inquiry about potential presence of compounds differs fundamentally from the type of formal permit application disclosures at issue in Piney Run. Third, allowing such informal exchanges to create permit obligations would discourage open communication between regulators and permit holders, undermining the cooperative framework envisioned by the Clean Water Act.

Piney Run's reasonable contemplation standard provides no clear guidance for facilities like the Vandalia Generating Station to determine which unregulated compounds must be disclosed. This uncertainty is precisely the type of unworkable framework that justifies departing from *stare decisis.* Adopting the reasoning in *Piney Run* would effectively require companies to predict the unpredictable. This reality is particularly evident where emerging research continually identifies new compounds. The permitting process must necessarily focus on known, regulated substances rather than attempting to anticipate every possible compound that might be detected through increasingly sensitive testing methods.

Given *Piney Run's* flawed reliance on agency deference, unworkable standard, and the practical impossibility of anticipating every potential compound that might be detected through modern testing methods all weigh heavily in favor of adopting *Atlantic States*' more coherent approach. Therefore, this Court should exercise its independent judgment under Loper Bright to adopt the framework that better serves both regulators and industry.

II. SCCRAP Fails To Support A Claim Under RCRA Because The Closure Permit Does Not Impose An Imminent And Substantial Endangerment To A Living Population, Nor Does It Prove That The Closure Plan Is Inadequate.

For SCCRAP to prevail in a citizen suit under RCRA, it must demonstrate that the closure plan does not meet the standards established by the CCR Rule, and that the risks presented by the impoundment are both significant and immediate enough to warrant intervention. ComGen's closure plan for the Impoundment satisfies RCRA's environmental protection standards, particularly concerning groundwater contamination, the leaching of toxic substances, and the potential for catastrophic failure of the impoundment in the future. ComGen is adhering to the requirements of the CCR Rule and RCRA; thus, there is insufficient evidence of imminent and substantial endangerment, as ComGen is following acceptable practices regarding groundwater monitoring and closure-in-place for CCR impoundments.

Under the RCRA, the "imminent and substantial endangerment" provision is a critical enforcement tool, particularly for citizens seeking to challenge hazardous waste handling, storage, and disposal practices that could endanger public health or the environment. Specifically, Section 7002(a)(1)(B) of RCRA (42 U.S.C. § 6972(a)(1)(B)) grants private citizens the right to file a lawsuit if they suspect that hazardous substances are causing or may cause an imminent and substantial endangerment to human health or the environment.

To establish an imminent and substantial endangerment, there must be a demonstrated imminent risk—meaning harm is either already occurring or is expected to occur soon, rather than being a speculative or distant threat. The endangerment must also be substantial, meaning the risk to human health or the environment is serious and significant. Courts evaluating such claims under RCRA typically assess several key factors. A plaintiff must show that the defendant has generated, is contributing to, or has otherwise been involved with hazardous waste that poses a risk of imminent and substantial harm to public health or the environment. *Courtland Co. v.*

Union Carbide Corp., No. 2:19-cv-00894, 2020 U.S. Dist. LEXIS 155019, at *11 (S.D. W. Va. Aug. 26, 2020). Imminent harm excludes risks which might occur, if at all, at some unspecified time in the future. *Id*. Similarly, "substantial" refers to a serious risk that necessitates remedial action, such as when there is reasonable cause to believe that exposure to hazardous substances could occur, endangering human health or the environment if corrective measures are not taken. *Price v. United States Navy*, 39 F.3d 1011, 1013 (9th Cir. 1994). The presence of hazardous contaminants, such as groundwater contamination, can establish an imminent and substantial endangerment. *Burlington Northern & Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1029 (10th Cir. 2007).

In *Courtland Co., Inc. v. Union Carbide Corp*., the court held that Filmont could not be classified as a hazardous waste disposal facility under RCRA because there was no evidence of intentional hazardous waste disposal after November 19, 1980. *Courtland Co., Inc. v. Union Carbide Corp*., 2023 WL 6331069 at *57. As a result, the court held that Union Carbide was not required to have a RCRA post-closure permit, nor was it in violation of RCRA's financial assurance and notification requirements. *Id*. at *34. The court also found that Courtland failed to prove that Filmont's location posed a health or environmental risk, as the expert testimony was too speculative. *Id*. at *68. Additionally, Courtland could not establish that the contamination presented an imminent and substantial endangerment to health or the environment. *Id*. at *17. The court rejected Courtland's RCRA claim regarding Filmont's hazardous waste disposal and flood plain risks. *Id*. at *10.

Although SCCRAP's alleges that the groundwater within 1.5 miles of the impoundment should not be used for drinking water, the expert's conclusion is speculative, with no direct evidence of groundwater contamination migrating to drinking water sources. (R. 9). In fact, there

is no evidence that contamination is reaching any public water supply; because the groundwater is not currently used as drinking water for the public, the groundwater does not currently pose a threat to human health. (*Id*.) Despite measurable levels of arsenic and cadmium in downgradient monitoring wells, there is no evidence that these substances have migrated to navigable waters or public drinking water sources. (R. 8). This negates the "imminent" aspect of the claim, as the contamination has not yet caused harm to public health or the environment. While the CCR Rule requires monitoring and management of potential contamination, there is no imminent threat of significant migration of hazardous substances into drinking water sources. The fact that no actual injury is occurring and that no one is drinking contaminated groundwater means the potential endangerment remains theoretical, not a present risk. ComGen's Closure Permit issued by the VDEP is valid and in full compliance with the CCR Rule. The permit includes stringent requirements for the closure of the impoundment, including the installation of groundwater monitoring wells, a plan to minimize leachate migration, and a final cover system to prevent further contamination. The closure process has already been underway since 2019 and is expected to be completed by 2031. (R. 7). ComGen has installed 13 groundwater monitoring wells as required by the closure plan, and the company has consistently submitted monitoring reports to the VDEP. (*Id*.) The elevated levels of arsenic and cadmium in groundwater do not present evidence of direct harm, as the concentrations are below federal regulatory thresholds for groundwater contamination. The CCR Rule specifically permits closure-in-place for coal ash impoundments, provided the closure plan meets certain environmental performance standards. The closure plan for the Impoundment complies with these standards, including ensuring that the site is closed in a manner that prevents future water impoundment and contamination release. Since ComGen is actively implementing its closure plan in accordance with EPA and state

regulations, there is no basis for arguing that the impoundment constitutes an open dump under RCRA. ComGen's actions are consistent with the requirements for the safe and compliant disposal of CCRs.

In conclusion, SCCRAP's claim fails to meet the requirements under RCRA, as the alleged risks associated with the Impoundment remain speculative and unfounded. The expert testimony regarding groundwater contamination is purely hypothetical, lacking the concrete evidence needed to establish an *imminent* or *substantial* threat to human health or the environment. Without proof of ongoing harm or a tangible, immediate risk, the court cannot base its judgment on mere speculation about potential future scenarios. There is no evidence of current contamination affecting drinking or navigable waters– the very issues RCRA is designed to address. If this claim were to succeed, it would not be on the merits of the case but rather on a fragile foundation of uncertain possibilities, which the law cannot, and should not, support. Therefore, his Court should hold that SCCRAP failed to support a claim under RCRA, as it did not prove that the closure plan was inadequate, nor did it prove an imminent and substantial endangerment to a living population. Accordingly, this Court should affirm the district court's final judgment in favor of ComGen.

III. SCCRAP Does Not Have Article III Standing To Challenge ComGen's Impoundment Closure Plan Because Its Alleged Injuries Are Not Fairly Traceable To ComGen's Conduct And Cannot Be Redressed By Injunctive Relief.

SCCRAP's attempt to challenge ComGen's Impoundment closure plan fails at the threshold question of Article III standing. Standing is "not a mere pleading requirement," but is an "indispensable part of [a] plaintiff's case." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In order to establish Article III standing, the plaintiff must first have suffered a particular and concrete injury-in-fact that is either actual or imminent, and cannot be hypothetical, nor speculative. *Id*. at 560. An injury is particular if it affects the plaintiff "in a personal and

individual way." *Id*. Next, the plaintiff must show that the injury is "fairly traceable" to the challenged conduct. *Mobile Baykeeper, Inc. v. Ala. Power Co.*, No. 1:22-00382-KD-B, 2024 WL 54118, at *11 (S.D. Ala. Jan. 4, 2024). Finally, the plaintiff must prove the redressability of the injury. *Lujan*, 504 U.S. at 561. Redressability requires that it is ''likely, as opposed to merely speculative,'' that the injury will be remedied by the relief sought. *Id*.

In *Mobile Baykeeper*, an environmental advocacy organization filed a citizen suit against Alabama Power Company under RCRA, alleging that Alabama Power's closure plan for the CCR impoundment at Plant Barry violated federal regulations. *Mobile Baykeeper*, 2024 WL 54118 at *1. It was contended that Alabama Power's "cap-in-place" closure plan for an unlined impoundment posed a risk of contamination to surrounding waters, including the Mobile River and Mobile-Tensaw Delta. *Id*. *Mobile Baykeeper's* members alleged aesthetic and recreational injuries from diminished enjoyment of areas near the impoundment due to concerns about contamination. *Id*. Additionally, *Mobile Baykeeper* alleged that coal ash was leaching "arsenic and other substances" into groundwater, and that extreme weather events could exacerbate the problem, potentially leading to catastrophic environmental harm. *Id*. at *2-3. The court rejected these claims, asserting that "[t]his Court will not go down a rabbit trail [over a fear] of catastrophic coal ash spill[s] or concerns over invisible pollution." *Id*. at *10.

Mobile Baykeeper's challenge was based on Alabama Power's incomplete closure plan under the CCR Rule, rather than the present leaching of CCRs into the river. *Id*. at *6. The court reasoned that "the alleged harm stems from pre-existing coal ash deposits rather than from any specific action or inaction included in the closure plan." *Id*. Thus, the court held that *Mobile Baykeeper* lacked standing because its injuries were not traceable to the challenged conduct. *Id*. at *14. Additionally, the relief that *Mobile Baykeepers* sought was not redressable; the court

explained that "ordering Alabama Power to implement a closure plan today that both eliminates the post-closure infiltration of liquids and releases of CCR into groundwater and precludes the probability of future impoundment of water, sediment, or slurry cannot redress ongoing leaching when the law only regulates how a CCR unit is closed." *Id*. at *13. Accordingly, the court held that *Mobile Baykeeper* lacked standing because the relief sought would fail to redress its injury-in-fact claims. *Id*. at *14.

Like the Mobile Baykeepers, SCCRAP failed to prove that its injuries were fairly traceable to ComGen's conduct and redressable by the relief sought. Like *Mobile Baykeepers*, SCCRAP asserts that their members suffered aesthetic and recreational injuries from a closure-in-place plan for a CCR impoundment. (R. 14). The court in *Mobile Baykeeper* held that there was no standing because "the alleged harm stems from pre-existing coal ash deposits rather than from any specific action or inaction included in the closure plan." *Mobile Baykeeper*, 2024 WL 54118 at *6. Here, the record explicitly states that the Impoundment was likely leaching for at least 5 to 10 years *prior* to the first monitoring report in 2021. (R. 8). ComGen did not begin closure activities for the Impoundment until 2019. (R. 7). Moreover, SCCRAP's members used the Vandalia River area near the Station and Impoundment for recreation, but have restricted such use because of concerns over arsenic and cadmium pollution. (R. 10). This demonstrates that, like in *Mobile Baykeeper*, the recreational and aesthetic injuries stem from historical contamination, not the closure plan.

Finally, SCCRAP faces the same insurmountable redressability hurdle that defeated standing in *Mobile Baykeeper*. There, the court held ''ordering Alabama Power to implement a closure plan today . . . cannot redress ongoing leaching when the law only regulates how a CCR unit is closed.'' *Mobile Baykeeper*, 2024 WL 54118, at *13. Similarly, here, SCCRAP seeks

injunctive relief to prevent ComGen's closure plan. (R. 7). Preventing further closure activities cannot remedy historical contamination that began several years before closure commenced. This is particularly true given that there is no evidence that either arsenic or cadmium have reached the Vandalia River or any other public water drinking supply or will in the next five years. (R. 8). The groundwater contamination stems from historical operation of the impoundment, not its closure.

SCCRAP lacks Article III standing to challenge ComGen's closure plan, as its injuries arise from historical contamination, rather than the challenged closure activities. Failure to demonstrate either injuries fairly traceable to the closure plan or redressability through injunctive relief, compels affirmance of the district court's judgment dismissing for lack of standing. Therefore, this Court should hold that SCCRAP does not have standing. Accordingly, this Court should affirm the district court's final judgment in favor of ComGen.

CONCLUSION

The district court correctly held that ComGen's compliance with its VPDES permit provides a complete shield from liability under the Clean Water Act. The Supreme Court's shift away from agency deference in *Loper Bright* commands adoption of *Atlantic States'* workable framework – one that recognizes the practical impossibility of monitoring every compound detectable by modern science. SCCRAP's claims amount to speculation about future harms, falling far short of RCRA's imminent and substantial endangerment standard. Most fundamentally, SCCRAP cannot transform historical contamination into injuries traceable to ComGen's closure plan. The permit shield exists to provide certainty, the Clean Water Act demands practicality, and Article III requires concrete, redressable injuries. SCCRAP's claims

satisfy none of these requirements. Thus, this Court should affirm the district court's final judgment in favor of ComGen.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing the Appellee, Commonwealth Generating Company, 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. 9