C.A. No. 24-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Stop Coal Combustion Residual Ash Ponds,

Plaintiff-Appellant,

-v.-

Commonwealth Generating Company,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF VANDALIA

OPENING BRIEF FOR PLAINTIFF-APPELLANT STOP COAL COMBUSTION RESIDUAL ASH PONDS (“SCCRAP”)

Team No. 26

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JURISDICTIONAL STATEMENT

This court has jurisdiction over each of the three claims in this case. The United States District Court for the Middle District of Vandalia had subject matter jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331 as the claims arose under 33 U.S.C. § 1365 and 42 U.S.C. § 6972, giving the court federal question jurisdiction. Given the timely appeal—Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed its appeal on November 10, 2024—and the jurisdiction granted by 28 U.S.C. § 1291, this court can review *de novo* the Middle District of Vandalia's grant of ComGen's Motion to Dismiss on October 31, 2024.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether ComGen's knowing discharge of undisclosed PFOS and PFBS into the Vandalia River is permitted under the Clean Water Act;

(2) Whether, in deciding Issue 1, the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*;

(3) Whether SCCRAP has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment; and

(4) Whether SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment with an allegation of endangerment to the environment itself.

STATEMENT OF THE CASE

I. Procedural History

On September 3, 2024, Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed a citizen suit against Commonwealth Generating Company ("ComGen") in the United States

District Court for the Middle District of Vandalia. SCCRAP claims that ComGen's operation of the Vandalia Generating Station and the planned closure of the associated Little Green Run Impoundment threatens the surrounding environment as well as the health, safety, and property of its members and the larger community. In its complaint, SCCRAP pursued three separate claims—one under the Clean Water Act (CWA) and two under the Resource Conservation and Recovery Act (RCRA).

Pursuant to § 505 of the CWA, 33 U.S.C. § 1365, SCCRAP alleged that ComGen has violated the CWA by knowingly discharging PFOS and PFBS into the Vandalia River without properly disclosing these pollutants during the discharge permitting process. SCCRAP sought declaratory relief that ComGen violated the CWA by discharging PFOS and PFBS without a valid permit; permanent injunctive relief to stop these discharges until a valid permit is obtained; and civil penalties.

Pursuant to § 7002(a)(1)(A) of RCRA, 42 U.S.C. § 6972(a)(1)(A), SCCRAP challenged the approved closure plan for the Little Green Run Impoundment (the "Closure Plan") for failing to satisfy the EPA's rule on the Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule"). *Hazardous and Solid Waste Management System*, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pt. 257, 261). SCCRAP alleged that the Closure Plan will result in the continued impoundment of water, sediment, or slurry, and fails to preclude the probability of future impoundment of water, sediment, or slurry. 40 C.F.R. § 257.102(d)(1)(ii). It is further alleged that the Closure Plan does not control, minimize, or eliminate, to the maximum extent feasible, the infiltration of liquids into the waste or releases of coal combustion residual ("CCR") pollution to ground or surface waters following Little Green Run's closure. 40 C.F.R.

§ 257.102(d)(1)(i). SCCRAP sought injunctive relief to prevent ComGen from implementing the alleged illegal Closure Plan.

Lastly, pursuant to § 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), SCCRAP alleged that the Little Green Run Impoundment presents an imminent and substantial endangerment to the environment itself. Downgradient monitoring wells from the Little Green Run Impoundment have shown consistent arsenic and cadmium exceedances, which SCCRAP alleged makes the groundwater undrinkable in the area of a planned housing development. SCCRAP is seeking declaratory and injunctive relief as well as civil penalties.

On September 20, 2024, ComGen filed a motion to dismiss SCCRAP's complaint. This motion was granted by the district court on October 31, 2024. The district court agreed with ComGen, holding that the defendant did not violate any disclosure requirements during the permit application process for the discharge of coal ash from the Vandalia Generating Station. ComGen, despite being aware of the presence of PFOS and PFBS in their residual coal ash, failed to disclose this to state regulators when directly asked by email. Because PFOS and PFBS were incorrectly determined to be "non-statutory" pollutants, the district court determined ComGen had not violated the CWA.

SCCRAP's claims under the RCRA were also dismissed. The district court held that SCCRAP had insufficient standing to challenge the Closure Plan because SCCRAP could not trace injuries that were judicially redressable to ComGen's conduct. As a result of its finding that SCCRAP lacked standing, the district court did not reach ComGen or SCCRAP's substantive arguments with respect to the Closure Plan. The district court also held that the RCRA does not support an imminent and substantial endangerment claim to the environment itself, opting for the wrong interpretation of the RCRA.

On November 10, 2024, SCCRAP filed this appeal to the United States Court of Appeals for the Twelfth Circuit, asking for a reversal of the district court rulings. The Twelfth Circuit issued an order on December 30, 2024 setting forth the issues to be briefed and argued on appeal.

II. Statement of Facts

In 1965, ComGen opened the Vandalia Generating Station, a coal-fired electric power plant in Mammoth, Vandalia, making the station among the oldest operating power plants in the state. In 2020, ComGen obtained a Vandalia Pollutant Discharge Elimination System ("VPDES") permit covering the generating station's outfalls into the Vandalia River and its tributaries, which are waters of the United States. The permit—which sets limits on the discharge of a variety of pollutants—became effective on September 1, 2020, and is set to expire on July 29, 2025.

To keep the station in operation, ComGen would have needed to make substantial upgrades to the Vandalia Generating Station to comply with the EPA's Effluent Limitations Guidelines ("ELG") for coal-fired power plants. Rather than perform those upgrades, ComGen announced in 2018 the planned closure of its Vandalia Generating Station in 2027.

Before the 2020 VPDES permit was issued, a deputy director of the Vandalia Department of Environmental Protection ("VDEP") directly asked an employee of ComGen over email about whether Vandalia Generating Station's discharges contained any PFOS or PFBS. These so-called "forever" chemicals are part of the broader family of chemicals known as per- and poly-fluoroalkyl substances (PFAS), which are an "urgent public health and environmental issue facing communities across the United States." *U.S. Environmental Protection Agency, PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (2021). The ComGen employee responded that the company had no knowledge of any PFOS or PFBS in the discharge. Because

of this statement, the VDEP felt comfortable issuing a permit that contained no set limits for the discharge of PFOS or PFBS and no requirements for the monitoring of such pollutants.

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is a national environmental and public interest organization based in Washington, D.C., with members located throughout Vandalia. SCCRAP and other environmental groups from Mammoth learned through a subpoena in separate, ongoing litigation that ComGen was fully aware the Vandalia Generating Station's discharges contained PFAS. The subpoena exposed that ComGen had actual knowledge of the discharge of PFOS and PFBS from the Vandalia Generating Station as far back as 2015. In almost all months, ComGen recorded discharge of PFOS or PFBS in concentrations as high as 15 ug/L and 35 ug/L, respectively. Through either deceit or incompetence, ComGen furnished the VDEP with inaccurate information regarding the specific pollutants the company knowingly dumps into the Vandalia River, which supplies drinking water for the residents of Mammoth.

In addition to river dumping, Vandalia Generating Station generates power through the combustion of coal, which produces coal combustion residuals ("CCRs"), commonly known as "coal ash." Coal ash contains contaminants like mercury, selenium, cadmium, and arsenic, which are associated with cancer and various other serious health effects. According to the EPA, these contaminants can leach into groundwater and drinking water sources, posing significant public health concerns.

ComGen has historically disposed of the Vandalia Generating Station's coal ash at the Little Green Run Impoundment (the "Impoundment"), formed by a dam to the east of the station. Prior to ComGen's announcement that it would close the station in 2018, the EPA published a rule in 2015 regarding the Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule") that regulates coal ash as solid waste according to subtitle D of the RCRA.

Hazardous and Solid Waste Management System, 80 Fed. Reg. 21,302. Companies are supposed to follow the rule of their own accord, and the EPA's 2015 Federal Register Notice identified citizen suits under § 7002 of the RCRA, 42 U.S.C. § 6972, as the main enforcement mechanism for violations of the CCR Rule.

ComGen submitted its initial "Permit Application for CCR Surface Impoundment" to the VDEP in December 2019, explaining its intent to follow EPA and state CCR regulations and close the Impoundment in place. ComGen's initial closure plan dates back to October 17, 2016, was amended in greater detail in both July 2019 and April 2020, and was included alongside the post-closure plans as part of the permit application at the end of 2019. The VDEP held a public hearing on March 30, 2021, where a SCCRAP representative among other community members argued for the permit's denial. Despite robust community opposition, the VDEP issued a Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment (the "Closure Permit") to ComGen in July 2021 that is valid until May 2031. The Closure Permit requires ComGen to follow the conditions as prescribed by the permit, the approved permit application, and federal CCR regulations regarding the management of CCR.

ComGen started their closure-in-place activities by installing 13 upgradient and downgradient groundwater monitoring wells for the Little Green Run Impoundment that help measure whether the Impoundment is preventing pollutants from leaching off site. These wells were operational by the end of 2021, and all reports that have been released since then have shown elevated levels of cadmium and arsenic above both Vandalia's groundwater quality standards and federal advisory levels. Industry and environmental groups believe the Impoundment was leaking for up to ten years before ComGen released its first monitoring report in 2021. SCCRAP is especially concerned about the closure plan's choice to store coal ash

permanently in contact with groundwater when it is already leaching into United States waters. Furthermore, because ComGen elected to store the coal ash below sea level, it is at an elevated risk of catastrophic failure if a flood or hurricane raised the water level enough to cause the coal ash to spill into the Vandalia River, which provides drinking water to the residents of Mammoth.

Lastly, SCCRAP's human health expert analyzed the downgradient monitoring well reports and has determined that groundwater downgradient of the site within 1.5 miles of the Impoundment is no longer safe to use as drinking water because of arsenic and cadmium groundwater contamination. This is especially troubling in light of a local housing developer's imminent plans to build a large subdivision less than a mile downgradient of the Impoundment with proposed plans to rely on well water as the development's primary source of drinking water. Several SCCRAP members are on the waiting list for the development, and they are now questioning that decision in light of the groundwater contamination. The leaching from the Impoundment and the discharges from the Vandalia Generating Stations have in the past and are currently impacting the members of SCCRAP's Mammoth chapter who fish, recreate, and own property in the Vandalia River and its watershed. They have changed their usage patterns specifically because of the PFAS, cadmium, and arsenic pollution, an injury that is directly traceable to the Vandalia Generating Station and the closure of the Little Green Run Impoundment.

SUMMARY OF THE ARGUMENT

The United States District Court for the Middle District of Vandalia should not have granted a Motion to Dismiss for any of SCCRAP's three claims. Its ruling allows ComGen's violation of the Clean Water Act to go unpunished by rendering as lawful illegal discharges of harmful chemicals into the Vandalia River. Its ruling also misinterprets existing Supreme Court

standing doctrine in holding that SCCRAP did not have standing to challenge the Little Green Run Impoundment closure plan. Finally, the district court adopts a faulty interpretation of the RCRA in holding that danger to the environment itself cannot support an imminent and substantial endangerment claim under the RCRA. The district court's ruling must be reversed and remanded for further proceedings.

The VDEP materially relied on ComGen's inaccurate statement that the Vandalia Generating Station was not discharging PFOS and PFBS into the Vandalia River. Evidence in the record indicates that ComGen was fully aware of the presence of PFOS and PFBS in the discharge, and their inaccurate statement is negligent at best and potentially criminal. In knowingly providing the VDEP with inaccurate information, ComGen violated the plain text of the CWA. As a result, ComGen cannot lawfully discharge PFOS and PFBS into the Vandalia River as the presence of these chemicals in the Vandalia Generating Station's discharges was not adequately disclosed.

The district court erroneously determined that the discharge of PFOS and PFBS was lawful simply because the harmful chemicals were not listed on ComGen's discharge permit. This reasoning is discordant with the Supreme Court's earliest jurisprudence on the CWA, the EPA's interpretation of the CWA, and the common understanding of all lower courts. All authorities agree: operators cannot lawfully discharge pollutants into the Nation's waters that were inadequately disclosed to regulators. This consensus does not rest on *Piney Run* or deference to agency interpretations of the CWA, but instead relies on the plain text of the CWA and Supreme Court reasoning that predates *Chevron*. The recent ruling in *Loper Bright* does not disturb this common-sense interpretation, which has stood since the CWA's inception.

Furthermore, the district court did have standing to rule on SCCRAP's challenge to the closure plan for the Little Green Impoundment. In holding sua sponte that it did not possess adequate subject matter jurisdiction, the court adopted a faulty understanding of modern Supreme Court standing doctrine that traces back to *Lujan v. Defenders of Wildlife.* While it correctly ruled that SCCRAP members had suffered injuries-in-fact, the district court ignored key evidence in the record that properly identifies these injuries-in-fact as traceable to ComGen's conduct and judicially redressable with a favorable decision.

Finally, the RCRA does support an imminent and substantial endangerment claim to the environment itself, as seen in well-settled opinions from Third and Tenth Circuits. In holding otherwise, the district court's opinion contradicts the plain text of the RCRA and clear legislative intent by Congress. The RCRA was explicitly designed to protect the now-contaminated groundwater near the Impoundment; that no one is currently using the groundwater as drinking water in no way reduces its intrinsic value.

ARGUMENT

I. The trial court erred in holding that ComGen's knowing discharge of undisclosed PFAS and PFBS from the Vandalia Generating Station was not a violation of the Clean Water Act.

In 1972, Congress passed the Clean Water Act ("CWA") in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The CWA was passed in order to address the failures of previous legislation, the Water Pollution Control Act of 1948, as amended by the Water Quality Act of 1965, which was the primary means of regulating water pollution prior to the CWA. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 264 (4th Cir. 2001). Under the 1948 legislation,

operators could discharge pollutants so long as their discharges did not reduce water quality below standards set by state regulators. *Id*. at 268. However, a given body of water has many streams of pollutants, making it difficult to prove that a particular operator's discharge reduced water quality below these standards. *See* S.Rep. No. 92–414 (1971); *see also Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000).

By "shift[ing] the focus away from water quality standards to direct limitations on the discharge of pollutants," the CWA fundamentally reformed the method of water pollution regulation. *Gaston Copper*, 204 F.3d at 151 (citing 33 U.S.C. § 1311). The CWA states that "the discharge of any pollutant by any person shall be unlawful" unless the discharge meets one of the statute's enumerated carve outs. 33 U.S.C. § 1311(a). The primary method by which an operator may lawfully discharge pollutants is in accordance with a permit issued by either the EPA or an authorized state agency, in this case the VDEP. *See* 33 U.S.C. § 1311(a), 1342(a), (c). The permitting authority relies on information from all relevant operators regarding the pollutants in their discharges and then calibrates each individual permit to maintain overall water quality standards. *Piney Run*, 268 F.3d at 266. In this way, the CWA accounts for the failures of previous legislation by no longer requiring a causal relationship between the degradation of water quality and a specific operator's discharges. *Id*. at 265. By receiving accurate information from all operators, the permitting authority can adequately calibrate an individual operator's allowable discharge levels and then simply determine whether the operator was in compliance with those levels. *Id*. at 265. Necessarily, these discharge permits are interdependent, where the permitting authority must account for the discharge of all operators in determining the appropriate levels of pollutant discharge for an individual permit holder. *Id*. at 266. Inaccurate or incomplete disclosures can undermine the CWA by denying the permitting authority the

information needed to write permits that adequately protect the environment. *In Re Ketchikan Pulp Co.*, 1998 WL 284964, at *14.

A. ComGen's behavior during the state permitting process makes the discharge of PFOS and PFBS into the Vandalia River unlawful and violates the plain text of the Clean Water Act.

The CWA defines "pollutant" 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. This definition is extremely broad, covering innumerable individual substances. *See, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 566 (5th Cir.1996) ("[T]he definition of 'pollutant' is meant to leave out very little"); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) (noting that there is "no principled reason why water itself, which is conceded to be a chemical, would not be considered a 'pollutant' under ... the Act"). It is unlawful for any person to discharge any pollutant unless the discharge is in compliance with an enumerated carve-out, which includes compliance with a discharge permit issued by a state authority like the VDEP.

In addition to placing limits on the discharge of pollutants, permits like the one issued to ComGen by the VDEP require compliance with the CWA's language on records, reports, and inspections—these are the CWA's "disclosure requirements," found in 33 U.S.C. § 1318. *See* 33 U.S.C. § 1342(b)(2) (requires State-level permitting authorities to "apply, and insure compliance with, all applicable requirements of section 1318"). The CWA's disclosure requirements, inter alia, "require the owner or operator of any point source to…provide such other information as [the Administrator] may reasonably require." 33 U.S.C. § 1318(a)(A)(v). As seen in the CWA's

section on the issuance of discharge permits, "Compliance with a permit issued pursuant to this section shall be deemed compliance…with sections 1311, 1312, 1316, 1317, and 1343 of this title." 33 U.S.C. §1342(k). Congress intentionally did not deem compliance with a permit as compliance with the CWA's disclosure requirements—section 1318 is not included in the quoted list of sections.

The district court erred in finding that ComGen violated no disclosure requirements. The district court bases this finding on the assertion that PFOS and PFBS were not pollutants that are specifically asked about in the formal permit application, but this is not the standard enumerated within the plain text of the CWA. When ComGen failed to provide the VDEP with accurate information about the presence of PFAS within the Vandalia Generating Station's discharges, the company failed to provide the Administrator with information that he may reasonably require, which they are required to provide under 33 U.S.C. § 1318. The breadth of the CWA's definition of "pollutant" covers PFAS chemicals, and the Administrator relies on operators to make accurate disclosures about the pollutants they intend to discharge. The Administrator's request for information regarding PFAS was reasonable, necessary to coordinate ComGen's permit with other permit holders in ensuring the water quality of the Vandalia River, and could have easily been complied with by ComGen. ComGen was well aware that they were discharging PFAS chemicals into the Vandalia river—it is inexplicable why they failed to indicate as much to regulators when asked directly over email.

The unsupportable finding by the district court with respect to ComGen's disclosure of pollutants infects the court's subsequent holdings. The district court adopts the reasoning in *Atlantic States* that "polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements." *Atlantic States Legal Found.*,

12 F.3d at 357. No party to this lawsuit contests this reasoning, which is supported by the text of 33 U.S.C. § 1342(k) that deems compliance with an operator's discharge permit as compliance with all relevant sections of the CWA except the Act's disclosure requirements. Seeing, however, that ComGen has directly violated the CWA's disclosure requirements, ComGen is not entitled to discharge pollutants that are not listed on their permit, meaning they are not entitled to discharge PFAS chemicals into the Vandalia River. Such a discharge is unlawful under 33 U.S.C. § 1311(a). If this court does not reverse, the EPA and state agencies would be relegated to repeat the failures of past legislation, as they would be incapable of coordinating the interdependent behavior of operators discharging pollutants. To find otherwise would allow operators to skirt disclosure requirements, willfully or otherwise, and knowingly dump any undisclosed pollutant into the Nation's waters. Such a result would directly contradict the reason Congress provided for amending prior legislation and passing the CWA.

It is worth noting that the authority of the VPDES, as administered by the VDEP, is contingent upon approval by the EPA Administrator (the "Administrator"). *See* 33 U.S.C. § 1342(b). By statute, the Administrator has the obligation to approve state-level permitting programs like the VPDES "unless he determines that adequate authority does not exist" under such programs to issue permits which can be terminated or modified for cause including the obtaining of a permit "by misrepresentation, or failure to disclose fully all relevant facts." 33 U.S.C. § 1342(b)(1)(C)(ii). If this court fails to reverse, it will threaten state agencies' ability to use their statutorily-derived authority, thereby threatening the federalist system of regulation that Congress has enacted.

Further, while this case has been brought as a citizen civil suit pursuant to 33 U.S.C. § 1365, the CWA also allows for the Administrator "to commence a civil action for appropriate

relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order," which includes violations of disclosure requirements. 33 U.S.C. § 1319(b). The CWA goes on to detail the levels of culpability required for criminal action against any violator of the CWA, whether it be negligently or knowingly. 33 U.S.C. § 1319(c). The record contains little detail on why ComGen provided the VDEP with inaccurate information about the presence of PFAS chemicals in the Vandalia Generating Station's discharge. This court must reverse and remand for further proceedings and discovery on the egregiousness of ComGen's behavior, which may include criminality.

B. ComGen's liability does not rely on Piney Run or deference to the EPA's guidance on the unpermitted discharges of pollutants

Deference has historically been given to the EPA's interpretation of 33 U.S.C. § 1342(k), the so-called "shield provision," which indicates that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance…with sections 1311, 1312, 1316, 1317, and 1343 of this title." 33 U.S.C. §1342(k). The motivation for deference has been the ambiguous scope of the permit's protection. *See Atlantic States Legal Found.*, 12 F.3d at 357–58 (concluding the shield provision's language is ambiguous with respect to scope of coverage). The critical question in the line of cases that inform the instant case is whether a discharge permit shields an operator from consequence for the discharge of pollutants that are not listed on their permit. *Piney Run*, 268 F.3d at 266.

The parties to this lawsuit, the district court, and the reasoning of *Atlantic States* all agree on a single interpretation of the scope of the CWA's shield provision: that "polluters may discharge pollutants not specifically listed in their permits *so long as they comply with the appropriate reporting requirements*." 12 F.3d at 357 (emphasis added).

When interpreting the shield provision of the CWA, the Second Circuit in *Atlantic States* relied heavily on a prior Supreme Court ruling which noted that "[t]he purpose of [Section 1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 138 n. 28 (1977). This Supreme Court decision predates *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, and the interpretation therein of the CWA's shield provision in no way relied on agency deference. 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The Second Circuit ultimately found against the plaintiffs in *Atlantic States* because their suggestion that the shield provision did not cover pollutants that were unlisted on the permit would run counter to the Supreme Court's *E.I. du Pont* ruling. *Atlantic States Legal Found.,* 12 F.3d at 357 ("Atlantic States' view of the regulatory framework stands [the Supreme Court's] scheme on its head"). The reasoning in *Atlantic States* is bolstered by agency deference under the standards of *Chevron*, however the Second Circuit's decision in no way rests on agency deference, hence the district court's reliance on the decision in adjudicating the instant case.

Six years after *Atlantic States* was decided, the EPA relied heavily on the Second Circuit's decision when administering the proceedings of *In Re Ketchikan Pulp Co.,* an Environmental Appeals Board decision which held that "[w]hen the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of [the discharge permit], even though the permit does not expressly mention those pollutants." 1998 WL 284964, at *11. This very same holding was adopted by the Fourth Circuit in *Piney Run*, which relies on frequent positive citations to both *Atlantic States* and the *In re Ketchikan Pulp Co.* litigation. When rejecting *Piney*

Run in favor of *Atlantic States*, it is clear the district court in the instant case did not realize that the two cases are in complete agreement on the scope of the shield provision. This court should reverse the district court's haphazard reasoning as it is so empowered under a *de novo* standard of review.

ComGen's liability for discharging pollutants does not rest on agency deference in interpreting the CWA's shield provision. The line of jurisprudence leading up to this case rests instead on the twin goals of liability insulation for operators and finality, as identified by the Supreme Court in 1977. *E.I. du Pont*, 430 U.S. at 138 n. 28. The permit shield provision in 33 U.S.C. § 1342(k) allows for compliance with a permit to act as a final determination of an operator's compliance with all relevant portions of the CWA, so long as they are also compliant with the disclosure requirements of 33 U.S.C. § 1318. This contingency is sensible, clearly contemplated by Congress' exclusion of 33 U.S.C. § 1318 from the scope of the CWA's shield provision, and is well understood by district courts. *See, e.g., Atlantic States Legal Found., Inc. v. Reynolds Metals Co.*, No. 88-CV-640, 1990 U.S. Dist. LEXIS 19077, at *13-*16 (N.D.N.Y. Feb. 16, 1990) (discharge of PCBs violated the CWA where discharge permit did not restrict discharge of PCBs due to defendant's failure to disclose its presence to regulators); *United States v. Tennessee Gas Pipeline*, No. 91-1428 (W.D.La. Oct. 8, 1991) (shield provision defense was rejected in a motion to dismiss because there was a factual dispute as to whether defendant knowingly withheld information requested in the permit application); *United States v. Tom-Kat Dev. Inc.*, 614 F.Supp. 613, 616 (D. Alaska, 1985) (shield provision defense rejected based on Tom-Kat's failure to obtain a permit)

C. *The EPA's guidance on the unpermitted discharges of pollutants meets the Skidmore standard and may be deferred to in light of the Supreme Court's decision in Loper Bright*

In 2024, the Supreme Court reversed the *Chevron* decision and substantially lowered the amount of deference to be given towards agency interpretations of ambiguous federal statutes. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). As a result, "[t]he weight [accorded to an administrative] judgment in a particular case will depend upon 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." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). The EPA's interpretation of the CWA's shield provision and the consequences of that interpretation on the unpermitted discharges of pollutants meets this *Skidmore* standard.

The EPA's interpretation of the CWA's shield provision is codified by the Environmental Appeals Board (the "Board") opinion *In re Ketchikan Pulp Co.*, 1998 WL 284964. This was the agency promulgated interpretation, pursuant to a notice-and-comment rulemaking or a formal adjudication, that the Second Circuit relied on in deciding *Piney Run*. 268 F.3d at 267 (citing *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)).

In a 24-page opinion, the Board exhaustively reviews the CWA's shield provision and its implication on the unpermitted discharge of pollutants. The Board looks at the CWA's statutory language, the resulting regulations, and judicial decisions. The Board recognizes that, "Although in theory the Agency could structure permits to prohibit the discharge of all pollutants except those listed in the permit, such an approach would require the Agency to include in the permit a list of every pollutant or combination of pollutants that conceivably might be contained in the

applicant's wastestreams." *In Re Ketchikan Pulp Co.*, 1998 WL 284964, at *9. The Board determines that, "Since any given wastestream may contain hundreds of pollutants, such a permit-writing approach would be unduly burdensome and costly, and ultimately, impractical." *Id*. at *9. The Board's reasoning closely mirrors that in *Atlantic States*, ultimately sharing in the conclusion that "polluters may discharge 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 *10 (quoting *Atlantic States*, 12 F.3d at 357) (emphasis added).

As for what constitutes compliance with the CWA's disclosure requirements, the Board surveys federal district courts to determine that "where the discharger has not adequately disclosed the nature of its discharges to permit authorities, and as a result thereof the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants has been held to be outside the scope of the permit." *Id*. at *11. This is because "the disclosures made by permit applicants during the application process constitute the very core of the NPDES permitting scheme." *Id*. at *11. These disclosures "provide the information which permit writers need to determine what pollutants are likely to be discharged in significant amounts and to set appropriate permit limits." *Id*. at *11.

The Board's opinion in *In re Ketchikan Pulp Co.* is consistent with prior judicial opinions. The Board's interpretation of the CWA's shield provision is rooted in the twin-goals of liability insulation for operators and finality, as explained by the Supreme Court in its third consideration of the CWA in 1977, less than five years after the Act's passage. *E.I. du Pont,* 430 U.S. at 138 n. 28. Using the *E.I. du Pont* ruling as an inception point, the Board goes on to positively cite a series of circuit court and trial court opinions that adopt the Board's

interpretation. *See, e.g., Natural Resources Defense Council v. EPA*, 822 F.2d 104, 109-110 (D.C.Cir.1987) (cited for the assertion that the CWA allows for the discharge of pollutants in line with the Act's limitations); *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976) (cited for the assertion that discharge permits transform general discharge limitations into operator-specific limitations); *Atlantic States Legal Found.*, 12 F.3d 353, and *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1200-1201 (E.D.Cal.1988) (both cited for the assertion that the discharge of unlisted pollutants is permissible when the pollutants have been disclosed to authorities during the permitting process). The Board's opinion contains no negative citation to any judicial opinion or authority. The Board's opinion has been cited in eleven federal opinions, positively in all instances. *See, e.g., Tennessee Clean Water Network v. Tennessee Valley Auth.*, 206 F. Supp. 3d 1280, 1301 (M.D. Tenn. 2016); *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d 1041, 1050 (N.D. Ill. 2016); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287 (6th Cir. 2015); *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014).

The EPA's interpretation of the CWA's shield provision and its consequences on the discharge of unpermitted pollutants is thorough, valid, and consistent with earlier and later pronouncements, particularly judicial opinions. However, if the enumerated elements in *Skidmore* are satisfied, judicial deference to agency interpretations is not then required by any court. 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). *Skidmore* requires only a low level of deference to agency interpretations, and courts must consider "all those factors which give [an administrative judgment] power to persuade." *Id.* at 140. The EPA is properly concerned with the costs, burdens, and practicality of the CWA and its resultant regulations. *In Re Ketchikan Pulp Co.*, 1998 WL 284964, at *9. Given the EPA's guidance on the regulation of

PFAS chemicals, the burdens imposed by a reversal, remand, and potential finding against ComGen are expected to be particularly low.

The EPA has described the potential need to develop monitoring requirements and or limitations relating to PFAS, for which there are not currently general water-quality based effluent limitations. *Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power*, 89 Fed. Reg. 40198 (May 9, 2024) (to be codified at 40 C.F.R. pt. 423). The steam-electric power sector was not identified as one of the top PFAS dischargers, however the EPA has noted that PFAS may be present in steam-electric discharges, as is the case with the Vandalia Generating Station. *Id*. Because of this, the EPA stated it would "proactively use existing [permitting] authorities to reduce discharges of PFAS at the source and obtain more comprehensive information through monitoring on the sources of PFAS and quantity of PFAS discharged by these sources." *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (October 18, 2021). This proactive use of existing permitting authorities is what motivated the VDEP inquiry into the level of PFAS in the Vandalia Generating Station's discharges.

In addition to making the VDEP's inquiry about PFAS discharges into the Vandalia river look reasonable, these pieces of EPA regulation and strategy show that ComGen was unlikely to face burdensome requests by regulators. The health and water-quality implications of PFAS discharges are not fully understood at this time, and the EPA has yet to impose strict limits on these discharges. *Id*. At present, the EPA is mostly concerned with monitoring and data-collection so that sensible discharge limits can be developed—the most recent effluent limitations guidelines show that the EPA "continued to focus on and evaluate the extent and nature of [PFAS] discharges and assess opportunities for limiting those discharges from multiple industrial categories." *Effluent Guidelines Program Plan 15*, 88 Fed. Reg. 6258 (Jan. 31, 2023)

(uncodified Notice). The steam-electric power sector is not one of the industrial categories outlined for the limitation of discharges. *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (October 18, 2021).

Despite ComGen's inaccurate statements to the VDEP, the company has been aware that PFAS are being discharged from the Vandalia Generating Station since at least 2015. They are actively monitoring these discharges and could have easily provided their records to the VDEP in order to aid in the development of water-quality standards with regard to PFAS discharges. It is unlikely that ComGen would be subject to any discharge limitations if they had complied with the CWA's disclosure requirements, as is their legal obligation. If this court reverses and remands this case for further proceedings, the injunctive relief that may follow is unlikely to be burdensome on ComGen. However, if further proceedings do uncover a high degree of culpability associated with the inaccurate statements by ComGen to the VDEP, the monetary and criminal penalties may be significant, as prescribed by the enforcement section of the CWA. 33 U.S.C. § 1319.

II. The trial court erred in holding that SCCRAP did not have standing under the RCRA to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment.

The RCRA authorizes two types of private suits: private suits against those alleged to have violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to the RCRA," and private suits against those who have "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). The Supreme

Court has interpreted this language in the RCRA as a provision "which permits private citizens to enforce its provisions in some circumstances." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484, 116 S. Ct. 1251, 1254, 134 L. Ed. 2d 121 (1996). This case is one of those particular circumstances—SCCRAP has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment.

For a plaintiff to exercise a citizen-suit provision, standing is necessary. The Supreme Court established the modern requisite elements for standing in *Lujan v. Defenders of Wildlife*: an injury-in-fact that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" traceable to the conduct of the defendant; and redressable by a favorable judicial decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Crucially, after *Lujan*, the Supreme Court also clarified that an organization "has standing to bring suit on behalf of its members when its 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." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

ComGen did not raise the issue of standing, but the district court relied on the reasoning in *Mobile Baykeeper, Inc. v. Alabama Power Co.*, No. CV 1:22-00382-KD-B, 2024 WL 54118 (S.D. Ala. Jan. 4, 2024) to determine that SCCRAP's lack of standing meant the court did not have the subject matter jurisdiction to decide the issue. While the Court correctly determined that

the recreational and aesthetic injuries SCCRAP suffered constituted an injury-in-fact, it erred in holding that those injuries were not traceable to ComGen's conduct or judicially redressable.

A. SCCRAP's injuries are traceable to the Closure Plan of the Little Green Run Impoundment.

Courts have been clear that there is no defined or exacting traceability standard like the "facial plausibility" standard developed by the Supreme Court. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The standard for traceability is, for example, "less stringent" than the doctrine of "proximate cause" established in tort-law in the famous case of *Palsgraf v. Long Island Railroad Co.* by Justice Benjamin Cardozo. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019). In the case at bar, ComGen's conduct does not have to be "the very last step in the chain of causation" for it to be considered fairly traceable to SCCRAP's injury-in-fact. *Bennett v. Spear*, 520 U.S. 154, 168–69, 117 S. Ct. 1154, 1164, 137 L. Ed. 2d 281 (1997).

The only concrete demonstration that SCCRAP must make for this court to find the injury-in-fact to be traceable to the Closure Plan and ComGen's alleged infractions of the CCR rule is that there is "*de facto* causality." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986). In fact, courts—including the Eleventh Circuit court that would hear a hypothetical appeal in the *Mobile Baykeeper, Inc.* case upon which the district court so heavily relied for its standing analysis—have consistently said that "even harms that flow indirectly from the action in question can be said to be "fairly traceable" to that action for standing purposes." *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003). The governing precedent is that "a plaintiff lacks standing…if an independent source would have caused him to suffer the same injury." *Swann v. Sec'y, Georgia*, 668 F.3d 1285, 1288 (11th Cir. 2012).

However, an independent source would not have caused SCCRAP's members to suffer the same injury-in-fact they have suffered here. In *Mobile Baykeeper, Inc.*, Baykeeper provided no evidence directly showing that the leaching of coal ash into the Mobile River from Plant Barry was affected in any way by the Closure Plan. *Mobile Baykeeper, Inc.*, 2024 WL 54118. Baykeeper alleged that the unlined Plant Barry coal ash impoundment had been leaching for decades and essentially assumed that it would continue leaching during and after the conclusion of Alabama Power Company's closure plan. *Id.* Absent any evidence to the contrary, it was reasonable for the United States District Court for the Southern District of Alabama to conclude that Baykeeper's harm was directly traceable only to the impoundment itself rather than Alabama Power's closure plan. *Id*.

In the case at bar, however, both ComGen and SCCRAP have produced evidence of elevated arsenic and cadmium groundwater contamination since ComGen began closure-in-place activities in 2019. Every report that has been released since ComGen installed 13 upgradient and downgradient groundwater monitoring wells for the Little Green Run Impoundment has shown elevated levels of arsenic and cadmium above federal advisory levels and Vandalia's own groundwater standards. That environmental and industry groups believe the Little Green Run Impoundment was leaking for up to ten years before these reports were first released in 2021 has no bearing on whether the Closure Plan has exacerbated the pollutants shown in every published report since closure-in-place activities began in 2019. If ComGen had evidence to indicate that the arsenic and cadmium levels have either stayed the exact same or even gone down since closure-in-place activities began in 2019, then this case would more directly analogize to *Mobile Baykeeper, Inc.*, 2024 WL 54118. ComGen has produced no evidence in the record that the elevated levels of arsenic and cadmium are entirely a result of pre-closure activities, which

would be necessary for this court to rule that the injuries-in-fact suffered by SCCRAP are not traceable to ComGen's closure plan. One reason the Twelfth Circuit should reverse and remand is to effectively undo an inference made by the district court that an absence of evidence is the evidence of absence.

Even if this court felt that it was incumbent upon SCCRAP rather than ComGen to show that the elevated levels have not in any way been exacerbated by the Closure Plan, SCCRAP provided another data point that proves their injuries-in-fact are traceable to the closure-in-place activities. SCCRAP's human health expert analyzed the downgradient monitoring well reports from ComGen and determined that that groundwater downgradient of the site within a mile-and-a-half of the Impoundment is not safe to use as drinking water. This determination may prove fatal to a local housing developer's plans to build a large subdivision in that area that relied on well water as its primary source of drinking water. Several SCCRAP members are on the waiting list for that development and now may no longer feel comfortable proceeding. That the housing development has not yet broken ground is irrelevant to the question of traceability. The facts would be the same had the developer symbolically cut a ribbon to break ground. As housing supply fails to keep up with demand, interest rates for 30-year mortgages remain north of seven percent, and the cost of existing homes continues to skyrocket, SCCRAP members having to take their names off housing development waiting lists because of contaminated drinking water constitutes a direct harm. Indeed, it is a far more direct harm than the "harms that flow indirectly from the action in question" standard for traceability referenced previously by the Eleventh Circuit. *Focus on the Fam.*, 344 F.3d at 1275.

B. SCCRAP's injuries are also judicially redressable.

The standard for whether an injury-in-fact is judicially redressable is "a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the "case or controversy" requirement of Art. III." *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 79, 98 S. Ct. 2620, 2633–34, 57 L. Ed. 2d 595 (1978). In *Mobile Baykeeper, Inc.*, the court noted that "Ordering that Alabama Power file a closure plan for the Plant Barry Ash Pond that satisfies the Federal CCR Regulations and the RCRA could only possibly alleviate a procedural injury, not Baykeeper's concrete injuries in fact." 2024 WL 54118, at *13. This conclusion on redressability is again tied to the fact that Baykeeper produced no affirmative evidence to indicate that the Closure Plan in any way exacerbated the leaching that occurred long before closure-in-place activities began, and given that traceability and redressability are often co-dependent variables, it made sense for the court to conclude in that case that no traceability means no redressability.

Once again, this case is different. Given the years of data from the upgradient and downgradient groundwater monitoring wells, it is wholly conceivable that an injunction preventing ComGen from further implementing the plan would have a positive effect on the elevated levels of arsenic and cadmium currently found in the groundwater. In that scenario, a favorable judicial decision on this issue has the potential to make the SCCRAP members who are currently uncomfortable recreating, fishing, and owning property in the Vandalia River and its surrounding watershed comfortable doing so again. Additionally, a decision that requires ComGen to alter the closure-in-place plan has the potential to take off the board a substantial outstanding risk that the elevated levels of arsenic and cadmium could eventually reach the Vandalia River, which supplies drinking water to residents of Mammoth.

In light of these facts, it is clear that the United States District Court for the Middle District of Vandalia erred in holding that SCCRAP did not have standing to bring suit under the RCRA.

III. The trial court erred in holding that SCCRAP could not pursue an imminent and substantial endangerment claim under the RCRA related to the Little Green Run Impoundment with an allegation of endangerment to the environment itself.

This Court is reviewing this case *de novo*, and as such it has a clear opportunity with this issue of first impression to align the Twelfth Circuit with the Third and Tenth Circuits in holding that the RCRA supports an imminent and substantial endangerment claim to the environment itself, even though the Complaint fails to allege a form of endangerment or exposure pathway to a living population.

The language of the RCRA reads: "The generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902. A plain meaning analysis of this text reveals that Congress passed the RCRA for two primary reasons: to protect "human health" and to protect "the environment." *Id.* One is not listed as more or less valuable than the other, and the language does not read "to minimize the present and future threat to the environment only when a living population is endangered." The clear legislative intent by Congress in passing this statute is to protect the environment itself whenever and wherever possible, a goal that was undermined by the district court's decision in this case.

In *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, the Third Circuit held that 42 U.S.C. § 6972(a)(1)(B) "imposes liability for endangerments to the environment, including water in and

of itself." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005). This holding permits a court to find an organization like ComGen liable under the RCRA for endangering the environment itself rather than a specific living population. The Tenth Circuit later embraced this conclusion from *Interfaith*, holding "Section 6972(a)(1)(B)'s phrasing in the disjunctive indicates proof of harm to a living population is unnecessary to succeed on the merits." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007).

Although courts have observed that "the standard for finding that there may be an imminent and substantial endangerment to the environment 'in and of itself' (i.e., in the absence of a living population) is underdeveloped" in the case law, this court has an opportunity to adopt a prominent interpretation of the *Interfaith* decision that will strengthen environmental protections in Vandalia for generations to come. *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 454 (E.D. Pa. 2015). Under that interpretation, the key factor for the court in upholding an imminent and substantial endangerment claim is whether "there is a risk that the environment will be altered negatively by the presence of a pollutant…In other words, RCRA would operate to preserve the existing state of nature, and any contamination that alters it constitutes a per se violation of RCRA." *Id.*

The case at bar illustrates why the Court should adopt this interpretation of the RCRA. Even though the groundwater is not currently being used for drinking water, it should still be protected from contamination both because of the inherent value of a potential drinking water source and the downstream effects that are currently evident as a result of ComGen's actions. A proposed housing development that would have brought economic activity in the form of construction jobs and increased housing supply is now threatened because it would have relied on the contaminated groundwater as its primary source of drinking water. This is an example of

the type of collateral consequence against which the RCRA is trying to guard, and it would greatly benefit the jurisdictions contained within the Twelfth Circuit to adopt this interpretation of the *Interfaith* decision as binding law.

Finally, this Court should note that the Supreme Court has previously held that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez,* 594 U.S. 413, 434, 141 S. Ct. 2190, 2210, 210 L. Ed. 2d 568 (2021). In this case, SCCRAP has identified that ComGen's decision to permanently store coal ash below sea level in the Little Green Run Impoundment presents an elevated risk of catastrophic failure if natural disasters—the severity and numbers of which are increasing in the United States and worldwide—caused the water level to rise enough that the coal ash would spill into the Vandalia River. Given the reliance of Mammoth residents on the river for drinking water, there is another framework by which this court can choose on *de novo* review to ascertain whether the Little Green Run Impoundment presents an imminent and substantial endangerment to either the environment itself or the population of Mammoth.

CONCLUSION

For the above stated reasons, appellant respectfully requests that the United States Court of Appeals for the Twelfth Circuit reverse the district court's Motion to Dismiss and remand for further proceedings consistent with SCCRAP's single claim pursuant to the Clean Water Act and two claims pursuant to the Resource Conservation and Recovery Act.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 26