No. 24-0682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

MARCH TERM 2025

STOP COAL COMBUSTION RESIDUAL ASH PONDS,

Appellant,

v.

COMMONWEALTH GENERATING COMPANY,

Appellee.

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

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BRIEF FOR APPELLEE

Team 3
Counsel for Appellee

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, the District Court for the Middle District of Vandalia had jurisdiction of the case docketed as No. 24-0682. The district court's federal question was based on an alleged violation of the Clean Water Act, 33 U.S.C. § 1365(a), and Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The final order being appealed from was issued October 31, 2024, and disposed of all issues. The notice of appeal was timely filed on November 10, 2024. Fed. R. App. P. 4(a). Accordingly, this appeal is properly before the United States Court of Appeals for the 12th Circuit.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Commonwealth Generating Company's ("ComGen") discharge of PFOS and PFBS is permitted under the Clean Water Act's Permit Shield Provision when they are not listed on the permit, but no statute or regulation required their disclosure, the relevant operating processes were disclosed, and the permitting authority contemplated their presence independently;
2. Whether, in deciding Issue 1, the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA guidance on unpermitted discharges when the Supreme Court's decision in *Loper Bright* returned the power of statutory interpretation to the courts and did not preserve *stare decisis* for *Chevron*-based holdings;
3. Whether Stop Coal Combustion Residual Ash Ponds ("SCCRAP") has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment when the alleged injuries stem from prior leaching of chemicals; and

4. Whether SCCRAP can pursue its RCRA imminent and substantial endangerment claim when there is no allegation of endangerment to a living population but only to the environment itself, absent evidence of the specific harms posed.

STATEMENT OF THE CASE

I. FACTUAL SUMMARY

A. Coal Combustion Residuals and the Little Green Run Impoundment

Coal combustion residuals ("CCRs"), commonly known as coal ash, are byproducts generated from coal combustion at electric power plants. R. at 3. Coal ash contains hazardous contaminants such as mercury, selenium, cadmium, and arsenic, that pose potential public health risks if they leach into groundwater. *Id.* The Little Green Run Impoundment, owned by Commonwealth Generating Company ("ComGen"), is an unlined surface impoundment where CCRs are disposed. *Id.* Located adjacent to the Vandalia Generating Station and Vandalia River, it spans approximately .111 square miles and contains less than .008 cubic miles of CCRs. *Id.*

B. Commonwealth Generating Company

ComGen operates coal-fired power plants, including the Vandalia Generating Station, and provides electricity across nine states. R. at 3. ComGen employs over 1,500 workers in Vandalia and has promoted environmental initiatives for over a decade, including its "Building a Green Tomorrow" program, which aims to transition to renewable energy. *Id.* at 4. ComGen plans to retire coal plants and build renewable energy facilities, including five solar and two wind farms. *Id.* The Vandalia Generating Station is slated for closure by 2027. *Id.* These initiatives will lower energy costs while reducing pollution for all of Vandalia. *Id.*

The generating station operates under a Vandalia Pollutant Discharge Elimination System ("VPDES") permit, which sets discharge limits for various pollutants. *Id.* The Vandalia

Department of Environmental Protection ("VDEP") issued the permit on July 30, 2020, and it became effective on September 1, 2020. *Id.* VPDES is an approved state alternative to the EPA's federal National Pollutant Discharge Elimination System ("NPDES"). *Id.* at 10–11. The permit does not regulate PFOS and PFBS, which are both types of perfluoroalkyl substances ("PFAS"), despite evidence of PFAS being present in CCRs. *Id.* at 4. A VDEP deputy director informally inquired about PFAS discharges and a ComGen employee expressed that PFAS were not known to be present. *Id.* VDEP made no further inquiries regarding PFAS discharges. *Id.* at 4–5.

C. Closure of Little Green Run Impoundment

The EPA's 2015 rule on the Disposal of Coal Combustion Residuals from Electric Utilities ("CCR Rule"), later supplemented by the Water Infrastructure Improvements for the Nation Act, established requirements for closing CCR impoundments. R. at 5. Under Vandalia's state-approved program, ComGen opted for "closure in place" for the Little Green Run Impoundment, avoiding costly upgrades. *Id.* at 6. Closure plans involve capping the impoundment and installing groundwater monitoring wells. *Id.* Public hearings and comments revealed some opposition to the closure plan, but after considering the overall public opinion and its own CCR regulations, VDEP determined that it was appropriate to issue a closure permit valid until 2031. *Id.* at 6–7. ComGen has already invested $50 million in compliance activities, with total costs projected to exceed $1 billion. *Id.* at 7.

During ComGen's ongoing compliance with the closure permit, groundwater monitoring detected arsenic and cadmium above federal and state standards in downgradient wells. *Id.* at 8. No contamination has reached the Vandalia River, but environmentalists remain concerned about the potential long-term risks. *Id.*

D. Stop Coal Combustion Residual Ash Ponds ("SCCRAP")

SCCRAP, a national environmental organization, has targeted coal ash impoundments for their environmental risks. R. at 8. SCCRAP's testing downstream of the Vandalia Generating Station identified PFOS and PFBS in discharge waters, corroborating ComGen's past internal monitoring data. *Id.* at 9. SCCRAP alleges that ComGen failed to disclose these pollutants to VDEP and that they are outside the scope of ComGen's VPDES permit. *Id.* at 12. SCCRAP also contests ComGen's closure plan for the Little Green Run Impoundment, citing ongoing leaching of contaminants into groundwater for the last five to ten years and risks of failure due to flooding or rising water tables. *Id.* SCCRAP's local members have restricted their recreational activities in the Vandalia River due to contamination concerns, diminishing their use and enjoyment of the area. *Id.* at 10.

II. PROCEDURAL HISTORY

A. Party Filings

Following VDEP's approval of ComGen's Closure Plan, SCCRAP filed a citizen suit against ComGen on September 3, 2024, in the United States District Court for the Middle District of Vandalia. R. at 12. SCCRAP initiated the suit after the requisite ninety-day notice period following their letter of intent to sue. *Id.* In its Complaint, SCCRAP brought three claims: one under the Clean Water Act ("CWA") and two under the Resource Conservation and Recovery Act ("RCRA"). *Id.*

SCCRAP alleged that ComGen violated the CWA by discharging PFOS and PFBS into the Vandalia River without a valid permit for these pollutants. *Id.* SCCRAP argued these pollutants were not within the reasonable contemplation of the permitting authority when the VPDES permit was issued and alleged misrepresentation by ComGen to VDEP regarding the

presence of PFAS. *Id.* SCCRAP sought declaratory relief, injunctive relief to halt discharges until proper permitting, and civil penalties. *Id.*

SCCRAP contested the adequacy of ComGen's Closure Plan under the RCRA and CCR Rule, alleging violations of 40 C.F.R. §§ 257.102(d)(1)(i), (d)(1)(ii), and (d)(2)(i). R. at 12. They sought injunctive relief to prevent ComGen from proceeding with the Closure Plan. *Id.* SCCRAP also claimed that the Little Green Run Impoundment's consistent exceedances of arsenic and cadmium at downgradient wells presented an imminent and substantial endangerment to the environment. *Id.* SCCRAP did not allege endangerment to a living population, but they pointed to the potential future use of groundwater as drinking water. *Id.* at 12–13. SCCRAP sought declaratory and injunctive relief as well as civil penalties. *Id.* at 13.

On September 20, 2024, ComGen filed a motion to dismiss all of SCCRAP's claims. *Id.* Regarding the CWA claim, ComGen argued that the reasoning of *Piney Run v. Cnty. Comm'rs*, which the 12th Circuit adopted in 2018, was inapplicable to the present case because PFOS and PFBS are not statutory pollutants and were not inquired about in ComGen's permit application. R. at 13. ComGen further contended that reliance on *Piney Run* was improper after the Supreme Court's decision in *Loper Bright*. R. at 13. Instead, ComGen urged the court to follow the reasoning in *Atl. States v. Eastman Kodak*. R. at 13.

ComGen argued that SCCRAP's RCRA allegations were conclusory and failed to plead specific facts establishing violations of the CCR Rule. *Id*. ComGen further asserted that the RCRA does not recognize endangerment claims limited to environmental harm without an exposure pathway to living populations. *Id.* After expedited briefing, SCCRAP submitted its response on October 8, 2024, and ComGen filed its reply on October 15, 2024. *Id.*

B. District Court's Decision

On October 31, 2024, the District Court granted ComGen's Motion to Dismiss. *Id.* Regarding the CWA Claim, the court declined to follow *Piney Run* and instead adopted the reasoning of *Atl. States*. R. at 14. It concluded that ComGen's permit shield defense applied because PFOS and PFBS were not pollutants requiring disclosure in the permit application. *Id.*

The court determined that SCCRAP lacked standing to challenge the Closure Plan on its RCRA claims. *Id.* It found SCCRAP's injuries were not traceable to ComGen's Closure Plan and instead arose from historical contamination unrelated to closure activities. *Id.* Consequently, the court did not address the substantive merits of the claim and ruled that RCRA does not support claims of environmental endangerment absent an exposure pathway to living populations. *Id.* It further held that contamination alone, without demonstrated harm to living organisms, fails to establish an imminent and substantial endangerment. *Id.*

C. Appeal to the 12th Circuit

On November 10, 2024, SCCRAP filed a notice of appeal to the United States Court of Appeals for the 12th Circuit, seeking reversal of the District Court's rulings. R. at 15. On December 30, 2024, the 12th Circuit issued an order outlining the issues to be briefed and argued on appeal. *Id.* at 1–2, 15.

SUMMARY OF THE ARGUMENT

After *Loper Bright*, the reasoning in *Piney Run* is no longer binding on this Court. The purpose of *Loper Bright* was to restore the power of statutory interpretation to the *courts*. If *Piney Run* is binding, that power remains with the EPA as to 33 U.S.C. § 1342(k). Instead, *Loper Bright* directs this Court to give no precedential value to *Piney Run's* holdings on the merits and only non-binding *Skidmore* deference to the EPA's interpretation.

Applying *Skidmore* deference to the EPA's opinion in *In re Ketchikan*, this Court should adopt the reasoning in *Atl. States v. Eastman Kodak* and find that ComGen's PFOS and PFBS discharges were permitted because regulations did not require their disclosure. Even if the Court considers *Piney Run* precedential, its reasoning is inapplicable to this case. Even if it were applicable, the discharges would still be permitted because they were adequately disclosed and within the contemplation of VPED.

SCCRAP lacks standing to challenge the closure plan for the impoundment because most of its alleged injuries are speculative and uncertain. Its aesthetic injuries from members' reduction in recreation in response to the contamination lack a sufficient causal relationship to the closure plan because the contamination preceded the implementation of the closure plan by at least five to ten years. Halting the plan's implementation would not redress SCCRAP's injuries, as there is no indication that closure plan activities contributed to the contamination.

SCCRAP cannot bring an imminent and substantial danger claim under the RCRA concerning the environment because only an endangerment affecting a living population can be "substantial." Allowing this claim absent allegations of endangerment to life would overextend the RCRA by disregarding the requirement of substantialness.

STANDARD OF REVIEW

A denial of a motion to dismiss is subject to *de novo* review. *Highmark Inc. V. Allcare Health Mgmt. Sys. Inc.*, 572 U.S. 559, 563 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("'questions of law' are 'reviewable *de novo*'"). A plaintiff must plead sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007). The responding plaintiff must provide the grounds for their entitlement to relief, which requires more

than labels and conclusions; a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678. A plaintiff must allege sufficient facts to create more than a possibility that a defendant has acted unlawfully. *Iqbal*, 556 U.S. at 678. A court is not bound to accept legal conclusions framed as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

ARGUMENT

I. APPLYING *LOPER BRIGHT*, THIS COURT IS NOT BOUND BY *PINEY RUN* AND MUST EXERCISE INDEPENDENT JUDGMENT TO INTERPRET THE CWA'S PERMIT SHIELD PROVISION.

A. Loper Bright Returned the Power of Statutory Interpretation from Agencies to the Courts.

Following *Loper Bright Enters. v. Raimondo*, the Supreme Court now directs federal courts to "exercise their independent judgment" when interpreting ambiguous statutes. 603 U.S. 369, 412 (2024). As the court engraved *Chevron*'s tombstone, they confirmed that statutory interpretation is a power that properly belongs to the judiciary, *not* the agencies. *Id.* at 413.

Chevron deference required courts to apply a two–part test when reviewing "an agency's construction of the statute[s]" they administered. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). First, the test asked if the statute was ambiguous regarding "the precise question at issue." *Id.* at 842–43. If so, the courts asked "whether the agency's [interpretation was] based on a permissible construction of the statute." *Id.* If the agency's construction met the extraordinarily low bar of being "reasonable,"[1] the interpretation was

[1] *Chevron* differentiated between implicit and explicit legislative gaps. 467 U.S. at 843–44. For *explicit* gaps, *Chevron* required that agency interpretations not be "arbitrary, capricious, or manifestly contrary to the statute." *Id.* For *implicit* gaps, *Chevron* required the agency interpretation to be "reasonable." *Id.* Because *Piney Run* involves an *implicit* legislative gap, only the "reasonable" standard is considered in this brief. *Piney Run*, 268 at 267 ("we defer to

considered "lawful" and binding to the courts. *Id.* at 843–44. *Chevron* deference forbade courts from imposing a better reading of the statute, even if the agency's interpretation was barely reasonable. *See Loper Bright*, 603 U.S. at 377–78. By 2001, the Court clarified that *Chevron* deference only applied to agency interpretations developed through specific agency actions that carried the force of law, such as "adjudication or notice-and-comment rulemaking." *United States v. Mead, Corp.*, 533 U.S. 218, 226–27 (2001).

The Supreme Court dismantled the *Chevron* framework in *Loper Bright*. *See* 603 U.S. at 369. The Court emphasized that "the final 'interpretation of the laws' [is] 'the proper and peculiar province of the *courts*,'" *not* of executive agencies. *Id.* at 385 (emphasis added) (quoting The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). This power has been exclusive to the judiciary since "Chief Justice John Marshall famously declared that '[it] is emphatically the province and duty of the *judicial department* to say what the law is.'" *Id.* at 385 (alteration in original) (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

The *Loper Bright* Court also highlighted the purpose of the Administrative Procedure Act (APA)—providing a *check* on the authority of federal administrations. *Id.* at 392 (quoting *Kisor v. Wilkie*, 588 U.S. 558, 580 (2019) (plurality opinion)); s*ee United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). One such check was to codify what had already been true since 1803: the *courts*, not the agencies, "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *see Loper Bright*, 603 U.S. at 391–92. The legislative history

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the agency's interpretation . . . as long as . . . the agency's interpretation is reasonable" (citing *Chevron*, 467 U.S. at 843)).

demonstrates that both houses of Congress intended for § 706 to accord with the traditional concept of judicial review by the *courts* "rather than agencies." H.R. Rep. No. 79–1980, at 278 (1946) ("This section provides that questions of law are for courts rather than agencies to decide."); *accord* S. Rep. No. 79–752, at 228 (1945). The Department of Justice also adopted this interpretation of § 706, even with "every incentive to endorse a view of the APA favorable to the Executive Branch." *Loper Bright*, 603 U.S. at 393 (citing U.S. Dep't of Just., Attorney Gen.'s Manual on the Admin. Proc. Act § 10(e) (1947).

After considering the historical precedent, the legislative history and plain language of § 706, and the fact that "[n]either *Chevron* nor any subsequent decision of th[e] Court attempted to reconcile its framework with the APA," the Court concluded that the binding deference required by *Chevron* could not "be squared with the APA" and that it was necessary to overrule *Chevron* completely. *Loper Bright*, 603 U.S. at 396, 412.

B. Statutory *Stare Decisis* Applies Specifically and Narrowly to Pre-Loper Holdings That "Specific Agency Actions Are Lawful."

Because the Supreme Court's opinion in *Loper Bright* very specifically singled out *stare decisis* as applying *only* to those holdings that "specific agency actions are lawful," *Piney Run* is only binding on this Court in so far as it acknowledges that the EPA's interpretation of 33 U.S.C. § 1342(k) is lawful. *Loper Bright*, 603 U.S. at 412. Whether it is the best statutory reading is a question *de novo*. *See Marbury*, 5 U.S. at 177.

Anticipating that stripping agencies of the power to interpret statutes would raise questions about the precedential weight of cases decided under the *Chevron* framework, the Court offered the following guidance: "[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases *that specific agency actions are lawful . . .* are still subject to statutory *stare decisis*." *Loper Bright*, 603 U.S. at 412. (emphasis added).

Consider a typical case decided under the *Chevron* framework. By necessity, it contains at least two holdings. Before reaching its holding on the merits, the court first needed to rule on whether the agency's interpretation of the relevant statute was "reasonable." *Chevron*, 467 U.S. at 844. If it were, the court would find the agency's construction permissible and thus *lawful*. Now, recall that an agency's interpretation of the statute was only subject to *Chevron* deference if it was developed through *specific agency actions* that carried the force of law. *See Mead*, 533 U.S. at 226-27. Therefore, before ruling on the merits of a case, *Chevron* required a court to issue a *holding* on whether a *specific agency action was lawful*. It is *these* holdings—as opposed to the holdings on the merits—that *Loper Bright* singled out as still subject to statutory *stare decisis*. *See Tennessee v. Becerra*, 117 F.4th 348, 371–72 (6th Cir. 2024) (Kethledge, J., dissenting).

The Court's earlier statement—that they "do not call into question prior cases that relied on the *Chevron* framework"—applies to both types of holding as it is *not* narrowed to refer to anything smaller than the case as a whole. *Loper Bright*, 603 U.S. at 412. The Court only applied the additional *stare decisis* protection to holdings regarding the lawfulness of agency actions. *Id.* As for the holdings on the merits, the Court did the equivalent of de-publishing them. The dispositions still apply because the cases have not been "call[ed] into question," but the opinions and reasoning lost any precedential value. *Id.* After all, the Court consciously chose not to subject them to statutory *stare decisis*. *Id.*

From a policy standpoint, stripping the precedential value from holdings *based* on *Chevron* deference makes sense. As *Loper Bright* repeatedly articulated, it is the role of *courts* to interpret statutes, so any judicial holding *based* on *Chevron* deference is improper because the reasoning flows from an *agency's* statutory interpretation. *See Loper Bright*, 603 U.S. at 384–413. Allowing those holdings to retain their precedential value would fly in the face of *Loper*

Bright's primary reasoning because it would ensure that *agency* interpretations, rather than *judicial* interpretations, would continue to determine the outcome of cases. There is no reason, however, to strip the precedential value from courts' applications of *Chevron*'s *test* and their subsequent findings of lawfulness. *Chevron* only required that the interpretation be "reasonable," a determination for which the courts exercised their independent judgment without undue influence from the agency. *Chevron*, 467 U.S. at 844. As such, those holdings *should* retain their precedential value.

In the present proceeding, the case subject to *Loper Bright* review is *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255 (4th Cir. 2001), adopted by this Court in 2018. R. at 12 n.3. After determining that the plaintiff had standing, the *Piney Run* court issued three separate holdings: two on the merits and one regarding the lawfulness of the Environmental Protection Agency's (EPA) interpretation of the Permit Shield Provision, 33 U.S.C. § 1342(k). *Piney Run* 268 F.3d at 259. First, under the *Chevron* framework, the court evaluated *In re Ketchikan Pulp Co.*—a formal adjudication before the EPA's Environmental Appeals Board—and found its interpretation of the statute to be reasonable. *Piney Run*, 268 F. 3d at 267–68; *see Ketchikan Pulp Co.*, 7 E.A.D. 605 (EAB 1998). As such, *Ketchikan* (a specific agency action) is lawful in so far as it interprets § 1342(k). *See Loper Bright*, 603 U.S. at 412. Under *Loper Bright*, holdings that "specific agency actions are lawful . . . are still subject to statutory *stare decisis*. *Id.* Therefore, the *fact* that the EPA's interpretation of § 1342(k) is *lawful* is subject to *stare decisis*.

Piney Run's two holdings on the merits no longer have precedential value because *Loper Bright* did not provide additional *stare decisis* protections for *merits* holdings reached under the *Chevron* framework. *See Loper Bright*, 603 U.S. at 412.

C. Non-Binding *Skidmore* Deference Should Be Applied to Lawful Agency Interpretations of Ambiguous Statutes.

Under *Loper Bright*, agency interpretations determined by the *Chevron* test to be lawful are subject to *Skidmore* deference and should be given respect and consideration but are not binding. *See Loper Bright*, 603 U.S. at 388; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

Loper Bright held that statutory interpretations by agencies determined to be lawful under the *Chevron* framework "are still subject to statutory *stare decisis*." *Loper Bright*, 603 U.S. at 412. The interpretation itself is not subject to *stare decisis*, only its *status* as "lawful" is, which begs the question of how much deference is owed to a "lawful" agency interpretation? Ideally, this Court will adopt an approach that uses guidance provided by *Loper Bright* to put the power of statutory interpretation back in the hands of the judiciary while simultaneously acknowledging the lawfulness of pre-*Loper* agency interpretations as required by *stare decisis*.

In *Loper Bright*, the Court indicated that the proper weight to give lawful pre-*Loper* agency interpretations is *Skidmore* deference. *Loper Bright*, 603 U.S. at 388. Under *Skidmore*, courts give weight to agency interpretations because they "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance," but the interpretations are not binding. 323 U.S. at 140. The only *stare decisis* consideration required by *Loper Bright* is the holding that an agency action *is* lawful. 603 U.S. at 412. By subjecting that action to *Skidmore* deference, a court acknowledges that the action is lawful, thus meeting its *stare decisis* obligations, but retains final interpretive power over the statute because they will not be bound by the agency's interpretation. *Loper Bright*, U.S. 603 at 388 (quoting *United States v. Am. Trucking Ass's, Inc.*, 310 U.S. 534, 549 (1940)).

Several courts have tried implementing alternative approaches, but these have been flawed and subject to criticism. *See Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024) (holding that an agency is free to retain a pre-*Loper* interpretation found to be lawful, but if they abandon that interpretation, the court must determine the best meaning); *Becerra*, 117 F.4th (holding that all pre-*Loper Bright* cases finding an agency interpretation to be lawful are binding). Both the Ninth and Sixth Circuit approaches have already received scholarly criticism. A forthcoming article by Professor Jonathan R. Nash describes them as "unwise," "impractical," and "precedent on steroids," and explains that both approaches are unlikely to be what the Supreme Court intended. Jonathan Remy Nash, Chevron *Stare Decisis in a Post*-Loper Bright *World*, 110 Iowa L. Rev. Online (forthcoming 2025) (manuscript at 14–15, 17) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966351).

Given the flaws in both the Sixth and Ninth Circuits' approaches, it would be unwise to follow their examples. Instead, this Court should adopt an approach of applying *stare decisis* to lawful pre-*Loper Bright* agency interpretations by subjecting them to *Skidmore* deference before exercising its independent judgment on the meaning of the statute.

Applying that approach to the present case, *Piney Run* is not binding on this Court except in holding that *Ketchikan* is a lawful interpretation of 33 U.S.C. § 1342(k). *See Loper Bright*, 603 U.S. at 412. As such, *Ketchikan* should be subjected to *Skidmore* deference while the Court exercises its independent judgment on the best interpretation of the statute.

II. WHETHER THE COURT APPLIES THE REASONING IN *ATL. STATES* OR *PINEY RUN*, COMGEN'S DISCHARGES OF PFOS AND PFBS ARE PERMITTED UNDER THE CLEAN WATER ACT.

Under the Clean Water Act ("CWA"), "the discharge of any pollutant . . . shall be unlawful." 33 U.S.C. § 1311(a). However, the CWA creates an exception that allows approved

states to issue permits for "the discharge of any pollutant." *Id.* § 1342(a)–(c). Under the CWA's Permit Shield Provision, 33 U.S.C. § 1342(k), once within the National Pollutant Discharge Elimination System ("NPDES") permitting scheme, or the permitting scheme of an approved state program such as the Vandalia Pollutant Discharge Elimination System ("VPDES"), "polluters may discharge pollutants not specifically listed on their permits so long as they comply with the appropriate reporting requirements." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993).

Whether or not this Court finds *Piney Run* to still have precedential value in light of *Loper Bright*, ComGen's discharges of PFOS and PFBS are permittable because they complied with the reporting requirements, made adequate disclosures, and both substances were within the contemplation of the permitting authority.

A. If *Piney Run* Is Not Precedential, *Skidmore* Deference Should Be Applied to *In Re Ketchikan* and the Reasoning in *Atl. States Should Be Adopted*.

1. *Applying Skidmore Deference to In re Ketchikan Indicates That Atl. States' Reasoning Should Be Adopted.*

Following the Supreme Court's Decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), *Piney Run*'s interpretation of 33 U.S.C. § 1342(k)—adopted from the EPA's opinion in *In re Ketchikan*—is no longer binding on this Court, but *Ketchikan* is still subject to non-binding *Skidmore* deference. *See Ketchikan*, 7 E.A.D. Under *Skidmore*, agency opinions and interpretations "are not controlling upon the courts . . . [but] do constitute a body of experience and informed judgment." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). However, the weight given to such a judgment "will depend on the thoroughness evident in its consideration." *Id. Ketchikan's* reasoning is not the most thorough, but it still offers some guidance.

The opinion insists that "when the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered within the scope" of the permit, but it fails to define what constitutes an adequate disclosure. 7 E.A.D. at 621. Specifically, *Ketchikan* does not differentiate between statutory and non-statutory pollutants. *See* 7 E.A.D. Does the disclosure of all statutory pollutants count as adequate? Or is there an expectation that applicants take the additional burdensome step of disclosing pollutants that were not inquired about in the course of the application process? The *Ketchikan* opinion does not answer this question, but under *Skidmore* deference, the opinion's heavy reliance on *Atl. States*, specifically regarding disclosure requirements, is evidence that this Court should also rely heavily on that case. *Ketchikan*, 7 E.A.D. at 619 ("[P]olluters may discharge pollutants not specifically listed in their permits *so long as they comply with the appropriate reporting requirements*." (quoting *Atl. States*, 12 F.3d at 357)).

2. Under the Reasoning in Atl. States, ComGen's Discharge of PFOS and PFBS Was Permitted.

ComGen's VPDES permit allows the discharge of PFOS and PFBS because disclosing those pollutants was not required to "comply with the appropriate reporting requirements." *Atl. States*, 12 F.3d at 357.

In *Atl. States*, the Eastman Kodak Company ("Kodak") operated a facility that discharged wastewater into the Genessee River. 12 F.3d at 355. To comply with the CWA, Kodak applied for and was issued a State Pollutant Discharge Elimination System ("SPDES") permit. *Id.* The Atlantic States Legal Foundation alleged that Kodak discharged pollutants not listed on its SPDES permit. *Id.* In finding that Kodak's unlisted discharges were permitted under the CWA's Permit Shield Provision, the Second Circuit reasoned that "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants" because the

EPA has identified "tens of thousands of different chemical substances." *Id.* at 357 (quoting Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976)).

In *Atl. States*, the EPA conceded that "the final regulations control discharges *only* of the pollutants listed in the . . . permit application." 12 F.3d at 357 (quoting Consolidated Permit Application Forms for EPA Programs, 45 Fed. Reg. 33516, 33523 (proposed May 19, 1980)). The EPA also conceded that a "permittee may discharge a large amount of a pollutant not limited by its permit, and [the] EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements." *Atl. States*, 12 F.3d at 357 (quoting Consolidated Permit Application Forms for EPA Programs, 45 Fed. Reg. at 33523).

Considering these concessions alongside the Second Circuit's holding that it is impractical for applicants to disclose every possible pollutant, it must be the case that there are some pollutants the EPA simply does not regulate through its permitting system but that are still protected by the Permit Shield Provision. PFOS and PFBS are two such pollutants.

Required disclosures for existing commercial dischargers are regulated by 40 C.F.R. § 122.21(g). Appendix D provides multiple tables listing over 200 pollutants that permittees are required to disclose under this section, but none include PFAS substances. *Id.* While § 122.21(g)(13) reserves the right for the agency to request additional disclosures, the list of pollutants is otherwise exhaustive and no additional information was ever formally requested from ComGen.

Further, when ComGen applied for a VPDES permit, the EPA did not consider PFAS to be within the regulatory framework of the permitting system. ComGen's VPDES permit became effective September 1, 2020. R. at 4. Almost three months *later*, the EPA issued an interim

strategy for regulating PFAS through the NPDES system. Memorandum from EPA Assistant Administrator for the Office of Water David P. Ross to Regional Administrators, Regions 1–10 (Nov. 22, 2020). The memo explained that "the CWA framework for *potentially* regulating PFAS discharges pursuant to the NPDES program [was] under development." *Id.* at 1.

While ComGen did not *explicitly* disclose PFOS and PFBS in its VPDES permit application, they are still permitted discharges because they were not required disclosures under 40 C.F.R. § 122.21(g), and the EPA itself only began to think about regulating PFAS through the permitting system *after* ComGen's permit had been issued.

B. If *Piney Run* Is Precedential, It Is Not Applicable to the Present Case, but PFOS and PFBS Would Be Permitted Discharges If It Was.

In *Piney Run*, the Piney Run Preservation Association alleged that a public waste treatment plant discharged warm water in violation of its NPDES permit, which did not explicitly permit the discharge of warm water. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 259 (4th Cir. 2001). The court found that the CWA's Permit Shield Provision protected the discharge of warm water because even though it was not expressly allowed by the permit, the permittees had "adequately disclosed" the discharge of heat and the warm water was "within the contemplation" of the permitting authority. *Id.* at 264. Applying *Chevron* deference, the *Piney Run* court relied on the EPA's interpretation of the Permit Shield Provision from *In re Ketchikan*.

1. *Piney Run is Not Applicable to the Present Case Because It Dealt with Statutory Pollutants and PFAS are non-statutory pollutants.*

Piney Run is easily differentiated from the present case because the "heat" at issue in that case was a statutory pollutant requiring disclosure under 40 C.F.R. § 122.21(g)(7)(iii), while the PFAS chemicals at issue in the present case "were never mentioned in any formal permit

documents or application materials," and are not named in § 122.21(g)(7). R. at 4–5; *see Piney Run*, 268 F.3d at 259. As such, even if this Court finds that *Piney Run* maintains its full precedential authority in light of *Loper Bright*, *Piney Run* is not applicable to the present case.

Under the rule articulated in *Piney Run*, if a permit holder "discharges a pollutant that it did not disclose, it violates the NPDES permit and the CWA." 268 F.3d at 268. However, the court also acknowledged that "it is impossible to identify and rationally limit every chemical or compound present in the discharge of pollutants." *Id.* at 268 (quoting *Ketchikan*, 7 E.A.D. at 618). Because not all pollutants can be reasonably disclosed, but discharging an undisclosed pollutant violates the CWA, it must be that the requirement to disclose only applies to statutory pollutants. Otherwise, all permittees would be in violation of their permits for failing to identify *every* chemical or compound they discharge, which the court acknowledged is "impossible" to do. *Id.* Thus, the holding and reasoning in *Piney Run* apply only to statutory pollutants.

Because PFAS chemicals are not accounted for in 40 C.F.R. § 122.21(g)(7)(iii) and were never formally inquired about during the application process, PFOS and PFBS are not statutory pollutants and *Piney Run* is not on-point precedent regarding ComGen's discharge of them.

2. If Piney Run Were Applicable, ComGen's PFOS and PFBS Discharges Would Still Be Permitted Because They Were Adequately Disclosed and Within the Contemplation of the Permitting Authority.

Under *Piney Run*, ComGen's discharge of PFAS was permitted because they clearly identified their operations and processes and the permitting authority demonstrated that PFAS was within its contemplation by making an informal inquiry.

Piney Run identifies two elements necessary for the Permit Shield Provision to apply to any given pollutant. First, a permittee is "in compliance with the CWA . . . as long as it only discharges pollutants that have been adequately disclosed," and second, "the discharges must

be . . . within the reasonable contemplation of[] the permitting authority." 268 F.3d at 268. Under *Chevron* deference, *Piney Run* relies on the EPA's interpretation of "adequate disclosures" as expressed in *In re Ketchikan*. *See Piney Run*, 268 F.3d at 266–68; *Ketchikan*, 7 E.A.D. at 624. According to *Ketchikan*, "pollutants not identified as present" in the discharges are considered to be adequately disclosed if they are "constituents of wastestreams, operations or processes that were clearly identified during the permit application process." 7 E.A.D. at 624.

In that same *Ketchikan* opinion, the EPA found that a permittee had violated their permit due to inadequate disclosures. *Id.* at 625. Specifically, because the permittee "failed to disclose a process which result[ed] in the discharge of substantial amounts of pollutants into receiving waters, it did not comply with the application provisions." *Id.* at 628.

The record does not indicate that ComGen failed to disclose a particular process or operation, nor is there any allegation that they did so. *See* R. Recent studies have shown that PFAS is present in coal combustion residuals ("CCRs"), which is known to be produced by the Vandalia Generating Station. *Id.* at 3, 5. As such, ComGen made adequate disclosures of its PFAS discharges by clearly identifying the operations that produced them.

In addition to being adequately disclosed, PFAS was also "within the contemplation" of the permitting authority. *Piney Run*, 268 F.3d at 264. According to *Ketchikan*, "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." 7 E.A.D. at 621 (emphasis added). Further, absent some "independent basis for knowing about" an undisclosed discharge, the permitting authority could not have intended to regulate that discharge. *Id.* at 625.

Even without an explicit disclosure from ComGen, the Vandalia Department of Environmental Protection ("VDEP") demonstrated an independent basis for knowing about the discharge of PFAS when one of their deputy directors informally inquired about PFOS and PFBS and indicated they knew of studies showing that PFAS is present in CCR. R. at 4. Because VDEP had an independent basis for knowing about the PFAS discharges, they were "within the contemplation" of the permitting authority. *Piney Run*, 268 F.3d at 264.

Piney Run is inapplicable to this case, but if it were, ComGen's discharges of PFOS and PFBS would be permitted because they were both adequately disclosed and within the contemplation of the permitting authority.

III. SCCRAP LACKS STANDING TO CHALLENGE THE CLOSURE PLAN.

SCCRAP lacks standing to challenge ComGen's closure plan, as it has failed to plead sufficient facts to demonstrate an injury-in-fact that is fairly traced to the closure plan and that a favorable outcome would redress. An organization has standing to sue when "its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). As SCCRAP's environmental goals align with the injunctive relief sought, SCCRAP's standing depends on whether any member of the organization would individually have standing to sue. *See id.*; R. at 8, 11–12.

For an individual to have standing, they must demonstrate "(i) that they have suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, (iii) that the injury likely would be redressed by the requested judicial relief." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (citing *Summers v. Earth Island Inst.*, 555

U.S. 488, 493 (2009); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing requirements prevent eager plaintiffs from "roam[ing] the country in search of [] wrongdoing." *All. For Hippocratic Med.*, 602 U.S. at 379 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982). SCCRAP is one such plaintiff, as their alleged injuries fail to meet each requirement of standing.

A. SCCRAP Fails to Allege an Injury-in-Fact.

First, SCCRAP's alleged injuries are too remote and speculative to demonstrate an injury-in-fact. An injury-in-fact must be "(a) concrete and particularized" and one that is "(b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Concreteness requires that the injury be "real and not abstract." *FDA*, 602 U.S. at 381. The Supreme Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Aside from the injuries alleged by SCCRAP members who have chosen to no longer recreate near the impoundment, SCCRAP's only other alleged injuries are insufficiently concrete and too speculative to satisfy Article III standing. R. at 7–9 (alleging risk of catastrophic failure from floods and injury to members on a waitlist for a housing development).

1. SCCRAP members on a property waitlist face only speculative harm.

While some SCCRAP members placed their names on a waitlist for a housing development that may be unable to use groundwater for its drinking water as planned initially, this injury is insufficiently imminent and concrete to demonstrate injury-in-fact. R. at 9. In *Lujan*, associational plaintiffs alleged that they suffered from a reduced likelihood of seeing endangered animals abroad someday in the future. 504 U.S. at 563–64. However, "without any

description of concrete plans, or indeed even any specification of *when* the some day [would] be," the Court held that they lacked a concrete injury. *Id.* In *Summers*, the Court explained that an organization member's assertion that he planned to visit "unnamed national forests in the future" could not establish standing to challenge regulations exempting certain Forest Service Projects from notice, comment, and appeal procedures. 555 U.S. at 495. The Court explained that, because standing depended on a chain of contingencies, it might have demonstrated "a chance" of injury but "hardly [the] likelihood" necessary to satisfy Article III. *Id.*

SCCRAP members who are now unhappy with their decision to sign up for the waitlist similarly lack concrete and imminent injury. *See* R. at 9. The waitlist does not guarantee SCCRAP members will become owners of property afflicted by groundwater contamination, as the development appears to lack a concrete completion date, and the record does not indicate that any SCCRAP members made an enforceable commitment to acquire property in the housing development by signing up for the waitlist. *See Id.* Much like the plaintiffs in *Lujan* and *Summers*, SCCRAP members have not alleged that they had a definite plan to purchase houses in the potential housing development and thus lack a cognizable injury. *See* 504 U.S. at 563–64; 555 U.S. at 495; R. at 9.

2. The Risk of Coal Ash Spilling from the Impoundment Is Too Speculative.

SCCRAP's allegation that future natural disasters in the form of floods, storms, and hurricanes pose a risk of "catastrophic failure" that could cause coal ash to spill into the Vandalia River is too speculative to establish an injury-in-fact. R. at 9. To meet the standard of imminence, "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). While SCCRAP claims that future weather conditions that could result in the

spillage of coal ash are possible, it has failed to allege any facts regarding the likelihood that these weather events will occur, let alone establish that they will certainly manifest. R. at 9.

B. SCCRAP's Aesthetic Injury Is Not Fairly Traceable to the Closure Plan.

SCCRAP members' allegations that they have ceased to fish and recreate in the area are not traceable to the closure plan. R. at 10. Standing requires "de facto causality." *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019). To meet the causation requirement of Article III standing, the injury must be "fairly . . . traced to the challenged action of the defendant . . . ." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41 (1976). "[T]raceability is satisfied" when the complained action contributes to the individual's harm. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000). There is no causation for Article III standing where a plaintiff "would have been injured in precisely the same way" without the defendant's challenged conduct. *Walters v. Fast AC, LLC*, 60 F.4th 642, 650 (11th Cir. 2023) (quoting *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1272 (11th Cir. 2019)). Even if SCCRAP has alleged an injury-in-fact for aesthetic damages, it is not fairly traceable to the closure plan.

SCCRAP's alleged aesthetic injury would have happened in precisely the same way had the impoundment's closure plan never begun. SCCRAP members who may have suffered an aesthetic injury claim it stems from contaminants in the groundwater, but there is consensus among both environmental and industry groups that this leaching was likely ongoing since 2011 or 2016 at the latest, years before ComGen began its closure activities in 2019. R. at 7–8, 10.

In *Mobile Baykeeper, Inc. v. Alabama Power Co.*, a court held that plaintiffs lacked standing to challenge a closure plan for a coal ash impoundment via the RCRA under similar factual circumstances. *See* No. CV 1:22-00382-KD-B, 2024 WL 54118, at *10–13 (S.D. Ala. Jan. 4, 2024). There, the court held that a plaintiff successfully demonstrated aesthetic injury-in-

fact by alleging that some of its members avoided the location of the coal ash impoundment and refrained from fishing, kayaking, or engaging in other recreation in the area due to fear of leached contaminants. *See id.* at *9–10. While the court recognized the plaintiff's injury, it held that it was insufficiently causally linked to the challenged implementation of the closure plan, as the impoundment was known to have been leaching and causing contamination in the relevant watershed for decades prior to the plan's implementation. *See id.* at *11–13. The court explained that, in light of the continuous leaching prior to the beginning of the closure activities, plaintiff's affected members would have received the precise same aesthetic injury if the defendant had not commenced its closure activities. *See id.* at 12–13. Accordingly, as the contamination forming the basis of SCCRAP's alleged injury would have been present in the water regardless of the closure plan's implementation in 2019, SCCRAP's alleged injury is not fairly traceable to its challenged action and does not satisfy causation. R. at 7, 8, 10.

C. SCCRAP's Injunctive Relief to Stop the Closure Plan's Implementation Would Fail to Redress the Alleged Injuries.

A favorable outcome would also fail to redress SCCRAP's injuries. To meet the standard for Article III redressability, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. 555 at 561 (quoting *Simon*, 426 U.S. at 41–42). SCCRAP seeks injunctive relief to stop the implementation of the impoundment's closure plan, but the record does not reflect that closure plan activities have been responsible for the leaching of contaminants into the groundwater. R. at 8, 12. SCCRAP has neither alleged that the Closure Plan has accelerated the rate of the leaching, nor has it sought injunctive relief to implement an alternative plan. *Id.* at 6, 8, 12. Even if an alternative were proposed, as held in *Mobile Baykeeper*, stopping the implementation of the closure plan while groundwater was independently leaching would not remedy the contamination at the root of the

alleged injury. *See* 2024 WL 54118, at *13; *Id.* at 12. SCCRAP's requested remedy would therefore fail to redress its alleged injury, and in conjunction with a lack of causation or other sufficiently pleaded injuries, SCCRAP lacks standing to challenge ComGen's closure plan.

IV. SCCRAP CANNOT ALLEGE ENDANGERMENT TO THE ENVIRONMENT WITHOUT REFERENCE TO A LIVING POPULATION.

SCCRAP cannot pursue an RCRA imminent and substantial endangerment claim concerning the environment alone, as nonliving things cannot face a risk of substantial endangerment. *See Price v. U.S. Navy*, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992), *aff'd*, 39 F.3d 1011 (9th Cir. 1994); *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, No. 99 CIV. 0275 (RWS), 2004 WL 1811427, at *10 (S.D.N.Y. Aug. 12, 2004). A plaintiff must demonstrate that solid waste "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Interpreting the citizens' suit provision to apply to all contamination "that impairs the purity natural state of some element of the environment *endangers* the environment would be to render the word 'substantial' superfluous . . . ." *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418 (E.D. Pa. 2015).

A. <u>The Mere Presence of Contaminants in the Environment Does Not Constitute a Substantial Endangerment.</u>

Courts have concluded that the presence of contaminants in the environment does not alone present a cognizable substantial endangerment without evidence of further harm to a population. *See Schmucker v. Johnson Controls, Inc.*, 477 F. Supp. 3d 791 (N.D. Ind. 2020), *aff'd*, 9 F.4th 560 (7th Cir. 2021) ("A substance that is present in the environment but threatens no harm does not pose an imminent and substantial endangerment to the environment."); *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 212 (2d Cir. 2009); *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 281–82, 298 (1st Cir. 2006).

In *Metacon Gun* Club, the Second Circuit considered whether lead contamination posed an imminent and substantial endangerment. 575 F.3d at 212. The plaintiffs provided a report claiming the contamination presented a "potential exposure risk to both humans and wildlife," which called for further assessment of the degree of risk to humans and wildlife from contaminated water, soils, and sediment. *Id.* Absent evidence of the degree of the risk to humans and wildlife, the Second Circuit determined that the report offered insufficient evidence to support a jury's finding of a cognizable substantial endangerment. *Id.* at 211–12. The Second Circuit next considered whether allegations that the lead's mere presence in the environment as a contaminant would suffice to demonstrate "the seriousness of the risk." *Id.* at 212. Although it was present at the site above state standards, this alone was insufficient to support concluding imminent and substantial environmental harm without additional evidence assessing the specific degree of risk posed by the lead contamination. *Id.* at 214.

In *Mallinckrodt*, the First Circuit similarly held that a contaminant alone in the environment could not demonstrate an imminent and substantial threat cognizable by the RCRA, absent evidence of harm to a population. 471 F.3d at 281–82, 298. There, riverbed sediment held high mercury concentrations due to the plaintiff's dumping. *Id.* at 281. The First Circuit endorsed the district court's assertion that evidence of a high mercury concentration in the river's sediment alone was insufficient to determine that it presented an imminent and substantial endangerment. *Id.* at 282. The district court considered additional evidence regarding the spread of mercury throughout the food web and the methylation of mercury downriver into "a highly toxic substance which, even in low doses, is inimical to human health." *Id.* It concluded that the standard for substantial endangerment was satisfied by a "reasonable medical concern for public health and a reasonable scientific concern for the environment," and the First Circuit affirmed its

holding. *Id.* at 282 (quoting *Me. People's All. v. Holtrachem Mfg. Co., LLC.*, 211 F. Supp. 2d 237, 252, 298 (D. Me. 2002)).

B. Even Courts with a Broader View Define "Substantial" with Respect to Potential Living Things in the Environment.

Even when courts purport to uphold endangerment to the environment alone, they refer to living populations as the basis for determining the presence of a substantial endangerment. For example, in *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, the Third Circuit accepted the language of the RCRA at face value, reading it to impose "liability for endangerments to the environment, including water in and of itself." 399 F.3d 248, 263 (3d Cir. 2005).

However, the Third Circuit's analysis of this issue was not necessary to the case's holding, given the court's finding of substantial human endangerment and the defendant's broad concessions. *See id.* at 263. The defendant did not argue against the sufficiency of purely environmental endangerment and even conceded that groundwater near the discharge site was in danger. *Id.* Though substantial human endangerment would have been dispositive under the RCRA, the Third Circuit, assuming that the "District Court clearly erred with respect to its findings relating to human endangerment," reviewed the findings regarding environmental endangerment. *Id.*; 42 U.S.C. § 6972(a)(1)(B). The defendant challenged only the sufficiency of the evidence underlying the substantialness of the endangerments. 399 F.3d at 263. The court determined that credible experts "in the areas of human health and/or ecological risk" provided enough evidence to find both substantial endangerments to humans and the ecosystem. *Id.*

The Third Circuit also determined that the nature of the endangerment presented by the substance at issue, hexavalent chromium, stemmed from its solubility and toxicity to humans and animals. *See id.* at 254 n.1. Its analysis of endangerment from water contamination centered around the danger presented to animals from the spread of contaminated water, including fish,

invertebrates, birds, and organisms living in contaminated river sediment. *See id.* at 262. For the organisms living in river sediment, the court also considered evidence of high mortality rates from exposure to the contamination. *Id.* Whereas the Third Circuit recounted factors demonstrating the substantialness of the endangerment to living elements within the environment, it merely stated that substantial endangerment applied to nonliving things without setting a rule as to what would render such an endangerment substantial. *See id.* at 262–63.

In *Burlington N. & Santa Fe Ry. Co. v. Grant*, the Tenth Circuit similarly found substantial and imminent danger to the environment because of its potential impact on a living population. *See* 505 F.3d 1013, 1021–22 (10th Cir. 2007). The Tenth Circuit rejected the notion that it was necessary to allege endangerment to a living population and determined that RCRA claims additionally require "consideration of imminent and substantial danger to the environment." *Id.* at 1021. Like the Third Circuit, the Tenth Circuit based its evidence for endangerment on the effects that a contaminant could produce in living organisms. *See id* at 1022. It determined that a genuine issue of material fact existed as to whether there was an imminent and substantial endangerment due to the contaminant's risk of causing cancer in outdoor workers, pets, and wildlife and the ability to proliferate this risk via other bodies of water. *Id.*

C. Allowing SCCRAP to Allege Endangerment to the Environment Alone Would Overextend the RCRA.

Allowing SCCRAP to bring its RCRA action without any reference to its effects on a living population would overextend the RCRA and "render the word 'substantial' superfluous." *Tri-Realty Co.*, 124 F. Supp. 3d at 455. Attempting to abide by the Third Circuit's holding in *Interfaith* without overextending the RCRA, the court in *Tri-Realty* posited a standard that would nominally allow substantial endangerment to the environment alone; however, it also used living

organisms as its baseline, holding that endangerment can be substantial if it "threatens the ability of a non-living element of the environment to serve some potential function in the local ecosystem." *Id. a*t 456. Besides acknowledging a connection between the leached chemicals and potential adverse health effects, SCCRAP does not address the extent of the harm posed to the environment nor allege a threat to its ability to serve a purpose in the ecosystem. *See* R. at 3. SCCRAP's substantial endangerment claim boils down to an allegation that the leachate's mere presence in the environment poses some unclear risk. *See id.* at 12–13. Thus, to allow SCCRAP's imminent and substantial endangerment claim, even under the permissive rule set forth in *Tri-Realty,* would render the requirement of substantialness "superfluous," allowing even "trivial discharges" to present liability under the RCRA. *See id.*; 124 S. Supp. at 455–56.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court and grant ComGen's motion to dismiss SCCRAP's complaint. In light of the Supreme Court's decision in *Loper Bright*, this Court owes limited deference to *Piney Run* and the EPA's guidance and should find that ComGen's discharge of PFOS and PFBS is permitted under the CWA. Similarly, this Court should find that SCCRAP failed to demonstrate standing to challenge ComGen's closure plan for the Little Green Run Impoundment and to properly allege endangerment to a living population in their RCRA claim.

Respectfully Submitted

Team 3

Counsel for Appellee

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing 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. 3