IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Stop Coal Combustion Residual Ash Ponds, Appellant,	)	
v.	)	C.A. No. 24-0682
Commonwealth Generating Company, Appellee.	)	

ON APPEAL FROM

THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF VANDALIA

BRIEF FOR THE APPELLEE

Team # 27
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02/05/2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases ***Pages***

Federal Appellate Court Cases ***Pages***

Federal District Court Cases ***Pages***

Federal Statutes ***Pages***

Other Authorities ***Pages***

JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had subject matter jurisdiction pursuant to 28 U.S.C § 1331. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over the final decision of the District Court pursuant to 28 U.S.C § 1291. Following the District Court's final decision on October 31, 2024, the decision was timely appealed on November 20, 2024. The Twelfth Circuit issued an order on December 30, 2024, setting forth four issues.

STATEMENT OF THE ISSUES PRESENTED

I. Under the Clean Water Act, does the permit shield protect a discharger from liability for the discharge of a pollutant not listed in its permit, when the permitting authority failed to formally inquire about it in the permit application?

II. Under *Loper Bright*, is a court required to reconsider a statutory precedent using its independent judgment, when that precedent used *Chevron* deference to uphold an agency interpretation that does not represent the best reading of a statute?

III. Under Article III of the U.S. Constitution, does an environmental organization have standing to challenge the adequacy of a coal ash impoundment closure plan, when some of its members have experienced injuries from the impoundment's historical pollution which predates the implementation of that closure plan?

IV. Under the Resource Conservation and Recovery Act, does an environmental organization state a claim for an imminent and substantial endangerment, when it has only alleged contamination of groundwater without an exposure pathway to a living population?

STATEMENT OF THE CASE

Statement of Facts

Commonwealth Generating Company ("ComGen") is a wholly owned subsidiary of Commonwealth Energy, a "multistate electric utility holding company system." R. at 3. For years, its affordable electricity has served as the energy backbone for a nine-state region, including Vandalia for more than a century. R. at 3-4. Currently, ComGen plays a major role in Vandalia's economy by employing over 1,500 Vandalians. R. at 4.

ComGen's commitment to the environment is evident from its numerous environmental stewardship endeavors, above all its "Building a Green Tomorrow Program." *Id.* This program's initiatives are on the forefront of sustainability, aiming to retire older coal-fired power plants by replacing them with renewable applications. *Id.* So far, ComGen has constructed five solar facilities and two wind farms, which are collectively capable of producing over 110 megawatts of renewable energy. *Id.*

Stop Coal Combustion Residual Ash Ponds ("SCCRAP"), an organization with nominal ties to the Vandalia region and the town of Mammoth, is a public interest organization based in Washington, D.C. R. at 8. This litigious group routinely goes after those who operate coal ash impoundments. R. at 4, 8. A few of its members engage in recreational activities along the Vandalia River. R. at 10. Additionally, some members have put their name on a waiting list for a *proposed* housing development in the area that would not actualize until 2031 – assuming the plans are ever approved. R. at 9.

The Vandalia Generating Station ("VGS") is one of the oldest coal-fired electric generating plants in the state, and has come to symbolize progress and innovation in Vandalia. R. at 4. Upon recognizing that the VGS required significant upgrades to comply with the EPA's Effluent Limitation Guidelines, ComGen sensibly chose the VGS for planned closure

by 2027 under the Building a Green Tomorrow program. *Id.*

Vandalia has received authority under the Clean Water Act to issue permits pursuant to the Vandalia Pollutant Discharge Elimination System ("VPDES"). *Id.* ComGen's permit is effective through July 29, 2025, and covers three outlets which discharge into the Vandalia River and its tributaries. *Id.* The permit application and the permit itself also expressly inquired about and set limits for certain pollutants like selenium, aluminum, pH, and temperature. *Id.* However, the permit failed to mention, even once, two types of PFAS: PFOS and PFBS – substances that have been discharged from the VGS. R. at 4-5, 9. During the permit application process, the Deputy Director of the Vandalia Department of Environmental Protection ("VDEP") casually inquired about the presence of PFOS and PFBS in ComGen's discharges through an informal email exchange with an unidentified "employee" of ComGen. R. at 4. The employee responded that neither pollutant was known to be present in ComGen's discharges. *Id.* The Deputy Director never followed up, nor did the state of Vandalia incorporate limitations or monitoring requirements for PFOS or PFBS into the permit application or the permit itself, despite being capable of regulating them. R. at 4-5.

The VGS has always responsibly disposed of its CCRs, coal fines, and waste material in the Little Green Run Impoundment ("Impoundment"). R. at 5. Although the Impoundment has probably been leaching arsenic and cadmium dating back to 2011, this pollution poses no threat to drinking water currently or in the foreseeable future. R. at 8.

In 2015, the EPA published its final rule on the Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule"). R. at 5. The CCR Rule establishes national minimum criteria for CCR surface impoundments like Little Green Run. *Id.* Vandalia assumed responsibility for administering and enforcing its own coal ash permitting program under the

Water Infrastructure Improvements for the Nation Act ("WIIN"). *Id.* Vandalia adopted regulations identical to the CCR Rule. *Id.* ComGen was required to prepare a written closure plan ("Closure Plan") for Little Green Run by October 17, 2016, *and* begin closing Little Green Run by October 31, 2020. R. at 6. ComGen diligently met both of those requirements. R. at 6-7. In December 2019, ComGen submitted its permit application for Little Green Run to the VDEP. R. at 6. After thoroughly considering the public's input, the VDEP issued the permit in July 2021. R. at 6-7. To date, ComGen has spent fifty-million dollars in implementing the Closure Plan, with over one billion dollars pledged through 2031. R. at 7.

Procedural History

On September 3, 2024, SCCRAP brought suit against ComGen in the United States District Court for the Middle District of Vandalia, pursuing one claim under the Clean Water Act ("CWA") and two claims under the Resource Conservation and Recovery Act ("RCRA"). R. at 12.

First, SCCRAP brought suit pursuant to the CWA, alleging that ComGen was discharging PFOS and PFBS into the Vandalia River without a permit. *Id.* SCCRAP sought a declaratory judgment that ComGen violated the CWA by discharging PFAS without a permit, permanent injunctive relief to halt the discharges until ComGen obtains the proper permit, and civil penalties. *Id.* The District Court granted ComGen's motion to dismiss, accepting ComGen's argument that dischargers are not required to disclose pollutants which are not specifically asked about in the permit application. R. at 13-14.

Second, SCCRAP brought suit pursuant to RCRA, alleging that ComGen's Closure Plan violated various CCR Rule standards. R. at 12. SCCRAP sought injunctive relief to stop ComGen from implementing the Closure Plan. *Id.* ComGen moved to dismiss this claim. R.

at 13. The court *sua sponte* dismissed SCCRAP's claim for lack of standing, finding that SCCRAP's injuries were neither traceable to ComGen's Closure Plan nor redressable by an injunction halting the implementation of the Closure Plan. R. at 14.

Third, SCCRAP brought suit pursuant to RCRA, alleging that the Little Green Run Impoundment presents an imminent and substantial endangerment to the environment due to arsenic and cadmium groundwater contamination. R. at 12. SCCRAP sought declaratory and injunctive relief, along with civil penalties. *Id.* The court dismissed SCCRAP's claim, determining that RCRA does not support a claim for contamination to the environment alone without potential harm to a living population. R. at 14.

STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss a complaint *de novo*. *E.g.*, *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1004 (7th Cir. 2019). In doing so, this Court must accept all well-pleaded allegations, ignore legal conclusions, and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, a plaintiff still must allege sufficient facts to state a "plausible" claim for relief. *Id.* at 679.

SUMMARY OF THE ARGUMENT

This Court is asked to circumvent fundamental constitutional and regulatory requirements so that an interest group might more readily achieve its policy goals at the expense of those who power the State of Vandalia.

First, this Court should affirm the District Court's decision to dismiss SCCRAP's CWA claim as barred by the permit shield. Under the *Piney Run* framework, ComGen was not required to disclose its discharges of PFAS, because the VDEP did not inquire about it in the permit application. Second, and to the extent that this Court understands *Piney Run* to require the

disclosure of pollutants not included in the permit application, *Piney Run* should be abandoned in light of its reliance on *Chevron* deference. After *Loper Bright*, this Court must return to the reasoning in *Atlantic States* as the best interpretation of the permit shield statute.

Third, this Court should affirm the District Court's decision to dismiss SCCRAP's challenge to the Closure Plan for lack of standing. Although SCCRAP has alleged aesthetic and recreational injuries, those injuries are neither traceable to the Closure Plan nor redressable by an injunction halting the Closure Plan's implementation. Furthermore, SCCRAP cannot recharacterize its injuries to devise traceability and redressability: any injury resulting from an inadequate closure plan, in the form of future pollution or catastrophic failure, is too speculative to satisfy the requirement of an imminent injury in fact.

Fourth and finally, this Court should affirm the District Court's decision to dismiss SCCRAP's imminent and substantial endangerment claim. RCRA's text does not support an imminent and substantial endangerment claim for contamination to groundwater without any alleged endangerment to a living population. Furthermore, even if this Court finds that SCCRAP has alleged an endangerment to a living population, the District Court's decision must still be affirmed because any harm to a speculative housing development cannot be imminent and substantial. Congress did not intend for RCRA to be a strict liability cleanup statute contemplating trivial harms to health or the environment.

Therefore, ComGen respectfully requests that this Honorable Court affirm the District Court's decision to dismiss SCCRAP's claims.

ARGUMENT

I. COMGEN IS PROTECTED BY THE PERMIT SHIELD FOR ITS PFAS DISCHARGES, BECAUSE THERE IS NO REQUIREMENT TO DISCLOSE POLLUTANTS NOT INCLUDED IN THE PERMIT APPLICATION.

This Court should affirm the district court's decision to dismiss SCCRAP's CWA claim, because there is no "adequate disclosure" requirement, *Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 268 (4th Cir. 2001), for pollutants like PFAS, which are not formally inquired about by the VDEP in the permit application. Because *Piney Run* is inapplicable, this Court should return to the baseline understanding of the permit shield articulated in *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993).

With the stated goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters[,]" Clean Water Act § 101, 33 U.S.C. § 1251(a), the CWA broadly prohibits "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a). However, that sweeping command is "tempered . . . by a . . . host of exceptions[.]" *Atl. States*, 12 F.3d at 357. One such exception to the CWA's "strict liability" regime, *Piney Run*, 268 F.3d at 265, is the National Pollutant Discharge Elimination System ("NPDES"), which allows the EPA to authorize the limited discharge of certain pollutants through a rigorous permitting process, 33 U.S.C. § 1342(a).

In crafting a permit, the EPA – or a state agency with delegated authority, 33 U.S.C. § 1342(b), (c) – follows a routine process. *See generally* U.S. EPA, NPDES Permit Writers' Manual (2010). Under the CWA, the EPA promulgates national Effluent Limitations Guidelines, which establish maximum allowable quantities of pollutants that can be discharged. *Piney Run*, 268 F.3d at 265. After collecting information about the nature of a permit applicant's discharges through a permit application, the permitting authority then incorporates those ELGs into the permit. *Id.* The permitting authority also considers certain state water quality standards, 33 U.S.C. § 1313, and, if necessary, ratchets up the strictness of the effluent limitations in the permit to account for those standards, *see Piney Run*, 268 F.3d at

265-6; *Atl. States*, 12 F.3d at 358; *Am. Paper Inst. v. U.S. EPA*, 996 F.2d 346, 349-50 (D.C. Cir. 1993).

The CWA contains a permit shield provision, which provides that "[c]ompliance" with a permit is sufficient to protect a discharger from citizen-suit or enforcement liability under 33 U.S.C. § 1311's general discharge prohibition. 33 U.S.C. § 1342(k). "The purpose of the [permit shield] 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).

Courts and the EPA understand the permit shield to cover the discharge of pollutants not expressly listed by a permit. *See Atl. States*, 12 F.3d at 358 ("[T]he [NPDES] permit is intended to identify and limit the most harmful pollutants, while leaving the control of the vast number of other pollutants to disclosure requirements."); *Ketchikan Pulp Co.*, 7 E.A.D. 605, 621 (1998); *Piney Run*, 268 F.3d at 266. Several courts – including this Court – rely on the United States Court of Appeals for the Fourth Circuit's two-part *Piney Run* framework for deciding whether the discharge of an unlisted pollutant is covered by the permit shield. In that case, the Fourth Circuit gave *Chevron* deference to the EPA's reasonable interpretation of the ambiguous word "compliance" contained in the permit shield provision. *Id.* at 268. That EPA interpretation in turn relied on the Second Circuit's reasoning in *Atlantic States*. *See Ketchikan*, 7 E.A.D. at 621 (citing 12 F.3d at 358). In formalizing those two interpretations, the Fourth Circuit fashioned a two-part test: a permit holder will be shielded from liability for the discharge of pollutants not listed in its permit so long as the permit holder "adequately disclosed" the presence of the pollutant, and the discharge was within the "reasonable contemplation" of the permitting authority during the application process. *Piney Run*, 268 F.3d

at 268.

The extent of a permit applicant's obligation to disclose is tied directly to the information sought in the permit. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 288 (6th Cir. 2015) ("Under the first prong of the *Piney Run* test, the key is that the polluter complied with the disclosure requirements *under the relevant permit*.") (emphasis added); *see also S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 565-70 (4th Cir. 2014). In *Southern Appalachian*, the Fourth Circuit held that "adequate disclosure" requires a permit applicant to test for and affirmatively indicate the presence or absence of a pollutant inquired about in the permit application. *Id.* at 567. There, the defendant failed to respond to a question in its permit application about whether the toxic pollutant selenium was present in its discharges. *Id.* at 562. As a result, selenium was unaccounted for in the permit. *Id.* After later testing indicated selenium to be present, the plaintiff brought suit, alleging violations under the CWA for unauthorized discharges. *Id.* at 563.

The defendant argued that the permit shield protected it from liability, because it was only required to disclose its discharges of selenium if it knew or had reason to know of the pollutant's presence. *Id.* at 565. The Fourth Circuit disagreed, holding that the defendant's failure to "affirmatively disclose after appropriate inquiry" rendered the permit shield inapplicable. *Id.* at 567. The court reasoned that the purpose of the CWA required permit applicants to provide the EPA with as much information as possible. *Id.* However, the court emphasized that its holding was not a slippery slope requiring the "endless disclosure" of pollutants: selenium's classification as a toxic pollutant included in the permit application justified a requirement of informed disclosure to invoke the permit shield. *Id.* at 567. Post-*Piney Run*, courts have consistently construed and applied the concept of "adequate

disclosure" in the context of pollutants which are formally inquired about as part of the permit application process. *See Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chi.*, 175 F. Supp. 3d 1041, 1050 (N.D. Ill. 2016). *But see Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1319-20 (N.D. Ga. 2022) (refusing to dismiss a CWA claim based on PFAS discharges).

ComGen is protected by the permit shield for its discharges of PFAS, because *Piney Run*'s "adequate disclosure" requirement does not apply to pollutants which are left out of the permit application. ComGen was obliged to adequately disclose *only* those pollutants which were specifically asked about by the VDEP in the permit application. *See ICG Hazard*, 781 F.3d at 288; *S. Appalachian*, 758 F.3d at 566-67. Here, however, the VDEP chose to initiate a vague and informal email inquiry with an underinformed "employee" of ComGen, asking merely whether certain PFAS parameters "might" be present in ComGen's discharges. R. at 4-5. This is not comparable to the circumstances which justified disclosure in *Southern Appalachian*. There, the court required the defendant to "affirmatively disclose [its selenium discharges] after appropriate inquiry" in response to a question in the permit application which commanded the applicant to "'indicate whether' it knows or has reason to believe" that a pollutant is present in its discharges. 758 F.3d at 567. In the absence of such an unmistakable regulatory directive, ComGen had no obligation to engage any further with the VDEP's abortive inquiry.

Although ComGen had a critical obligation to inform the VDEP about the nature of its discharges, *see Piney Run*, 268 F.3d at 268; *Atl. States*, 12 F.3d at 358, the VDEP's responsibility for apprising ComGen of its obligations in the permit application was no less important. *See Atl. States*, 12 F.3d at 358 (explaining that the existence of state water quality

standards is necessary before the EPA can set effluent limitations for a pollutant). By attempting to avoid the formalities of the permitting process, the VDEP failed to uphold its end of the bargain.

SCCRAP's erroneous interpretation of *Piney Run* would leave courts without any meaningful standard to judge the adequacy of a particular disclosure. To avail itself of the permit shield for its PFAS discharges, ComGen would have needed to outwork the VDEP by proactively testing for an unregulated pollutant which the VDEP was content not to formally ask about. The *Piney Run* court could not have intended to leave dischargers guessing about which pollutants merit unprompted testing and disclosure, or which sort of informal inquiries would require them to test and adequately disclose. Rather than serving "to relieve [permittees] of having to litigate in an enforcement action the question whether their permits are sufficiently strict[,]" *du Pont*, 430 U.S. at 138 n.28, this interpretation would force permittees to defend against claims that they inadequately gauged the seriousness of a particular discharge, or failed to institute testing protocols. By treating the permit application as the exclusive mechanism through which applicants become responsible for collecting and disclosing information, the regulatory process will function as intended.

Additionally, the vast regulatory arsenal at the VDEP's disposal makes reliance on informal channels unnecessary for dealing with emerging pollutants like PFAS. Although the EPA has yet to promulgate ELGS for PFAS, and the VDEP has apparently not factored PFAS into its state water quality standards, the EPA or the VDEP can impose effluent limitations on a case-by-case basis under a "best professional judgment" standard, *see* 33 U.S.C. § 1342(a)(1)(B), or simply require monitoring for PFAS, *see id.* § 1342(a)(2). The VDEP neglected to pursue any of these options. Although PFAS no doubt poses a threat, the

carefully calibrated process embodied in the CWA cannot tolerate an end-run around the NPDES by administrators and citizen-plaintiffs dissatisfied with the pace of the regulatory process.

While the district court in *Parris* applied the adequate disclosure standard in the context of a town wastewater plant's discharge of PFAS, *see* 595 F. Supp. 3d at 1318-20, that case is distinguishable from ComGen's situation. Because the record contained no information about what information the EPA sought in the permit application, the court – in ruling on the town's motion to dismiss based on the permit shield – was forced to accept as true the plaintiff's allegations that the town unlawfully discharged PFAS. *Id.* at 1319-20. Here, however, it is undisputed that the VDEP failed to ask about PFAS in the permit application. R. at 5.

Ultimately, *Piney Run*'s adequate disclosure requirement must be understood in the context in which it originated. *Atlantic States* makes clear that the permit only limits those "pollutants listed in the . . . permit application." 12 F.3d at 358. Because PFAS was not included in the permit application, ComGen is protected by the permit shield for its discharges.

II. *LOPER BRIGHT* REQUIRES THIS COURT TO ABANDON *PINEY RUN* AND RETURN TO *ATLANTIC STATES*, BECAUSE *PINEY RUN* RELIED ON *CHEVRON* DEFERENCE TO UPHOLD AN ERRONEOUS INTERPRETATION OF THE PERMIT SHIELD.

To the extent that this Court understands *Piney Run* to require the "adequate disclosure" of pollutants like PFAS which are not inquired about in the permit application, then *Piney Run*, and the EPA interpretation upon which it relied, *see Ketchikan*, 7 E.A.D. at 621, should be abandoned in light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369. This Court should return to the Second Circuit's reasoning in *Atlantic States*, which limits a permit applicant's disclosure obligations to the information sought in the permit

application. *See* 12 F.3d at 357.

In *Loper Bright*, the Supreme Court upended the field of administrative law by overturning the *Chevron* doctrine. 603 U.S. at 412. Under *Chevron*, courts were instructed to defer to agencies' reasonable interpretations of ambiguous statutory language. *Id.* at 379-80. Now, *Loper Bright* mandates that courts exercise independent judgment in arriving at the best meaning of a statute. *Id.* at 379-80. Because the Fourth Circuit's reasoning in *Piney Run* relied on *Chevron* deference to uphold a restrictive EPA interpretation of the permit shield provision, *see* 268 F.3d at 266-69, this Court must abide by *Loper Bright*'s command to reevaluate whether that interpretation is the best meaning of the provision, *see Loper Bright*, 603 U.S. at 400. To the extent that *Piney Run* and the EPA's guidance in *Ketchikan* premise the availability of the permit shield defense on the "adequate disclosure" of pollutants which the permitting authority has not asked about in the application, this Court should decline to follow that guidance under *Loper Bright* and instead reaffirm the Second Circuit's interpretation in *Atlantic States* as the best meaning of the permit shield.

A. ***Loper Bright*** **requires courts to reexamine past precedents to see whether agency interpretations that were upheld as reasonable using *Chevron* deference represent the best reading of a statute.**

Loper Bright requires that courts reconsider precedents that relied on *Chevron* deference. The judicially created doctrine of *Chevron* deference required courts to defer to agencies' reasonable interpretations of ambiguous statutes. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), *overruled by Loper Bright*, 603 U.S. at 412. Under *Chevron* a court would first look to the statute itself to determine whether Congress spoke unambiguously. *Id.* If the statute was ambiguous, then the court would defer to the agency's reasonable interpretation. *Id.* at 483. In 2024, the Supreme Court put an end to *Chevron*, citing the

doctrine's inconsistency with the dictates of the Administrative Procedure Act. *Loper Bright*, 603 U.S. at 398-99 ("*Chevron* defies the command of the APA that 'the reviewing court' – not the agency whose action it reviews – is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'") (quoting 5 U.S.C. § 706). In consigning *Chevron* to the dustbin of judicial history, the Court briefly addressed the ramifications for agency interpretations that were upheld under *Chevron* deference:

> By [overturning *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful — including the Clean Air Act holding of *Chevron* itself — are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.

Id. at 412 (citation omitted).

Although the principle of stare decisis serves to "promote[] the evenhanded, predictable, and consistent development of legal principles . . . [,]" *Payne v. Tennessee*, 501 U.S. 808, 827(1991), it is not an "inflexible command," *id.* Furthermore, although statutory precedents are entitled to even greater respect than constitutional precedents, *id.* at 828 (citation omitted); *see also Kimble v. Marvel Entm't LLC*, 576 U.S. 446, 456 (2015) (justifying stricter protection for statutory precedents on the ground that Congress is free to change the statute if it disagrees with the Court), they are nonetheless subject to being overruled if they are "unworkable or [] badly reasoned[,]" *Payne*, 501 U.S. at 827 (1991) (citing *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Courts consider a number of overlapping factors when considering whether to overrule a precedent. These include, roughly: the nature of the legal error (i.e., whether the decision was "egregiously wrong"), the workability of the rule, and the

lack of concrete reliance interests. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231, 267 (2022); *Ramos v. Louisiana*, 590 U.S. 83, 121-24 (2020) (Kavanaugh, J., concurring).

Loper Bright requires this Court to reconsider its past precedents which relied on *Chevron*. Admittedly, the Court made clear in *Loper Bright* that not all prior agency interpretations ratified under *Chevron* are automatically defective. 603 U.S. at 412. However, *Loper Bright* obliges courts to reconsider these precedents by exercising their independent judgment. First, *Loper Bright*'s assurance that statutory stare decisis will protect "specific agency actions" upheld as lawful using *Chevron* deference, *id.*, must be understood as applying *only* to the Supreme Court's past *Chevron* precedents. A contrary interpretation would invite an unacceptable proliferation of conflict among the circuit courts of appeals: if an agency interpretation ratified under *Chevron* is subject to stare decisis in one circuit, then that same interpretation could be challenged in another circuit which never considered the issue. In light of *Loper Bright*, the latter circuit would then be obliged to arrive at the best meaning of the statute, *id.* at 400, which could easily depart from the agency's interpretation. This outcome would result in extreme disarray. Prudence counsels that the Court did not intend to provide *Chevron* with an afterlife in thousands of circuit court decisions. Now, any conflicts that might arise over whether a particular agency interpretation is the "best meaning" of a statute, *id.* at 400, will be an acceptable – and entirely natural – result of the courts exercising their traditional duty to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

To read *Loper Bright* as requiring statutory stare decisis treatment for *Chevron*-era circuit court decisions would produce another unacceptable result; namely, agency interpretations that were never intended to be final would suddenly be elevated to the status of

statutory precedents. The prospect of agency "flip-flopping" between different reasonable constructions of a statute was a well-established component of the *Chevron* framework. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (opining that statutory ambiguities represent Congress's intent to provide agencies with policymaking discretion based on changing circumstances); *Chevron*, 467 U.S. at 863-64 ("[Agencies] must consider varying interpretations and the wisdom of . . . policy on a continuing basis."). In fact, this problem was a major reason why the Court in *Loper Bright* found *Chevron* undeserving of stare decisis protection itself. 603 U.S. at 410 ("Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them."). Because the Court specifically attacked this fundamental flaw with *Chevron* deference, *id.*, it is implausible that it would elevate thousands of merely "reasonable," and provisional, agency interpretations to unassailable statutory precedents in the same breath. This would extend far beyond the damage control the Court likely intended to accomplish by cloaking its own precedents with stare decisis treatment.

The Court's invocation of statutory stare decisis in *Loper Bright* is best understood, not as a sweeping immunization of all *Chevron*-era precedents from reconsideration, but as a modest grant of protection for those Supreme Court precedents that have produced the most reliance due to their nationwide applicability. Thus, this Court is duty-bound to apply its independent judgment to past cases that relied on *Chevron* deference.

B. ***Piney Run* should be abandoned because any reading of the permit shield which exposes dischargers to liability for failure to disclose pollutants which are not included in the permit application is not the best reading of the provision.**

In the wake of *Loper Bright*, this Court should abandon *Piney Run* and return to *Atlantic States*, because the EPA interpretation adopted in *Piney Run* is not the best meaning of the permit

shield statute. The *Piney Run* court, which gave *Chevron* deference to the EPA's interpretation of the permit shield, fashioned a two-part framework for deciding the question of whether the permit shield extends to the discharge of pollutants not listed in the permit. 268 F.3d at 264. According to the Fourth Circuit, a polluter will be shielded so long as they adequately disclosed their discharges, and those discharges were within the reasonable contemplation of the permitting authority. *Id.*

The idea that permit "compliance" might extend beyond the letter of the permit itself originated in *Atlantic States*, 12 F.3d at 358, and served as the basis for the subsequent misunderstandings of the EPA in *Ketchikan* and the Fourth Circuit in *Piney Run*. In *Atlantic States*, the Second Circuit construed the scope of the permit shield defense broadly, holding that a discharger is shielded from liability even when the discharged pollutant is not expressly listed in the permit. *Id.* at 357. By leaving tens of thousands of otherwise-regulated chemical substances outside the scope of the permit application process, the court reasoned that Congress and the EPA chose to focus on those pollutants capable of "rational[] limit[ation]." *Id.* at 358.

Although the court recognized that dischargers are shielded for the discharge of unlisted pollutants only to the extent that they "comply with the appropriate reporting requirements . . . [,]" *id.* at 357, it nonetheless made clear that the permitting process is designed to focus on a select group of dangerous pollutants, *id.* at 357, 358.

The EPA's interpretation of the permit shield, *see Ketchikan*, 7 E.A.B. at 621, as ratified in *Piney Run* through the use of *Chevron* deference, 268 F.3d at 268, does not represent the best reading of the permit shield provision. Because the Supreme Court's stare decisis instruction in *Loper Bright* is properly understood as applying only to Supreme Court precedents, *see* 603 U.S. at 412, this Court is obliged to reconsider whether the *Piney Run* court's understanding of the permit shield represents the "best reading" of the statute, *id.* at 400. It does not. The permit shield

is designed to assure permit holders that they will be protected from litigation over the strictness of their permit. *See de Nemours*, 430 U.S. at 138 n.28. Any understanding of the permit shield which purports to condition protection from liability on the "adequate disclosure" of pollutants which are left out of the permit application departs from the intent of Congress by opening the door to the problematic use of informal channels to gather information.

Even if *Loper Bright* requires this Court to accord statutory stare decisis treatment to its *Chevron* precedents, *Piney Run* should still be abandoned. Under the Supreme Court's stare decisis factors, *Piney Run* and *Ketchikan* are not only wrong, but "egregiously wrong." *Dobbs*, 597 U.S. at 294. If the goal of the permit shield is to create certainty for permit holders by protecting them from unexpected liability, *see de Nemours*, 430 U.S. at 128 n.28, an ambiguous and open-ended disclosure requirement would produce the opposite result. Furthermore, an adequate disclosure requirement for pollutants which are not included in the formal permit application is also unworkable. *Loper Bright*, 603 U.S. at 407-8. An extension of this requirement to pollutants which are not included in the permit application would leave the lower courts with no standard by which to judge the adequacy of a particular disclosure. Dischargers would be forced to guess whether an inquiry from the permitting authority was sufficiently formal to trigger disclosure obligations. This is exactly the sort of "impressionistic and malleable" concept that would prove unworkable in practice. *Id.* at 408. Finally, because *Piney Run* and the EPA's guidance create a regulatory landscape where dischargers could be subject to liability for the discharge of unregulated pollutants without any notice or disclosure requirements, there are no reliance interests that would be upended by returning to the reasoning in *Atlantic States*. The only thing that dischargers could expect under the *Piney Run* framework is inherent uncertainty and litigation risk.

The Second Circuit's approach in *Atlantic States* is capable of addressing these pitfalls. First, by emphasizing reporting requirements and permit amendment as the preferred remedy for dealing with the problematic discharge of unlisted pollutants, the *Atlantic States* approach complements Congress's intent to provide stability for permit holders. 12 F.3d at 358. Second, *Atlantic States* provides a workable rule for courts to apply. Although dischargers are required to disclose the information sought in the permit application and comply with reporting requirements, their obligations are limited to the permit application and the permit itself. *Id.* at 357. By sticking to those core documents, courts will not be forced to evaluate whether a permitting authority's use of informal channels is sufficiently formal to trigger an adequate disclosure obligation. Third and finally, *Atlantic States* allows dischargers to rely on the validity of their permits, thus accomplishing the CWA's goal of stability for permit holders.

In light of these factors, the *Piney Run* framework is undeserving of statutory stare decisis treatment. This Court should return to the reasoning in *Atlantic States* from which *Piney Run* deviated and hold that ComGen is protected by the permit shield for its discharges of PFAS.

III. SCCRAP LACKS STANDING TO CHALLENGE COMGEN'S CLOSURE PLAN BECAUSE ITS MEMBERS' INJURIES ARE NOT TRACEABLE TO THE CLOSURE PLAN OR REDRESSABLE BY THEIR RELIEF SOUGHT.

In exercising its "independent obligation to assure that standing exists . . . [,]" this court should maintain judicial standards and find that SCCRAP fails to meet the requirements. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Article III of the U.S. Constitution "[c]onfines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Transunion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). A case or controversy can only exist if a

plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Article III standing consists of three elements: injury in fact, causal connection, and redressability. *Id.* This court should hold that SCCRAP does not have standing because (A) SCCRAP's aesthetic and recreational injuries are not causally connected to ComGen's Closure Plan, (B) its injuries are not redressable by their injunctive relief sought, and (C) any attempt to frame a more traceable and redressable injury in connection to the Closure Plan would fail to establish standing.

A. SCCRAP's alleged aesthetic and recreational injuries are in no way traceable to ComGen's Closure Plan.

SCCRAP fails to establish a causal connection between its alleged injuries and ComGen's Closure Plan. Standing requires that there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant. *Lujan*, 504 U.S. at 561. The mere fact that a plaintiff has suffered harm from a defendant is insufficient: there must be a form of direct causation tying together the specific harm and the disputed conduct. *N.C. Fisheries Ass'n v. Pritzker*, No.4:14−CV−138−D, 2015 WL 4488509, at *7 (E.D.N.C July 22, 2015). There must be a "genuine nexus between a plaintiff's injury and a defendant's alleged conduct." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000).

In *Mobile Baykeeper, Inc. v. Alabama Power Co.*, the defendant operated a coal-fired electricity generating plant and a CCR surface impoundment. No. CV 1:22-00382-KD-B, 2024 WL 54118, at *2 (S.D. Ala. Jan. 4, 2024). Plaintiff alleged that defendant's closure plan for its impoundment violated RCRA and Federal CCR Regulations. *Id.* at *3-4. In evaluating standing, the court held that the plaintiff suffered aesthetic and recreational injuries because the coal ash impoundment had been contaminating water for decades, which the plaintiff recreated on. *Id.* at *11-12. However, the court found the plaintiff's injuries were not traceable

to the Closure Plan because the injuries the plaintiff suffered resulted from contamination pre-dating defendant's closure plan. *Id.* at *13; *see also Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 17−CV−707, 2018 WL 2417862, at *5 (M.D. N.C. May 29, 2018) (same).

Here, it is not disputed that SCCRAP's members have suffered aesthetic and recreational harm. R. at 10. The VGS has discharged PFAS into the Vandalia River since 2015. R. at 9. Additionally, arsenic and cadmium have been leaching from the Impoundment potentially dating all the way back to 2011. R. at 8. Like the plaintiff in *Mobile Baykeeper*, SCCRAP is challenging the adequacy of a closure plan which has in no way caused or contributed to its alleged injuries. R. at 12. Because ComGen did not begin implementing the Closure Plan until *after* the substances that caused SCCRAP's injuries in fact were released, there is an obvious *mismatch* between the injury and challenged conduct. R. at 7-9. Specifically, whether this Closure Plan was only dreamt of or put in place to the fullest extent would it have any bearing on the injury suffered by SCCRAP – the injury would have already occurred regardless. *See Walters v. Fast AC, LLC*, 60 F.4th 642, 650 (11th Cir. 2023) (explaining traceability cannot be established when the plaintiff "would have been injured in precisely the same way without the defendant's alleged misconduct."). Although ComGen is responsible for both SCCRAP's injuries and the Closure Plan, individually, the injury in fact is not fairly traceable to the challenged conduct. R. at 6-9. Therefore, in exercising its obligation to ensure SCCRAP's standing, this Court must dismiss.

B. SCCRAP's aesthetic and recreational injuries are not redressable by an injunction halting the implementation of the Closure Plan.

SCCRAP's alleged injury in fact is in no way redressable by a favorable court order. If a plaintiff cannot establish traceability, it is likely the same can be said for redressability. *See Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021)

(citation omitted) (detailing that traceability and redressability often travel together). The hurdle to establish the final element of standing is not a low one to clear, only allowing claims which are *likely* to be redressable by a favorable decision. *Lujan*, 504 U.S. at 561 (emphasis added).

In *Mobile Baykeeper*, the plaintiff sought injunctive relief to stop the defendant from implementing their closure plan *and* injunctive relief requiring defendant to file a compliant closure plan. 2024 WL 54118, at *12. The court found that when addressing these two claims that even if the defendant implemented a compliant closure plan today, the ongoing leaching would not be redressed. *Id.*

Here, unlike the plaintiff in *Mobile Baykeeper*, SCCRAP *only* seeks to enjoin the Closure Plan's implementation, one step of recourse less than the plaintiff in *Mobile Baykeeper*. R. at 12. If the plaintiff's injury in *Mobile Baykeeper* was not redressable by injunctive relief to stop the closure plan *and* create a new closure plan, it will not be redressable here, where SCCRAP is seeking *only* injunctive relief to stop the Closure Plan. *Id.* at 12. Because SCCRAP's injury is not fairly traceable to the Closure Plan, it will not be redressable by the injunctive relief sought. Even if the Closure Plan is halted, it will continue to leach substances that have been contributing to SCCRAP's harm. R. at 8-9.

Furthermore, by hypothetically granting SCCRAP a favorable decision and halting the Closure Plan, the Impoundment would remain in its current state, continuing to leach pollutants. *Id.* Instead, this outcome would continue to fuel the exact harm that SCCRAP is ostensibly seeking to prevent. Ultimately, this court should be puzzled as to why SCCRAP brought a claim under 42 U.S.C. § 6972(a)(1)(A), challenging the Closure Plan which is not the source of the alleged leaching that has fueled SCCRAP's harm, thus being incapable of

redressing injury. R. at 12. Therefore, the final element of standing is clearly not met.

C. SCCRAP cannot allege any imminent injury in any shape or form related to the Closure Plan of the impoundment.

Although SCCRAP has plausibly alleged aesthetic and recreational injuries in fact, it cannot allege an *imminent* injury resulting from a potential failure of the Impoundment. Thus, any attempt by SCCRAP to recharacterize its injuries to satisfy the requirement of traceability must fail. An injury in fact is an invasion of a legally protected interest which is both (a) concrete and particularized and (b) "actual or imminent, not conjectural or hypothetical." *Id.* at 560. Furthermore, allegations of possible future injury are insufficient to establish injury in fact – the injury must be "certainly impending." *Clapper v. Amnesty Int'l Inc. USA*, 568 U.S. 398, 401 (2013).

Any attempt by SCCRAP to reframe its injury in fact as a future injury traceable to a possible failure of the Closure Plan must fail. Here, ComGen's Closure Plan would not be completed for seven years. R. at 9. Thus, any injury from a catastrophic spill or any post-closure pollution from a faulty plan are in no way imminent. Furthermore, there are no factual allegations showing that ComGen's implementation of the Closure Plan has currently resulted in increased pollution levels. R. at 1-14. Undoubtedly, this closure plan has failed to prove any injury at all, let alone one that is certainly impending. An injury of this nature is purely hypothetical and cannot serve as a basis for standing. Therefore, any attempt by SCCRAP to recharacterize its injuries must fail.

IV. SCCRAP HAS FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 6972(a)(1)(B) BECAUSE CONTAMINATION TO THE ENVIRONMENT ALONE DOES NOT CONSTITUTE AN ENDANGERMENT.

Because contamination to the environment alone does not constitute an endangerment to the environment, SCCRAP cannot sustain an imminent and substantial endangerment claim.

Therefore, this Court must affirm. RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. *See* Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6901; *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Its primary purpose is to "reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste . . . so as to minimize the present and future threat to human health and the environment." *Compare* 42 U.S.C. § 6901, *with* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101-175, 42 U.S.C. §§ 9601-9675 *(*holding parties *strictly liable* for the cleanup of hazardous substances at a site). Under RCRA, a citizen may bring suit against persons responsible for "waste which may present an *imminent and substantial endangerment* to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

This Court has yet to decide whether a citizen can pursue an imminent and substantial endangerment claim where the only alleged endangerment is the *mere presence* of contaminants in the environment. To ensure that RCRA is not reduced to a strict liability cleanup statute, this Court must hold that SCCRAP *cannot* pursue an imminent and substantial endangerment claim for two reasons: (A) RCRA does not support a claim of endangerment to the environment itself based on the presence of contaminants alone without some form of endangerment to a living population and (B) to the extent that this Court finds an endangerment to a living population, the endangerment is not imminent and substantial.

A. RCRA does not support an imminent and substantial endangerment claim to the environment caused by the *mere presence* of contamination because there must be at least some form of endangerment to a living population.

Because the *mere presence* of contamination alone does not constitute an endangerment to the environment, SCCRAP cannot sustain an imminent and substantial claim

without some form of endangerment or exposure pathway to a living population. The operative word of RCRA is "may," which is "expansive language that confers upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004). However, "there is a limit to how far the tentativeness of the word [can] carry a plaintiff." *Courtland Co. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331068, at *97 (S.D.W. Va. Sept. 28, 2023) (citation omitted). The term "endangerment" means a threatened or potential harm and does not require proof of actual harm. *Parker*, 386 F.3d at 1051. But, not every harm will constitute an endangerment. *See Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006) ("[A] reasonable prospect of future harm is adequate to engage the gears of a [claim] [if] the threat is near-term and involves potentially serious harm."). Thus, an endangerment requires "some threatened or potential effect *beyond* the fact that a foreign substance is present on land, water, or beneath the surface." *Courtland*, 2023 WL 6331069, at *100. Accordingly, the *mere presence* of contamination alone is not enough to constitute an imminent and substantial endangerment to human health or the environment. *Id.* at *98.

For example, the *Courtland* court properly refused to broaden the scope of an imminent and substantial endangerment claim to contemplate contamination to groundwater alone, where it held that the plaintiff failed to provide additional evidence demonstrating any viable exposure pathway by which any human or ecological receptor could come into contact with contaminated groundwater. *Id.* The court reasoned that because there were no known groundwater wells within a mile of the site, it followed that there were no exposure pathways by which any living receptor could come into contact with any contamination – through

ingestion or otherwise. *Id.* at *55-56, *98; *see also Liebhart v. SPX Corp.*, 917 F.3d 952, 960 (7th Cir. 2019) (holding that the presence of contaminants in soil is not enough without a threat to human health).

Although "it may be desirable for nature to remain in pristine condition," it is infeasible to hold that contamination alone constitutes an endangerment to the environment. *Schmucker v. Johnson Controls, Inc.*, 477 F. Supp. 3d 791, 810 (N.D. Ind. 2020). The United States Court of Appeals for the Third Circuit erroneously broadened the scope of an imminent and substantial endangerment claim by holding that concentrations of contamination in the environment constitute an endangerment to the environment in and of itself. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 263 (3d Cir. 2005). Relying on the provision's disjunctive phrasing, "or environment," the court reasoned that harm to a living population was not required. *Id.* Thus, the *Interfaith* decision can be interpreted to stand for the proposition that RCRA operates to preserve the "existing state of nature, and any contamination that alters it constitutes a *per se* violation of RCRA" – a completely unworkable proposition. *Id.*

To accept SCCRAP's theory that the presence of high levels of contamination *alone* constitutes an endangerment to the environment is not only irrational but also underdeveloped. First, RCRA's text does not support finding a violation for trivial discharges because relief for an endangerment claim is authorized "only as necessary to prevent harm from an imminent and substantial endangerment." *Schmucker*, 477 F. Supp. 3d at 811. To hold that any amount of pollution endangers the environment would render the other terms in the statute "superfluous, as practically *any* addition of a pollutant into the environment would give rise to liability." *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418 (E.D. Pa. 2015); *see also King v.*

St. Vincent Hosp., 502 U.S. 215, 221 (1991) ("It is a cardinal rule that courts should strive to interpret statutes as a whole and give effect to every word and phrase."). Second, RCRA is neither a cleanup nor a strict liability statute, and to interpret it as such would be "wholly irrational." *Meghrig*, 516 U.S. at 486 (holding that it is irrational to interpret RCRA as a cleanup statute because it contains no statute of limitations, does not require a showing that the response costs being sought are reasonable, a private party may not bring suit without giving 90 days' notice, and no citizen suit can proceed if either the EPA or the State has commenced, and is diligently prosecuting, a separate enforcement action). If SCCRAP wanted to recover, it should have brought an action under CERCLA – a strict liability cleanup statute. Third, this standard is underdeveloped and leads to a difficult question: "What does it mean to endanger something that is not alive?" *See Tri-Realty,* 124 F. Supp. 3d at 454. The lack of judicial standards to evaluate harm to the environment itself – without reference to injured humans, animals, or plants – makes this question ill-suited for resolution under RCRA.

Here, ComGen's yearly monitoring reports showed elevated levels of arsenic and cadmium above federal advisory levels and Vandalia's groundwater quality standards for such parameters. R. at 8. However, these elevated levels are *all* that were found in the report. *Id.* There is no evidence that either substance had reached the Vandalia River or any other public water drinking supply or will in the next five years. *Id.* Although SCCRAP has alleged the presence of cadmium and arsenic in groundwater, *id.*, this fact alone is insufficient to sustain a claim under RCRA, *see e.g.*, *Liebhart*, 917 F.3d at 960. And, like in *Courtland* where the lack of groundwater wells was fatal to the plaintiff's claim, SCCRAP has failed to allege that anyone is using the groundwater for drinking within the area. R. at 8, 9. Thus, there is no exposure pathway for a living population to ingest the alleged contamination because no one

is drinking the groundwater, and contamination has not reached the Vandalia River. *Id.*

Accordingly, SCCRAP has failed to allege any harm beyond the *mere presence* of contamination in groundwater and cannot prove an exposure pathway by which a living population can be harmed.

B. Any endangerment to the proposed housing development is not sufficiently imminent and substantial.

To the extent that the proposed housing development constitutes an endangerment to a living population, it is not imminent and substantial. Under RCRA, an endangerment can only be "imminent" if it "threatens to occur immediately." *Meghrig*, 516 U.S. at 485 (citation omitted). Thus, there "must be a threat which is present *now*, although the threat may not be felt until later." *Id.* at 486. An endangerment is "substantial" if it is "serious." *Courtland*, 2023 WL 6331069, at *98 (citation omitted). However, "[c]ourts seldom quantify the necessary level of harm with any precision. Instead, substantiality looks to formulations like where there is a reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken." *Id.* (citation omitted). But, this risk of harm "cannot be remote in time, completely speculative in nature, or de minimis in degree." *Id.* (citation omitted).

"[I]t is difficult to reconcile the existence of an endangerment that is both imminent and substantial when the contamination present threatens no actual harm to someone or something." *Id.* Courts have declined to find an imminent and substantial endangerment where the harm alleged is one to *future* occupants. *See e.g., Scotchtown Holdings LLC v. Town of Goshen*, No. 08-CV- 4720, 2009 WL 27445, at *2 (S.D.N.Y. 2009) (rejecting the argument that an imminent and substantial endangerment existed because the supposed endangerment was to the health of *future* occupants of any dwellings constructed or *to be* constructed on the

site); *SPPI-Somersville, Inc. v. TRC Cos.*, No. 07-5824 SI, 2009 WL 2612227, at *12 (N.D. Cal. Aug. 21, 2009). Thus, a complaint that does not "allege any deleterious effects that [contaminants] have had or may have on health or the environment other than preventing the development of [a site]" does not allege an imminent and substantial endangerment. *Scotchtown*, 2009 WL 27445, at *2.

Additionally, there cannot be an RCRA imminent and substantial endangerment claim where the harm proposed by the contaminants will never occur. *Id.* Accordingly, if groundwater is contaminated and deemed unsafe for human consumption, there is no one drinking the water for harm to occur. *Id.* ("If indeed the ground water is contaminated . . . it will never be approved for human consumption."); *see also Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1147 (M.D. Fla. 2020) (explaining that many courts have rejected groundwater endangerment claims with no evidence of anyone potentially drinking contaminated water).

Here, no one currently uses groundwater wells for drinking within the contaminated area. R. at 9. The only possible endangerment is to a housing development *considering* building a subdivision within a mile downgradient of the Impoundment, which has *plans* to use well water as the primary drinking water source. *Id.* Several SCCRAP members have put their name on a waiting list for this proposed development. *Id.* Assuming the plans are ever executed, the housing development would not be finished until at least 2031: over five years from now. *Id.* Thus, there is no threat which is present *now* because "no one [is] currently us[ing] groundwater wells for drinking within the area" – there is no housing development threatened by the contaminated water *now* because the housing development does not even exist. *Id.* Additionally, the harm is completely speculative in nature as SCCRAP members are

only on a *waiting list* for the *proposed* development. *Id.* Thus, there is no evidence that these members will actually use the groundwater in the next five years.

Furthermore, SCCRAP's human health expert has determined that the groundwater "should not be used for drinking water." R. at 9. Thus, it is likely that the contaminated groundwater will never be approved for human consumption even if the proposed plan were executed. The circumstances prevent any human population from drinking the water, and therefore, the residents on the waiting list are not threatened *now* and will never be threatened because they will never drink the water. Thus, the threat is not imminent and substantial.

Accordingly, to the extent SCCRAP has alleged an endangerment to a living population, the endangerment is not imminent and substantial because a *proposed* housing development cannot be threatened *now.* And any claim to the contrary is purely speculative.

CONCLUSION

For the foregoing reasons, ComGen respectfully requests that this Court: (1) affirm the decision of the United States District Court for the Middle District of Vandalia to dismiss SCCRAP's CWA claim; (2) affirm on the alternate ground that *Loper Bright* requires this Court to overturn *Piney Run* due to its reliance on *Chevron* deference; (3) find that SCCRAP lacks standing to challenge the implementation of ComGen's Closure Plan under RCRA; and (4) affirm the decision to dismiss SCCRAP's imminent and substantial endangerment claim,

Respectfully submitted,

Team 27

/s/_____

Counsel for the Appellee

02/05/2025

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing ComGen 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 at 6:00 p.m. Eastern time, February 5, 2025.

Respectfully submitted,

Team No. 27