UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 24-0682

STOP COAL COMBUSTION RESIDUAL ASH PONDS	)	C.A. No. 24-0682
Plaintiff/Appellant,	)	On Appeal from the United States District Court For the Middle District of Vandalia
-v.-	)	
COMMONWEALTH GENERATING COMPANY,	)	
Defendant/Appellee.	)	**Appellant's Merit Brief**

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Stop Coal Combustion
Residual Ash Ponds

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JURISDICTIONAL STATEMENT

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed a citizen suit against Commonwealth Generating Company ("ComGen") in the United States District Court for the Middle District of Vandalia. Jurisdiction in the district court was based on 33 U.S.C. § 1251 and 42 U.S.C. § 6972(a)(1)(B), each of which state that the district court shall have jurisdiction over claims therein, without regard to the amount in controversy or the citizenship of the parties. Clean Water Act § 505(a), 33 U.S.C. § 1251; Resource Conservation and Recovery Act § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(B). The complaint was timely filed on September 3, 2024, ninety days after SCCRAP sent ComGen a notice of intent to sue. The district court, in a final decision, granted ComGen's Motion to Dismiss in its entirety on October 31, 2024. SCCRAP filed a timely appeal with the United States Court of Appeals for the Twelfth Circuit on November 10, 2024. Fed. R. App. P. 4(a)(1). This Court's jurisdiction is based on 28 U.S.C. § 1291, which states that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

1. Under Article III, does SCCRAP have standing to challenge ComGen's closure plan when its members allege continued environmental harm?

2. Under RCRA, can SCCRAP bring an imminent and substantial endangerment claim based on groundwater contamination when the district court ruled that endangerment requires a direct threat to human health?

3. Under stare decisis, must the 12th Circuit follow Piney Run and defer to the EPA's interpretation of the permit shield when Loper Bright eliminated Chevron deference but left prior circuit precedent intact?

4. Under the Clean Water Act, does ComGen's undisclosed discharge of PFOS and PFBS from Outlet 001 constitute an unpermitted discharge when these pollutants were neither disclosed in its permit application nor contemplated by regulators?

STATEMENT OF THE CASE

ComGen owns and operates the Little Green Run Impoundment ("LGRI"), located adjacent to the Vandalia Generating Station ("VGS") and along the Vandalia River. R. at 3. The LGRI is an on-site surface impoundment for coal combustion residuals ("CCRs" or "coal ash") and is the historic disposal site of the coal ash produced by the VGS. R. at 3.

The VGS holds a Vandalia Pollutant Discharge Elimination System ("VPDES") permit from the Vandalia Department of Environmental Protections ("VDEP") that covered its outfalls into the Vandalia River and its tributaries. R. at 4. During the VPDES permit application process, a deputy director of the VDEP asked an employee of ComGen via email whether any of their Outlets might have perfluorooctane sulfonate ("PFOS") or perfluorobutane sulfonate ("PFBS") in its discharges. R. at 4. The deputy director was concerned about these pollutants because new studies have shown such PFAS parameters are present in fly and bottom ash. R. at 4. ComGen

ComGen unveiled the "Building a Green Tomorrow" program that involved the retirement of several coal-fired power plants, including the VGS. R. at 4. ComGen submitted its initial permit application for CCR surface impoundment of the LGRI to the VDEP. R. at 6. The permit application explained ComGen's intention to close in place the LGRI in accordance with the EPA and state CCR Regulations. R. at 6. After a public hearing and written comments, the VDEP issued ComGen a closure permit for the LGRI. R. at 6.

SCCRAP is a national environmental and public interest organization with members located throughout Vandalia. R. at 8. SCCRAP, along with several local environmental groups,

suspected that the VGS was causing Per- and polyfluoroalkyl substances ("PFAS") problems in the Vandalia River, which supplies drinking water for the resident of Mammoth. R. at 9. These groups performed a test of the Vandalia River and identified PFOS and PFBS concentrations in outlet 001 of the VGS. R. at 9. After testing, the groups learned from a subpoena that ComGen knew outlet 001 was discharging PFOS and PFBS and possessed monthly monitoring reports dating back 10 years tracking the discharge of PFOS and PFBS from Outlet 001. R. at 9.

SCCRAP has also been closely monitoring the arsenic and cadmium groundwater contamination emanating from the LGRI. R. at 9. Based on the levels of arsenic and cadmium in the downgradient monitoring wells, SCCRAP's human health expert has determined that groundwater downgradient of the site within 1.5 miles of the LGRI should not be used for drinking water. R. at 9. A housing developer is considering building a large subdivision within a mile downgradient of the Impoundment and has proposed plans to use well water as the primary drinking water source for that development. R. at 9.

Additionally, SCCRAP believes that ComGen's closure plan for the LGRI is deficient as it will permanently store coal ash below sea level and in contact with water, including groundwater, where it is already leaching into water of the United States. R. at 9. SCCRAP is also concerned that future weather incidents, such as floods, storms, and hurricanes, present a risk of catastrophic failure as a rise in the water level could elevate the groundwater in the LGRI and cause coal ash to spill into the Vandalia River. R. at 9.

Following ComGen's announcement of its intent to close the VGS and the VDEP's approval of ComGen's closure plan for the LGRI, SCCRAP filed suit with several claims against ComGen in the United States District Court for the Middle District of Vandalia. R. at 12. First, SCCRAP alleged that ComGen violated § 505 of the Clean Water Act ("CWA") by discharging

PFOS and PFBS into the Vandalia River through Outlet 001 without a VPDES permit for such pollutants. R. at 12. SCCRAP also alleged that such PFAS pollutants were not "within the reasonable contemplation of the permitting authority at the time the permit was granted" because such pollutants are not listed in the permit, and ComGen lied to the VDEP deputy director about such pollutants before its VPDES permit was issued. R. at 12. Second, SCCRAP challenged the LGRI closure plan as inadequate under § 7002(a)(1)(A) of the Resource Conservation and Recovery Act ("RCRA"). R. at 12. Finally, SCCRAP alleged that the LGRI presents an imminent and substantial endangerment to the environment itself due to its consistent arsenic and cadmium exceedances at its downgradient monitoring wells. R. at 12.

ComGen filed a Motion to Dismiss all complaints. R. at 13. The District Court issued an order granting ComGen's Motion to Dismiss in its entirety. R. at 13. For SCCRAP's CWA claim, the court followed the reasoning of Atlantic States, rather than the Piney Run framework, to conclude that because PFOS and PFBS are not pollutants that are specifically asked about in the formal permit application, there were no disclosure requirements that ComGen violated, and thus the permit shield was applicable. R. at 14. For SCCRAP's RCRA claim, the Court determined that SCCRAP did not have standing to challenge the closure plan. R. at 14. For SCCRAP's imminent and substantial endangerment claim, the Court held that the RCRA does not support an imminent and substantial endangerment claim to the environment itself and that there must be some form of endangerment or exposure pathway to a living population. R. at 14. SCCRAP now appeals to this Honorable Court seeking a reversal of the District Court's decision.

SUMMARY OF ARGUMENT

This case turns on whether ComGen can evade environmental accountability by exploiting legal technicalities. The district court's decision misapplies well-established

precedent, allowing ComGen to proceed with a deficient closure plan, discharge pollutants without regulatory scrutiny, and escape liability for ongoing contamination. This Court should reverse the decision and require compliance with the legal framework Congress put in place to prevent precisely these harms.

First, SCCRAP has standing to challenge ComGen's closure plan for the LGRI. The district court incorrectly concluded that SCCRAP's injuries were not traceable to ComGen's conduct, reasoning that contamination existed before the closure process began. However, the relevant legal question is not whether contamination existed but whether ComGen's closure plan complies with federal law. The current plan leaves coal ash in direct contact with groundwater, worsening contamination that already prevents SCCRAP's members from safely recreating in and around the Vandalia River. This is a concrete and particularized harm. Moreover, a favorable ruling would require ComGen to implement a compliant closure plan, reducing pollution and directly addressing SCCRAP's injuries. The district court's standing analysis should be reversed.

Second, the district court improperly narrowed the scope of the RCRA by requiring a direct threat to human health. RCRA explicitly allows lawsuits to prevent imminent and substantial endangerment to health or the environment. ComGen's unlined coal ash impoundment continues to leach arsenic and cadmium into groundwater, creating a clear and ongoing environmental hazard. Multiple circuit courts have recognized that contamination of groundwater, soil, or surface water alone is sufficient to establish an endangerment claim under RCRA. The district court's restrictive interpretation conflicts with the statute's plain language and purpose, and this Court should correct that error.

Third, this Court should uphold its precedent in Piney Run and recognize the EPA's long-standing interpretation of the CWA. The CWA requires polluters to fully disclose all pollutants in

their permit applications. A pollutant cannot be shielded under the company's permit if it is not disclosed. The Supreme Court's recent ruling in Loper Bright adjusted how courts defer to agencies but did not overturn circuit precedent. This Court's holding in Piney Run remains binding unless explicitly overruled, and the EPA's consistent interpretation of the permit shield provision aligns with that precedent. The district court erred in disregarding both this Court's prior rulings and the EPA's expertise.

Finally, ComGen's discharge of PFOS and PFBS is an unpermitted violation of the CWA. ComGen never disclosed these chemicals in the permit application process and even misled the permitting authority by falsely claiming they were not present in its discharges. Internal monitoring records—only revealed through outside litigation—show that ComGen has discharged these pollutants into the Vandalia River for years. This is not a case where regulators simply failed to impose limits; it is a case where the permit holder deprived the agency of essential information, preventing regulatory oversight. The permit shield does not apply in such circumstances, and the district court's contrary holding was in error.

SCCRAP has standing to bring this challenge. RCRA's protections extend to environmental endangerment, ComGen's undisclosed discharges violate the CWA, and this Court's precedent supports SCCRAP's position. Therefore, this Court should reverse the district court's decision and remand for further proceedings.

ARGUMENT

I. SCCRAP Has Standing to Challenge ComGen's Closure Plan

SCCRAP satisfies all standing requirements to challenge ComGen's non-compliant closure plan for the LGRI. The Supreme Court has long held that standing requires three elements: (1) an injury-in-fact that is concrete and particularized; (2) a causal connection

between the injury and the defendant's conduct; and (3) redressability. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). SCCRAP meets each of these requirements.

This section addresses three key issues. First, SCCRAP's injuries are fairly traceable to ComGen's non-compliant closure plan, as required by Article III standing doctrine. Second, the district court erred by relying on an "injured in the same way" rationale that misapplies precedent. Third, ComGen's historical pollution does not negate SCCRAP's standing, as the ongoing environmental harm stems directly from the closure plan's deficiencies.

A. SCCRAP's Injuries are Traceable to ComGen's Conduct

To establish traceability, a plaintiff need not prove proximate causation—only that the defendant's conduct is a substantial factor in causing the harm. Cordoba v. DirectTV, LLC, 942 F.3d 1259, 1271 (11th Cir. 2019). Courts routinely recognize that injuries flowing indirectly from a defendant's actions satisfy this standard. *See* United States v. SCRAP, 412 U.S. 669, 688 (1973); Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003) ("[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes."). Cases under RCRA are subject to traditional standing analysis. Me. People's All. and Nat. Res. Def. Council v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006).

Here, SCCRAP's members suffer diminished use and enjoyment of the Vandalia River due to pollution from ComGen's closure plan. The non-compliant plan leaves coal ash in direct contact with groundwater, perpetuating contamination. This ongoing injury is directly linked to ComGen's conduct and falls well within the "fairly traceable" standard. Cox v. Taylor, 256 F.3d 281, 305 (5th Cir. 2001) (finding traceability where a defendant's failure to remediate illegal dumping prolonged pollution); Ass'n of Irritated Residents v. U.S. EPA, 10 F.4th 937, 944 (9th

Cir. 2021) (holding injuries caused by pre-existing air pollution were traceable to state implementation plan designed to reduce the pollution). Despite these principles of standing, the Court applied a much more stringent standard.

1. The Relevant Inquiry Is Whether ComGen's Closure Plan Causes or Worsens SCCRAP's Injuries.

The court believes "SCCRAP's would have been injured in the same way" had ComGen Power never begun closing the LGRI Ash Pond. R. at 14. ComGen is required by law to close the LRGI—the Rule requires all active utility coal ash impoundments to close. 40 C.F.R. § 257.101(a)(1). There is no scenario in which the LGRI would not be closed. It will either close in compliance with the Rule, or it will close in violation of the Rule. The relevant question is whether ComGen's chosen method of closure complies with the law and mitigates future harm. Non-compliant closure will cause or contribute to SCCRAP's injuries by leaving coal ash in groundwater, leaching pollutants into the surrounding waters. This is why Congress and EPA gave SCCRAP a legal right to challenge non-compliant closure procedures.

The district court wrongly framed the issue as whether SCCRAP's members would suffer harm if ComGen had never begun the closure process. This hypothetical is irrelevant. What matters is whether ComGen's closure plan itself contributes to ongoing pollution. The record shows that it does: ComGen's closure-in-place approach leaves coal ash in direct contact with groundwater, allowing arsenic and cadmium to leach into surrounding waters. R. at 9–10. A legally compliant closure would remove the ash from water contact, preventing further contamination.

SCCRAP's members would not have been injured "in precisely the same way" absent ComGen's non-compliant closure. The state-permitted closure plan ComGen is implementing leaves ash in water, resulting in discharges of contamination, which directly causes SCCRAP's

injuries. SCCRAP's members attested that the LGRI closure is a major concern for them, and non-compliant closure is reducing their use and enjoyment of the river and surrounding watershed because of the pollution it causes and the ongoing risk of further contamination. R. at 9–10. The factual record demonstrates that these members would not be injured "in the same way" if ComGen was implementing a legal closure plan. R. at 14. Leaving CCR in an unlined and uncovered impoundment permanently extends SCCRAP's injuries.

The Supreme Court has long rejected reasoning that disregards a defendant's role in perpetuating an injury. In Maine People's Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006), the court recognized that standing exists when a defendant's conduct contributes to an ongoing environmental hazard, even if the contamination began earlier. Here, ComGen's non-compliant closure is not merely incidental to SCCRAP's injuries—it actively prolongs and exacerbates them. Causation in this instance is direct and clear.

2. Historical Pollution Pre-Dating the Closure Plan Is Not a Valid Basis to Reject Standing

At the motion to dismiss stage, the burden to prove redressability and traceability is "relatively modest." Bennett v. Spear, 520 U.S. 154, 171 (1997). The court accurately determined that SCCRAP has suffered an injury-in-fact in the form of aesthetic and recreational injuries. R. at 14. Thus, the issue is whether a ruling in SCCRAP's favor will redress its injuries.

The Court found a disconnect between SCCRAP's injuries and ComGen's misconduct because "the contamination began before any closure activities began." R. at 14. This framing conflicts with established concepts of standing. The touchstone of traceability is showing "that the injury was likely caused by the defendant." TransUnion, LLC v. Ramirez, 594 U.S. 413, 423 (2021). ComGen created and is causing the ongoing pollution and other risks that

are affecting SCCRAP's members' use and enjoyment of the waters around the leaking impoundment. ComGen constructed the impoundment and is responsible for the contamination it has created. There is no intervening cause, attenuated chain of possibilities, or contribution to SCCRAP's injuries by any third party.

The district court's approach is also inconsistent with the Supreme Court case announcing the "fairly traceable" standard, Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977). There, the Court held that plaintiffs had standing to challenge a zoning decision that blocked construction of low-income housing, even though racial discrimination in housing predated the challenged ordinance. The key question was not whether discrimination existed before, but whether the ordinance reinforced or prolonged the harm. Id. at 264. The decision below "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 168–69 (1997).

The court's reasoning misses the direct link between SCCRAP's injuries and ComGen's ongoing violations of the CCR Rule's standards. Closing the LGRI in place will permanently store coal ash below sea level and in contact with groundwater. R. at 9. The ongoing location and storage method of the coal ash is the origin of SCCRAP members' diminished use and enjoyment of the Vandalia River. R. at 10. Thus, there is a clear link between the historical pollution, current deficient closure plan, and SCCRAP's injuries. This is a case of causation that easily meets the standard of causation for standing purposes. Walters v. Fast AC, LLC, 60 F.4th 642, 650 (11th Cir. 2023).

ComGen's past pollution cannot invalidate SCCRAP's standing. If it did, the closure plan rule would be rendered unenforceable by any citizen, simply because the LGRI has been leaking

for years. Ongoing, legacy pollution was the impetus for the CCR Rule's closure requirements to begin with—they were put in place to ensure this problem would not continue once the impoundments were closed. In the Rule's Preamble, EPA said that "many existing CCR surface impoundments are currently leaking . . . these are the risks the disposal rule specifically seeks to address." 80 Fed. Reg. at 21,343. The Rule was created to regulate the storage and disposal of coal ash under RCRA in a manner that will alleviate the injuries demonstrated by SCCRAP. 80 Fed. Reg. at 21,312. Through this statutory and regulatory framework, citizen plaintiffs are empowered to sue for violations of the Rule's closure standards, to ensure impoundments are closed in a manner that will abate the historical, ongoing contamination associated with coal ash impoundments. But citizens could never enforce the Rule if pollution targeted by the Rule that began prior to closure somehow invalidated their standing. The Rule specifically provides for citizen enforcement of closure standards at the stage that SCCRAP initiated this case.

ComGen has been creating and implementing its closure plan for years. Despite thousands of comments from the public and comment on the record from SCCRAP in opposition to the approval of their plan, VDEP approved their permit. SCCRAP is currently suffering the effects: pollution is continuing now because this unlawful closure fails to comply with the Rule and address the pollution source, coal ash in contact with groundwater. Accordingly, the harms to SCCRAP's members are more than "fairly" traceable to this defective closure—they are directly connected to ComGen's ongoing closure of the impoundment that leaves coal ash in the Vandalia River watershed.

B. The Requested Remedy Will Redress SCCRAP's Injuries

To establish redressability, SCCRAP must demonstrate a substantial likelihood that its members' injuries "will be redressed by a favorable decision." Black Warrior Riverkeeper, Inc. v.

U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1279 (11th Cir. 2015). The standard does not require certainty; instead, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). SCCRAP meets this standard because the relief sought—an injunction requiring ComGen to implement a compliant closure plan—will mitigate ongoing contamination and prevent future environmental harm. R. at 12.

The relief sought will undoubtedly remedy SCCRAP's injuries. Here, SCCRAP does not need to prove that an injunction would immediately eliminate all contamination from the LGRI. It is enough that requiring a legally compliant closure plan would reduce the extent and duration of pollution by removing coal ash from groundwater contact. ComGen's own monitoring data shows that arsenic and cadmium continue to leach from the impoundment R. at 9-10. A compliant closure would address these violations by eliminating free liquids before capping and ensuring that coal ash is properly contained. *See* 40 C.F.R. § 257.102(d)(2)(i)-(ii). Regulatory compliance would substantially mitigate ongoing contamination, satisfying the Supreme Court's redressability standard. Because an order requiring compliant closure would redress SCCRAP's injuries, the trial court's analysis should have ended there.

II. SCCRAP Can Pursue an RCRA Imminent and Substantial Endangerment Claim

The district court wrongly dismissed SCCRAP's RCRA claim by imposing a nonexistent requirement that endangerment must affect a "living population." But RCRA's plain text allows citizen suits for threats to health ***or*** the environment—and courts consistently interpret this language broadly. The statute's purpose is preventative, empowering citizens to stop hazardous waste risks before they cause harm. Legislative history confirms Congress intended a proactive

approach. By narrowing RCRA's scope, the district court undermined its enforcement and must be reversed.

A. The Plain Text of the Statute Supports SCCRAP's Claim

Statutory interpretation begins with the text itself. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). If the text is unambiguous, judicial inquiry ends. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The RCRA authorizes citizen suits against any entity that "has contributed to" hazardous waste disposal that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The district court erroneously restricted this straightforward language to require endangerment to a "living population," a limitation unsupported by the statute.

Crucially, the text of the statute permits citizen suits when there is an imminent threat of serious harm to health *or* the environment. 42 U.S.C. § 6972(a)(1)(B). The statute does not define "environment," but based on its plain meaning, this is understood to include soil, air, and water. Appellants have clearly identified at least two threatened environmental resources - the groundwater and the soil in the vicinity of the river and proposed housing development, which is contaminated at levels exceeding standards. Groundwater, potable or not, and soil are a part of the environment. *See* Lincoln Properties v. Higgins, CIV. No. S-91-760 DFL/GGH, 1993 WL 217429, at *13 (E.D. Cal. Jan. 21, 1993) (concluding that the term "environment" includes air, soil, and water). Furthermore, plaintiffs have produced evidence indicating that the proposed housing development is down gradient from the LGRI, suggesting a particular living population is at risk of exposure to the contaminants. Consequently, these arguments do not entitle the defendants to a motion to dismiss.

B. The District Court Misread RCRA's Citizen Suit Provision

While the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") addresses the remediation and cleanup of areas already contaminated with waste and toxic substances termed "Superfund" sites, RCRA seeks to *prevent* the creation of such areas in the first place. 42 U.S.C. §§ 9601–28. The citizen-suit provisions of the law underscore this preventative focus. The goal of citizen suits is to "ameliorate present or obviate risk of future 'imminent harms.'" Meghrig v. KFC Western, Inc., 516 U.S. 479, 486 (1996). Because of this prevention focus, RCRA lawsuits have the power to require facilities to adopt stricter policies that guard against chemical releases before they reach the point of irreversible harm. The District Court's analysis grossly misreads the statute and must be reversed.

1. Given its Remedial Objectives, the Citizen-Suit Provision Must Be Broadly Construed.

SCCRAP's RCRA claim must be assessed in light of the RCRA's broad remedial objectives. RCRA's primary purpose is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste, which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Meghrig, 516 U.S. at 483.

The First, Second, Third, Fifth, and Eleventh Circuits have all held unanimously that courts' "imminent and substantial endangerment" authority under RCRA § 7002(a)(1)(B) should be liberally construed. Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991) ("Significantly, congress used the word 'may' to preface the standard of liability …. This is 'expansive language'…." (citations omitted)), rev'd in part on other grounds, 505 U.S. 557 (1992); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 258-59 (3d Cir. 2005) (agreeing with other courts that the "operative word" is "may," and that "if an error is to be made

in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment." (quoting United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985))); Cox v. City of Dallas, 256 F.3d 281, 299 (5th Cir. 2001) (noting, "[a]t the outset," that "the operative word is 'may' "); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004) (agreeing with other Courts of Appeals that the operative word is "may," that "endangerment" does not require proof of actual harm, and that the provision grants expansive authority "to eliminate *any risk* posed by toxic wastes" (internal quotations and citations omitted)); *see also* Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002) ("Imminence does not require an existing harm, only an ongoing threat of future harm." (citing Cox, 256 F.3d at 299)).

Two other Circuits have upheld a similarly broad interpretation of liability under section 7003, the parallel provision giving EPA imminent and substantial endangerment enforcement authority. United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (noting that RCRA is a remedial statute that should be liberally construed and whose purpose is "to 'give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment.'" (quoting Conservation Chem., 619 F. Supp. at 199)); United States v. Waste Indus., Inc., 734 F.2d 159, 165 (4th Cir. 1984) (rejecting the proposition that "section 7003 was designed to control pollution only in emergency situations"). No court of appeals has held to the contrary. The Twelfth Circuit should align with courts that recognize endangerment claims for environmental harm, rejecting the district court's unduly narrow interpretation.

C. Legislative history establishes the district court diluted RCRA's citizen's suit provision by finding the contamination may not present an imminent and substantial threat to health or the environment.

The district court improperly narrowed the scope of RCRA's citizen suit provision by concluding that the arsenic and cadmium contamination at issue does not threaten a living population. This finding contradicts both the statute's text and its legislative history, which demonstrate that Congress intended the provision to be expansive, ensuring proactive intervention against environmental hazards. The legislative history makes clear that Congress intended to create a broad citizen suit provision to redress not only current, ongoing harm but also potential future harms from hazardous wastes. Ample court precedent supports the legislative intent of § 7002(a)(1)(B). As such, the Court clearly erred, and the finding should be overturned.

RCRA, enacted on October 21, 1976, was intended to address the growing problem of hazardous and industrial waste by minimizing the "present and future threat to human health and the environment" posed by improper waste management practices. S. 2150, 94th Cong. (1976); 42 U.S.C. § 6902(b). Congress granted primary enforcement authority to the EPA but expressly empowered private citizens to take legal action when the EPA or states failed to act. *See* 42 U.S.C. § 6972(a)(1).

In 1984, Congress expanded RCRA through the Hazardous and Solid Waste Amendments, which added § 7002(a)(1)(B). The amended provision authorizes citizen suits against:

> "Any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *which may present an imminent or substantial endangerment to health or the environment*."

42 U.S.C. § 6972(a)(1)(B) (emphasis added).

The more expansive language in the 1984 amendments greatly reduced the burden for plaintiffs to bring citizen suits. The 1976 law allowed citizen suits only when a defendant was "alleged to be in violation" of an effective "permit, standard, regulation, condition, requirement or order." S. 2150, 94th Cong. § 7002 (1976); 90 Stat. 2795, 2825. The 1984 amendment removed the requirement for an alleged violation of an effective permit, standard, regulation, condition, requirement, or order. Accordingly, a plaintiff in an RCRA lawsuit does not have to establish present harm to bring a claim, nor does a defendant have to violate a current state or federal regulation, permit, or other standard for plaintiffs to establish harm or potential harm.

The legislative history makes clear that Congress intended to significantly expand the role of private citizens in abating potential harm from hazardous wastes because "leaving all enforcement responsibility to EPA and the states has not been satisfactory in light of the widespread non-compliance by hazardous waste facilities." 130 Cong. Rec. 29, 530 (1984). Instead, Congress recognized that greater citizen involvement "can expand the national effort to minimize these very real threats to our well-being." 130 Cong. Rec. 20, 815 (1984). The House Report to the 1984 amendments reinforces this intention, stating that "this expansion of the citizens' suit provision will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." H.R. Rep. No. 98-198, at 53 (1983).

The 1984 amendments also gave courts wider discretion when ordering remedies, allowing courts to enforce, restrain, or "order such person to take such other action as may be necessary, or both." H.R. 2867, 98th Cong. § 401 (1984); 98 Stat. 3221, 3269. Congress wished to "confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic waste." S. Rep. No. 98-284, at 59 (1983); *see also* Liebhart v.

SPX Corp., 917 F.3d 952, 958-59 (7th Cir. 2019) (describing the statutory language as "unequivocal" and citing to United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982)). The risks to be eliminated do not have to be established but maybe "assessed from suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as 'fact.'" S. Rep. No. 98-284, at 59 (1983) (internal citations omitted).

The district court failed to apply a lenient standard that requires neither existing harm nor quantification of risk. *See* Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F. 3d 969, 973 (7th Cir. 2002) (finding imminence, "does not require an existing harm, only an ongoing threat of future harm"); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 259 (3d Cir. 2005) (holding RCRA "does not require quantification of the endangerment" or "that a water supply will be contaminated to a certain degree."). By failing to apply this lenient standard, the district court not only misinterpreted RCRA but also deprived SCCRAP of a remedy explicitly intended by Congress to empower citizens to enforce environmental protections when regulatory agencies fail to act.

III. The Court owes deference to its prior decision in Piney Run, and therefore to the EPA's guidance on unpermitted discharges, as Loper Bright indicates prior cases relying on Chevron are still subject to statutory *stare decisis.*

The Supreme Court, in its recent decision in Loper Bright v. Raimondo, overruled Chevron. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024). In so doing, the Court overturned the deference previously afforded by courts to agency interpretations, when statutory ambiguity was present; the Supreme Court held, rather, that "courts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority." Id. Prospectively courts "may not defer to an agency interpretation of the law simply because a

statute is ambiguous." Id. at 413. Courts may, however, allow the views of the Executive Branch to inform their inquiries and judgments. Id.

Yet while overturning Chevron, the Court clearly stated that despite the change in "interpretive methodology … the holdings of … prior cases that relied on the Chevron framework … are still subject to statutory *stare decisis*." Id. at 412. These prior cases may not be overturned solely because their holdings relied on Chevron; there must be a "'special justification' for overruling such a holding;" Chevron reliance alone "is not enough to justify overruling statutory precedent." Id.

A court's prior judgment relying on Chevron is only binding, however, if the holding ascribed to certain conditions: the holding must have been made by an appellate court, and the holding must withstand *stare decisis* analysis. Loper Bright at 412; Bartolo v. Garland, No. 23-1578, 2025 U.S. App. LEXIS 178 (9th Cir. Jan. 6, 2025); Save Jobs USA v. United States Dep't of Homeland Sec., 111 F.4th 76 (D.C. Cir. 2024).

A. For a prior case decided on the basis of Chevron guidance to be considered binding precedential law, it must have been decided by an appellate court.

An appellate court's prior holding, decided on the basis of Chevron deference, is still binding precedential law subject to *stare decisis* analysis. Bartolo at *5. In Bartolo v. Garland, the 9th Circuit determined the legality of their own prior holding under the new guidance provided by Loper Bright. Bartolo at *4. The court held that it was bound by its prior holding "unless Loper Bright 'undercut the theory or reasoning underlying [the court's prior precedent] in such a way that the cases are clearly irreconcilable.'" Id. As the Supreme Court in Loper Bright gave a "clear directive" that the "holdings of those cases that specific agency actions are lawful … are subject to statutory *stare decisis*," the holding in Loper Bright is not clearly unreconcilable with prior

cases. Id. at *5. Thus, an appellate court's prior holding remains binding, precedential authority under Loper Bright's direction.

This understanding is further bolstered by the circuit court's decision in Save Jobs v. U.S. Dep't of Homeland Sec., which similarly upheld its prior decision relying on Chevron. Save Jobs at 80 (stating that "'we may depart from the law of the case and from circuit precedent … based on an intervening Supreme Court decision … [but] if *stare decisis* means anything, it means a future court lacks the authority to say a previous court was wrong about how it resolved the actual legal issue before it.'").

Conversely, courts have routinely vacated, reversed, and remanded holdings by district courts which relied on Chevron deference. Ogier v. Int'l Follies, Inc., No. 23-14225, 2024 U.S. App. LEXIS 27875 (11th Cir. Nov. 4, 2024) (vacating and remanding to ensure the "district court has an opportunity to address … the impact of Loper Bright on its interpretation of the relevant statute"); Utah v. Su, 109 F.4th 313 (5th Cir. 2024) (vacating and remanding to the district court "for the limited purpose of reconsidering Plaintiff's challenge in light of the Supreme Court's decision in Loper Bright). Thus, prior holdings based on Chevron deference are only maintained if they were affirmed by an appellate court.

B. The prior holding of the court must withstand *stare decisis* analysis to be binding precedent.

Loper Bright made clear that "prior cases that relied on the Chevron framework … are still subject to statutory *stare decisis* …. Mere reliance on Chevron cannot constitute a 'special justification' for overruling such a holding [as] … that is not enough to justify overruling a statutory precedent." Loper Bright at 412. Thus, to overrule a prior case which relied on the Chevron framework, there must be a special justification which indicates that the principles of *stare decisis* no longer support the prior case as binding precedent.

Stare decisis, the doctrine which governs judicial adherence to precedent, has several factors to consider in deciding whether to overrule a past decision: the quality of the decision's reasoning, the workability of the rule it established, the holding's consistency with other related decisions, developments since the decision was handed down, and reliance on that decision. Janus v. AFSCME, Council 31, 585 U.S. 878, 917 (2018). The Court has noted that a past decision should not be overturned "unless there are strong grounds for doing so." Id.

C. Piney Run is binding precedent deserving of deference under the guidance provided by Loper Bright.

Piney Run is binding, appellate level authority under the guidance provided by Loper Bright, as the principles of *stare decisis* support its holding. Thus, the present case should be bound by the guidance in Piney Run pertaining to the permitting process and what constitutes an unpermitted discharge.

1. The quality of the decision's reasoning.

The holding of Piney Run was decided based on firm, clear Chevron analysis that governed decisions for over forty years; it should therefore be afforded deference. Chevron, U.S.A., Inc., v. NRDC, Inc., 467 U.S. 837 (1984); Piney Run Pres. Ass'n v. Cnty. Comm'rs, 268 F.3d 255, 266 (4th Cir. 2001) ("in construing the application of the CWA's (Clean Water Act's) provisions in this case, we find it necessary and appropriate to perform a Chevron analysis"). The Court followed Chevron's guidance expressly, first "examin[ing] the language of the statute to see if 'Congress has directly spoken to the precise question at issue,'" then, upon a finding that the language was ambiguous, "apply[ing] Chevron's second step … deferr[ing] to the agency's interpretation" as long as the agency followed proper notice-and-comment rulemaking, and the agency's interpretation is reasonable. Piney Run at 266-67. The Court both found that the CWA was ambiguous, and observed that the relevant agency, the Environmental Protection Agency,

promulgated an interpretation of the ambiguous provision that is reasonable. Id. at 267. Thus, this Court's decision in Piney Run was based on firm, established reasoning. Subsequently, this factor of *stare decisis* weighs in favor of upholding this Court's prior decision in Piney Run, as reliance on a clear Chevron analysis is "not enough to justify overruling a statutory precedent." Loper Bright at 412.

2. The workability of the rule established by the decision.

The rule established in Piney Run is entirely workable; subsequently, this factor of *stare decisis* weighs in favor of maintaining its holding. The central issue in Piney Run was "whether the NPDES permit [granted by the Clean Water Act] implicitly incorporates pollutant discharges by the permit holder to the permitting authority that are not explicitly allowed in the permit." Piney Run at 266.

This Court held, pursuant to its Chevron analysis, that the EPA "outlined the proper structure for the permitting process." Id. at 268. This Court found:

> "[A]s long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit. The only other limitation on the permit holder's ability to discharge such pollutants is that the discharges must be reasonably anticipated by, or within the reasonable contemplation of, the permitting authority…. [A]ll discharges adequately disclosed to the permitting authority are within the scope of the permit's protection."

Id. at 268, 69. This Court further clarified that compliance with the disclosure and reporting requirements can be attained during the permit application process if the applicant "informed the permitting authority [of the discharge] during the permit application process" and filed reports of these discharges with the permitting authority as required by the permit. Id. at 271.

Thus, the rule established by this Court in Piney Run is clear and workable. It provides explicit guidance to both applicants and permitting authorities regarding which actions must be

taken to ensure that a specific discharge is within the scope of the permit's protection. The workability of the rule, therefore, weighs in favor of upholding this Court's prior decision.

3. Consistency with related decisions.

Piney Run was decided consistently with related decisions, as the Court deferred to an agency's interpretation in the face of ambiguity, pursuant to Chevron's guidance. Piney Run at 267. Chevron, having been decided in the 1980s, was firmly grounded precedential law which "demand[ed] that courts ... afford *binding* deference to agency interpretations." Loper Bright at 399 (emphasis added).

In Piney Run, the application of Chevron's doctrine to a question of ambiguity within the CWA was particularly apt, and therefore consistent with prior decisions, as the Court in Chevron itself accepted an agency's interpretation of the CWA when confronted with statutory ambiguity. Chevron at 866 ("[W]e hold that the EPA's definition … is a permissible construction of the statute."). Numerous other courts have applied Chevron deference to an interpretation of statutory ambiguity within the CWA. Catskill Mountains Chapter of Trout Unlimited, Inc. v. United States EPA, 846 F.3d 492 (2d Cir. 2017) (affording Chevron deference to the question of whether the CWA's National Pollutant Discharge Elimination System (NPDES) permitting system applied to water transfers); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (affording Chevron deference to an agency's interpretation of the CWA's jurisdiction); Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 287 (6th Cir. 2015) (affording Chevron deference to an agency's interpretation, holding "that the EPA's interpretation of the statutory scheme – allowing some pollutants to be discharged even though not specifically listed in the general permit – is a 'sufficiently rational one.'").

Thus, the Court's decision in Piney Run to afford Chevron deference to the EPA's interpretation of the CWA in the face of statutory ambiguity remains consistent with other related decisions; subsequently, this element of *stare decisis* supports maintaining Piney Run's holding.

4. Developments since Piney Run was decided.

The most significant legal development since Piney Run, the holding of Loper Bright, explicitly supports maintaining the holding of Piney Run; the Court stated that in overturning Chevron, they "do not call into question prior cases that relied on the Chevron framework." Loper Bright at 412. Without a 'special justification' the holdings of prior cases which relied on a Chevron framework are still good law. Id. Thus, prior holdings are not implicated by the prospective change in interpretive methodology mandated by Loper Bright.

Further there are no significant factual developments which support overturning Piney Run. Piney Run affords deference to an agency's interpretation of the scope of its permit. Piney Run at 267 ("the EPA's … Board determined that the NPDES permit covers all pollutants disclosed to the permitting authority during the permit application process…. The EPA therefore outlined the proper structure for the permitting process"). This permit is still present today, and no factual changes have occurred which indicate the EPA's interpretation of the scope of its permit is altered. Thus, this element of *stare decisis* supports maintaining the holding in Piney Run.

5. Reliance on Piney Run.

The guidance afforded by the Court in Piney Run has consistently been relied on since its promulgation, and therefore this element of *stare decisis* supports this Court's continued maintenance of its prior holding.

The Supreme Court has held that "traditional reliance interests arise 'where advance planning … is most obviously a necessity.'" Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287

(2022). The Court has further held that the "force of *stare decisis* is 'reduced'" with respect to reliance interests "when rules that do not 'serve as a guide to lawful behavior' are at issue." Knick v. Twp. of Scott, 588 U.S. 180, 205 (2019). The force of reliance is undermined particularly when a rule provides a "lack of clarity." Janus at 882.

With respect to compliance with the CWA, Piney Run's holding establishes clear guidance to applicants and permitting authorities on which those parties rely; each party must reference the guidance provided by the EPA, and this Court, to ensure that they engage in lawful behavior with respect to the discharge of pollutants. The guidance provided in Piney Run unquestionably serves as a guide to lawful behavior, as the Court's holding clearly established the conditions requisite to be "protected by the permit shield defense" and avoid liability under the CWA. Piney Run at 271. Thus, the force of *stare decisis* is not reduced in this instance, as the rules established by this Court serve as a guide to lawful behavior.

Moreover, advanced planning is required to comply with the guidance. Applicants must know of the requirements for compliance with their permit application and properly ensure that they disclose any pollutant discharges and report accordingly. Id. Applicants thus rely on the clear, decisive rules established by this Court and the EPA.

Thus, the factor of reliance weighs in favor of upholding the decision in Piney Run, as it establishes clear guidance with respect to what constitutes lawful behavior under the CWA, and advance planning is required for compliance with this guidance. Subsequently the factors of *stare decisis* weigh in favor of affording deference to this Court's decision in Piney Run.

IV. Applying the Piney Run framework, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the Clean Water Act.

This court should reverse the District Court and remand this case for analysis under the Piney Run framework for two reasons. *First*, ComGen is subject to the CWA and therefore must be

granted a National Pollutant Discharge Elimination System ("NPDES") permit to discharge PFOS and PFBS. *Second*, utilizing the Piney Run framework, ComGen's discharge of PFOS and PFBS is unpermitted under the CWA. For these reasons, this Court should reverse the District Court and remand this case for analysis consistent with the Piney Run framework.

A. ComGen is a discharger of pollutants and therefore subject to the Clean Water Act and must be granted a NPDES permit to discharge pollutants.

ComGen discharges pollutants into the Vandalia River and is therefore subject to the CWA and all NPDES permit requirements. The CWA states that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 987. The CWA prohibits the "discharge of any pollutant by any person from any point source into the navigable waters of the United States" unless the EPA or a state agency authorizes the discharge. Food & Water Watch v. United States EPA, 20 F.4th 506, 508. A person or entity violates the CWA by discharging a pollutant into the waters of the United States without proper authorization. Johnson v. 3M, 563 F. Supp.3d 1253, 1330.

Under the CWA, dischargers must operate pursuant to a NPDES permit obtained from either the EPA or an authorized state agency. 33 U.S.C. §1311(a); 33 U.S.C. §1342(a); Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 260. The CWA imposes strict liability on persons who discharge pollutants without a permit or in violation of the terms of a permit. Johnson v. 3M, 563 F. Supp.3d at 1331. An NPDES permit provides a "shield against liability under the CWA for the discharge of pollutants not specifically listed in the permit only when the permit applicant has made adequate disclosures to permit authorities during the application process about the nature of its discharges." In re Ketchikan Pulp Co., 7 E.A.D. 605, 605.

If a company is discharging a pollutant into waters of the United States, they are liable under the CWA. Once CWA liability is established, the person or entity must obtain a NPDES permit to

discharge pollutants. If inaccurate, a disclosure "could undermine the purpose of the CWA by denying the permit writer the information necessary to write a permit to adequately protect the environment." In re Ketchikan, 7 E.A.D. at 626.

A NPDES permit is a regulatory tool under the CWA that governs the discharge of pollutants into the waters of the United States. A NPDES permit intends to "identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." Atlantic States Legal Found. v. Eastman Kodak Co., 12 F.3d 353, 357. Under the NPDES, the permitting authority may "issue a fixed-term permit allowing a point-source discharger to discharge specific pollutants . . . subject to limitations on the quantities, rates, and concentrations" of the specific discharged pollutants. Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 284 (6th Cir. 2015) (citing Ark. v. Okla., 503 U.S. 91, 101 (1992)).

Accordingly, ComGen is subject to the CWA and all NPDES permit requirements. ComGen discharges pollutants into the Vandalia River, a navigable water of the United States, from the VGS. Since "the discharge of any pollutant by any person shall be unlawful," ComGen must have a NDPES permit before discharging a pollutant. The VDEP granted ComGen a NPDES permit for its discharge into the Vandalia River. However, ComGen does not possess a permit for the discharge of PFOS or PFBS. Because ComGen is discharging pollutants into the Vandalia River, it must answer to the CWA and satisfy all NDPES permit requirements.

B. Applying the Piney Run framework, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the CWA.

Giving deference to this Court's decision to adopt Piney Run and its reasoning, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the CWA. Because of ComGen's discharge into the Vandalia River, ComGen is subject to the CWA. *See* 33 U.S.C. §1311(a).

Under the CWA, pollutant dischargers must operate pursuant to a NPDES permit obtained from either the EPA or an authorized state agency. *See* 33 U.S.C. §1342(b).

A NPDES permit will shield its holder from liability under the CWA if the permit holder "complies with the express terms of the permit and with the Clean Water Act's disclosure requirements" and the permit holder "does not make a discharge of pollutants that was not within the *reasonable contemplation* of the permitting authority at the time the permit was granted." Piney Run, 268 F.3d at 259 (emphasis added). If a permit holder "complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit." Piney Run, 268 F.3d at 268. Thus, a permit holder is liable only for discharges not in compliance with its permit. Id. at 269.

Generally, permit holders must monitor their effluent discharges and report the results. Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 538 (6th Cir. 2004). The permit shield is meant to "prevent permit holders from being forced to change their procedures due to changes in regulations, or to face enforcement actions over whether their permits are sufficiently strict." Parris v. 3M Co., 595 F. Supp. 3d 1288, 1319 (D. Ga. 2022) (citing S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 564 (4th Cir. 2014). Once a pollutant is within the NPDES "scheme" polluters may discharger pollutants not specifically listed in their permits, so long as they comply with reporting requirements. Id.

The court in Piney Run stated that "[t]he Ketchikan decision therefore made clear that a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit, as long as it only discharges pollutants that have been adequately disclosed to the permitting authority." Piney Run, 268 F.3d at 268 (citing In re Ketchikan, 7 E.A.D at 630). The court further explained that "discharges not within the reasonable contemplation of the

permitting authority during the permit application process, whether spills or otherwise, do not come within the protection of the permit shield." Piney Run, 268 F.3d at 268. Reasonable contemplation focuses on whether the alleged discharges were "within the reasonable contemplation of the permitting authority *during the permit application process*." Tenn. Clean Water Network v. TVA, 206 F. Supp. 3d 1280, 1300 (M.D. Tenn. 2014) (quoting Piney Run, 268 F.3d at 267).

Accordingly, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the CWA and not subject to permit shield protections. ComGen's VGS discharges pollutants into the Vandalia River, subjecting ComGen to liability under the CWA. Since the State of Vandalia has obtained approval from the EPA to administer its own coal ash permitting program, ComGen applied for, and the VDEP granted, a VPDES permit authorizing the discharge of certain pollutants into the Vandalia River. However, ComGen does not possess a VPDES permit authorizing the discharge of PFOS or PFBS. As such, ComGen must satisfy the Piney Run framework to avail itself of liability for its unlawful discharge.

Applying the Piney Run framework, ComGen fails both prongs. First, ComGen has not satisfied all reporting and disclosure requirements. ComGen has known since 2015 that PFOS and PFBS were present in their Outlet 001 discharge. Yet, when a deputy director of the VDEP inquired about the existence of these pollutants, ComGen's employee assured the deputy director that ComGen was not discharging PFOS or PFBS. By not only failing to disclose the presence of the pollutants, but also lying, ComGen failed to satisfy the reporting and disclosure prong of Piney Run.

ComGen also fails the reasonable contemplation prong of Piney Run. Being within the reasonable contemplation of the permitting authority at the time a permit is granted is not limited

to just the permit itself and the permit application. Rather, a permitting authority can have a pollutant placed in its reasonable contemplation throughout the entirety of the application *process*. Although informal, the email communication from the VDEP deputy director to ComGen is a part of the application process. ComGen had a duty to report all "relevant facts" or face the potential termination of their permit. 33 U.S.C. 1342(b)(1)(C)(ii). Therefore, by failing to place the pollutants in the reasonable contemplation of the permitting authority at the time the VDEP granted the permit, ComGen fails the second prong of Piney Run.

Since ComGen has failed both prongs of the Piney Run framework, ComGen cannot avail itself of liability with the permit shield. ComGen had the opportunity to place the PFOS and PFBS pollutants into the NPDES scheme when a deputy director of the VDEP inquired about the existence of the pollutants. If ComGen had disclosed the discharge of PFOS and PFBS, the pollutants would have entered the NPDES scheme and been protected under the permit shield. Instead, ComGen lied. By misleading the deputy director and failing to comply with the CWA's reporting and disclosure requirements, ComGen kept the pollutants from the permitting authority's reasonable contemplation and therefore cannot receive protection under the permit shield. Thus, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the Piney Run framework and not subject to permit shield protections.

CONCLUSION

For the reasons stated, this Court should reverse the District Court's decision and remand this case for further proceedings.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Appellants 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. 5