C.A. No. 24-0682

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 # 4, Counsel for the Appellee

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JURISDICTIONAL STATEMENT

The District Court for the Middle District of Vandalia had subject jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as this controversy arises under the laws of the United States. This court, too, has subject matter jurisdiction under 28 U.S.C. § 1331 and is the appropriate court to hear this appeal as Vandalia is within its circuit. The action was dismissed in the District Court on October 31, 2024, and a timely appeal was filed on November 10, 2024.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court correctly decide that Commonwealth Generating Company's (ComGen) discharges were compliant with a valid Vandalia Pollutant Discharge Elimination System (VPDES) permit given that the discharges did not violate any enumerated restrictions, all reporting requirements were adhered to, and the Deputy Director of the issuing agency was aware that the complained of PFAS discharges were associated with byproducts of coal plants prior to the issuance of the permit?
2. In deciding issue 1, is it appropriate to defer to the Environmental Protection Agency's (EPA) statutory interpretation of what "compliance" with a permit means as described in *Piney Run* given that the reasoning in *Piney Run* relies on *Chevron* deference to a federal agency's interpretation of a statute now inconsistent with the Supreme Court's ruling in *Loper Bright v. Raimondo* on the grounds of *stare decisis* when doing so would ensure an inconsistent and inequitable application of the law in regards to statutory interpretation in this case compared with other like cases?
3. Does SCCRAP have standing—either as an organization or on behalf of its members—to challenge the adequacy of a state-approved closure plan regulating a coal ash

impoundment where any contamination emitted due to such inadequacy is limited to groundwater that is presently unused for any purpose and the point at which it may extend to nearby navigable waters, if at all, is uncertain aside from the fact that it will not occur within the next five years?

4. Given that Article III standing sets the constitutional backdrop against which Congress legislates, can the RCRA authorize citizen-style suits for purely environmental harms that pose no threat to any person's health or particularized interests such that no citizen could establish an injury-in-fact?

STATEMENT OF THE CASE

Procedural History

Stop Coal Combustion Residual Ash Ponds (SCCRAP) filed a lawsuit in the United States District Court for the Middle District of Vandalia on September 3, 2024 after giving the notice required by 33 U.S.C. § 1365. (R. at 12). The action alleged that ComGen had committed acts and/or omissions in violation of its obligations under the Clean Water Act and Resource Conservation and Recovery Act.

ComGen filed a motion to dismiss pursuant to Fed. R. C. P. 12(b) on September 20, 2024. On October 31, 2021, the district court entered judgment allowing ComGen's motion in its entirety. SCCRAP filed its appeal with the 12th Circuit Court of Appeal on November 10, 2024, requesting reversal.

Factual Background

ComGen currently operates the Vandalia Generating Station, a coal-fired electric generating plant, and has done so since 1965. ComGen acquired a VPDES permit for its

discharges into the Vandalia River which became active on September 1, 2020, covering Outlets 001, 002, and 003. The permit sets various limits on discharges – all of which have been complied with by ComGen – and will remain active until July 29, 2025. The permit itself does not mention or limit PFAS discharges at all. During the permitting process, the Administrator of a permitting program, in this case VDEP, has the authority to request data, information, testing, disclosures, and to take other actions necessary to ensure that the permit granted will comport with the objectives of the permitting system. Throughout the process, VDEP never requested anything related to PFAS, and ComGen complied with all requests it did make in the permit issuance process. An opportunity for public hearing presumably followed pursuant to 33 U.S.C. § 1342(a)(1), although the record is devoid of any mention of it or SCCRAP's involvement in such a proceeding.

While VDEP made the decision not to request any PFAS information, the record does show that VDEP contemplated its presence in the outflows from the plant. (R. at 4). A Deputy Director of the organization, outside the formal permitting process, did casually ask a ComGen employee over email whether any of ComGen's Outlets may be emitting PFAS, as the Deputy Director was aware that PFAS chemicals are associated with coal byproducts. The ComGen employee incorrectly stated that they were not known to be in the discharge, although documents indicate that ComGen was aware of PFAS discharges from Outlet 001 since 2015. (R. at 9). There is no evidence on the record that indicates the employee was aware of the discharges when responding. The email exchange indicates that VDEP knew of the possibility of PFAS coming from the plant and the employee's response, while inaccurate, neither denied the presence of PFAS nor confirmed it. VDEP did not pursue any information relating to PFAS from ComGen following this.

SCCRAP learned of the presence of PFAS in the Vandalia River after conducting its own testing and getting access to the documents that indicate ComGen knew of the discharges. (R. at 9). Several of SCCRAP's members have limited their recreation in the River and its tributaries following learning of the presence of PFAS, complaining that they find the pollution offensive and that it diminishes their enjoyment of the river. (R. at 9). These complaints form the basis of SCCRAP's lawsuit to the extent it is predicated on violations of the Clean Water Act.

In 2015, ComGen unveiled a plan to retire several older coal-fired power plants as part of its initiative to invest in renewable sources of energy production. Pursuant to this plan, ComGen announced in 2018 that it would cease all operations at the Vandalia Generating Station by 2027. Soon thereafter, it began the process of closing that facility's 71-acre coal ash depository, the Little Green Run Impoundment (the Impoundment). In compliance with Vandalia's adopted rendition of 40 C.F.R. § 257.02(b)(2)(i), ComGen submitted a permit application for a Coal Combustion Residuals Surface Impoundment to VDEP, explaining its intention to close the Impoundment in place. As part of this application, ComGen included its then-existing Closure Plan. After a lengthy review process, which included both a public hearing and a written public comment period, VDEP, in July of 2021, issued a permit to ComGen, allowing it to implement its Closure Plan—compliance with which was a condition of the permit's continued validity.

As a part of its Closure Plan, ComGen installed a total of thirteen upgradient and downgradient groundwater monitoring wells—each of which was functional by the end of 2021. Beginning that same year, publicly available readings from these wells have suggested that Impoundment leachate has contaminated nearby groundwater, leading it to have elevated levels of both arsenic and cadmium. It is believed that such leaching began sometime between 2011 and 2016. While the groundwater was—and remains—unused, the Impoundment's continued

leaching has caused concern among nearby Vandalians that further contamination of groundwater is imminent and that, eventually, cadmium and arsenic will reach the Vandalia River and other sources of safe drinking water. Despite no such contamination occurring during the past eight years of leaching and models suggesting no such event will occur in the next five years, some Vandalians have ceased recreational use of the Vandalia River altogether. Others, inspired by a related apprehension, have begun to second-guess their decision to join a waitlist for housing in a prospective development that may possibly—and one would hope inadvertently—draw its drinking supply from contaminated groundwater. The housing development is still prospective and, if realized, would not be completed until 2031.

These complaints form the basis of SCCRAP's lawsuit to the extent it is predicated in the Resource Conservation and Recovery Act (RCRA).

SUMMARY OF ARGUMENT

The district court did not err in dismissing SCCRAP's lawsuit. ComGen's discharges from the Vandalia Generating Station took place with the approval of VDEP, the administering agency of the VPDES permit system. Because ComGen complied with all the reporting requirements and limitations on discharges enumerated within the permit, it is shielded from liability under the plain meaning of 33 U.S.C. § 1342(k).

Under 33 U.S.C. §1342 (b)-(c) of the Clean Water Act (CWA), states may, in lieu of the federal National Pollutant Discharge Elimination System (NPDES), administer a permitting program that regulates the discharge of pollutants, subject to approval by the Environmental Protection Agency (EPA) administrator. In Vandalia, the VPDES—a system which functions identically to the federal NPDES – has received such approval. As is the case with the NPDES,

Vandalia's program maintains that compliance with a valid permit will preclude liability for discharges in a citizen suit authorized by 33 U.S.C. § 1365. SCCRAP has brought their suit under 33 U.S.C. § 1365, relying on the EPA interpretation of 33 U.S.C. § 1342(k), the provision which provides a defense to liability for discharges in compliance with a permit, and Vandalia's adoption of *Piney Run* which defers to that interpretation.[1] Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty*., MD.*, 268 F.3d 255 (4th Cir. 2001). The case's reasoning hinged on the application of *Chevron* deference, a standard repudiated by the Supreme Court in *Loper Bright v. Raimondo*, 144 S.Ct. 2244 (2024), as being contrary to the role of courts as described in the Administrative Procedure Act (APA). While the Court noted that reliance on *Chevron* alone is not enough to invalidate the holdings of prior cases, there are a multitude of reasons in addition to the use of reasoning contrary to the APA to set aside *Piney Run*.

Continuing to use *Piney Run* would have guaranteed a circuit split, see Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993), produced inconsistency in how this court applies interpretative principles to this and other statutes, subjected ComGen and similarly situated parties to an unfairly slated method of statutory interpretation in light of the method mandated by the nation's highest court, and – perhaps most importantly – created perverse incentives for the administering agency which are antithetical to the clear purpose of the Clean Water Act. For these reasons, the district court correctly set aside *Piney Run*.

Instead, the district court adopted the reasoning of *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 2001) which, consistent with the clear object of 33

[1] The EPA's interpretation adopted in *Piney Run* confines permit shield liability protection only for those discharges "within the reasonable contemplation" of the permitting authority when the permit was issued. *Piney Run,* 268 F.3d 255 at 268.

U.S.C. § 1342(k) and the plain meaning of the word compliance, considers the permit shield to apply so long as the entity operates within the terms of the permit. This is also consistent with the instruction by Congress to the EPA to be the administrators of Title 33 Chapter 26 of the United States Code under 33 U.S.C. § 1251(d), placing the onus on the regulator to request pertinent information before granting a permit and to write that permit in a manner which makes clear to the discharger which acts are prohibited. The EPA's construction shifts the consequences for administrative laziness onto private entities, removing any incentive on the administrator of a program to engage in the due diligence Congress clearly intended for them to engage in when they instructed the agency to administer the chapter and its permitting scheme. For these reasons, the district court correctly adopted the standard from *Atlantic States*.

Even if this court finds that *Piney Run* should control – or that the EPA's interpretation is the best one – the usual reporting requirement would nevertheless be inapplicable here. The EPA's interpretation in *In re Kecthikan Pulp Co.*, 7 E.A.D. 605, 609 (1998) (discussing reasonable anticipation of discharge), as understood in *Piney Run*, the basis of appellant's claim, limits the discharge of pollutants to those discharges "reasonably anticipated by, or within the reasonable contemplation of, the permitting authority." Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carroll Cnty*., MD*, 268 F.3d 255, 268 (4th Cir. 2001). In this instance, the Deputy Director of VDEP admits in their communications to ComGen an awareness of the presence of PFAS chemicals in coal plant byproducts and an awareness of the possibility of their presence in the discharges of ComGen. This indicates not only that this pollutant was within the reasonable contemplation of the agency, but that the agency actually contemplated the possibility of its presence in the discharge. Despite this, the permitting process never asked about nor required testing for PFAS. The reporting requirement spawned in *In re Ketchikan Pulp Co.* exists to bring

a possible pollutant to the attention of the permitting agency, but such a disclosure is clearly unnecessary in this case as the rule from *Piney Run* is satisfied by the agency's admission of contemplation.

For these reasons, whether or not this court chooses to follow the district court in discarding *Piney Run*, appellee's conduct falls within the scope of the permit shield and the claim was correctly dismissed.

The district court, similarly, did not err in deciding that SCCRAP lacks standing to challenge the adequacy of ComGen's Closure Plan under the RCRA. Because the party invoking federal jurisdiction bears the burden of establishing standing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), SCCRAP—an organizational plaintiff—was required to demonstrate that it either had standing in its own right or on behalf of its members. Indeed, the district court was required to sua sponte examine the issue of standing where ComGen had failed to initially raise. such a challenge in its motion to dismiss. United States v. Hays, 515 U.S. 737, 742 (1995).

In its complaint, SCCRAP articulates only the fact that cadmium and arsenic from the Little Green Run Impoundment have leached and contaminated presently unused groundwater. (R. at 8). It does not dispute that such contamination has not yet reached the Vandalia River, its tributaries, or any other source of presently used drinking water; nor does it dispute that any such contamination is unlikely to occur at some time over the next five years. (R. at 8). For this reason, it fails to indicate how alleged inadequacies in the Closure Plan do, or imminently will, invade a legally protected interest—of the organization or its members—which is both "concrete and particularized and [] actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61. To the extent that this requirement for an injury-in-fact has gone unsatisfied, the district court was correct to dismiss SCCRAP's complaint for want of standing.

The fact that members of SCCRAP living near the Impoundment have voluntarily abandoned recreational use of the Vandalia River for fear of arsenic and cadmium contamination occurring at some time in the indefinite future, if at all, is insufficient to confer an injury-in-fact. While fear, or actions motivated by fear, can constitute an injury-in-fact when supported by concrete evidence beyond mere conjecture that the feared future happenings are "certainly impending," Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013), that is not the case here. Indeed, it is possible—and likely—that contamination from the Impoundment will never reach the Vandalia River. Even assuming arguendo, it was reasonably likely that future contamination of the River could occur at some unknown time in the future, the threatened injury would still not be appropriately described as "certainly impending." Buchholz v. Tanick, 946 F.3d 855, 865 (6th Cir. 2020). The same 'injury-in-fact defeating' reality applies to SCCRAP's members who are second guessing their decision to live at a prospective development for fear of contaminated drinking water. Such injury is not only premised on the assumption that the housing development will actually be built and SCCRAP members will be chosen from the waiting list, but also on the assumption that leachate from the Impoundment will proliferate the region's water supply such that no uncontaminated source could be found to supply the development. Not only does this urge the court to venture down a speculative path of attenuated and hypothetical occurrences, it improperly relies on "the unfettered choices made by independent actors not before the court." *Clapper*, 568 U.S. 414 n.5 (quoting *Lujan*, 504 U.S. at 562).

From this, not only is it clear that SCCRAP is unable to establish an injury-in-fact, but the decisions of its members are self-inflicted harms inspired by an apprehension of future occurrences which are, most likely, speculative and, at best, reasonably likely. Neither is sufficient to establish an injury-in-fact. Moreover, where a SCCRAP member's loss of

recreational use of the Vandalia River or of housing option is tied to their apprehension of speculative harms, it is so completely due to the plaintiffs' own subjective chill that it can no longer be fairly traceable to any alleged inadequacies in ComGen's Closure Plan.

Lastly, the district court did not err in its decision that "an imminent and substantial endangerment" claim under the RCRA cannot be predicated on a showing of such harm to the environment itself, absent a pathway for exposure to a human population. (R. at 14). Indeed, the court's decision comports faithfully with the understanding that Article III standing is a backdrop against which Congress legislates and that harms to the environment alone, if actionable by a citizen suit, would be a statute very few citizens—if any—would have standing to pursue. It is telling that the Supreme Court, in *Summers v. Earth Island Institute*, 555 U.S. 488, 488 (2009), made clear that "harm to [an organization's] members' recreational… interests in the National Forests will suffice [for standing]…but generalized harm to the forest or environment will not." While Congress could certainly make such harms to the environment actionable under the RCRA, they are incapable of severing the requirement of Article III standing from such an action. It is, therefore, unlikely they intended to do so.

By reading 42 U.S.C. § 6972(a)(1)(B) to require an "imminent and substantial endangerment to health [and] the environment," this court may give effect to the likely congressionally intent—or at least, the congressional understanding of legislative limits. In addition, to do so would also give effect to the long-held understanding that "or" is often used as a careless substitute for "and," in a context where *and* "would express the thought with greater clarity." De Sylva v. Ballentine, 351 U.S. 570, 573 (1956). To decide that substantial and imminent endangerment to the environment, alone, is insufficient for purposes of the RCRA, would be to recognize that all Congress can give in a citizen-suit authorizing statute is the ability

for those with a particularized interest to pursue generalized, public interests—such as the protection of the environment from contaminants—collaterally.

ARGUMENT

STANDARD OF REVIEW

A district court's grant of a motion to dismiss is subject to review *de novo* by an appellate court, as is the case with its legal conclusions. City of Pontiac Gen. Emp.'s Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 173 (2d Cir. 2011). The choice to set aside *Piney Run* and adopt the reasoning of *Atlantic States* was a legal determination, and therefore both issues at bar are subject to *de novo* review.

I. The district court correctly found that ComGen had complied with the terms of its permit.

A. Should *Piney Run* be set aside, a plain reading of 33 U.S.C. § 1342(k) precludes the liability of ComGen for the PFAS discharges under the Clean Water Act.

Should the court set aside *Piney Run* and interpret the Clean Water Act without deference to the EPA's interpretation, for the reasons discussed in section II, the district court's decision to adopt the reasoning of *Atlantic States* is the correct one. 33 U.S.C. § 1342(k) provides that compliance with a valid NPDES permit constitutes compliance with the requirements of the CWA for purposes of 33 U.S.C. § 1365, the statute under which this suit is brought. The EPA's interpretation of this, the one urged by appellants, is that compliance with the permit will only provide protection from liability for discharges "within the reasonable contemplation of" the issuing authority. *Piney Run*, 268 F.3d at 268. However, this interpretation both runs afoul of the first canon of statutory interpretation and clashes with the clear Congressional intent behind the CWA. When interpreting statutory language, a court must first see if the language has a plain and

unambiguous meaning, ceasing inquiry there if this is the case and a coherent statutory scheme results.[2] Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997). In this instance, 33 U.S.C. § 1342(k) reads as follows: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311. . . of this title," Black's Law Dictionary defines "compliance" as follows: "The state of being in conformity with some command, demand, requirement, etc.; harmony, agreement, or accordance <**brought into compliance with the statute**>." *Compliance*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added). This clearly fits with compliance as used in the statute, indeed the example language used in the dictionary all but confirms this. With this understanding of compliance, it becomes obvious that the language used in 33 U.S.C. § 1342(k) is both clear and unambiguous. Conformance with a permit suffices for conformity with the requirements of § 1311 – the general prohibition on polluting – for the purposes of § 1365, the provision under which this suit was brought. *Atlantic States* adopts reasoning which applies this, that being that when a discharger complies with all the requirements in a permit they enjoy protection from liability under § 1342(k). The EPA's interpretation first requires that the simple language discussed be ambiguous, which it isn't, and it would be enough to end the argument there. There is no textual basis in §1342(k) necessitating as a prerequisite to liability shielding that the issuing authority have all discharges within their reasonable contemplation. A possible reason comes

[2] Courts have at times allowed congressional intent, when possible to derive, to allow a reading of a statute in contrast to its plain meaning. *See* Armijo v. FedEx Ground Package Sys., Inc., 285 F.Supp.3d 1209, 1214 (D. N.M. 2018). However, courts have historically taken a dim view of this approach and appear resistant to apply it unless legislative intent would clearly be frustrated by a plain reading. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 1440 (2010) (". . . what matters is the law that the Legislature *did* enact. **We cannot rewrite that to reflect our perception of legislative purpose**.") (emphasis added); EagleMed LLC v. Cox, 868.F.3d 893, 904 (10th Cir. 2017) ("Any deficiency in the plain language of the statute **or the scope of its coverage** must be corrected by Congress, not this court.") (emphasis added).

from the multitude of tools available to the issuing authority to bring within their contemplation pollutants that they are concerned with. Agencies can demand data, testing, and other information from dischargers before issuing a permit. 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for such permits. . . including conditions on data and information collection, reporting, and such other requirements **as he deems appropriate**.") (emphasis added). Any failure to contemplate a pollutant lies squarely on the issuing authority considering the broad power granted to them in gathering information about a discharger's activities prior to and after granting a permit to them.

This, along with certain other provisions of the CWA, reveals the intent of Congress in creating the Act. The EPA was to administer this chapter (33 U.S.C. § 1251(d)), therefore the authority to discharge comes through the EPA in their role as administrator of the NPDES. Private actors were to come to the EPA and request a permit. As experts in the field of environmental protection, the EPA was given broad authority to investigate and regulate the pollutants they deemed necessary to achieve the goal of Congress in maintaining "the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251).[3] Indeed, Congress' intent to rely on the discretion and expertise of the EPA (and such state permitting agencies as given authority under the Act) is indicated by the phrase "and other such requirements as he deems appropriate" in 33 U.S.C. § 1342(a)(2) discussing the authority of the administrator to impose requirements on those allowed to discharge under the permitting scheme. If private actors went through this process and followed the requirements of their permit, it was the clear goal of Congress to insulate them from liability resulting from *government sanctioned discharges*. The

[3] Also see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 104 S.Ct. 2778, 2793 (1984) acknowledging that the EPA has expertise in the environmental field in the context of the Clean Air Act, a similar statutory scheme.

EPA's interpretation of § 1342(k) effectively offloads the accountability properly ascribed to them deriving from the responsibility that Congress clearly delegated to them (or a designated program administrator) onto private actors. This interpretation even further abrogates expressed congressional intent *within the CWA itself* when read in conjunction with 33 U.S.C. § 1251(f) which states, "It is the national policy that to the **maximum extent possible** the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." An interpretation which, in essence, requires an entity seeking a permit to disclose every substance in their wastewater which could be construed as a pollutant unprompted to protect themselves from liability would necessarily cause a mountainous increase in paperwork, waste in manpower, and unnecessary delays in the grant of permit decisions.

Tens of thousands of different chemicals are listed in the EPA's Toxic Substances Control Act Chemical Substance Inventory, and the incredibly broad construction of "pollutant" in 33 U.S.C. § 1362(6) which includes "industrial, municipal, and agricultural waste discharged into water," seems to include *every* substance within the wastewater. The time and expense the EPA's construction thrusts on private actors to conduct testing on its wastewater for *everything*, and then transmit that information in a coherent form to the EPA, flies directly in the face of the stated intent of Congress in the drastic minimization of paperwork. In addition, the time it would take for administrative agencies to sift through these gigantic disclosures from every private actor applying for a permit, a good portion of which probably contain information on substances the agency does not intend to regulate, would be burdensome and likely lead to unnecessary delays in the issuance of permits.

The construction adopted by the district court properly follows the plain meaning rule, aligns with the stated intent of Congress, incentivizes administrative agencies to conduct their statutory obligations vigorously as the responsibility for laxity rests with them, and streamlines the permitting process while allowing for the administrative agencies to scrutinize and regulate pollutants they find problematic. This choice should be affirmed, and such a choice would preclude liability to ComGen as they complied fully with the permit.

B. Even using the EPA's construction, as adopted in *Piney Run*, VDEP demonstrably contemplated the possibility of PFAS discharges, precluding any liability for ComGen.

This court adopted a rule consistent with the EPA's interpretation of the permit shield defense of the CWA in its adoption of *Piney Run*. The relevant language defining the limits of the scope of the permit shield defense preclude liability for pollutants, "reasonably anticipated by, or within the reasonable contemplation of, the permitting authority." *Piney Run*, 265 F.3d at 268. The plain meaning of the phrase "within the reasonable contemplation of" will bring within the protection afforded by the permit shield the discharges of PFAS by ComGen.

"Within," when used in the context of the definition given, would refer to the extent of, or scope of something, such as knowledge or the reach of law. *Within*, OXFORD ENGLISH DICTIONARY (2024). Contemplation can be described as "the action or fact of taking something into account or consideration," and while this usage is now rare it appears to be the most analogous usage given the examples and its history of usage in the legal field.[4] Contemplation, *n.*, Sense 7b. OXFORD ENGLISH DICTIONARY (2024) (in use since 1673). In fact, the phrase "in

[4] "Doubtless, parties, when they enter into contracts, may well consider both what their rights and what their liabilities will be by the law, . . . but this **contemplation** of consequences which can ensure only when the contract is broken, is no part of the contract itself." Ogden v. Saunders, 25 U.S. 213, 244 (1827) (usage of contemplation analogous to the case at bar, synonymous with consideration)

contemplation of death" has been construed to mean the "thought of death" in bankruptcy law. United States v. Wells, 51 S.Ct. 446, 451-52 (1931). Taking these definitions, and against the backdrop of the canon of judicial interpretation which directs that language in decisions should be read to discern intent and in accordance with the context of the entire decision, the phrase can be interpreted. Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Trible, 66 F.4th 766, 770 (9th Cir. 2023). Given that the concern of this rule is the agency considering a pollutant when granting a permit, hence the disclosure requirement that the rule advances,[5] the language indicates that the shield would only protect those discharges that the permitting authority could reasonably be expected to consider during the permit application process. However, in the case at bar the discharge of PFAS chemicals from the plant was not only within the reasonable contemplation of the permitting authority but *actually considered*.

A Deputy Director of VDEP admittedly was aware, prior to the issuance of the permit, that PFAS parameters are present in byproducts generated by the Vandalia Generating Station. (R. at 4). The Deputy Director was informed, casually, that PFAS parameters were not, "known to be in the discharge," a statement which does not deny their presence in ComGen's discharges or even indicate that ComGen had ever looked into the matter. (R. at 4). This means that a Deputy Director of VDEP, the issuing authority, was aware of the possibility of PFAS discharges from the plant. The EPA's test as described in *Piney Run*, concerned with notice and the ability of the issuing authority to consider pollutants, is clearly met. The disclosure rule is a vehicle to substantiate that notice is present, but such notice has been admitted on the record and that

[5] *See In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 612 (1998) (citing an EPA guidance memorandum on the permit-shield defense)

admission is uncontested. The permit shield, even applying the rule advocated for by respondents, would protect ComGen from PFAS discharge liability.

II. In light of *Loper Bright v. Raimondo*, the district court's decision to give no deference to *Piney Run* was correct

Loper Bright completely changed the paradigm of administrative law, instructing the courts not only that they did not have to defer to the interpretations of ambiguous statutes by agencies administering them, but that they "may not" do so. *Loper Bright*, 144 S.Ct at 2273. *Piney Run*'s reasoning hinged upon the application of *Chevron* deference, which as of now is riddled with erroneous reasoning antithetical to the command of APA as described in *Loper Bright*. For this reason, and several others, the case was correctly set aside.

The contention against setting aside the case would necessarily come from the end of *Loper Bright*, specifically ". . . we do not call into question prior cases that relied on the *Chevron* framework," and the notion of *stare decisis*. *Loper Bright*, 144 S.Ct. at 2273. However, the Supreme Court has recently noted that *stare decisis* is not "an inexorable command."[6] Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2260 (2022). While *Loper Bright* instructs that overruling a prior decision *solely* based on its *Chevron* reliance is inappropriate, there are several other reasons applicable here. *Loper Bright*, 144 S.Ct. at 2273.

Continuing to follow *Piney Run* will create an enduring circuit split in how this court and others interpret the language of 33 U.S.C. § 1342(k), for example the Second Circuit in *Atlantic States* has ruled contrary to this interpretation. Blind obedience to *stare decisis* will create a split in which this court, and others who cling to *Chevron*-era rulings on this topic, apply

[6] There are a wealth of opinions which express this idea. *See e.g. Payne v. Tennessee*, 111 S.Ct. 2597 (1991), *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), *Kimble v. Marvel Entertainment LLC*, 135 S.Ct. 2401 (2015).

demonstrably faulty reasoning to the disadvantage of private actors when compared to circuits who review the language anew after *Loper Bright*. This regime would unfairly punish ComGen and other similarly situated entities purely on the basis of which circuit they are located in, not based on any disagreement in how a law should be understood, but because of a dogmatic application of *stare decisis* which would fly in the face of the longstanding view that *stare decisis* is not an absolute command. In addition to this, continued application of *Piney Run* will maintain a regime which creates perverse incentives for the EPA and other administrative agencies running a permitting program. Because these agencies aren't responsible for engaging in any due diligence under this rule – as private actors must disclose *everything* at their peril – the agencies have little incentive to carefully tailor applications and information requests to achieve the aims of the CWA. Rather than considering the needs of a particular waterway and creating a streamlined, efficient process, an agency can wait for an application to come in and sift through the extensive disclosures companies are incentivized to produce. This promotes a permitting process which unnecessarily requires more paperwork, labor in parsing it, and delays in the process of distributing permits. Administrative agencies should not be incentivized to be lax in their execution of their statutory duties, and if they choose to be lax the burden properly rests with them and not private actors relying on their grant to discharge.

III. SCCRAP lacks organizational and associational standing where the contamination underlying its RCRA claim is indefinitely confined to unused groundwater.

Article III of the U.S. Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). To establish a case or controversy, an appellant must meet "the irreducible constitutional minimum of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To establish standing, an

appellant must demonstrate that they (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan* 578 U.S. at 560-561) (hereinafter "the *Lujan* factors").

There are two ways through which SCCRAP may seek to establish standing. First, it may aver to enjoy standing in its own right; in other words, organizational standing. See Warth v. Seldin, 422 U.S. 490, 511 (1975). Alternatively, SCCRAP may rely on associational standing by which it serves "solely as the representative of its members." *Id*. at 511. To qualify for this type of standing, "an organization must establish that (1) at least one of its members would have standing to bring an individual claim regarding the challenged practice; (2) the interests that the organization seeks to protect 'are germane to the organization's purpose;' and (3) individual participation of each injured party is not indispensable" to the claim brought or the relief sought in the case." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

A. SCCRAP does not have standing, in its own right, to challenge the Closure Plan.

Should SCCRAP seek to satisfy organizational standing alone, its argument founders under the first *Lujan* factor, injury-in-fact. A plaintiff suffers injury-in-fact where it suffers "an invasion of a legally protected interest which is (a) concrete and particularized… and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations omitted). A bare statutory violation is not enough to establish standing, "no matter how beneficial [society] may think the statute [is]." Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1242 (11th Cir. 2022). Indeed, Congress has historically refrained from creating "federal 'citizen suit' style causes of action to private plaintiffs who did not suffer concrete harms." *TransUnion*

LLC, 594 U.S. 413, 428 n. 1 (2021).[7] To accept that SCCRAP—an organization based in Washington D.C.—has organizational standing to challenge hazardous waste practices in Vandalia would depart from this well-settled principle of standing jurisprudence.

SCCRAP articulates no facts to indicate that the handling of hazardous waste in Vandalia under ComGen's Closure Plan has led it—or will lead it—to suffer concrete harm as an organization. Nor does SCCRAP allege that any such handling practices have negatively impacted its associational ties with members living in the state. See NAACP v. Alabama, 357 U.S. 449, 458-60 (1958). The fact that the impoundment's cadmium and arsenic leachate are limited to unused groundwater pockets is an insurmountable barrier for any out-of-state plaintiff attempting to establish standing in its own right. See *TransUnion LLC*, 594 U.S. 413, 427 (2021) (noting a plaintiff in Hawaii has suffered no personal harm where pollution in violation of a federal law occurs in Maine). Any injury alleged by SCCRAP, as an organization, is limited to a "generalized grievance" that a waterway or groundwater is being contaminated; contrarily, an injury-in-fact must be "concrete and particularized" such that the plaintiff feels it in a way separate and distinct from those with generalized concerns. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (mere interest in a problem... is insufficient to confer standing).

B. SCCRAP does not have associational standing through its members living in Vandalia.

Given its inability to establish organizational standing, SCCRAP may look to assert associational standing by relying on the rights of its members to challenge the Closure Plan. Indeed, SCCRAP's members in Vandalia reside near the groundwater contaminated by

[7] One likely reason for this is lawmakers' understanding that "Congress legislates against the backdrop of standing." Bennett v. Spear, 520 U.S. 154, 163 (1997). While the Supreme Court's analysis in *Bennett* focused primarily on prudential standing, it is well-established that "Article III places even clearer limits on Congress' ability to create civil remedies." Hammer v. Sam's East, Inc., 754 F.3d 492, 509 (8th Cir. 2014) (Riley, J., dissenting).

ComGen's impoundment and "recreate, fish, and own property in the Vandalia River and its watershed." Some members, citing concerns over the health risks associated with exposure to PFAS, cadmium, and arsenic, have ceased recreation in the river area altogether.[8] Others, fearing groundwater contamination, are reconsidering their place on a waitlist for a prospective residential property that, if built, plans to use nearby wells as a source of drinking water. None of these concerns are sufficient to meet Article III standing requirements.

i. A loss of recreational use due to fear of speculative harm is insufficient to satisfy injury-in-fact.

While several SCCRAP members may, in fact, have limited their recreation and fishing in and around the Vandalia River for fear of its being contaminated by cadmium and arsenic, there is "no evidence that either [contaminant] ha[s] reached the Vandalia River." (R. at 8). Moreover, it is unlikely that such contaminants will reach the River at any point within the next five years.[9] Accordingly, this court must ask: when is the alleged contamination and its associated health hazards set to occur, if ever? As stated above, an injury-in-fact must be "(a) concrete and particularized… and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Considering the question presented can be answered in no certain, or even probable, terms, SCCRAP's injury-in-fact argument based on a loss of recreational use must fail under the second prong of this two-part inquiry.[10]

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[8] Monitoring of the groundwater has revealed only cadmium and arsenic contamination. To the extent SCCRAP's RCRA claim challenges the adequacy of the Closure Plan, this court's analysis needs only to consider the cadmium and arsenic contamination of groundwater. Neither PFAS nor PFOS is known to be a leaching byproduct of the Impoundment.

[9] It is telling that no such contamination has occurred in the five to ten-year period preceding this litigation—all the while, there is reason to believe that leaching has been in progress.

[10] A loss of recreational use, when motivated by fear of a certainly impending harmful occurrence, is likely to be concrete and particularized. Wilderness Soc'y, Inc. v. Rey, 622 F.3d 1251, 1256 (9th Cir. 2010).

In *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), the Supreme Court drew a line between injuries in fact and injuries in the form of an ongoing fear of a specific future harm that may arise from a defendant's actions. (emphasis added). The fact that no contamination from the impoundment has reached the Vandalia River to date suggests that the SCCRAP members' actions are in the latter camp. To be sure, fear, or actions motivated by fear, can constitute an injury-in-fact when supported by "concrete evidence" beyond "mere conjecture" that the feared future happenings are certainly impending. *Clapper*, 568 U.S. at 418. To the extent SCCRAP cannot, in certain terms, describe when—or if— contaminants will reach the Vandalia River, its members' loss of recreational use is an injury based on fear of hypothetical harm that is neither actual nor imminent. See Pharm. Rsch. & Mfrs. of Am. v. HHS, 656 F. Supp. 3d 137 (D.D.C. 2023) ("the Court must be able to say something about a future injury's timing"). Indeed, a feared occurrence is speculative if "the time when [it] would come to pass (if ever) is entirely uncertain." Amburgy v. Express Scripts, Inc., 671 F. Supp. 2d 1046 (E.D. Mo. 2009). Moreover, the fact that the feared contamination is unlikely to occur in the next five years suggests that this is not a case where the harm may find its imminence from an ability to occur "at any moment and with no notice." See Olympic Fed. Sav. & Loan Ass'n v. Director, 732 F. Supp. 1183, 1187-88 (D.D.C. 1990). To the extent the members' loss of recreational use of the Vandalia River is inspired by neither an actual nor imminent harm, it is insufficient to constitute an injury-in-fact.

ii. A loss of recreational use based on speculative harm is self-inflicted and not fairly traceable to the ComGen Closure Plan.

The subjective chill that underlies a SCCRAP member's loss of use is not an adequate substitute for a claim of specific present objective harm or an imminent threat of specific future harm. See *Tatum*, 408 U.S. 1, 13. To hold otherwise would, in essence, allow plaintiffs to "manufacture standing merely by inflicting harm on themselves based on their fears of future

harm that is not certainly impending." Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 827 (9th Cir. 2020). As applied here, this not only runs afoul of Article III's requirement that standing be predicated on an injury-in-fact, but also its requirement that such injuries be fairly traceable to the defendant's actions. *Lujan*, 578 U.S. at 560-561. The presence of cadmium and arsenic in groundwater falls short of the genuine threat required for standing. Any loss of recreational use now suffered by SCCRAP members is self-inflicted and cannot be fairly traceable to ComGen—the actual risk of the feared harm does not rise beyond a speculative level. The injury alleged is thereby "due to the plaintiff's own fault" and the casual chain necessary for Article III standing is broken. NRDC v. FDA, 710 F.3d 71, 85 (2nd Cir. 2013).

iii. The voluntary abandonment of a housing option for fear of a speculative harm is insufficient to establish injury-in-fact.

The SCCRAP members who decided to remove their name from the waitlist of the prospective housing development for fear of contaminated groundwater seek relief for an injury they have inflicted upon themselves.[11] As stated above, actions motivated by fear of a future injury may constitute an injury-in-fact only where concrete evidence beyond mere conjecture can support that the harmful occurrence is "certainly impending." *Lujan*, 504 U.S. at 555-56 n.2. To arrive at the members' feared harm, however, would require this court to embark down an attenuated and speculative chain of inferences that would push the phrase "imminence" beyond its breaking point. First, the prospective housing development, which is merely being considered by a developer, would need to be approved and constructed. Second, the developers would need to access a water well contaminated with harmful amounts of cadmium and arsenic, choosing it

[11] There is an open question of whether being on a waiting list for a prospective property confers a valuable, intangible legal interest that, when invaded, is sufficient for Article III standing. Indeed, it is possible no such interest materializes until the property is developed and/or a lease is offered. See Hutchinson v. Pfeil, 211 F.3d 515, 521 (10th Cir. 2000).

to be the one that will supply the new development with drinking water. Lastly, SCCRAP asks this court to assume its members will be selected from the developer's waiting list to become residents of the new residential property.[12]

This speculative chain of possibilities is insufficient to establish an injury based on a future occurrence that is certainly impending or the present fear therefrom. Moreover, plaintiffs may not rely on speculation about "the unfettered choices made by independent actors not before the court." *Clapper*, 568 U.S. 414 n.5 (quoting *Lujan*, 504 U.S. at 562). Yet, each of the above-mentioned occurrences required for SCCRAP's theory of establishing an injury-in-fact does exactly this.

Even assuming arguendo that the development was constructed and that SCCRAP members were to reside there, the prospect of having drinking water supplied from a contaminated well would remain conjectural. The presence of cadmium and arsenic in some pockets of groundwater nearby does not mean that such contamination is certain to proliferate the entire local water supply, making it impossible for the development to find an uncontaminated source. To assume that position assigns a degree of immediacy to an injury that may never occur at all.

It is notable that if, in fact, the development's proposed groundwater source was to become contaminated at some point prior to 2031—the developer's anticipated completion date—it would thereby never be approved for human consumption. Courts routinely dismiss RCRA claims where, notwithstanding the existence of contaminants in the water supply, the specific factual circumstances at issue prevent humans from drinking contaminated water. See, e.g., Two

[12] The fact that the affected SCCRAP members are merely second-guessing their placement on a waitlist but have not yet removed themselves introduces a question of ripeness. "Generally, a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998).

Rivers Terminal L.P. v. Chevron USA, Inc., 96 F. Supp. 2d 432, 446 (M.D. Pa. 2000). Again, familiarly, appellants trot out an incredibly speculative and distant "injury" which flies in the face of Article III standing requirements, as do all previous. They seek to manufacture standing merely by highlighting harm its members inflicted on themselves based on their fears of future harm that is not certainly impending—a point which, as noted above, undermines the Article III requirement that an injury-in-fact be fairly traceable to the defendant.

C. SCCRAP cannot have associational standing where the members represented would be precluded from individually challenging the Closure Plan's adequacy.

In the half-century since the *Hunt* Court introduced a test for associational standing, no court has addressed whether, in the penumbra of the first and third prongs, there exists an implicit requirement: namely, that the member(s) whose individual standing an organization relies on to establish their own must themselves have been capable of bringing the lawsuit individually, had they chosen to do so. Here, the principles of judicial efficiency and commonsense become salient—should an organization be able to have associational standing to pursue claims on behalf of members that would have been precluded from pursuing such claims individually? This court should answer "no."

i. SCCRAP members are precluded from challenging the Closure Plan's adequacy.

The federal common-law rules of preclusion require federal courts to give a state agency's fact-finding the same preclusive effect to which it would be entitled in that state's courts when "the state agency act[s] in a judicial capacity and resolves disputed issues of fact properly before it in which the parties have had an adequate opportunity to litigate." Univ. of Tenn. v. Elliott, 478 U.S. 788, 794 (1986). This preclusion doctrine is squarely applicable to the RCRA. See Mobile Baykeeper, Inc. v. Alabama Power. Co., 2023 WL 7458847 (S.D. Ala. Sept. 30, 2023) (no congressional intent to contravene the common law rules of preclusion in RCRA).

The question, therefore, becomes whether SCCRAP's members in Vandalia would be precluded from challenging the adequacy of ComGen's closure plan in state courts, considering their interests were vigorously represented by SCCRAP during the Vandalia DEP's review of ComGen's permit application. Assuming Vandalia courts have adopted a preclusion scheme that mirrors that of many of its sister states, the answer is "yes."

Generally, claim preclusion will attach where (1) a state agency, acting in a judicial capacity, rendered a prior judgment; (2) the prior judgment was final and on the merits; (3) both proceedings involved the same parties or their privies; and (4) both proceedings involved the same cause of action. See, e.g., Lee v. Hall, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990). The first, second, and fourth factors are readily satisfiable in the present case. The Vandalia DEP—while reviewing the merits of ComGen's application for an impoundment closure permit—acted in a judicial capacity to decide the adequacy of ComGen's Closure Plan. A state agency acts in a judicial capacity where it hears evidence, allows parties an opportunity to brief and argue their versions of a factual dispute, and reaches a decision based on preexisting legal standards or policy considerations. See Bourgeon v. City & Cnty. of Denver, 159 P.3d 701, 705 (Colo. App. 2003). This is precisely what the Vandalia DEP did between February and July of 2021. It not only provided members of the public notice of ComGen's application for approval of the Closure Plan, but also provided for a public hearing and written comment period (effectively inviting briefing on the issue)—a process to which SCCRAP availed itself and provided oral argument on March 30, 2021. The July 2021 issuance of a permit constituted judgment on that issue.

SCCRAP's involvement in the Vandalia DEP review process is sufficient to preclude its members that live in Vandalia from challenging the Closure Plan under a theory of privity. Among the relationships that have been deemed sufficiently close for purposes of privity are

organizations that adequately represent the interests of their members before an adjudicatory body—be it a court or administrative agency. See Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1081-82 (9th Cir. 2003) (noting sufficient commonality of interest as a dispositive factor in this analysis). In *Crane v. Commissioner of Department of Agriculture, Food & Rural Resources*, 602 F. Supp 280, 286 (D. Me. 1985), judge Conrad Cyr suggested that this determination must turn on whether the association was authorized or otherwise expected to represent the interests of its members. Here, the answer is "yes." See Grossman v. Axelrod, 466 F. Supp. 770, 774-75 (S.D.N.Y. 1979) (individual bound by the prior judgment in action litigated by a trade association of which he was a member, even though he had never authorized association to pursue the action on his behalf). To the extent SCCRAP, in privity with its members, vigorously contested the adequacy of the Closure Plan before the Vandalia DEP, albeit unsuccessfully, neither may now relitigate the issue.

IV. Where Congress did not intend to abrogate Article III standing within the RCRA, claims based in its provision against imminent and substantial endangerments must allege a threat to a living human population or an individual person's particularized interests in order to be actionable.

A. A threat to human health is the nexus between the RCRA's citizen-suit provision and Article III standing.

The requirement that plaintiffs seeking judicial review of a government action show that they, individually, have been adversely affected is well established. See *Morton*, 405 U.S. at 740. In line with this principle, the Supreme Court, in *Summers v. Earth Island Inst*., 555 U.S. 488, 488 (2009), made clear that "harm to [an organization's] members' recreational… interests in the National Forests will suffice [for standing]…but generalized harm to the forest or environment will not." (emphasis added). Just because Congress, in the RCRA, may have identified this intangible harm—to the environment—as a legally cognizable injury does not suggest it intended

to pave the way for claims that would, in effect, abrogate the Court's reasoning in *Summers*. Indeed, "Congress is well positioned to identify intangible harms that meet [the] minimum [requirements of] Article III." *Spokeo*, 578 U.S. at 341. Where the law is clear that Congress cannot legislate around Article III standing, it follows (and may be presumed) that lawmakers would not create a cause of action under which no person – or entity representing such a person – could successfully bring a claim for lack of standing.

i. Reading *or* as an expository for purposes of 42 U.S.C. 6972(a)(1)(B) ensures Congress legislated against the backdrop of standing.

Because Congress, in the plain text of the RCRA, has neither expressly nor impliedly suggested an intent to legislate in abrogation of the Article III standing requirements, this court may appropriately assume it is a backdrop against which the statute was drafted. *Bennett*, 520 U.S. at 163. Accordingly, the private cause of action allowed by 42 U.S.C. 6972(a)(1)(B) for an "imminent and substantial endangerment to health or the environment" must be read in a manner that would not otherwise frustrate this implied legislative intent. Indeed, to do this and avoid an anomalous result in this context—the RCRA providing a cause of action through which no private citizen can avail themselves for want of standing—would require this court to construe the oft disjunctively used word "or" as an expository or conjunctive.

Admittedly, this is an unconventional method of statutory interpretation. The word "or," as used in a statute, is "almost always disjunctive," meaning that the words it connects should receive separate and independent significance. United States v. Kobito, 994 F.3d 696 (4th Cir. 2021). That is not to say, however, that *or* is always, or mechanically, disjunctive. The word's exact meaning and proper application have long frustrated courts. De Sylva v. Ballentine, 351 U.S. 570, 573 (1956) ("trouble with the word [or] has been with us for a long time"). Indeed, sometimes *o*r is "interpretive or expository of the preceding word." Bowles v. Weiner, 6 F.R.D.

540, 542 (E.D. Mich. 1947). As an expository, *or* would be intended to explain or describe something. Applied here, in the expository sense, the RCRA could be read as providing a cause of action for "imminent and substantial endangerment to health [by way of] the environment." In this way, the RCRA's purpose—protecting the environment from hazardous materials—is achieved by those who would be able to satisfy Article III standing.

ii. Reading *or* conjunctively is efficient and faithful to the RCRA's legislative focus.

The word *or* is also susceptible to interpretation as a conjunctive—that is, it is often used as a careless substitute for *and*, in a context where *and* "would express the thought with greater clarity." *Ballentine*, 351 U.S. at 573. Indeed, this Court would be in good company to begin with a presumption that this is the proper meaning to prescribe the word here. See United States v. Fisk, 70 U.S. (3 Wall.) 445, 447 (1865) ("courts are often compelled to construe 'or' as meaning 'and'"). Read conjunctively, the RCRA provides a cause of action for "imminent and substantial endangerment to health [and] the environment." Tethering relief under the RCRA to hazardous disposals that threaten both health and the environment does not frustrate the purpose of the statute in any way. Instead, where courts have read the RCRA as Congress' vehicle to "confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes," reading *or* conjunctively ensures that such "risk" will indeed be actionable—that is to say, felt by those able to satisfy the requirements standing. Dague v. City of Burlington, 935 F.2d 1343, 1355 (2nd Cir. 1991).

Reading *or* conjunctively is, in effect, the most faithful reading of the RCRA. It is telling that the Supreme Court in *Meghrig v. KFC Western Inc*., 516 U.S. 479, 483 (1996), characterized the RCRA's primary purpose as being to minimize the present and future threat to "human health and the environment." (emphasis added). Assuming arguendo that a substantial endangerment to

the environment exists, or is made imminent, whenever there is the introduction of a pollutant, the RCRA would appropriately be characterized as operating to preserve the existing state of nature. See Tri-Realty Co. v. Ursinus Coll., 124 F. Supp. 3d 418, 455 (E.D. Pa. 2015). If any contamination of this existing state can be characterized as a substantial endangerment and, therefore, a violation of the RCRA, the question remains, what private citizen has standing to enforce it? By reading *or* conjunctively, the answer is clear: the person whose health is presently, or will be, affected by the contamination. The congressional intent is such that, by pursuing RCRA claims, private citizens will be able to advance the public's interest in environmental integrity, collaterally. Such is all Congress is capable of giving. *Warth*, 422 U.S. 490, 499 (1975) ("[t]he Art. III judicial power exists only to redress... even though the court's judgment may benefit others collaterally").

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the district court.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2025.

Respectfully submitted,

Team No. 4