No. 24-0682

In the United States Court of Appeals for the Twelfth Circuit

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STOP COAL COMBUSTION RESIDUAL ASH PONDS,

Appellant,

v.

COMMONWEALTH GENERATING COMPANY,

Appellee.

On Appeal from the United States District Court
for the Middle District of Vandalia
Honorable Samuel L. Wotus, Judge Presiding
District Court No. 2025

BRIEF OF APPELLEE

Team 25
Counsel for Appellee

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction for this case pursuant to 28 U.S.C. §1331, as this case arises under the Constitution, laws, or treaties of the United States. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291, as this case arises from an appeal of a final decision of the United States District Court for the Middle District of Vandalia. The District Court decision was ordered on October 31, 2024, and Appellee filed notice of appeal on November 10, 2024.

STATEMENT OF THE CASE

Congress passed the Clean Water Act of 1972 to switch from water quality control to the direct regulation of "effluent limitations", or pollutants discharged into the nation's waterways. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). The act also created the National Pollutant Discharge Elimination System ("NPDES"), which included a permitting system to allow for certain pollutant discharges. 40 C.F.R. § 122 (2024). Tasked with effectuating the Clean Water Act, the Environmental Protection Agency ("EPA") created the Disposal of Coal Combustion Residuals from Electric Utilities rule (the "CCR Rule"), regulating the impoundment of coal ash, a byproduct of electric generating plants. R. at 1, 5. The State of Vandalia has its own parallel regulations for permitting and impoundment, each consistent with the federal standards. R. at 4, 5. These are called the Vandalia Pollutant Discharge Elimination System ("VPDES") and Vandalia CCR Regulations respectively. R. at 4, 5.

Complimenting the Clean Water Act and related regulations is the Resource Conservation and Recovery Act ("RCRA"). This is a federal law which allows for private causes of action against those who: (1) have violated environmental permits, standards, or regulations related to storage or disposal of hazardous waste; or (2) have contributed to such storage or disposal which presents "imminent and substantial" danger to health or the environment. R. at 11; 42 U.S.C. § 6972(a)(1).

The Vandalia Generating Station ("generating station"), owned and operated by respondent Commonwealth Generating Company ("ComGen"), is covered by a VPDES permit for its discharge into the Vandalia River. R. at 4. It disposes of its coal ash in the Little Green Run Impoundment. R. at 5. The generating station will be closed by ComGen in 2027 as part of the company's renewables efforts. R. at 4. ComGen applied for and received a VDEP permit to close its Little Green Run impoundment pursuant to the CCR Rule. R. at 6. This includes the installation of monitoring wells and the annual release of reports of the discharge. R. at 8.

Petitioner is Stop Coal Combustion Residual Ashe Ponds ("SCCRAP"), an environmental organization that has members in Vandalia. R. at 8. SCCRAP began testing water near the generating station and found PFOS and PFBS in the mixing zone of Outlet 001 at concentrations of 6 ppt and 10 ppt respectively. R. at 9. The permit process does not request information about either of these chemicals, but a ComGen employee told the VDEP, before the permit was issued, that neither was known to be in the plant's discharge. R. at 9. A subpoena from unrelated litigation produced ComGen monitoring records which also included PFOS and PFBS. R. at 9.

SCCRAP also alleges that the generating station has made groundwater unsuitable for drinking due to arsenic and cadmium. R. at 12. Although a developer is considering building housing a mile from the impoundment, no one uses groundwater wells for drinking water in the area. R. at 9. Members of SCCRAP also allege that they have restricted their use of the Vandalia River for recreation as a result. R. at 10.

After ComGen announced the Closure Plan for the generating station and impoundment, SCCRAP brought three suits against ComGen. R. at 12. First, it alleged that ComGen violated its VPDES permit by discharging PFOS and PFBS. R at 12. This relied on *Piney Run*, which prohibits any discharge not explicitly disclosed to the relevant agency. R. at 12. Second, it alleged that ComGen violated the CCR Rule's standards for impoundment. R. at 12. Third, it alleges that the impoundment is an "imminent and substantial" danger to the environment under the RCRA. R. at 12.

ComGen responded to the complaint with a motion to dismiss, which the district court granted. R. at 13. First, it agreed with ComGen's argument that *Piney Run* was distinguishable from these facts because PFOS and PFBS are not required by the permit application or disclosure requirements. R. at 14. Second, it dismissed the challenge to the impound closure plan for lack of standing. R. at 14. The court found that the injury would exist even if the impound remained open. R. at 14. Third, it found that claims under the RCRA require endangerment to a living population and not the environment itself, which SCCRAP did not allege. R. at 14. Thus, the

district court dismissed all three of the SCCRAP claims against ComGen. R. at 14. SCCRAP now appeals this decision, requesting its reversal. R. at 15.

SUMMARY OF THE ARGUMENT

This court should uphold the district court's grant of summary judgment in favor of ComGen.

First, a polluter is not liable under the Clean Water Act for discharging pollutants not listed in its permit, as per the Second Circuit Court of Appeals decision, *Atlantic States*. ComGen has complied with the VDEP's permitting and reporting requirements as the pollutants in question, PFBS and PFOS, are not listed as pollutants under the Clean Water Act. It has a valid permit and is protected by the "permit shield" provision of the Clean Water Act. *Paris v. 3M Co.*, furthermore, is distinguishable because the permit in that case was generic, while ComGen's permit lists specific pollutants. As a result, that case does not confer liability on ComGen.

Second, the *Piney Run* case relied on by SCCRAP is both distinguishable from the facts here and impermissibly deferred all statutory interpretation to the Environmental Protection Agency, in violation of the Administrative Procedure Act. Stare decisis is not a barrier to abandoning this case as precedent. The nature of the error in Piney Run, and its total lack of independent legal reasoning, counsel in favor of overruling the case.

Third, SCCRAP lacks Article III standing to bring a suit against ComGen for the closure of Little Green Run impoundment. SCCRAP members cannot show that

they have suffered a concrete and particularized injury because there is no evidence of PFBS or PFOS has had any negative or deteriorative effects on Vandalia River. The members' knowledge of the pollutants is not sufficient to sustain a claim of injury based on reduction of use. Cases which allowed for injury of purely aesthetic harm are also distinguishable from the facts here, because SCCRAP does not allege any aesthetic harm. Potential future harm caused by elevated groundwater levels is far too speculative to constitute an impending harm.

SCCRAP has also not established a causal connection between the plan to close the impoundment and the alleged loss of use and enjoyment of the Vandalia River. The pollution SCCRAP members claim to have caused this loss began five to ten years prior to the implementation of the closure plan. SCCRAP would have thus suffered, and would continue to suffer, the alleged loss even if ComGen continued to operate the plant and impoundment. For this reason, an injunction to prevent the impoundment closure from proceeding would not provide an appropriate remedy for the alleged harm.

Finally, SCCRAP cannot bring a claim of an imminent and substantial danger to the environment alone. They rely on the evaluation of their human health expert stating that no people should use drinking water within 1.5 miles of the plant as a result of discharge. There are no wells in the area that produce drinking water, however. The mere possibility of a housing development project that may install wells in the future is too attenuated and speculative to constitute an "imminent harm" to a living population under the Resource Conservation and

Recovery Act ("RCRA"). Even if the RCRA allows for a claim of substantial endangerment to the environment alone, SCCRAP cannot show that the discharge has or will cause any deteriorative effects to the river or its ecosystem. As the claim of harm is merely speculative, the claim of imminent harm and substantial endangerment under the RCRA must fail.

ARGUMENT

I. The discharge of PFBS and PFOS into the Vandalia River is not a violation of the Clean Water Act.

The release of PFBS into the Vandalia River is not an unlawful discharge in violation of the Clean Water Act, 33 U.S.C. § 1311(a), as the Court should follow the Second Circuit Court of Appeals precedent in *Atlantic States*, which states that pollutant discharges listed in a NPDES permit are limited to what is in the text, and additional discharges for pollutants not listed are not a violation. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). Since the EPA has not determined PFBS to be included on toxic inventory lists or conventional pollutants, it is not necessary for a business to test for those materials and disclose results in their application for a permit.

Generally, a violation of the Clean Water Act is made when a pollutant is discharged into a river. 33 U.S.C. § 1311(a). However, Congress established a system of permitting to restrict but allow discharges of pollutants that would be normally prohibited. 33 U.S.C. § 1342(a). Further, a State is allowed to establish their own permitting systems in lieu of relying on the EPA to issue permits. 33 U.S.C. § 1342(b).

The State of Vandalia has elected to establish a state permitting program. R. at 11. As the 2nd Circuit ruled in *Atlantic States*, "Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutant." *Atl. States*, 12 F.3d at 357. Further, the 2nd Circuit found that there is a method to redress inadequacies of a permit that is later discovered, which is to either modify the existing permit or to issue a new permit that regulates the additional pollutants. The court determined, with concurring EPA opinions on the matter, that the statutory scheme was not ambiguous and clearly limits any citizen suits for violation of the Clean Water Act to the discharges as listed in the permits, and not additional permits. As the statute lists in 33 U.S.C. § 1342(k), there is a permit shield applied to any liability imposed to the chemicals, and anything beyond that is not considered.

SCCRAP has argued that by failing to disclose the release of PFBS compounds from Outlet 001 to the Vandalia River, the permit application and subsequent permit granted by the State of Vandalia were invalid, and it should be revoked, with an injunction granted to pause all discharge until a new permit can be granted. R. at 12. Appellants rely on the Fourth Circuit Court of Appeal's interpretation of NPDES permitting in the case *Piney Run Preservation Ass'n v. Cnty. Com'rs of Carroll Cnty.*, MD, 268 F.3d 255 (4th Cir. 2001). In that case, the Fourth Circuit, analyzing EPA regulations and the legislative intent of the Clean Water Act, determined that it is not a violation of a permit to discharge chemicals only if they were within the

reasonable contemplation of the EPA. *Id.* at 268 (citing I*n Re Ketchikan Pulp Co.*, 7 E.A.D. 605 (E.A.B. 1998)).

However, this is an incorrect reading of the statute and applicable Federal Regulations, and PFBS chemicals are currently not deemed a pollutant that requires measuring during the permit application process. Under 40 CFR §122.21 (2024), when applying to a NPDES permit (or applicable state equivalent), certain chemicals and testing must be done and results included with the application. Additionally, under Appendix A, some additional testing must be done to measure industry-specific pollutants that vary based on the specific work. Despite these numerous steps, PFBS compounds are not listed as a chemical that must be tested or disclosed to regulatory bodies, and Commonwealth Generation has complied with all applicable regulations and laws as required under both the Clean Water Act and the connected EPA regulations. 40 C.F.R. § Pt. 122, App. A (2024). Furthermore, under EPA effluent guidelines, which includes compounds that must be tested under the Clean Water Act, and is specifically applicable to Steam Electric Power Plants, PFBS are not listed as a pollutant under both toxic and conventional pollutants. *See* 40 C.F.R. § 401.15 (2024); 40 C.F.R. § 401.16 (2024).

SCCRAP has also argued that the *Parris v. 3M Co.* decision, which dealt with PFAS discharge (a compound similar to PFBS), as evidence of a violation of the Clean Water Act as grounds for a lawsuit under § 505 of the Clean Water Act. *Parris v. 3M Co., 595 F. Supp. 3d 1288* (N.D. Ga. 2022). R. at 12. As was the case in *Piney Run*, the decisions of that particular case are inapplicable to the State of Vandalia's

permitting program and do not support discharges of PFBS to be a violation of the Clean Water Act. Notably, the District Court determined that the nondisclosure of PFAS by defendant Trion would be more likely to be a violation if the permit involved was generic and identified general waste streams, in lieu of specific pollutants being discharged. *Id*. at 1320 (citing *Southern Appalachian Mt. Stewards v. A & G Coal Corp.*, 758 F.3d 560 (4th Cir. 2014)). When Commonwealth Generation applied for a permit with the State of Vandalia for the three discharges at outlets 001, 002, and 003, the State of Vandalia asked for specific pollutants to be monitored for discharge levels, including selenium, aluminum, water pH, and water temperature. R. at 4. PFBS and PFOS have no target limits provided by either the State or the EPA, and as a result there is no monitoring levels required, further supporting following the framework created in *Atlantic States*, 12 F.3d at 357.

Since the EPA has not required these chemicals to be specifically monitored and disclosed during the application process of a NDPES, the nondisclosure of PFBS monitoring results in the Vandalia River do not invalidate the permit as granted by the State of Vandalia. It is irrelevant that these pollutants could not have been in the contemplation of the State, as EPA guidelines provide no reference to these materials when creating a permit for a specific industry. As the 2nd Circuit ruled in *Atlantic States*, materials not listed under EPA regulations and explicitly regulated under the Clean Water Act do not need to be disclosed and cannot be a violation of the law and are not grounds for a suit to stop the discharges.

II. Piney Run should be abandoned by this Court as precedent and adopt Atlantic States.

Piney Run is distinguishable from the facts here and should not hold it as precedent due to its reliance on *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Piney Run*'s holding applies to statutory pollutants that are included in the NPDES permitting and reporting requirements. According to the EPA itself, the mission of the Clean Water Act is best met by focusing on the main culprits of pollutants "established in effluent guidelines and disclosed by permittees in their permit applications." *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 618 (1998). The application process is designed precisely to "elicit from applicants the disclosures necessary" for the regulating authority to determine the correct effluent limitations. *Id*. at 619.

To that end, the regulations include explicit requirements for quantitative data for certain pollutants in every outfall as well as specific listed pollutants for certain industries. 40 C.F.R. § 122.21(g)(7)(iii) (2024); 40 C.F.R. § 122.21 App. D (2024). These naturally contain the pollutants that the EPA has determined to be most necessary for limitation monitoring to maintain desired clean water standards. None of these lists contain requirements to report PFOS nor PFBS to the EPA. 40 C.F.R. § 122.21(g)(7)(iii) (2024); 40 C.F.R. § 122.21 App. D (2024). As the district court recognized in its opinion, neither chemical is required to be disclosed in any permit application, either. R at 13. In fact, the EPA's application regulations do not even require applicants to test for them when applying. 40 C.F.R. § 122.21(g)(7) (2024). Requiring reporting for every known pollutant in discharge would render this entire

section surplusage and eliminate the distinction that the regulation makes between industries. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). (stating that the canon against surplusage applies when an alternative reading gives effect to the surplus language).

It is also undisputed that ComGen's specific permit under the Vandalia Pollutant Discharge Elimination System ("VPDES") has no limitations or reporting requirements for PFOS or PFBS. R. at 4. The Vandalia Department of Environmental Protection ("VDEP") has knowledge of PFBS, as evidenced by its informal inquiry into its presence. R. at 4. The VDEP and EPA could include the chemical explicitly in their own permit applications or reporting requirements, but they have not. R. at 4. Nor have they included a blanket requirement to report the entire chemical composition of discharge. As these chemicals are not required by the EPA and VDEP's regulations to be limited, reported, or even tested for, they are thoroughly outside the scope of the disclosure requirements applicable in *Piney Run*. Thus, it is inappropriate to apply *Piney Run*'s holding to these circumstances.

Even if PFOS or PFBS were within the scope of NPDES disclosure requirements, *Piney Run*'s holding lacks the legal analysis required by *Loper Bright Enterprises v. Raimondo* and this Court should dispose of it as precedent. *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369, 412 (2024). The Court in *Piney Run* did not live up to the judiciary's historic duty of determining what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Supreme Court's precedent forced it to relinquish this duty in deference to the guidelines of the EPA. *Chevron*, 467 U.S.

at 866. Now that the Supreme Court has overturned *Chevron*, such a deference is an impermissible abandonment of the court's correct and proper role. *Loper Bright*, 603 U.S. at 412. Without the foundation of Chevron, *Piney Run* lacks the independent statutory interpretation that *Loper Bright* demands. It should thus be abandoned by this court in favor of *Atlantic States*. Stare decisis is not a barrier as the factors the Supreme Court has enumerated weigh in favor of overturning *Piney Run*. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022).

The *Loper Bright* decision robustly criticizes the legal analysis that underscored *Chevron*, stating that "Chevron's justifying presumption is [….] a fiction" and the requirements of its application "byzantine". *Loper Bright*, 603 U.S. at 404, 406. The Supreme Court is particularly hostile to the idea that agencies are somehow better equipped to resolve statutory ambiguities than the courts. *Id.* at 412. In fact, it states explicitly that a court deferring exclusively to an agency to resolve an ambiguity is a violation of the Administrative Procedures Act ("APA"). *Loper Bright*, 603 U.S. at 413; 5 U.S.C. § 706. When Congress has not expressly delegated discretionary authority to an agency, any deference to that agency's position is at the discretion of the Court. *Loper Bright*, 603 U.S. at 395.

Applying this standard to the legal analysis in *Piney Run* reveals a violation of the APA's directive that courts "decide all relevant questions of law." 5 U.S.C. § 706. *Piney Run* clearly states that it owes binding deference to the EPA's decision and cannot effectuate its own opinion: "in construing the application of the Clean Water Act's provisions [….] we find it *necessary* and appropriate to perform a Chevron

analysis. Under Chevron, we are *required* to apply a two-part test." (emphasis added). *Piney Run Pres. Ass'n* 268 F.3d at 266-67. Usage of the terms "necessary" and "required" is clear—the court had no option but to hand over statutory interpretation to the agency. *Id*. This is further reflected in the Court's application of step two of the Chevron test, where it states that "we *observe* that the EPA has promulgated [….] an interpretation of the permit shield provision that is reasonable." (emphasis added). *Id*. at 267. The choice of the word "observe" is also apt—beyond that point, the court's independent legal analysis plays no part in its holding on the permit shield provision. *Id*. at 263. There is no evaluation of the EPA's guidelines, merely the conclusory statement that "we see the EPA's interpretation of the permit shield as a rational construction of Clean Water Act's statutory ambiguity," and the application of that interpretation to the facts in *Piney Run*. *Id*. at 267. In other words, the interpretation that the court would have reached absent the mandatory *Chevron* deference is unknown. Supreme Court precedent now demands that a decision be reached by the court itself using "all relevant interpretive tools"—anything less does not meet the standards required by the APA. *Loper Bright*, 603 U.S. at 400.

Stare decisis is not a barrier to this Court rectifying the errors of *Piney Run* and adopting *Atlantic States* as precedent. As the Supreme Court identified in *Dobbs*, the doctrine of stare decisis "serves many valuable ends," especially respecting the precedents set by past courts. 597 U.S. at 264. Precedent is not unquestionable divine knowledge, however. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This is particularly true when the foundation of a decision has been called into question

further developments of constitutional interpretation, as is true here. *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (stating that stare decisis cannot be controlling when a decision's underpinnings have been eroded by subsequent decisions). *Alabama v. Smith*, 490 U.S. 794, 803 (1989) (remanding a sentencing when further law on guilty pleas necessitated overruling precedent). The nature of *Piney Run*'s error and the quality of its reasoning demonstrate why this court should abandon it. *Dobbs*, 597 U.S. at 268.

First, *Piney Run*'s error, although mandated by the *Chevron* precedent at the time, is now known to be a violation of the APA—the "fundamental charter of the administrative state." *Kisor* v. *Wilkie*, 588 U.S. 558, 580 (2019). The APA is clear on the role the judiciary has when reviewing agency actions as it expressly states that courts shall decide all questions of law. 5 U.S.C. § 706. As the Supreme Court noted in *Loper Bright*, the APA also expressly states that courts shall defer to agencies' *policymaking* and *factfinding*. 603 U.S. at 392. The APA contains no express deference to agencies regarding statutory ambiguities, however, which are a question of law and not fact. *Id*. at 392. If Congress had intended for agencies to be responsible for resolving statutory ambiguities such as in *Piney Run*, it would have included language mandating this deference as it did for others. On the contrary, legislative history shows that Congress intended for courts to decide legal questions under the APA. *Id*. at 393. "The text of the APA means what it says." *Id*.

Chevron deference, in other words, is a historic departure from the long-standing role of the judiciary in the balance of power in the United States government

system. *Marbury*, 5 U.S. (1 Cranch) at 177. The APA demands that questions of law be decided by the courts. As *Piney Run* relied exclusively on this deference in issuing its holding, it too is a violation of the APA that should not be perpetuated. This court can decide using its own independent judgment what the law is.

Second, the *Piney Run* decision is devoid of independent legal judgment. The quality of the legal reasoning in a decision is an important factor on overturning precedent. *Dobbs*, 597 U.S. at 268. Although the court in *Piney Run* provided historical analysis that explained how the EPA reached its opinion on resolving statutory ambiguities under the APA, the Court provided none of its own reasoning. *Piney Run*, 268 F.3d at 267-68. It applied its own judgment to whether the Clean Water Act language was ambiguous for the purposes of Chevron analysis, but only for the purpose of ceding statutory interpretation to the agency. *Id*. at 267. This is shown clearly in the language the Court used, stating it was "necessary" to perform the "required" Chevron analysis, and it "observe[d]" that the EPA had issued its own opinion on the matter. *Id*. at 267-68. Each word highlights the passive role the Court was compelled to take.

Atlantic States, on the other hand, contains no such defect. The Court there reviewed the EPA regulations related to the Clean Water Act and engaged in the proper statutory interpretation to reach its decision. *Atl. States*, 12 F.3d at 358. It began with an analysis of the statutory language, finding that the plain meaning of the text includes a list of exceptions that allow the discharge of pollutants once a

polluter complies with the permitting system, including the permit shield provision at issue here. *Id.* at 357.

Atlantic States included the Supreme Court's observation that the permit shield was designed "to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *Id*. This is the exact opposite reading that the plaintiff has taken against ComGen. The Court went on to label the view of the shield provision argued by SCCRAP as "absolutist" and "wholly impractical" because it requires polluters to meet the "impossible" task of identifying every chemical present in all discharge. Id. at 357. *Atlantic States's* statutory analysis is appropriately supported by the EPA's own statements attesting to this reading, while stopping short of total deference as in *Piney Run*. *Id*. at 358. It managed this without abandoning its duty to rule on what the law is, however, and as such should be adopted as precedent by this Court.

III. SCCRAP cannot challenge ComGen's coal ash Closure Plan without Article III standing.

A district court's dismissal of a suit for lack of standing is reviewed de novo. *Marshall v. Meadows*, 105 F.3d 904, 905-06 (4th Cir. 1997). ComGen did not challenge SCCRAP's standing in its motion to dismiss, but standing "may be raised by the parties (even by the court sua sponte) at any stage of the case." *A&M Gerber Chiropractic LLC v. Geico Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019). SCCRAP challenges ComGen's Closure Plan under 42 U.S.C. §6972(a)(1)(A), which authorizes citizen suits against parties allegedly violating RCRA requirements. R. at

12. However, a statutory authorization for citizen suits does not confer Article III standing by itself. *Public Interest Research Group v. Magnesium Elektron*, 123 F.3d 111, 120 (3rd Cir. 1996) (internal quotations omitted). Article III standing is a threshold jurisdictional prerequisite to a court's review of a claim's merit. *Magnesium Elektron*, 123 F.3d at 120 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-473 (1982)).

Article III of the Constitution limits federal judicial power to resolving actual "Cases and Controversies." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Under Article III, a case or controversy exists only when a plaintiff has standing to sue, i.e., a personal stake in the outcome of the case. U.S. Const. art. III, §2; *United States v. Texas*, 599 U.S. 670, 675 (2023). Standing is "perhaps the most important" justiciability requirement; federal courts may not adjudicate a matter in its absence. *Allen v. Wright*, 468 U.S. 737, 750 (1984). To establish standing, a plaintiff must satisfy three conjunctive elements: injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

SCCRAP's Members do not have standing to challenge ComGen's Closure Plan.

First, an "injury" must be a concrete, particularized harm that is actual or imminent; it may not be abstract, conjectural, or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotes omitted); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("threatened injury must be certainly impending."). Second, a plaintiff must establish causation by demonstrating that the injury is fairly traceable to the defendant's conduct—requiring a direct, causal link between the harm suffered and the

defendant's action. *Lujan*, 504 U.S. at 560. Finally, redressability requires a plaintiff to show that a favorable court ruling will likely remedy the alleged injury. *Allen*, 468 U.S. at 751 (1984).

As an organization, SCCRAP only has standing to pursue this relief if: (1) at least one of its members would have standing to sue in their individual capacity, (2) the interests at stake in the litigation are material to the organization's purpose, and (3) neither the claim nor relief requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Because the second and third requirements are uncontested, SCCRAP's standing turns on whether at least one of its members has suffered an injury in the first place. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021) ("No concrete harm, no standing"). The only SCCRAP members who could even arguably meet this requirement are those in its Mammoth chapter ("Members"), as they alone allege some semblance of concrete harm—aesthetic and recreational injury from ComGen's Closure Plan. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (an association may bring suit on behalf of its members when members would have standing to sue on their own right).

1. SCCRAP cannot sufficiently plead injury in fact.

SCCRAP fails to allege actual, imminent, or even aesthetic harm. For these reasons, they lack the requisite injury to have standing. SCCRAP asserts that its injury arises from knowing that pollutants such as arsenic and cadmium are present in the groundwater around the monitoring wells, which it argues has diminished its

use and enjoyment of the Vandalia River. R. at 10. However, the record clearly establishes that neither arsenic nor cadmium has reached the Vandalia River or any public drinking water supply or will in the next five years. R. at 8. Standing requires that an injury must be concrete and particularized. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). Because no pollutants have reached the Vandalia River or any public water source, SCCRAP cannot allege a concrete injury. *See id.*

In a similar case, where plaintiffs alleged injury from diminished enjoyment of a river due to knowledge of a corporation's pollution, the Third Circuit held that without actual harm to the river, its surroundings, or its ecosystem, a reduction in recreational use alone does not constitute injury. *Magnesium Elektron*, 123 F.3d at 121. In *Magnesium Elektron*, a district court found Magnesium Elektron Inc. ("MEI") liable for discharging chemicals into Wickecheoke Creek in excess of its NPDES permit. *Id.* at 114. However, the Third Circuit reversed on appeal, holding the plaintiffs lacked standing because they ceased using the river based solely on their knowledge of pollution, not because the chemicals posed an actual, imminent environmental threat. *Id.* at 123.

No evidence shows that chemicals reached the Vandalia River or any other public drinking water source. R. at 8. Like the plaintiffs in *Magnesium Elektron*, SCCRAP's only alleged injury is that their knowledge of chemicals in the groundwater has led them to stop using the river. However, the Third Circuit has held such claims to be insufficient to establish injury-in-fact. *See Magnesium Elektron*, 123 F.3d at 123 (holding that "knowledge that MEI exceeded effluent limits set by its

permit does not, by itself, demonstrate injury or threat of injury."). Mere awareness of pollution, without an accompanying injury or credible threat of harm, is no more concrete than a "generalized grievance shared by the public at large." *Id.* at 123 (3rd Cir. 1997) (citing *Valley Forge*, 454 U.S. at 475 (1982).

Additionally, cases where purely aesthetic harm was held to establish injury-in-fact are readily distinguished from SCCRAP's assertion for a simple reason: the Vandalia River has suffered no aesthetic harm. *See Piney Run*, 268 F.3d 255 at 263 (4th Cir. 2010) (a county-operated waste treatment plan caused rapid, dense growth of green algae in a stream running through the plaintiff's property); *see also Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 71 (3rd Cir. 1990) (a corporation's pollution of a river caused the water to turn brown and emit a bad odor); *see also La. Crawfish Producers Ass'n v. Amerada Hess Corp.*, 935 So. 2d 380, 381 (La. App. Ct. 2006) (defendant's oil and gas exploration activities destroyed the surrounding aquatic ecosystem).

Unlike the cases above, SCCRAP does not allege that ComGen's conduct has discolored the Vandalia River, caused it to emit an unpleasant odor, or led to the deterioration of its ecosystem and wildlife. Because SCCRAP cannot identify any concrete harm to the Vandalia River, it fails to establish injury— even a purely aesthetic one. *See TransUnion LLC*, 594 U.S. at 417 ("No concrete harm, no standing."). Unable to demonstrate actual or aesthetic harm, SCCRAP also turns to speculation about potential future threats. It claims the Closure Plan is deficient because floods or natural disasters could elevate groundwater levels, causing coal ash

to spill into the Vandalia River— posing a risk of "catastrophic failure." R. at 9. The Supreme Court has expressly rejected such conjecture.

When a plaintiff alleges future harm, "the threatened injury must be certainly impending." *Clapper*, 568 U.S. at 409 (2013) (internal quotations omitted). An injury is not certainly impending if it is speculative or depends on a highly attenuated chain of possibilities. *Id.* at 410. For example, in *Clapper*, the plaintiffs, Amnesty International, challenged a statute allowing U.S. intelligence officials to intercept foreign communications. *Id.* at 401. Amnesty International argued they suffered an injury in fact because there was "an objectively reasonable likelihood" their communications would be intercepted "at some point in the future." *Id.* The Supreme Court rejected their argument for two reasons. First, it held that an "objectively reasonable likelihood" is insufficient— future injuries must be "certainly impending;" second, it ruled that injury cannot rest on a chain of speculative contingencies. *Id.* at 410.

Although imminence is a "somewhat elastic concept, it cannot be stretched beyond its purpose . . . to ensure that the alleged injury is not too speculative." *Id.* at 410. Like Amnesty International, SCCRAP's claims of impending harm rest on speculation and a chain of contingencies— the mere possibility of some objectively realistic harm occurring at an unspecified time, triggering a domino effect that ultimately leads to the alleged injury. *See id.* at 401. SCCRAP's concerns about natural disasters and their potential impact on the Impoundment may be objectively

reasonable, but as the Court in *Clapper* made clear, "objectively reasonable" is insufficient for Article III standing.

SCCRAP has not identified an impending hurricane or natural disaster nor provided evidence of the frequency of such events. Instead, it merely alleges that such disasters could occur in the future and "present a risk" of catastrophe. R. at 9. Beyond failing to meet the established legal standard of a "certainly impending" injury, SCCRAP's argument remains purely speculative as a matter of common sense. *Clapper*, 568 U.S. at 410. Furthermore, even if this Court affirms the district court's finding that SCCRAP "suffered an injury-in-fact" (it should not), SCRRAP fails to demonstrate causation between ComGen's conduct and their purported injury. R. at 14.

2. SCCRAP fails to establish causation.

SCCRAP's only viable injury is its members' alleged loss of enjoyment of the Vandalia River. However, because this loss stems solely from their knowledge of pollution, it cannot be traced to the challenged conduct—ComGen's Closure Plan—since the pollution predated its implementation by five to ten years. R. at 8. To establish causation, a plaintiff's injury must be "fairly traceable" to a defendant's conduct. *Lujan*, 504 U.S. at 560. Traceability is not an exacting standard—a plaintiff is "not required to prove causation beyond a reasonable doubt or by clear and convincing evidence." *Cordoba v. DIRECTV, LLC*, 942F.3d 1259, 1272 (11th Cir. 2019) (internal quotations omitted). However, "the line of causation" breaks when the connection between challenged conduct and the alleged injury is too attenuated. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

For this reason, traceability is absent when a plaintiff would have suffered the same injury regardless of the defendant's conduct. *Walters v. Fast AC, LLC*, 60 F.4th 642, 651 (11th Cir. 2023). For example, in *Cordoba*, a class of plaintiffs sued a telemarketing company for violating a federal statute requiring phone companies to maintain and abide by a no-call list. *Cordoba,* 942 F.3d at 1263. The Eleventh Circuit held that individuals who never requested placement on the list lacked standing because even if the telemarketers had kept a no-call list, these plaintiffs would not have been on it. *Cordoba*, 942 F.3d at 1272. In other words, their injury was not traceable to the telemarketer's failure to maintain a no-call list because they would have received the calls anyway. *Cordoba*, 942 F.3d at 1272.

Likewise, SCCRAP's alleged injury is not traceable to the conduct it challenges—the alleged deficiency in ComGen's Closure Plan. Any contamination detected in groundwater predated the Closure Plan by years. Thus, SCCRAP "would have suffered the same injury" regardless of the plan's efficacy. *Walters*, 60 F.4th at 651. Before the groundwater monitoring reports in 2021, SCCRAP's Members regularly used and enjoyed the Vandalia River notwithstanding the presence of arsenic and cadmium in the groundwater. Their alleged harm stems from the distress caused by learning about the pollution—not from any deficiency in the Closure Plan. Because SCCRAP's claimed injury originates from preexisting contamination, not the Closure Plan itself, it is "too attenuated" from ComGen's alleged conduct to satisfy traceability. *Allen*, 468 U.S. at 752.

3. A favorable court decision would not redress the injury SCCRAP alleges.

Furthermore, an injunction to block the Closure Plan would also not address the source of SCCRAP's alleged injury. Redressability requires that the plaintiff demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal quotes omitted). In other words, the plaintiff must show that a court could provide them with "substantial and meaningful relief." *Larson v. Valentine*, 456 U.S. 228, 243 (1982). Here, SCCRAP seeks to prevent ComGen from implementing its Closure Plan. R. at 12. But even if this Court grants them such relief, the pollution—the source of SCCRAP's alleged harm—would remain unchanged.

Additionally, redressability is harder to establish when the plaintiff's relief depends on "independent contingencies" or the actions of third parties. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989). For example, in ASARCO, schoolteachers challenged a state law governing mineral lessees, arguing that it resulted in higher taxes and deprived the school trust of millions of dollars. *Id*. The Supreme Court rejected this argument, finding it "pure speculation" that overturning the law would lead to increased education funding or that additional funds would automatically raise teacher salaries. *Id*.

In the present case, blocking the Closure Plan would not remedy the groundwater contamination—the very reason SCCRAP members stopped using the Vandalia River. R. at 10. Even if the Plan were halted, SCCRAP provides no explanation for why this would lead its members to perceive the river as safer.

Moreover, SCCRAP assumes that blocking the Closure Plan would prompt ComGen, a third party, to draft a revised plan that cures its alleged deficiencies. Like the schoolteachers in *ASARCO*, SCCRAP relies on assumptions, independent contingencies, third party actions—none of which are sufficient to establish redressability. *See Lujan*, 504 U.S. at 560 (plaintiff must show it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision"). SCCRAP alleged injury stems from its Members' diminished perception and enjoyment of the Vandalia River due to groundwater contamination. R. at 10. A ruling favorable to SCCRAP would neither alter the condition of the groundwater nor redress their diminished perception.

IV. SCCRAP's imminent and substantial endangerment claim against ComGen fails because it does not allege immanent harm to a living population.

To prevail on an imminent and substantial endangerment claim, the alleged endangerment "can only be imminent if it threatens to occur immediately." *Meghrig v. Kfc W.*, 516 U.S. 479, 485 (1996). In cases involving toxic substances, harm may take years to materialize yet still satisfy "imminency." *See Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 279 (1st Cir. 2006) (holding that a carcinogen constitutes an imminent harm if it could cause cancer twenty years later). However, the harm must be more than a hypothetical future possibility and cannot be speculative. *Crandall v. City & Cnty. of Denver*, 594 F.3d 1231, 1238 (10th Cir. 2010).

Furthermore, for a substance to present a harm at all, there must be someone or something actually endangered. *Courtland Co. v. Union Carbide Corp.*, Civil Action No. 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306, at 171 (S.D. W. Va. Sep. 28, 2023). In *Courtland*, the court considered a claim of imminent endangerment to the environment due to pollutants. *Id*. at 167. The plaintiff relied on expert testimony which stated that the hazardous substances were detected in groundwater and surface water in the affected area. *Id*. The plaintiff argued that because the discharge originated from the defendant and exceeded acceptable water drinking values, it posed an imminent and substantial endangerment to both the environment and human health. *Id*. at 165-66. The court rejected this argument, noting that there were no known drinking wells in the area and no evidence that the contaminated water would reach any populated location. *Id*. at 286. Because there was no indication that the water was currently affecting or ever would affect drinking water sources, the court concluded that the alleged harm was purely speculative and thereby not imminent. *Id*. at 286-87.

The facts here mirror those in *Courtland*. SCCRAP, relying on its own human health expert, alleges that the groundwater within 1.5 miles of the impoundment is not suitable for human consumption. R. at 9. However, no wells in the affected area produce water for consumption. R. at 9. While a developer has considered building housing near the impoundment, there are no concrete plans—only a proposal. R. at 9. Regardless, to purport these developments to be some sort of indication of harm would contravene basic standing principles. *See Clapper*, 568 U.S. at 402

("respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm").

Lastly, even if the RCRA permits a substantial endangerment claim based solely on environmental harm, SCCRAP fails to allege any concrete, future threat to the river or its ecosystem. R. at 12-13 There is no evidence that the contamination extends beyond the groundwater. R. at 13. Because SCCRAP cannot even identify a speculative future risk to the environment, its claim RCRA under 42 U.S.C. 6972(a)(1)(B) fails.

CONCLUSION

For these reasons, this Court should affirm the judgment, reverse the judgment of the United States District Court for the Middle District of Vandalia.

Team 25
Counsel for Appellee

Appendix B

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 1, 2025.

Respectfully submitted,

Team No. 25