Fourteenth Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law

March 2025

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 24-0682
ORDER

STOP COAL COMBUSTION RESIDUAL ASH PONDS,	)	
Appellant,	)	
-v.-	)	C.A. No. 24-0682
COMMONWEALTH GENERATING COMPANY,	)	
Appellee.	)	

This case involves an appeal to the United States Court of Appeals for the 12th Circuit of an order by the United States District Court for the Middle District of Vandalia granting Commonwealth Generating Company's ("ComGen") motion to dismiss Stop Coal Combustion Residual Ash Ponds's ("SCCRAP") Complaint.

With respect to this appeal, the Court hereby orders that SCCRAP and ComGen brief the following issues:

> **Issue 1**: Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the Clean Water Act;
>
> **Issue 2**: Whether, in deciding **Issue 1,** the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*;

Issue 3: Whether SCCRAP has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment; and

Issue 4: Whether SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment when there is no allegation of endangerment to a living population but only to the environment itself.

SO ORDERED
Entered this 30th Day of December, 2024
Judge Samuel L. Wotus

Factual Background

A. Coal Ash Impoundments

Coal combustion residuals ("CCRs"), commonly known as "coal ash," are byproducts of the combustion of coal at electric generating plants. There are several different types of materials produced, including (1) fly ash, a very fine, powdery material composed mostly of silica made from the burning of finely ground coal in a boiler, (2) bottom ash, a coarse, angular ash particle that is too large to be carried up into the smoke stacks so it forms in the bottom of the coal furnace, (3) boiler slag, molten bottom ash from slag tap and cyclone type furnaces that turns into pellets that has a smooth glassy appearance after it is cooled with water, and (4) flue gas desulfurization material ("FGD"), a material leftover from the process of reducing sulfur dioxide emissions from a coal-fired boiler that can be a wet sludge consisting of calcium sulfite or calcium sulfate or a dry powered material that is a mixture of sulfites and sulfates.

Coal ash contains contaminants like mercury, selenium, cadmium, and arsenic, which are associated with cancer and various other serious health effects. Coal ash is disposed of in wet form in large surface impoundments and in dry form in landfills. According to the Environmental Protection Agency ("EPA"), without proper protections, these contaminants can leach into groundwater and can potentially migrate to drinking water sources, posing significant public health concerns.

CCRs are one of the largest industrial waste streams generated in the United States. In 2012, more than 470 coal-fired electric utilities burned over 800 million tons of coal, generating approximately 110 million tons of CCRs in 47 states and Puerto Rico. CCRs can be disposed of in off-site landfills, or disposed in on-site landfills or surface impoundments. In 2012, approximately 60 percent of the CCRs generated were disposed in surface impoundments and landfills, with the vast majority disposed in on-site disposal units, including more than 735 active on-site surface impoundments, averaging more than 50 acres in size with an average depth of 20 feet. The Little Green Run Impoundment, owned and operated by ComGen, is one such on-site surface impoundment; it is located adjacent to the Vandalia Generating Station and along the Vandalia River.

B. Commonwealth Generating Company

Commonwealth Generating Company ("ComGen") is a wholly owned subsidiary of Commonwealth Energy ("CE"), a multistate electric utility holding company system providing electric service at retail and wholesale rates in nine states (including the State of Vandalia). ComGen owns a variety of merchant plants, as well as regulated power plants whereby ComGen

recovers the operating costs of its operation (including a return on investment) from captive retail electric customers through the ratemaking process at state public utility commissions ("PUCs").

ComGen boasts that its reliable electricity has kept Vandalia moving for more than a century at affordable prices. It also employs more than 1,500 Vandalians at its various facilities throughout the region and engages in many environmental stewardship projects throughout its service territory.

In 2015, ComGen unveiled "Building a Green Tomorrow," a program aimed at lowering energy costs while reducing pollution. A key component of that program includes plans to retire several older coal-fired power plants and replace that capacity with renewable solar and wind facilities. Since Building a Green Tomorrow's start, ComGen has constructed and commenced operation of five solar facilities providing more than 50 megawatts of power and two wind farms providing 60 megawatts of wind capacity. In light of ComGen's successes in its recent renewables efforts and in furtherance of its Building a Green Tomorrow commitments, in 2018, ComGen announced the planned 2027 closure of its Vandalia Generating Station in Mammoth, Vandalia.

1. The Vandalia Generating Station

The Vandalia Generating Station is a coal-fired electric generating plant that is among the oldest operating power stations in Vandalia. Opened in 1965, it has a capacity of 80 MW but needs substantial upgrades to comply with the EPA's Effluent Limitations Guidelines ("ELG") for coal-fired power plants if it were to continue operation. Because of its age, condition, and limited capacity, the Vandalia Generating Station was considered by ComGen to be the best candidate for closure under its Building a Green Tomorrow program.

The Vandalia Generating Station has a Vandalia Pollutant Discharge Elimination System ("VPDES") permit covering its outfalls into the Vandalia River and its tributaries, which are waters of the United States. Its VPDES Permit was issued on July 30, 2020. It became effective on September 1, 2020, and is set to expire on July 29, 2025. The Permit covers Vandalia Generating Station's three outfalls—Outlets 001, 002, and 003—and sets limits for a wide array of pollutants, including selenium, aluminum, pH, temperature, etc. However, there are no limits set for PFOS or PFBS, nor does it require monitoring for such parameters. In fact, the permit and permit application fail to mention those pollutants at all.

As seen in FOIA documents, however, a deputy director of the Vandalia Department of Environmental Protection ("VDEP") did informally ask an employee of ComGen over email about PFOS or PFBS before the 2020 Permit was issued. Specifically, the deputy director asked whether any of the Outlets might have PFOS or PFBS in its discharges since newer studies have shown such PFAS parameters are present in fly and bottom ash. The employee of ComGen assured the deputy director that neither PFOS or PFBS were known to be in the discharge, and it

appears that was the end of the matter since such parameters were never mentioned in any formal permit documents or application materials.

2. The Little Green Run Impoundment

Coal ash produced by the Vandalia Generating Station has historically been disposed of in the Little Green Run Impoundment, which was formed by the construction of a dam across Green Run, immediately east of the Vandalia Generating Station. The dam has a current height of 395 feet from toe to crest, with a top elevation of 1,050 feet above sea level. The impoundment formed by the dam covers approximately 71 surface acres and currently contains approximately 38.7 million cubic yards of solids, mainly CCRs and coal fines and waste material removed during the coal cleaning process. The Impoundment is unlined.

a. The Closure Permit

On April 17, 2015, the EPA published its rule on the Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule"). The CCR Rule regulates coal ash as solid waste under subtitle D of RCRA and establishes "national minimum criteria for existing and new CCR landfills . . . and surface impoundments . . . consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification and internet posting requirements." 80 Fed. Reg. 21,302. The Rule is designed to be "self-implementing," meaning that "facilities are directly responsible for ensuring that their operations comply with the Rule's requirements." *Id.* at 21,311. EPA's 2015 Federal Register Notice specifically envisioned that the primary enforcement mechanism for the Rule would be citizen suits under Section 7002 of RCRA. *Id.* at 21,427; 42 U.S.C. § 6972.

A year after the CCR Rule was promulgated by EPA, Congress passed the Water Infrastructure Improvements for the Nation Act (the "WIIN Act"). The WIIN Act allows states to obtain approval from EPA to administer coal ash permitting programs "in lieu of" the federal rule, and to assume enforcement responsibilities. 42 U.S.C. § 6945(d)(1)(A). The State of Vandalia has obtained approval from EPA to administer its own coal ash permitting program and has regulations consistent with the federal CCR Rule.[1] Specifically, the Vandalia CCR Regulations include provisions that are identical to the Federal CCR Regulations, including the "Criteria for conducting the closure or retrofit of CCR units."

[1] Because the state regulations are the same as the federal CCR Rule, it is undisputed in this case that EPA's authorization of Vandalia's program makes that state program effective pursuant to RCRA; thus. violations of the state program are actionable through a RCRA citizen suit in federal court. *See Schmucker v. Johnson Controls, Inc.*, 90 F. Supp. 3d 786 (N.D. Ind. 2015).

Under the CCR Rule and Vandalia's parallel regulations, the owners or operators of existing CCR surface impoundments must prepare initial written closure plans consistent with the requirements specified in subsection (b)(1) no later than October 17, 2016, 40 C.F.R. § 257.102(b)(2)(i), and impoundments which do not meet certain criteria, such as location, liner composition, and groundwater impacts, must begin the process of retrofitting or closure by October 31, 2020, 40 C.F.R. § 251.101; 83 Fed. Reg. 36441. There are two closure options: (a) excavation and removal of the CCR; and (b) closure in place. Owners or operators hoping to leave or cap CCR in place in the existing impoundment are subject to additional requirements in implementing their closure plan. First, prior to installing a "final cover system" as specified in subsection (d)(3), "free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues." 40 C.F.R. § 257.102(d)(2)(i). Second, at a minimum, the unit must be closed in a manner that will "preclude the probability of future impoundment of water, sediment, or slurry." *Id.* § 257.102(d)(1)(ii). Third, at a minimum, the unit must be closed in a manner that will "control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters." *Id.* § 257.102(d)(1)(i). Cap-in-place closure plans must describe how the final cover system will achieve the performance standards specified in subsection (d). *Id.* § 257.102(b)(1)(iii). Separately, practices failing to satisfy any of these criteria constitute open dumping, which is prohibited under Section 4005 of the RCRA. *Id.* § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

Knowing that the Vandalia Generating Station will be ceasing operations by 2027 and unwilling to invest millions to upgrade the Little Green Run Impoundment to continue its operations for just a few more years, ComGen is in the process of closing the Impoundment in place in accordance with the CCR Rule.

In December 2019, ComGen submitted to the Vandalia DEP its initial "Permit Application for CCR Surface Impoundment" at the Little Green Run Impoundment. The permit application explained ComGen's intention to close in place the Impoundment in accordance with the EPA and state CCR Regulations.

ComGen placed its initial closure-in-place plan for the Little Green Run Impoundment in the Vandalia Generating Station's operating record on October 17, 2016. ComGen amended the plan with more detail in July 2019 and again in April 2020. ComGen included its then-existing closure and post-closure plans for the Impoundment as part of its 2019 permit application.

In February 2021, the Vandalia DEP issued a notice of both ComGen's initial Permit Application for CCR Surface Impoundment at the Little Green Run Impoundment and of a public hearing the following month to receive oral comments on the proposed initial issuance of the permit. The notice explained that the Vandalia DEP would also receive written public comments for entry

into the public hearing record. Members of the public submitted thousands of comments in opposition to the proposed permit. On March 30, 2021, the VDEP held the public hearing, during which numerous individuals, including a representative of SCCRAP, urged the VDEP to deny ComGen the proposed permit.

In July 2021, after considering the public hearing record, the written comments, and its CCR Regulations, the VDEP issued to ComGen a Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment (the "Closure Permit"). The Closure Permit for the Impoundment is valid until May 2031. ComGen is obligated to manage CCR at the Impoundment in accordance with the conditions of the Permit, the approved permit application, and the federal CCR Regulations.

ComGen began closure-in-place activities in 2019. ComGen has already spent about $50 million in implementing the closure plan (mainly to install the groundwater monitoring wells, as described below), but expects to spend over $1 billion upon its completion in 2031.

b. Groundwater monitoring

ComGen's first closure-in-place activity was installing upgradient and downgradient groundwater monitoring wells for the Little Green Run Impoundment. Such monitoring wells help show whether the Impoundment is properly holding the coal ash in place or if pollutants from the Impoundment are leaching off site. As shown in the image below, ComGen installed 13 monitoring wells, which were operational by the end of 2021.

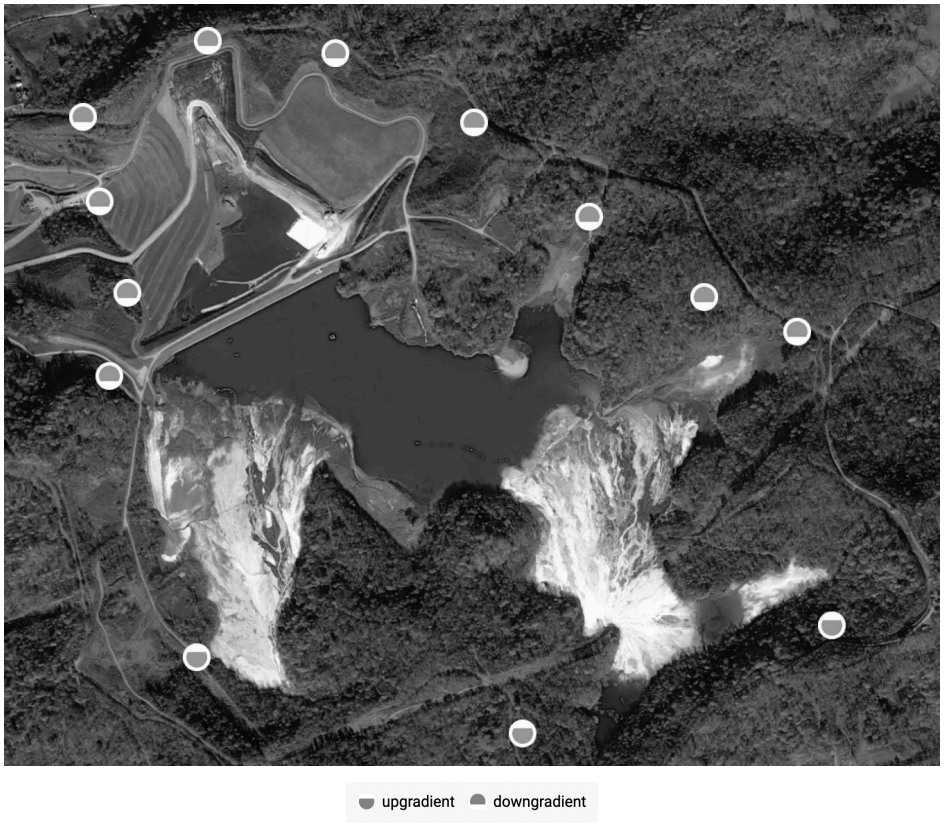

Figure 1

ComGen must release the yearly monitoring reports for these wells. Each year, from 2021 to present, the downgradient monitoring wells showed elevated levels of arsenic and cadmium above federal advisory levels and above Vandalia's groundwater quality standards for such parameters. However, there is no evidence that either arsenic or cadmium have reached the Vandalia River or any other public water drinking supply or will in the next five years. Both environmental and industry groups agree that the Impoundment was likely leaching for at least 5 to 10 years prior before the first monitoring report in 2021.

C. Stop Coal Combustion Residual Ash Ponds

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is a national environmental and public interest organization based in Washington, D.C. SCCRAP has members located throughout Vandalia. SCCRAP has utilized both the Clean Water Act and the Resource Conservation and Recovery Act to hold owners and operators of coal ash impoundments accountable. SCCRAP has specifically begun targeting coal-fired power plants with coal ash ponds on site that have both groundwater problems and have PFAS discharges, as SCCRAP's missions, aside from getting rid of coal ash ponds, are to protect public water from pollutants from the fossil fuel industry and to transition to a cleaner, more sustainable energy supply that does not create harmful by-products, like coal ash.

SCCRAP and other local environmental groups suspected that the Vandalia Generating Station was causing PFAS problems in the Vandalia River, which supplies drinking water for the residents of Mammoth. These environmental groups performed their own testing for several PFAS parameters upstream and downstream of Outlets 001, 002, and 003. The groups identified PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001, which were not present a mile upstream of the Outlet. After testing, the groups also learned from a subpoena in separate, ongoing litigation that ComGen knew Outlet 001 was discharging these PFAS parameters. In fact, in response to the subpoena, ComGen was forced to produce monthly monitoring records going back to 2015 that measured the discharge of PFOS and PFBS from Outlet 001. In almost all months, there was some recorded discharge of PFOS or PFBS in concentrations as high as 15 ug/L and 35 ug/L, respectively. However, ComGen has always maintained that because neither of these pollutants are regulated under the Clean Water Act and were not pollutants specifically asked about in its permit application, it did not need to disclose their presence to the Vandalia DEP.

SCCRAP has also become concerned with ComGen's Closure Plan for the Little Green Run Impoundment. SCCRAP believes it is deficient because it will permanently store coal ash below sea level and in contact with water, including groundwater, where it is already leaching into waters of the United States. SCCRAP also believes that future floods, storms, and hurricanes present a risk of catastrophic failure as any surrounding water level rise could elevate groundwater in the Impoundment and cause the coal ash to spill into the Vandalia River.

Finally, SCCRAP has been closely monitoring the arsenic and cadmium groundwater contamination emanating from the Little Green Run Impoundment. Based on the levels of arsenic and cadmium in the downgradient monitoring wells, SCCRAP's human health expert has determined that groundwater downgradient of the site within 1.5 miles of the Impoundment should not be used for drinking water. Currently, no one uses groundwater wells for drinking within that area, but a housing developer is considering building a large subdivision within a mile downgradient of the Impoundment and has proposed plans to use well water as the primary drinking water source for that development. Several SCCRAP members have put their name on the waiting list for this proposed development but have since learned about the groundwater contamination, which is making them second guess that decision. But that housing development, even if it did go through, would not be finished until at least 2031.

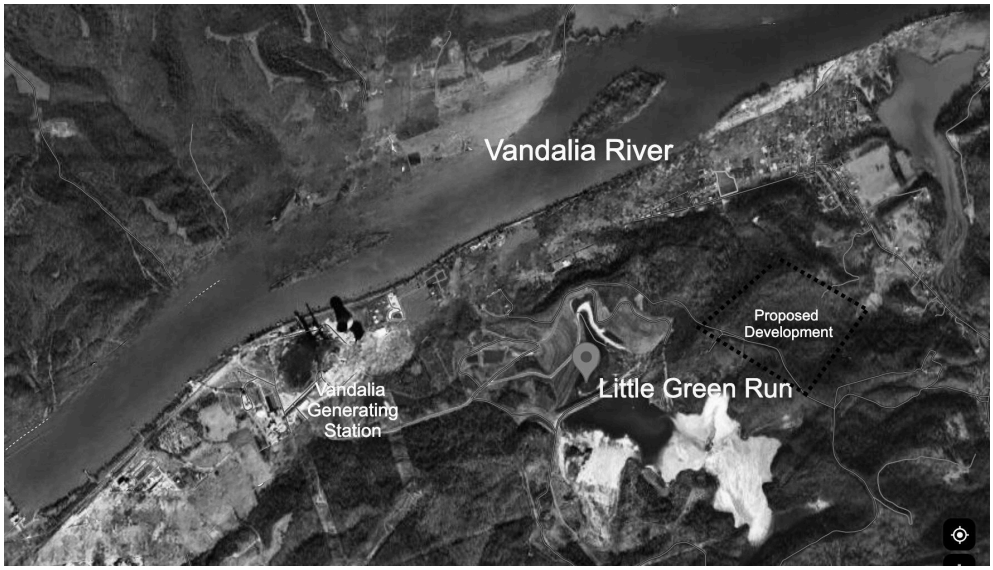

Figure 2

SCCRAP's chapter in the town of Mammoth has members who recreate, fish, and own property in the Vandalia River and its surrounding watershed. SCCRAP's chapter in Mammoth includes several members who allege they are directly affected by the environmental impacts associated with the Little Green Run Impoundment and the discharges from the Vandalia Generating Station. Specifically, they used to recreate in the Vandalia River and its tributaries near the Station and Impoundment but have restricted such use because of concerns over PFAS, arsenic, and cadmium pollution. They find such pollution offensive and it diminishes their use and enjoyment of the River.

Legal Background

A. The Clean Water Act

The Clean Water Act ("CWA") was enacted in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To those ends, the Act prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise authorized by the Act. *Id.* §1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* §1362(12). The term "point source," in turn, means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." *Id.* §1362(14).

As recognized in §1311(a), the Act provides for the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specified effluent standards. In 50 U.S.C.

§1342(a), the Act established the National Pollutant Discharge Elimination System ("NPDES"), under which EPA may "issue a permit for the discharge of any pollutant" provided that the authorized discharge complies with the effluent standards specified in the permit or otherwise imposed by the Act. Through that system, the EPA also shares regulatory authority with the States, and a State can elect to establish its own permit program, subject to EPA approval. *Id.* §1342(b)-(c). When a State elects to establish its own program, the EPA suspends its federal permit program and defers to the State's, allowing the state discharge permit to authorize effluent discharges under both state and federal law. (The state of Vandalia has elected to implement permitting programs under the Clean Water Act.)

B. The Resource Conservation and Recovery Act ("RCRA")

The Resource Conservation and Recovery Act ("RCRA") is the primary federal law governing the solid waste and hazardous waste disposal. Enacted in 1976 to address the growing volume of municipal and industrial waste being generated throughout the nation, RCRA provides for private causes of action for citizens seeking relief against present or future risks of harms to health or the environment created by the handling, storage, treatment, transportation or disposal of any solid or hazardous waste.

Two types of private suits are authorized by RCRA:

1. Private actions against entities that are alleged to have violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to the RCRA," and
2. Private actions against persons who have "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1).

RCRA's provisions were intended to complement the CWA, ensuring that while the federal government worked to remove pollutants from the air and water, entities were not thereafter disposing of removed pollutants in an environmentally unsound way.

Procedural Background

A. SCCRAP's District Court Action

Following ComGen's announcement of its intent to close the Vandalia Generating Station and the Vandalia DEP's subsequent approval of ComGen's Closure Plan for the for the Little Green Run Impoundment, and after 90 days had passed since SCCRAP sent a letter of its notice of intent to sue, SCCRAP filed a citizen suit against ComGen on September 3, 2024, in the United States District Court for the Middle District of Vandalia. In its Complaint, SCCRAP pursued three separate claims—one under the CWA and two under RCRA.[2]

First, pursuant to § 505 of the CWA, SCCRAP alleged that ComGen has violated the CWA by discharging PFOS and PFBS into the Vandalia River through Outlet 001 without a NPDES permit for such pollutants. SCCRAP also alleged that such PFAS pollutants were not "within the reasonable contemplation of the permitting authority at the time the permit was granted" because such pollutants are not listed in the permit and ComGen lied to the WVDEP deputy director about such pollutants before its 2020 VPDES permit was issued. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 259 (4th Cir. 2001);[3] *see also Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1319 (N.D. Ga. 2022). SCCRAP is seeking declaratory relief that ComGen is violating the CWA by discharging PFOS and PFBS without a valid NPDES permit, permanent injunctive relief to stop such unlawful discharges until a valid NPDES permit is obtained, and civil penalties.

Second, pursuant to § 7002(a)(1)(A) of RCRA, 42 U.S.C. § 6972(a)(1)(B), SCCRAP challenged the Closure Plan as inadequate. Specifically, SCCRAP alleged that the Plan fails to satisfy the CCR Rule's standard to eliminate free liquids prior to capping in place, *see* 40 C.F.R. § 257.102(d)(2)(i), will result in the continued impoundment of water, sediment, or slurry, and fails to preclude the probability of future impoundment of water, sediment, or slurry, *see* 40 C.F.R. § 257.102(d)(1)(ii), and does not control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste or releases of CCR pollution to ground or surface waters, *see* 40 C.F.R. § 257.102(d)(1)(i). SCCRAP is seeking injunctive relief to prevent ComGen from implementing the alleged illegal Closure Plan.

Third, pursuant to § 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), SCCRAP alleged that the Little Green Run Impoundment presents an imminent and substantial endangerment to the environment itself due to its consistent arsenic and cadmium exceedances at its downgradient monitoring wells. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005); *Burlington N. & Santa Fe Ry. Co. v. Grant,* 505 F.3d 1013 (10th Cir. 2007). SCCRAP did not include any allegations regarding endangerment to a living population since they did not find any

[2] It should be assumed that all of the Factual Background was included in SCCRAP's Complaint.
[3] *Piney Run* and its reasoning were adopted by the 12th Circuit in 2018.

evidence that the contamination had extended beyond the groundwater, which is not currently being used for drinking water. But SCCRAP did allege that the groundwater may be used for drinking water for the new housing development contemplated near the Impoundment. SCCRAP is seeking declaratory and injunctive relief, as well as civil penalties.

B. ComGen's Motion to Dismiss

On September 20, 2024, ComGen filed a motion to dismiss the Complaint.

As to SCCRAP's CWA unpermitted discharge claim, ComGen argued that *Piney Run* and the 12th Circuit's adoption of it are inapplicable. First, unlike the pollutants at issue in *Piney Run*, PFOS and PFBS are not statutory pollutants included in any permit application. Further, ComGen argued that *Piney Run* and its adoption both rely on *Chevron* deference to EPA guidance, which is now inconsistent with *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024). Because *Piney Run* is not on-point and agency deference is no longer required under *Loper Bright*, ComGen argues that such decision should be cast aside and the reasoning in *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), should be adopted ("The EPA lists tens of thousands of different chemical substances in the Toxic Substances Control Act Chemical Substance Inventory . . . [but] the EPA does not demand even information regarding each of the many thousand chemical substances potentially present in a manufacturer's wastewater because 'it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants.'").

With regard to SCCRAP's RCRA claims, ComGen argued that SCCRAP's attack on its Closure Plan are too conclusory and SCCRAP has failed to plead sufficient facts to prove any standards set out in the CCR Rule were violated. Finally, as to the imminent and substantial endangerment claim, ComGen argued that SCCRAP has failed to state a claim as a matter of law because the 12th Circuit has never recognized imminent and substantial endangerment claims to the environment itself and adopting such a broad interpretation of RCRA would allow an imminent and substantial endangerment suit essentially whenever there is any form of contamination. *See, e.g.*, *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 454–58 (E.D. Pa. 2015).

After the parties agreed to an expedited briefing schedule, SCCRAP submitted its response to ComGen's Motion to Dismiss on October 8, 2024, and on October 15, 2024, ComGen submitted its reply.

C. The District Court's Decision

On October 31, 2024, the District Court issued an order granting ComGen's Motion to Dismiss in its entirety.

In dismissing SCCRAP's CWA claim, the Court accepted ComGen's argument. In so doing, the Court did not follow *Piney Run* and the 12th Circuit's adoption of it but rather followed the reasoning in *Atlantic States*. Specifically, the Court found that because PFOS and PFBS are not pollutants that are specifically asked about in the formal permit application, there were no disclosure requirements that ComGen violated, and thus the permit shield was applicable. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) ("Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. 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 pollutants.").

As to SCCRAP's RCRA challenge to the Closure Plan, the Court determined that SCCRAP does not have standing to challenge the Closure Plan. Relying on the reasoning in *Mobile Baykeeper, Inc. v. Alabama Power Co.*, No. CV 1:22-00382-KD-B, 2024 WL 54118 (S.D. Ala. Jan. 4, 2024), the Court determined that while SCCRAP has suffered an injury-in-fact in the form of aesthetic and recreational injuries, such injuries are not traceable to ComGen's conduct, nor is it redressable. Specifically, the Court found that SCCRAP would be injured in the same way even if the Impoundment were not closing at all because the contamination began before any closure activities began—thus, SCCRAP's injuries are not from the Closure Plan or its alleged infractions of the CCR Rule, but from the historical pollution stemming from the Impoundment. Although standing was not raised by ComGen, the Court emphasized its independent duty to ensure it has subject matter jurisdiction to decide the issue. Because the Court found SCCRAP did not have standing to challenge the Closure Plan, the Court did not reach ComGen's substantive arguments as to this issue.

Finally, as to SCCRAP's RCRA imminent and substantial endangerment claim, the Court determined that RCRA does not support an imminent and substantial endangerment claim to the environment itself and there must be at least some form of endangerment or exposure pathway to a living population, which the Complaint fails to allege. *See, e.g.*, *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D. W. Va. Sept. 28, 2023) ("To the extent [plaintiff] takes the position that contaminated groundwater in and of itself demonstrates an endangerment to the environment, even absent any secondary effects, the court declines to find an endangerment in this respect. Indeed, it is difficult to reconcile the existence of an endangerment that is both imminent and substantial when the contamination present threatens no actual harm to someone or something."). Thus, the district court rejected the Third and Tenth Circuit opinions to the contrary.

On November 10, 2024, SCCRAP filed this appeal to the United States Court of Appeals for the 12th Circuit, asking that the rulings of the District Court be reversed. The 12th Circuit issued an order on December 30, 2024, setting forth the issues to be briefed and argued on appeal.

[NOTE: No decisions or documents dated after December 30, 2024, may be cited either in briefs or in oral arguments.]