C.A. No. 24-0682

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

BRIEF OF THE APPELLANT

Team 10

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The district court had jurisdiction pursuant to 28 U.S.C. § 1331 based on Appellant's claims brought under the Clean Water Act, 28 U.S.C. § 1331, and Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court's order was ordered on October 31, 2024. The Appellant filed a notice of appeal on November 10, 2024.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ComGen under the Clean Water Act is permitted to discharge PFOS and PFBS when it knowingly provided contrary information to the permitting authority.

II. Whether *Piney Run* is a valid interpretation of the Clean Water Act under *Loper Bright* when *Piney Run*'s interpretation relied on the CWA's text and Congressional intent.

III. Under *Hunt* and *Lujan*, can SCCRAP and its local members have standing, when ComGen's Impoundment is leaching arsenic and cadmium in the direction of the River and a proposed residential development?

IV. Whether SCCRAP must plead an injury to a living population under the Resource Conservation and Recovery Act when the Act's text recognizes injury to the environment itself.

STATEMENT OF THE CASE

On September 3, 2024, a citizen suit under the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") alleged three pressing violations of the acts. R. at 12. The citizens, an organization known as Stop Coal Combustion Residual Ash Ponds ("SCCRAP"), alleged that the Commonwealth Generating Company ("ComGen") (1) discharged pollutants into the Vandalia River (the "River") in violation of the CWA, (2) holds an inadequate

Closure Plan permit because it failed to satisfy necessary rules and the RCRA, and (3) that arsenic and cadmium pollution was an "imminent and substantial endangerment to the environment" as a result of ComGen's violation of the RCRA. *Id.*

ComGen, a subsidiary of Commonwealth Energy, produces both energy and harmful waste, known as coal combustion residuals ("CCRs"), including Fly and Bottom Ash. *Id.* at 3. The CCRs produced contain known carcinogens and contaminants such as mercury, selenium, cadmium, and arsenic. *Id.* at 3. For nearly 60 years, ComGen's Vandalia Generating Station (the "Station") deposited this waste in an unlined dam, known as the Little Green Run Impoundment (the "Impoundment"). *Id.* at 5. Today, the larger than average Impoundment covers 71 surface acres with 38.7 million cubic yards of waste. *Id.* In addition to the Impoundment, other pollutant containing waste is released into the River under a permit granted by the Vandalia Department of Environment Protection ("VDEP"). *Id. at* 4. As part of the permitting process, the VDEP deputy director "informally asked" an employee of ComGen whether outlets 001, 002, or 003 were releasing PFOS or PFBS into the River, citing recent studies that the chemicals were present in Fly and Bottom Ash. *Id.* ComGen "assured the deputy director" that neither were present and did not report any PFOS or PFBS in their application or permit. *Id.* The issued permit set limits for "a wide array of pollutants, including selenium, aluminum, pH, temperature, etc." but did not include PFOS or PFBS. *Id.*

As an economically driven business decision, ComGen intends to close the Station, leaving the 38.7 million cubic yards of CCRs in place. *Id.* at 6. Under CCR Rules and Vandalia's adopted regulations, ComGen could have chosen to remove the CCR but instead chose to close in place. *Id*. ComGen submitted a timely initial written closure plan and a permit application in December 2019. *Id.* After two amendments, a hearing, and public comment, the VDEP issued a

Closure Permit in July 2021. *Id.* After the Closure Permit was granted, 13 ground monitoring wells became operational by the end of 2021. *Id.* at 7. Certain wells were placed between the Impoundment sloping towards the River and a proposed residential development. *Id.* at 9. Since 2021, these wells have reported elevated levels of arsenic and cadmium above federal advisory levels and state standards. *Id.* at 8. It is uncontested that the arsenic and cadmium are likely present due to the Impoundment "leaching" for at least five to ten years prior to 2021; as of now, the leaching has not reached the River which supplies Mammoth's drinking water. *Id.*

Based upon a combination of private water testing and the opinion of a human health expert, local Mammoth members of SCCRAP take issue with ComGen's current and anticipated conduct. *Id.* at 9. These members "recreate, fish, and own property" on the River and surrounding watershed. *Id.* at 10. Due to the current leaching of arsenic and cadmium and the direct discharge of PFOS and PFBS into the River, SCCRAP members have reduced their recreational use of the River. *Id.* at 8-9. Although no SCCRAP member currently resides where cadmium and arsenic have been detected in the groundwater, some plan to relocate to a proposed development within the contaminated area. *Id.* at 9. As part of SCCRAP's investigation, it discovered that ComGen "knew outlet 001 was discharging" PFOS and PFBS since 2015, five years before the VDEP's deputy director inquired during the application process. *Id.* at 4, 9.

Acting on these concerns, SCCRAP initiated suit in the Middle District of Vandalia against ComGen on September 3, 2024. *Id.* at 11. In response, on September 20, 2024, ComGen filed a Motion to Dismiss. *Id.* at 13. First ComGen argued that, unlike in *Piney Run*, PFOS and PFBS are not statutory pollutants under the CWA, second that SCCRAP's complaint was too conclusory and failed to plead sufficient facts, and third that as a matter of law the RCRA does not allow claims for imminent and substantial endangerment to the environment alone. *Id.* at 13.

On October 31, 2024, the district court granted ComGen's Motion to Dismiss. *Id*. Regarding SCCRAP's first claim, the court held that even though ComGen was specifically asked, it was not required to disclose PFOS and PFBS in the permit application; in doing so, the court cited the Second Circuit in *Atlantic States. Id.* at 14. Next the court held that SCCRAP lacked standing to challenge the RCRA Closure Plan, reasoning that although it suffered an injury in fact, the injury was not traceable to ComGen's conduct nor redressable. *Id.* The court did not reach the merits of this claim. *Id.* Lastly, the court held that the RCRA required an "endangerment or exposure pathway to a living population" which SCCRAP failed to allege. *Id.* The court extensively relied upon *Courtland* in its decision. *Id.*

On November 10, 2024, SCCRAP appealed to the United States Court of Appeals for the Twelfth Circuit, and on December 30, 2024, this Court set forth the issues to be briefed and argued. *Id.* at 15. There are four issues for review: (1) whether ComGen's discharge is unpermitted under the CWA; (2) in deciding issue one, whether *Loper Bright* warrants a reversal of *Piney Run* and its reasoning; (3) whether SCCRAP has standing to challenge the Closure Plan; and (4) whether the RCRA requires endangerment to a living population. *Id.* at 1-3.

SUMMARY OF THE ARGUMENT

ComGen's discharge of PFOS and PFBS is unpermitted and violates the CWA. To discharge pollutants into navigable waters, applicants must abide by the permitting authority's disclosure requirements. Such open disclosure allows the permitting authority to set appropriate limits on discharge that would negatively affect water quality. ComGen failed to abide by disclosure requirements because it lied about its discharge of PFOS and PFBS when the deputy asked whether they were present. Furthermore, in deciding whether such actions violate the CWA, the Court owes deference to its decision adopting Piney Run. Even though Piney Run

utilized *Chevron* deference, principles of statutory stare decisis still must be applied. Such principles weigh in favor of upholding the reasoning this Court previously adopted. Furthermore, this Court may still find the EPA's interpretation of the CWA persuasive when deciding the issue. The EPA's interpretation is consistent with the rule set forth in *Piney Run*. Furthermore, the district court incorrectly applied the rationale of *Atlantic States* which also required adequate disclosure and would not allow an applicant to mislead a permitting authority member. Therefore, ComGen's undisclosed discharge of PFOS and PFBS violates the CWA.

SCCRAP has standing to challenge ComGen's Closure Plan for the Impoundment. Because SCCRAP's members have suffered injuries in fact that are causally connected to the Closure Plan that will be redressed by a favorable judicial decision, SCCRAP has demonstrated in its complaint how its members would otherwise have standing under *Lujan*. Further, because SCCRAP can show that the interests that it is seeking to protect are germane to its organizational purpose and neither the claim it asserts nor the relief it requests requires the individual participation of the parties, organizational standing under *Hunt* is also met.

An RCRA imminent and substantial endangerment claim related to the Impoundment can be pursued by SCCRAP against ComGen based solely on the endangerment to the environment itself for several reasons. First, a plain, textual reading of § 6972(a)(1)(b) shows that SCCRAP can pursue this claim based solely on an endangerment of the River. Second, the district court improperly relied on *Courtland* because it was incorrectly decided and SCCRAP's allegations are materially different. Third, SCCRAP's complaint sufficiently establishes all three elements required under a § 6972(a)(1)(b) claim. Finally, under both a strict and functional interpretation of *Interfaith*, the River itself has been endangered by the Impoundment.

ARGUMENT

In reviewing the district court's grant of a Motion to Dismiss, this Court's review is *de novo*. *Simmons v. Sonyika*, 394 F.3d 1335, 1338 (11th Cir. 2004). In doing so, this Court accepts all allegations made in the complaint as true and construed "'in the light most favorable to the plaintiff.'" *Id.* (citation omitted).

I. COMGEN'S DISCHARGE OF PFOS AND PFBS FROM OUTLET 001 IS AN UNPERMITTED DISCHARGE IN VIOLATION OF THE CLEAN WATER ACT.

When enacting the CWA Congress's goal was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). An identified objective pursuant to this goal was to eliminate the "discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a)(1). The effluent limitations section of the CWA further states that, unless in compliance with other sections of the CWA, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Under the CWA, pollutant is defined broadly to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, *chemical wastes,* biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial*, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (emphasis added). Additionally, the "discharge of a pollutant or pollutants" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12).

The CWA imposes strict liability for violations, except where specific exceptions apply. 33 U.S.C. § 1311(a). One such exception involves obtaining a National Pollutant Discharge Elimination System ("NPDES") permit which authorizes the "discharge of any pollutant, or combination of pollutants[.]" 33 U.S.C. § 1342. The CWA allows for a discharger to obtain a

permit from either the Environmental Protection Agency ("EPA")[1] or an authorized state agency. *Id.* Additionally, while a state permitting authority may impose more stringent restrictions than the EPA, the EPA's guidelines must be followed as the minimum standard. 33 U.S.C. § 1370.

Applicants must comply with all reporting and monitoring requirements to be covered by the permit shield defense. *See* 33 U.S.C. § 1342(a); 33 U.S.C. § 1314(i). The importance of disclosure is reinforced by the fact that the CWA explicitly grants state permit programs the authority to revoke a permit if it was obtained through "misrepresentation, or failure to disclose fully all relevant facts[.]" 33 U.S.C. § 1342(b)(1)(C)(ii). Also, the federal regulation governing applications for "existing manufacturing, commercial, mining, and silvicultural dischargers[,]" gives the permitting authority the right to request additional information, and applicants must comply. 40 C.F.R. § 122.21(13).

A. An applicant's disclosure of pollutants is essential for the permitting authority to properly determine a pollutant's effect on water quality.

The EPA and several circuit courts have emphasized the importance of following reporting procedures to ensure the validity of the permit and the facility's compliance with the CWA.[2] The EPA explained the importance of disclosures in *In re Ketchikan Pulp Co*. *In re Ketchikan Pulp Co*., at *12–13. Here, the EPA's Environmental Appeals Board ruled that an NPDES permit encompasses all pollutants disclosed to the permitting authority during the permit application process. *Id.* at *11. The Board explained that disclosure of an applicant's discharge is crucial to the effectiveness of the permitting program because the scope of the permit and the

[1] The EPA is authorized to administer and enforce the CWA. *See* 33 U.S.C. § 1251(d).
[2] *See In re Ketchikan Pulp Co*., 1998 WL 284964, at *12–13 (EPA 1998) (EPA 1998); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 267 (4th Cir. 2001); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *as amended* (Feb. 3, 1994); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 289–90 (6th Cir. 2015).

discharge limitations are primarily based on the information provided by the permit applicant. *Id.* at *11. It held that "where the discharger has not adequately disclosed the nature of its discharges to permit authorities, and as a result thereof the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants has been held to be outside the scope of the permit." *Id.* at *11 (citations omitted). Therefore, according to the EPA, undisclosed pollutants that an entity discharges violate the CWA. *Id.*

The Fourth Circuit in *Piney Run* also emphasized that compliance with the CWA permit scheme is dependent upon an applicant's proper disclosure of pollutants. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 259 (4th Cir. 2001). The *Piney Run* court interpreted the EPA's reading in *In re Ketchikan Pulp Co*. to establish a two-part test to determine whether pollutants were covered by permits; the test requires that:

> (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted.

Id. The Fourth Circuit also pointed out that both the EPA in *In re Ketchikan Pulp Co.*, and the Second Circuit in *Atlantic States Legal Foundation* found that the permitting authority can only analyze pollutants it "'reasonably anticipates' could damage the environmental integrity of the affected waterway." *Id.* at 268 (quoting *Ketchikan,* 1998 WL 284964 at *11; *Atlantic States Legal Found.,* 12 F.3d at 358). Therefore, when a pollutant is not properly disclosed, the authority cannot assess its potential harm. *Id.* Additionally, the Sixth Circuit in *Sierra Club*, adopted the test from *Piney Run* and applied the analysis to general permits. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 286 (6th Cir. 2015). The Sixth Circuit correctly explained that, given the nature of the permitting process, it is necessary for the party discharging the pollutants to carry the "burden of gathering or disclosing information." *Id.* at 289–90.

B. Comgen's discharge of PFOS and PFBS is unpermitted due to their failure to disclose known pollutants in response to a direct inquiry from the permitting authority's deputy director.

ComGen's discharge of PFOS and PFBS into the River violates the CWA and its permitting requirements. Under the CWA, any facility discharging pollutants into navigable waters must operate under a permit issued by the EPA or an authorized state agency. The Station, operated by ComGen, holds a permit from the VDEP, a state program, to discharge into the River. The permit contains no limits for PFOS or PFBS and does not require ComGen to monitor for such parameters. The permit itself does not mention PFOS or PFBS.

However, prior to authorizing their permit, the VDEP deputy director specifically questioned whether any of the Station's outfalls contained PFOS or PFBS. In response, ComGen assured the deputy director that PFOS and PFBS were not known to be present in the discharge. Yet, this assurance was untruthful. R. at 9. ComGen had been monitoring the discharge of PFOS and PFBS from Outfall 001 since 2015 and was fully aware of the pollutants' presence. ComGen's monthly reports show that, in nearly every month, some level of PFOS or PFBS were present, with concentrations reaching as high as 15 µg/L and 35 µg/L. The undisclosed discharge of PFOS and PFBS into the River was unpermitted because it was not anticipated by the permitting authority and, as a result, not covered by the permit. Thus, by discharging the pollutants while withholding this critical information, ComGen violated the CWA.

The CWA requires that all applicants for discharge permits fully disclose *all relevant information* about their discharges. This includes disclosing information about other pollutants, even if not explicitly listed in the regulations. As emphasized by the EPA Court of Appeals Board in *In re Ketchikan Pulp Co*., the scope of a permit and its limitations are based on the information provided by the applicant. If the applicant fails to disclose important information,

such as the presence of pollutants, the permitting authority cannot adequately assess the potential harm the pollutant may cause or determine the appropriate discharge limitations. The Second, Fourth, and Sixth Circuits have similarly held that permits only authorize the discharge of pollutants when the applicant has fully disclosed those pollutants to the permitting authority.

Neither the CWA nor federal regulations explicitly prohibit PFOS and PFBS. However, the CWA allows state directors to impose stricter limitations. Therefore, the VDEP director had the authority to restrict or regulate the discharge of PFOS and PFBS into the River. Additionally, 40 C.F.R. § 122.21(13), grants the permitting authority the discretion to request additional information if necessary to maintain water quality. The VDEP director specifically inquired about PFOS and PFBS prior to issuing the permit, making it imperative for ComGen to disclose the presence of these pollutants. Had ComGen provided the required information, the permitting authority could have assessed whether limitations on PFOS and PFBS were necessary to protect water quality. Instead of complying with the disclosure requirements, ComGen misled the permitting authority by falsely assuring the director that these pollutants were not present. This act of bad faith not only undermines the regulatory process but also violates the CWA's strict liability framework. As set forth in 33 U.S.C. § 1342(b)(1)(C)(ii), the CWA provides that a permit may be revoked if an applicant obtains it through "misrepresentation or failure to disclose fully all relevant facts."

Thus, ComGen's misrepresentation of the presence of PFOS and PFBS provides grounds for the revocation of its permit, and SCCRAP's permanent injunction to stop such unlawful discharges until a valid permit is obtained should be granted.

II. IN DECIDING WHETHER COMGEN'S UNDISCLOSED DISCHARGE IS A VIOLATION OF THE CLEAN WATER ACT, THE COURT OWES DEFERENCE TO ITS OWN DECISION ADOPTING *PINEY RUN*.

In *Loper Bright* the Supreme Court overruled *Chevron,* which gave deference to an agency's reasonable interpretation when a statute was ambiguous. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412, (2024). The Court stated that courts should no longer "defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 413. However, *Loper Bright* emphasized that prior decisions utilizing *Chevron* deference are not overturned and "are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Id.* at 412. As the Court has stated previously, "[p]rinciples of *stare decisis,* after all, demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). The Court in *Loper Bright* reasoned that reliance on *Chevron* alone is not sufficient grounds to overturn precedent. *Loper Bright Enterprises*, 603 U.S. 369, 412 (2024). The sole fact that the case relied on *Chevron* is, "at best, 'just an argument that the precedent was wrongly decided.'" *Loper Bright Enterprises v. Raimondo*, 603 U.S. at 412 (quoting *Dickerson v. United States,* 530 U.S. 428, 443 (2000)).

A. The district court's departure from precedent, solely on the grounds that its previous decision relied on *Chevron* deference, was improper.

In 2018, this Court adopted the approach taken by *Piney Run*. R. at 12 n.3. In *Piney Run* the court applied *Chevron* deference to the EPA's CWA interpretation that a discharge permit only covers pollutants that are properly disclosed and known to the permitting authority.[3] The district court accepted ComGen's argument that *Piney Run* should be cast aside because it is "not on point" and relied on *Chevron*. However, as the Supreme Court clarified in *Loper Bright*, past

[3] *Piney Run* adopted the EPA's interpretation in *In re Ketchikan Pulp Co*.

cases applying *Chevron* are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology. The district court did not identify any other factors of *stare decisis* that would support abandoning the rationale of *Piney Run*. As *Loper Bright* indicated, the sole fact that a case relied on *Chevron* only relates to the factor that the case was wrongly decided.

Other factors to consider when analyzing whether to overrule past decisions include "the quality of [the past decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). As described above, not only is the holding of *Piney Run* consistent with the EPA's interpretation of the permit shield defense, but it is also in line with the nature of the permitting process and the main goals of the CWA. Additionally, it has been used and relied on by lower courts within the Fourth Circuit and its two-prong test has been cited by other circuits including the Sixth, Ninth, and Eleventh.[4] *Piney Run* has been coined the "seminal case" regarding NDPES permit shields by other courts. *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d 1041, 1050 (N.D. Ill. 2016).

Moreover, the Supreme Court has identified that statutory interpretative decisions require "special justification" to be overturned. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). Statutory *stare decisis* is more stringent than constitutional stare decisis because Congress may clarify judicial interpretations by amending statutes. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014). Yet, Congress has not changed the CWA to specify that permit holders

[4] *See S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 286 (6th Cir. 2015); *Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 765 F.3d 1169, 1173 (9th Cir. 2014); *Black Warrior Riverkeeper, Inc. v. Black Warrior Mins., Inc.*, 734 F.3d 1297, 1304 (11th Cir. 2013).

are only limited by the permit restrictions and are allowed to discharge all other pollutants not mentioned. Instead, the language of the CWA remains: "the discharge of *any* pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). Also, Congress has yet to narrow the definition of the term "pollutant" within the CWA. Therefore, without any such specialized justification or further reasoning beyond its finding that *Piney Run* was not "on point," the district court's deviation from this Court's prior interpretation was improper.

B. The text of the CWA and the EPA's interpretation support a conclusion that applicants must disclose pollutants to be covered by a permit.

Loper Bright does not bar a court from considering an agency's interpretation of a statute when ambiguities arise. *Loper Bright Enters.*, 603 U.S. at 402. As the Supreme Court noted, reviewing courts will not be required to "blindly" make statutory interpretations in subjects they lack expertise in, but may consider an agency's perspective. *Id.* Such agency interpretations will still have the "power to persuade" a reviewing court's decision albeit lacking the "power to control." *Id.* Such factors to consider when determining what weight to give an agency's interpretation include the "thoroughness evident in it its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," and any other reasons the court finds persuasive. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

The decision in *Piney Run* relied on the EPA's adjudication in *In re Ketchikan.* The EPA described in detail why disclosure is required for the issuance of permits. *In Re Ketchikan Pulp* Co., 1998 WL 284964, at *9. It explained that the permitting authority relies on effluent limitation guidelines along with applicant disclosures to determine appropriate limitations to control pollution. *Id*. It rationalized that:

> Although in theory the Agency could structure permits to prohibit the discharge of all pollutants except those listed in the permit, such an approach would require the Agency to include in the permit a list of every pollutant or combination of pollutants that conceivably might be contained in the applicant's wastestreams, and to determine which of those pollutants the Agency considered appropriate for discharge.

Id. Therefore, because applicants have more knowledge regarding what pollutants they discharge, it is logical for the burden to rest on applicants to disclose such pollutants.

Additionally, this Court should consider giving deference to the rationale in *In re Ketchikan* because it is consistent with prior EPA policy statements. Each decision has maintained that disclosure is crucial for pollutants to be permitted. For example, the 1992 EPA memorandum addressed the issue and explained that "water quality-based limits are established where the permitting authority *reasonably anticipates* the discharge of pollutants by the permittee[.]"[5] Because pollutant limitations are established only when the authority "reasonably anticipates the discharge of pollutants[,]" the permitting scheme requires disclosure of pollutants. The permitting authority cannot reasonably anticipate a pollutant when information is withheld as ComGen did in this case. In a subsequent memorandum in 1994, the EPA maintained this position reiterating that a permit authorizes pollutants that have been "clearly identified in the permit application process[.]"[6] It further stated that pollutants which the authority did not establish limits or conditions for are still authorized if such pollutants were "specifically identified as present in facility discharges during the permit application process[.]" *Id.*

[5] Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I–X, at 2–3 (Aug. 14, 1992) (emphasis added).
[6] Memorandum from Robert Perciasepe, Assistant Administrator for Water, Steven A. Herman, Assistant Administrator for Enforcement and Jean C. Nelson, General Counsel to Regional Administrators and Regional Counselors (July 1, 1994).

Furthermore, this Court should find persuasive that the EPA's interpretation aligns with the language and intent of the CWA. The EPA's interpretation is supported by three key aspects: (1) Congress's goal to eliminate the discharge of pollutants into navigable waters; (2) the strict liability scheme of the CWA; and (3) the CWA's broad definition of pollutant. Congress intentionally used expansive language in the statute to achieve its ambitious goal of significantly improving the nation's water quality. Allowing applicants to bypass permitting authority by not disclosing known pollutants—especially when explicitly asked—undermines the clear intent of the statute and the strict liability framework that should hold all dischargers accountable.

C. The Second Circuit's holding in *Atlantic States* also supports the conclusion that an undisclosed discharge violates the Clean Water Act.

Not only did *Atlantic States* also apply *Chevron* deference, but its holding similarly supports the conclusion that a permit applicant must follow disclosure requirements to raise the shield defense. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), as amended (Feb. 3, 1994). In *Atlantic States*, the Second Circuit recognized that, "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." *Id.* at 357. Although *Atlantic States* found that not all pollutants not mentioned in a permit would result in a violation, it still required that applicants disclose pollutants adequately. *Id.* In fact, the court's opinion in that case distinguished between the defendants who complied with disclosure requirements from those who failed to accurately disclose pollutant discharges which rendered their discharges unpermitted. *Id.* at 357 n. 8.

The Second Circuit also quoted the EPA's clarification which recognized that water quality-based limitations are developed through a "step-by-step process" with limitations being set when the permitting authority "reasonably anticipates" that a permittee's pollutant discharges

may exceed state water quality criteria. *Id.* at 358 (citation omitted). Like indicated above, this language from the EPA further enforces the idea that the permitting authority will only mention pollutants in permits if those pollutants are known, thus making disclosure an important factor for compliance with the CWA. Although the Second Circuit was primarily focused on the disclosure of specific pollutants identified in the permit, the court's emphasis on disclosure supports the conclusion that applicants must honestly report any pollutants the permitting authority specifically asks about. The court's decision in *Atlantic States* should not be read to support dishonesty and nondisclosure but to reinforce the expectation of full and truthful disclosure during the permitting process.

Therefore, the district court incorrectly interpreted *Atlantic States*. Regardless of whether this Court adopts *Piney Run* or *Atlantic States*, both holdings require adequate disclosure for a pollutant to be covered under the CWA.

III. SCCRAP HAS STANDING TO CHALLENGE COMGEN'S COAL ASH CLOSURE PLAN FOR THE LITTLE GREEN RUN IMPOUNDMENT.

The RCRA was enacted by Congress in 1976 with the objectives of promoting and protecting "health and the environment and to conserve valuable material and energy resources[.]" 42 U.S.C. § 6902(a). The primary purpose of the RCRA "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. Kfc W.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). Under the RCRA's citizen suit provision, "any person may commence a civil action on his own behalf against any person [] who is alleged to be in violation of any permit, standard, *regulation*, condition, requirement, prohibition, or order which has become effective pursuant to this Act[.]" 42 U.S.C. § 6972(a)(1)(A) (emphasis added).

The legislative history and plain language of the RCRA make it clear that Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982) (citations omitted) (reviewing congressional records). The RCRA's language "authorizes the cleanup of a site, *even a dormant one*, if that action is necessary to abate a present threat to the public health or the environment." *Id.* (emphasis added).

Article III of the United States Constitution extends judicial power over all cases and controversies. U.S. Const. art. III, § 2, cl. 1. For a court to be permitted to decide the merits of an RCRA claim, the litigants must have standing. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). For an organization to bring an RCRA action on behalf of its members, the organization must prove: that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

To meet the first *Hunt* prong, an organization must prove that its members would otherwise have individual standing to sue in their own right. *Id.* To establish an individual member's Article III standing, an organization bears the burden of satisfying three prongs: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury will be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Under the first *Lujan* prong in environmental cases, the relevant showing is not an injury to the environment, but an injury to the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). The Supreme Court in *Laidlaw* held that

"environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. 167 at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). "The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing[.]" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)).

To satisfy the second *Lujan* prong, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" *Lujan*, 504 U.S. 555 at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). "[A] plaintiff need not prove that their injury can be traced to specific molecules of pollution emitted by the alleged polluter." *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Eng'rs*, 781 F.3d 1271, 1280 (11th Cir. 2015). To establish causation, a plaintiff "must merely show that a defendant discharges a pollutant that 'causes or contributes to the kinds of injuries alleged by the plaintiffs.'" *Nat. Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (quoting *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)).

The third and final *Lujan* prong is redressability. *Lujan*, 504 U.S. 555 at 560. While causation "focuses on the connection between the defendant's conduct and the plaintiff's injury, the redressability factor focuses on the connection between the plaintiff's injury and the judicial relief sought." *Pub. Interest Research Grp.*, 913 F.2d at 73. When a plaintiff alleges that a defendant has exceeded its permit limits and complains of a diminishment in water quality, "an injunction will redress that injury at least in part." *Id.* However, a plaintiff need not show "that

the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Id.* Redressability will be established if injunctive relief "will materially reduce [the plaintiff's] reasonable concerns about those endangerments." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 257 (3d Cir. 2005).

Once an organization satisfies individual standing, then under *Hunt's* second prong, it must prove that the organization's purpose is "germane to the subject of its member's claim[.]" *United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 555-56 (1996). When analyzing this requirement, "[a] court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the association[.]" *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 149 (2d Cir. 2006).

The third and final prong of *Hunt* requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. 333 at 343. This prong may be satisfied "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members[.]" *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004).

A. SCCRAP's members would otherwise have standing to sue in their own right.

SCCRAP's members would otherwise have standing to sue in their own right because they have suffered an injury in fact, caused by the Closure Plan, that will be redressed by a favorable judicial decision. *Lujan*, 504 U.S. 555 at 560-61.

1. Individual members of SCCRAP have suffered an injury-in-fact.

SCCRAP's members have suffered an injury-in-fact by alleging that they would use the River more frequently but for the Closure Plan's inadequacy resulting in current and future pollution from the Impoundment. The members have restricted their recreational use of the River

"because of concerns over PFAS, arsenic, and cadmium pollution." R. at 10. The residents "find such pollution offensive and it diminishes their use and enjoyment of the river." *Id.*

These injuries are similar to the injuries-in-fact the Eleventh Circuit recognized when pollution decreased the plaintiff's recreational enjoyment of the water at issue. *Black Warrior Riverkeeper*, 781 F.3d at 1280. The injuries to SCCRAP's members are also similar to the recreational and aesthetic injuries that the Sixth Circuit found when a plaintiff alleged that he refrained from fishing and swimming in the waters near the coal mining operation because he was "extremely concerned about the pollution and sediment" coming from the mines. *Ky. Riverkeeper, Inc. v. Midkiff*, 800 F. Supp. 2d 846, 862 (E.D. Ky. 2011).

Unlike the plaintiffs in *Food & Water Watch* who did not live near the proposed compressor site but merely observed scenic views from the top of an amusement park ride, the members of SCCRAP own property on the River and its surrounding watershed. *Food & Water Watch v. FERC*, 28 F.4th 277, 284 (D.C. Cir. 2022). Here, the member's proximity to and use of the River is more similar to the plaintiffs in *Interfaith* who recreated and fished less than a quarter of a mile from their homes and would no longer do so because of pollution. *Interfaith*, 399 F.3d at 257. These injuries qualified as an injuries-in-fact because the plaintiffs established a reasonable, present concern that constituted a legally cognizable injury. *Id.*

The Supreme Court has recognized that "threatened injury rather than actual injury can satisfy Article III standing[,]" further supporting SCCRAP's claimed injury-in-fact. *Gaston* Copper, 204 F.3d at 160 (citing *Valley Forge Christian Coll.*, 454 U.S. 464 (1982)). The threatened injury stems from a plan to build a housing development within a mile downstream of the Impoundment that utilizes well water as its primary drinking source. R. at 9. Because SCCRAP's human health expert has reported that "groundwater downgradient of the site within

1.5 miles of the Impoundment should not be used for drinking water[,]" there is a threat that members who move into the housing development will drink contaminated water. *Id.*

Therefore, SCCRAP has established an injury-in-fact by alleging that its members use the affected area, the River, and the member's recreational values of the River will be lessened by the challenged activity, the Closure Plan. Future injury only compounds the conclusion that SCCRAP has alleged a sufficient injury-in-fact.

2. The injuries that SCCRAP's members suffer are causally connected to ComGen's coal ash Closure Plan for the Little Green Run Impoundment.

There is a causal connection between the SCCRAP members' injuries and ComGen's action because the injuries are "fairly traceable" to the Closure Plan. To establish causation, the members of SCCRAP must merely show that the Closure Plan discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Nat. Res. Def. Council*, 954 F.2d at 980.

The plan to cap saturated coal ash within the existing unlined Impoundment presents an existing and continuing threat of danger to SCCRAP members who use and enjoy the River. According to the Fourth Circuit, if harmful pollution from a defendant's facility can be shown in publicly accessible portions of the water, the plaintiffs can establish sufficient causation between the defendant and the injury complained of. *Nat. Res. Def. Council*, 954 F.2d at 980. Here, according to SCCRAP's human health expert, harmful pollution has been detected by monitoring wells in the groundwater sloping towards the River. R. at 9. It is uncontested that the Impoundment has been leaching for at least five to ten years. *Id.* at 8. There is no evidence that arsenic or cadmium will reach the River in the next five years. *Id.* However, because the proposed Closure Plan does not address the root issue of leaching, the pollutants will eventually reach the River.

The members of SCCRAP do not need to "prove that their injuries can be traced to specific molecules" of arsenic and cadmium from the Impoundment. *Black Warrior Riverkeeper*, 781 F.3d at 1280. It is enough that they show that ComGen's Impoundment leaches pollutants that cause the kinds of injuries the members allege. *Id.* These injuries include (1) restricting their use of recreating in the River because of arsenic and cadmium; and (2) concerns with future drinking water pollution below the planned development. R. at 9. Because there is evidence the Impoundment discharges those pollutants, there is a positive causal link between the Closure Plan and the injuries. This link is similar to the causal connection that the Sixth Circuit found between the defendant's mining project that resulted in pollutant discharge and the plaintiff's injuries that included a decrease in the quantity and quality of fish and wildlife habitats. *Ky. Riverkeeper, Inc.*, 800 F. Supp. 2d at 862. (*See* also *Interfaith*, 399 F.3d at 257 (discussing "adequate causal link" of current and future pollution).

3. The injuries that SCCRAP's members are suffering will be redressed by a favorable judicial decision.

The members of SCCRAP do not need to show "that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Pub. Interest Research Grp.*, 913 F.2d at 73. The injury that SCCRAP's members are suffering, a diminishment in water quality, will be redressed by a favorable judicial decision because "an injunction will redress that injury at least in part." *Id*. The Closure Plan "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." R. at 9. Here, injunctive relief to prevent the inadequate Closure Plan would redress the member's injuries because it would materially reduce their concerns about further pollution.

B. The interests that SCCRAP seeks to protect are germane to the organization's purpose.

SCCRAP meets the second prong of *Hunt* because it is "organized for a purpose germane to the subject of its member's claim[.]" *United Food & Commer. Workers Union Local 751*, 517 U.S. 544 at 555-56. The interests that SCCRAP is seeking to protect are the waters of the River that have been contaminated by the Impoundment. R. at 8. Those interests are germane to the organization's purpose because SCCRAP's mission is "to protect public water from pollutants from the fossil fuel industry." *Id.* A successful verdict would protect the River's waters which would "tend to further the general interests" that SCCRAP's members sought in joining. *Bldg. & Constr. Trades Council of Buffalo*, 448 F.3d at 149. Because the interests that SCCRAP is seeking to protect are the waters that may be further contaminated by the closure of the Impoundment, and the organization's purpose is to protect public waters from pollutants, the second *Hunt* prong is met. *Hunt*, 432 U.S. 333 at 343.

C. Neither the claims that SCCRAP asserts nor the relief requested requires the participation of individual members.

The participation of SCCRAP's members in this suit is not required based on the claims and relief alleged. *Id*. The Second Circuit held that the third *Hunt* prong was met when the injunctive relief requested by the plaintiffs did not require individual proof and could be resolved in a group context. *Bldg. & Constr. Trades Council of Buffalo*, 448 F.3d at 149. Because SCCRAP seeks the purely legal ruling of an injunction and is not requesting that this Court award individualized relief to its members, SCCRAP has satisfied the third *Hunt* prong of organizational standing.

IV. SCCRAP CAN PURSUE AN RCRA IMMINENT AND SUBSTANTIAL ENDANGERMENT CLAIM RELATED TO THE IMPOUNDMENT BASED SOLELY ON THE ENDANGERMENT TO THE ENVIRONMENT ITSELF.

The Fifth Circuit interpreted § 6972(a)(1)(B) as requiring a plaintiff to prove:

> (1) that the defendant is a person … who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

Cox v. City of Dall., 256 F.3d 281, 292 (5th Cir. 2001). At least four circuits have construed § 6972(a)(1)(B) "expansively."[7] "[A]ll four courts have emphasized the preeminence of the word 'may' in defining the degree of risk needed to support the RCRA['s] liability standard." *Me. People's All.*, 471 F.3d at 288. Here, only the third element requires substantial analysis.

An "endangerment" to the environment "does not require quantitative proof of actual harm." *United States v. Conservation Chem. Co*., 619 F. Supp. 162, 194 (W.D. Mo. 1985). Courts have reasoned that, "because the evaluation of a risk of harm involves medical and scientific conclusions that clearly lie on the frontiers of scientific knowledge, such that 'proof with certainty is impossible.'" *Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 970 (S.D. Ohio 2015) (citation omitted). If a plaintiff demonstrates "that there exists reasonable cause for concern for the integrity of the public health or the environment" that is sufficient to establish an "endangerment" pursuant to § 6972(a)(1)(B). *United States v. Valentine*, 856 F. Supp. 621, 626 (D. Wyo. 1994). An "endangerment" could be "a threatened or potential harm[.]" *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). However, the

[7] *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006); *See Interfaith*, 399 F.3d at 257; *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *Cox*, 256 F.3d at 299; *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992).

"endangerment must be substantial or serious[.]" *Id.* Courts "have agreed that the word 'substantial' implies serious harm." *Me. People's All.*, 471 F.3d at 288. The endangerment to the environment must be "substantial" enough that there is "some necessity for the action." *Price*, 39 F.3d at 1019. However, quantification, such as "proof that a certain number of persons will be exposed" or "that a water supply will be contaminated to a specific degree" is not required. *Conservation Chem. Co*., 619 F. Supp. at 194. "[I]mminent" in § 6972(a)(1)(B) does not require "that actual harm will occur immediately." *Price*, 39 F.3d at 1019. "Imminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately." *Me. People's All.*, 471 F.3d at 288. If the risk of threatened harm is present, the danger to the environment is "imminent[.]" *Conservation Chem. Co*., 619 F. Supp. at 194.

The Third Circuit has held that the "environment" includes "water in and of itself." *Interfaith*, 399 F.3d at 257. "Under *Interfaith*, an imminent and substantial endangerment to the environment may give rise to RCRA liability even in the absence of a threatened living population." *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 454 (E.D. Pa. 2015). There are contrasting ways that courts have interpreted RCRA claims to the environment itself under *Interfaith*. *Id.* "Under the stricter interpretation, an endangerment to the environment may exist whenever there is a risk that the environment will be altered negatively by the presence of a pollutant." *Id*. The Third Circuit gave the following example:

> [I]magine that a freshwater lake supports no living population and contains an extremely low level of dissolved salts. If salt spills into the water so that it has a higher level of dissolved salts, but remains a freshwater lake because it still has a low level of dissolved salts, the stricter interpretation of *Interfaith* would find that the lake has suffered harm "in and of itself" because its water is less pure than it once was.

Id.

Under the functional interpretation of *Interfaith*, "an imminent and substantial endangerment to the environment in and of itself may exist if contamination threatens the ability of a non-living element of the environment to serve some potential function in the local ecosystem." *Id.* The functional interpretation contains two prongs: (1) "the Court considers what potential purpose the non-living element of the environment could serve in the local ecosystem[;]" (2) "the Court considers whether the alleged contamination impairs the ability of that non-living element of the environment to serve that potential purpose in the local ecosystem." *Id.*

> Returning to the example of the salt added to the freshwater lake, under the functional interpretation of Interfaith, an imminent and substantial endangerment to the lake in and of itself may exist if there is some potential purpose that freshwater might serve in the local ecosystem that the freshwater from the lake can no longer serve due to the additional salt. For example, if the original freshwater from the lake could potentially support the growth of certain plants in the local ecosystem, then the addition of salt to the lake may present an imminent and substantial endangerment to the lake in and of itself if the additional salt impairs the ability of the lake's freshwater to support the growth of those plants.

Id.

A. A plain, textual reading of § 6972(a)(1)(b) demonstrates that SCCRAP can pursue this claim.

Section 6972(a)(1)(B) requires "an imminent and substantial endangerment to health *or* the environment[.]" § 6972(a)(1)(B) (emphasis added). The RCRA defines "environment" as:

> (A) the *navigable waters*, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 USCS §§ 1801 et seq.], and (B) any other surface water, *groundwater*, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

42 U.S.C. § 9601 (emphasis added).

SCCRAP has not alleged in its complaint any harm to the health of a living population because there is no evidence that the contamination has extended beyond the groundwater. R. at 12-3. However, SCCRAP has presented evidence that the environment, the River, and the groundwater surrounding the Impoundment, are being in endangered. Under (A) and (B) of 42 U.S.C. § 9601, the River falls under the definition of "environment" because it is a *navigable water* and because the Impoundment is leaching into the surrounding *groundwater*. The Third Circuit in *Interfaith* emphasized that "§ 6972(a)(1)(B)'s disjunctive phrasing, 'or environment,' means a living population is not required for success on the merits." *Interfaith*, 399 F.3d at 257. Therefore, a plain reading of § 6972(a)(1)(B) authorizes SCCRAP to pursue their claim against ComGen for their imminent and substantial endangerment to the River and the groundwater.

B. The district court improperly relied on *Courtland* because (1) it was incorrectly decided and (2) SCCRAP's allegations are materially different.

The district court rejected the Third and Tenth Circuit's interpretation of "environment" and accepted the interpretation given in *Courtland* which emphasized that for an RCRA claim, "there must be at least some form of endangerment or exposure pathway to a living population." R. at 14. The plain language of § 6972(a)(1)(B) does not support the "exposure pathway" concept. The RCRA is to be read "expansively", and Congress did not intend to restrict the RCRA in this way. *Me. People's All.*, 471 F.3d at 288. Similarly, *Courtland*'s "secondary-effects" interpretation is without foundation in the text or intent of the RCRA.

Courtland's material facts are easily contrasted to the present case in several ways: (1) there was no evidence that the contaminated water *could or would* reach the area at issue; (2) the contaminated groundwater flowed opposite to the living population; (3) a local ordinance prohibited groundwater use; (4) there was no evidence the living population utilized or planned to use groundwater; (5) the plaintiff's own expert was unable to conclude the contamination was

a reasonable harm to humans[.]" *Courtland Co. v. Union Carbide Corp.*, Civil Action No. 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306, at *99-100 (S.D. W. Va. Sep. 28, 2023)

Unlike in *Courtland*, SCCRAP's evidence goes beyond the mere presence of contamination. For example, the human health expert's evidence shows that the groundwater should not be utilized for drinking, SCCRAP's members plan to drink this groundwater as residents of the development, and the River is in the direct path from which the contaminants are leaching. While this housing development is a plan for the future, it still satisfies the "may present" language of § 6972(a)(1)(B).

C. SCCRAP has sufficiently established in its complaint all three elements of an RCRA claim against ComGen.

The first element of a § 6972(a)(1)(B) claim is met because ComGen owns the Station which is "a coal-fired electric generating plant" that disposes coal ash, which is classified as a solid waste under the RCRA. R. at 3-4. *See* 42 U.S.C. § 6903 (defining solid waste). It is undisputed that ComGen generates solid waste. The second element is also met because the Station disposes coal ash into the unlined Impoundment. R. at 5. The Impoundment currently "contains approximately 38.7 million cubic yards of solids, mainly CCRs and coal fines and waste material removed during the coal cleaning process." *Id.* Because ComGen owns a facility that disposes solid waste, the first two elements of a § 6972(a)(1)(B) claim are met.

The third element of a § 6972(a)(1)(B) claim is that the waste may present an imminent and substantial endangerment to the environment. First, the solid waste that the Impoundment contains presents an *endangerment* to the environment. An endangerment exists if there is a "reasonable cause for concern for the integrity of the" environment. *Valentine*, 856 F. Supp. at 626. The River and the proposed development's drinking water are in danger of being polluted

with arsenic and cadmium by the Impoundment's continued leaching. Therefore, the endangerment element is easily satisfied.

Next, *imminency* does not require proof that harm will occur tomorrow. *Conservation Chem. Co*., 619 F. Supp. at 194. To survive a motion to dismiss, the plaintiff does not need to allege "an already existing harm, a harm that is certain to occur, or a harm that will manifest immediately." *City of Evanston v. N. Ill. Gas Co.*, 229 F. Supp. 3d 714, 722 (N.D. Ill. 2017). Because a housing developer is considering building a large subdivision within a mile downgradient of the Impoundment and a human health expert has determined that said groundwater is unsuitable for human consumption, there is a foreseeable danger that the residents of that subdivision will be drinking polluted water. R. at 9. It is sufficient, at the pleading stage of an RCRA endangerment claim, that the plaintiff identifies the defendant "as a possible contributor to the solid waste, the release of which may present an imminent and substantial endangerment to health of [local] inhabitants or the environment in general." *Vill. of Riverdale v. 138th St. Joint Venture*, 527 F. Supp. 2d 760, 767 (N.D. Ill. 2007). Courts have denied RCRA motions to dismiss where the claim merely relied on the text of the statute. *Id.* at 762-63; *See also T & B Ltd. Inc. v. City of Chi.*, 369 F. Supp. 2d 989, 993 (N.D. Ill. 2005). Here, SCCRAP's complaint went beyond the statute providing specific examples of endangerment and explained why the endangerment is imminent and substantial.

Then, an endangerment is *substantial* if there is "some necessity for the action." *Price*, 39 F.3d at 1019. If nothing is done to prevent the Impoundment from further polluting the River and groundwater, SCCRAP's members will continue to not use the River recreationally and prospective residents of the housing development may be subject to drinking poisonous groundwater. R. at 9. These situations most definitely require necessity and there is "a reasonable

cause for concern" that the River "may continue to be exposed to a risk of harm." *Little Hocking Water Ass'n*, 91 F. Supp. 3d at 969.

D. SCCRAP can pursue this claim because the Impoundment is endangering the environment itself under a strict or functional interpretation of *Interfaith*.

SCCRAP can pursue an RCRA imminent and substantial endangerment claim against ComGen when the allegation is only to the environment itself under the strict interpretation of *Interfaith* because "there is a risk that the environment will be altered negatively by the presence of a pollutant." *Tri-Realty Co.*, 124 F. Supp. 3d at 455. Because there is a risk that the River and groundwater will be altered negatively by the presence of arsenic and cadmium, the River has suffered harm "in and of itself" because its water is less pure than it once was. *Id.*

SCCRAP's claim succeeds even under the functional interpretation of *Interfaith* because the contamination from the Impoundment threatens the ability of the River and the groundwater "to serve some potential function in the local ecosystem." *Id.* There are several purposes that the River serves in the local ecosystem such as a habitat for fish, a recreational spot for locals, and a potential drinking water source for the future housing development. R. at 9. The contamination of the River by the Impoundment's pollutants impairs the ability of the River to serve its potential purpose in the local ecosystem because if the River is polluted, the fish will not be able to survive, locals will not recreate in it, and the homeowners in the new housing development will not have a clean water source.

CONCLUSION

For the aforementioned reasons, the Appellant respectfully requests that this Court reverse the lower court and remand for further proceedings.

Respectfully submitted,

Team No. 10
Counsel for Appellant

Appendix A

CERTIFICATE OF COMPLIANCE (BRIEF)

Pursuant to Official Rule III.C.9, Appellant certifies that its brief contains 30 pages in Times New Roman 12-point font.

We further certify that we have read and complied with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the Team Members of Team No. 10, and the Team Members of Team No. 10 have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 10

Appendix B

CERTIFICATE OF SERVICE

Pursuant to Official Rule IV, Team Members representing Appellant 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. 10