No. 24-0682

In the United States Court of Appeals for the Twelfth Circuit

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STOP COAL COMBUSTION RESIDUAL ASH PONDS,
APPELLANT

v.

COMMONWEALTH GENERATING COMPANY,
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF VANDALIA

BRIEF FOR APPELLANT

Counsel for Appellant

Team 11

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JURISDICTIONIONAL STATEMENT

The District Court had subject matter over this case under 28 U.S.C. § 1331 as Stop Coal Combustion Residual Ash Ponds (hereinafter "SCCRAP") has brought claims against Commonwealth Generating Company (hereinafter "ComGen") under 33 U.S.C. § 1251 et seq. (hereinafter "Clean Water Act" or "CWA") and 42 U.S.C. § 6901 et seq. (hereinafter "Resource Conservation and Recovery Act" or "RCRA"). Additionally, 42 U.S.C. § 6972(a) grants district courts where the alleged violation or endangerment may have occurred "jurisdiction without regard for any amount in controversy or citizenship of the parties." This Court has appellate jurisdiction under 28 U.S.C. § 1291 over this appeal from the final decision of the District Court's order to dismiss SCCRAP's claims. The order to dismiss was issued on October 31, 2024. SCCRAP filed its Notice of Appeal in a timely manner on November 10, 2024. This appeal is from a final judgement which disposes of all of SCCRAP's claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the Clean Water Act;

II. Whether, in deciding Issue I, 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*;

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

IV. 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.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Appellant, SCCRAP, is a national environmental and public interest organization whose mission is to protect public water from pollutants and contribute to more sustainable energy supplies that do not create harmful by-products. R. 8. Appellee, ComGen, is a wholly owned subsidiary of Commonwealth Energy. R. 3. ComGen owns and operates the Vandalia Generating Station, a coal-fired electric generating plant, located in the town of Mammoth in the state of Vandalia. R. 3-4.

The Vandalia Generating Station is among the oldest operating power stations in Vandalia. R. 4. The station is subject to a Vandalia Pollutant Discharge Elimination System (hereinafter "VPDES") permit which covers its three Outlets: 001, 002, 003. R. 4. The permit was issued on July 30, 2020, effective September 1, 2020. R. 3. The permit does not cover the discharge of PFOS or PFBS, yet ComGen has knowingly been discharging PFOS and PFBS from Outlet 001 since as early as 2015. R. 9. Although ComGen knew about these discharges, ComGen did not disclose the presence of PFOS or PFBS when specifically asked by a deputy director of the Vandalia Department of Environmental Protection (hereinafter "VDEP") during the permitting process. R. 4.

Coal ash produced by the Vandalia Generating Station is disposed of in an unlined impoundment: the Little Green Run Impoundment (hereinafter "Impoundment"). R. 5. The Impoundment is subject to Vandalia's Disposal of Coal Combustion Residuals from Electric Utilities (the "CCR Rule"), identical to the Federal CCR Regulations. R. 5. Under this rule, the owners or operators of existing CCR surface impoundments must either (a) excavate and remove

coal combustion residuals (hereinafter "CCR") or (b) close in place. Unwilling to retrofit the Impoundment due to cost, ComGen elected to close it in place and submitted its closure plans on October 17, 2016. R. 6.

SCCRAP and other individuals of Vandalia have openly opposed ComGen's plan to close in place (hereinafter "Closure Plan"). R. 7. SCCRAP contends 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. 9. SCCRAP also contends future floods, storms, and hurricanes present a risk of catastrophic failure: any surrounding water level rise could elevate groundwater in the Impoundment and cause coal ash to spill into the Vandalia River. R. 9.

After learning of ComGen's Closure Plan, members of the public submitted thousands of comments in opposition. R. 7. Then, on March 30, 2021, the VDEP held a public hearing regarding the plan, and numerous individuals, including a representative of SCCRAP, urged the VDEP to deny ComGen's proposed permit. R. 7. Despite these efforts, the VDEP issued ComGen a permit to close in place. R. 7. As such, members of SCCRAP who recreate, fish, and own property in the Vandalia River and surrounding watershed have ceased such usage because of concern for toxic contamination, including PFOS, PFBS, arsenic, and cadmium. R. 10.

Due to its ever-growing concern, SCCRAP has been closely monitoring the levels of arsenic and cadmium emanating from the Impoundment. R. 9. SCCRAP's human health expert determined that the levels of arsenic and cadmium render the groundwater downgradient of the site within 1.5 miles of the Impoundment itself should not be used for drinking water. R. 9.

ComGen's own monitoring reports show elevated arsenic and cadmium levels downgradient the Impoundment, exceeding federal advisory levels and Vandalia standards. R. 8.

II. PROCEDURAL HISTORY

On September 3, 2024, after issuing ComGen a notice of intent to sue, SCCRAP filed a citizen suit against ComGen in the United States District Court for the Middle District of Vandalia. R. 12. Therein, SCCRAP pursued three claims against ComGen: one under the CWA and the remaining two under the RCRA (hereinafter "Complaint"). *Id.*

Under the CWA, SCCRAP alleged ComGen was unlawfully discharging pollutants into the Vandalia River via Outlet 001 without a permit to do so. *Id.* As such, SCCRAP is seeking: declaratory relief that ComGen's discharge of PFOS and PFBS without a permit is a violation under the CWA, injunctive relief to stop said discharges until permitted, and appropriate civil penalties. *Id.*

Under the RCRA, SCCRAP has first challenged ComGen's Closure Plan of the Impoundment as inadequate for failure to comply with Title 40 of the Code of Federal Regulations which dictate the closure in place conditions of CCR surface impoundments. *Id.* As such, SCCRAP is seeking injunctive relief to prevent the implementation of the Closure Plan. *Id.* Second, under the RCRA, SCCRAP has alleged the Impoundment presents an imminent and substantial endangerment to the environment due to consistent arsenic and cadmium exceedances downgradient of the Impoundment. *Id.* As such, SCCRAP is seeking declaratory and injunctive relief, in addition to imposition of civil penalties. R. 13.

On September 20, 2024, ComGen filed a motion to dismiss the Complaint. Regarding the CWA claim, ComGen argued that the Court does not owe deference to standing precedent previously adopted by this Court because the pollutants alleged here are not statutory pollutants

included in any VDEP permit application. *Id.* It further argued that prior precedent relied on strict agency deference, which has since been prohibited, meaning it is no longer on-point nor applicable. *Id.* For SCCRAP's RCRA claims, ComGen argued that SCCRAP has pled insufficient facts to maintain a claim against the Closure Plan. And, that the 12th Circuit has not yet adopted an interpretation of "imminent and substantial endangerment" to the environment itself under the RCRA which can entertain SCCRAP's claim. *Id.*

On October 31, 2024, the District Court granted ComGen's motion to dismiss. *Id.* In dismissing SCCRAP's CWA claim, the District Court did not follow prior precedent and determined that because the alleged pollutants were not inquired about in the formal permitting process, the permit shield defense applied. R. 14. In dismissing SCCRAP's challenge to the Closure Plan, the District Court sua sponte determined SCCRAP lacked standing because although it did plead injury-in-fact, its harm was not attributable to ComGen nor was it redressable. *Id.* Finally, in dismissing SCCRAP's imminent and substantial endangerment claim, the District Court found there must be some form of endangerment or exposure pathway to a living population, which SCCRAP did not plead. *Id.*

On November 10, 2024, SCCRAP timely filed this appeal to the United States Court of Appeals for the 12th Circuit, requesting the rulings of the district court be reversed. R. 15.

STANDARD OF REVIEW

The District Court dismissed SCCRAP's complaint in its entirety. R. 14. This case presents four questions of law, which this Court reviews *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF ARGUMENT

This Court should reverse the District Court's motion to dismiss for four reasons: (1) ComGen's discharge of PFOS and PFBS is prohibited under the CWA; (2) this Court owes

deference to its adoption of *Piney Run* despite the *Loper Bright* ruling; (3) SCCRAP has standing to challenge ComGen's closure plan; and (4) SCCRAP can pursue an RCRA imminent and substantial claim even where the harm is only to the environment itself.

First, ComGen's discharge of PFOS and PFBS is prohibited under the CWA because they fit the definition of pollutants under the statute, and ComGen intentionally concealed their discharge during the permit application. A permit to discharge only grants immunity where (1) the permit holder has complied with all reporting requirements and (2) the discharge was within the reasonable contemplation of the issuing authority. *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001). The application process includes both the formal application and any other supplemental information necessary to make an informed decision. 40 C.F.R. § 122.21(e). ComGen did not adhere to these requirements, thereby violating the CWA.

Second, this Court owes deference to its decision adopting *Piney Run* because this precedent is reasonable, consistent, and workable. *See Ramos v. Louisiana*, 590 U.S. 83, 105 (2020). Simply because precedent relied on agency deference does not qualify it as unusable. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). The *Piney Run* court considered the history, objectives, and structure of the CWA to form its decision. *See Piney Run*, 268 F.3d. at 264. Such analysis has been repeated in subsequent decisions to assess novel alleged violations. Ultimately, the *Piney Run* two-part analysis is a practical approach that should not, and cannot be, discounted for its mere accordance with agency deference.

Third, SCCRAP has standing to challenge ComGen's Closure Plan for the Impoundment. SCCRAP has associational standing to bring suit on behalf of its members. The Mammoth chapter members of SCCRAP have standing to sue in their own right, preventing coal ash pollution is germane to the organization's purpose, and the relief sought does not require the

participation of individual members in the lawsuit. Further, SCCRAP has standing because it has successfully pled an injury-in-fact, its injury is traceable to ComGen's admitted arsenic and cadmium leeching, and the RCRA empowers courts to order ComGen to correct this harm. R. 8-9, 14; 42 U.S.C. 6972(a).

Fourth, RCRA imminent and substantial endangerment claims can be predicated on endangerment to the environment alone. The District Court erred in relying on other district court decisions which add requirements to plead endangerment to the environment. A plain reading of the RCRA "does not require quantification of the endangerment" nor necessitate allegations of endangerment to a living population. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005). Thus, SCCRAP's allegation of endangerment to the Vandalia River watershed ecosystem is sufficient to state a claim.

ARGUMENT

I. COMGEN'S DISCHARGE OF PFOS AND PFBS FROM OUTLET 001 ARE UNPERMITTED DISCHARGES UNDER THE CWA.

ComGen's discharge of PFOS and PFBS from Outlet 001 violate the CWA because these substances are pollutants, ComGen's permit did not authorize the discharge of these pollutants, and the discharge was not within the reasonable contemplation of the VDEP because ComGen intentionally concealed their discharge.

A. PFOS and PFBS are pollutants under the CWA.

The CWA prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise authorized. 33 U.S.C. § 1311(a). A pollutant is "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, or agricultural waste." *Id.* § 1362(6). "Any addition of any pollutant into water from any point source" constitutes a discharge. *Id.* § 1362(12).

Perfluorooctane sulfonate (PFOS) and perfluorobutanesulfonic acid (PFBS) are members of a larger group of per- and polyfluoroalkyl substances. *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA (Nov. 26, 2024), www.epa.gov/pfas. PFOS and PFBS are man-made chemicals not naturally found in water. *Supra.* PFOS and PFBS are commonly released into the environment through industrial manufacturing and are studied for their harmful effects. *Supra*. These chemicals break down incredibly slowly, allowing them to build up over time with frequent consumption. *Supra.* Exposure to these chemicals may contribute to decreased fertility; developmental harm in children; increased risk of cancer; compromised immune systems; general interference with the body's natural hormones; increased cholesterol levels; and risk of obesity. *Supra.*

Under the CWA, pollutants are any substance not naturally found in water, not just those in statutory or regulatory listings. *See* 33 U.S.C. § 1362(6). Because PFOS and PFBS are chemicals not found naturally in water, they are pollutants under the plain language of the statute. Accordingly, ComGen's discharge of PFOS and PFBS are prohibited under the CWA unless ComGen was authorized to discharge them. 33 U.S.C. § 1342(a).

B. ComGen's discharge of PFOS and PFBS was not authorized by the VDPES permit.

ComGen was not in compliance with its VPDES permit because the permit did not authorize the discharge of PFOS or PFBS. The CWA allows the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specific effluent limitations. 33 U.S.C. § 1342(a). Although the Environmental Protection Agency (hereinafter "EPA") is the administrator of the CWA, the EPA is empowered to delegate its permitting authority to individual states. *Id.* § 1342(b). A state may implement its own permit-issuing authority with

approval from the EPA, but the EPA retains supervisory authority over the state program. *Id.* § 1342(c)(1). Regardless of who issues the permit, an operator must comply with it. *Id.* § 1342(a).

Before a permit may be issued, an application must be complete: this occurs when the issuing authority receives an application form and *any supplemental information necessary to inform the decision.* 40 C.F.R. § 122.21(e) (emphasis added). To comply with a permit, an operator must abide by the limitations regarding the amount of pollutants an operator may discharge, in addition to administering a variety of "monitoring, testing, and reporting requirements." *Friends of the Earth v. Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). Every permit must contain two conditions: (1) effluent limitations based on achievable reductions; and (2) any additional limitations necessary to meet water quality standards. *American Paper Inst., Inc. v. United State Envt'l Protection Agency*, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1311(b)(1)). The permitting process is gravely dependent on an operator's compliance with these requirements. *See* 33 U.S.C. § 1318. Similarly, a permit can be revoked for obtaining it through misrepresentation or failure to disclose relevant information. *Id.* § 1342(b)(1)(C)(ii). The permitting authority uses all discharge information from all relevant parties to discern which limitations are necessary to maintain overall water quality standards. *Piney Run*, 268 F.3d at 266. Full disclosure is necessary for the issuing authority to make a wholly informed decision. *Id.*

Here, ComGen was operating under a VPDES permit. R. 4. Although statute-issued, the permit operates the same as a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit. R. 5. The VPDES permit did not set forth any limitations for PFOS or PFBS. R. 4. Although the "formal" application did not specifically ask about PFOS or PFBS, ComGen had an obligation to disclose any *supplemental* information necessary to inform the VDEP's

decision, which includes a written inquiry about PFOS and PFBS. *See* C.F.R 40 § 122.21(e). the District Court erred in determining that the application process is limited to what is in the formal application and did not consider that an issuing authority must have all pertinent information to make an informed decision. While it is true that the formal application process cannot possibly list all possible pollutants, ComGen was specifically asked about PFOS and PFBs, yet ComGen did not disclose the discharge of PFOS and PFBS even when asked, circumventing the entire purpose of 33 U.S.C. § 1318.

C. ComGen did not comply with the reporting requirements of its application for a VPDES permit nor was the discharge of PFOS and PFBS within the reasonable contemplation of the VDEP.

ComGen intentionally concealed the discharge of PFOS and PFBS when the VDEP deputy director specifically asked about the presence of PFOS and PFBS during the application process. R. 4-5. Since the VDEP would have no way of knowing whether PFOS and PFBS were being discharged into the Vandalia River, it was not within the reasonable contemplation of the VDEP, and the permit shield defense does not apply.

Under the CWA, an operator's compliance with its issued permit shields it from liability for certain violations of those standards. *See* 33 U.S.C. § 1342(k). The Supreme Court has stated the purpose of the permit shield defense is "to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138n. 28 (1997). But, the Supreme Court has never determined the scope of the permit shield defense. However, this Court has adopted the Fourth Circuit's two-part analysis for determining the scope of the permit shield defense: (1) whether the polluter complied with its reporting requirements and (2) the discharge was within the reasonable contemplation of the permitting authority. *Piney Run*, 268 F.3d at 259; R. 12 n.2.

The permit shield defense not only covers discharges listed on a permit, but other discharges "adequately disclosed to the permitting authority." *Id.* at 269. (Since the applicant properly disclosed the discharge of heat and the permitting authority was aware of this, the further discharge of heat was protected by the permit shield defense). Additionally, an operator cannot claim ignorance of its own pollutants and still be afforded the protection of the permit shield defense. *See S. Appalachian Mt. Stewards v. A & G Coal Corp.*, 758 F.3d 560 (4th Cir. 2014) (the permit shield does not apply when a coal-mine operator claims to not know about a pollutant but also does not test for it). Furthermore, the permit applicant bears the burden of gathering and providing information to the permitting agency. *See Paris v. 3M Co.*, 595 F. Supp. 3.d 1288, 1320 (N.D. Ga. 2022) (permit shield defense does not apply where the applicant does not take steps to test for pollutants inquired about in its application). Finally, if the issuing authority is aware that an operator could produce a specific pollutant due to its presence in nearby facilities, then such pollutants are within the issuing authority's reasonable contemplation. *See Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015) (Because the issuing authority knew that mines within the same area produce selenium, it reasonably contemplated that a particular mine in that same area would also produce selenium).

The District Court improperly applied *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, when making its decision because *Atlantic States* stands for the same proposition: pollutants disclosed to the issuing authority during the application process are within the reasonable contemplation of the issuing authority. 12 F.3d 353, 358 (2d Cir. 1993) The hallmark difference between *Atlantic States* and here is that the operator in *Atlantic States* did, in fact, disclose that it was discharging the pollutant in dispute. *Id.* at 357. Despite having this

knowledge, the EPA did not implement any limitations on that pollutant, impliedly authorizing the operator to continue in its discharge. *Id.* Thus, the permit shield defense applied.

Here, it is true that ComGen was not asked about PFOS or PFBS in its written application. Had this encompassed the entirety of the permitting process, perhaps ComGen would have succeeded with the permit shield defense; but, alas, the permitting process includes any supplemental information needed to inform the decision. 40 C.F.R. § 122.21(e). Before the VPDES permit was issued, the deputy director of the VDEP asked ComGen whether any of the Outlets might have PFOS or PFBS in its discharges. R. 4. This was done because newer studies have shown that these pollutants can be present in fly and bottom ash which ComGen does produce. R. 4. In response to this inquiry, ComGen told the deputy director that PFOS and PFBS were not being discharged whatsoever from any outlet, intentionally concealing facts, thereby preventing a wholly informed decision.

ComGen intentionally concealed its discharge of PFOS and PFBS to the issuing authority during the application process, was fully aware that it was discharging PFOS and PFBS from as early as 2015, and the VDEP was not aware that any other sites in Mammoth were producing PFOS or PFBS. ComGen now wants this court to accept that PFOS and PFBS are not the type of pollutants that they were required to disclose. This cannot stand: ComGen is attempting to use the permit shield defense as a sword and escape liability despite its deliberate failure to comply with its permit and the permit application process. The District Court's decision provides operators, such as ComGen, the ability to blatantly lie during the application process and still remain exempt from responsibility. If this precedent is permitted to stand, the entire objective of the CWA is greatly, if not entirely, diminished. 33 U.S.C. § 1251 (the objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters).

In conclusion, this Court should reverse the District Court's dismissal of SCCRAP's CWA claim. ComGen has violated the CWA because 1) PFOS and PFBS are pollutants under the CWA; 2) ComGen's permit did not explicitly permit the discharge of PFOS and PFBS; and 3) the discharge of PFOS and PFBS was not within the reasonable contemplation of the VDEP due to ComGen's intentional concealment during the application process.

II. THIS COURT OWES DEFERENCE TO ITS DECISION ADOPTING PINEY RUN.

This Court owes deference to its decision adopting *Piney Run* because it set a significant precedent that has stood the test of time. Additionally, *Piney Run* is still applicable because the *Loper Bright* decision did not overrule cases which relied on agency deference. Finally, this Court must not merely defer to the EPA's interpretation of the permit shield defense and should instead rely on the reasoning in *Piney Run*.

A. This court owes deference to its decision adopting *Piney Run* because the precedent set by *Piney Run's* two-part analysis is reasonable, consistent, and workable, and was not overruled by the *Loper Bright* decision.

The weight prior precedence commands may depend on the quality of its reasoning, its consistency with related decisions, and its workability. *Ramos*, 590 U.S at 105. The reasoning of a judicial decision is what "allow[s] it to have life and effect" in future cases. *Id.* at 104. Moreover, precedent is only powerful where its reasoning has the "power to persuade." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416 (2024) (Gorsuch, J., concurring). Decisions that are poorly reasoned do not adequately convey the law's meaning. *Id.* Where a decision is consistent and reflects the "time-tested wisdom of generations," it is more likely to be correct and worthy of respect. *Id.* at 425. The workability of precedent needs to be considered outside the scope of who it merely benefits. *See Ramos*, 590 U.S. at 108. Ultimately, where a court must assess whether it should follow or depart from precedent, the court must consider whether the

precedent is "demonstrably erroneous" or "egregiously wrong." *Gamble v. United States*, 587 U.S. 678, 716 (2019) (Thomas, J., concurring); *see also Ramos*, 590 U.S. at 122.

Additionally, courts must understand that judicial opinions cannot be read like statutes. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (an opinion is not a statute and its language should not be parsed as if it were); *Nev. v. Hicks*, 533 US. 353, 372 (2001). Courts must appreciate the possibility that different facts and legal arguments may result in a different result. *Loper Bright*, 603 U.S. at 426 (Gorsuch, J., concurring). An opinion is not a "comprehensive code" and proper precedent helps "keep the scale of justice even and steady." *Id.*

This Court owes deference to its adoption of *Piney Run* because the two-part analysis instituted by *Piney Run* established significant precedence that has sound reasoning, proves consistent, and remains workable since it was decided in 2001. Notably, the *Piney Run* court recognized that it "need not find that the [EPA's] interpretation is the only permissible construction" of the statute. *Piney Run*, 268 F.3d at 27 citing *Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc.,* 470 U.S. 116, 134 (1985). Therefore, *Piney Run* cannot be abandoned merely because it utilized agency deference in part. *Loper Bright*, 603 U.S. at 412.

Piney Run is valid precedent because of its sound reasoning: rather than simply deferring to the EPA, the court examined the legislative history of the CWA, the objectives of the CWA, and the structure of the CWA before agreeing with the EPA's interpretation. *Piney Run*, 268 F.3d at 264. The *Piney Run* court observed that the CWA was a fundamental change in the regulation of water pollution "shifting the focus away from water quality standards to direct limitations on the discharge of pollutants." *Id.* at 265 (quoting *Friends of the Earth, Inc.,* 204 F.3d at 151). Illustrating consistency, the decision in *Piney Run* has been cited and applied in numerous

subsequent cases, reinforcing its authority. *See*, *e.g.*, *S. Appalachian Mt. Stewards v. A & G Coal Corp,* 785 F.3d 560 (4th Cir. 2014); *Ohio Valley Envtl. Coalition v. Fola Coal Co., LLC*, 845 F.3d 133 (4th Cir. 2017); *Alaska Cmty. Action on Toxins v. Aurora Energy Servs., LLC,* 765 F.3d 1169 (9th Cir. 2014); *Sierra Club v. ICG Hazard, LLC,* 781 F.3d 281 (6th Cir. 2015). As to the test's workability, it offers a clear, structured approach to the scope of the permit shield defense. The analysis demonstrates a practical approach: it would be impossible for the EPA to list every pollutant possible within its permit application, but if the EPA specifically asks about a particular pollutant, the applicant must disclose that information. *See Piney Run*, 268 F.3d at 267; *see also Atlantic States*, 12 F.3d 353, 358 (2d Cir. 1993).

Further, this Court owes deference to its decision to adopt *Piney Run* because *Loper Bright* did not overrule cases which relied on *Chevron* deference. *Loper Bright*, 603 U.S. at 412. Arguing that precedent should not be used because it relied on *Chevron* is just that: an argument. It is not dispositive of whether the precedent should not be used. *See Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 266 (2010) (quoting *Dickerson v. United States*, 530 U.S. 428, 442 (2000)). Prior cases that have relied on the *Chevron* framework are still subject to statutory *stare decisis* even though the methodology has changed. *Loper Bright*, 603 U.S. at 412. Further, mere reliance on agency deference does not constitute a special justification for overruling, or not abiding by, such a holding. *Id.* Arguing that this Court should not adhere to its precedent because of the decision in *Loper Bright* is unfounded and factually incorrect.

B. This Court must not defer to the EPA alone when determining the scope of the permit shield defense and should instead rely on the analysis promulgated in *Piney Run*.

This Court must not defer to the EPA's interpretation alone when examining the scope of the permit shield. Courts must exercise their "independent judgment" in interpreting an ambiguous statute. *Loper Bright*, 603 U.S. at 412. Even still, the EPA's interpretation may still

be considered to help inform this Court's inquiry. *Id*. But, this Court may not merely defer to the EPA's interpretation without other considerations. *Id.*

Instead of relying only on the EPA's interpretation, this Court should rely on the precedent set before it by concluding that the permit shield defense applies where: (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. *Piney Run*, 268 F.3d at 260. While this rule considered the EPA's interpretation, it was not the only consideration. *See id*. Furthermore, this Court, and the courts before it, may still rely on precedent even where it used *Chevron* deference. Ultimately, in rendering its decision, this Court should consider the precedent set before it, the reasons underlying this precedent, and all other considerations as previously mentioned.

In conclusion, the district court erred in determining that it need not adhere to its decision adopting *Piney Run* because the two-prong test established a foundational precedent that is reasonable, consistent, and workable. Additionally, the mere reliance of *Chevron* in *Piney Run* is not, alone, enough to justify overruling the statutory precedent. The decision in *Piney Run* is applicable, appropriate, and relates directly to this case in particular. Accordingly, this Court should continue to follow in the steps that *Piney Run* adequately established. Finally, this Court need not, and must not under the ruling in *Loper Bright*, merely defer to the EPA's interpretation of the scope of the permit shield defense.

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

This Court should reverse the District Court's erroneous sua sponte ruling that SCCRAP lacks standing to challenge ComGen's Closure Plan. A party establishes standing where it

"demonstrate[s] i) that [it] has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (referencing *Summers v. Earth Island Institute*, 555 U.S. 488 (2009)). To maintain standing, a plaintiff must show injury-in-fact, caused by a defendant, for which the courts can provide relief.

A. SCCRAP has standing to bring suit on behalf of its members.

Although the standard for a typical plaintiff is clear, the Supreme Court has warned "that courts do not opine on legal issues in response to citizens who might 'roam the country in search of [] wrongdoing.'" *Id.* at 379 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 487 (1982)). Indeed, SCCRAP is a "national environmental and public interest organization" which seeks to "hold owners and operators of coal ash impoundments accountable," such as ComGen; but its desire to roam the nation in search of wrongdoing does not preclude it from standing in this matter. SCCRAP's national presence and stake in this matter is anchored in Vandalia by its "members located throughout [the state]" R. 8. An association such as SCCRAP, may "[have] standing to file a suit on behalf of its members when: (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 Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014).

First, members of SCCRAP would have standing to sue in their own right. Again, standing requires injury-in-fact, causality, and redressability. The District Court correctly determined that SCCRAP suffered an "injury-in-fact in the form of aesthetic and recreational

injuries." R. 14. The individual members of SCCRAP's Mammoth chapter qualify as "person[s]" under 42 U.S.C. § 6972(a), and they have alleged injury via fear of PFOS, PFBS, arsenic, and cadmium contamination near the Vandalia Generating Station and the Impoundment thereby restricting them from recreating, fishing, and generally enjoying the Vandalia River ecosystem. R. 10. In sum, they allege the "pollution [is] offensive and [] diminishes their use and enjoyment of the [r]iver." R. 10.

Second, associational standing requires that the interests the party seeks to protect are germane to its purpose. However, "courts have generally found the germaneness test to be undemanding." *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1159 (9th Cir. 1998); *see also Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 147-8 (2nd Cir. 2006). Thus, "'a mere pertinence between litigation subject and organizational purpose' is sufficient." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 637 (D.C. Cir. 2000) (quoting *Soc'y of United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). Here, SCCRAP is an environmental and public interest organization which seeks "to hold owners and operators of coal ash impoundments accountable" for the purpose of "protect[ing] public water from pollutants of the fossil fuel industry." R. 8. Undoubtedly, SCCRAP claims against ComGen are at the very least pertinent to its self-described purpose.

Finally, the RCRA does not require suit to be brought by SCCRAP's members in their individual capacity. *See Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) ("nothing in [the] RCRA's text or history that suggests a congressional intent to erect statutory standing barriers beyond those imposed by Article III"). In fact, "nothing in this section shall restrict any right which any person [] may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or

hazardous waste, or to seek any relief." 42 U.S.C. § 6972(f). Associations, such as SCCRAP, are persons under 42 U.S.C § 6903(15) for the purposes of RCRA citizen suits.

Moreover, the Court in *Hunt* stated that: "'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members, but [] such participation would be required in an action for damages to an association's members." *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 546 (1996) (quoting Hunt, 432 U.S. at 343); *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975). Here, SCCRAP's challenge to the Closure Plan seeks only declaratory and injunctive relief, and the imposition of civil penalties under the RCRA. Although similar, damages and the civil penalties sought by SCCRAP are distinct. Civil penalties are "[a] type[] of money damages." *United States v. Ford Motor Co.*, 497 F.3d 1331, 1338 (Fed. Cir. 2007); *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 427 (D.C. Cir. 2002) ("the government recovered as damages a civil penalty"). Therefore, the government only 'recovers' in the form issuing "a fine assessed for a violation of a statute or regulation." *Civil Penalty*, Black's Law Dictionary (12th ed. 2024); *Contra*, *Damages*, *Supra*. ("money claimed by, or ordered to be paid to, a person as compensation for loss or injury"). Civil penalties sought by SCCRAP would only make ComGen "liable to the United States" and serve as a tool of compulsion to force ComGen to satisfy injunctive orders. 42 U.S.C. § 6928(g).

B. SCCRAP has sufficiently pled injury-in-fact, causation, and redressability to maintain standing.

"[Standing] requires a plaintiff to first answer a basic question: 'What's it to you?'" *FDA*, at 367 (2024) (quoting A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 882 (1983)). To SCCRAP, ComGen's inadequate Closure Plan for the Impoundment presents an inevitable and significant harm to the

environment today and an unreasonable danger to the health of SCCRAP members in Vandalia tomorrow. R. 9.

Although injury-in-fact, causality, and redressability are required for standing, the Supreme Court has also noted: “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.” *Friends of the Earth, Inc.*, 528 U.S. 167, 183 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972)). An injury-in-fact “must [also] be actual or imminent, not speculative - meaning that the injury must have already occurred or be likely to occur soon” and should a plaintiff “seek[] prospective relief such as an injunction, [it] must establish a sufficient likelihood of future injury.” *FDA*, at 381 (referencing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 at 401, 409 (2013)). However, through the web of interlocking federal statutes and regulations, there is a guideline for this Court to address the extent to which a likelihood of future injury must be shown.

First, the RCRA requires private citizen suits be “against any person[1] 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 USCS §§ 6901 et se.].” Because ComGen has been granted a permit by the VDEP to “clos[e] the Impoundment in place,” it is subject to the regulations promulgated under 40 C.F.R. § 257.102 and is a valid defendant under the RCRA. R. 6-7. In relevant part, 40 C.F.R. § 257.102(d)(1) requires that “the owner or operator of a CCR unit must ensure that, at a minimum, the CCR unit is closed in a manner that will: (i)

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[1] [1]ComGen does not easily escape liability because it is not a “person” in the traditional sense. 42 § 6903(15) defines “person” as “an individual, [], firm, joint stock company, corporation, partnership, association [].” ComGen is a “wholly owned subsidiary of Commonwealth Energy a [] holding company.” R. 3.

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 or to the atmosphere." (emphasis added). In short, ComGen must ensure that its Closure Plan prevents contaminated run-off from entering surface waters *after the closure has been completed*. Thereby, the scope of future harm to seek relief from is statutorily broadened.

SCCRAP recognizes ComGen need not predict the future indefinitely because the closure plan need only minimize post-closure harm "to the maximum extent feasible." 40 C.F.R. § 257.102(d)(1)(i). And SCCRAP must show "'threatened injury must be *certainly impending* to constitute injury in fact' and '[a]llegations of possible future injury' are not sufficient.'" *Clapper* 568 U.S. 398, 410 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). But, SCCRAP has pled certainly impending and ongoing harm.

Here, as the District Court accurately determined, SCCRAP has pled injury-in-fact in the form of aesthetic and recreational injuries from the Impoundment's leeching. R. 10, 14. Beyond injury in fact, SCCRAP must, and can, show that the alleged harm is likely caused or is likely to be caused by ComGen. The Supreme Court has been clear: "[a] plaintiff must [] establish that the plaintiff's injury likely was caused or likely will be caused by the defendant's conduct" and "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *FDA*, 602 U.S. at 382; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). Although "not easy to define" the Supreme Court has maintained that "proximate cause analysis is controlled by the nature of the statutory cause of action. The question [] is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Lexmark*, 572 U.S. at 133. Specifically concerning the RCRA and CCR, the "EPA has [] envisioned that the primary enforcement mechanism would be citizen

suits under [the RCRA]. R. 5. *See also* 80 Fed. Reg. 21,302 (recognizing citizen suits are necessary to prevent adverse effects on the health or environment as the CCR is primarily self-regulating).

Here, SCCRAP's injury of aesthetic and recreational harm takes the form of diminishing the use and enjoyment of the Vandalia River and its tributaries because of "concerns over PFOS, PFBS, arsenic, and cadmium pollution." R. 10. Both SCCRAP and ComGen monitoring reports have revealed these pollutants to be emanating from the Impoundment. R. 9. Considering the harm alleged is precisely the type of harm the CCR rule seeks to prohibit and the RCRA seeks to enforce, SCCRAP's injuries are both likely to have been caused by ComGen and likely to be proximately caused by ComGen's violation of the statute.

Finally, SCCRAP's claim must also be redressable. That is, the court must be able to provide "relief; remedy." *Redress*, Black's Law Dictionary, (12th ed. 2024). Although the District Court correctly recognized that its claims likely stem from historical pollution at the Impoundment, not just ComGen's closure plan, it ignores that ComGen has *chosen* to close the Impoundment. ComGen was otherwise required to retrofit *or* submit plans to close the Impoundment by October 17, 2016. R. 6., 40 CFR 257.102(b)(2)(i). In other words, ComGen's hand has been forced, but it has other options at its disposal. Additionally, the District Court did not recognize that 42 U.S.C. § 6972(a) specifically empowers district courts "to enforce the permit, standard, regulation, condition, requirement, or order [for a closure in place permit]" and "to restrain any person who has contributed or who is contributing to the past or present handling, storage, [] or disposal of any solid or hazardous waste" and "to order such person to take such other action as may be necessary" and finally "to apply any appropriate civil penalties under section 3008(a) and (g)." Simply, the RCRA empowers district courts to enjoin owners

and operators of coal ash impoundments, like ComGen, from actions which violate permits and/or enjoin them to prevent actions which may present an imminent and substantial endangerment to health or the environment, as well as apply civil penalties prescribed by statute. Thus, the District Court was actually empowered to provide relief to SCCRAP's alleged harms.

ComGen's current Closure Plan is merely the cheapest as it is unwilling to "invest millions to upgrade the Impoundment to continue operations for just a few more years." R. 6. But, 40 C.F.R. § 251.102, provides ComGen multiple options to satisfy federal law and to redress SCCRAP's alleged harms: amend the Closure Plan to be in compliance, retrofit the Impoundment, or closure by removal of the CCR within the Impoundment according to 40 § C.F.R. 257.102(c). Ultimately, although the District Court correctly determined SCCRAP suffered injury-in-fact, it was mistaken that such harms could not be redressed when the RCRA specifically arms district courts to combat closure plan violations via several methods.

This Court should reverse the District Court ruling that SCCRAP lacks standing to challenge ComGen's Closure Plan for the Impoundment. SCCRAP, as an association, may bring suit on behalf of its members. Further, as alleged, SCCRAP's Complaint successfully states an injury-in-fact which is directly attributable to ComGen which can be redressed.

IV. THE RCRA'S "IMMINENT AND SUBSTANTIAL" REQUIREMENT FOR ENDANGERMENT ITSELF IS SATISFIED BY ALLEGATIONS OF HARM TO THE ENVIRONMENT ITSELF.

This Court should reverse the District Court's ruling that the RCRA does not support imminent and substantial endangerment claims based solely on endangerment to the environment itself. The District Court's determination relies on out-of-circuit precedent, which itself deviates from circuit precedent. Additionally, a plain reading of the RCRA illustrates that statutory interpretations which require prefatory quantification for endangerment to the environment necessitate adding language not present nor implied by the purpose of the RCRA.

The District Court erred by relying on an out-of-circuit district court to formulate its ruling. R. 14.; *see Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D. W. Va. Sept. 28, 2023) (endangerment to the environment alone "is difficult to reconcile [with] the existence of an endangerment that is both imminent and substantial when the contamination present threatens no actual harm to someone or something"). However, that court's opinion is itself irreconcilable with the precedent which it relies on and findings elsewhere in the 4th Circuit. *See e.g.*, *Waterkeeper v. Frontier Logistics, L.P.*, 488 F. Supp. 3d 240, 258 (D.S.C. 2020) (refusing to dismiss RCRA claim because plaintiffs adequately plead the "harmful environmental effects that the spilled plastic pellets pose"). The *Courtland* court correctly cites the Supreme Court's explanation of 'imminent' under the RCRA: "An endangerment can only be 'imminent if it 'threatens to occur immediately." *Courtland*, at *277-78, quoting *Meghrig v. Kfc W.*, 516 U.S. 479, 485-6 (1996). When § 6972(a)(1)(b) is read as a whole ("waste which *may present* an imminent and substantial endangerment to health or the environment"), the statute's "language 'implies that there must be a threat which is present *now*, although the impact of the threat may not be felt until later.'" *Meghrig*, 516 U.S. at 486, quoting *Prince v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005) (plaintiffs need only show potential for imminent threat of harm).

Indeed, the facts of *Courtland* and this case are undeniably similar with both the Impoundment and the Filmont facility of *Courtland* shown to be dispersing hazardous substances in the environment. R. 7-8.; *Courtland* at *31, *55. However, where they differ is significant. In *Courtland*, the court concluded there was no evidence of any viable exposure pathway via contaminated groundwater because there was an ordinance which prevented the potable use of

groundwater. *Id.* at *57. There is no such ordinance here: a proposed housing development within the recommended 1.5 mile downgradient 'no-go-zone' already has a waiting list, including several SCCRAP members, intending to reside there. R. 9.

Here, the present threats are the "consistent arsenic and cadmium exceedances at [the] downgradient monitoring wells [of the Impoundment]." R. 7-8 and 12. Although the pollutants have not presently reached the Vandalia River or an existing public drinking water supply, "groundwater downgradient [the Impoundment] within 1.5 miles [] should not be used for drinking water" due to current leaching. R. 8-9. However, the impact is inevitable should catastrophic failure cause water level elevation or occur upon completion of the proposed housing development reliant on well water (groundwater). R. 9. Though claims generally may not be speculative, "§ 6972(a) was designed to provide a remedy that ameliorates present or obviates the risk for future 'imminent' harms." *Meghrig*, 516 U.S. at 486. Thus, SCCRAP's claim seeks relief from a present threat via removing a future risk as intended by the RCRA and its policy prescription. 42 U.S.C. § 6902(b).

Similarly, the *Courtland* court correctly acknowledged that "an endangerment is 'substantial' if it is serious.'" *Courtland*, at *98, quoting *Cox v. City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001); *see also Interfaith*, 399 F.3d at 259; *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004). It also agreed with the Third and Tenth Circuit determination that "endangerment is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken." *Courtland*, at *97, quoting in part *Burlington Northern & Santa Fe R. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007).

The *Courtland* court, however, diverges from a plain reading of the RCRA by relying on *Tri-Realty*, adding in effect a quantification requirement stating: "'evidence regarding the likelihood and degree of human and environmental exposure to contamination, along with the risks of such exposure, is most likely to assist courts in making endangerment determinations.'" *Courtland*, at 98 (quoting *Tri-Realty Co. v. Ursinus College*, 124 F. Supp. 3d 418, 444 (E.D. Pa. 2015); *but see Pennenvironment & Sierra Club v. PPG Indus., Inc.*, No. 12-527, 2018 WL 1784555 *11, *17 (W.D. Pa. Apr. 13, 2018) (quantification requirements are inappropriate under the RCRA). Despite the inconsistency of the two district courts, the Third Circuit clearly concluded that a plain reading of "[the] 'substantial requirement' does not require quantification of the endangerment." *Interfaith*, 399 F.3d at 259 (quoting *United States v. Union Corp*, 259 F. Supp. 2d 356, 399-400 (E.D. Pa. 2003); *see also United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985) ("proof that a water supply will be contaminated to a specific degree" is erroneous). Because the RCRA does not define "substantial," the courts must look to the totality of the circumstances. *See Interfaith*, 399 F.3d at 258-261.

Here, the totality of the evidence when taken in favor of SCCRAP illuminates a serious harm to the environment. ComGen's yearly groundwater monitoring reports show "elevated levels of arsenic and cadmium" downgradient the Impoundment above federal advisory levels and above Vandalia's state quality standards. R. 8. Combined with the unlined nature[2] of the Impoundment, and the ongoing leaching of arsenic and cadmium, the alleged endangerment to the environment is serious. *See generally*, Renald Blundell et al., *Heavy metal pollution in the*

[2]The EPA has determined unlined impoundments to exceed typical risk thresholds and are "more prone to leach contaminants into groundwater." *See* 80 Fed. Reg. 21,302. Although this Court need not defer entirely to the EPA's opinions, its scientific findings stand and provide a framework for assessing SCCRAP's injury in fact of impending harm.

environment and their toxicological effects on humans, Vol. 6 Heliyon I. 9, e04691 (Sept. 2020) (these toxic carcinogenic pollutants hinder ecosystems by traversing water and food chains).

A. The plain language of the RCRA permits suit for an endangerment to the environment itself.

Ultimately, the district court, *Courtland* court, and ComGen ignore the plain language and purpose of the RCRA. R. 13. ComGen and the *Courtland* court mistakenly rely on *Tri-Realty* to determine the scope and purpose of the RCRA for endangerments to the environment itself. The *Tri-Realty* court misapplied its parent court's interpretation of the scope of § 6972(a)(1)(B). The Third Circuit found 42 U.S.C. § 6972(a)(1)(B) "impose[s] liability for endangerments to the environment, including water in and of itself." *Interfaith*, 399 F.3d at 263. Rather than apply a broad interpretation of "in and of itself" to mean "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," the *Tri-Realty* court interpreted *Interfaith* to instruct "that 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 ecosystem." *Tri-Realty*, 124 F. Supp 3d 418, 454-58. Although pragmatic, this interpretation adds standards not present or suggested by the statute's language, nor implied at the time of drafting. *See* S. Rep. No. 98-284, 98th Cong., 1st Sess. at 59 (1983) (The RCRA is "intended to confer upon the courts the authority to eliminate *any* risks posed by toxic wastes") (emphasis added).

The *Tri-Realty* court claimed a functional interpretation of *Interfaith* is consistent with the "characterization of the RCRA statute in *Meghrig*, that limits RCRA applicability to non-trivial environmental problems" and the RCRA text "does not support finding a violation of trivial discharges." *Id.* at 456-58. But, that court misconstrued the Supreme Court's analysis of

when a party can bring suit and when a party can recover costs under § 6972(b)(2)(B) and (C) (both sections relating to restrictions on bringing suit if the EPA or relevant state agency has already brought suit). In other words, this 'non-trivial' standard is founded in interpretation of one's ability to bring suit, not the substance of the suit itself.

This reasoning was further based in hypotheticals of minor amounts of salt added to a freshwater lake and contamination of soil which presently has no life but may support it. *Tri-Realty*, at 455-57. These thought experiments ignore the language, scope, and purpose of the RCRA as noted by *Tri-Realty*'s parent court: "if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment." *Interfaith*, 399 F.3d at 259 (quoting *Conservation Chemical Co.*, at 194) (emphasis added). Rather than apply the statute as written in favor of the environment, the *Tri-Realty* court opted for applying an interpretation beneficial to judicial efficiency, not consistent with the RCRA nor its parent court. *See Interfaith*, 399 F.3d at 258-59 (referencing *United States v. Price*, 688 F.2d 204, 213-214 (3d Cir. 1982) ("concluding [the RCRA] contains 'expansive language' conferring upon the courts the authority to grant equitable relief to the extent necessary to eliminate *any* risk posed by toxic wastes'") (emphasis added).

Courts have found the broad interpretation of *Interfaith* – "endangerments to the environment may exist even in the absence of a living 'population' of humans, animals, or plants." *Compare*, *Tri-Realty*, at 92-3, *with Burlington Northern & Southern Santa Fe Ry.*, 505 F.3d at 1021 ("Section 6972(a)(1)(B)'s phrasing in the disjunctive indicates proof of harm to a living population is unnecessary to succeed on the merits"); *Talarico Bros. Bldg. Corp. v. Union Carbide Corp.*, 73 F.4th 126, 128 (2d Cir. 2023) ("courts [have] the ability 'to grant affirmative

equitable relief to the extent necessary to eliminate any risk posed by toxic wastes'") (quoting *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009)).

Indeed, *Tri-Realty* is relied on by some courts, but they too misinterpret the plain language and purpose of the RCRA or the findings of *Interfaith*. *See e.g.*, *Cnty. Comm'n of Fayette Cnty., W. Virginia v. Nat'l Grid NE Holdings 2 LLC*, No. 2:21-CV-00307, 2024 WL 1207061, *5 (S.D.W. Va. Mar. 20, 2024) (without engaging in any exhaustive interpretation of the statutory language, this court noted that a broad interpretation of substantial would be superfluous); *see e.g.*, *Sanchez v. Esso Standard Oil de P.R.*, No. 08-2151 (JAF), 2010 U.S. Dist. LEXIS 103949, *28 (D.P.R. Sep. 29, 2010) (claiming a current or likely pathway of exposure to humans was necessary for contamination to be imminent and substantial; whereas *Interfaith* actually held this proposition was inconsistent with the RCRA (*Interfaith*, at 259 fn. 5)).

A plain reading of the RCRA illustrates that there is no ambiguity; an exploration of the legislative history is unnecessary. *See generally Rosmer v. Pfizer*, 263 F.3d 110, 118 (4th Cir. 2001) (quoting *Jones v. Brown*, 41 F.3d 634, 639 (Fed. Cir. 1994) ("'differences in judicial interpretation of a statute' do not prove 'the statute's ambiguity'")). Thus, the plain language and purpose of the RCRA are all that is needed by this Court to properly address SCCRAP's claims. Illustrated by *Interfaith* and *Burlington*, the plain language of § 6972 allows suit even when there is no allegation of endangerment to a living population but only to the environment. The RCRA merely requires "solid or hazardous waste which may present an imminent and substantial danger to human health or the environment." 42 U.S.C. § 6972(a)(1)(B).

Here, this Court is faced with reconciling "human health or the environment." Some courts have determined that there must be some "likely pathway of exposure to humans" as a prerequisite for waste to present an imminent and substantial danger. *Sanchez*, at *28. These

courts disregard the conjunction "or" meaning "used as a function word to indicate and alternative; either (sink or swim)". *Or*, Merriam-Webster, https://www.merriam-webster.com/dictionary/or (last visited Feb. 4, 2025). Thus, a plain reading of the RCRA reveals that SCCRAP's claim should swim, rather than sink, because the statute requires endangerment to *either* human health *or* the environment. Any "exposure pathway to a living population" is erroneous; courts should not read words into a statute which are not expressly present. R. 14.; *see Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). Although requiring ComGen to remedy ongoing environmental endangerments may be a harsh outcome, Congress has clearly intended to "minimize the present and *future* threat to human health *and* the environment." 42 U.S.C. § 6902(b) (emphasis added). To protect both human health and the environment as intended by Congress, this Court should not ignore the latter by necessitating the former.

CONCLUSION

This Court should reverse the District Court's motion to dismiss because (1) ComGen's intentional concealment of its discharge of PFOS and PFBS violates the CWA; (2) this Court's adoption of *Piney Run* remains applicable; (3) SCCRAP has standing to challenge ComGen's closure plan; and (4) the RCRA allows an "imminent and substantial" claim be brought even where the harm is to the environment itself.

Dated: February 5, 2025

Respectfully submitted,
/s/ Team Members
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CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds 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 standard time, on Wednesday February 5, 2025.

Dated: February 5, 2025

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