CASE NO. 24-0682

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS

Plaintiff-Appellant

v.

COMMONWEALTH GENERATING COMPANY

Defendant-Appellee

ON APPEAL FROM
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF VANDALIA,
CIVIL ACTION No. 12-3456

BRIEF OF APPELLANT, STOP COAL COMBUSTION RESIDUAL ASH PONDS

BRIEF SUBMITTED BY:
Team No. 23

Counsels for Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal under 28 U.S.C. § 1291, which grants jurisdiction over final decisions of the district courts. The district court had subject-matter jurisdiction pursuant to 29 U.S.C. § 1331, as the case involves claims arising under federal law, specifically the Clean Water Act, 33 U.S.C. § 1251 et seq., and the Resources Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.

The District Court entered final judgment on October 31, 2024, and Appellant timely filed a notice of appeal on November 10, 2024, within the 30-day period prescribed by rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

Because the district court's judgment fully resolved all claims of all the parties, it is a final and appealable order under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

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 1**,** the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*

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

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

Commonwealth Generating Company ("ComGen"), a subsidiary of Commonwealth Energy, owns the Vandalia Generating Station (VGS), a coal-fired plant operating since 1965. [R. 3-4]. VGS produces coal combustion residuals ("CCRs") stored in the unlined Little Green Run Impoundment near the Vandalia River. [R. 5]. Due to VGS's planned closure in 2027, ComGen began closing the impoundment in compliance with the EPA's 2015 CCR Rule and Vandalia's state-approved coal ash permitting program. [R. 5-6].

ComGen installed groundwater monitoring wells in 2019, revealing elevated arsenic and cadmium levels from 2021 onward that exceeded federal and state standards. [R. 7-8]. Though no evidence suggests contamination of the Vandalia River or drinking water sources, experts believe the impoundment has been leaching for 5-10 years. [R. 8].

VGS operates under a Vandalia Pollutant Discharge Elimination System (VPDES) permit issued on July 30, 2020, covering three outfalls; however, the permit lacks any limits or monitoring requirements for PFOS and PFBS. [R. 4]. Before the permit was issued, a VDEP official informally asked a ComGen employee about PFAS discharges, and the employee denied any were present. [R. 4-5]. Independent testing by SCCRAP and environmental groups later detected PFOS and PFBS in Outlet 001's mixing zone. [R. 9]. A subpoena in separate litigation revealed that ComGen had been discharging PFOS and PFBS nearly every month since 2015. [R. 9].

SCCRAP, a national environmental group, filed a citizen suit against ComGen on September 3, 2024, after ComGen's closure plan approval and SCCRAP's 90-day notice. [R. 12]. SCCRAP's claims include: (1) CWA violations for unpermitted PFOS and PFBS discharges; (2)

failure to meet RCRA's CCR Rule standards for the closure plan; and (3) imminent and substantial endangerment under RCRA due to ongoing pollution. [R. 12-13].

ComGen moved to dismiss, arguing that *Piney Run* and the 12th Circuit's application were inapplicable, that *Eastman Kodak* should control because PFOS and PFBS were not disclosed pollutants, that SCCRAP failed to show RCRA violations, and that the 12th Circuit does not recognize endangerment claims solely to the environment. [R. 13].

On October 31, 2024, the district court granted ComGen's motion in full. The district court followed *Eastman Kodak*, holding that because PFOS and PFBS were not formally required to be disclosed, the permit shield applied. [R. 14]. The court also ruled SCCRAP lacked standing to challenge the closure plan under *Mobile Baykeeper* and that RCRA requires an exposure pathway to a living population. [R. 14].

SCCRAP appealed to the 12th Circuit on November 10, 2024, seeking reversal. [R. 15].

SUMMARY OF THE ARGUMENT

First, the court should reverse the holding that ComGen's discharge of PFOS and PFBS is a lawful discharge under the Clean Water Act because ComGen did not disclose the discharge to VDEP. The discharge of PFOS and PFBS by ComGen is a discharge of a pollutant as ComGen is discharging PFOS and PFBS, industrial waste, into the Vandalia River which are navigable waters from Outlet 001 which is a point source. Therefore, the discharge of PFOS and PFBS by ComGen falls under the CWA. The permit shield defense does not apply in this case because ComGen did not disclose the discharge to the permitting authorities. The district court erred in relying solely on *Eastman Kodak* because *Piney Run* incorporated its reasoning through *Chevron*

deference to *Ketchikan*. *Eastman Kodak* held that unlisted pollutants may be discharged under an NPDES permit if properly disclosed and subject to reporting requirements. *Ketchikan* expanded this by confirming that disclosed but unlisted pollutants fall within a permit's scope. *Piney Run* applied *Chevron* deference to *Ketchikan*, recognizing the CWA's ambiguity and upholding *Ketchikan* as a reasonable interpretation. It established that a permittee is shielded from liability only if it discloses all discharged pollutants; undisclosed pollutants violate the permit and the CWA.Next, application of the Piney Run test shows ComGen violated their VPDES permit because the discharges were not within the reasonable contemplation of VDEP. In *Parris v. 3M Co.*, the court denied the permit shield defense because the defendant failed to disclose PFAS discharges during the permitting process, meaning they were not within the regulatory agency's reasonable contemplation. This case is similar to *Parris* because ComGen never disclosed its discharges to VDEP; its employee denied them over email, and neither the permit nor the application mentioned the discharge. This case differs from *Sierra Club* because there is no indication that VDEP was aware of or anticipated ComGen's discharges of PFOS and PFBS. The record confirms that neither the permit nor the application mentioned these pollutants, and no post-issuance monitoring requirements were imposed.

Second, the 12th Circuit owes deference to its decision adopting *Piney Run* because *Loper Bright* did not overturn the decision. *Loper Bright* held that *Chevron* was inconsistent with the APA as the APA incorporates the traditional understanding that courts must exercise independent judgment in determining statutory provisions and not automatically defer to the agency's interpretation. However, *Loper Bright* did not hold that a prior case relying on *Chevron* means that the case's holding is invalid as these cases are still subject to statutory stare decisis and requires special justification to overturn other than that the precedent was wrongly decided.

Additionally, *Piney Run* is still valid because under *Chevron*, courts could decline to extend the agency's interpretation if the interpretation was unreasonable. Both the fourth circuit in *Piney Run* and the sixth circuit in *Sierra Club*, respectively, found that *Ketchikan* was a reasonable agency interpretation. Finally, *Eastman Kodak* also relied on *Chevron* to reach their holding.

Third, SCCRAP has standing to bring a citizen suit under the Resource Conservation and Recovery Act (RCRA) because it satisfies the traditional Article III standing requirements. SCCRAP's members have demonstrated a concrete and particularized injury resulting from ComGen's failure to comply with the Coal Combustion Residuals (CCR) Rule. The contamination stemming from ComGen's inadequate closure plan has diminished SCCRAP members' use and enjoyment of the Vandalia River, a recognized basis for environmental standing.

Further, SCCRAP's injuries are fairly traceable to ComGen's conduct. The district court erred in finding that SCCRAP's harm was merely historical, ignoring the fact that ComGen's current closure plan fails to meet current federal environmental standards. ComGen's own groundwater monitoring data confirms ongoing contamination, and its decision to close in place continues to expose SCCRAP members to environmental harm. Courts have consistently held that traceability does not require direct causation, only a connection between the injury and the defendant's actions. Also, SCCRAP's injuries are redressable by a favorable court decision. A court order requiring ComGen to implement a compliant closure plan would mitigate or prevent further contamination, reducing the environmental harm suffered by SCCRAP members. Even partial relief satisfies the redressability requirement, as the Supreme Court has recognized that incremental environmental improvements meet the standing threshold.

Fourth, SCCRAP has the authority to pursue a citizen suit under RCRA for imminent and substantial endangerment to the environment stemming from ComGen's coal ash disposal at the Little Green Run Impoundment. Under 42 U.S.C. § 6972(a)(1)(B), SCCRAP need only show that ComGen's disposal practices "may present" an endangerment to health or the environment. Courts have consistently interpreted this standard broadly, requiring only a potential threat rather than proof of actual harm.

ComGen qualifies as a responsible party under RCRA because it is a generator and disposer of coal combustion residuals (CCRs), which are classified as "solid waste" under the statute. Despite RCRA's classification of CCRs as non-hazardous, the ongoing contamination from Little Green Run meets the statutory threshold for endangerment. ComGen's own groundwater monitoring data confirms that arsenic and cadmium levels have exceeded federal and Vandalia state groundwater quality standards since at least 2021, demonstrating that contamination is actively leaching into the environment.

Courts have recognized that endangerment is "imminent" when it poses an ongoing risk, even if the most severe consequences have not yet materialized. Additionally, "substantial" endangerment does not require proof of immediate harm but rather a reasonable cause for concern that the environment may suffer if action is not taken. The record shows that ComGen's closure plan allows coal ash to remain in contact with groundwater, creating an ongoing and worsening environmental hazard.

The potential for severe environmental harm is heightened by the risk of natural disasters such as floods or storms, which could exacerbate leaching from the impoundment. However, SCCRAP does not need to rely on future events to establish imminent and substantial

endangerment, as current contamination already satisfies RCRA's threshold. Courts have repeatedly held that an ongoing threat to the environment alone is sufficient to bring a claim under § 6972(a)(1)(B).

ARGUMENT

A. The court should reverse the holding that ComGen's discharge of PFOS and PFBS is a lawful discharge under the Clean Water Act because ComGen did not disclose the discharge to the VDEP.

The Clean Water Act ("CWA") was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Prior to the CWA's enactment, what was then known as the Water Quality Act of 1965 required states to promulgate water quality standards. *Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty.*, MD, 268 F.3d 255, 264 (4th Cir. 2001). Within this scheme, operators could discharge pollutants so long as their discharges did not reduce water quality below these standards. *See Id.* at 264. However, the scheme was difficult to carry out and enforce. *Id.*

The promulgation of the CWA represented a fundamental change in the manner of federal regulation of water pollution by shifting the focus away from water quality standards to direct limitations on the discharge of pollutants. *See Id.* at 265. Regulators, instead of having to show a causal link between worse water quality standards and the pollutant in question, only had to determine whether the entity was discharging more pollutant into the water than allowed by the CWA. *See Id.* The CWA also established a regime of strict liability: unless a discharge fits within

one of the CWA's limited exceptions, the entity discharging the pollutant violated the CWA. *See Id.*

The primary exception to the blanket liability imposed by the CWA is the NPDES permitting system. *See Id.* The EPA issues NPDES permits; however, the EPA suspends its issuance of permits if it approves a state permitting program. *Id.* Permittees, no matter the issuing authority, are required to comply with effluent limitations as well as a variety of monitoring, testing, and reporting requirements. *See Id.* If permittees follow the terms of their NPDES permits, they will avoid CWA liability. *See Id.*

Despite the CWA's shift to focus on effluent limitations, water quality standards still have an important role in the CWA scheme. *See Id.* When drafting a permit, the regulatory authority is not only required to include effluent limitations but must also include limitations necessary for the waterway receiving the pollutant to meet water quality standards. *Id.*

The effectiveness of the permitting process is heavily dependent on the permittees' compliance with the CWA's monitoring and reporting requirements. *Id.* at 266. The permitting authority receives discharge information from [the permittee] and then calibrates each individual permit to maintain overall state water quality standards. *See Id.*

The court should reverse the holding that ComGen's discharge of PFOS and PFBS is a lawful discharge under the CWA because the discharge meets the definition of discharging a pollutant under the CWA and the permit shield defense does not apply in this case because ComGen never disclosed the discharge of PFOS and PFBS.

1. ComGen's discharge of PFOS and PFBS is unlawful because the discharge meets the definition of discharging a pollutant under the CWA.

The CWA provides that "[T]he discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

Pollutants under the act include industrial waste discharged into water. *See* 33 U.S.C. § 1362(6). Courts have interpreted the definition of pollutant to encompass substances not specifically enumerated but subsumed under the broad generic terms listed in § 1362(6). *U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Maine, LLC.*, 215 F.Supp. 2d 239, 246 (D. Me. 2002). It is not relevant that the EPA has not issued a permit or promulgated an effluent limitation to regulate the substance alleged to be a pollutant; the court can independently determine that a substance falls within one of the general terms. *Id.*

Here, the Vandalia Generating Station operated by ComGen is an industrial coal-fired electricity plant. The station is discharging PFOS and PFBS, synthetic chemicals known to be persistent in the environment and cause a variety of health issues for humans and animals. *See Parris v. 3M Co.*, 595 F.Supp. 3d 1288, 1306 (N.D. Ga. 2022). ComGen's permit does not require limitations for PFOS or PFBS, nor does it require monitoring. [R. 4]. However, based on *U.S. Public*, it is not relevant that a limitation exists for a court to determine a discharge falls into a category named in § 1362(6). Therefore, ComGen is adding a pollutant by discharging PFOS and PFBS.

Navigable waters means the waters of the US. 33 U.S.C. § 1362(7). The record indicates that the Vandalia River and its tributaries are waters of the US. [R. 4]. Therefore, ComGen is discharging pollutants into navigable waters. A point source is any discernable, confined, and discrete conveyance. 33 U.S.C. § 1362(14). ComGen's VPDES permit covers its outfalls and identifies Outlet 001 as a point source. [R. 4]. Therefore, ComGen is discharging pollutants into

navigable waters from a point source and ComGen's discharge of PFOS and PFBS meets the definition of discharging pollutants under the CWA.

2. The permit shield defense does not apply in this case because ComGen did not disclose the discharge to the permitting authorities.

    a. The district court erred in relying solely on *Eastman Kodak* because *Piney Run* incorporated *Eastman Kodak* through the application of the *Chevron* analysis.

Eastman Kodak held that permittees can discharge pollutants unlisted in their permits as long as they comply with the appropriate reporting requirements and abide by any new limitations imposed on [the unlisted pollutants]. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1994).

In *Eastman Kodak*, the plaintiff brought suit against *Eastman Kodak* alleging that they had violated the terms of their state-issued NDPES permit by discharging sixteen unlisted pollutants. *See Id.* The plaintiff argued that the plain language of section 1311 of the CWA prohibits the discharge of any pollutants not expressly listed in the permit. *See Id.* at 358.

The court rejected the plaintiff's overly restrictive interpretation of the CWA because the EPA had never acted in a way to suggest that the plaintiff's absolute interpretation of the permit shield was valid; in fact, EPA's actions and policy statements had frequently contemplated discharge of pollutants not listed in permits. *See Id.* at 357-58. Instead, the EPA had indicated that there was a possibility that a permittee may discharge large amounts of pollutant not limited in the permit but would not violate their permit as long as the permittee complied with notification requirements. *See Id.* at 358.

In a footnote contained in the decision, the court recognized that disclosure plays a key role in determining whether the shield defense is applicable. *See Eastman Kodak*, 12 F.3d 353 n. 8 ("The cases [plaintiff] cites are therefore inapposite because each involves either a failure to correctly disclose accurately the discharge of pollutants…"). Self-reporting and full disclosure allow for non-permitted expansion of effluent discharge. Therefore, EK expanded the scope of NPDES permits and held that permittees may discharge unlisted pollutants as long as the proper reporting disclosure requirements are followed.

The *Ketchikan* decision then incorporated the reasoning from *Eastman Kodak*. The Environmental Appeals Board ("EAB") in *Ketchikan* held that when a permittee has made adequate disclosures during the application process regarding the nature of discharges, unlisted pollutants may be considered within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants. *Ketchikan Pulp Co.*, 7 E.A.D. 605, 621 (EAB 1998)

To reach this decision, the EAB used the same rule from *Eastman Kodak* in interpreting the scope of a NPDES permit. *Id.* at 620 ("*Eastman Kodak* therefore stands for the proposition that the discharge of unlisted pollutants is permissible when the pollutants have been disclosed to permit authorities during the permitting process.") Using this rule, the court held that the permit shield extends to unlisted pollutants as long as the permittee had made adequate disclosures during the application process. *See Id.* at 621. Therefore, *Ketchikan* adopted the reasoning of *Eastman Kodak*.

Finally, the court in *Piney Run* gave *Chevron* deference to *Ketchikan* to determine the scope of the permit shield defense. *See Piney Run*, 268 F.3d 255, 267. The *Ketchikan* decision therefore made clear that a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit, as long as it only discharges pollutants that have been adequately

disclosed to the permitting authority. *Id.* at 268. To the extent that a permit holder discharges a pollutant that it did not disclose, it violates the NPDES permit and the CWA. *Id.* at 268. In order to determine the scope, the court found the provisions of the CWA ambiguous and elected to conduct a *Chevron* analysis. *See Id.* at 266. In applying the second step of the analysis, the court found that the EPA had already promulgated *Ketchikan* and held that the decision was a rational construction of the CWA's statutory ambiguity and therefore a reasonable interpretation. *See Id.* at 267. In adopting *Ketchikan*, the *Piney Run* court held that the defendants would be liable for violating their NPDES permit through the plant's discharge if either: (1) the permit explicitly barred these discharges; or (2) the defendants adequately disclosed the discharges. *See Id.* at 268.

Therefore, the district court erred in relying on *Eastman Kodak* because *Piney Run* adopted the *Eastman Kodak* holding by giving *Chevron* deference to *Ketchikan*.

b. Application of the *Piney Run* test shows ComGen violated their VPDES permit because the discharges were not within the reasonable contemplation of VDEP.

An NPDES permittee can discharge pollutants not specifically listed if the pollutant is reasonably anticipated by, or within the reasonable contemplation of, the permitting authority. *See Piney Run*, 268 F.3d 255, 268. Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process do not come within the protection of the permit shield. *Id.*

In *Parris v. 3M Co.*, the court held that the defendant's NPDES permit did not shield it from liability for a CWA citizen suit based on PFAS discharge because the defendant did not disclose its PFAS discharges during the permitting process so they were not within the reasonable

contemplation of the regulatory agency at the time the permit was granted. 595 F.Supp. 3d 1288, 1320 (N.D. Ga. 2022). The plaintiffs alleged that the defendants unlawfully discharged PFAS into a water body without a NPDES permit and therefore violated the permit because of the discharges. *See Id.* at 1318. In response, the defendants raised the permit shield defense, arguing that they were operating within all limits imposed by its permit. *See Id.* The sole question the court chose to address was whether Trion sufficiently disclosed its PFAS discharges during the permitting process such that they were within the reasonable contemplation of the regulatory authority. *See Id.* at 1319.

The court concluded that because neither party referenced any permit application or other administrative records to substantiate what the defendants disclosed, the defendants had not properly disclosed the PFAS discharge. *See Id.* Therefore, the defendants had made unpermitted discharges of PFAS and violated their permit by doing so. *See Id.* at 1320.

Parris is similar to this case because like the defendants in *Parris*, ComGen never disclosed the discharge to VDEP during the permitting process. [R. 4-5]. Before the 2020 permit was issued, an employee of ComGen denied the discharge to the deputy director of VDEP over email. [R. 5]. The permit and permit application do not mention the discharge. [R. 4]. The discharge was discovered by SCCRAP's independent testing and by a subpoena from prior litigation which revealed discharges in almost every month going back to 2015. [R. 9]. It is immaterial that the court was forced to accept the plaintiff's allegations as true because the record makes it clear that ComGen never disclosed the discharge. In *Parris*, this was something that the court accepted as true, and this accepted fact contributed to the court's holding. *See Id.* at 1320. Based on these facts, the discharge in this case is analogous to the discharge by the defendants in *Parris* because in both cases, the discharges were not reasonably anticipated by the permitting authorities.

In *Sierra Club v. ICG Hazard, LLC.*, the court ruled that the discharge of selenium by the defendant was within the authority's reasonable contemplation because the authority knew at the time the NPDES permit was issued that the area could produce selenium. 781 F.3d 281, 290 (6th Cir. 2015). In particular, a provision in the permit recognized the possibility that any of the mines under its purview may discharge selenium. *See Id.* The authority considered the possibility and included a one-time monitoring requirement as a condition of coverage under the permit. *Id.* Also, the authority's treatment of post-issuance evidence of selenium discharges, which required continued monitoring, shows that selenium discharges were within their reasonable contemplation. *Id.*

This case is unlike *Sierra* because there is no indication that VDEP knew anything about the discharge from Outlet 001 at the time the permit was issued, nor did VDEP address any post-issuance discharges of PFOS and PFBS. The record establishes that neither the permit nor the permit application mentions PFOS and PFBS. [R. 5]. The record also states that the permit did not have set limits for PFOS and PFBS. [R. 4]. Therefore, ComGen's discharge of PFOS and PFBS was not within VDEP's reasonable contemplation because VDEP was not aware of the discharge before the permit was issued.

Therefore, application of the *Piney Run* test shows that ComGen violated their VPDES permit because the discharges were not within the reasonable contemplation of VDEP.

3. ComGen's failure to disclose the discharge of PFOS and PFBS violated the disclosure requirements of the Clean Water Act because disclosure of pollutants is crucial to the permitting scheme.

The disclosures made by permit applicants during the application process constitute the very core of the NPDES permitting scheme. *See Ketchikan*, 7 E.A.D. 605, 622. The [EPA's] reliance on a discharger's accurate disclosures is not limited to the identification and control of toxics. *Id.*

In *Ketchikan*, the EAB discussed the EPA's stance on the disclosure requirements and how those requirements affect the permit process. As part of a modification to the Code of Federal Regulations, the EPA said that accurate disclosures by permittees regarding the presence of either toxic pollutants or conventional and nonconventional pollutants in discharge not only allows for effective limitations of those pollutants, but also directly affects the permit shield defense as "a permittee is deemed to be in compliance with the CWA if he meets the requirements and limitations of his permit." *Id.* The EAB also discussed a guidance memorandum explaining the purpose of the permit shield defense, which not only includes pollutants limited in permits, but also pollutants that have no established limits in permits but that are specifically identified as present in facility discharges during the permit application process. *Id.* at 624. As a result, the EAB held that the facility did not make adequate disclosures regarding the pollutants in that case and therefore neither discharge was within the scope of the permit. *Id.* at 625.

By not disclosing the discharge, ComGen prevented the VPDES permitting scheme from functioning properly. As outlined above, disclosing the discharge would have placed the pollutants into the reasonable contemplation of VDEP, which would have allowed the authority to determine whether the discharge could damage the Vandalia. However, since ComGen did not, VDEP was not able to allow the discharge of PFOS and PFBS. Even though VDEP does not require monitoring for these pollutants, the broader scheme of the CWA requires their disclosure nonetheless because the disclosure of any potential pollutant is crucial to the scheme of the CWA and is not limited to statutory pollutants and specifically listed pollutants in permits. Therefore,

although there were no effluent limitations for PFOS and PFBS, ComGen violated the CWA by not disclosing their discharge because the disclosure of all pollutants is crucial to the permitting scheme.

Therefore, ComGen's discharge of PFOS and PFBS was an unpermitted discharge under the CWA because PFOS and PFBS are pollutants contemplated under the act and the permit shield does not apply because the discharges were not within the reasonable contemplation of the VDEP.

B. The 12th Circuit owes deference to its decision adopting *Piney Run* because *Loper Bright* did not overturn the decision.

Loper Bright overturned the *Chevron* deference and gave the power back to the courts to make independent interpretations of ambiguous statutes instead of being forced to defer to an agency's interpretation. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024) To answer the question of how to interpret a question of statutory interpretation, the Court in *Chevron* articulated and employed a two-step approach. *See Id.* at 379. First, discern whether Congress had directly spoken to the question at issue; if the intent of the statute was clear, then the inquiry is over. *Id.* at 396. However, when the intent is unclear, the court had to defer to the agency's interpretation of its governing statute and regulations, as long as (1) the agency had promulgated that interpretation pursuant to a notice-and-comment rulemaking or a formal adjudication and (2) the agency's interpretation is reasonable. *Piney Run*, 268 F.3d 255, 267.

However, the Court in *Loper Bright* held that the *Chevron* analysis was contrary to the Administrative Procedure Act ("APA") as the APA incorporated the traditional understanding of judicial function under which courts must exercise independent judgment in determining statutory provisions and not automatically defer to the agency's interpretation. *Loper Bright*, 603

U.S. 369, 397-98. In exercising their independent judgment, courts may resort to the agency interpretation for guidance as these interpretations constitute a body of experience and informed judgment.

The 12th Circuit owes deference to its adoption of *Piney Run* because even though *Loper Bright* overturned *Chevron*, *Loper Bright* did not hold that a prior case relying on the *Chevron* deference means that the case's holding is invalid. Additionally, the overturning of *Chevron* is not consequential to this case because under *Chevron*, courts could overturn agency interpretation if the interpretation was unreasonable and *Eastman Kodak* also relied on *Chevron* to reach their holding.

1. *Loper Bright* did not hold that a prior case relying on the *Chevron* deference means that the case's holding is invalid.

By overruling *Chevron*, though, the Court does not call into question prior cases that relied on the *Chevron* framework. *Id.* at 412. These cases are still subject to statutory stare decisis despite [the] change in interpretive methodology. *Id.* Where the precedent interprets a statute, stare decisis carries enhanced force. *Kimble v. Marvel Ent., LLC.*, 576 U.S. 446, 456 (2015).

In *Kimble*, the Court reasoned that cases that interpret statutes require more to overturn because critics can take the ruling across the street [to Congress] and Congress can correct any mistake it sees. *Id.*

Here, *Piney Run* should not be disregarded solely because the case's holding relied on *Chevron*. Unless a special justification exists besides "an argument that the precedent was wrongly decided," *Piney Run* is still a valid interpretation of a statute. Therefore, the *Piney Run*

test is still valid because *Loper Bright* did not automatically overturn cases that relied on *Chevron*.

2. Under *Chevron*, a court could decline to extend the agency's interpretation if the interpretation was unreasonable.

If [the agency's interpretation] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, the court should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 845 (1984). To sustain the EPA's interpretation, the court does not need to find that it is the only permissible interpretation, but that their understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of the EPA. *Piney Run*, 268 F.3d 255, 267.

In *Piney Run*, the fourth circuit held EPA's interpretation of the permit shield in *Ketchikan* as a rational construction of the CWA's statutory ambiguity and therefore reasonable within the meaning of a *Chevron* analysis. *Id.*

In *Sierra Club*, the sixth circuit also found the EPA's interpretation of the permit shield "allowing some pollutants to be discharged even though not specifically listed in the general permit is a sufficiently rational one to preclude a court from substituting its judgment for that of the EPA." *Sierra Club*, 781 F.3d 281, 286. The court reasoned that *Ketchikan* explained the practical impossibility of the permitting authority identifying and limiting every potential chemical in a given discharge. *See Id.* at 287. If it were so, compliance would be impossible and the potential for litigation limitless. *See Id.* Therefore, the court held that this bolstered the EPA's interpretation enough to make it reasonable under *Chevron*.

These cases reflect that two circuit courts of appeals have adopted *Ketchikan* as reasonable, and this circuit should continue its adoption of *Piney Run* because no other circuit has found the reasoning unacceptable.

3. *Eastman Kodak* relied on *Chevron* to reach their holding.

In *Eastman Kodak*, the second circuit used *Chevron* and gave deference to previous EPA administrative actions to reach their holding. *See Eastman Kodak Co.*, 12 F.3d 353, 358 ("Because the EPA's implementation of the CWA is entirely reasonable, we defer to it.") Specifically, the court relied on memorandums from EPA discussing the impracticality of listing every possible pollutant on permits, and instead focusing on chief pollutants as well as ones disclosed by permittees. *See Id.* at 357-58. This is relevant to the current case because not only was *Eastman Kodak* incorporated into the reasoning of *Piney Run*, but both cases incorporated the *Chevron* deference to reach their respective holdings. Therefore, the court in *Eastman Kodak*, like *Piney Run*, relied on *Chevron* to reach their holding.

In conclusion, ComGen's discharge of PFOS and PFBS was an unpermitted discharge under the CWA because PFOS and PFBS are pollutants contemplated under the CWA and the permit shield defense does not apply in this case because the discharge was not within VDEP's reasonable contemplation. Additionally, the 12th Circuit owes deference to its adoption of *Piney Run* because *Loper Bright* did not automatically overturn cases that relied on *Chevron* and *Chevron's* overturning does not affect this case because courts could still decide an agency's interpretation was unreasonable under *Chevron* and *Eastman* Kodak relied on *Chevron* to reach its holding.

C. This court should reverse the district court's dismissal of SCCRAP's 42 U.S.C. § 6971 citizen suit because SCCRAP presented facts that support article III standing, satisfying the burden of proof for all three elements.

SCCRAP has standing to bring a citizen suit challenging ComGen's Coal ash closure plan for the Little Green Run. The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have presented evidence of such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Tri-Realty Co. v. Ursinus Coll.*, 124 F.Supp. 3d 418, 436 (E.D. Pa. 2015).

This court should consider reasonings promulgated by other circuits regarding the issue of standing, particularly the threshold to which the plaintiff must meet. Accordingly, when determining whether SCCRAP had standing to pursue a claim under RCRA's citizen suit provision, this Court should apply nothing more than the traditional Article III analysis. *See Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (finding "there is nothing in RCRA's text or history that suggests a congressional intent to erect statutory standing barriers beyond those imposed by Article III of the Constitution ...").

Courts are unable to, "raise the standing hurdle higher than the necessary showing for success on the merits in an action." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 399 F.3d 248, 255 (3d Cir. 2005) (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000)).

As an organization, SCCRAP has standing to bring suit on behalf of its members because its members would otherwise have standing to sue in their own right, the interests at stake are germane to SCCRAP's purpose, and neither the claim asserted, nor relief requested requires the participation of individual member in the lawsuit. *See Friends of the Earth, Inc. v. Laidlaw Envtl.*

Servs. Inc., 528 U.S. 167, 181 (2000), *also see S. River Watershed All., Inc. v. Dekalb Cnty.*, 69 F.4th 809, 819 (11th Cir. 2023) ("An organization has standing to redress an injury suffered by its members without showing an injury to the association itself.").

Under RCRA, "any person may commence a civil action… 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 chapter..." 42 U.S.C. § 6972(a)(1)(A). RCRA gives SCCRAP a congressionally created right to challenge the closure plan, but under Article III of the U.S. Constitution, a case or controversy can exist only if a plaintiff has standing to sue. *Mobile Baykeeper, Inc. v. Ala. Power Co.*, 2024 U.S. Dist. LEXIS 1739, 27 (S.D. Ala. Jan. 4, 2024).

Any person bringing a RCRA citizen suit must meet the constitutional standing requirements as the §6972 provisions do not, in and of themselves, satisfy the case-in-controversy requirement of Article III. *See Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F.Supp. 3d 940 (S.D. Ohio 2015) (Court's apply the traditional Article III analysis to determine standing in a RCRA citizen suit action.).

In order for SCCRAP to satisfy Article III's standing requirement, SCCRAP must show (1) that it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180-181 (2000) *citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)).

SCCRAP needs only to plead general factual allegations of the standing elements, because on a motion to dismiss the Court presumes that general allegation embrace those specific facts that are necessary to support the claim. *Mobile Baykeeper, Inc.*, 2024 U.S. Dist. LEXIS 1739, 29.

Thus, courts apply the "familiar three-part algorithm: a would-be plaintiff must demonstrate a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury." *Me. People's All.*, 471 F.3d 277, 283.

1. The district court correctly found that SCCRAP made a factual showing of an injury that is both concrete and particularized and actual or imminent, not conjectural or hypothetical.

For SCCRAP to establish an "injury in fact" sufficient for standing in a citizen suit, it must demonstrate that the injury is (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical**.**

A "concrete" injury must be *de facto*, meaning it must be real and existent rather than abstract. This requirement ensures that the injury is either tangible or, if intangible, still presents an actual harm. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). A mere procedural violation, absent concrete harm, does not satisfy this standard. *Id.* An injury is deemed "concrete" if it is real and distinct rather than abstract, while it is sufficiently "particularized" if it affects the plaintiff in a personal and individualized manner. *Tri-Realty Co.,* 124 F. Supp. 3d 418, 436.

Here, SCCRAP has demonstrated that its members have suffered a concrete and particularized injury due to ComGen's violations of the Resource Conservation and Recovery Act (RCRA) and the Coal Combustion Residuals (CCR) rule. SCCRAP members include individuals who recreate, fish, and own property in the Vandalia River and its surrounding watershed. [R. 10]. Multiple members of the Mammoth chapter have alleged direct harm

stemming from the historical environmental impacts associated with the Little Green Run Impoundment, and they have curtailed their usage of the area due to concerns over pollution caused by ComGen.[R. 10]. These members find the contamination offensive, and it has diminished their ability to use and enjoy the river. [R. 10]. The Court has recognized that such statements "adequately document injury in fact" when they assert use of the affected area and demonstrate that the challenged activity has lessened its aesthetic and recreational value. See *Interfaith Cmty. Org.*, 399 F.3d 248, 183.

Additionally, SCCRAP's injury is actual or imminent, rather than speculative. The second requirement, "actual or imminent, not conjectural or hypothetical"**,** makes clear that if a harm is not presently occurring, then the alleged future injury must be sufficiently imminent. While imminence is "somewhat elastic," courts require plaintiffs to demonstrate a realistic danger of sustaining a direct injury rather than a speculative or hypothetical one. *Tri-Realty Co.*, 124 F. Supp. 3d 418, 436. In other words, there must be a realistic chance or genuine probability that a future injury will occur for it to be sufficiently imminent. *Id.*

Here, SCCRAP members have already experienced diminished use and enjoyment of the area surrounding Little Green Run due to contamination. [R. 10, 14]. The environmental harm is ongoing, and ComGen's current closure plan for the Little Green Run Impoundment fails to meet the Closure Performance Standard under 40 C.F.R. § 257.102(d). Specifically, the regulations require that closure plans must, at a minimum:

i. "Control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and the release of CCR, leachate, or contaminated runoff into the ground, surface waters, or atmosphere."

ii. "Preclude the probability of future impoundment of water, sediment, or slurry."

ComGen's proposed closure plan leaves CCR in place and fails to meet these regulatory requirements, creating a realistic danger of continued contamination**.** This ongoing environmental risk heightens the likelihood of future harm, making it more than a mere hypothetical concern. Courts have found standing in similar circumstances where an environmental nonprofit identified a specific member who reduced their use of a watershed due to pollution. *See S. River Watershed All., Inc.*, 69 F.4th 809, 820.

Because SCCRAP members have provided concrete statements regarding their diminished use of the affected area, and because the environmental harm is ongoing with a genuine probability of continued injury, SCCRAP has satisfied the injury in fact requirement for standing.

2. The district court erred in concluding that SCCRAP's injuries were neither traceable to ComGen's conduct nor redressable by judicial relief.

The second element of standing requires a causal connection between the injury and the defendant's conduct such that the injury is "fairly traceable" to the challenged action. *Lujan*, 504 U.S. 555, 560. Importantly, the traceability requirement "is not an exacting standard" and does not require proximate cause. *Walters v. Fast AC, Ltd.*, 60 F.4th 642, 650 (11th Cir. 2023). Additionally, plaintiffs are not required to prove causation beyond a reasonable doubt or with clear and convincing evidence. *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003). Rather, "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Id.*

a. SCCRAP's injuries are fairly traceable to ComGen's conduct because the harms felt stemmed from ComGen's violation of the CCR Rule.

The district court erred in finding that SCCRAP's injuries are not traceable to ComGen's failure to comply with the CCR Rule's closure requirements because the district court ignored the critical distinction between historical contamination and the ongoing failure of ComGen to comply with the revised CCR Rule standards. 40 C.F.R. § 257.102(d) mandates that impoundments must be closed in a way that: (1) Prevents post-closure infiltration of liquids into the waste and release of contaminants into the environment, and (2) Precludes the probability of future impoundment failure due to rising groundwater, flooding, or storm events. 40 C.F.R. § 257.102(d).

SCCRAP members' ongoing injuries are not merely the result of historical pollution, but of ComGen's continued failure to comply with these federal standards. In *Mobile Baykeeper, Inc. v. Ala. Power Co.*, the court denied standing because the challenged closure plan was still in flux and was not the source of the leaching that caused the plaintiffs' injury. 2024 U.S. Dist. LEXIS 1739, 46. Here, however, SCCRAP challenges ComGen's decision to permanently store coal ash below the water table, where it is already leaching contaminants into the watershed. [R. 10].

Additionally, ComGen's own groundwater monitoring data confirms that contamination continues. Each year since 2021, downgradient wells have detected arsenic and cadmium above both federal and Vandalia's groundwater quality standards. [R. 10]. ComGen's decision to close in place rather than remove the coal ash for economic reasons does not exempt it from regulatory compliance. SCCRAP is able to use the data between the upgradient and downgradient monitors to show that the contamination is leaching from Little Green Run.

b. SCCRAP's injuries are redressable because ComGen's violations can be remedied by a favorable decision requiring the implementation of a compliant closure plan.

The third element of standing requires that the plaintiff's injury is "likely to be redressed by a favorable decision." *Lujan*, 504 U.S. 555, 561. A plaintiff need not show that the requested remedy will completely eliminate the harm, only that it will reduce or mitigate the injury. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 79 (1978).

Here, SCCRAP's injuries are redressable because a court order compelling ComGen to comply with 40 C.F.R. § 257.102(d) would prevent further leaching by requiring ComGen to implement protective closure measures such as excavation or a properly designed cap-and-liner system. A favorable decision would also reduce contamination risk from storms and flooding, particularly given SCCRAP's concerns that future climate events could cause catastrophic failure of the impoundment. [R. 10]. Lastly, it would alleviate members' diminished use and enjoyment of the Vandalia River, as courts have recognized that redressability includes restoring plaintiffs' ability to use affected areas free from ongoing contamination concerns. *See Interfaith,* 399 F.3d 248, 257. If the company's closure plan was in compliance, further contamination would be reduced or prevented.

Further, the Supreme Court has rejected the notion that partial relief is insufficient for standing, explaining that a plaintiff need only show that the requested remedy will alleviate a discrete injury, not every conceivable harm. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (explaining that even incremental reductions in environmental harm satisfy redressability). Thus, even if SCCRAP's injury is partially historical, requiring ComGen to implement a CCR compliant closure plan would slow or prevent further contamination, thereby satisfying redressability.

Therefore, the district court erred in concluding that SCCRAP's injuries were neither traceable to ComGen's conduct nor redressable by judicial relief. Unlike in *Mobile Baykeeper*, SCCRAP challenged an ongoing failure to meet environmental standards, not a procedural deficiency. ComGen's decision to close in place rather than remove coal ash does not absolve it of compliance, and its failure to meet the CCR Rule's revised standards continues to expose SCCRAP members to environmental harm. These levels would not be continuing to rise if the closure plan met the required performance standard under 40 C.F.R. § 257.102(d), therefore SCCRAP has satisfied the standing requirements of causation and redressability.

In conclusion, SCCRAP has standing to bring a citizen suit. SCCRAP has organizational standing to sue on behalf of its members and presented facts that support traditional Article III standing. SCCRAP established an injury in fact, that is both concrete in particularized as well as actual or eminent. The injuries inflicted upon the plaintiff can be traced to the contamination caused by ComGen's activities. Those injuries could be remedied or the effect could be lessened by a favorable court decision requiring that ComGen implement a compliant closure plan. For these reasons, this court should find that SCCRAP has standing in this case.

D. SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment while only alleging to the environment itself.

To establish imminent and substantial endangerment under 42 U.S.C. § 6972(a)(1)(B**)**, SCCRAP must demonstrate that ComGen's coal ash disposal may present an endangerment to health or the environment. 42 U.S.C. §6971 (a)(1)(B) states, in pertinent part, "against any person, including past or present generators or owners or operators of treatment, storage, or disposal facilities ... of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment"

a. The plain language of 42 U.S.C. §6971 (a)(1)(b) gives SCCRAP the authority to bring this suit.

For SCCRAP to have the authority to initiate a civil action for imminent and substantial endangerment, it must establish that ComGen falls within the category of parties covered by the statute. The plain language of the statute confirms that a defendant may be any past or present generator, transporter, or owner of a facility involved in the handling, storage, or disposal of solid or hazardous waste.

Even though Coal Combustion Residuals (CCRs) are not classified as hazardous waste, 42 U.S.C § 6903 defines “solid waste” to include any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, as well as other discarded materials. *See* 42 U.S.C. § 6903(27). Among the undisputed facts in this case, CCRs are byproducts of coal-powered electric generating plants. [R. 3]. Coal ash consists of various materials, including bottom ash—coarse, angular ash particles too large to be carried into smokestacks—and boiler slag, which solidifies into smooth, glassy pellets. [R. 3].

The record states that ComGen’s energy production at the coal-fired Vandalia Generating Station results in the creation of CCRs. [R. 4]. Historically, coal ash produced by the Vandalia Generating Station has been disposed of in the Little Green Run Impoundment. [R.5]. Given that ComGen’s operations inherently generate CCRs as a byproduct of energy production, ComGen qualifies as a producer of "solid waste" that must be removed from the generating station and properly disposed of. Accordingly, ComGen is a “person” that has produced and stored “solid waste” within the meaning of the statute.

b. Contamination from Little Green Run "may present" an endangerment to health or the environment.

The operative word in 6972(a)(1)(B) is the word "may." *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004). Courts have consistently interpreted this standard to mean that plaintiffs need only demonstrate the *potential* for an imminent and substantial threat, rather than proving actual harm. *Tri-Realty Co.*, 124 F. Supp. 3d 418, 443.

Under RCRA, the "may present" standard for endangerment to health or the environment is interpreted broadly. Courts have repeatedly held that a threat to the environment alone is sufficient to satisfy this standard, without requiring proof of actual harm or immediate risk. This expansive interpretation allows courts to grant equitable relief to eliminate any risk posed by toxic waste. *See Id.* (holding that a possible endangerment to either health or the environment is sufficient to establish RCRA liability).

In the current case, the contamination leaching from Little Green Run is the result of permanently stored coal ash that extends below the sea level and is contacting the ground water. [R. 9]. The leachate is presenting a harm to the environment as it is causing arsenic and cadmium levels to rise above a safe standard. The ongoing endangerment may present an even larger threat to the environment if any type of weather such as floods, storms, and hurricanes were to take place. Simple weather conditions may exacerbate the known harm and turn the situation into a catastrophic environmental hazard. The "may present" aspect of a future storm is merely an additional affirmation, as this the current situation already satisfies the requirement.

Similarly, in *Black Warrior Riverkeeper, Inc. v. Drummond Co., Inc.*, the court found a genuine issue of material fact as to whether groundwater discharging from a refuse pile

constituted an imminent and substantial endangerment under RCRA. The court noted that RCRA applies retroactively to past violations, provided that those violations pose a present threat to health or the environment. *Black Warrior Riverkeeper, Inc. v. Drummond Co., Inc.*, 387 F. Supp. 3d 1271, 1278 (N.D. Ala. 2019).

Additionally, in *Ky. Waterways All. v. Ky. Utils. Co.*, the court addressed claims that toxic constituents of coal combustion residuals (CCRs) had contaminated groundwater and surface water, potentially creating an imminent and substantial endangerment. The court observed that while proof of contamination exceeding state standards *may* support a finding of liability, RCRA does not require such proof to establish a claim. *Ky. Waterways All. v. Ky. Utils. Co.*, 539 F. Supp. 3d 696, 717 (E.D. Ky. 2021)

c. The endangerment to the environment is imminent and substantial.

42 U.S.C. § 6972(a)(1)(B) requires that the endangerment be both *imminent* and *substantial*, meaning there must be a present threat, even if the harmful effects are not immediately realized. *See Meghrig v. Kfc W.*, 516 U.S. 479, 486 (1996).

In *Interfaith,* 399 F.3d 248, 260, the court rejected the additional requirements for proving endangerment that were set forth in *Price v. U.S. Navy,* 818 F. Supp. 1323 (S.D. Cal. 1992). The *Price* court had articulated four conditions for establishing imminent and substantial endangerment:

> "A site "may present an imminent and substantial endangerment" within the meaning of RCRA where: (1) there is a potential population at risk; (2) the contaminant at issue is a RCRA "solid" or "hazardous waste"; (3) the contaminant is present at levels above that considered acceptable by the state; and (4) there is a pathway for current and/or future exposure." *Id.* 259.

However, the *Interfaith* court found these additional requirements unsupported by statutory interpretation and concluded that at least two were inconsistent with § 6972(a)(1)(B). *Interfaith,* 399 F.3d 248*,* 259. By declining to adopt the *Price* factors, the court reaffirmed that a plaintiff need only establish the following elements to prevail under § 6972(a)(1)(B):

> "(1) that the defendant is a person, including, but not limited to, one 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." *Parker*, 386 F.3d 993, 1014-15.

This interpretation aligns with statutory language, particularly regarding the term "substantial." *See United States v. Union Corp.*, 259 F. Supp. 2d 356, 399-400 (E.D. Pa. 2003). Legislative history and case law confirm that endangerment is "substantial" if it is serious. Furthermore, courts have held that RCRA endangerment is substantial if there is "some reasonable cause for concern that someone or something may be exposed to a risk of harm if remedial action is not taken." *Interfaith,* 399 F.3d 248 (3d Cir. 2005). The contamination leaching from Little Green Run into the groundwater constitutes an imminent and substantial endangerment to the surrounding environment. The record confirms that, as of now, there is no evidence that arsenic or cadmium have reached the Vandalia River or a public drinking water supply, nor is there an expectation that they will within the next five years. [R. 8]. However, this does not negate the existence of imminent and substantial endangerment. An endangerment is considered *imminent* if it poses an ongoing threat, even if its worst effects have not yet materialized. *Tri-Realty Co.*, 124 F. Supp. 3d 418.

Moreover, the assertion that contamination has not yet reached the river or a public drinking supply does not account for the harm posed to the downgradient environment. It is undisputed that ComGen's groundwater monitoring data collected from both upgradient and downgradient of Little Green Run, has consistently shown elevated levels of arsenic and cadmium exceeding federal advisory limits and Vandalia's groundwater quality standards. [R. 8]. This contamination has been present since the first available report in 2021 and continues to this day. [R. 8]. This evidence confirms that Little Green Run is actively leaching toxic substances into the surrounding groundwater, creating a present and ongoing environmental hazard.

SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment while only alleging to the environment itself. The plain language of 42 U.S.C. §6971 (a)(1)(b) gives SCCRAP the authority to bring this suit. Contamination from Little Green Run is currently presenting an imminent and substantial endangerment to the environment and if it is not addressed, the contamination may present an imminent and substantial endangerment to health.

CONCLUSION

For the foregoing reasons, SCCRAP respectfully requests that this Court reverse the district court's order granting ComGen's motion to dismiss and remand for further proceedings.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Pounds 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. 23