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 DISTRICT OF VANDALIA,
CIVIL ACTION No. 24-0682

BRIEF OF APPELLEE,
Commonwealth Generating Company

Team No. 7

Counsels for Plaintiff-Appellee

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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia found in favor of ComGen and had original jurisdiction pursuant to 28 U.S.C. (section symbol) 1331. This Court ordered the issues to be set forth, briefed, and argued on December 30, 2024. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1292(b).

STATEMENT OF THE ISSUES PRESENTED

I. Issue 1: Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the Clean Water Act;

II. Issue 2: Whether, in deciding Issue 1, the Court owes deference to its own decision adopting Piney Run (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in Loper Bright;

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

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

STATEMENT OF THE CASE

I. Procedural History

This cases arises out of a motion for summary judgement requested by the Appellee, Commonwealth Generating Company ("ComGen"), in response to an action made by the Appellant, Stop Coal Combustion Resdiual Ash Ponds ("SCCRAP"). (R. 12-13). SCCRAP filed an action after sending a letter of notice of its intent to sue, after 90 days SCCRAP filed a complaint in the United States District Court for the Middle District of Vandalia. (R. 1, 12). SCCRAP persued three separate claims targeting two locations under the operation of ComGen. (R. 12). The two following locations will have their factual issues presented and their coensiding claims presented in the discussion of each location.

II. Vandalia Generating Station

The Vandalia Generating Station is a coal fired electricity plant. (R. 4). ComGen, operates the generating station under a permit granted by Vandalia Department of Environmental Protection ("VDEP") for effluent limitations called the Vandalia Pollutant Discharge Elimination System. *Id*. The permit was issued by the VDEP on July 30, 2020 and became effective on September 1, 2020. *Id*. The permit covers three specific outlets of discharge with an array of coverage of pollutants, but that coverage did not include PFOS or PFBS, but the permit has never required the monitoring or reporting of such substances. *Id*. Moreover, the permit application failed to mention PFOS or PFBS when seeking to institute regulation. *Id*.

SCCRAP's first claim, filed on September 3, 2024, alleged that ComGen was in violation of its permit under §505 of the CWA. (R. 12). SCCRAP claimed that the discharge of PFAS from Outlet 1 was a violation for the fact that the pollutants were not "within the reasonable contemplation of the permitting authority" when the permit was being granted. *Id*. SCCRAP

sought declaratory relief against ComGen with a request for an injunction to stop discharges despite current permit. *Id*.

ComGen responded to the claims made by SCCRAP on September 20, 2024 by filing a motion to dismiss. (R. 13). ComGen argued that the pollutants SCCRAP sought enforcement against for permit violations were not regulated by statute, the EPA does not seek to regulate every substance potentially present in dischares, and that the case law upon which SCCRAP relies is inapplicable. *Id*.

III. The Little Green Run Impoundment

The Little Green Run Impoundment is a coal ash impoundment used for the storage of coal buring byproduct. (R. 5). The Impoundment was created by the construciton of a dam across a tributary, creating 71 surface acres of wet coal ash storage. *Id*. The EPA in 2015, established the Dispoasl of Coal Combustion Residuals from Electric Utilites (The "CCR Rule"), which set forth closure requirements and post closure care of impoundments like Little Green Run. *Id*. The primary means of enforcement of the CCR rule is citizen suits under RCRA. *Id*. The EPA later promlugated the WIIN act, Water Infrastructure Improvements for the Nation Act, which allowed states obtain approval instead of the administering the federal CCR rule. *Id.* States were given the authority to create criteria for conduction the closure or retrofit of CCR untis. *Id*.

The rules set forth two closure options, which ComGen chose the option of closure in place, under the regulation. (R. 6). ComGen created a closure in place plan for the Little Green Run Impoundment in 2016. *Id*. That plan was amended twice, July 2019 and April 2020. *Id*. VDEP issued a notice of the Permit Application for the closure in place and held a public hearing in Feburary of 2021, a period of public comment was opened then closed, and after a review ComGens permit for closure in place was approved and valid until May 2031. *Id.* They are

bound to manage the CCR in accordance with the permit and the closure in place activities began in 2019. *Id.* Groundwater monitoring devices were placed which were all operational by the end of 2021. (R. 7). In following the permit ComGen released yearly monitoring reports of the wells. (R. 8). A degree of some substances were detected in the wells every year after 2021, but no substances have ever leached into the Vandalia river. *Id.*

SCCRAP, not liking the closure plan of ComGen, sought an expert which stated that it was his belief that ground water in a 1.5 miles of the Impoundment would not be safe for drinking water. (R. 9). Currently no one lives in this area, and there is only a plan for a potential community to be built by a housing developer, but it will not be finished until at least 2031. *Id.* SCCRAP also states that its members recreational habits are potentially placed at risk by their preieved concerns for pollutants and claim this affects their use and enjoyment of the River. (R. 10).

The second action brought by SCCRAP alleged that ComGen's closure plan is inadequate by claiming that the plan fails to eliminate free liquids prior to capping and thus would violate RCRA. (R. 12). Thirdly, SCCRAP alleged that the Little Green Run Impoundment is an imminant and substantail chance of endangering the environment due to its precieved potential to release pollutants, but had put forward no allegations of endangerment to any living population and only alleged a potential harm to a potential subdivision which has not started construction. (R. 12-13).

ComGen responded to these RCRA claims that the claims are too conclusory and that SCCRAP has failed to pled suffient facts as to prove that the provisions of the CCR rule have been violated and that there is an substanital endangerment to living population was not raised. (R. 13).

V. The District Court's Decision and Subsequent Appeal.

On October 31, 2024 the district court granted an order granting the motion to dismiss filed by ComGen. *Id.* SCCRAP filed an appeal to the United States Court of Appeals for the 12th District, asking that the lower courts decision to grant the motion to summary judgement be reversed. (R. 15). The 12th Circuit on December 30, 2024, accepted the appeal and ordered the issues be briefed and argued. *Id.*

SUMMARY OF THE ARGUMENT

I. Issue 1

The District Court for the Middle District of Vandalia correctly held that the Appellant's suit under §505 of the Clean Water Act was not proper since the permit shield was applicable to ComGens discharges under 33 U.S.C. §1342. Specifically, for the fact that permits do not intend to regulate every potential discharge from a point source, no formal request was ever made in either the application or the final permit, and PFOS and PFBS are not regulated substances under the CWA. For those, reasons the decision of the District Court should be upheld.

II. Issue 2

The District Court for the Middle District of Vandalia, is correct in asserting that after the *Loper Bright* decision the rule setforth in the *Piney Run* is not binding precident. The Piney Run decision is in conflict with prior pronouncements by the EPA and with the prior holding of *Atlantic States*. This court is now charged with the factors setforth in Skidmore, which were endorsed by the Supreme Court in *Loper Bright*, to make a new start on creating rules for ambiguous statutes. We ask this court to adopt the test setforth by the Appellee which seeks to resolve the contridictions between prior decisions and return the statutory scheme to its original order.

VI. Issues 3

The District Court for the Middle District of Vandalia correctly held that Appellant did not have proper standing to bring suit in federal court under Article III, Section II of the United States Constitution. Standing doctrine requires that a plaintiff have a concrete and particular injury that is traceable to the defendant and is redressable by some action of the court. The Appellee did not suffer any concrete or particular injury as such an alleged injury is speculative in nature and uncertain to occur imminently. Also, since there is no action the court can take to

redress the supposed injury, SCCRAP does not have an injury that the Court can solve. Thus, the Appellee in this matter lacks proper standing and the claim against ComGen should be dismissed.

VII. Issue 4

The District Court correctly dismissed SCCRAP's claim against ComGen for failing to allege harm against a living population in the complaint. Under Section 6972(a)(1)(B) of the RCRA, a plaintiff may bring a civil suit against an owner or operator of a facility that stores hazardous materials which poses an imminent and substantial endangerment to health or the environment. Though the statute seems to indicate that a plaintiff may bring suit for endangerment to the environment itself, without harm to a living population, the statute is ambiguous and operates against legislative intent and leads to absurd results. Thus, a required standard of the suit is endangerment to a living population and because SCCRAP failed to allege such a fact in its complaint, the suit was properly dismissed.

ARGUMENT

I. Standard of Review

The standard of review for decisions following a district court granting of summary judgment is, generally, *de novo*. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1045 (6th Cir. 1998). Yet, when a district court is required to make findings of fact, the standard of review on the district court's determinations of fact is reviewed based on clear error. *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

II. Issue 1: Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the Clean Water Act?

The Clean Water Act, 33 U.S.C. §1311. Effluent Limitations, states, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by a person shall be unlawful." The main exception to the liability this statute imposes is through the NPDES permit program established by 33 U.S.C. §1342. These permits contain a lengthy and detailed set of conditions and expectations that must be met by the permittee for the exception to apply. *See* 40 U.S.C. §122.41. This provision sets out the permittees' duties and responsibilities applicable to the State program within the federalism system created by §1342 of the Clean Water Act. One of these key responsibilities is the duty to comply with the permit conditions or face expressed and serious penalties for violation of the permit conditions.

Here, the Appellee has complied with all the requirements set forth by the Vandalia DEP in the States' NPDES program and has not committed any violations of the permit or the permit application requirements. Therefore, ComGen's actions are not unpermitted since all discharges are covered by the permit shield under §1342(k) since the Appellee has abided by the scope of the formal application, the CWA does not apply to an infinite number of potential chemical

compounds not considered by the regulating body in during that permit process permitting process for NPDES, and PFOS and PFBS are not regulated substances under the CWA at the time of ComGen's permit renewal.

A. All Discharges By The Appellee are Protected By the Permit Shield Defense.

Permit Shield Defense contained within the Clean Water Act, 33 U.S.C. §1342(k), provides a bar for any enforcement action seeking to state the permit is not strict enough. As the Supreme Court stated in *E.I. Dupont de Nemours & Co. V. Train*, "In short, [§1342(k)] serves the purpose of giving permits finality". 430 U.S. 112, 138 n. 28, (1977). The CWA permit shield provisions state specifically: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 [government enforcement action] and 1365 [citizen suits] with section 1311 [effluent limits] 1312 [water quality based effluent limits]. 33 U.S.C. §1342(k), (brackets ours). If the permit holder complies with these listed sections under its permit they are considered to be within "compliance" under the act.

The holding of *Atlantic States Legal Found. v. Eastman Kodak* recognized that "compliance" was met when the permittee complied with the reporting requirements outlined in the permit application and by following any new permit limitations imposed on pollutants included in such amendments. 12 F.3d 353 at 357, (2d Cir. 1993), as amended (Feb. 3, 1994). Thus, if the permit application requirements and duties are followed by the permittee then according to the EPA's own rules provides "the security of knowing that if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit." 45 Fed. Reg. 33290, 33311 (May 19, 1980). *Atlantic States* recognized that if the permittee was only protected when abiding by "a limited permission for the discharge of identified pollutants" but if liability were to attach to any pollutant that was

not specifically named by the permit would as the court stated, "stand the scheme on its head" *Id*. 12 F.3d 353 at 357. Therefore the application must set a specific scope that details the requirements, duties, and responsibilities that if followed confer the permittees the permit shield's protection designed by Congress and affirmed by the USEPA. *Id*.

This "application-based" approach of detailing the specific details of the permit by the regulatory body is the only "workable" approach, this fact is admitted to by the EPA as cited in *Atlantic States*, " it is impossible to identify and rationally limit every chemical compound or compound in the discharge of the pollutants" *Id*. citing *In Re Ketchikan Pulp Co*., 1998 WL 284964. The EPA has long recognized, "the burden on the permit writers rather than the permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that the permittee may rely on its USEPA-issued permit document to know the extent of its enforceable duties under the appropriate Act." 45. Reg. 333132 (May 19, 1980).

Thus, the duty is not placed on the permittee but rather on the permit writer to specifically include the scope the permit seeks to cover, which does not include all potential chemical discharges but rather covers what the regulatory agency deems appropriate to regulate. The Appellee has abided by all the requirements outlined in both the application process and operation under its permit it is barred from being the target of any litigation through citizen suits according to 33 U.S.C. 1342(k).

B. NPDES Permits Do Not Seek to Regulate All Potential Chemical Discharges.

Clean Water Act, at 33 U.S.C. §1362, defines the term "pollutant" as "dredged spoil, solid waste…garbage, sewage sludge…chemical wastes, biological materials…radioactive materials, heat…rock, sand, cellar dirt, and industrial, municipal, and agricultural waste." This

statement is quite broad, but even the EPA and the Courts have recognized that, "it is impossible to identify and rationally limit every chemical or compound present in the discharge of pollutants" and " Consequently, the Agency has determined that the goals of the CWA may be more effectively achieved by focusing on the chief pollutants and waste streams established in effluent guidelines and disclosed by permittees in their permit applications" *In Re Ketchikan Pulp Co.*, 1998 WL 284964, at *9.

The Appellant argues that any presence of substances not requested in the contents of the permit application or that a failure to include a reference to the presence of a compound, that the permit application does not require the permittee to monitor, measure, or report, constitutes an immediate violation of the permit. This assertion is counter to the long-held view of the USEPA and would mean all discharges are in violation, making the permit shield effectively useless. This problem was quickly recognized by the Deputy Assistant Administrator of Water Enforcement Jeffery Miller, in 1976, where he stated, "Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit." *Atlantic States*, 12 F.3d 353, 357. If any such discharge constitutes a violation of the permit it would make such permits unusable and would fail to comply with its purpose in excluding the permittee from such litigation. This is not the focus nor the function of the NPDES permits or the State permit system.

Section 1342(a)(2) states, " The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." The duty of determining the scope of the permit is entirely dependent on the

formal requirements and requests of the regulatory authority. How then does the authority make such determinations as to what it deems appropriate to include in permit and application duties and guidelines?

The two main methods by which the regulatory authority determines the scope of their permit are through Technology-Based Effluent Limitations and Water Quality Effluent Limitations, both of which are outlined in §1311(b). These standards seek to enforce the highest level of applicable effluent reduction for the pollutants upon which those limitations seek to reduce targeted pollutants upon which the regulatory body "reasonably anticipates the discharge of pollutants by the permittee that have the reasonable potential to cause or contribute to an excursion above any state water criterion" *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), as amended (Feb. 3, 1994), citing *Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors*, Regions I–X, at 2–3 (Aug. 14, 1992).

This leads to the conclusion that the scope of the permit is based on the terms and conditions set forth by the regulatory authority and bases its scope on statutorily based limitations of pollutants the agency seeks to regulate when presenting those regulations in the permit application process. Two lists of pollutants are provided by federal regulation, Conventional pollutants, found in 40 CFR §401.16, and Toxic pollutants, found in 33 U.S.C. §1317(a), 1362(13), within this category the EPA has a list of 126 priority pollutants for which tests methods and regulatory limits. These industry-based standards are used to inform the permit writer as to what to potentially monitor during the application process. Under either of these provisions, neither PFOS nor PFBS can be found, nor is there any evidence within the record that

such compound was required to be monitored and reported to VDEQ through the formal application process.

C. PFOS and PFBS Were Not Considered a Regulated Pollutant Under CWA.

At the time of the permit approval of the NPDES, in this case, the VPDES permit, no government regulation was prescribed by the EPA on the monitoring and elimination of PFAS was implemented, thus unless the VDEQ required in its formal duty was placed on ComGen to monitor or report any such compound since it was not deemed a conventional or toxic pollutant at the time of filing.

It was not until after the permit was approved and put in place by Vandalia DEQ in 2020 that the EPA, in 2021, began its initiative to regulate PFAS under the Clean Water Act Through NPDES permits. In October of 2021, the EPA presented the "*EPA's PFAS Strategic Roadmap – 2021-2024*". In this *Roadmap*, the EPA detailed its future intent to research and regulate PFAS and recognized its power to include PFAS as a regulated substance under the CWA but has failed to make such designations of PFAS as a toxic or hazardous pollutant. The *Roadmap* states that the EPA intends to begin to implement monitoring requirements upon NPDES permit holders, but this intention which sought to mandate the monitoring of such compounds was not an official policy statement until 2021, after the monitoring requirements of the permit application for ComGen had been set by the VDEQ in 2020. *Id*. at p.11-14 and (R. 4).

In December 2022 a guidance memorandum was published for States that wish to regulate PFAS in their own NPDES permits. *Id*. and *Memo on Addressing PFAS in Clean Water Act Permitting*, Fox, Radhika, Assistant Administrator, (Dec. 5, 2022) Within the memo the administrator noted that this memo is a "recommendation" while "The Office of Waterworks works to revise Effluent Limitation Guidelines (ELGs) and develop water quality criteria to

support technology-based and water quality-based effluent limits for PFAS in NPDES permits," *Id*. at p.1. No standards were produced at the time of the permit application; thus the permit writers placed no specific formal requirements requesting the monitoring of a substance not yet being sought to be monitored. (R. 14).

This fact is indicative that any regulatory action for PFAS is dependent on the individual permit requirements set forth by the agency. Vandalia DEQ set forth an application process and issued a final permit that contained a specific scope to which ComGen complied completely. *Id.* At no point did the governing authority seek to institute regulation of such particles in the formal application process for PFAS which have not been included as a regulated substance under any statute of the CWA. The informal request made by the regulator to an employee, who according to 33 U.S.C. §1318 is not an owner or operator, cannot validly attest to the exact nature of discharges of the facility. (R. 4). Furthermore, according to §1318, "[The Administrator or his authorized representative] shall have a right to entry to, upon or through any premises… or in which any records required to be maintained under clause (A)." Nowhere within the record was a request for any such reports to the owner or operator - only an informal email to a non-officer employee - that formally requested materials, data, and monitoring of the PFAS, which was well within the rights of the department representative. *Id*.

This case is highly distinguishable from the issue presented in *Piney Run Preservation Association v. Count Commissioners of Carrol County Maryland*, centrally on the fact that the pollutant, heat, that was alleged to have violated the County's NPDES permit is and has been a recognized pollutant under control under the Clean Water Act. The district court construed the plant's NPDES permit as not prohibiting the discharge of heat. 268 F.3d 255, 259 (4th Cir. 2001). The issue in *Piney Run* focused on heat pollution, which is a pollutant that is regulated by 33

U.S.C. 1311, and whether it would constitute a violation when it is not reported despite intentionally being removed from permit requirements. *Id*. This is quite different than a nonregulated chemical substance not being included in a state-implemented NPDES permit after a formal permit application process. (R. 14). For that reason, the rules instituted in *Piney Run* focused on violations surrounding a regulated pollutant cannot apply to the issue involving the exclusion of a nonregulated substance after compliance with the formal permit process.

The District Court's factual conclusion that PFOS and PFBS are not regulated substances should be upheld since the conclusions are supported by the proper interpretation of the regulation and memorandum and prior statements issued by the EPA. Thus the courts' assertions of fact are not clearly erroneous and the interpretations of law fall within the prior interpretations of the ambiguous statutes under de novo review.

III. Issue 2: Whether, in deciding Issue 1, the Court owes deference to its own decision adopting Piney Run (and its reasoning) and to the EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in Loper Bright.

In *Loper Bright Enterprises v. Raimondo,* the United States Supreme Court stated, "Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." 603 U.S. 369, 412 (2024). *Chevron v. Natural Resources Defenses Council*, decided in 1984, was a case which until the *Loper Bright* opinion was the seminal case where the Supreme Court laid out a two-part test for guiding judges when facing issues of statutory interpretation for administrative regulations. The two-part test required judges to make two determinations, first, is the statute being interpreted ambiguous, and, second, is the agency's interpretation of the statute reasonable. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). This rule, according to the United States

Supreme Court is contrary to the powers granted to the Court under Article III of the U.S. Constitution, by forcing an abdication of the Court's "judicial power" *Id*. 603 U.S. 369, 414.

Judges should now not rely on Chevron's test as a guiding means in determining whether or not an interpretation is proper. *Id*. at 612. More emphasis has now been placed on the role of the judge in making determinations as to whether an agency's interpretation of an ambiguous statute is not only reasonable but also valid and persuasive. As the court states, "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Loper Bright*, 603 U.S. 369, 388 citing *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). Though the Agencies may well present their knowledge with much expertise, *Loper Bright* has placed the power of reasonable interpretation not in the hands of just one party, but rather in the hands of the court.

Before the court is a novelle issue where this body must decide between two options: maintain this court precedent on decisions it faces relying on the *Chevron* test, which the Supreme Court has stated to be insufficient, or to approach all matters with the fullness of the court's power to reason, hear arguments presented by both parties, give each the same weight, and decide based on the persuasiveness of the arguments, reason, and come to the best conclusion of law. We ask this court to choose the latter.

The holding of *Piney Run*, which relied on the Chevron analysis in determining the scope of the NPDES permits mischaracterizes the holding of *Atlantic States* and rather places the burden on the permittee to conclude what it believes the agency thinks is "reasonably anticipated".

A. The Holdings of *Atlantic States* and *Piney Run* Conflict on the Scope of NPDES Permits

The Second Circuit, in deciding *Atlantic States* cites directly to the EPA director's memorandum, holding that the scope of the permit is based on the "reasonable anticipation" of the permit writers to determine the scope of mandatory discharge disclosures and not the permittee. As stated here:

> "The proper interpretation of the regulations is that developing water quality-based limitations is a step-by-step process.... [W]ater quality-based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion" 12 F.3d 353, 358 (2d Cir. 1993) citing *Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I–X*, at 2–3 (Aug. 14, 1992).

The EPA's regulatory guidance of 1980, of the same year as cited for *Atlantic States* opinion stated, " the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit." and " if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will [not] be enforced against" 45 Fed. Reg. 33312 (May 19, 1980). It was the EPAs stance at the time of the decision of *Atlantic States* that the duties and responsibilities of the permit holder were detailed in the application. The duty was placed on the permitter to "reasonably anticipate" based on their criterion on what substances they seek to regulate, not the permittee.

Piney Run has resulted in what the *Atlantic States* decision referred to as "stand the scheme on its head" *Id.* 12 F.3d 353 at 357. The *Piney Run* decision has inverted the order by which the regulation proceeds in comparison to the holding of *Atlantic States*. "[P]ermit shield defense is relatively straightforward. An NPDES permit holder is shielded from CWA liability for discharges in compliance with its permit, and is liable for any discharges not in compliance

with its permit. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty*., 268 F.3d 255, 269 (4th Cir. 2001). Yet, the definitions of compliance are drastically different between the two decisions. *Atlantic States* adopts a compliance model that they refer to as "application-based" which places the burden on the permit writers to outline their regulations on what the permit writer "reasonably anticipates" and places in the permit application, but *Piney Run* holding states that a permittee compliance is not satisfied by following the express directives of the permit, but that "compliance is a broader concept than merely obeying the express restrictions set forth on the face of its NPDES permit." *Id.*

Piney Run relies on the EPA's reasoning from its formal adjudication *In Re: Ketchikan Pulp*, 1998 WL 284964. *Ketchikan* outlines the EPA's process of NPDES permitting. *Ketchikan Pulp* requested a permit, the application was provided, the application stated what was required to be reported, but specifically contained a catchall phrase to give "a description of 'all operations contributing wastewater to the effluent.'" *Id.* at p.4. *Piney Run* fails to note that the EPA recognized in *Ketchikan* the principle of "application-based" compliance as held by *Atlantic States* where the scope of the disclosures is dependent on the scope of the questioning in the application. As mentioned previously, the EPA has long recognized that if the writer of the permit application fails to include what the writer "reasonably anticipates" to be present, the permittee is not liable for any nondisclosure if not sought out in the application process. *Id*. Fed. Reg. 33312.

The rule outlined in the *Piney Run* decision ignores the burden placed on the permit application writer, as recognized by the EPA, who set reporting requirements based on technological and water quality standards that they believe to be present in a specific industry effluent discharge within the formal applications duties. *Piney Run* states, "[a]ll discharges

adequately disclosed to the permitting authority are within the scope of the permits protection." *Id*. 268 F.3d 255, 269. This rule fails to recognize that adequacy of disclosure is not a subjective standard, but rather an objective standard determined by compliance with the agency's requested reporting in the formal application by use of technological and water-based standards. Requiring disclosure of "all discharges", without some quantifying metric or standard for the permittee to know what should or should not be included in its reports, would place the permit holder's status of compliance at the whim of the governing body. This would allow the governing authority to change the scope of the permits' duties and retroactively deem the permit holder to be non-compliant for substances it set no requirements upon.

For this reason, *Piney Run* cannot be the appropriate test because its holding does not recognize that the permittee is only responsible for complying with the scope as requested in the permit application and the contents of its final permit. The rule within *Atlantic State* is more precise and focuses on the contents of the formal application requirements and emphasizes the fact that the goal of the formal application is to target the contemplated pollutants it "reasonably anticipates" and thus avoid holding permittees liable for retroactive noncompliance. *Id*. 12 F.3d 353, 357.

B. Potential for New Analysis Under Skidmore Factors

"The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co*., 323 U.S. 134, 140(1944). In *Loper Bright*, these factors have been recommended by the Supreme Court to guide the analysis of statutory interpretation.

Since the Supreme Court has not addressed the specific issue of statutory interpretation this court faces, it is well within this court's authority to make a fresh start in its analysis of the language of §1311 and §1342(k) to determine the extent to which the permit shield defense applies to discharges for pollutants not regulated by the permit. A model rule that would align with the reasoning set forth in *Atlantic States* and avoid the inverted regulatory scheme of *Piney Run* could be articulated as follows: First, did the permittee abide by all the requirements and duties outlined in the formal application as written by the permitting agency? Second, did the permittee abide by all of the requirements and duties outlined in the finalized permit and any lawful alterations to said permit? Third, did the permittee, by intent or omission, not include data on known regulated substances under the CWA or of substances specifically requested in the formal application?

This rule maintains the permitting authority's ability to construct their permits to include substances it wishes to regulate, regardless of being a listed or unlisted pollutant, but also avoids the permittee from falling out of compliance over informal inquiries, discharges of unregulated substances, and avoids retroactive liability. If the permittee follows all officially mandated requirements in the formal process, maintains its duties while in the duration of its final permit and any legal amendments to that permit, and the permittee within its due diligence reports all compounds it knows are pollutants under the CWA and notified the agency of their potential presence. If these requirements are met, the court should recognize this as compliance under the CWA.

An analysis of this rule under the *Skidmore* factors indicates a strong likelihood that this rule is proper and should be controlling for all decisions concerning the permit shield doctrine. This test meets the court's requirements for “thoroughness of consideration” under *Skidmore*, this

test upholds the "application-based" standard set out in the *Atlantic States* decision but also recognizes a duty upon the permittee to be forthcoming of what the permittee knows the EPA officially recognizes to be a pollutant under the CWA by reporting their existence, regardless of its specific inclusion in the application.

The "validity of the reasoning" factor of *Skidmore* is met in the test. It ensures that the purpose of the CWA is upheld, but simultaneously defends permit holders from being the subject of litigation by way of citizen suits, that wish to bypass the permit shield defense, based on a perceived lack of "strictness" by the permitting authority. Furthermore, it places the agencies charged with enforcing such regulations to be thorough and inclusive during the application process. This test prevents permittees from being the subject of retroactive enforcement of items not listed within the scope of the application or finalized permit. This test ensures that the scheme of regulation starts in its proper place with agencies placing regulations through the notice and comment requirements required by the Administrative Procedure Act, 5 U.S.C. §553.

Lastly, this test's "consistency with earlier and later pronouncements." As discussed earlier, this test seeks to remedy an inconsistency across the jurisprudence. The *Piney Run* decisions application has resulted in a clear inversion of the regulatory scheme as prescribed in the court's earlier pronouncements, specifically *Atlantic State*s. This test will provide much-needed clarification of the court's original stance on the permit shields scope and return the duty to the agency to ensure that their permits detail the scope which they deem appropriate to achieve the regulation's purpose.

We ask this court when taking into consideration its ability to implement precedent after the overturning of *Chevron* to look to the reasoning of *Atlantic States* and its "application-based" interpretation of the permit shield defense, apply the aforementioned test, and find that

Commonwealth Generating Company's actions fall well within the scope its permit and has abided by its duties as recognized by the district court.

V. Issue 3: SCCRAP Does Not Have Standing to Challenge ComGen's Coal Ash Closure Plan for the Little Green Run Impoundment Because There Is No Redressable Injury.

Article III Section II of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." This limit on jurisdictional power has been characterized as an "irreducible constitutional minimum" otherwise known as "standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112, S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). The doctrine of standing ensures that federal courts preside over disputes of the "justiciable sort" which are "appropriately resolved through the judicial process." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)). Moreover, the doctrine is so fundamental that an issue of standing may be raised at any time in the litigation process, even by the court on its own motion, and if found lacking, a federal court must dismiss the case. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

Standing requires a plaintiff to have a concrete and particular injury that is caused by or traceable to the challenged actions of the defendant and said injury must be redressable by the relief sought by plaintiff and provided by the court. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000). Further, the injury must be actual or imminent and cannot be hypothetical or merely conjecture; the injury must be fairly traceable to the defendant's actions; and, it must be likely, rather than speculative, that the injury will be redressed by a favorable decision. *Id.*

Historically, environmental and ecologically friendly organizations have invited greater scrutiny as to questions of whether they maintain proper standing. Normally, by their very

nature, these organizations tend to vindicate the rights of animals or the environment and not people with actual or imminent injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *See also Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). When organizations bring suit on behalf of someone else, as opposed to a person bringing suit for their own injury, "standing is not precluded, but it is 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting*Allen v. Wright*, 468 U.S. 737, 758, 104 S. Ct. 3315, 3328, 82 L. Ed. 2d 556 (1984)). SCCRAP, as an environmental organization bringing suit on behalf of its members, fails to meet this more difficult burden in the instant case and the claim should be dismissed for lack of standing.

A. SCCRAP Does Not Have Standing Because the Organization Has Not Suffered a Concrete or Particular Injury.

Though the lower court was correct to dismiss the case for lack of standing, the lower court's reasoning in deciding the issue was incomplete. In addition to SCCRAP's supposed injury being incapable of being redressed by the court, said injury is actually no injury at all and is far too speculative and hypothetical.

SCCRAP is an organization bringing this suit on behalf of its members so, therefore, SCCRAP is subject to the requirements for an organization to have proper standing before a federal court. The requirements for organization standing are: its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 181. (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). Appellee in this matter cedes the second and third requirements for organizational standing. SCCRAP is a "national

environmental and public interest organization" that utilizes the CWP and the RCRA "to hold owners and operators of coal ash impoundments accountable[,]" (R. 8), so the interests of the suit are directly in line with the goals of the organization. Further, there is nothing to indicate that any individual member is required under the claims brought nor the relief sought. Under the first requirement, however, organizational standing requires a further analysis into traditional standing principles applicable to individuals.

As stated above, traditional standing requires an injury that is concrete and particularized to a plaintiff, that is actual or imminent and is not merely hypothetical nor conjectural. *Id.* at 180. Additionally, in order for the "injury-in-fact" requirement to be satisfied, the party seeking review must himself be amongst the injured and such injury must be outside any special cognizable interest. *Lujan*, 504 U.S. at 563. A member of SCCRAP must, therefore, have been harmed or about to be harmed by the actions of ComGen in order for SCCRAP to have standing to sue. In the instant case, for the RCRA action seeking to enjoin the closing operation at Little Green Run, no such injury presently exists nor is it imminent. For instance, any contamination of ground water caused by ComGen in the area surrounding the Little Green Run Impoundment has seeped downgradient 1.5 miles from the Impoundment. (R. 9). Even assuming that SCCRAP's human health expert was correct in finding that the groundwater in that area is no longer safe for drinking water, (R. 9), no one lives in the area to actually drink the water.

Further, while the Supreme Court has recognized aesthetic and environmental injuries that satisfy the requirements under standing doctrine, no such injury is present in the instant case. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636. Any aesthetic injury is only felt by those who use the affected environmental area and, as a result of the injury, the

recreational value or use of the area will be lessened. *Id.* at 735. Here, there is no indication that any of the members of SCCRAP utilized the area impacted by the seepage of CCRs from the Green Run Impoundment in the area of the proposed development. Thus, the recreational value of the affected proposed development with respect to SCCRAP cannot be lessened as a result of the seepage or any action by ComGen, and so there is no injury within that area for SCCRAP to complain about.

Further, while ComGen has released chemicals into the Vandalia River from Outlet 001, there is no evidence that any contaminants from Little Green Run have reached the Vandalia River where members of SCCRAP recreate, fish, and own property. (R. 10). In fact, there is no evidence to suggest that contaminants from the Impoundment will reach the Vandalia River within even the next 5 years.(R. 8) Thus, where the chemicals released from the Vandalia Generating Station may give rise to standing under the CWA, the contaminants from Little Green Run do not contribute to any actual injury against SCCRAP or any of its members. Additionally, given that there is no indication of when the contaminants from the Impoundment will reach the river, if at all, the injury is both not imminent and purely speculative. Thus, with respect to the environmental area on the Vandalia River, SCCRAP's action pursuant to the RCRA does not have an aesthetic injury, so, therefore, SCCRAP has suffered no injury and does not have standing to bring suit in a federal court for this claim.

In reality, the only indication of any harm or injury caused by ComGen would be to a housing developer who is considering building a large subdivision within a mile downgradient of the Impoundment. (R. 9). There, the housing development would be within the area contaminated by the seepage of CCRs into the surrounding groundwater. With respect to the housing development, the only members of SCCRAP that might be harmed are those considering

moving into the housing development upon its completion, however, it is not clear that the housing development will be constructed and, even if it was built, the project would not be finished until 2031; 6 years from now. (R. 9). Given the speculative nature of the housing development, the time between now and its completion, and that the SCCRAP members are only second guessing, rather than committing to pulling out of the development, then, any injury to a SCCRAP member is speculative at best and wholly nonexistent at worst.

Thus, no member of SCCRAP has individual standing to bring suit and, consequently, neither does SCCRAP.

B. Alternatively, SCCRAP Does Not Have Standing Because Their Injury is Incapable of Being Redressed by The Court.

As stated above, redressability requires a showing that it is likely, as opposed to merely speculative, that an injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. This requirement ensures that a remedy for an injury is not better handled by the political branches and that "federal courts exercise 'their proper function in a limited and separated government'". *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 423, 141 S. Ct. 2190, 2204, 210 L. Ed. 2d 568 (2021) (citing Roberts, *Article III Limits on Statutory Standing*, 42 Duke L. J. 1219, 1224 (1993)) Further, a plaintiff must show standing for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000). In the instant case, then, each form of relief sought by SCCRAP must be individually analyzed and determined to be capable of redressing the supposed injury sustained by the organization. The relief sought by SCCRAP is incapable of redressing any injury sustained by the organization and, therefore, SCCRAP lacks standing to bring suit in federal court.

SCCRAP, pursuant to its claim under the RCRA, challenged ComGen's Closure Plan as inadequate and wishes to enjoin the closure of the Little Green Run Impoundment. (R. 12). ComGen began closure of the Impoundment in 2019 and established the first operational groundwater monitoring wells by the end of 2021. (R. 7). The Impoundment was likely leaching for at least 5 to 10 years before the first monitoring report according to environmental and industry groups. (R. 8). Then, according to the environmental and industry groups, the Impoundment was leaching contaminants before the closure activities had started. If the Impoundment was leaching prior to the Closure Plan and it is also leaching after the Closure Plan's commencement, then enjoining ComGen's course of action and effectively preventing ComGen from going through with the Closure Plan will not prevent further leaching from the Impoundment, nor prevent any contaminants from reaching the Vandalia River or other areas of the environment.

Thus, given the requested relief, the injury is not redressable and SCCRAP lack standing to sue.

IV. Issue 4: SCCRAP Cannot Pursue an RCRA Imminent and Substantial Endangerment Claim Related to the Little Green Run Impoundment When There is No Allegation of Substantial Endangerment to a Living Population

Under the RCRA, a citizen may bring a suit against:

> any person. . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment

42 U.S.C. §6972(a)(1)(B).

Pursuant to this provision of the RCRA, SCCRAP brought an action against ComGen, as an owner of a storage facility that is contributing to the present handling of Coal Ash, for potentially threatening an imminent and substantial endangerment to the environment. Further, ComGen cedes these facts: that it is an owner of a storage facility and is contributing to the storage of solid, hazardous waste, which, if improperly stored, may present an imminent and substantial endangerment to health or the environment.

This provision, however, further contemplates—as correctly pointed out by the trial court—a necessary element of endangerment to some living population. Also, as stated in *Ashcroft v. Iqbal*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state 'a claim to relief that is plausible on its face.'" and "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). The complaint, however, does not mention anything about human health, nor does the complaint allege any facts about endangerment to a living population. Rather the complaint merely alleges an imminent and substantial endangerment to the environment itself. Since the trial court was correct in its interpretation that the RCRA requires that there be an endangerment to a living population, then without such an allegation in the complaint the pleadings fail to satisfy the standard set out in *Twombly* and *Iqbal*. SCCRAP, therefore, has not stated a cause of action for which relief can be granted, and the suit was properly dismissed by the lower court.

A. SCCRAP Has Not Properly Pled a Cause of Action Because The RCRA Contemplates The Necessity For Endangerment to a Living Population

As noted above in the citizens suit provision of the RCRA, any person may bring a suit for the "imminent and substantial endangerment to health or the environment." 42 U.S.C. §6972. To bring a suit for the imminent and substantial endangerment of human health necessarily implies an endangerment to a living population. The same, though not implied as a matter of necessity, is true for a claim of endangerment to the environment.

As noted in *Courtland Company, Inc. v. Union Carbide Corporation*, "the 'mere presence' of contaminants, even at high concentrations, is 'alone not enough to constitute an imminent and substantial endangerment' to human health or *the environment*." No. 2:18-CV-01230, 2023 WL 6331069 (S.D.W. Va. Sept. 28, 2023) (citing *Me. People's All. & NRDC v. Mallinckrodt, Inc.*, 471 F. 3d 277, 282 (1st Cir. 2006)) (emphasis added). If, even at high concentrations, the mere presence of contaminants is not enough to constitute an imminent and substantial endangerment, then there must be more to constitute such an endangerment. This something "more," can be found by looking to the statute and the definitions of the words therein.

The courts have defined "imminent and substantial endangerment" by taking the normal meaning of each of the words "imminent," "substantial," and "endangerment." The term "endangerment," as it used by the court, means "a threatened or potential harm." *Union*, 2023 WL 6331069, *98 (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F. 3d 993, 1014 (11th Cir. 2004)) Endangerment is "substantial" if it serious and "there is a reasonable cause for concern that someone or something may be exposed to risk of harm. . . ." and the risk of harm is not "remote in time, completely speculative in nature, or de minimis in degree." *Id.* (quoting *Crandall v. City and Cnty. Of Denver Co.*, 594 F.3d 1231, 1238 (10th Cir. 2010); *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007); *Little Hocking Water Ass'n. v.*

E.I. Du Pont Nemours & Co., 91 F. Supp. 3d 940, 967 (S.D. Ohio 2015)). Finally, an endangerment is "imminent" if it "threatens to occur immediately." *Id.* (*Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996)). Thus, utilizing the definitions given, "imminent and substantial endangerment" can be defined as a threatened or potential harm that is serious and certain to occur immediately.

If, under this definition, the mere presence—even in high concentrations—of contaminants is not a substantial or imminent endangerment to the environment, then it follows logically that there must be some required threat to a living population. Such a conclusion is evidenced in that, without some population to experience the ill effects of the contaminants, the seriousness and harm requirements under the definitions of "substantial" and "endangerment," respectively, can never be met. Take, as an example, an impoundment in a remote, arid desert where no organisms live or use the surrounding environment. If the impoundment were to leak, what harm could there possibly be? The "mere presence", as previously mentioned, is a non-factor—even in high concentrations—and while the leakage would certainly have an effect on the environment such as mixing with the sand, soil, and what little groundwater is present, there is no doubt that the remoteness of the environment places the impoundment in the ideal location so that nothing relies on the affected resources. Any claim for endangerment against the environment itself in this hypothetical case without regard to any living population would necessarily fail because the concentration of contaminants would not matter and there is nothing to be harmed as required by the definition of "endangerment."

Thus, the civil suit brought by SCCRAP under the RCRA requires an allegation of harm to some living population as otherwise there is no substantial endangerment as required by

the statute. The complaint did not allege such a fact; therefore, the case was properly dismissed by the trial court below, and the decision should be affirmed.

B. The 10th and 3rd Circuits' Interpretations of The RCRA Are Incorrect Because They Do Not Provide For Harm as an Element of The Cause of Action.

The Third and Tenth Circuits have found that a civil suit brought under the RCRA can be sustained by alleging imminent and substantial endangerment to the environment itself without any allegation of harm to a living population. *See Interfaith Community Organization v. Homeywell Intern., Inc.*, 399 F. 3d 248, 259 (3rd Cir. 2005); *See also Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007). In *Burlington*, the Tenth Circuit found that the district court erred upon finding that an essential element of a claim brought under the RCRA was a threat to a living population. 505 F. 3d at 1021. In its reasoning, the court determined that the language of the pertinent statute precluded any such conclusion. *Id.* Specifically, the court pointed to the use of the disjunctive "or" used in "[] which may present an imminent and substantial endangerment to health *or* the environment." 42 U.S.C. §6972 (emphasis added). The court stated, "[The RCRA's] phrasing in the disjunctive indicates proof of harm to a living population is unnecessary to succeed on the merits." *Burlington*, 505 F. 3d at 1021. With all due respect to the Tenth Circuit, that court's interpretation is flawed, since, otherwise, the reading of the statute would be both construed against congressional intent and would lead to absurd results.

In passing the RCRA, Congress intended to "regulate land disposal of discarded materials and hazardous waste." *Interfaith,* 399 F. 3d at 261 (quoting H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241). It was the intent of Congress, then, to regulate land disposal methods, but it was not its intent to impose unlimited and unavoidable liability. In *Tri-Realty Co. v. Ursinus Coll.*, the district court reflected such

sentiments. 124 F. Supp. 3d 418, 456 (E.D. Pa. 2015). Specifically, the court examined the language of the *Interfaith* opinion and the two possible results therefrom; either the language created a strict *per se* violation of the RCRA upon the presence of any contaminants or hazardous material, or it created a looser interpretation in which a violation occurs only upon an imminent and substantial endangerment "to the environment in and of itself where contamination threatens the ability of a non-living element of the environment to serve some potential function in the local ecosystem." *Id.* The court determined that the latter interpretation was appropriate because the scope of the claim created under the RCRA is for "imminent and *substantial* endangerment" to the environment and that to allow for a *per se* violation would render the word "substantial" superfluous. *Id.*(quoting 42 U.S.C. § 6972(a)(1)(B))(emphasis added). Also, the court found that such a strict interpretation would be in violation of Supreme Court precedence which found that the RCRA would be "'a wholly irrational mechanism' if it were intended to address the most minor environmental problems." *Id.* (quoting *Meghrig v. KFC W., Inc*., 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996)). Thus, it was not Congress's intention to impose unavoidable liability on the owners and operators of hazardous waste storage facilities.

As discussed extensively above, the statute contemplates endangerment, or harm, to the environment. If a living population is not required within the standard of the RCRA, then a remote environment, as previously imagined in the hypothetical above, that has no living organisms—including trees, grass, bacteria, and more—could also be included within the scope of the statute. That environment, however, would be the ideal location to deposit contaminants that might prove harmful to a living population, and if such an environment would be inappropriate, then all environments would be inappropriate, and an owner of an impoundment would not be able to store their contaminants anywhere without risk of being sued. Essentially,

such an owner of an impoundment would be unable to avoid potential liability. As discussed before, the *Tri-Realty* case makes clear that it was not the intention of Congress to impose unavoidable liability. Surely then, the avoidance of such an absurd result requires a threat to a living population within the reading and understanding of the statute.

Thus, a threat to a living population is a standard required by the RCRA. SCCRAP, in its complaint, did not allege such a standard so the granting of the motion to dismiss by the trial court below should be affirmed.

CONCLUSION

For all the above signed reasons we ask this court to uphold the decision to grant summary judgement in favor of the Appellee by the District Court for the Middle District of Vandalia.

Respectfully Submitted,

Team No. 7
Counsels for Commonwealth Energy

CERTIFICATE OF COMPLIANCE

Emailed separately from the brief in compliance with the *Official Rule* III.C.8.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Plaintiff-Appellee Commonwealth Energy 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, 2021.

Respectfully submitted,

Team No. 7