IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT
C.A. No. 22-0682

Stop Coal Combustion Residual Ash Ponds,	)	
	)	
Appellant,	)	
	)	
-v.-	)	C.A. No. 24-0682
	)	
Commonwealth Generating Company,	)	
	)	
	)	
Appellee.	)	

On appeal from a U.S. District Court order from the Middle District of Vandalia.

BRIEF FOR APPELLEE, COMMONWEALTH GENERATING COMPANY

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Jurisdictional Statement

This case challenges a final order from the Middle District of Vandalia, dismissing the claims brought to the district court under 28. U.S.C. § 1331. The Clean Water Act and the Resource Conservation and Recovery Act are both federal statutes which each claim is based upon. On October 31, 2024, the district court dismissed each claim and Stop Coal Combustion Residual Ash Ponds ("SCCRAP") timely appealed on November 10, 2024. The twelfth circuit has jurisdiction over this appeal under 28 U.S.C. § 1291.

Statement of the Issues Presented

Four questions are 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; and

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

Statement of the Case

Commonwealth Generating Company ("ComGen") is a subsidiary of Commonwealth Energy, a multistate electric utility holding company that provides affordable electricity in the state of Vandalia for over a century. (R. at 3.) The Vandalia Generating Station is a coal-fired electric generating plant built in 1965, owned, and operated by ComGen. (R. at 4.) As part of the

company's "Building a Green Tomorrow" initiative, the station is scheduled for closure in 2027 to transition to renewable solar and wind facilities. (R. at 4.) Currently, the Vandalia Generating Station operates under a valid Vandalia Pollutant Discharge Elimination System ("VPDES") permit, which was issued by the Vandalia Department of Environmental Protection ("VDEP") and authorizes the discharges from the station's three outfalls. (R. at 4.) The permit regulates a variety of pollutants but does not set limiting or monitoring requirements for PFOS or PFBS. (R. at 4.) The permit is set to expire in 2025. (R. at 4.) Before issuing the permit, VDEP informally asked in an e-mail about the potential presence of PFOS and PFBS in the outlets' discharges. (R. at 4.) An employee of ComGen replied that there was no known presence of these substances, and no further action was taken by VDEP, the permitting authority. (R. at 4.)

Throughout its operation, the Vandalia Generating Station has disposed of coal combustion residuals ("CCRs") – byproducts of coal combustion, including fly ash, bottom ash, and other materials – at the Little Green Run Impoundment. (R. at 5.) The Impoundment covers approximately 71 acres and is adjacent to the Vandalia River. (R. at 5.) It holds around 38.7 million cubic yards of CCRs and waste material. (R. at 5.) In compliance with the federal Environmental Protection Agency ("EPA"), CCR Rule, and Vandalia's own coal ash permitting program allowed by the Water Infrastructure Improvements for the Nation Act ("WIIN Act"), ComGen has begun a closure-in-place plan for the Little Green Run Impoundment. (R. at 5.) They invested approximately $50 million in the closure process, including the installation of groundwater monitoring wells. (R. at 7) Upon issuance of a Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment (the "Closure Permit"), ComGen detected elevated levels of arsenic and cadmium in downgradient wells. (R. at 8.) However, there is no evidence that these substances have migrated to the Vandalia River or any public drinking water

source—nor will it in the next five years—and no one uses groundwater in the affected areas for consumption. (R. at 8.)

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is an environmental advocacy group that conducted independent testing and found low levels of PFOS and PFBS in the mixing zone of Outlet 001. (R. at 9.) These tests detected that the PFOS were appearing in concentrations of 6 ppt and PFBS were in concentrations of 10ppt. (R. at 9.) SCCRAP allege that environmental impacts associated with the Little Green Run Impoundment and the discharges from the generating station diminish their use and enjoyment of the Vandalia River where SCCRAP members recreate, fish and own property. (R. at 10.) Additionally, SCCRAP is concerned about a housing developer possibly building a large subdivision within a mile downgradient of the impoundment and using well water as the primary drinking water source for the development. (R. at 9.) Even if the development plans were to materialize, the development would not be completed until at least 2031. (R. at 9.) SCCRAP filed a citizen suit against ComGen in the United States District Court for the Middle District of Vandalia on September 3, 2024, alleging violations under the Clean Water Act ("CWA") as well as the Resource Conservation and Recovery Act ("RCRA"). (R. at 12.)

The first claim is a violation of the CWA for the alleged unpermitted discharge of PFOS and PFBS that were not within the reasonable contemplation of the permitting authority. (R. at 12.) SCCRAP also alleges that ComGen lied to the VDEP director about the existence of such pollutants before the VPDES permit was issued. (R. at 12.) Second, SCCRAP alleges that the closure plan for the Little Green Run Impoundment fails to satisfy the CCR Rule's standard to eliminate free liquids prior to capping in place and is therefore inadequate under the RCRA. (R. at 12.) Finally, SCCRAP alleges that the Little Green Run Impoundment presents an imminent

and substantial endangerment to the environment itself because of the arsenic and cadmium present at its downgradient wells. (R. at 12.).

The district court dismissed SCCRAP's claims in their entirety on October 31, 2024. (R. at 13.) First, the court rejected the CWA claim by holding that ComGen's VPDES permit shielded it from liability, following the reasoning in *Atlantic States Legal Foundation v. Eastman Kodak Co.*, rather than *Piney Run Preservation Ass'n v. County Commissioner*s because PFOS and PFBS do not have disclosure requirements, and the permit shield was applicable. (R. at 14.) The court also dismissed the RCRA challenge to the closure plan for the Little Green Run Impoundment because SCCRAP lacked standing due to their alleged injuries being attributed to historical contamination, rather than the closure itself. (R. at 14.) Finally, the court dismissed the imminent and substantial endangerment claim, holding that the RCRA does not support claims based only on environmental harm without a threat to human health or living organisms. (R. at 14.)

SCCRAP now brings an appeal to the United States Court of Appeals for the 12th Circuit, seeking reversal of the district court's dismissal. (R. at 14.)

Summary of the Argument

The Court must affirm the district court's grant of ComGen's motion to dismiss in its entirety because PFOS and PFBS are not pollutants that are specifically inquired about in the formal permit application, there were no disclosure requirements that ComGen violated, and thus the permit shield is applicable. Additionally, SCCRAP lacks standing to sue under the RCRA and there is no imminent and substantial endangerment to the environment. The reviewing court must review the district court's order of dismissal under de novo standard of review. There are four issues before the Court.

I. Clean Water Act Claims

The CWA prohibits "the discharge of any pollutants by any person into navigable waters." 33 U.S.C. § 1251(a). However, there is a primary exception to the prohibition on discharge of any pollutant by the CWA, which is the National Pollutant Discharge Elimination System ("NPDES") or State Pollutant discharge Elimination system ("SPDES") permitting system. 33 U.S.C. § 1342. As long as a permit holder complies "with the terms of their permit and with the Clean Water Act's disclosure requirements," they will be in compliance and avoid liability. *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 142 (4th Cir. 2017). The purpose behind the permit shield defense is to relieve permit holders of having to litigate "whether their permits are sufficiently strict." *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). In this case, ComGen is in compliance with the terms of their VPDES permit and with the CWA disclosure requirement because neither the permit nor the formal application specifically inquiries about PFOS or PFBS. In addition, PFOS and PFBS are not statutory pollutants that are regulated under the CWA; thus, the Court must adopt the *Atlantic States Legal Foundation* reasoning.

The Court must affirm the district court's adoption of the *Atlantic States Legal Found.*, as the Court does not owe deference to *Piney Run* or to EPA's guidance on unpermitted discharged because *Piney Run* is not on-point and agency deference is no longer required under *Loper Bright.*

When the meaning of a statute is at issue, the judicial role is to "interpret the act of congress, in order to ascertain the rights of the parties." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Decatur v. Paulding*, 39 U.S. 497, 515 (1840)). The *Loper Bright* decision overruled Chevron deference, resulting in a return of "the traditional judicial approach of independently examining each statute to determine its meaning." *Loper Bright Enters.*, 603

U.S. at 385. In this case, ComGen is entitled to the reasoning adopted in *Atlantic States Legal Found.*, because it will require agencies to streamline the permitting process, making it workable for regulated industries, and in turn make it easier for compliance with the regulations. In addition, it will prevent unnecessary litigation. Lastly, by placing the burden on the permit issuing authority, it would provide formality in the permit application process, compared to if the burden is placed on the applicant with the impossible task of identifying and determining what is necessary to disclose in order to avoid liability.

II. Resource Conservation and Recovery Act Claims

SCCRAP does not have standing to challenge the closure plan for the Little Green Run Impoundment under the RCRA. Standing requires a plaintiff to demonstrate an injury in fact, causal connection between the injury and conduct complained of, and that the injury is likely, as opposed to merely speculative, to be redressed by a favorable decision. *Mobile Baykeeper, Inc. v. Ala. Power Co.*, No. 1:22-00382-KD-B, 2024 U.S. Dist. LEXIS 1739 at *28 (S.D. Ala. Jan. 4, 2024). While SCCRAP's alleged aesthetic and recreational injuries establish an injury in fact, the second and third prongs of standing are not met.

There is no causal link between the closure plan and the alleged harm from the pollution. SCCRAP's own claims indicate that pollution from the Little Green Run Impoundment predated ComGen's closure plan, meaning its injuries would have occurred regardless of implementation. Further, SCCRAP does not meet the redressability requirement for standing. Invalidating the closure plan will not remedy pre-existing contamination or restore the Vandalia River's usability. Traceability and redressability requirements are often intertwined. *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021). SCCRAP asks this Court to prevent the implementation of the closure plan, but its injuries stem from longstanding

contamination. Ruling against ComGen and preventing the closure of the Little Green Run Impoundment would not redress the alleged harm which occurred before closure discussions began. Because SCCRAP fails to establish both traceability and redressability, it lacks standing and its challenge to the closure plan should be dismissed.

SCCRAP also brings a claim under RCRA § 6972(a)(1)(B), arguing that there is an imminent and substantial harm to the environment in and of itself. Section 6972(a)(1)(B) allows citizen suits to be initiated "against any person [...] 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.S. § 6972(a)(1)(B). An imminent and substantial endangerment requires a serious and immediate threat that is not speculative in nature. *Reserve Mining Company v. Environmental Protection Agency*, 514 F.2d 492, 520 (8th Cir.1975). In *Courtland Co. v. Union Carbide Company*, the court rejected an RCRA claim where contamination was detected in groundwater and surface water but no actual harm to any living population. *Courtland Co. v. Union Carbide Corp.*, Civil Action No. 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306, at *63 (S.D. W. Va. Sep. 28, 2023). Similarly, SCCRAP does not allege any harm to humans or animals and does not demonstrate that pollutants from the Impoundment migrated beyond the groundwater.

Additionally, the speculative claims regarding the possibility of future environmental harm by a potential natural disaster or a future housing development do not rise to the statutory requirement of imminent and substantial. These risks are too remote and dependent on hypothetical future conditions.

Even if endangerment to the environment alone were sufficient, the pollution levels at the

Impoundment do not meet the imminent and substantial threshold for harm. The levels of pollutants are significantly lower than the level of pollutants in *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, a case where the court found that there was a threat to the environment in and of itself. The environment in and of itself must be highly contaminated if it is to be considered an imminent and substantial engagement, and SCCRAP has not met this standard. *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 456 (E.D. Pa. 2015). Because SCCRAP's claims rely on speculative future harm and fail to establish an imminent and substantial endangerment, their RCRA claim must be dismissed.

Argument

I. THE DISTRICT COURT CORRECTLY HELD THAT COMGEN'S DISCHARGE OF PFOS AND PFBS IS NOT AN UNPERMITTED DISCHARGE UNDER THE CWA BECAUSE PFOS AND PFBS ARE NOT POLLUTANTS THAT ARE SPECIFICALLY ASKED ABOUT IN THE FORMAL PERMIT APPLICATION, THERE WERE NO DISCLOSURE REQUIREMENTS VIOLATED, AND THUS THE PERMIT SHIELD IS APPLICABLE.

The district court correctly granted ComGen's Motion to Dismiss in its entirety. Specifically, the court found that because PFOS and PFBS are not pollutants that are specifically asked about in the formal permit application, there were no disclosure requirements that ComGen violated, and thus the permit shield was applicable.

The Court must review a district court's order of dismissal under de novo standard of review. *NRDC, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 651 F.3d 1066, 1070 (9th Cir. 2011). Questions of law also fall under de novo review. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012). "The purpose of the Clean Water Act ("CWA") is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, by, among other things, prohibiting the discharge of any pollutants by any person into navigable waters." 33 U.S.C. § 1251(a). The Clean Water Act defines pollutant extremely broad to include "dredged, spoil, solid waste, incinerator residue,

sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). "The term discharge of a pollutant [means] "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Since 1972, the CWA federal enforcement efforts have shifted to "direct limitations on the discharge of pollutants—effluent limitations." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000); see also 33 U.S.C. § 1311. Strict liability has been imposed upon illegal pollution discharge. *Id.* at 151. However, there is a primary exception to the prohibition on discharge of any pollutant by the CWA, which is the National Pollutant Discharge Elimination System ("NPDES") permitting system. 33 U.S.C. § 1342. The NPDES outlines the requirements and procedures for obtaining permits for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342. The Environmental Protection Agency ("EPA") issues the permits; however, states may elect to establish and issue their own permit program ("SPDES") subject to the approval of the EPA. 33 U.S.C. § 1342(b). Regardless of the permit issuing authority, "permit holders must comply not only with the limitations on the amount of pollutants they may discharge, [but] also with a variety of monitoring, testing, and reporting requirements." 33 U.S.C. § 1318. Therefore, as long as they comply "with the terms of the permit and with the Clean Water Act's disclosure requirements," permit holders will be in compliance and avoid liability. *Ohio Valley Envtl. Coal.*, 845 F.3d at 142; see also 33 U.S.C. §

1342(k). The purpose behind § 1342(k) is "to relieve permit holders of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *Atlantic States Legal Found.*, 12 F.3d at 357. "By rendering permits final, the shield allows permit holders to conduct their operations without concern that an unexpected discharge might lead to substantial liability." *S. Appalachian Mt. Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014).

To establish that a permit holder is not entitled to the permit shield, it must be proven that the permit holder did not comply with the terms of their permit or with the Clean Water Act's disclosure requirements. *Atlantic States Legal Found.*, 12 F.3d at 357. Even "the EPA does not demand information regarding each of the many thousand chemical substances potentially present . . . because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Id.* For example, the United States Court of Appeals for the Second Circuit in *Atlantic States Legal Found.*, held that the operator of a wastewater treatment plant (Kodak) did not violate the CWA where they complied with the terms of their permit and all disclosure requirements, and thus, were entitled to the permit shield defense. *Atlantic States Legal Found.*, 12 F.3d at 358. (The complaint alleged that Kodak had violated the CWA by discharging pollutants not specifically listed in their permit. *Id.* at 354. However, when Kodak applied for the SPDES permit, they disclosed all pollutants that were specifically inquired about in the formal application process). *Id.* at 355. The court reasoned that the discharge of an unlisted pollutant will be within the reasonable contemplation of the permitting authority because:

> viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutant while leaving the control of the vast number of other pollutants to disclosure requirements. Id. at 357. Once within the NPDES or SPDES scheme, therefore, [permit holders] may discharge pollutants not specifically listed in their permits so as long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.

Id. at 357.

In contrast, the United States Court of Appeals for the Fourth Circuit in *S. Appalachian Mt. Stewards*, held that the permit shield was not applicable when A&G Coal Corporation (A&G) failed to comply with the CWA disclosure requirements because it did not disclose the presence of Selenium when specifically asked during the formal application. *S. Appalachian Mt. Stewards*, 758 F.3d at 566. (The NPDES application unequivocally and specifically inquired into whether Selenium was present in its discharge, to which A&G failed to indicate that selenium was present on the formal application). *Id.* The court reasoned that it has been established that the discharge of unlisted pollutants are permissible so long as the pollutants have been disclosed to permit authorities during the formal permitting process, however, A&G failed to do so. *Id.* at 567. Furthermore, the court reasoned that "selenium is a [statutory] pollutant under the CWA," thus, "there was no question that A&G was required" to disclosure the presence of selenium. *Id.* at 569.

In this case, ComGen is in compliance with the terms of their VPDES permit and with the CWA disclosure requirement because neither the permit nor the formal application specifically inquiries about PFOS or PFBS. In addition, PFOS and PFBS are not statutory pollutants that are regulated under the CWA. This case is comparable to *Atlantic States Legal Found.*, but unlike *S. Appalachian Mt. Stewards*. This case is comparable to *Atlantic States Legal Found.*, because in both cases, the permit holder complied with the CWA disclosure requirements by disclosing all pollutants specifically inquired about during the formal application process. Furthermore, in both cases, the permits did not mention the pollutants at all. Lastly, in both cases, the permit holder's discharge contained unlisted pollutants. In this case, ComGen's VPDES permit covers Vandalia Generating Station's three outfalls—Outlets 001, 002, 003—and sets limits for a wide array of pollutants. (R. at 4.) However, the VPDES permit has no limits set for PFOS or PFBS, nor does

the permit or the permit application mention the pollutants at all. In addition, the CWA does not regulate PFOS and PFBS. Just as the *Atlantic States Legal Found.*, court held that Kodak was entitled to the permit shield defense because they complied with the terms of their permit, and with CWA disclosure requirements by disclosing all pollutants that were specifically inquired about in the formal application process. This Court must hold that ComGen is entitled to the permit shield defense because ComGen complied with the terms of their permit, and with the CWA disclosure requirements when they disclosed all pollutants asked about during the formal permit application.

A&G in the *S. Appalachian Mt. Stewards* case, was not entitled to the permit shield defense because they did not comply with the CWA's disclosure requirements when they failed to disclose the presence of selenium, after they were unequivocally and specifically asked about it in the formal permit application. However, ComGen is entitled to the permit shield defense because they disclosed the presence of every pollutant that was specifically asked about in the formal permit application. The *S. Appalachian Mt. Stewards* court deferred to the Environmental Protection Agency's reasoning to support the court's holding that A&G was in obvious violation of the CWA because not only is selenium one of the pollutants listed in the formal permit application, but selenium was an obvious pollutant regulated by the CWA. In contrast, neither ComGen's permit nor the formal permit application mention PFOS or PFBS. Furthermore, PFOS and PFBS are not specifically regulated by the CWA. Lastly, had the issuing permit authority intended that the PFOS and PFBS be regulated by the permit, not only would they have inquired about them during the formal application process, but they would have put a disclaimer that it is the permit applicants' burden to disclose the presence of any and all pollutants that are not specifically asked about in the application.

SCCRAP counters that such PFAS were not "within the reasonable contemplation of the permitting authority at the time the permit was granted because such pollutants are not listed in the permit and that ComGen lied to the VDEP deputy director about such discharge." (R. at 12.) In addition, SCCRAP argues that the deputy director of the VDEP did inquire into whether PFOS or PFBS were present in any of the outlets' discharge before the permit was issued, to which an employee of ComGen assured the deputy director that neither PFOS nor PFBS were known to be present. Although there is an email exchange between the deputy director and an employee of ComGen, the Court must take into consideration that had the VDEP considered PFOS or PFBS to be among the most harmful pollutants, they would have included the PFAS in the formal permit documents or application materials. Furthermore, SCCRAP would like the Court to rely on *Piney Run* to further their argument that it was ComGen's burden to disclose any and all pollutants in order for the permitting authority to properly analyze the environmental risks of those pollutants and place limitations on those that could cause environmental harm. However, had the permitting authority intended to place the burden on ComGen to disclose any and all pollutants, the permit would have put such a disclaimer on the application or the permit. Therefore, this Court must adopt the holding and reasoning of *Atlantic States Legal Found.*, because although there is an email exchange between the deputy director and an employee discussing PFOS and PFBS, the Court should not take this into consideration due to the informal nature of the email. Also, any evidence of lying is purely speculative. Rather, the Court must consider that ComGen disclosed all pollutants that were specifically inquired about in the formal application process. Moreover, had VDEP considered PFOS and PFBS to be among the most harmful pollutants, they would have included it in the permit and the formal permit application. Lastly, holding otherwise would be inconsistent with the purpose behind § 1342(k): "to relieve

permit holders of having to litigate in an enforcement action the question whether their permits are sufficiently strict." Atlantic States Legal Found., 12 F.3d at 357.

Therefore, this Court must affirm the district court's holding that that ComGen's discharge of PFOS and PFBS from Outlet 001 is not an unpermitted discharge under the Clean Water Act because the PFOS and PFBS are not pollutants that are specifically asked about in the formal permit application, there were no disclosure requirements violated, and thus the permit shield was applicable.

II. THE TRIAL COURT WAS CORRECT IN ADOPTING THE REASONING IN *ATLANTIC STATES LEGAL FOUND.,* AS THE COURT DOES NOT OWE DEFERENCE TO *PINEY RUN* OR TO EPA'S GUIDANCE ON UNPERMITTED DISCHARGE BECAUSE *PINEY RUN* IS NOT ON-POINT AND AGENCY DEFERENCE IS NO LONGER REQUIRED UNDER *LOPER BRIGHT*.

The district court was correct in adopting the reasoning in *Atlantic States Legal Found.,* as the court does not owe deference to *Piney Run* or to EPA's guidance on unpermitted discharged because *Piney Run* is not on-point and agency deference is no longer required under *Loper Bright.*

The standard of review for questions of law is de novo. *Miranda v. Anchondo,* 684 F.3d at 849. The foundational decision of *Marbury v. Madison* gave the judicial role of determining what the law is. *Marbury v. Madison,* 5 U.S. 137, 1 Cranch, 177 (1803). "When the meaning of a statute was at issue, the judicial role was to 'interpret the act of congress, in order to ascertain the rights of the parties.'" *Loper Bright Enters.,* 603 U.S. at 385 (quoting *Decatur,* 39 U.S. at 515). Prior to Chevron deference, a court was entitled to "the traditional judicial approach of independently examining each statute to determine its meaning." *Loper Bright Enters.,* 603 U.S. at 371. Following the Chevron decision, a presumption was established that "Congress, when it left ambiguity in a statute meant for implementation by an agency . . . that the ambiguity would be resolved . . . by the agency [rather than the courts]." *Id.* at 372. Thus, a two-step approach was

adopted in order to review agency action. *Id.* at 371. First, the court was to decide "whether Congress had directly spoken to the precise question at issue." *Id.* "If the intent of Congress [was] clear, that is the end of the matter, and courts were therefore to reject administrative constructions which [were] contrary to clear congressional intent." *Id.* However, if congressional intent was unclear or silent as to the precise question at issue, the court could not impose their own interpretation of the statute, rather the court was to apply step two of the approach, "a court had to defer to the agency if it had offered a permissible construction of the statute," even if the court itself, would have reached a different conclusion. *Id.*

The *Loper Bright* decision effectively overruled *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and in doing so courts may no longer adhere to agency deference. *Loper Bright Enters.*, 608 U.S. at 412-13. Rather, courts must exercise their independent judgment in interpreting the law, particularly where the statute is ambiguous. *Id. Loper Bright's* decision is rested on the premise that "Chevron has prove[n] to be fundamentally misguided" as it is inconsistent with the Administrative Procedure Act ("APA"), which "specifies that courts, not agencies, will decide all relevant questions of law arising on review of agency action." *Id.* at 371, 375.

The EPA's Environmental Appeals Board in *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 619 (Environmental Protection Agency May 15, 1998), emphasized, as did in *Piney Run*, that the burden is on the permit applicant to disclose the contents of its discharge in order to avail itself of the permit shield. *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 267 (4th Cir. 2001). Relying on the decision in *In re Ketchikan*, *Piney Run* developed a two-part test to determine whether the permit holder is entitled to the permit shield: "(1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2)

the permit holder does not make a disclosure of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was issued*." Piney Run Pres. Ass'n.*, 268 F.3d at 266. For example, the court in *Piney Run* held that the Commissioners of the waste treatment plant satisfied the two-part test when the commissioners complied with their permit and the CWA disclosure requirements, and that the discharge of warm water was within the reasonable contemplation of the permitting authority. *Id.* at 271. (The Commissioners disclosed to the permitting authority that the plant was discharging heat during the formal permit application process and complied with daily reports on the water temperature after the permit was issued). *Id.*

In contrast, *Atlantic States Legal Found.*, effectively placed the burden on the permitting authority to determine what chemicals or compounds to place on the formal application and permit. *Atlantic States Legal Found.*, 12 F.3d at 357. In addition, the court did not expressly use the two-part test laid out in *Piney Run*; instead, the court held that where a permit holder discharges a pollutant that is not listed in their permit, the permit holder is entitled to the permit shield defense so long as they comply with the terms of their permit and the CWA's disclosure requirements. *Id.* The court reasoned that the discharge of an unlisted pollutant will be within the reasonable contemplation because "it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id.* at 357-58. In addition, "the EPA does not demand information regarding each of the many thousand chemical substances potentially present . . . because it is impossible to identify and rationally limit every chemical or compound present in a discharge." *Id.*

In this case, ComGen is entitled to the reasoning adopted in *Atlantic States Legal Found.*,

because it will require agencies to streamline the permitting process, making it workable for regulated industries, and in turn make it easier for compliance with the regulations. In addition, it will prevent unnecessary litigation. Moreover, *Piney Run'*s reasoning is unworkable and cumbersome on the permitting process and the judicial system. Lastly, *Piney Run* and its adoption both rely on Chevron deference on EPA guidance, which is now inconsistent with *Loper Bright*.

SCCRAP would counter that although *Piney Run* and its adoption both rely on Chevron deference to the EPA, which is now inconsistent with *Loper Bright*, the Court is charged with determining the interpretation of the scope of the permit; therefore, the Court can independently decide that EPA's interpretation is consistent with the statutory meaning. Although SCCRAP counterargument may be true, the Court is also free to decide against *Piney Run's* interpretation; thus, placing the burden on the permit issuing authority to determine regulation standards and what chemicals and compounds pose the most harm to the navigable waterways. By placing the burden on the permit issuing authority, it would provide formality in the permit application process compared to if the burden is placed on the applicant with the impossible task of identifying and determining what is necessary to disclose in order to avoid liability. Holding otherwise would make the permit application process unworkable.

Therefore, the Court must affirm the district court's adoption of *Atlantic States legal found.*, as the Court does not owe deference to *Piney Run* or to EPA's guidance on unpermitted discharge because *Piney Run* is not on-point and agency deference is no longer required under *Loper Bright*.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT SCCRAP DOES NOT HAVE STANDING TO CHALLENGE THE LITTLE GREEN RUN IMPOUNDMENT CLOSURE PLAN BECAUSE THE INJURIES ALLEGED ARE NOT CAUSALLY CONNECTED TO COMGEN'S ACTIONS REGARDING THE

CLOSURE PLAN, NOR ARE THE INJURIES REDRESSABLE BY A FAVORABLE DECISION.

Appellate courts "apply a *de novo* standard of review to standing." *Save the Bull Trout v. Williams*, 51 F.4th 1101, 1105 (9th Cir. 2022). Under *de novo* review, courts "do not defer to the lower court's ruling but freely consider the matter anew." *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988).

SCCRAP does not have standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment. Pursuant to Article III of the US Constitution, "a case or controversy can exist only if a plaintiff has standing to sue." *United States v. Texas*, 599 U.S. 670, 675 (2023). To establish standing, a plaintiff must show: (1) an injury in fact, (2) a causal connection between the injury and conduct complained of, and (3) that the injury is likely, as opposed to merely speculative, to be redressed by a favorable decision. *Mobile Baykeeper, Inc.*, 2024 U.S. Dist. LEXIS 1739 at *28. The party seeking jurisdiction has the burden of establishing each of these elements. *Id.*

ComGen maintains that SCCRAP has plausibly alleged an injury in fact. In *Mobile Baykeeper, Inc. v. Alabama Power Co.*, a factually similar case, the court found that Mobile Baykeeper alleged plausible recreational and aesthetic injuries by claiming that they recreate, own property, and fish in the vicinity of an electric generating plant, and the risks created by the plant and impoundment site are reducing the use and enjoyment of the land. *Id.* at *31. If a plaintiff shows that a defendant discharges a pollutant that can cause or contribute to the kinds of injuries alleged, there is a properly alleged injury in fact. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1281 (11th Cir. 2015). SCCRAP claims its members previously recreated in the Vandalia River, but concerns over PFAS, arsenic, and cadmium pollution have diminished the use and enjoyment of the river. ComGen concedes that aesthetic

use and enjoyment qualify as an injury in fact which can be plausibly attributed to discharge of a pollutant.

However, SCCRAP does not have standing to challenge the closure plan because the injuries they allege are not fairly traceable to the challenged action. To satisfy the second requirement for standing, "[a] plaintiff must at least demonstrate factual causation between his injuries and the defendant's misconduct." *Walters v. Fast AC, Ltd. Liab. Co.*, 60 F.4th 642, 650, 29 (11th Cir. 2023). Simply "alleging that the defendant caused both the injury and the challenged conduct is not enough." *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 17-CV-707, 2018 U.S. Dist. LEXIS 92893, at *4 (M.D. N.C. May 29, 2018). If the plaintiff would have the same injury without the defendant's alleged misconduct, there is no plausible causal chain. *Walters*, 60 F.4th at 650.

In Mobile Baykeeper, Alabama Power owned and operated an electric plant, a coal ash pond and impoundment called Plant Barry. *Mobile Baykeeper, Inc.*, 2024 U.S. Dist. LEXIS 1739, at *6. Following submission of an initial closure plan for the coal ash pond, the Alabama Department of Environmental Management (which adopted its own CCR regulations) approved the permit application to close the coal ash pond in place. *Id.* at *9. Mobile Baykeeper brought an RCRA citizen suit to challenge the closure plan, alleging injuries from lack of enjoyment of the river near the ash pond. *Id.* at *35. The court found that Mobile Baykeeper did not have standing to bring the suit because there was no plausible causal chain between the failure to "implement a non-final closure performance standard […] or the post-closure infiltration of liquids to Plant Barry's ongoing leaching of coal ash." *Id.* at *42.

Similarly, environmental and industry groups agree that the Little Green Run Impoundment was likely leaching contaminants for at least five to ten years prior to the first monitoring report

in 2021, well before ComGen first submitted the permit application to the VDEP in 2019. SCCRAP members would have been injured in the exact same way if ComGen never began the process of closing the Impoundment. The pollution the members allege "pre-existed and is therefore not fairly traceable to the challenged action" of ComGen's implementation of the closure plan. *Id.* at *39. Therefore, the closure plan for the Impoundment does not have a causal connection to the injuries SCCRAP alleges, thus they are not fairly traceable to the challenged action.

SCCRAP's standing to sue is further invalidated by the lack of redressability from a favorable decision. The final prong to establish standing requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The traceability and redressability requirements "often travel together." *Support Working Animals, Inc.*, 8 F.4th at 1201. The failure to establish any causal connection between alleged illegal conduct and the plaintiff's injury can lead courts to conclude that judicial intervention will not redress their injuries. *Hope, Inc. v. Cty. of Du Page*, 738 F.2d 797, 811 (7th Cir. 1984).

SCCRAP has not shown how preventing the closure plan's implementation will remedy the aesthetic injury of pollution, when the pollution occurred before the closure plan and permit were granted. Even if the closure plan were invalidated, the contamination would continue without remediation efforts, leaving SCCRAP's injuries ongoing. Moreover, SCCRAP's own allegations confirm that pollution from the Vandalia Generating Station and the Little Green Run Impoundment has already been leaching into waters of the United States. Therefore, preventing implementation of the closure plan will not retroactively address the contamination or restore SCCRAP members' ability to use the river for recreation and fishing. Since there is no causal

link between ComGen's actions regarding the closure plan and the injuries alleged, the redressability requirement is not met because the aesthetic injuries predate the closure plan.

SCCRAP lacks standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment because it fails to satisfy all three requirements under Article III. While SCCRAP has plausibly alleged an injury in fact based on diminished use and enjoyment of the Vandalia River due to pollutants, it cannot establish that these injuries are fairly traceable to ComGen's closure plan or would be redressable by a favorable decision. Consequently, SCCRAP fails to meet the requirements for standing because it cannot demonstrate either traceability or redressability. Accordingly, the challenge to the closure plan must be dismissed.

IV. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT SCCRAP CANNOT PURSUE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT CLAIM WHEN THERE IS NO ALLEGATION OF ENDANGERMENT TO A LIVING POPULATION, AND THERE IS NO IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE ENVIRONMENT ITSELF.

For RCRA endangerment determinations, the standard of review is clear error. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 254 (3d Cir. 2005). Under the clear error standard, "a finding of fact may be reversed on appeal only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 352 (3d Cir. 2003); see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

SCCRAP is unable to raise an imminent and substantial endangerment claim regarding the Little Green Run Impoundment because there is no allegation of endangerment to a living population, only to the environment itself. The purpose of the RCRA is "to reduce the generation of hazardous wastes and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Section 6972(a)(1)(B) of the

RCRA governs citizen suits and allows for anyone to commence a civil action "against any person [...] 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.S. § 6972(a)(1)(B). ComGen concedes that they are an owner and operator of a solid or hazardous waste facility and that they have contributed to the storage and disposal of solid or hazardous waste.

However, SCCRAP fails to meet the requisites prescribed in § 6972 because the Little Green Run Impoundment does not create an imminent and substantial endangerment to health or the environment. Under the RCRA, endangerment is defined as "a threatened or potential harm, and does not require proof of actual harm." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004). Endangerment is considered imminent if the harm is immediate or impending. *Meghrig*, 516 U.S. at 485. Finally, for endangerment to be substantial, it must be serious in nature and produce a risk of harm in the event remedial action is not taken. *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1017 (10th Cir. 2007). "Courts will not find that an imminent and substantial endangerment exists if the risk of harm is remote in time, completely speculative in nature, or de minimis in degree." *Reserve Mining Company*, 514 F.2d at 520.

In *Courtland Co. v. Union Carbide Corp.*, Union Carbide Corporation (UCC) owned property and operated a solid waste landfill that was closed in place in 1987. *Courtland Co.*, 2023 U.S. Dist. LEXIS 174306, at *63. Courtland brought suit under the RCRA, arguing that "because hazardous substances have been detected at levels exceeding screening levels in the groundwater [...], in surface water surrounding the site in years past and present, and in some sediment within the surface water, an endangerment to human health and/or the environment is

automatically present." *Id.* at *279. The court rejected this argument stating that "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." *Courtland Co.*, 2023 U.S. Dist. LEXIS 174306, at *279 (quoting *Me. People's All. & NRDC v. Mallinckrodt, Inc.*, 471 F.3d 277, 282 (1st Cir. 2006)). The court reasoned that Courtland's environmental expert failed to inform the court of any negative effects to human or ecological receptors associated with the pollutants found. *Id.* at *283.

Like the *Courtland* case, SCCRAP does not allege that any living population has been endangered by arsenic and cadmium in the groundwater, as there is no evidence that these pollutants have extended beyond it. For instance, *Courtland* did not raise any reasonable risk of harm beyond speculation that the contamination would cause a risk of potential harm. Comparably, SCCRAP claims that contaminated groundwater has been leaching into the Vandalia River but does not prove any immediate or serious threat to a living population. Allowing SCCRAP to pursue an RCRA imminent and substantial endangerment claim would undermine the statutory intent, which aims to ensure that the environment is protected from concrete threats and potential harms, not hypothetical concerns.

In *Price v. United States Navy*, Gloria Price filed an RCRA suit, arguing that the Navy should remove potentially contaminated soil underneath her home. *Price v. United States Navy*, 39 F.3d 1011, 1012 (9th Cir. 1994). Price claimed that the home had structural issues that could eventually lead to hazardous materials being released into the environment if she attempted to repair or renovate it. *Id.* at 1018. This was not enough to be considered imminent and substantial endangerment under the RCRA. *Id.* at 1020. The court reasoned "[t]he RCRA provision implies that there must be a threat which is present now, although the impact of the threat may not be felt

until later." *Id.* at 1019. Therefore, Price's concerns were not imminent or substantial because there was no evidence that contradicted the fact that the concrete slab under the structure "could be repaired without disturbing the foundation and underlying soil." *Id.* at 1021.

In comparison, SCCRAP fails to produce any evidence of a threat that is present now. Neither ComGen's groundwater monitoring wells nor SCCRAP's testing shows that neither arsenic or cadmium have reached the Vandalia River or any other public water drinking supply, or that they will within the next five years. There is no present threat to the public or environment, nor will there be one in the foreseeable future. SCCRAP's belief that future floods, storms and hurricanes create a potential risk poses no present threat because there can be no real indication of when and if one of these natural disasters will occur. Additionally, the factual allegations that groundwater downgradient of the site within 1.5 miles of the Impoundment should not be used for drinking water does not create an imminent and substantial endangerment because no one is currently using groundwater wells for drinking.

In an attempt to substantiate these drinking water claims, SCCRAP's also cites that a potential housing development may rely on well water within a mile downgradient of the Impoundment. This also does not rise to the level of imminent and substantial for several reasons. First, the development remains in the proposal stage, indicating that there is a possibility that construction may never begin. Second, even if construction began, it would not be completed until 2031, when ComGen's current closure permit expires. Because SCCRAP's claims rest on speculation of a future threat, it would be unreasonable to conclude there is an imminent and substantial endangerment to the environment.

Even if this Court finds potential endangerment to the environment alone, the pollution from the Impoundment does not meet the imminent and substantial threshold under the RCRA.

SCCRAP maintains the imminent and substantial endangerment requirement applies to the environment in and of itself. While certain courts have subscribed to this idea, the environment in and of itself must be highly contaminated if it is to be considered imminent and substantial engagement. *Tri-Realty Co.*, 124 F. Supp. 3d at 456. "To hold that any amount of pollution that impairs the purity or natural state of some element of the environment endangers the environment would be to render the word 'substantial' superfluous, as practically any addition of a pollutant into the environment would give rise to liability." *Id.* at 455.

In *Interfaith Community Organization v. Honeywell International, Inc.*, Mutual Chemical Company, later owned by Honeywell, operated a chromate chemical plant that generated hazardous waste with high pH and toxic hexavalent chromium, which was dumped at a wetlands site along a nearby river. *Interfaith Cmty. Org.*, 399 F.3d at 252. The waste created a large landmass, with contamination levels massively exceeding state standards. *Id.* Despite ongoing risks, only temporary measures were implemented, which deteriorated over time, leaving the site heavily polluted and prone to discharge into the river. *Id.* at 253. The court found ample evidence of contamination pathways, including breaches in liners, discharge of chromium into groundwater and the river, and high exposure risks for humans and wildlife. *Id.* at 261. Because Honeywell conceded that its site was discharging into the river potentially harmful pollutants to aquatic organisms, and the average level of contamination was over 30 times higher than the state standard, there was a substantial and imminent risk to public health and the environment itself. *Id.* at 262.

The Little Green Run Impoundment is incomparable to the chemical plant in *Interfaith* due to the highly inconsistent levels of pollutants in both cases. While the contamination was over 30 times higher than the state standard in *Interfaith*, the PFOS and PFBS concentrations in the

Vandalia River at the mixing zone of Outlet 001 were 6 ppt and 10 ppt, respectively. Meaning the coal ash pollutants were only 1.5 times and 2.5 times more than the EPA's maximum contaminant levels. The maximum contaminant levels for these pollutants are used to regulate drinking water, which Outlet 001 is not used for, further demonstrating the lack of imminent and substantial harm. Moreover, the pollutants in *Interfaith* were shown to have significant negative effects on underwater organisms, and these findings were substantiated by multiple environmental experts. In this case, SCCRAP has not alleged any allegations of harm to a living population, nor did they raise concerns in the event that contamination does extend beyond the groundwater. The only potential harm that SCCRAP has alleged in relation to the closure plan is that the groundwater may be used for drinking water in several years. However, this requires the housing developer to move beyond mere consideration of placing a subdivision near the Impoundment. The dangers in *Interfaith* were substantial and directly present. In contrast, the potential dangers that SCCRAP alleges will result from the closure of the Impoundment are too hypothetical and remote to be considered an imminent and substantial harm, even to the environment itself.

SCCRAP cannot establish an imminent and substantial endangerment claim under the RCRA. Even if this Court concludes that there is potential endangerment to the environment in and of itself, that endangerment fails to meet the threshold because it is not immediate and substantial. Additionally, its arguments about potential future risks, such as the possibility of a housing development using groundwater wells by 2031, and future natural disasters are speculative and fail to demonstrate an imminent threat. These scenarios are too remote and do not constitute concrete or present risks. SCCRAP has not provided evidence of environmental harm rising to the level required to meet the statutory standard.

Conclusion

For the foregoing reasons, this Court should uphold the decision from the United States District Court for the Middle District of Vandalia. SCCRAP's claims under the CWA and RCRA are without merit and the motion to dismiss was properly granted in its entirety.

Appendix A

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company 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. 19