Civil Action No. 24-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Stop Coal Combustion Residual Ash Ponds,

Appellant,

v.

Commonwealth Generating Company,

Appellee.

On Appeal from the United States District Court for the Middle District of Vandalia

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Opening Brief for the Appellant

Team Number Twelve

Counsel for the Appellant

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case implicates questions of federal law under the Clean Water Act and the Resource Conservation & Recovery Act. R. at 12-13. The Twelfth Circuit Court of Appeals has subject matter jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the District Court issued its final order disposing of all issues in the case on October 31, 2024. R. at 14. On November 10, 2024, SCCRAP timely filed its Notice of Appeal to the United States Court of Appeals for the Twelfth Circuit. R. at 15.

ISSUES PRESENTED

Issue I: Can ComGen invoke the permit shield defense under the Clean Water Act for its unpermitted discharges of PFOS and PFBS when they lied to the permitting authority?

Issue II: Can the Court continue to defer to *Piney Run* post-*Loper Bright Enterprises* when the EPA interpretation at the heart of that case warrants great persuasive weight?[1]

Issue III: Does SCCRAP have associational standing to challenge ComGen's closure plan when the plan contributes to injuries SCCRAP is already suffering and will continue to suffer?

Issue IV: Can SCCRAP raise an imminent and substantial endangerment claim under RCRA for an allegation of endangerment to the environment?

STATEMENT OF THE CASE

I. Factual History

In 2015, Commonwealth Generating Company ("ComGen"), an electric utility company subsidiary, announced its "Building a Green Tomorrow" program. R. at 3-4. ComGen claims this

[1] The Appellant will present its Issue II argument before its Issue I argument as Issue II is the prerequisite to addressing Issue I.

program is intended to lower energy costs and reduce pollution, primarily by closing its older coal-fired power plants in exchange for renewable energy facilities. R. at 4. Among those plants designated for closure is the Vandalia Generating Station, set to be closed by 2027. R. at 4.

The Generating Station disposes of its coal combustion residuals ("CCRs") (i.e., its "coal ash") [2] in the Little Green Run Impoundment, a body of water covering 71 surface acres. R. at 5. Currently, the unlined impoundment contains 38.7 million cubic yards of waste from the Station's coal cleaning process. R. at 5. Knowing that the Generating Station would close in 2027, and that the impoundment would cost millions to continue to operate, ComGen also decided to close the impoundment. R. at 6.

In 2015, the Environmental Protection Agency ("EPA") promulgated its rule on the Disposal of Coal Combustion Residual from Electric Utilities (the "CCR Rule"). R. at 5. As relevant here, the CCR Rule sets the closure, post-closure, and disclosure requirements for surface impoundments like Little Green Run. R. at 5. Pursuant to the Water Infrastructure Improvements for the Nation Act, the State of Vandalia is approved by the EPA to administer its own parallel coal ash permitting program with identical criteria for monitoring the closure of impoundments like Little Green Run. R. at 5.

Pursuant to the CCR Rule and Vandalia's identical provisions, ComGen timely submitted a written closure plan for the Little Green Run Impoundment. 40 C.F.R. § 257.102(b)(2)(i); R. at 6. Instead of electing to close the impoundment by removing its accumulated CCR waste,

[2] CCR, or "coal ash" are byproducts of coal combustion at electric generating stations like those owned by ComGen. R. at 3. Coal ash is known to contain pollutants like mercury, selenium, cadmium, and arsenic, all of which are known to be human carcinogens, and otherwise harmful to human health. R. at 3. These pollutants are able to leach into groundwater and thereby reach sources of drinking water. R. at 3.

ComGen elected to close the impoundment "in place" (i.e., leaving the waste in the Impoundment after the plant's closure). R. at 6. The CCR Rule and Vandalia state provisions set additional closure requirements on those owners attempting to close their impoundments "in place" including (1) removing or solidifying remaining waste (2) precluding "future impoundment of water, sediment, or slurry," and (3) precluding "to the maximum extent feasible" post-closure contamination of ground or surface waters. R. at 6; 40 C.F.R. § 257.102.

In December of 2019, ComGen applied for a permit to close the Little Green Run Impoundment in place. R. at 6. By the end of 2021, ComGen received its closure permit and installed thirteen upgradient and downgradient groundwater monitoring wells as part of its closure plan. R. at 7. These wells monitor whether coal ash properly stays in the impoundment or if there are any leaching pollutants. R. at 7.

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is a national environmental and public interest group created to hold coal ash pond owners like ComGen accountable under the applicable law in an overarching effort to protect the public from polluted water supply. R. at 8.

SCCRAP's members in Vandalia have refrained from recreating on the Vandalia River because of the leaching. R. at 10. Additionally, there are plans to build a housing development by 2031 within one mile downgradient of the impoundment. R. at 9. This development would use groundwater affected by the leaching, and members of SCCRAP are currently on the waitlist for the development. R. at 9.

a. Discovery of Arsenic and Cadmium Leaching

Since 2021, ComGen's downgradient wells show levels of arsenic and cadmium elevated above both federal and state quality standards. R. at 9. While no evidence has been found to

show the arsenic or cadmium levels will reach the Vandalia River or any public water supply within the next five years, there is no evidence in the record of the threat the arsenic and cadmium levels will pose five years from now and beyond. R. at 8. Environmental and industry representatives are unable to determine when these pollutants began leaching, only that the leaching likely began between 2011 and 2016. R. at 8.

As a result of the levels of arsenic and cadmium, SCCRAP experts determined that the groundwater downgradient within 1.5 miles of the Impoundment is unfit for human consumption. R at 9. This would threaten the proposed housing development and thwart the developer's plans to use well water as the primary drinking source for its residents. R. at 9. The housing development is projected to be completed by 2031. R. at 9. Because ComGen has only been able to provide that its arsenic and cadmium levels will not reach public water supply within the next five years, the housing development's anticipated residents have no assurance that any nearby public water supply will be safe by 2031. R. at 9.

b. High Concentrations of PFAS Parameters[3] in Outlet 001

When SCCRAP began suspecting the Station was "causing PFAS problems in the Vandalia River," a public water supply, it conducted its own independent tests. R. at 9. These tests found that Outlet 001 was discharging PFOS at concentrations of 6ppt and PFBS at concentrations of 10ppt. R. at 9. Ultimately, SCCRAP discovered through subpoena that

[3] PFAS are compounds which have recently been discovered to contribute to a "plethora" of human health conditions including "liver and kidney disease, increased cholesterol, reproductive and developmental conditions and immune deficiency." M. Elizabeth Gross, *Rectifying the Safe Drinking Water Act and the Clean Water Act: Per-and Poly-Fluoroalkyl Substances (PFAS): A Case Study*, 110 KY. L.J. 567, 568-569 (2022). Currently, PFAS are not regulated by the CWA. *Id.* at 569.

ComGen was aware that Outlet 001 had been discharging these PFAS parameters since 2015. R. at 9. These pollutants were never disclosed to the Vandalia DEP. R. at 9.

ComGen attempts to excuse their failure to report PFAS levels by claiming that because PFOS and PFBS are not regulated pollutants under the Clean Water Act and were not mentioned in its permit application, they did not need to disclose them. R. at 9.

In July of 2020, the Generating Station obtained a Vandalia Pollutant Discharge Elimination System permit (the "VPDES permit"). R. at 4. The VPDES permit limits a "wide array" of pollutants anticipated from the Generating Station's three outlets, but PFOS and PFBS were not listed. R. at 4. Before the VPDES permit was issued, the Deputy Director of the Vandalia Department of Environmental Protection ("VDEP") asked ComGen whether PFOS or PFBS could be expected from its outfalls due to new studies on PFAS parameters. R. at 4. ComGen answered that "neither PFOS or [sic] PFBS were known to be in the discharge." R. at 4.

c. Deficiencies in ComGen's Closure Plan

SCCRAP also took a closer look at ComGen's closure plan for the impoundment. R. at 9. The plan provides that it will store coal ash below sea level permanently, where it is in contact with water that is already leaching into the nation's water sources. R. at 9. There is the ever-present risk of major weather events (i.e., floods and storms) causing surrounding water levels to rise, including the contaminated groundwater in the impoundment. R. at 9. As the water level increases, so does the likelihood of a catastrophic and irrevocable spill of coal ash into the Vandalia River. R. at 9.

II. Procedural History

SCRAAP filed a citizen suit against ComGen on September 3, 2024, bringing forward claims under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act

("RCRA"). R. at 11. ComGen filed its Motion to Dismiss both claims on September 20, 2024. R. at 13. On October 31, 2024, the United States District Court for the Middle District of Vandalia granted ComGen's Motion to Dismiss in its entirety. R. at 12. SCRAAP filed its appeal to this Court on November 10, 2024, and this Court granted its appeal on December 30, 2024. R. at 15.

SUMMARY OF THE ARGUMENT

As to Issues I and II, regardless of the test this Court adopts, ComGen's discharge of PFAS compounds was not permitted by its VPDES permit. First, the EPA's interpretation of the CWA is entitled to persuasive weight under *Skidmore v. Swift* because it was delivered in a formal adjudication, is related to agency expertise, and has been consistently held. Furthermore, both the plain text and purpose of the CWA support the EPA's interpretation and *Piney Run's* adaptation of it. Under the *Piney Run* test, ComGen's discharge of PFAS was not shielded by its permit because ComGen lied to the permitting authority about the presence of PFAS in its discharges. Because the agency had no basis to believe PFAS would be present, ComGen's discharges were not within the agency's reasonable contemplation. Even if this Court adopts the test in *Atlantic States*, ComGen still cannot invoke the permit shield defense because they deceived the permitting authority, which violates the EPA's disclosure requirements.

As to Issue III, SCCRAP has associational standing to bring its claim under 42 U.S.C. § 6972(a)(1)(A) because ComGen's illegal closure plan will sustain and contribute to SCCRAP's environmental injuries. As such, SCCRAP's alleged injuries are fairly traceable to ComGen's misconduct, and would be redressed by enjoining the enforcement of the deficient closure plan.

As to Issue IV, SCCRAP's 42 U.S.C. § 6972(a)(1)(B) imminent and substantial claim must be allowed to proceed past the pleading stage because the provision's disjunctive phrasing allows a claim solely for endangerment to the environment. However, even if this Court declines

to follow the ordinary language of the statute, the endangerment alleged by SCCRAP nonetheless threatens the health of future living populations.

ARGUMENT

I. Standard of Review

To survive a motion to dismiss under Fed R. Civ. P. 12(b)(6), a complaint must contain sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). All the non-movant's factual allegations will be taken as true, and all inferences must be drawn in the non-movant's favor. *Iqbal*, 556 U.S. at 679.

A district court's *sua sponte* dismissal for lack of standing is reviewed *de novo*. *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

II. This Court Should Defer to the *Piney Run* Decision Because the EPA's Interpretation of the CWA Carries Great Persuasive Weight and is Supported by Traditional Tools of Statutory Interpretation

The District Court erred in granting ComGen's Motion to Dismiss SCCRAP's CWA claim and, in doing so, rejecting the Twelfth Circuit's adoption of *Piney Run Preservation Association v. County Commissioners of Carroll County*. 268 F.3d 255 (4th Cir. 2001) [hereinafter *Piney Run*]. In *Piney Run*, the Fourth Circuit established when a polluter may raise a "permit shield defense" under 33 U.S.C. § 1342(k), which operates to bar a polluter's liability "for the discharge of pollutants not expressly regulated by the [NPDES] permit." *Id*. at 259. Since it was decided in 2001, *Piney Run* has been the definitive case for when a polluter can successfully raise the defense. *Id*. at 271-72; *see also Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 285-86 (6th Cir. 2015); *Alaska Cmty. Action on Toxics v. Aurora Energy Serv., LLC.*, 765 F.3d 1169, 1173-74 (9th Cir. 2014); *NRDC v. Metro. Water Reclamation Dist.*, 175 F.Supp. 3d 1041, 1050 (N.D. Ill. 2016)

("[T]he seminal case construing § 1342(k) the permit shield is *Piney Run."*). The recent overruling of *Chevron* does nothing to diminish the legitimacy of *Piney Run's* holding. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

In *Piney Run*, the Fourth Circuit addressed whether an NPDES permit bars liability under the CWA for discharging pollutants not "expressly allowed by the permit." *Piney Run*, 268 F.3d at 266. In deciding the scope of NPDES permits, namely, "whether the permit holder may continue to empty . . . unlisted pollutants into the water," the *Piney Run* court engaged in a *Chevron* analysis, an administrative law doctrine used by courts to determine the extent they should defer to an agency's statutory interpretation. *See Chevron U.S.A., Inc. v. Natural Resource Def. Council, Inc*., 467 U.S. 837, 842-43 (1984); *Piney Run*, 268 F.3d at 267. Under the two-step *Chevron* analysis, because the court found 33 U.S.C. § 1342(k) to be ambiguous, it then deferred to the Environmental Protection Agency's (the "EPA") interpretation of the provision: so long as the permit holder (1) complies with the terms of the permit and the EPA's disclosure requirements and (2) does not discharge pollutants that were "not within the reasonable contemplation of the permitting authority at the time the permit was granted," an NPDES permit issued pursuant to 33 U.S.C. § 1342(k) shields the holder from liability under the CWA. *Piney Run*, 268 F.3d at 259, 267-68; *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 608-609 (EAB 1998).

Loper Bright Enterprises v. Raimondo overruled the two-step *Chevron* analysis employed by the *Piney Run* court and held that "courts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority." 603 U.S. at 412. Nonetheless, *Piney Run's* deference to the EPA's interpretation of § 1342(k) is proper as this is the exact arena where courts have deferred to an agency's "body of experience and informed judgement" since the inception of the administrative state. *Id.* at 394.

a. The EPA's interpretation of the CWA is entitled to persuasive weight because it has been a consistently held position regarding a technically complex statute issued in a formal proceeding.

Piney Run's reliance on the EPA's interpretation of § 1342(k) is still good law in the Twelfth Circuit because, even in a post-*Chevron* world, agency interpretations carry persuasive weight, particularly when these interpretations are well-informed and consistent. In *Chevron's* absence, the Court in *Loper Bright* revived its historical *Skidmore* deference as the prevailing framework for judicial reliance on agency interpretations. *See Loper Bright*, 603 U.S. at 402 (overruling *Chevron* because courts have relied on an "agency's 'body of experience and informed judgment'" since *Skidmore*, among other reasons). Prior to *Chevron*, the Supreme Court articulated in *Skidmore v. Swift & Company* that agency interpretations of the laws they enforce "constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance." 323 U.S. 134, 140 (1944). The persuasive weight given to an agency interpretation pre-*Chevron* depended on "the thoroughness evident in its consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements." *Id.* Historically, when the Supreme Court approached cases in which it held *Chevron* did not apply, it invoked its holding in *Skidmore* to nonetheless give persuasive weight to agency interpretations. *See U.S. v. Mead Corp.*, 533 U.S. 218, 221 (2001); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

Under *Skidmore*, the factors a court may consider when assigning persuasive weight to an agency interpretation are "the degree of the agency's care, its consistency, formality, and relative expertness." *Mead Corp.*, 533 U.S. at 228 (citing *Skidmore,* 323 U.S. at 139-40). First, in *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court held that an EPA interpretation regarding how the CWA regulates pollutants in groundwater did not carry much persuasive weight because it contradicted "longstanding regulatory practice" and the EPA's own interpretations of the

statute. 590 U.S. 165, 174, 177 (2020). Because of the inconsistency, the Court chose not to award persuasive weight to the EPA's changed interpretation. *Id.* at 179.

Second, agency interpretations are afforded more weight when they are couched in a formal process such as rulemaking or adjudication. *Reno v. Koray*, 515 U.S. 50, 61 (1995). Although informal agency interpretations such as guidance documents, internal guidelines, and interpretative rules are still "entitled to some deference," the greatest deference is reserved for those agency interpretations which are subject to "the rigors of the Administrative Procedure Act." *Id.* These formal work products result from procedures that "force agencies to think carefully about the matter at hand" and "will almost invariably reflect the benefit of expertise and therefore should merit deference. *See, e.g*., Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 738 (2002). For example, in *SEC v. Chenery Corp.*, ("*Chenery II"*), the Court expanded the type of reliable work product from an agency's promulgated rules to interpretations found in an agency's formal adjudication process. 332 U.S. 194, 202-203 (1947). In fact, the Court held an agency's "administrative judgments are entitled to the greatest amount of weight by appellate courts." *Id*. at 208. The Court held that formal adjudications represent an agency's "product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts." *Id*. at 209. Therefore, the Court held that the SEC's formal adjudication was a proper forum to "announc[e] and apply[] a new standard of conduct." *Id*. at 203.

Lastly, and perhaps most decisive, an agency's interpretation is, and "always has been" "especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Loper Bright*, 603 U.S. at 402. For example, in *Aluminum Company of America v.*

Central Lincoln Peoples' Utility District, the Court awarded great weight to an agency's interpretation of a statute governing power generation systems based in part on the agency's expertise with what it viewed to be a "technical and complex" subject matter. 467 U.S. 380, 390 (1984). More specifically, the Supreme Court has already noted and relied on the EPA's "unique experience and expertise" in regulating the discharge of pollutants under the Clean Water Act before *Chevron* deference was conceptualized. *See E.I. Du Pont de Nemours & Co v. Train*, 430 U.S. 112, 139 n. 25 (1977). Moreso, the Supreme Court has relied on the EPA's interpretations of the scope of NPDES permits under § 1342 of the CWA without resorting to *Chevron* deference at all. *See Decker v. Nw. Env't Def. Ctr*., 568 U.S. 597, 613 (2013).

As applied, the EPA's interpretation of § 1342(k) satisfies the factors set forth in *Skidmore* to the extent that it should be afforded great persuasive weight even in a post-*Chevron* world. First, the interpretation has remained unchanged since it was first adopted under formal adjudication in 1998 by the EPA Appeals Board Decisions' *In re Ketchikan Pulp*. 7 E.A.D. at 617-19. The EPA's interpretation provides this Court with approximately 27 years of consistency, in contrast to the stark divergence from a consistently held policy in *County of Maui*. 590 U.S. at 179.

Second, because the EPA's interpretation was couched in the formal adjudication of *Ketchikan*, it is afforded the "greatest amount of weight by appellate courts." *Chenery II*, 332 U.S. at 209. Under *Chenery II*, this adjudication can be presumed to be informed by "administrative experience," "responsible treatment" of the record, adherence to statutory policies, and the contemplation of all "complexities of the problem." *Id*. As such, the form of the EPA's interpretation here is one which "administrative agencies are best equipped to make," taking the shape of "an informed, expert judgment on the problem." *Id*. at 207-209.

Lastly, § 1342 of the CWA governs the issuance of NPDES permits and is therefore particularly dependent on the technical expertise of the EPA. *In re Ketchikan Pulp Co.*, 7 E.A.D. at 608-10. The EPA's interpretation of the CWA as it pertains to issuing NPDES permits is based on a balance of identifying and reducing "hundreds" of "chief pollutants" in various water streams against the feasibility issues of doing so. *Id.* at 619-20. Not only has the Court consistently relied on the EPA's expert interpretation of the CWA, [4] but it has already relied on an EPA interpretation of § 1342. This indicates the CWA, and its permitting provision specifically, is highly "technical and complex" and well within the EPA's "relative expertise" to be afforded persuasive deference. *Aluminum Co. of America*, 467 U.S. at 390; *Mead*, 533 U.S. at 235. Because of the highly technical and scientific nature of the permitting provision of the statute, and the EPA's role in administering it, this factor should be weighed in favor of the interpretation's persuasiveness.

Because all the *Skidmore* factors weigh in favor of the EPA's "body of experience and informed judgment" behind its § 1342 interpretation, *Piney Run's* incorporation of it is still good law in a post-*Chevron* world, and this Court should grant it great persuasive weight. *Skidmore*, 323 U.S. at 140.

b. The EPA's interpretation of the permit shield in Piney Run *is supported by traditional tools of statutory interpretation.*

After establishing the great persuasiveness of the EPA's interpretation of § 1342, the decision of whether this interpretation complies with the statute is still this Court's to make. It is true that "the starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska,* 451 U.S. 259, 265 (1981) (*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S.

[4] The Court has also noted that the Clean Water is a "very 'complex statute," making reliance on expert guidance much more necessary. *Chem. Mrfs. Ass'n v. NRDC*, 470 U.S 116, 122 (1985).

723, 756 (1975) (Powell, J., concurring)). In this case, the provision governing NPDES permits which articulates the permit shield defense, reads that "compliance with a permit issued pursuant to this section shall be deemed compliance" with the other provisions of the CWA. 33 U.S.C. § 1342(k). However, statutory analysis "must not be guided by a single sentence or member of a sentence but . . . the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)). The *Piney Run* test is supported both by the text of this provision, and the purpose of the CWA to prohibit the "discharge of *any* pollutant by *any* person." 33 U.S.C. § 1311(a) (emphasis added).

The text, purpose, and legislative history of the CWA all illustrate that an NPDES permit is meant to grant a limited exception to the Act's absolute prohibition on the discharge of pollutants into waterways. *See Train v. Colorado Pub. Int. Rsch. Grp.*, 426 U.S. 1, 7 (1976) ("[T]he discharge of 'pollutants' into water is unlawful without a permit"); *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976) ("Under NPDES it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms"); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). This limited exception cannot be read to apply a broad shield of protection.

SCCRAP concedes that § 1342(k) would still allow a polluter to discharge pollutants which are unmentioned in its permit. *See Atl. States L. Found. v. Eastman Kodak, Co.*, 12 F.3d 353, 357 (2d Cir. 1993). The Supreme Court noted that § 1342(k) was adopted to prevent excessive litigation against permit holders and reflects the infeasibility to screen for every pollutant which could possibly be present in a discharge. *Id.* (citing *Train*, 430 U.S. at 138 n. 28). However, this interpretation of § 1342(k) as a pragmatic limitation of the lofty goals of the CWA is also consistent with the Fourth Circuit's two step *Piney Run* test. 268 F.3d at 271-72. Under the *Piney*

Run test, a polluter may discharge a pollutant not explicitly mentioned in a NPDES permit but may not discharge pollutants which were not properly disclosed or within the "reasonable contemplation" of the permitting authority. *Id.*

If the purpose of § 1342(k) is to provide the EPA a feasible means to achieve the purposes of the CWA as *Atlantic States* contemplates, then *Piney Run* is consistent with that goal as the test was based on guidance directly from the EPA. *See In Re Ketchikan Pulp,* 7 E.A.D. at 621 ("[When] the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants has been held to be outside the scope of the permit."). *Piney Run* is also more consistent with the strict liability nature of the statute than an approach which does not consider whether the unlisted pollutants were in the reasonable contemplation of the permit issuer. *Costle*, 568 F.2d at 1375. The CWA contains a strong purpose clause in the text which states that "it is the national goal that discharge of pollutants into navigable waters be eliminated." 33 U.S.C. § 1251(a)(1). Although the statutory goal has endured pragmatism concerns about enforceability, the CWA is primarily a strict liability statute, to the extent that a permit is the sole way a polluter can "escape the total prohibition" of the Act. *Costle*, 568 F.2d at 1375. With the statutory goals in mind, and with the knowledge that the EPA itself finds the two-step *Piney Run* test feasible to implement, *Piney Run* is consistent with the CWA, and this Court should award it deference.

III. Under the *Piney Run* Test, ComGen's Discharge of PFAS is Prohibited Because the Pollutants Were Not Within the EPA's Reasonable Contemplation When the Permit was Issued

The District Court erred in dismissing SCCRAP's CWA claim by holding that ComGen's unpermitted discharge of PFOS and PFBS pollutants was permissible, because the pollutants were not within the reasonable contemplation of the EPA at the time the permit was granted.

Therefore, ComGen's permit shield defense fails. Under *Piney Run*, for an NPDES permit to successfully shield a polluter from liability for the discharge of an unlisted pollutant, the discharge must be (1) properly disclosed and (2) "within the reasonable contemplation of the permitting authority." *Piney Run*, 268 F.3d at 267. Generally, a pollutant is *not* considered to be within the reasonable contemplation of the permitting authority if the authority was not aware that the discharges impacted the relevant waterway at the time the permit was being contemplated. *Piney Run*, 268 F.3d at 267; *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 285-286 (6th Cir. 2015); *Ohio Valley Env't Coal., Inc. v. Marfork Coal, Inc.*, 966 F. Supp. 2d 667,687 (S.D.W. Va. 2013). By invoking the permit shield defense, ComGen "bears the burden of proving that it may validly advance it." *S. Appalachian Mt. Stewards v. A&G Coal Corp*., 758 F.3d 560, 569 (4th Cir. 2014).

In *Piney Run*, the Fourth Circuit applied the permit shield defense to shield a polluter's liability for its discharge of heat even though the pollutant was not expressly listed on its NPDES permit. *Piney Run*, 268 F.3d at 271. First, the court noted that the polluter met the requisite disclosure requirements because it adequately informed the permitting authority that its facility was discharging heat while the permit application was ongoing. *Id*. Second, the court held that the permitting authority reasonably contemplated the facility's heat because they required "daily reports on water temperatures and heat discharges . . . after the permit was issued." *Id*. Because the discharge of heat was disclosed and contemplated, the Fourth Circuit determined that the polluter's NPDES permit shielded it from liability. *Id.* at 272.

In addition, even if pollutant discharges are not disclosed to the permitting authority, they may still be within its reasonable contemplation if the permitting authority was aware that alike facilities can discharge alike pollutants. *See ICG Hazard*, 781 F.3d at 290. For example, in *Sierra*

Club v. ICG Hazard, the Sixth Circuit considered the discharge of selenium to be within the permitting authority's reasonable contemplation because the agency knew that "mines in the area could produce selenium" and required selenium monitoring as a condition to receive a permit. *Id.* However, *ICG Hazard* contemplated the liability shielded by a *general* permit, which requires more information gathering by the permitting authority during the application process, while applying for an *individual* permit like that issued to ComGen requires more information gathering from the applicant. *Id.* R. at 4.

By contrast, in *Ohio Valley Environmental Coal, Inc. v. Marfork Coal, Inc.*, the Southern District Court of West Virginia found that even pollutants which had been adequately disclosed to the permitting authority may not have been within its reasonable contemplation if there was no indication that the amount within the discharge would impact water quality. 966 F. Supp. 2d at 687. In *Marfork*, the polluter adequately reported low levels of selenium during the permit application process but later began discharging "high levels of selenium above the water quality standard." *Id.* The court determined that because the initial disclosure did not indicate a risk that the level of selenium would impact the water quality at the time of the permit application, the selenium discharges were not reasonably contemplated by the permitting authority. *Id.*

Here, as distinguished from *Piney Run*, ComGen's PFAS discharges could not be reasonably contemplated by VDEP because ComGen never disclosed the presence of PFAS pollutants within its discharge and answered in the negative when asked about the presence of PFAS by the VDEP Deputy Director. R. at 4-5. Furthermore, while the VDEP was aware of some "newer studies" that suggested PFOS and PFBS could be present in fly and bottom ash, there is nothing in the record to suggest that it had any knowledge that facilities such as ComGen's were discharging these pollutants. R. at 4. There is nothing in the record to suggest that VDEP was as

aware of PFAS pollutants in Generating Station discharges as the permitting authority in *ICG Hazard* was aware of selenium discharges in mines, prompting it to actively monitor the pollutant. *ICG Hazard*, 781 F.3d at 290. Additionally, because ComGen was pursuing an individual VPDES permit, it had the greater burden to gather information in the permitting process than the polluters obtaining a general permit in *ICG Hazard. Id.* R. at 4.

The situation here is far more analogous to the one in *Marfork.*; while the VDEP suspected PFAS discharges may be present in fly and bottom ash, they were not provided information during the VPDES permit application process that would have alerted them to the fact that these discharges were occurring at ComGen's facility and in a high enough quantity to impact overall water quality. Because the VDEP's only knowledge of ComGen's PFAS levels was that they were nonexistent during the application process, ComGen's PFAS discharges could not have been within its reasonable contemplation and therefore, under the *Piney Run* test, these discharges fell outside the scope of the VPDES permit, and ComGen should be held liable.

a. Even if this Court adopts the reasoning of Atlantic States*, ComGen's PFAS discharges were not covered by its permit because it lied to the VDEP.*

Even if this Court declines to adopt *Piney Run* and accepts ComGen's argument that the reasoning in *Atlantic States*[5] should be adopted in its place, SCCRAP still prevails because ComGen intentionally misled the VDEP regarding its PFAS discharges and therefore fell short of *Atlantic States'* disclosure requirement. In *Atlantic States Legal Foundation v. Eastman Kodak Co*., the Second Circuit, in adopting the same EPA interpretation of §1314 adopted by *Piney Run*,

[5] ComGen urges this Court to reject the reasoning in *Piney Run* due to its reliance on the now-overruled *Chevron* doctrine and argues *Atlantic States* should be adopted in its place. R. at 13. However, *Atlantic States* also relied on *Chevron* deference to the same EPA interpretation adopted by *Piney Run* without enumerating the "reasonable contemplation" requirement. *Compare Atlantic States*, 12 F.3d at 358 *with Piney Run*, 267 F.3d at 267-69. To this end, by ComGen's own argument, *Atlantic States* should also be "cast aside." R. at 13.

held that NPDES permits would shield polluters from liability for unpermitted discharges "so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." 12 F.3d 353, 358 (1993). Along with disclosing the presence of any named pollutants within its discharges, EPA regulations state that polluters must provide the permitting authority with any "additional information" requested by the permitting authority. 40 C.F.R. § 122.21(g)(13). The EPA has also stated that a permit holder complies with the disclosure requirements of 40 C.F.R. § 122.21 when it makes adequate disclosures to allow the EPA to make an informed decision to issue a permit. *In re Ketchikan Pulp*, 7 E.A.D. at 622.

For example, in *Southern Appalachian Stewards v. A&G Coal*, a polluter failed to disclose that selenium was present in its discharges. 758 F.3d at 566. Under § 122.21(g), the court held the polluter was required to "include significant detail regarding the nature and composition of the expected discharges" during the permit application process. *Id*. at 563. A&G argued that because it did not know selenium was in its discharges, it could not be liable for failing to disclose it. *Id*. at 565.The court rejected this argument, holding that it is the applicant's burden to "gather and provide" information to the permitting agency "so that it can make a fully informed decision to issue the requested permit." *Id*. at 566. As such, the court held that A&G's failure to test for selenium levels and comply with disclosure requirements defeated its permit shield defense. *Id.*

In addition, a polluter's ignorance as to the contents of its discharges does not shield them from a failure to disclose. *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1327-29 (N.D. Ga. 2022). In *Parris v. 3M Co.*, the Northern District Court of Georgia swiftly rejected the proposition that a permit holder's ignorance of reported PFAS discharges relieved them of its disclosure requirements. *Id.* at 1320. The court held that a permit holder "cannot claim ignorance about the

contents of its own discharge and expect to receive the protection of the permit shield." *Id*. To hold otherwise would incentivize an applicant's "willful blindness." *Id*. Furthermore, the court took note of the prematurity of the defense at the motion to dismiss stage, because the court could not "infer from the terms of [the] permit alone whether [the holder] adequately informed the [permitting authority] about the nature and location of its discharges." *Id*. at 1319-20.

As applied and accepting all facts alleged in the Complaint as true, ComGen lied to the VDEP deputy director about its PFAS pollutant discharges before its VPDES permit was issued. R. at 4-5. Certainly, such a misrepresentation cannot satisfy the comprehensive disclosure requirements under the CWA, and ComGen fails the permit shield defense set forth in *Atlantic States*. More so, under *Southern Appalachian* and *Parris*, the disclosure requirements require the applicant to provide sufficient information for the permitting authority to make an informed decision to grant or deny the permit. *S. Appalachian*, 758 F.3d at 566; *Parris*, 595 F. Supp. 3d at 1327-29. Therefore, ComGen had a duty to disclose its five years of data showing high PFAS concentrations from Outlet 001 for the VDEP to make an informed decision despite the omission of PFAS from the permit application. Under *Parris*, ComGen's failure to fully inform the VDEP in this regard defeats its permit shield defense, assuming this case is ripe at the dismissal stage to assess the fact-specific inquiry of ComGen's permit shield.

Additionally, 40 C.F.R. § 122.21(g)(13) requires polluters to provide any additional information requested by the permitting authority during the application process. Therefore, the VDEP deputy director's email to ComGen inquiring as to their PFAS parameters, though in an informal context, was part and parcel of the other requests for disclosure in ComGen's application process. Under *South Appalachian*, ComGen cannot rely on its ignorance (albeit

feigned) for failing to disclose during the permitting process. *Southern Appalachian*, 758 F.3d at 566.

Under the *Atlantic States* standard ComGen champions, ComGen cannot be rewarded with the permit shield defense without either ignoring the CWA's comprehensive disclosure requirements or encouraging a pervasive, willful blindness that would "tear a large hole in the CWA." *S. Appalachian*, 758 F.3d at 570. ComGen's permit shield defense is defeated under *Piney Run* because the VDEP could not have contemplated PFAS discharges, and under *Atlantic States* because ComGen failed to meet its disclosure requirements. Regardless of the standard, ComGen's unpermitted discharge of PFAS pollutants cannot enjoy reprieve from the protective arm of the CWA.

IV. SCCRAP Has Article III Associational Standing to Sue ComGen

The District Court erred in dismissing, *sua sponte*, SCCRAP's challenge of ComGen's Closure Plan pursuant to § 6972(a)(1)(A) of RCRA because SCCRAP has Article III standing as an association.

For an association like SCCRAP to have standing to sue on behalf of its members, (1) at least one of its members must have standing individually, (2) the interests at stake in the action must be germane to the organization's purpose, and (3) neither the claim nor the relief requested can require individual members' participation in the suit. *Friends of the Earth, Inc. v. Laidlaw Env't Serv., Inc.*, 528 U.S. 167, 181 (2000). For members to have standing individually and satisfy the first element of the *Laidlaw* test, they must show they suffered an "injury in fact" that is "fairly traceable" to the defendant's actions and redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). It is not disputed that SCCRAP members have suffered "injuries in fact" in the form of "aesthetic and recreational injuries." R. at 14. However, the District Court's finding that SCCRAP's standing fails because its injuries are not traceable nor

redressable is irreconcilable with established standing jurisprudence for environmental citizen suits.

a. Pollution from the closure plan would contribute to an ongoing injury sufficient to establish traceability.

SCCRAP has sufficiently pled that its injuries would be worsened, and are thus "fairly traceable," to ComGen's plan to permanently store CCR waste below sea level, leaching into groundwater that touches national waterways. *Lujan*, 504 U.S. at 560-61; R at 9. To satisfy Article III standing, the injury complained of must be causally connected to the alleged misconduct. *Lujan* 504 U.S. at 560. This is not a stringent standard; "even harms that flow indirectly from the action in question" satisfy Article III's traceability requirement. *Focus on the Fam. v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003). The fact that a plaintiff's injury is ongoing, or some harm has already occurred, does not preclude the causal connection between injury and the alleged misconduct. *Laidlaw*, 528 U.S. at 187-88. Further, a specific action does not have to be the sole cause of an environmental injury to be for the injury to be fairly traceable. *Massachusetts v. EPA*, 549 U.S. 497, 523-25 (2007). Although SCCRAP members are already suffering the consequences of leaching pollutants from the Generating Station, these injuries would assuredly continue and worsen if the illegal closure plan were implemented. R. at 9; *Laidlaw*, 528 U.S. at 187-88 (affirming an environmental group's standing due to an ongoing NPDES permit violation "that could continue" to injure the environmental plaintiffs); *Massachusetts*, 549 U.S. at 523-25.

In *Massachusetts v. EPA*, the Supreme Court affirmed Massachusetts's standing to challenge the EPA's failure to regulate motor vehicle emissions because, at the very least, the EPA's inaction would "contribute" to the state's injuries arising from global warming. 549 U.S. at 523. The Court rejected the EPA's argument that its effectiveness would be offset by other

sources of greenhouse gasses because even a "tentative" or "incremental step" toward "resolv[ing] massive problems" may be brought into federal court "to determine whether that step conforms to law." *Id.* at 524. Because "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts," and the EPA's regulatory power would reduce "to some extent" the risk of further harm, traceability to the EPA's inaction was satisfied. *Id.* at 526. The *Massachusetts* holding makes clear that a party's misconduct can be traceable to an environmental injury if a party's misconduct could "contribute" in some way to an ongoing environmental injury. *Id.* at 523.

In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, the Fourth Circuit similarly addressed the traceability requirement of environmental injuries. 204 F.3d 149, 161-62 (4th Cir. 2000). The court held "threatened environmental injury is by nature probabilistic," such that an "increased risk" of environmental injuries can be sufficiently traceable to a polluter's misconduct. *Id.* at 160. Environmental plaintiffs must merely "demonstrate that a particular defendant's discharge has affected or has the potential to affect his interests." *Id.* at 162. Therefore, the plaintiff's evidence that there were already pollutants in his lake "of the type" discharged by the polluter established sufficient traceability to the polluter's failure to meet its NPDES permit terms. *Id.* at 161-62. The court held that there was "no suggestion that any entity other than [the polluter] is responsible for the injury in fact." *Id*. Otherwise stated, "[w]here a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit," traceability is satisfied. *Id*.

As applied, the District Court erred in limiting its review of SCCRAP's injuries in a vacuum; the court failed to consider how the deficiencies in ComGen's closure plan would

"contribute" to or present the "potential to affect" the aesthetic and recreational injuries SCCRAP established. *See Massachusetts*, 549 U.S. at 523; *Gaston*, 204 F.3d at 161-62.

SCCRAP's primary challenge to ComGen's closure plan is that it fails to meet RCRA's statutory standards designed to mitigate future environmental harms post-closure. R. at 12. SCCRAP challenges the plan because it poses an "increased risk" of further environmental injury that will result from ComGen's inability to satisfy RCRA's closure requirements. *Gaston*, 204 F.3d at 160. Like the EPA's refusal to regulate motor vehicle emissions to mitigate the ongoing global warming crisis in *Massachusetts*, the deficient closure plan has the potential to be, if nothing else, a contributor to the recreational and aesthetic injuries SCCRAP is suffering. *See* 549 U.S. at 523-25. Just as the EPA's failure to regulate greenhouse gas emissions would allow the global warming crisis to continue or worsen, so would ComGen's sloppy closure plan allow improperly stored coal ash byproduct to worsen SCCRAP's environmental injuries. *See id.* Like the plaintiff in *Gaston*, who had already begun noticing pollutants and challenged the polluter's violations of its NPDES permit to prevent future pollution, SCCRAP members have already refrained from enjoying local waters, and challenge ComGen's deficient closure plan to prevent future, unchecked mishandling of "in place" pollutants. *See* 204 F.3d at 160.

The District Court's reliance on *Mobile Baykeeper* is misguided. R. at 14. The *Mobile Baykeeper Inc. v. Alabama Power Co.* holding ignores the *Massachusetts* precedent by failing to address the contributory or increased harm posed to environmental plaintiffs by impending enforcement of an illegal closure plan. No. CV 1:22-00382-KD-B, 2024 WL 54118, at *11-14 (S.D. Ala. Jan. 4, 2024). If traceability required an illegal closure plan to be the originating cause of harm to an environmental plaintiff, it "would doom most challenges to regulatory action" under § 6972 (a)(1)(A) of the RCRA. *Massachusetts*, 549 U.S. at 524. A citizen suit under

§ 6972 (a)(1)(A) allows private enforcement of the "violation of any permit, standard," or "regulation." If the traceability requirement for such suits could not address the prospective harm that would result from the alleged "violation," it would require the complete commission of the violation so the plaintiffs can suffer and seek to rectify new injuries post-enforcement. But, as the district court found, § 6972(a)(1)(A) is a cause of action for "citizens seeking relief against present or future risks of harm." R. at 11. Also, the District Court correctly noted that suits under § 6972 are intended to be "enforcement mechanisms" of the CCR Rule. R. at 5. It cannot be true that RCRA's citizen suits provide relief for *future* harm and operate as the CCR Rule's enforcement mechanism if a plaintiff must wait for the violation to (1) be completed[6] and (2) cause new, distinct injuries prior to suing.

b. SCCRAP's injuries would be redressed by a favorable decision from this Court.

SCCRAP's injuries would be redressed by a favorable decision from this Court because enjoining ComGen from implementing the closure plan would prevent the permanent storage of coal ash below sea level and the resulting unmonitored leaching of pollutants into the national water supply. R. at 9. The causation and redressability requirements are often "flip sides of the same coin" meaning that enjoining an action that is fairly traceable to a defendant would redress the injury that results from that action. *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 288 (2008). Simply put, when a plaintiff in a citizen suit alleges "a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy the alleged harm." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998). Because SCCRAP is seeking to enjoin the continued enforcement of the illegal closure plan, this Court's enjoining of the plan would prevent further contribution to SCCRAP's environmental injuries.

[6] Surely, the CCR Rule cannot function if it must wait for closure plan violations to be completed (and likely cause irrevocable harm) before a plaintiff can enforce RCRA in court.

V. SCCRAP Can Pursue an Imminent and Substantial Endangerment Claim

The District Court erred in dismissing SCCRAP's second RCRA claim because an imminent and substantial endangerment to the environment adequately supports a claim under § 6927(a)(1)(B). R. at 9, 12. By ignoring the disjunctive "or" in the statutory language and that the impacts of the Impoundment's high concentrations of arsenic and cadmium on future living populations "may not be felt until later," the District Court erred in dismissing SCCRAP's second RCRA claim. R. at 14. *Meghrig v. Kfc W.*, 516 U.S. 479, 486 (1996).

a. RCRA allows for imminent and substantial endangerment claims for endangerment solely to the environment.

One need look no further than the text of § 6972(a)(1)(B) to find that the provision provides for citizen suits based on an imminent and substantial endangerment solely to the environment. RCRA provides a cause of action "against any person...who has contributed or is contributing to," the mishandling of hazardous waste, "which may present an imminent and substantial endangerment to health *or* the environment." § 6972(a)(1)(B) (emphasis added). RCRA's stated purpose is to "minimize the present and future threat to human health *and* the environment." 42 U.S.C. § 6902(b). Moreso, the District Court took proper notice that RCRA's citizen suit provisions were intended to be the CCR Rule's enforcement mechanism. R. at 5.

In *Interfaith Community v. Honeywell International*, the Third Circuit Court of Appeals rejected its lower court's holding that there must be a "potential population at risk," to bring an imminent and substantial endangerment claim under RCRA. 399 F.3d 248, 259 (3d Cir. 2005). The environmental association brought action against a series of polluters for deficiently maintaining a dump site, allowing dangerously high levels of carcinogens to leach into surface and groundwater. *Id*. at 252. The court held that these facts were sufficient to withstand an imminent and substantial endangerment claim. *Id*. at 260-61. Specifically, the court held that to

require the endangerment be toward a living population is "irreconcilable," with §6972(a)(1)(B)'s "disjunctive phrasing, '*or* environment." *Id*. at 259. The court held the disjunctive "or" meant that an imminent and substantial claim may survive even if it only alleges the endangerment of the environment, because the phrasing "means a living population is not required for success on the merits." *Id*. at 260.

Likewise, in *Burlington Northern & Santa Fe Railway v. Grant,* the Tenth Circuit Court of Appeals reversed summary judgement against Burlington Northern's § 6972(a)(1)(B) claim. *See generally* 505 F.3d 1013 (10th Cir. 2007). Burlington Northern alleged that Grant was aware of and directed "substantial earth moving and construction on his property" that started the decades-long migration of a harmful tar-like pollutant onto Burlington's downhill, neighboring property. *Id*. at 1018. The court noted that "Congress conferred enforcement power [of RCRA] upon affected United States citizens" and that § 6972(a)(1)(B)'s "expansive language" is intentional to give courts the authority to grant relief "to the extent necessary to eliminate any risk posed by toxic wastes." *Id*. at 1020 (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (internal quotations omitted)). The court held that the lower court's inability to find "any person who had been injured" by the pollutant was inconsequential. *Grant*, 505 F.3d at 1021. The court pointed to the disjunctive phrasing of § 6972(a)(1)(B) to conclude that the provision also "requires consideration of . . . endangerment to the environment," and that "proof of harm to a living population is unnecessary." *Id.* The court also held that "such a holding would remove from consideration" the tar-like pollutant's "potential harm to health or environment." *Id*.

As applied, SCCRAP's allegations of ComGen's pollutants creating an endangerment to the environment are sufficient to state a claim under § 6972(a)(1)(B) because the provision was written to rectify endangerment either to a living population's "health *or* the environment." As

the Third and Tenth Circuits noted, the disjunctive phrasing "or" was meant to disjoint the nominal phrase of the sentence and provide relief for two types of harm, especially when reviewing the language in context with the statute's purpose to protect "human health *and* the environment." 42 U.S.C. § 6902(b) (emphasis added); *Grant*, 505 F.3d at 1021; *Interfaith Cmty.,* 399 F.3d at 259; *see also Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (providing that "or" is "almost always disjunctive," especially when "context favors the ordinary disjunctive meaning of 'or'"). It cannot be true that RCRA is intended to protect both human life and the environment, yet its primary enforcement provision only remedies endangerment to one. Such a reading is "irreconcilable," unnatural, and based solely on the erroneous assumption that it is absurd for the RCRA to provide a mechanism of enforcement "essentially when there is any form of contamination," when that is, at its core, the RCRA's purpose in the nation's water conservation regulatory scheme. *Interfaith Cmty.,* 399 F.3d at 259; R. at 11, 13 (finding "RCRA's provisions were intended to complement the CWA, to ensure entities were not . . . disposing of removed pollutants in an environmentally unsound way," i.e., in a manner that results in contamination).

The District Court's reliance on the unpublished opinion *Courtland Co. v. Union Carbide Corp.*, is misguided. No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D. W. Va. Sept. 28, 2023). First, Courtland sought the West Virginia Southern District Court's review after trial concluded. *Id*. at *1. The stark difference in procedural postures between *Courtland*'s post-trial stage and SCCRAP's current pleading stage should be enough to dissuade this Court's reliance on it. Second, the *Courtland* holding as to § 6972(a)(1)(B) turned decisively on the credibility of an expert witness rather than the text or purpose of the provision itself; because the expert witness's testimony was too conclusive and uninformed, the *Courtland* court could not adhere to

it without broadening the scope of § 6927(a)(1)(B). *Id*. at *165-189. Lastly, the *Courtland* holding contradicts itself; after holding that an endangerment must present a harm to human life, the court held that "it is difficult to reconcile the existence of an endangerment. . . when the contamination presently threatens no actual harm to someone *or something*." *Id*. at *171 (emphasis added). Within the same breath, the court holds endangerment solely to the environment is insufficient, yet follows by suggesting that, if Courtland had sufficiently alleged "actual harm . . . to *something*," its claim would survive. *Id*. Either this immediate contradiction displays the court's inability to preclude a § 6927(a)(1)(B) claim for endangerment to the environment, or it shows that the court's true point of contention was the lack of evidence Courtland was able to produce a trial. If the former, SCCRAP prevails past the pleading stage. If the latter, the *Courtland* court's disregard of Supreme Court precedent that states § 6972(a) was intended to remedy "future" rather than "actual" harm should give this Court decisive pause in relying on it. *Meghrig*, 516 U.S. at 486.

b. Even if this Court does not recognize an actionable claim under § 6927(a)(1)(B) for endangerment to the environment alone, the facts sufficiently allege potential harm to future living populations.

Even if this Court disregards the text of § 6972(a)(1)(B) and refuses to recognize imminent and substantial claims solely to the environment, because the Impoundment pollutes groundwater that may be used for drinking water in a future housing development, it presents an endangerment to a living population. While neither § 6972(a)(1)(B) nor the Supreme Court define "endangerment," circuit courts have addressed the meaning of the term. Multiple circuit courts have held that present harm is not required for an endangerment to be actionable. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); *Maine People's All. v. Mallinckrodt*, 471 F.3d 277, 279-80 (1st Cir. 2006); *Dague,* 935 F.3d at 1355-56 ; *Ethyl Corp. v. EPA*, 541 F.2d 1, 13

(D.C. Cir. 1976) ("[C]ase law and dictionary definition agree that endanger means something less than actual harm. . . .").

In *Price v. U.S. Navy*, the Ninth Circuit held that "endangerment" means a threatened or potential harm. 39 F.3d at 1019. In *Price*, a party dumped materials containing toxic metals and asbestos into a junkyard that was eventually developed into a neighborhood. *Id.* at 1012. A homeowner sued the party under § 6972(a)(1)(B) upon discovering the presence of the hazardous materials while building an in-ground pool. *Id.* The court denied the homeowner's claim because concrete foundations had been constructed which prevented the materials from contaminating her property. *Id.* at 1021. There was no mention of the effect the pollutants may have had on the homeowner's drinking water supply. *Id.*

In *Sullins v. Exxon/Mobil Corp.*, the District Court for the Northern District of California found that, in the context of § 6972(a)(1)(B), endangerments can be present in land to be developed. 759 F. Supp. 2d 1129, 1137-38 (N.D. Cal. 2010). Property developers purchased land previously used by a gas station with petroleum storage tanks buried underground. *Id.* at 1131. Three of the tanks leaked, polluting the groundwater. *Id.* Although the contamination presented no current risk to a living population, the court noted that remediation of the groundwater would be necessary if the site were developed into housing. *Id.* at 1136. Ultimately, because the property was being targeted for development, the contamination could present an endangerment to inhabitants of the proposed development. *Id.* at 1137-38.

Here, unlike in *Price*, there is nothing in place to prevent the coal ash pollutants in the Impoundment from contaminating groundwater at the site of the proposed housing development. *See* 39 F.3d at 1021; R. at 9. Rather, this case is most factually analogous to *Sullins*. *See* 759 F. Supp. 2d at 1131. SCCRAP's expert determined that groundwater within 1.5 miles of the

Impoundment is not safe for drinking. R. at 9. Like in *Sullins*, there has been a proposed development that would utilize the contaminated groundwater. *See* 759 F. Supp. 2d at 1136-38; R. at 9. Thus, the contamination could present an endangerment to future inhabitants of the development even though there is currently no present harm to a living population.

Although there is no evidence that the contamination will reach a public drinking water supply within the next five years, the development is projected to be finished six years from now. R. at 8-9. There is no evidence to indicate that drinking water will be safe by then. Additionally, because the development will use groundwater that is not currently part of a public drinking water supply, there is no evidence in the record indicating that the groundwater for the development would not be impacted. R. at 9. Because the Impoundment poses imminent and substantial harm to a future population's health, SCCRAP's second RCRA claim should proceed.

CONCLUSION

For the foregoing reasons, SCCRAP respectfully asks this court to REVERSE the District Court's grant of ComGen's Motion to Dismiss, REVERSE the District Court's finding of no standing *sua sponte*, and REMAND for further proceedings consistent with this ruling.

Respectfully submitted,

/s/ *Team Number Twelve*

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Counsel for the Appellant

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, Team Members representing SCCRAP 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, on February 5, 2025.

Respectfully submitted,

/s/ *Team Number Twelve*

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Counsel for the Appellant