Team 1

C.A. No. 24-0682

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 in case No. 24-0682, Judge Samuel L. Wotus

Brief of Appellant, STOP COAL COMBUSTION RESIDUAL ASH PONDS

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STATEMENT OF JURISDICTION

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") appeals from an Opinion and Order granting partial summary judgment for defendant Commonwealth Generating Company ("ComGen"), entered June 1, 2022, in the United States District Court for the Middle District of Vandalia, in case No. 24-0682. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1367 (supplemental). SCCRAP, ComGen, and the United States Environmental Protection Agency ("EPA") all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final and thus appealable. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

STATEMENT OF ISSUES PRESENTED

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

II. In deciding Issue 1, does the Court owe 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. Does SCCRAP have standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment?

IV. Can SCCRAP 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

A. Regulatory Framework

The Clean Water Act was enacted in 1972 with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise authorized. *Id*. § 1311(a). A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12).

The Act established the National Pollutant Discharge Elimination System ("NPDES"), creating a comprehensive scheme to regulate discharges from point sources, which the Act defines to include any "discrete conveyance." 33 U.S.C. § 1362(14). Discharges from point sources are prohibited unless permitted under the NPDES program, and EPA is responsible for setting technology-based effluent limits on permitted discharges. *Id*. § 1311. Under the NPDES program, EPA may "issue a permit for the discharge of any pollutant" provided that the discharge complies with technology-based effluent limits on permitted discharges set by the EPA. *Id*. § 1342(a). States may establish their own permit programs, subject to EPA approval, and Vandalia has elected to do so. *Id*. § 1342(b)-(c); Order at 11. Nonpoint source pollution, which is not defined in the Act but generally includes any other pollution sources, is largely left to be controlled by the states, with some federal oversight and funding. *Cnty of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1472 (2020); 33 U.S.C. §§ 1288, 1329.

The Resource Conservation and Recovery Act, enacted in 1976, is the primary federal law governing solid and hazardous waste disposal. Order at 11. RCRA authorizes two types of private citizen suits: actions against entities that have violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to RCRA,"

and actions against persons who have "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1); Order at 11.

In 2015, EPA published its Coal Combustion Residuals Rule, which regulates coal ash as solid waste under subtitle D of RCRA and establishes "national minimum criteria for existing and new CCR landfills...and surface impoundments...consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification and internet posting requirements." 80 Fed. Reg. 21,302; Order at 5. The Rule is "self-implementing," meaning that "facilities are directly responsible for ensuring that their operations comply with the Rule's requirements." Id. at 21,311. A year later, Congress passed the Water Infrastructure Improvements for the Nation Act, allowing states to obtain EPA approval to administer coal ash permitting programs "in lieu of" the federal rule. 42 U.S.C. § 6945(d)(1)(A). The State of Vandalia has obtained such approval and has regulations consistent with the federal CCR Rule. Order at 5.

The CCR Rule requires owners of existing CCR surface impoundments to prepare initial written closure plans by October 17, 2016, and impoundments that do not meet certain criteria must begin retrofitting or closure by October 31, 2020. 40 C.F.R. §§ 257.102(b)(2)(i), 251.101; Order at 6. The Rule provides two closure options: excavation and removal of CCR, or closure in place. For closure in place, owners must eliminate free liquids, preclude future impoundment of water, and "control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters." 40 C.F.R. § 257.102(d); Order at 6.

B. The Vandalia Generating Station and Little Green Run Impoundment

Commonwealth Generating Company ("ComGen"), a wholly owned subsidiary of Commonwealth Energy, owns and operates the Vandalia Generating Station in Mammoth, Vandalia. The Station, opened in 1965, is among the oldest operating power stations in Vandalia with a capacity of 80 MW. Order at 4. The Station operates under a Vandalia Pollutant Discharge Elimination System ("VPDES") permit that covers three outfalls—Outlets 001, 002, and 003—into the Vandalia River and its tributaries. The current permit, issued on July 30, 2020, and effective September 1, 2020, sets limits for various pollutants but contains no limits for PFOS or PFBS, nor does it require monitoring for these parameters. *Id.* at 4-5.

Before the 2020 permit was issued, a deputy director of the Vandalia Department of Environmental Protection ("VDEP") informally inquired via email whether any of the Outlets might discharge PFOS or PFBS, citing newer studies showing such PFAS parameters in fly and bottom ash. A ComGen employee assured the deputy director that neither PFOS nor PFBS were known to be in the discharge. These parameters were never mentioned in any formal permit documents or application materials. *Id.* at 4-5. However, ComGen's monthly monitoring records from 2015 onward, revealed through a subpoena in separate litigation, showed consistent discharge of PFOS and PFBS from Outlet 001 in concentrations as high as 15 ug/L and 35 ug/L, respectively. *Id.* at 9.

Coal ash from the Station has historically been disposed of in the Little Green Run Impoundment, formed by a dam across Green Run immediately east of the Station. The dam reaches 395 feet from toe to crest, with a top elevation of 1,050 feet above sea level. *Id.* at 5. The unlined impoundment covers approximately 71 surface acres and contains approximately 38.7

million cubic yards of solids, mainly CCRs and coal fines and waste material removed during the coal cleaning process. *Id.*

In 2018, as part of its "Building a Green Tomorrow" program aimed at lowering energy costs while reducing pollution, ComGen announced the planned 2027 closure of the Vandalia Generating Station. Rather than invest millions to upgrade the Station to comply with EPA's Effluent Limitations Guidelines, ComGen decided to close the Little Green Run Impoundment in place. *Id.* at 6.

In 2019, ComGen began closure activities by installing thirteen groundwater monitoring wells around the Impoundment. *Id.* at 6-7. From 2021 to present, downgradient monitoring wells have shown elevated levels of arsenic and cadmium above federal advisory levels and Vandalia's groundwater quality standards. While there is no evidence that these contaminants have reached the Vandalia River or any public drinking water supply, both environmental and industry groups agree the Impoundment was likely leaching for 5 to 10 years before the first monitoring report in 2021. *Id.* at 7-8. ComGen has already spent around $50 million implementing the closure plan and expects to spend over $1 billion upon its completion in 2031. *Id.* at 7.

C. The Closure Plan and Permit

In December 2019, ComGen submitted to VDEP its initial "Permit Application for CCR Surface Impoundment" at the Little Green Run Impoundment. Order at 5. The permit application explained ComGen's intention to close the Impoundment in place in accordance with EPA and state CCR Regulations. *Id*. ComGen had placed its initial closure-in-place plan for the Little Green Run Impoundment in the Vandalia Generating Station's operating record on October 17, 2016. *Id*. ComGen amended the plan with more detail in July 2019 and again in April 2020,

including its then-existing closure and post-closure plans for the Impoundment as part of its 2019 permit application. *Id*.

In February 2021, VDEP issued a notice of ComGen's initial Permit Application and announced a public hearing to receive oral comments on the proposed permit. *Id*. at 5-6. The public submitted thousands of comments in opposition to the proposed permit. *Id*. at 6. On March 30, 2021, VDEP held the public hearing, during which numerous individuals, including a representative of SCCRAP, urged VDEP to deny ComGen the proposed permit. *Id*.

In July 2021, after considering the public hearing record, written comments, and its CCR Regulations, VDEP issued to ComGen a Coal Combustion Residual Facility Permit to Close for the Little Green Run Impoundment. *Id*. The Closure Permit is valid until May 2031, and ComGen is obligated to manage CCR at the Impoundment in accordance with the conditions of the Permit, the approved permit application, and the federal CCR Regulations. *Id*.

A housing developer is currently considering building a large subdivision within a mile downgradient of the Impoundment and has proposed plans to use well water as the primary drinking water source for that development. Order at 8-9. Several SCCRAP members have put their name on the waiting list for this proposed development but have since learned about the groundwater contamination, which is making them second guess that decision. *Id*. at 9. However, even if approved, the housing development would not be finished until at least 2031. *Id*.

D. SCCRAP's Environmental Concerns

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is a national environmental and public interest organization based in Washington, D.C., with members located throughout Vandalia. Order at 8. SCCRAP's missions include targeting coal-fired power plants with coal ash ponds that have both groundwater problems and PFAS discharges, protecting public water from

pollutants from the fossil fuel industry, and transitioning to a cleaner, more sustainable energy supply that does not create harmful by-products like coal ash. *Id*.

SCCRAP and other local environmental groups suspected the Vandalia Generating Station was causing PFAS problems in the Vandalia River, which supplies drinking water for Mammoth residents. *Id*. at 9. Their testing identified PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001, which were not present a mile upstream of the Outlet. Id.

SCCRAP has also expressed concerns about ComGen's Closure Plan for the Little Green Run Impoundment. SCCRAP believes the plan is deficient because it will permanently store coal ash below sea level and in contact with water, including groundwater, where it is already leaching into waters of the United States. *Id*. SCCRAP also believes that future floods, storms, and hurricanes present a risk of catastrophic failure as any surrounding water level rise could elevate groundwater in the Impoundment and cause the coal ash to spill into the Vandalia River. *Id*.

SCCRAP's chapter in Mammoth includes members who recreate, fish, and own property in the Vandalia River and its surrounding watershed. Order at 9. These members allege they are directly affected by the environmental impacts associated with the Little Green Run Impoundment and the discharges from the Vandalia Generating Station. *Id*. Specifically, they used to recreate in the Vandalia River and its tributaries near the Station and Impoundment but have restricted such use because of concerns over PFAS, arsenic, and cadmium pollution. *Id*. at 10. They find such pollution offensive and it diminishes their use and enjoyment of the River. *Id*.

E. District Court Proceedings

Over 90 days after sending its notice of intent to sue, SCCRAP filed a citizen suit against ComGen on September 3, 2024, in the United States District Court for the Middle District of Vandalia. Order at 12. SCCRAP's Complaint pursued three claims: one under the CWA and two under RCRA. *Id*.

First, pursuant to § 505 of the CWA, SCCRAP alleged that ComGen violated the CWA by discharging PFOS and PFBS into the Vandalia River through Outlet 001 without a NPDES permit for such pollutants. Id. SCCRAP alleged these pollutants were not "within the reasonable contemplation of the permitting authority at the time the permit was granted" because they were not listed in the permit and ComGen had misrepresented their presence to the WVDEP deputy director. Id.

Second, pursuant to § 7002(a)(1)(A) of RCRA, SCCRAP challenged the Closure Plan as inadequate. Id. Specifically, SCCRAP alleged the Plan fails to satisfy the CCR Rule's requirements to eliminate free liquids prior to capping in place, will result in continued impoundment of water, sediment, or slurry, and does not adequately control post-closure infiltration of liquids or releases of CCR pollution. Id.

Third, pursuant to § 7002(a)(1)(B) of RCRA, SCCRAP alleged that the Little Green Run Impoundment presents an imminent and substantial endangerment to the environment itself due to consistent arsenic and cadmium exceedances at its downgradient monitoring wells. Id.

ComGen moved to dismiss the Complaint on September 20, 2024. Id. The District Court granted ComGen's motion in its entirety on October 31, 2024. Order at 13-14. The court declined to follow the 12th Circuit's adoption of *Piney Run* regarding the CWA claim, instead following Atlantic States to find the permit shield applicable. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 259 (4th Cir. 2001); *Id*. at 13. On the RCRA claims, the court

found SCCRAP lacked standing to challenge the Closure Plan and determined that RCRA does not support an imminent and substantial endangerment claim to the environment itself without allegations of endangerment to a living population. Id. at 13-14.

SCCRAP filed this appeal on November 10, 2024. Order at 15. The 12th Circuit issued an order on December 30, 2024, setting forth the issues to be briefed and argued on appeal.

SUMMARY OF THE ARGUMENT

ComGen's discharge of PFOS and PFBS from Outlet 001 constitutes an unpermitted discharge under the Clean Water Act (CWA) because these pollutants were neither disclosed during the permitting process nor within the reasonable contemplation of the permitting authority. The permit shield provision protects permit holders from liability only when they comply with express permit terms and the CWA's disclosure requirements, and when the pollutants discharged were within the reasonable contemplation of the permitting authority. *Parris v. 3M Company*, 595 F.Supp.3d 1288, 1319 (N.D. Ga. 2022). Unlike the permit holder in *Piney Run* who adequately disclosed heat discharges, ComGen actively misled regulators by representing that neither PFOS nor PFBS were present in its discharge, despite possessing five years of monthly monitoring records showing concentrations as high as 15 ug/L and 35 ug/L respectively. Order at 4, 8-9; *Piney Run*, 268 F.3d 255, 259 (4th Cir. 2001).

SCCRAP has standing to challenge ComGen's coal ash closure plan because its members meet all of the requirements for constitutional standing through their concrete aesthetic and recreational injuries. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*. established that environmental plaintiffs adequately allege injury-in-fact when their aesthetic or recreational interests are directly affected. 528 U.S. 167, 183 (2000). Here, SCCRAP's members have demonstrated concrete recreational and aesthetic injuries—they "used to recreate in the Vandalia

River and its tributaries near the Station and Impoundment but have restricted such use because of concerns over PFAS, arsenic, and cadmium pollution." Order at 9. These injuries are fairly traceable to ComGen's conduct through specific evidence of contamination—environmental testing confirms PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001, which were not present a mile upstream. *Id*. at 8. Through a subpoena in separate litigation, SCCRAP discovered that ComGen has known about and monitored these PFAS discharges since 2015. *Id.*

Additionally, SCCRAP's requested relief would redress these injuries by allowing members to resume their recreational activities without fear of contamination. *See Friends of the Earth v. Laidlaw*, 528 U.S. at 183-84. The Supreme Court in *Massachusetts v. EPA* found that environmental petitioners satisfied redressability because their requested relief would reduce risks to the environment, even if it would not completely eliminate those risks. 549 U.S. 497, 526 (2007). The fact that some historical contamination may remain does not defeat redressability where, as here, the requested relief would significantly reduce future environmental risks. *Massachusetts v. EPA*, 549 U.S. at 526.

SCCRAP may pursue an imminent and substantial endangerment claim related to Little Green Run Impoundment. Unlike *Courtland Co. v. Union Carbide Corp.*, where plaintiffs struggled to show the degree of risk, SCCRAP has demonstrated through monitoring well data that arsenic and cadmium levels exceed federal advisory levels and state groundwater standards. No. CV 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306, *57 (S.D. W. Va. Sept. 28, 2023); Order at 7-8. This case is analogous to *Maine People's Alliance v. Mallinckrodt*, where the court found standing and liability despite uncertainty about the exact extent of harm, relying on elevated

contaminant levels in monitoring data and expert testimony about potential serious effects. 471 F.3d 277, 279 (1st Cir. 2006).

The language and structure of RCRA explicitly separate protection of "health" from protection of "the environment" by using the disjunctive "or," indicating Congress's intent to protect each independently. 42 U.S.C. § 6972. The Supreme Court's analysis in *Meghrig v. KFC Western* reinforces that RCRA's focus is on preventing future environmental harm, not just addressing past human impacts. 516 U.S. 479, 486 (1996). SCCRAP has presented substantial evidence of environmental endangerment through documented contamination of groundwater systems that has persisted for 5-10 years. Order at 7. The fact that this contamination has not yet reached drinking water supplies is irrelevant under RCRA's preventative mandate—the statute exists precisely to address such environmental threats before they impact human populations. *See Meghrig*, 516 U.S. at 486.

Therefore, this Court should reverse the district court's grant of summary judgment for ComGen regarding the permit shield defense and remand for further proceedings consistent with that decision.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007). In reviewing a grant of summary judgment, the Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A

genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. COMGEN'S DISCHARGE OF PFOS AND PFBS FROM OUTLET 001 CONSTITUTES AN UNPERMITTED DISCHARGE UNDER THE CLEAN WATER ACT BECAUSE THESE POLLUTANTS WERE NEITHER DISCLOSED DURING THE PERMITTING PROCESS NOR WITHIN THE REASONABLE CONTEMPLATION OF THE PERMITTING AUTHORITY.

A. Nondisclosure During the Permitting Process Exempts a Discharge From NPDES Permit Shield Protection.

Under the Clean Water Act (CWA), any discharge of pollutants by any person is unlawful unless authorized by a permit. *Piney Run*, 268 F.3d at 265 (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000)). The National Pollutant Discharge Elimination System (NPDES) permit program provides the primary exception to this prohibition. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977). The "permit shield" provision of the CWA protects permit holders from liability when they comply with their permit terms. *Piney Run*, 268 F.3d at 267.

However, this shield only applies when: (1) the permit holder complies with the express terms of the permit and the CWA's disclosure requirements, and (2) the pollutants discharged were within the reasonable contemplation of the permitting authority at the time the permit was granted. *Parris v. 3M Company*, 595 F.Supp.3d 1288, 1319 (N.D. Ga. 2022). The effectiveness of this permitting process depends heavily on permit holder compliance with monitoring and reporting requirements. *Piney Run*, 268 F.3d at 266.

The Fourth Circuit's decision in *Piney Run*, which the Twelfth Circuit adopted in 2018, illustrates the proper application of the permit shield doctrine. *Id*. An environmental group sued a county claiming its sewage treatment plant was discharging heated water into a stream in

violation of the Clean Water Act, even though heat was not listed as a pollutant in the plant's NPDES permit. *Id*. at 259. The court held that while the permit did not expressly authorize heat discharges, the county was protected by the permit shield defense because it had adequately disclosed the heat discharges during the permitting process and such discharges were within the reasonable contemplation of the permitting authority. *Id*. at 271-72. The court emphasized that the effectiveness of the permitting scheme depends on full disclosure by permit holders, allowing regulators to properly evaluate environmental risks. Id. at 268.

In contrast to *Piney Run*, ComGen's 2020 VPDES permit contains neither limits for PFOS and PFBS nor monitoring requirements for these parameters. *See Id*. at 271-72. When directly questioned about potential PFOS or PFBS discharges by a VDEP deputy director, ComGen's employee affirmatively represented that neither pollutant was known to be in the discharge. *See Piney Run*, 268 F.3d at 259; Order at 3-4. However, discovery revealed that ComGen possessed monthly monitoring records dating back to 2015 showing PFOS and PFBS discharges as high as 15 ug/L and 35 ug/L respectively. *Id*. at 9.

This case closely parallels *Parris v. 3M Company*, where 3M discharged PFAS into waterways without proper permits, ultimately contaminating downstream drinking water supplies. *See Parris*, 595 F.Supp.3d at 1319. In *Parris*, the court rejected a permit shield defense because the defendant failed to sufficiently disclose its PFAS discharges during the permitting process. *Parris*, 595 F.Supp.3d at 1319. As emphasized in *Piney Run*, the permitting scheme depends on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment. 268 F.3d at 268.

ComGen's conduct closely mirrors the violation in *Parris*. *See Parris*, 595 F.Supp.3d at 1319. Like the defendants in those *Parris*, ComGen had knowledge of its PFAS discharges for

years, as evidenced by its monthly monitoring records showing PFOS and PFBS discharges dating back to 2015. Order at 8-9; *See Parris*, 595 F.Supp.3d at 1319. When specifically asked about these discharges by regulators, ComGen affirmatively misrepresented their presence similar to the impermissible conduct of the defendants in *Parris*. 595 F.Supp.3d at 1319. These discharges have resulted in measurable contamination, with testing showing PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001. Order at 8. ComGen's failure to disclose known PFAS discharges undermined the entire permitting scheme. *See Parris*, 595 F.Supp.3d at 1319.

B. ComGen Cannot Otherwise Claim Protection Under the Permit Shield Doctrine.

The EPA has determined that "when the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit." *Piney Run*, 268 F.3d at 267 (citing *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *12-13 (EPA 1998)). However, the effectiveness of the permitting process depends heavily on permit holder compliance with monitoring and reporting requirements. *Id*. at 266. When a permit holder has not adequately disclosed the nature of its discharges to permit authorities, the discharge of unlisted pollutants falls outside the scope of the permit shield. *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *13 (EPA 1998). Unlike the permit holder in *Piney Run* who adequately disclosed heat discharges during the permitting process, ComGen actively misrepresented its knowledge of PFOS and PFBS discharges. *See Piney Run*, 268 F.3d at 271-72.

ComGen's attempt to claim protection under *Atlantic States Legal Found. v. Eastman Kodak Co.* fails for the same reason–because of active misrepresentation to the EPA. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 353 (2d Cir. 1993). In *Atlantic*

States, Kodak had properly disclosed the presence of numerous pollutants during its permit application process through both a Form 2C and an Industrial Chemical Survey. *Id*. at 354-55. The Second Circuit held that once a facility is within the NPDES scheme, it may discharge unlisted pollutants as long as it complies with appropriate reporting requirements. *Id*. at 357. However, the court's holding was premised on the fact that Kodak had made proper disclosures - the very element missing here. Order at 3-4; *see Atlantic States*, 12 F.3d at 357.

Instead of disclosing PFOS and PFBS like Kodak disclosed its relevant pollutants, ComGen affirmatively misled regulators by representing that neither pollutant was present in its discharge, despite possessing at that point 5 years of monthly monitoring records showing significant concentrations of both as high as 15 ug/L and 35 ug/L respectively. Order at 8-9; *see Atlantic States*, 12 F.3d at 357. Although, as ComGen maintains, PFOS and PFBS were not specifically asked about in the permit application, a ComGen employee did specifically assure the VDEP deputy director via email that neither PFOS or PFBS were known to be in the discharge. Order at 4; *see Atlantic States*, 12 F.3d at 357. It is likely that the VDEP deputy directly relied upon this representation, to the detriment of the people of Vandalia. This is precisely the type of conduct that places a discharge outside the scope of the permit shield, as it deprives regulators of the information needed to properly evaluate environmental risks and set appropriate permit conditions. *See Piney Run*, 268 F.3d at 268.

For the reasons stated, this Court should reverse the district court's ruling and hold that ComGen's discharge of PFOS and PFBS constitutes an unpermitted discharge under the CWA. *See id*. at 267. ComGen's discharges fall outside permit shield protection because (1) ComGen failed to comply with CWA disclosure requirements, and (2) ComGen's misrepresentation

prevented these pollutants from being within VDEP's reasonable contemplation when issuing the permit. *See id*.

II. THE COURT OWES DEFERENCE TO ITS OWN DECISION ADOPTING *PINEY RUN* AND TO THE EPA'S GUIDANCE ON UNPERMITTED DISCHARGES IN LIGHT OF THE SUPREME COURT'S DECISION IN *LOPER BRIGHT*.

A. The Twelfth Circuit's Adoption of Piney Run Remains Binding Precedent Despite Loper Bright.

For forty years, courts followed the two-step framework established in *Chevron*. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-83 (1984). When reviewing an agency's interpretation of a statute it administered, courts would first determine whether "Congress ha[d] directly spoken to the precise question at issue." *Id*. at 842. If congressional intent was clear, that ended the matter. *Id*. at 842-43. However, if the statute was "silent or ambiguous," courts would proceed to step two, which meant deferring to the agency's interpretation only if it was "based on a permissible construction of the statute." *Id*. at 843.

This framework changed dramatically in 2024 when the Supreme Court decided *Loper Bright*. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 376 (2024). The Court held that Chevron's requirement that courts defer to agencies' reasonable interpretations of ambiguous statutes was incompatible with the Administrative Procedure Act's directive that courts "decide all relevant questions of law" and "interpret...statutory provisions." *Id.* at 376. While courts may still consider agencies' views, they must now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id*. at 412.

1. Loper Bright Expressly Preserves Prior Holdings That Found Specific Agency Actions Lawful.

Despite the Supreme Court's recent overturning of *Chevron* deference in *Loper Bright*, the Twelfth Circuit's adoption of *Piney Run* remains binding precedent in this circuit. See *Loper*

Bright, 603 U.S. at 376; *Piney Run*, 268 F.3d at 259; *Chevron*, 467 U.S. at 842-83. The court in *Piney Run* held that discharges that were adequately disclosed to the permitting authority during the permit application process, but not expressly listed in the permit, fall within the permit's shield provision. *Piney Run*, 268 F.3d at 259. Discharges that were not adequately disclosed are thus not protected. *Id*. *Loper Bright* only sought to change the interpretive methodology going forward, while explicitly preserving prior holdings through statutory *stare decisis*. 603 U.S. at 412. The Court stated that it "does not call into question prior cases that relied on the *Chevron* framework" remain subject to stare decisis "despite our change in interpretive methodology." *Id*.

The Fifth Circuit recently applied this principle in *Restaurant Law Center*, where industry groups challenged Department of Labor regulations defining "large capacity magazines" for firearms. *Rest. L. Ctr. v. United States Dep't of Lab.*, 120 F.4th 163, 174 (5th Cir. 2024). Though the Fifth Circuit acknowledged Loper Bright changed how courts should analyze new agency interpretations going forward, it emphasized that the decision "forecloses new challenges based on specific agency actions that were already resolved via Chevron deference analysis." *Id*. at 177. The court explained that mere reliance on Chevron in a prior decision is, at best, just an argument that the precedent was incorrectly decided and is insufficient to overturn established precedent. *Id*. Just as *Restaurant Law Center* preserved prior agency determinations about firearms regulations despite *Loper Bright*'s changes to the interpretive framework, this Court should preserve Piney Run's established framework for analyzing permit shield coverage. *See Restaurant Law Center*, 120 F.4th at 174; *Loper Bright*, 603 U.S. at 412.

Piney Run's analysis did not depend solely on Chevron deference but rather engaged in traditional statutory interpretation using multiple tools. *Piney Run*, 268 F.3d at 267-268. The Fourth Circuit carefully examined the text of the Clean Water Act as well as its purpose and

history before concluding that discharge of unlisted pollutants could be shielded if they were adequately disclosed to and reasonably contemplated by the permitting authority. *Id*. This kind of reasoned analysis remains valid post-*Loper Bright*, which emphasized that courts should continue to consider agencies' "body of experience and informed judgment" while exercising independent interpretive authority. *Loper Bright*, 603 U.S. at 412 (citing *Skidmore v. Swift* & Co., 323 U.S. 134, 140 (1944)).

Third, overturning settled circuit precedent would undermine the very stability and predictability that the Supreme Court sought to protect through its preservation of prior holdings in *Loper Bright*. 603 U.S. at 412. As the Court recognized in *Long Island Care at Home v. Coke*, dramatic changes in interpretive rules do not justify disrupting settled understandings where regulated parties have structured their conduct around existing precedent. 551 U.S. 158, 170-171 (2007). This principle applies with particular force here, where the regulated community has relied upon *Piney Run*'s interpretation, particularly in terms of PFOS and PFOS nondisclosure in the permit application process.

Additionally, *Chemical Manufacturers Association v. NRDC* teaches that when analyzing environmental regulations, courts should not substitute their judgment for that of the agency when the agency's interpretation reflects long-standing policy and aligns with statutory goals. 470 U.S. at 125. While *Loper Bright* changes how courts approach new agency interpretations, it does not disturb this fundamental principle of environmental law. Indeed, *Loper Bright* explicitly noted that agency views may still receive respectful consideration, even absent controlling deference. 603 U.S. at 412.

2. Application of Piney Run to ComGen's PFOS and PFBS Discharges

Applying these principles to the present case, PFOS and PFBS discharges from Outlet 001 should still be analyzed under *Piney Run*'s framework. 268 F.3d at 267-268. Like the heat discharges at issue in Piney Run, these discharges were known to and adequately disclosed to VDEP during the permitting process through ComGen's response to direct inquiry from the deputy director about PFAS parameters before the 2020 permit was issued. Record at 3-4; *See Piney Run*, 268 F.3d at 267-68 (holding that the permit shield applies to pollutants disclosed during the permitting process). The fact that asked about PFOS and PFBS discharge concentrations demonstrates these pollutants were within VDEP's reasonable contemplation when issuing the permit. Record at 8-9; *See Chemical Mfrs.*, 470 U.S. at 125 (noting courts must determine whether agency's understanding of statutory scheme is sufficiently rational).

Again however, there is a key distinction from *Piney Run* that weighs against permit shield coverage here. *See Piney Run*, 268 F.3d at 267-68. In Piney Run, the court emphasized that the discharger had been "forthright" in disclosing the heat discharges. *Piney Run*, 268 F.3d at 271. In contrast, ComGen actively misled VDEP by assuring the deputy director that "neither PFOS or PFBS were known to be in the discharge," despite possessing monitoring data showing otherwise. Record at 3-4; *See Long Island Care at Home*, 551 U.S. at 170-171 (noting that regulated entities must not gain advantage through misleading conduct). The *Piney Run* court was clear that the permit shield only applies when the permitting authority can make an informed decision about whether and how to regulate particular pollutants. Piney Run, 268 F.3d at 268. ComGen's conduct undermined this core principle by denying VDEP accurate information needed to determine whether permit limits for PFOS and PFBS were warranted. *See Skidmore*, 323 U.S. at 140 (explaining that agency determinations require thorough consideration of relevant facts). Unlike the situation in *Piney Run* where the regulatory authority made a

conscious choice not to impose limits on adequately disclosed pollutants, VDEP was deprived of the opportunity to make an informed decision about PFOS and PFBS regulation. Record at 3-4.

Therefore, while Piney Run remains binding precedent post-*Loper Bright*, its application to this case counsels against extending permit shield protection to ComGen's undisclosed PFOS and PFBS discharges. *See Loper Bright*, 144 S.Ct. at 2262. To hold otherwise would reward permit applicants for providing misleading information to regulators, contrary to both *Piney Run*'s reasoning and the Clean Water Act's objectives. *See Piney Run*, 268 F.3d at 268-69.

B. The EPA's Guidance on Unpermitted Discharges Warrants Skidmore Deference.

While *Loper Bright* eliminated the heightened standard of deference to agency statutory interpretations, it explicitly preserved *Skidmore* deference. *Loper Bright*, 144 S.Ct. at 2262; *Skidmore*, 323 U.S. at 140. Under *Skidmore*, courts may seek guidance from agency interpretations which "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The Court emphasized that agency interpretations issued contemporaneously with a statute and maintained consistently over time can be "especially useful" in determining statutory meaning. *Id*.

This preservation of *Skidmore* deference reflects the Court's recognition that agencies possess valuable expertise even as courts must independently interpret statutes. *See Long Island Care at Home*, 551 U.S. at 170 (noting agency interpretations reflect specialized experience and broader investigations than courts typically encounter). Indeed, even the *Loper Bright* dissent acknowledged the majority's clear intent that "Skidmore deference continues to apply." *Loper Bright*, 144 S.Ct. at 2309 (Kagan, J., dissenting).

One district court case in Colorado, *Green v. Perry*, explicitly confirmed this understanding, holding that Skidmore provides a framework for courts to evaluate agency

interpretations based on "the thoroughness evident in its consideration, validity of its reasoning, and consistency with earlier and later pronouncements." Green v. Perry, 2024 WL 4993356 at *8 (D. Colo. Dec. 05, 2024). This is similar to the recognition in *Restaurant Law Center* that while agencies no longer receive automatic deference, their views may still receive "respectful consideration" based on their expertise and experience. *Restaurant Law Center*, 120 F.4th at 174.

The interpretation of permit requirements warrants significant respect under *Skidmore*'s framework. *Skidmore*, 323 U.S. at 140. The Supreme Court has long recognized that an agency's interpretation merits deference proportional to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Skidmore, 323 U.S. at 140.

Here, the EPA's guidance that permits must contemplate or otherwise explicitly authorize pollutant discharges reflects decades of consistent interpretation. *See Piney Run*, 268 F.3d at 268. This interpretation aligns with the Clean Water Act's core purpose of controlling water pollution through a comprehensive permitting scheme. *See Chemical Mfrs.*, 470 U.S. at 125. Interpretation of the EPA's power and its delegation to state agencies has consistently maintained that permit applicants must provide accurate information about pollutant discharges to enable informed regulatory decisions. *Piney Run*, 268 F.3d at 268-69. This interpretation reflects the EPA's and states' extensive experience implementing the permitting program and advances the Act's goals of transparency and effective pollution control. *See Long Island Care at Home*, 551 U.S. at 170-171. When VDEP's deputy director specifically inquired about PFAS parameters, ComGen provided misleading information despite possessing contrary monitoring data. Record at 3-4. EPA's interpretation preventing such conduct from receiving permit shield protection represents a rational policy choice supporting the statutory scheme. *See Restaurant Law Center*, 120 F.4th at

174; *Skidmore*, 323 U.S. at 140. While courts must independently interpret the Clean Water Act post-*Loper Bright*, the EPA's and the states' thorough and consistent interpretation of permit requirements provides valuable guidance that warrants judicial respect under *Skidmore*.

III. SCCRAP HAS STANDING TO CHALLENGE COMGEN'S COAL ASH CLOSURE PLAN BECAUSE ITS MEMBERS MEET THE REQUIREMENTS OF CONSTITUTIONAL STANDING.

An organization may bring suit on behalf of its members if it can establish organizational standing through three requirements: (1) at least one member would have individual standing, (2) the organization's interest in the suit is germane to its purpose, and (3) individual member participation is unnecessary. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). To establish individual standing under Article III, a plaintiff must demonstrate: (1) an injury-in-fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's conduct; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

SCCRAP satisfies all three Hunt requirements. First, as discussed in the next section, SCCRAP's members have individual standing through their aesthetic and recreational injuries. *See Hunt*, 432 U.S. at 343. Second, SCCRAP's interest in this suit is directly germane to its organizational mission of protecting public water from pollutants from the fossil fuel industry and transitioning to cleaner, more sustainable energy that does not create harmful by-products like coal ash. *See id.* Finally, individual member participation is unnecessary as SCCRAP seeks declaratory and injunctive relief that would benefit all members collectively rather than requiring individualized proof. *See id*. While the District Court found that SCCRAP demonstrated injury-in-fact through aesthetic and recreational injuries, it erroneously concluded that these injuries could not be traced to ComGen's conduct and were not redressable. This finding was

incorrect because at the complaint stage, courts must presume that general allegations establish traceability. *Lujan*, 504 U.S. at 561. Additionally, redressability is satisfied because the relief sought will resolve the injury and reduce environmental risks. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 62 (1978).

A. SCCRAP Has Demonstrated an Injury-in-Fact Through Aesthetic and Recreational Injuries to Its Members.

In *Friends of the Earth*, the Supreme Court established that environmental plaintiffs who use affected areas for aesthetic or recreational purposes adequately allege injury-in-fact when those interests are harmed. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000). In *Laidlaw*, organization members averred that their recreational, aesthetic, and economic interests in the North Tyga River were directly affected by the defendant's alleged discharges. *Id.* The Court found that injuries to the plaintiffs' ability to recreationally use the river and its banks, along with their aversion to the river's smell and appearance, satisfied the requirements for concrete and particular pleadings. *Id*. Here, like the plaintiffs in *Laidlaw*, SCCRAP's members have demonstrated concrete recreational and aesthetic injuries. SCCRAP's chapter in Mammoth includes members who "used to recreate in the Vandalia River and its tributaries near the Station and Impoundment but have restricted such use because of concerns over PFAS, arsenic, and cadmium pollution." These members "find such pollution offensive and it diminishes their use and enjoyment of the River." *Id*.

In its analysis, the district court relies heavily on *Mobile Baykeeper, Inc. v. Alabama Power Co.,* does present a similar case as SCCRAP because of the finding that aesthetic and recreational injuries satisfied the injury-in-fact component of standing. *Mobile Baykeeper, Inc. v. Ala. Power Co*., No. CV 1:22-00382-KD-B, 2024 U.S. Dist. LEXIS 1739, *43 (S.D. Ala. Jan. 4. 2024). In *Mobile Baykeeper*, the organization's members, like SCCRAP's, were local residents

who recreated, fished, and owned property in the affected area but were forced to stop due to contamination. *Id.* The court found these aesthetic and recreational injuries sufficient for injury-in-fact, just as the district court did here. *Id*.

B. SCCRAP Has Established Traceability Through Specific Evidence of Contamination and Redressability Through Its Requested Relief.

At the complaint stage, the traceability requirement is lenient—courts will presume general allegations are sufficient to establish the connection between a defendant's actions and the alleged harm. *Lujan*, 504 U.S. at 561. A complaint facing a motion to dismiss need not contain detailed factual allegations explaining every link in the causal chain. *Lujan*, 504 U.S. at 561; *see also Massachusetts v. EPA*, 549 U.S. at 517.

In *Massachusetts v. EPA*, the Supreme Court found sufficient traceability where petitioners could demonstrate that man-made pollution contributed to widespread environmental changes that caused their injuries. *Massachusetts v. EPA*, 549 U.S. at 517. The Court accepted that showing the scale of the pollution and its connection to observed impacts was enough to establish traceability at the pleading stage. *Id*.

Here, SCCRAP has presented even more specific evidence of causation than in *Massachusetts*. *See Massachusetts v. EPA*, 549 U.S. at 517. Environmental groups documented PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001, which were not present a mile upstream of the Outlet. Through a subpoena in separate litigation, SCCRAP discovered that ComGen has known about and monitored these PFAS discharges since 2015, with concentrations as high as 15 ug/L and 35 ug/L. Id. Additionally, ComGen's own monitoring wells show elevated levels of arsenic and cadmium above federal advisory levels and Vandalia's groundwater quality standards. This concrete evidence of specific contaminants at specific locations downstream from ComGen's facility that are absent upstream

provides more than sufficient evidence of a connection between ComGen's conduct and the environmental damage to establish traceability at the pleading stage. *See Massachusetts v. EPA*, 549 U.S. at 517; *Lujan*, 504 U.S. at 561.

The district court incorrectly found that SCCRAP lacked redressability based on its flawed traceability analysis. *See Massachusetts v. EPA*, 549 U.S. at 526. Redressability can be established by showing either that the requested relief would address the concrete injuries or reduce risks to the environment. *Massachusetts v. EPA*, 549 U.S. at 517; Duke Power Co., 438 U.S. at 62.

Under *Duke Power Co.*, redressability is satisfied by demonstrating a "substantial likelihood" that judicial relief will redress the injury-in-fact. *Duke Power Co.*, 438 U.S. at 62. SCCRAP seeks both injunctive and declaratory relief that would require ComGen to stop its unlawful discharges and address the contamination. These remedies would directly redress its members' injuries by allowing them to resume their recreational activities in and around the Vandalia River without fear of contamination. *See Friends of the Earth v. Laidlaw*, 528 U.S. at 183-84; *Duke Power Co.*, 438 U.S. at 62.

In *Massachusetts*, the Supreme Court found that environmental petitioners satisfied redressability because their requested relief would reduce risks to the environment, even if it would not completely eliminate those risks. *Massachusetts v. EPA*, 549 U.S. at 526. Similarly, SCCRAP's requested relief would reduce environmental risks by stopping ongoing contamination and requiring proper closure of the Little Green Run Impoundment. *See id*. The fact that some historical contamination may remain does not defeat redressability where, as here, the requested relief would significantly reduce future environmental risks. *Massachusetts v. EPA*, 549 U.S. at 526; Duke Power Co., 438 U.S. at 62.

C. Congress' and The EPA's Explicit Intent For Citizen Suits To Be The Primary Enforcement Mechanism Supports Standing.

The Clean Water Act and RCRA's citizen suit provisions reflect Congress's intent to eliminate barriers to citizen standing and empower private citizens to act as "private attorneys general" when enforcement agencies cannot or will not act. 33 U.S.C. § 1365; 42 U.S.C. § 6972; *see also* 80 Fed. Reg. 21,427. By finding SCCRAP lacks standing, the district court's ruling frustrates both EPA's regulatory scheme and congressional intent. *See* 42 U.S.C. § 6972; 80 Fed. Reg. 21,311. The EPA's 2015 Federal Register Notice specifically envisioned that citizen suits under Section 7002 of RCRA would be the primary enforcement mechanism for the CCR Rule. 80 Fed. Reg. 21,427. Indeed, the EPA designed the Rule to be "self-implementing," meaning that "facilities are directly responsible for ensuring that their operations comply with the Rule." 80 Fed. Reg. 21,311. This regulatory structure depends on citizen enforcement. *Id*.

While the court in *Mobile Baykeeper* found the plaintiff organization lacked standing to challenge a closure plan, it specifically noted that standing would have been proper had the organization brought suit under 42 U.S.C. § 6972(a)(1)(B). *Mobile Baykeeper, Inc.*, No. CV 1:22-00382-KD-B, 2024 U.S. Dist. LEXIS 1739, *43. Here, SCCRAP has brought claims under both § 6972(a)(1)(A), challenging ComGen's violations of the CCR Rule, and § 6972(a)(1)(B), addressing imminent and substantial endangerment. This dual approach precisely follows the enforcement scheme EPA envisioned, allowing citizens to address both specific regulatory violations and broader environmental threats. *See* 80 Fed. Reg. 21,427.

Moreover, while Vandalia has obtained EPA approval to administer its own coal ash permitting program, violations of the state program remain actionable through RCRA citizen suits in federal court. The state regulations mirror the federal CCR Rule, making violations actionable through RCRA citizen suits in federal court. *See* 42 U.S.C. § 6945(d)(1)(A) (allowing

state implementation of coal ash permitting programs). This framework demonstrates the EPA's continued reliance on citizen enforcement even within state-administered programs. *See* 80 Fed. Reg. 21,427.

Denying standing here would create precisely the type of barrier to citizen enforcement that Congress sought to eliminate through the citizen suit provisions. *See* 33 U.S.C. § 1365; 42 U.S.C. § 6972. SCCRAP has demonstrated concrete injuries to its members, traced those injuries to ComGen's conduct through specific evidence, and shown how its requested relief would redress those injuries. *See* Lujan, 504 U.S. at 560-61. Where, as here, an environmental organization has satisfied constitutional standing requirements and properly invoked both enforcement mechanisms under RCRA, courts ought to honor the EPA's explicit intent that citizen suits serve as the primary enforcement mechanism by allowing the case to proceed. *See* 80 Fed. Reg. 21,427; 42 U.S.C. § 6972(a)(1). A ruling to the contrary would frustrate the EPA's regulatory scheme and leave a critical gap in enforcement of coal ash regulations. *See* 80 Fed. Reg. 21,311.

IV. SCCRAP MAY PURSUE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT CLAIM RELATED TO LITTLE GREEN RUN IMPOUNDMENT.

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to provide for private causes of action for citizens seeking relief against present or future risks of harms to health or the environment created by the handling, storage, treatment, transportation or disposal of any solid or hazardous waste. 42 U.S.C. § 6972. RCRA allows two types of private suits: (1) actions against entities that are alleged to have violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to the RCRA," and (2) actions against persons who have "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste

which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1). RCRA's provisions were intended to complement the Clean Water Act, ensuring that while the federal government worked to remove pollutants from the air and water, entities were not thereafter disposing of removed pollutants in an environmentally unsound way. *See Cox v. City of Dallas*, 256 F.3d 281, 289 (5th Cir. 2001).

Relying on *Courtland Co., Inc. v. Union Carbide Corporation.*, the district court here incorrectly found that RCRA does not apply when there is no allegation of endangerment to a living population but only to the environment itself. *Courtland Co. v. Union Carbide Corp., No*. CV 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306, *57 (S.D. W. Va. Sept. 28, 2023). In Courtlant, relief was sought for ongoing unpermitted discharges under the RCRA, but the plaintiffs struggled to show the degree of risk from the data they had collected. *Id.* The bodies of water were still suitable for living things and recreational activities in *Courtland Co., Inc.*, whereas here, SCCRAP members living in Mammoth were forced to restrict their activities due to contamination to the water, making *Courtland Co., Inc*. inapplicable in this case. *See id.*

Maine People's Alliance v. Mallinckrodt provides the most analogous precedent. 471 F.3d 277 (1st Cir. 2006). Environmental groups brought suit under RCRA against a chemical plant operator over mercury contamination in a river system. *Id*. at 279-280. The court found standing and liability despite uncertainty about the exact extent of harm, relying on elevated mercury levels in monitoring data and expert testimony about potential serious effects. *Id*. at 282. The First Circuit held that a reasonable prospect of future harm is adequate to invoke RCRA's endangerment provision, as long as the threat is near-term and involves potentially serious harm. *Id*. at 279. Notably, the court rejected arguments that environmental endangerment claims require absolute certainty or actual harm to human populations. *Id*. at 288.

Here, much like with the mercury contamination in *Maine People's Alliance*, SCCRAP has demonstrated through monitoring well data that arsenic and cadmium levels exceed federal advisory levels and state groundwater standards. *See id*. at 282. While there is currently no evidence these contaminants have reached drinking water supplies, environmental experts indicate the contamination has been ongoing for 5-10 years, presenting the same type of serious near-term threat to environmental systems that satisfied RCRA requirements in Maine People's Alliance. *See id.* at 288.

In *Tri-Realty Co. v. Ursinus Coll.*, the court provided a framework for evaluating endangerment through exposure pathways, finding that the presence of animals and plants in contaminated water was sufficient evidence. 124 F. Supp. 3d at 446, 448. SCCRAP has established similar pathways here - monitoring wells show contamination is spreading through groundwater, and members previously used the waters for fishing before restricting activities due to contamination. *See id*. at 448. In *Dague v. Burlington*, the Second Circuit found evidence of imminent and substantial endangerment where a landfill's discharge of pollutants disrupted aquatic ecosystems through flooding. 935 F.2d 1343, 1346 (2nd Cir. 1991). The Little Green Run Impoundment presents similar risks, as it is unlined and susceptible to flooding that could spread contamination. *See id*.

The language and structure of RCRA explicitly separate protection of "health" from protection of "the environment" by using the disjunctive "or," indicating Congress's intent to protect each independently. 42 U.S.C. § 6972. The Supreme Court's analysis in *Meghrig v. KFC Western* also reinforces that RCRA's focus is on preventing future environmental harm, not just addressing past human impacts. 516 U.S. 479, 486 (1996). The Court explained that endangerment under RCRA exists when the current situation may present a threat, distinguishing

it from statutes requiring actual harm. *Id*. at 485-86. While *Meghrig* dealt with the temporal aspect of RCRA claims, its emphasis on RCRA's preventative nature supports allowing claims based on environmental threats before they impact human populations. *See id*. at 486.

Here, SCCRAP has presented substantial evidence of environmental endangerment through documented contamination of groundwater systems. Just as the Third Circuit court found mercury contamination of waterways sufficient without requiring proof of human exposure, the elevated levels of arsenic and cadmium above federal advisory levels demonstrate environmental endangerment. *See Maine People's Alliance,* 471 F.3d at 288. The contamination has persisted for 5-10 years, and, being unlined, the Impoundment continues to leach these contaminants into the surrounding environment. *See id.* The fact that this contamination has not yet reached drinking water supplies is irrelevant under RCRA's preventative mandate—the statute exists precisely to address such environmental threats before they impact human populations. *See Meghrig*, 516 U.S. at 486. Moreover, SCCRAP has identified clear exposure pathways through groundwater, demonstrating exactly the type of environmental system impacts that RCRA protects. *See Maine People's Alliance*, 471 F.3d at 288. The district court's requirement of proof of harm to living populations improperly ignores both RCRA's explicit protection of "the environment" and the substantial body of case law recognizing that environmental endangerment claims need not demonstrate impacts on human populations. *See* 42 U.S.C. § 6972; *Maine People's Alliance*, 471 F.3d at 285-86.

CONCLUSION

For the foregoing reasons, Appellant SCCRAP respectfully requests that this Court reverse the district court's grant of summary judgment for ComGen regarding the permit shield defense and remand for further proceedings consistent with that decision.

Certificate of Compliance (Brief)

Pursuant to *Official Rule* III.C.9, [Party Name] certifies that its brief contains [# of pages] pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No.* 1, and the *Team Members* of *Team No.* 1 have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 1

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing [Party Name] 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 1, 2023.

Respectfully submitted,

Team No. 1