C.A. 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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF VANDALIA

BRIEF FOR APPELLANT
STOP COAL COMBUSTION RESIDUAL ASH PONDS

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JURISDICTIONAL STATEMENT

On September 3, 2024, appellant, Stop Coal Combustion Residual Ash Ponds, filed suit against appellee, Commonwealth Generating Company, under the Clean Water Act and the Resource Conservation and Recovery Act. R. at 12. The United States District Court for the Middle District of Vandalia properly exercised subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331, which states "district courts have original jurisdiction [over] all civil actions arising under the Constitution [and] laws … of the United States." Following a final order issued by the District Court on December 30, 2024, appellant filed a timely notice of appeal with the United States Court of Appeals for the Twelfth Circuit, on November 10, 2024. R. at 15. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, which grants federal appeals courts jurisdiction over "final decisions of the district courts of the United States."

STATEMENT OF THE ISSUES PRESENTED

1. Whether ComGen's discharge of PFOS and PFBS from outlet 001 is an unpermitted discharge under the Clean Water Act, where ComGen knowingly concealed information about its PFOS and PFBS discharges to the Vandalia Department of Environment before the VPDES permit was issued.
2. Whether, in deciding Issue 1, the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to EPA's guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*, where the EPA's interpretation reflects the agency's informed and persuasive interpretation of the Clean Water Act's permit shield.

3. Whether SCCRAP, an environmental non-profit and public interest group, has associational standing to sue ComGen for employing an ineffective impoundment closure plan that prolongs members' recreational injuries.
4. Whether SCCRAP can pursue an imminent and substantial endangerment claim, absent harm to a living population, where the legislative history and plain text of RCRA recognizes environmental harm.

STATEMENT OF THE CASE

History of Commonwealth Generating Company

Commonwealth Generating Company ("ComGen") is a multi-state electric utility holding company that provides electric service to the State of Vandalia and eight other states. R. at 3. ComGen owns a variety of power plants, including the Vandalia Generating Station which opened in 1965 and is located along the Vandalia River. R. at 3-4. The Vandalia Generating Station requires significant upgrades to comply with EPA's Effluent Limitations Guidelines for coal-fired power plants. R. at 4. Rather than make the needed updates, GomGen elected to close the generating station by 2027. R. at 4. One major byproduct of coal combustion at electric generating plants is coal combustion residuals ("CCRs"). R. at 1. There are several different types of materials produced during coal combustion, including fly ash and bottom ash. R. at 1. Newer studies have shown that PFAS parameters are present in fly and bottom ash. R. at. 4. CCRs contain contaminants like mercury, selenium, cadmium, and arsenic, which are associated with adverse public health effects like cancer. R. at 1.

The Vandalia Generating Station & CWA

Pursuant to § 402 of the Clean Water Act ("CWA"), the Environmental Protection Agency ("EPA") has delegated authority to the Vandalia Department of Environmental

Protection ("VDEP") to regulate discharges into navigable waters through the Vandalia Pollutant Discharge Elimination System ("VPDES") program. 33 U.S.C § 1342(b)-(c); R. at 4, 11. In July 2020, VDEP issued a VPDES permit for the Vandalia Generating Station, authorizing discharges from three outfalls – 001, 002, and 003 – into the Vandalia River and its tributaries. R. at 4. The Vandalia River and its tributaries are waters of the United States. R. at 4. The permit sets limits and monitoring requirements for several pollutants, including selenium, aluminum, pH, and temperature. R. at 4. According to FOIA documents, the VDEP deputy director informally emailed a ComGen employee inquiring whether any of the three Outfalls have PFOS or PFBS in their discharges. R. at 4. The employee claimed that neither PFOS nor PFBS were known to be in the discharge. R. at 4. The resulting permit and application materials make no mention of PFOS nor PFBS. R. at 5.

Around the same time, Stop Coal Combustion Residual Ash Ponds ("SCCRAP") – a national environmental public interest organization – grew concerned that ComGen's Generating Station was contaminating the Vandalia River with PFOS and PFBS. R. at 9. This concern interfaces with SCCRAP's mission to eliminate coal ash ponds and protect public water from fossil fuel pollutants and harmful byproducts. R. at 8. As such, SCCRAP and other local environmental groups conducted PFAS testing upstream and downstream of Outlets 001, 002, and 003. R. at 9. The results revealed concentrations of PFOS and PFBS in the mixing zone of Outlet 001, at 6 ppt and 10 ppt respectively, which were not present a mile upstream. R. at 9. Furthermore, SCCRAP learned from a subpoena in a separate litigation that ComGen knew Outlet 001 was discharging these PFAS parameters. R. at 9. Since 2015, ComGen has produced monthly monitoring reports that reveal discharges of PFOS or PFBS in concentrations as high as 15 ug/L and 35 ug/L respectively. R. at 9. ComGen argues that it did not need to disclose the

presence of PFOS and PFBS parameters to VDEP because neither pollutant is regulated under the Clean Water Act nor were they specifically asked about in the permit application. R. at 9.

The Little Green Run Impoundment & CCR Rule

ComGen also owns and operates the Little Green Run Impoundment, an on-site surface impoundment where the facility has historically disposed of CCRs. R. at 3, 5. The Impoundment spans approximately 71 surface acres, contains an estimated 38.7 million cubic yards of solids – mainly CCRs, coal fines, and waste byproducts from the coal cleaning process – and is notably unlined. R. at 5. In April 2015, the EPA published a rule on the Disposal of Combustion Residuals from Electric Utilities (the "CCR Rule"), which regulates coal ash as solid waste under subtitle D of the Resource Conservation and Recovery Act ("RCRA"). The CCR Rule also establishes "national minimum criteria for existing and new CCR … surface impoundments." R. at 5. This includes groundwater monitoring, corrective action, and closure requirements. R. at 5. Facilities bear full responsibility for ensuring compliance with the CCR requirements. R. at 5. Under § 7002 of RCRA, citizens can sue for certain types of violations. R. at 5.

In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act, allowing states to administer and enforce their own coal ash permitting programs so long as they are consistent with the federal CCR Rule and receive EPA approval. R. at 5. Under the CCR rule and Vandalia's parallel regulations, owners or operators of existing surface impoundments are required to prepare initial written closure plans consistent with subsection (b)(1) of the CCR Rule. R. at 6. Impoundments that fail to comply with subsection (b)(1)'s criteria, such as location, liner composition, and groundwater impacts, must begin retrofitting or closure. R. at 6.

Under the CCR rule, there are two closure options which owners or operators can choose from: (a) excavation and removal or (b) closure in place. R. at 6. ComGen elected to close the

Little Green Run Impoundment in place and is subject to three additional requirements under 40 C.F.R. § 257.102(d) of the CCR Rule. R. at 6. First, prior to installing a final cover system, free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues. R. at 6. Second, at a minimum, the unit must be closed in a manner that will "preclude the probability of future impoundment of water, sediment, or slurry." R. at 6. Third, the unit must be closed in a manner that will control, minimize, or eliminate, to the extent feasible, post-closure infiltration of liquids into the waste and release of CCR or contaminated run-off to ground or surface waters. R. at 6.

In December 2019, ComGen submitted an initial permit application to VDEP for the Little Green Run Impoundment, describing its intent to close in place. R. at 6. In July 2021, VDEP issued ComGen a Closure Permit for the Little Green Run Impoundment, requiring ComGen to manage CCRs at the impoundment in accordance with the Permit and CCR regulations. R. at 7. The permit expires in May 2031. R. at 7. In 2019, ComGen commenced its first closure in place activity and installed thirteen upgradient and downgradient monitoring wells for the Little Green Run Impoundment. R. at 7. From 2021 to present, annual monitoring reports for the downgradient wells revealed exceedances of arsenic and cadmium above federal advisory levels and state groundwater quality standards for such parameters. R. at 7. There is no definitive evidence that arsenic or cadmium have reached or will reach the Vandalia River or the public water drinking supply in the next five years. R. at 8. All parties agree the Impoundment was likely leaching for at least 5 years prior to the first monitoring report in 2021. R. at 7.

SCCRAP is also concerned with ComGen's Closure Plan for the Little Green Run Impoundment. R. at 9. SCCRAP believes that the plan is inadequate because it will permanently store coal ash below sea level and in contact with groundwater, where it is already leaching into

waters of the United States. R. at 9. SCCRAP is concerned that future floods, storms, and hurricanes pose a risk of catastrophic failure as any surrounding water level rise could elevate groundwater in the impoundment and cause coal ash to spill into the Vandalia River. R. at 9. Based on the levels of arsenic and cadmium in groundwater monitoring wells, SCCRAP's human health expert determined that the groundwater gradient of the site within 1.5 miles of the impoundment is unfit for drinking water. R. at 9.

Although no one uses groundwater wells for drinking water, a housing developer is considering building a large subdivision within 1.5 miles of the impoundment and is seeking to use well water as the primary drinking water source for that development. R. at 9. Several SCCRAP members that had put their name on the waiting list for this proposed development are second guessing their decision because of the groundwater contamination. R. at 9. Members of SCCRAP's chapter in Mammoth allege that the arsenic, cadmium, and PFAS pollution associated with the Little Green Run Impoundment and the Vandalia Generating station has diminished their enjoyment and recreational use of the Vandalia River and its tributaries near the Station and Impoundment. R. at 10.

Procedural History

On September 3, 2024, SCCRAP filed a citizen suit against ComGen in the United States District Court for the Middle District of Vandalia. R. at 12. First, SCCRAP alleged that ComGen violated the Clean Water Act by discharging PFOS and PFBS into Vandalia River through Outlet 001 without a NPDES permit for such pollutants. R. at 12. SCCRAP is seeking declaratory relief, civil penalties, and permanent injunctive relief to stop such unlawful discharges until a valid NPDES permit is obtained. R. at 12. Second, SCCRAP challenged the Closure Plan as inadequate pursuant to § 7002(a)(1)(A) of RCRA. R. at 12. SCCRAP argues that the plan is

illegal and fails to satisfy the CCR Rule's standard. R. at 12. SCCRAP is seeking injunctive relief to prevent ComGen from implementing the allegedly illegal Closure Plan. R. at 12. Third, pursuant to section 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 its consistent arsenic and cadmium exceedances. R. at 12. SCCRAP did not include allegations about endangerment to a living population, and is seeking declaratory and injunctive relief, as well as civil penalties. R. at 12.

On September 20, 2024, ComGen filed a motion to dismiss SCCRAP's complaint. R. at 13. Regarding the CWA unpermitted discharge claim, ComGen argued that PFOS and PFBS are not statutory pollutants included in any permit application and that the Twelfth Circuit's adoption of *Piney Run* is now inconsistent with *Loper Bright Enters. v. Raimondo*. R. at 13. Second, ComGen argued that SCCRAP's attack on ComGen's closure plan is too conclusory and third, that SCCRAP failed to state a claim because the Twelfth Circuit has never recognized imminent and substantial endangerment claims to the environment itself. R. at 13.

On October 31, 2024, the District Court granted ComGen's Motion to Dismiss in its entirety. On November 10, 2024, SCCRAP filed an appeal to the United States Court of Appeals for the 12th Circuit, requesting that the rulings of the District Court be reversed. R. at 15.

SUMMARY OF THE ARGUMENT

The District Court erroneously determined that ComGen's discharge of PFOS and PFBS from Outlet 001 were not unpermitted discharges under the Clean Water Act because they were not specifically referenced in the permit or the permit application. To the contrary, ComGen's discharge of PFOS and PFBS were unpermitted discharges because they were not adequately disclosed to the Vandalia Department of Environment and not within the reasonable

contemplation of the permitting authority. Furthermore, PFOS and PFBS are pollutants that can be regulated under the Clean Water Act because they qualify as chemical wastes. Second, the District Court improperly cast aside the Twelfth Circuit's adoption of *Piney Run* and its reasoning because of the *Loper Bright* ruling overturning *Chevron* deference. Under *Loper Bright,* Courts may give deference to the agency's experience and informed judgement when interpreting the law. Furthermore, *Loper Bright* does not provide special justification to overturn the reasoning in *Piney Run*.

Third, the District Court incorrectly concluded that SCCRAP lacked standing. SCCRAP meets the standard for organizational standing because it has demonstrated that (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose of protecting public water from pollutants from the fossil fuel pollution, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Fourth, SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment when there is no allegation of endangerment to a living population but only the environment. The congressional intent and disjunctive phrasing of RCRA is evidence that endangerment can occur to the environment itself without having secondary effects.

ARGUMENT

I. STANDARD OF REVIEW

Under the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for failure to state a claim or lack of standing. Fed. R. Civ. P. 12(b)(1), (6). If such complaints are dismissed and appealed, the appellate court shall review the lower court's decision de novo. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 269 (4th Cir. 2001) ("We review the district court's application of contract principles de novo"); *Motor Vehicles*

Mfrs. Ass'n of U.S. v. N.Y. State Dep't. of Envtl. Conservation, 79 F.3d 1298, 1304 (2d Cir. 1996) ("de novo standard of review … ensure[s] … substantive law was correctly applied").

II. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT COMGEN'S DISCHARGE OF PFOS AND PFBS FROM OUTLET 001 IS NOT AN UNPERMITTED DISCHARGE UNDER THE CLEAN WATER ACT.

The Court should find that ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge. Under the Clean Water Act, it is unlawful for any person to discharge any pollutant into navigable waters unless authorized by law. 33 U.S.C. § 1311(a). Further, the permit shield provision of the Clean Water Act states that compliance with a permit issued shall be deemed compliance with various effluent limitations and enforcement mechanisms under the law. *See* 33 U.S.C. § 1342(k). While 33 U.S.C. §1342(k) does not explicitly explain the scope of permit protection for discharges not expressly regulated by the permit, multiple Courts have held that an entity is not liable under the CWA for discharges not expressly regulated by the permit if the entity (1) complied with the discharge limitations and reporting requirements of their permit and (2) the discharges were within the reasonable contemplation of the permitting authority at the time the permit was issued. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 263 (4th Cir. 2001); *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1299 (N.D. Ga. 2022); *Sierra Club v. ICG Hazard*, LLC, 781 F.3d 281, 294 (6th Cir. 2015). Thus, an entity may also discharge a pollutant not limited to its permit, provided that the permittee complies with the application notification requirements. 45 Fed.Reg. 33516, 33523 (May 19, 1980). But if an entity has not adequately disclosed the nature and source of its discharges to permit authorities, the discharge of the unlisted pollutants has been held to be outside the scope of the permit. *See Ketchikan Pulp Co.*, 7 E.A.D. 605, 621 (EAB May 15, 1998).

A. ComGen's Discharge PFOS or PFBS are Unlawful Because They Were Not Adequately Disclosed and Within the Reasonable Contemplation of the Vandalia Department of Environment.

In *Piney Run*, the Piney Run Preservation Association filed a lawsuit under the Clean Water Act (CWA) against the Commissioners of Carroll County, Maryland, alleging that the county was discharging warm water into the Piney Run stream in violation of the county's National Pollution Discharge Elimination System (NPDES) permit. 268 F.3d at 256. But the county properly disclosed the discharge of heat during its application process, and the Maryland Department of Environment reasonably contemplated that the Plant would discharge heat pursuant to its permit. *Id.* Thus, the Court determined that the county complied with the disclosure requirements and was protected by the permit shield. *Id.* at. 265.

The circumstances here are materially distinguishable from the facts in *Piney Run*. While ComGen complied with the discharge limitations and reporting requirements for the pollutants listed in its permit, ComGen did not make adequate disclosures to the permitting authorities regarding its discharge of PFOS and PFBS. R. at 4. Instead, when asked about the presence of PFOS or PFBS in their discharge, ComGen officials lied to the Vandalia Department of Environmental Protection, stating that neither PFOS nor PFBS were known to be in the discharge. R. at 4-5. When SCCRAP and other local environmental groups conducted their own testing for several PFAS parameters upstream and downstream of outlet 001, the groups identified PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone. R. at 9. Based on monthly monitoring records going back to 2015 that measured the discharge of PFOS or PFBS, there were some recorded discharges of PFOS or PFBS as high as 15ug/L and 35ug/L, respectively. R. at 9. Because ComGen did not make adequate disclosures and the discharges were not within the reasonable contemplation of authorities, ComGen's discharge of PFOS and PFBS is an unpermitted discharge under the Clean Water Act.

Furthermore, the facts in the present case are analogous to *Parris*. In *Parris*, the plaintiff complained that the defendant unlawfully discharged PFAS into Raccoon Creek without a valid NPDES permit. 595 F. Supp. 3d at 1289. The Court accepted the plaintiff's allegations as true because there was a lack of permit application materials or other administrative records to substantiate whether the defendant had disclosed its PFAS discharges during the permitting process. *Id.* at 1301. As a result, the Court concluded that the defendant could not claim willful ignorance about the content of its own discharges and expect to avail itself of the permit shield protection. *Id.* at 1302.

Here, as in *Parris*, the issue also involves PFAS discharges that were neither adequately disclosed nor within the reasonable contemplation of the permitting authority. R. at. 4. Like the manufacturer defendant in *Parris*, ComGen knowingly concealed information from the permitting authorities about its PFAS discharges, thus preventing the permitting agency from receiving the information necessary to effectively safeguard the water from pollution. R. at. 4. As illustrated in FOIA documents, when a deputy director of the Vandalia Department of Environment Protection asked a ComGen employee whether any of the outlets might have PFOS or PFBS in its discharges, the ComGen employee denied that there were PFOS or PFBS in its discharges. R. at. 4. Although ComGen had monitoring reports showing PFOS and PFBS in its discharges, ComGen opted to hide this information from the VPDE throughout the permit application process. Because ComGen misled the VDEP into believing there were no PFOS or PFBS discharges in its outlets, such matters were not mentioned again in any formal permit documents. R. at. 5. Thus, the Court here should also find that ComGen's Discharge of PFOS and PFBS from outlet 001 is an unpermitted discharge under the Clean Water Act.

B. The Clean Water Act's NPDES Permit Shield Does Not Shield ComGen's Discharge of PFBS and PFOS.

ComGen also contends that the reasoning in *Atlantic States Legal Found. v. Eastman Kodak* should be adopted because unlike the pollutants in *Piney Run*, PFOS and PFBS are not statutory pollutants included in any permit application. R. at. 13. Specifically, ComGen relies on the reasoning in *Atlantic States Legal Found. v. Eastman Kodak Co.,* stating that "the EPA does not demand even information regarding each of the many thousand chemical substances potentially present in a manufacturers wastewater because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Atlantic States Legal Found. v. Eastman Kodak Co.,* 12 F.3d 353, 357 (2d Cir. 1993).

This is a misleading interpretation of the ultimate holding in *Atlantic States*. In *Atlantic States*, Atlantic States Legal Foundation sued Kodak under the Clean Water Act for discharging pollutants not specifically listed in its permit. 12 F.3d at 357. But the Court rejected Atlantic States' absolutist interpretation of the NPDES permit system, stating that it treats permit as establishing limited permission for the discharge of identified pollutants and a prohibition on the discharge of unidentified pollutants. *Id.* at 355. To the contrary, the Court explained that the NPDES permit system is intended to identify and limit the most harmful pollutants while leaving control of its vast number of other pollutants to disclosure requirements. *Id.* at 356. And once within the NPDES scheme, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by new limitations when imposed on such pollutants. *Id.* at 356. Here, unlike *Atlantic States*, ComGen is not protected by the permit shield because ComGen did not make appropriate disclosures before its 2020 VPDES permit was issued. R. at 4. Instead, ComGen misled the deputy director about

its discharges. R. at 4. Thus, ComGen should not be entitled to permit shield protection for its discharge of PFOS and PFBS in Outlet 001.

ComGen's discharges of PFOS and PFBS are also inconsistent with the EPA's regulations and policy guidance on CWA unpermitted discharges. First, 40 C.F.R. § 122.41(l)(6) establishes a general duty for a facility to report unauthorized discharges. While not binding on the Court, the EPA's 1995 policy statement spells out the scope of the authorization to discharge under an NPDES permit and the shield associated with permit authorization. Memorandum from EPA Assistant Administrator for Water Robert Perciasepe to Regional Administrators and Regional Counsel, at 1 (July 1, 1994). Specifically, the policy statement states that an industrial permit applicant should provide information about the presence and quantity of specific pollutants in its effluent as well as all other operations contributing to the facility's effluent. *Id.* at 1. Second, an individual permit provides authorization and a shield for the following pollutants: (1) pollutants specifically limited in the permit; (2) pollutants specifically identified in writing as present in facility processes in the permit application; and (3) pollutants not identified as present but which are constituents of waste streams that are clearly identified in writing in the application. *Id.* at 2.

In the present case, ComGen breached its general duty to provide information about the presence of PFOS or PFBS parameters in the Vandalia Generating Station's operations. R. at 4, 9. Further, ComGen's discharges of PFBS and PFOS do not fall into any of the categories necessary to warrant permit shield protection. These discharges were not specifically listed in the permit, identified in writing as present in the permit application, nor were they clearly identified at any point during the permit application process. Because this contravenes EPA's existing regulations and long-standing EPA guidance on the scope of authorized discharges under the

NPDES program, the District Court erred in concluding that ComGen's discharge of PFOS and PFBS were not unpermitted discharges under the Clean Water Act.

C. PFOS and PFBS Discharges are Pollutants Under the Clean Water Act.

ComGen erroneously contends that because PFOS and PFBS are neither statutory pollutants nor included in any permit application, they are not regulated under the Clean Water Act. But this narrow interpretation of the definition of a pollutant is in conflict with the plain meaning and congressional intent concerning the definition of a pollutant under the Clean Water Act. Congress and the EPA have defined "pollutant" broadly to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). While the listing of a specific substance in the definition of a pollutant is important, the fact that a substance is not listed as a statutory pollutant does not preclude it from being regulated under the Clean Water Act. *See, e.g. U.S. Steel Corp. v. Train*, 556 F.2d 822, 848 (7th Cir. 1977) (finding that acid discharges are pollutants since they are chemical wastes); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2nd Cir. 1994) (finding that liquid manure is a pollutant since the definitional list encompasses solid waste, sewage, biological materials, and agricultural waste)*; United States v. Plaza Health Labs.*, *Inc.*, 3 F.3d 643, 645 (2nd Cir. 1993) (finding that human blood is a pollutant because the definitional list encompasses biological materials).

For example, in *United States Steel Corp. v. Train*, the permit restricted U.S. Steel's discharges of acid wastes to a deep waste-injection well to their present level. 556 F.2d at 823. The company was required to monitor acid waste discharges and submit data relating to the deep

well and the performance of treatability studies of the deep-well wastes. *Id.* at 828. In this case, the Court determined that the U.S. Steel's acid discharges into the well were "chemical wastes" within 33 U.S.C. § 1362(6) even though they were not specifically designated as a statutory pollutant. *Id*. at 848. Thus, the Court found that their discharge into the deep well may properly be regulated by the permit-granting authorities pursuant to 33 U.S.C. § 1342. *Id*.

Here, as in *U.S. Steel*, the PFBS and PFOS discharges fall within the category of "chemical wastes" under 33 U.S.C. § 1362(6). As the record illustrates, newer studies have shown that PFAS parameters, which encompass PFBS and PFOS, are present in coal combustion residuals such as fly and bottom ash. R. at. 3. As the Court explained in *Parris*, PFAS are synthetic chemicals that are highly mobile and water soluble, which means they can leach from soil to groundwater, making groundwater vulnerable to contamination. 595 F. Supp. 3d at 1289. Because PFOS and PFBS chemicals meet the definition of a pollutant under 33 U.S.C. § 1362(6), the discharges here should be regulated pursuant to 33 U.S.C. § 1342(a)(3).

III. THE COURT MAY STILL GIVE DEFERENCE TO ITS OWN DECISION ADOPTING PINEY RUN AND TO EPA GUIDANCE ON UNPERMITTED DISCHARGES DESPITE THE RULING IN LOPER BRIGHT.

In light of *Loper Bright*, the Court should still give weight to its own decision in *Piney Run* and to EPA guidance when deciding whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge. Although the Supreme Court held that it is the responsibility of courts to decide statutory ambiguities related to technical matters, the Court also noted that reviewing court's may still give weight to an agency's body of specialized experience and informed judgement, among other information, at its disposal. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 373 (2024). The Court explained that an agency's interpretation of a statute may be especially informative to the extent that it "rests on factual premises within the agency's expertise, and such expertise has been of factors which may give an executive branch

interpretation the power to persuade if, lacking the power to control." *Id*. at 379. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) Furthermore, the Court explained that its ruling does not call into question prior cases that relied on *Chevron. Loper Bright*, 603 U.S. at 384.

A. The Twelfth Circuit's Adoption of The Reasoning in *Piney Run* and EPA Guidance on Unpermitted Discharges Should Receive *Skidmore* Deference in Light of *Loper Bright.*

The Court should apply *Skidmore* deference to the Twelfth Circuit's adoption of *Piney Run* and the EPA's guidance on unpermitted discharges because it satisfies the *Skidmore* factors. For example, in *Env't Integrity Project*, the Court applied *Skidmore* deference to EPA's interpretation of Title V of the Clean Air Act. 969 F.3d at 530. Specifically, the Court found thorough and persuasive the EPA's interpretation that Title V permitting does not require substantive reevaluation of the underlying Title I pre construction permits applicable to a pollution source. *Id.* at 536. In addition, the Court found that the EPA's interpretation was consistent with the statutory text, structure, and purpose of Title V to simplify and streamline sources' compliance with the Act's substantive requirements. *Id*. at 538.

Here the Court should also give weight to the court's reasoning in *Piney Run* and the EPA's interpretation of the Clean Water Act's permit shield provision because of the thoroughness of its consideration, validity of its reasoning, and consistency. First, the EPA's memorandum on the scope of discharge authorization and shield associated with NPDES permits reflects the long-standing position of the EPA and has been a key source of guidance for the environmental appeals board and multiple Courts. Memorandum from EPA Assistant Administrator for Water Robert Perciasepe to Regional Administrators and Regional Counsel, at 1 (July 1, 1994). For example, in *Ketchikan Pulp Co.*, the EPA environmental appeals board emphasized that the permit applicant's disclosures and the permitting authority's knowledge of

potential pollutants are critical factors in determining the applicability of the shield defense. 7 E.A.D. at 621.

The EPA's interpretation was adopted in the Fourth Circuit's *Piney Run* decision and has subsequently been adopted in the Second, Sixth, and Twelfth Circuit Court of Appeals respectively. For example, in *Atlantic States Legal Found., Inc. v. Eastman Kodak Co,* the Second Circuit Court of Appeals found that polluters may discharge pollutants not specifically listed in permits so long as they comply with appropriate reporting requirements. 12 F.3d at 356-57. And in *Sierra Club v. ICG Hazard LLC,* the Sixth Circuit Court of Appeals determined that the permit shield was applicable because (1) the permittee disclosed all required information, including a selenium sample, and (2) the permitting authority had knowledge when it issued the permit that mines in the area could produce selenium. 781 F.3d at 286. Thus, the EPA's interpretation of the NPDES permit shield provision should be entitled to *Skidmore* deference because of its long-standing persuasiveness and consistency over time.

Furthermore, the Court should give *Skidmore* deference to the Twelfth Circuit's adoption of *Piney Run* and the EPA's interpretation of the permit shield because of the thoroughness of its consideration and its validity of its reasoning in advancing the statutory purpose of the Clean Water Act's permit shield provision. Both *Piney Run* and the EPA's memorandum on unpermitted discharges point out that the effectiveness of the permitting process is highly dependent on the permit holder's compliance with monitoring and reporting requirements. 268 F.3d at 260; Memorandum from EPA Assistant Administrator for Water Robert Perciasepe to Regional Administrators and Regional Counsel, at 1 (July 1, 1994). Complying with disclosure requirements allows regulatory agencies to accurately assess potential environmental impacts and set appropriate permit conditions to protect water quality. *Piney Run*, 268 F.3d at 259. Due

to the thoroughness and validity of this explanation, the Twelfth Circuits adoption of *Piney Run* and the EPA's guidance on the scope of the NPDES permit shield should receive *Skidmore* deference in light of the *Loper Bright* ruling.

B. The *Loper Bright* Ruling Does Not Provide Special Justification to Cast Aside the 12th Circuit's Adoption of *Piney Run* and EPA Guidance Merely Because They Rely on *Chevron*.

ComGen argues that *Piney Run* and the Twelfth Circuit's adoption of it are inapplicable in the instant case because both rely on *Chevron* deference. As a result, ComGen contends that such a decision should be cast aside and that the reasoning in *Atlantic States* be adopted. This is a misinterpretation of *Loper Bright* because the Court's decision does not call into question prior cases that relied on the *Chevron* framework. *Loper Bright*, 603 U.S. at 384. Indeed, the Court explained that mere reliance on *Chevron* cannot constitute such a special justification for overruling such a holding. *Id.* at 384.

In *Tennessee v. Becerra*, Tennessee challenged the precedential effect of *Rust* and *Ohio'*s deference to HHS's application of its 2021 rule interpreting section 10008 to require nondirective counseling and referral options because of its reliance on *Chevron*. *Tennessee v. Becerra*, 117 F.4th 348, 355 (9th Cir. 2024). The Court rejected this argument, however, and explained that *Loper Brigh*t did not abrogate the precedential effect of *Rust* and *Ohio* merely because they relied on *Chevron*. *Id*. at 355. Indeed, the Court in *Tennessee* explained that reliance on *Chevron* is not sufficient to justify overruling a statutory precedent. *Id*. at 355.

Here, the same reasoning applies. The mere fact that *Piney Run* and the EPA's guidance on unpermitted discharges relies on *Chevron* does not constitute sufficient grounds to cast aside the reasoning in *Piney Run* and ignore the EPA's guidance. Although the Court is empowered to exercise its own judgement in interpreting the permit shield provision of the Clean Water Act,

there is no adequate legal basis to overturn the holding in *Piney Run* or cast aside the EPA's interpretation on unpermitted discharges. Further, the principle of stare decisis cautions against disturbing existing precedent. *Payne v. Tennessee*, 501 U.S. 808, 835 (1991). Overturning existing precedent should be based on considerations such as the quality of the precedent's reasoning, the workability of the rule, and reliance on the decision. *Loper Bright*, 603 U.S. at 381. Here, the District Court did not sufficiently apply the foregoing considerations in its decision to cast aside the Twelfth Circuit's adoption of *Piney Run*. Instead, the District Court based its reasoning on the fact that *Loper Bright* overturned the *Chevron* framework. R. at. 13. Because the Court in *Loper Bright* explained that the decision does not call into question prior cases that relied on *Chevron*, the District Court's decision should be reversed.

IV. SCCRAP HAS ORGANIZATIONAL STANDING TO CHALLENGE COMGEN'S CLOSURE PLAN FOR PROLONGING AND COMPOUNDING COAL ASH POLLUTION, IN CONTENTION WITH SCCRAP AND ITS MEMBERS INTERESTS

The District Court improperly concluded the SCCRAP lacks standing to challenge ComGen's closure plan for failure to establish traceability and redressability. The standing doctrine, based on Article III of the Constitution, places restrictions on the adjudicative powers of federal courts, requiring they decide only "cases" and "controversies" and consequently limiting claimants to those who can allege a "personal stake in the outcome." *Summers v. Earth Island Inst.*, 555 U.S. 488, at 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). As a legal person, an association can bring suit in its individual capacity, however if it wishes to file suit on behalf of its members, the organization must also demonstrate that (1) its members would have standing to sue independent from the organization, (2) the members' interests are "germane to the organization's purpose," and (3) the individual participation of each member is

not required for the type of claim asserted or relief requested in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

A. SCCRAP's Members Have Standing to Sue as They Have Suffered Recreational Injuries as a Result of ComGen's Inadequate Closure Plan.

Under Article III of the Constitution, a plaintiff must demonstrate three elements to satisfy the standing requirement: (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); U.S. Const. art. III, § 2, cl. 1.

i. ComGen's closure plan and contaminant-leaching impoundment disrupt SCCRAP members' longstanding use and enjoyment of the Vandalia River Watershed.

As the District Court correctly observed, SCCRAP easily satisfies the injury in fact element of standing. This is evident through the recreational injuries SCCRAP's members sustained. Injury in fact occurs when a plaintiff suffers harm to a legally protected interest, that is both "concrete and particularized" as well as "actual or imminent." *Lujan*, 504 U.S. at 560. While "concrete and particularized" is typically understood to mean a "personal and individual" injury, courts have held that an organization can sue on behalf of its members, if at least one member "faces a realistic danger of suffering an injury." *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1342 (11th Cir. 2014) (citation omitted). In the context of environmental claims, such harm can manifest as an aesthetic or recreational injury, whereby an individual who uses the affected environment intends to scale back their use or eliminate interaction with the affected area due to concerns surrounding the challenged conduct. *Sierra Club v. Tenn. Valley Auth.*, 430 F. 3d 1337, 1344 (11th Cir. 2005); *Friends of the Earth, Inc., v. Laidlaw Envt' Servs. Inc.*, 528 U.S. 167, 181 (2000); *Mobile Baykeeper, Inc. v. Alabama Power Co.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, at *34 (S.D. Ala. Jan. 4, 2024).

In *Mobile Baykeeper*, community members living in the vicinity of a coal ash plant alleged harm from the facility's storage impoundment which leached arsenic and other

contaminants into the groundwater and threatened downstream waterways used by the members. *Id*. at *9. The facility's closure plan, which proposed storing coal ash on the riverbank and in contact with groundwater, exacerbated concerns, as members feared sea level rise and storm surges would lead to "catastrophic failure" and eventual leakage into the river. *Id.* at *9-10. The court held that community members had adequately asserted a factual injury as members (1) fished, recreated, and owned property in the watershed where the plant was located and (2) vowed to cease using the water due to fears of contamination. *Id*. The court further concluded that Baykeeper, an environmental non-profit, had organizational standing to sue, because some of its members were also those community members suffering recreational impairment. *Id*.

In the present instance, SCCRAP's injuries are nearly identical to those in *Mobile Baykeeper*. SCCRAP members who live and recreate in Mammoth – the town where the Vandalia Generating Station and Little Green Run Impoundment are located – assert that their use and enjoyment of the Vandalia River watershed has significantly diminished due to the offensive nature of GomGen's groundwater pollution. R. at 10. Specifically, members who own property along the river and its tributaries no longer feel comfortable fully utilizing their land. R. at 10. Fishermen have also limited their use of the river due to fears of future facility failure and PFAS, arsenic, and cadmium pollution emanating from the coal ash impoundment. R. at 10. Additionally, multiple SCCRAP members have retracted their names from a proposed subdivision development. R. at 9. Such fears are not speculative. Rather, monitoring data indicates that ComGen has already discharged PFAS into the water, while arsenic and cadmium from the impoundment have leached into the groundwater which is hydrologically connected to the river. R. at 9. These contaminants have serious health implications. PFAS is a "forever chemical" that bioaccumulates in plants and wildlife and is therefore extremely difficult to

remove from the environment. R. at 3; *Parris*, 595 F. Supp. 3d at 1306. Furthermore, arsenic and cadmium are known carcinogens, both of which are generally tasteless and odorless, making them difficult to detect and effectively more harmful. R. at 3. For these reasons, SCCRAP's members have suffered an injury in fact.

ii. ComGen's closure plan contributes to SCCRAP members' aesthetic injuries, regardless of existing pollution and opportunities for adaptation.

SCCRAP's recreational injuries are traceable to ComGen's closure plan, independent of historical pollution. Once the injury in fact prong is met, a plaintiff must also demonstrate that the injury suffered is causally connected to the challenged action – in this case, ComGen's inadequate closure plan. A causal connection exists when the alleged misconduct is "fairly traceable" to or "causes or contributes to the kinds of injuries alleged." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408, 417 (5th Cir. 2022). Establishing traceability does not require plaintiffs to establish that the alleged conduct is the proximate cause of injury. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Moreover, several courts including the Second and Third Circuits acknowledge that fair traceability is not contingent on "scientific certainty that defendant's [actions] … alone, caused the precise harm suffered by plaintiffs." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 257 (3d Cir. 2005); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345 (2d Cir. 2009).

For example, in *Am. Elec. Power Co.*, plaintiffs filed suit against five power corporations alleging harm caused by the companies' carbon dioxide emissions. 582 F.3d at 345. The defendants claimed it was impossible to pinpoint whether their specific emissions were to blame for plaintiffs' injuries, as many other sources contribute to carbon-dioxide on a global and local scale. *Id*. However, the court rejected this argument, finding that other contributing sources did not absolve the defendants of responsibility for their own contributions. *Id*. at 356-57.

Similar to *Am. Elec. Power Co.*, SCCRAP's members assert injuries from multiple sources. For instance, ComGen's storage of coal ash in the Little Green Impoundment further contributes to historical groundwater contamination. This runs afoul of 40 C.F.R. § 257.102(d)(2)(ii), which requires that the Impoundment be closed in a manner that will control or minimize the releases of CCR to the ground or surface waters. Importantly, this exacerbates and prolongs the community's recreational harm. R. at 9-10. ComGen's deficient closure plan also presents new concerns about the possible contamination of the Vandalia River, which is currently a vital drinking water source for individuals in the community. R. at 9. This is inconsistent with 40 C.F.R. § 257.102(d)(2)(i), which requires that the impoundment be closed in a manner that will preclude the probability of future impoundment of water, sediment, or slurry. R. at 12. Like in *Am. Elec. Power Co.*, ComGen's closure plan is one of multiple causes contributing to the community's injuries and concerns about pollution. Multiple causes can "independently, but concurrently, produce [an injury]," each thereby qualifying as a de facto cause, regardless of whether the injury would have occurred in its absence. *Walters v. Fast AC, Ltd. Liab. Co.,* 60 F.4th 642, 651 (11th Cir. 2023) (citation omitted). *See also* Restatement (Third) of Torts: Phys. & Emot. Harm § 27 (Am. L. Inst. 2010).

Irrespective of the flexible language numerous courts have used to describe causation, the District Court chose to rely on the Eleventh Circuit's narrow interpretation: that no traceability exists where plaintiff's injuries would be "precisely the same" absent the alleged conduct. *Mobile Baykeeper*, 2024 WL 54118, at *11-13 (citation omitted) (finding plaintiffs would be no worse off had there been no closure plan, because their injuries – diminished use and enjoyment of a river basin – were not directly tied to a coal ash impoundment's alleged failure to comply

with the CCR rule, but rather ongoing groundwater pollution). For the foregoing reasons, the District Court's reasoning is flawed, and this Court is not bound to follow it.

iii. Enjoining ComGen from implementing its inadequate Closure Plan would provide community members with necessary relief.

The Court can adequately redress SCCRAP's injuries by ordering ComGen to discontinue use of the current closure plan and reexamine for compliance with 40 C.F.R. § 257.102(d). Upon establishing causation, a plaintiff must make one final showing regarding standing – that a favorable court decision is substantially likely to prevent or rectify the alleged harm. *Lujan*, 504 U.S. at 561 (citation omitted). At the same time, relief is not all or nothing; relief can fulfill the redressability requirement by alleviating a portion of an injury or addressing some injuries when multiple have occurred. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (citation omitted).

One such way to redress harm is through injunctive relief. For example, in *Utah Physicians*, a non-profit sued defendants for modifying and selling trucks in violation of Clean Air Act emissions standards. *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 374 F. Supp. 3d 1124, 1131 (D. Utah 2019). The court ultimately held that declaratory relief – and injunctive relief had it been geographically tailored – could "provide redress by curbing ongoing violations and halting plaintiff's pollution related injuries." *Id.* at 1135-36. Plaintiffs need not solve the entirety of cumulative impacts. *Id.* Even if other emissions sources persist, defendants' specific pollution would no longer pose a risk. *Id.* Enforcing a regulation or procedural right, designed with public and environmental health in mind, "serves to protect the health of those who desire to use affected land, whether for recreation or other purposes." *Grand Canyon Trust v. Energy Fuels Res. (U.S.A.)*, 269 F. Supp. 3d 1173, 1192 (D. Utah 2017).

Despite the above, the District Court in this case held that injunctive relief would do little to redress plaintiffs' harms because requiring defendants to consider a new closure plan would take time to implement and would not stop illegal groundwater leakage occurring in the present. R. at 14; *Mobile Baykeeper*, 2024 WL 54118, at *13. Even if injunctive relief does not immediately correct impoundment deficiencies or halt groundwater pollution, requiring ComGen to reevaluate its inadequate closure plan for compliance with the CCR rule would go a long way towards mitigating and absolving plaintiff's fears, and consequently, their diminished use of the water. For the above reasons, SCCRAP has adequately asserted standing to challenge GomGen's closure plan and paved a path through which the court can and should grant injunctive relief.

B. SCCRAP's Organizational Mission is Directly Connected to the Types of Injuries Facing Community Members and the Individual Members' Participation is Not Required to Pursue the Relief Requested.

Finally, SCCRAP visibly satisfies the second and third elements of associational standing. *Hunt*, 432 U.S. at 334. The pollution emanating from ComGen's facilities is germane to SCCRAP's organizational mission of protecting public water from the risks associated with coal ash contamination. R. at 8. Likewise, GomGen's groundwater pollution is causing harm to SCCRAP members' recreational interests and enjoyment of the Vandalia River Watershed. R. at 10. Thus, members' interests and SCCRAP's purpose are identifiably connected. Regarding the third element, the individual participation of SCCRAP's members is not required for the type of claim asserted or relief requested in the lawsuit. R. at 12. Here, SCCRAP's members do not request monetary damages for the alleged violations of the CCR Rule. Rather, SCCRAP only requests injunctive relief relating to GomGen's closure plan. R. at 12. As such, the third element of the *Hunt* test is also satisfied.

V. SCCRAP CAN PURSUE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT CLAIM BECAUSE RCRA DOES NOT REQUIRE HARM TO A LIVING POPULATION AND THE LITTLE GREEN RUN IMPOUNDMENT HAS DRAINED THE GROUNDWATER OF ITS INTRINSIC VALUE.

This Court should reverse the District Court's decision and find that harm to the groundwater itself is sufficient to establish a RCRA endangerment claim, thereby honoring Congressional intent. Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA") permits citizen suits against any corporation "who has contributed or who is contributing to the past or present handling, storage, … or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The language of the text is straightforward; there is no requirement to demonstrate harm to a living population. Solely alleging endangerment to the environment is sufficient to pursue a RCRA imminent and substantial endangerment claim.

A. The District Court Held SCCRAP to a Higher Standard than Congressionally Intended by Requiring a Showing of Harm to a Living Population and Ignoring Harm to the Environment.

The District Court erroneously concluded that RCRA does not support findings of endangerment to the environment itself. The plain text of RCRA clearly establishes that a threat to a living population – animal, plant, or human – is unnecessary for liability under § 7002(a)(1)(B) of the Act. 42 U.S.C. § 6972(a)(1)(B); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 454 (E.D. Pa. 2015); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). Specifically, the deliberate inclusion of disjunctive phrasing – "endangerment to health or the environment" – is evidence that an endangerment can occur to the environment itself, without needing to cause secondary effects. *Interfaith*, 399 F.3d at 259. Such phrasing also underscores the importance of environmental protection independent from human health. "When [a] statute's language is plain, the sole function of the courts … is to

enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). To hold otherwise would directly contradict the purpose of RCRA and the intent of drafters.

Conditioning RCRA liability on the presence of a living population is overly restrictive and requires plaintiffs to overcome an unnecessarily high hurdle. *Interfaith*, 399 F.3d at 263. In *Interfaith*, a non-profit filed a RCRA citizen suit against chemical manufacturers for hexavalent chromium contamination 75 to 8,000 times higher than applicable state standards. *Id*. at 261. On appeal, the Third Circuit corrected the District Court's misguided application of the endangerment standard, finding the lower court had introduced an additional living population requirement that is absent from the Act's text. *Id*. at 259. While the Court ultimately deemed the usage of a higher standard a harmless error – resting on the fact that the lower Court still came to an endangerment determination – the error in the present instance is not so harmless. *Id*. at 261 (citing *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985) ("error is harmless… if there is a high probability that it did not affect the outcome of the case"). Furthermore, the Appellate Court's decision to address the District Court's misstep speaks to the significance of environmental endangerment in and of itself.

Here, unlike in *Interfaith*, the District Court's mistake in requiring SCCRAP to make a higher showing led to a rejection of the endangerment claim. Limiting the success of endangerment claims to "living populations" while disregarding environmental harm goes directly against the purpose of RCRA. To honor Congressional intent, "if any error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment." *Id*. at 259 (citing *United States v. Conservation Chemical*

Co., 619 F. Supp. 162, 194 (W.D.Mo.1985)). To correct such error, the appellate court should reverse the District Court's decision that harm to a living population is required.

Protecting groundwater for human consumption has always been of critical concern, one which echoes throughout the legislative history and current text of RCRA. 42 U.S.C. § 6901. In the final rule adopting criteria for solid waste classification and open dumps in 1979, EPA acknowledged groundwater is an essential drinking water source. *Criteria for Classification of Solid Waste Disposal Facilities and Practices*, 44 Fed. Reg. 53,438, 53,445 (Sept. 13, 1979) (explaining that groundwater is the drinking source for more than half the U.S. population and is particularly beneficial because of its "high quality, low cost, [and ready availability]"). In turn, the EPA declared that the protection of groundwater for human consumption is the first and primary objective of groundwater protection. *Id*. At first glance, this may seem to indicate that endangerments are linked to human health, but on the contrary, it speaks to the inherent value of groundwater as a drinking water source. Because the groundwater can no longer serve one if its primary ecosystem functions, the court can and should find that an endangerment to the environment exists.

B. Recognizing Claims of Environmental Endangerment Does Not Open the Flood Gates to Imminent and Substantial Endangerment Suits Whenever There is Any Form of Contamination.

Contrary to ComGen's allegations, interpreting RCRA to include an endangerment to the environment itself, does not open the door to imminent and substantial endangerment claims whenever there is any form of contamination. An environmental endangerment is premised on whether contamination amounts to a loss of ecosystem services, not minute alterations to the natural state of the environment. *See Tri-Realty*, 124 F. Supp. 3d at 455-57 (holding that Chrysene contamination emanating from a college campus, despite posing no endangerment to human health or aquatic life, created an environmental endangerment where it tainted freshwater

springs to the extent they were no longer drinkable). Furthermore, environmental endangerment can occur even if the non-living element being threatened is not serving its potential purpose at the time of impairment. *Id.* For example, in *Tri-Realty*, the fact that the freshwater springs were not currently used for drinking water was irrelevant. *Id.*

Similar to the defendants in *Tri-Realty*, ComGen's actions have stripped the groundwater of its ability to serve as a drinking water source, by way of highly toxic chemicals in excess of what the government deems safe. R. at 8-9. At present, no one in the Vandalia community uses groundwater for drinking, however such details are immaterial to finding an environmental endangerment and solely relevant to estimating risks to human health. R. at 9. Of relevance is the housing developers' potential plans to tap into the groundwater, which reflects that potability is one of the beneficial uses and inherent functions of the groundwater. R. at 9.

Furthermore, SCCRAP does not allege insubstantial amounts of contamination nor endangerment to the natural state of the environment. Of the thirteen monitoring wells installed by ComGen, ten are downgradient of the Little Green Run Impoundment – all ten of which demonstrate continuing exceedances of not only state groundwater quality levels but federal advisory levels for arsenic and cadmium – two highly carcinogenic contaminants. R. at 7-8. Some courts have held that "proof of contamination in excess of state standards may support a finding of liability and may alone suffice for liability." *Interfaith*, 388 F.3d at 261.

Further, the present case is highly distinguishable from the facts in *Courtland,* which the District Court relied upon to decline an endangerment finding based on harm to the environment itself. *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069 (S.D. W. Va. Sept. 28, 2023). In *Courtland*, the court emphasized a lack of exposure pathways, finding (1) no evidence contaminated groundwater was or would be used for drinking water – or

any other purpose – anywhere within a mile of the site, (2) the landscape redirected the flow of groundwater away from residential areas, and (3) under local ordinance, a majority of the site in question and the surrounding neighborhood fell within a "Restricted Use" designation which explicitly prohibited the use of untreated groundwater above state standards. *Id.* at 100-01.

In contrast, as it pertains to the Vandalia Generating Station, the Little Green Run Impoundment, and the surrounding Vandalia neighborhoods, there are no restricted use ordinances that regulate the use of groundwater by first requiring treatment. The absence of such an ordinance is evidenced by the fact that developers have already proposed plans to use the groundwater as a drinking source. R. at 9, 13. Additionally, all ComGen's downgradient monitoring wells demonstrate arsenic and cadmium contamination is advancing in the direction of the proposed development, which sits squarely within the 1.5 miles zone deemed unsafe for drinking by SCCRAP's human health expert and practically overlaps with four of ComGen's existing downgradient monitoring wells. R. at 8-10. ComGen has provided no expert testimony to the contrary.

CONCLUSION

For the foregoing reasons, appellant respectively requests this Court reverse the District Court's decision in its entirety. The Court should grant declaratory relief, permanent injunctive relief, and civil penalties for ComGen's CWA unpermitted discharges. The Court should also grant injunctive relief to prevent ComGen from implementing the alleged illegal Closure Plan, as well as declaratory relief, injunctive relief, and civil penalty for the Little Green Run Impoundment's imminent and substantial endangerment to the environment.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Stop Coal Combustion Residual Ash Ponds certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2025.

Respectfully submitted,

Team No. 24