No. 24-0682 **Team 2**

In the United States Court of Appeals
for the Twelfth Circuit

STOP COAL COMBUSTION ASH PONDS,

Plaintiff-Appellant,

v.

COMMONWEALTH GENERATING COMPANY,

Defendant-Appellee.

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

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had federal question jurisdiction over this case pursuant to 42 U.S.C. § 6972 and 33 U.S.C. § 1365 since this case alleges that ComGen's actions violated both the Clean Water Act and EPA regulations set forth in 40 C.F.R. § 251.101. This appeal is from a final judgment entered by the Vandalia Middle District Court on October 31, 2024. Plaintiff filed a timely notice of appeal on November 10, 2024. Thus, this court has jurisdiction under 42 U.S.C. § 6972 and 33 U.S.C. § 1365.

QUESTIONS PRESENTED

(1) Whether ComGen violated the Clean Water Act by discharging PFAS pollutants into the Vandalia River and its tributaries where ComGen did not disclose five years of internal reports showing PFAS pollutant discharges to permitting authorities;

(2) Whether, when deciding Question 1, the Court should continue to follow its own decision adopting *Piney Run* (and its reasoning), as well as the EPA's guidance on unpermitted discharges, considering the EPA's technical expertise and the longstanding nature of the decision;

(3) Whether SCCRAP has standing to challenge ComGen's coal ash closure plan under the RCRA where an injunction would prevent future environmental damage, but not undo existing harm; and

(4) Whether SCCRAP can pursue a claim under the RCRA for imminent and substantial endangerment to the environment but not individuals where the text authorizes suits for endangering "health or the environment?"

STATEMENT OF THE CASE

Stop Coal Combustion Residual Ash Ponds ("SCCRAP"), an environmental and public interest organization, seeks to compel Commonwealth Generating Company ("ComGen"), a coal burning electricity company, to comply with EPA regulations and the Clean Water Act ("CWA") regarding the long-term disposal of its coal burning byproducts. R. at 3-12.

Coal Ash and Impoundments

Coal combustion residuals ("CCRs"), commonly referred to as coal ash, are the byproducts created when coal is burned at electric generating plants. R. at 3. Coal ash contains hazardous contaminants such as mercury, selenium, cadmium, and arsenic. *Id.* These substances are associated with cancer and other serious health effects. *Id.* Disposal methods include wet disposal in large surface impoundments and dry disposal in landfills. *Id.* The Environmental Protection Agency ("EPA") has warned that, without proper safeguards, these contaminants can leach into groundwater and potentially migrate to drinking water sources, posing significant public health risks. *Id.*

CCRs represent one of the largest industrial waste streams in the United States. *Id.* Disposal options include off-site landfills as well as on-site landfills and surface impoundments. *Id.* In 2012, about 60 percent of the CCRs produced were disposed of in surface impoundments and landfills. *Id.* An example of such a facility is the Little Green Run Impoundment, owned and operated by the Commonwealth Generating Company ("ComGen"), which is located adjacent to the Vandalia Generating Station along the Vandalia River. *Id.*

Commonwealth Generating Company

ComGen is a multistate electric utility holding company that provides electricity in nine states, including Vandalia. *Id.* ComGen has been selling energy services to Vandalia for more than a century. R. at 4. Currently, ComGen employs over 1,500 Vandalians throughout the

region. *Id.* In 2015, ComGen began a program to phase out older coal-fired power stations and replace their generating capacity with newer technology. *Id.* As part of this program, in 2018, ComGen ComGen announced that it would close its Vandalia Generating Station in Mammoth, Vandalia, by 2027. *Id.*

The Vandalia Generating Station, a coal burning power plant dating back to 1965, has an 80 MW capacity but would need significant upgrades to comply with the EPA's Effluent Limitations Guidelines ("ELG") for coal burning plants if it were to remain active. *Id.* On July 30, 2020, the Vandalia Department of Environmental Protection ("VDEP") issued a Vandalia Pollutant Discharge Elimination System ("VPDES") permit regulating its effluent discharges into the Vandalia River and its tributaries (federally protected waterways). *Id.* This VPDES permit was issued on July 30, 2020, took effect on September 1, 2020, and is valid until July 29, 2025. *Id.* It governs three discharge points (Outlets 001, 002, and 003), and sets limits for numerous pollutants (selenium, aluminum, pH, temperature, etc.). *Id.* However, there are no limits or monitoring requirements specifically addressing PFOS or PFBS. *Id.* These compounds are not mentioned in the permit or in the associated application materials. *Id*.

Before issuing the 2020 VPDES, a deputy director at the VDEP asked a ComGen employee via email whether any of the outfalls might contain PFOS or PFBS, citing recent studies showing such substances in various CCRs. *Id*. ComGen assured the deputy director that neither PFOS nor PFBS were believed to be in the station's discharges, despite ComGen possessing over five years of monthly reports showing both pollutants were present. R. at 4, 9.

Little Green Run Impoundment and Its Closure Plan

East of the Vandalia Generating Station, the Little Green Run Impoundment houses ComGen's deposited coal ash. R. at 5. This impoundment is unlined yet spans roughly 71 acres and contains around 38.7 million cubic yards of material, primarily CCRs. *Id*.

On April 17, 2015, EPA issued its Disposal of Coal Combustion Residuals from Electric Utilities rule ("CCR Rule"). *Id*. This rule governs coal ash as a solid waste under Subtitle D of the Resource Conservation and Recovery Act ("RCRA") and establishes national minimum standards for location, operating, monitoring, closure, and documentation. 80 Fed. Reg. 21302. In its 2015 Federal Register notice, the EPA anticipated that primary enforcement would occur through citizen suits under Section 7002 of RCRA. *Id*. at 21427; 42 U.S.C. § 6972. The State of Vandalia obtained the EPA's approval to administer its own coal ash permitting program, and its regulations align with the federal CCR Rule. R. at 5. In particular, the Vandalia CCR Regulations replicate the Federal CCR Regulations, including the "Criteria for conducting the closure or retrofit of CCR units." *Id*.

Under the CCR Rule and Vandalia's corresponding regulations, owners or operators of existing CCR surface impoundments must prepare initial written closure plans in accordance with 40 C.F.R. § 257.102(b)(1), no later than October 17, 2016. 40 C.F.R. § 257.102(b)(2)(i). Impoundments failing certain criteria, including location, liner composition, or groundwater impacts, must begin retrofitting or closure by October 31, 2020. 40 C.F.R. § 251.101; 83 Fed. Reg. 36441. There are two options for closure: excavation of CCR or closure in place. R. at 6.

If choosing closure in place, 40 C.F.R. § 257.102(d)(2)(i) requires elimination of free liquids prior to installing the "final cover system." *Id*. Additionally, closures must at least prevent the possibility of future water, sediment, or slurry impoundment and control or eliminate post-closure infiltration and associated releases. 40 C.F.R. § 257.102(d)(1)(ii). The plan must also demonstrate how the final cover system achieves these standards. R. at 6. Any practice that does not meet these criteria is deemed open dumping, which is prohibited under Section 4005 of

the RCRA. *Id*. Together, these requirements ensure CCR units either remove and safely dispose of all CCR or remain subject to stringent design, operational, and ongoing standards. *Id*.

In December 2019, ComGen submitted its initial "Permit Application for CCR Surface Impoundment" to the Vandalia DEP, explaining its plan to close the Impoundment in place in compliance with both the EPA and Vandalia CCR regulations. *Id*. ComGen originally included its closure-in-place plan, detailing how it would manage and monitor the Impoundment once operations ceased, in the operating record on October 17, 2016, and revised it in July 2019 and April 2020. *Id*. ComGen attached its most current closure and post-closure plans to the 2019 permit application. *Id*.

At a March 2021 public hearing, and in written public commentary for the record, thousands of community members opposed the proposed permit. *Id*. The hearing included numerous individuals, including a representative from SCCRAP, who urged the Vandalia DEP to reject ComGen's permit request. R. at 7. This opposition underscored public concern about environmental impacts associated with coal ash impoundments. *Id*.

In July 2021, after reviewing public input and CCR rules, the Vandalia DEP granted ComGen a Coal Combustion Residual Facility Permit to Close the Little Green Run Impoundment, valid until May 2031. *Id*. ComGen must follow permit conditions, its approved application, and federal CCR Regulations. *Id*. Closure began in 2019, with 50 million dollars spent to date and over 1 billion dollars expected by completion. *Id*.

ComGen's initial closure-in-place measure was installing upgradient and downgradient wells to track potential pollutant migration from the Little Green Run Impoundment. R. at 7-8. Thirteen monitoring wells were installed by late 2021, and ComGen must release annual data. *Id*. From 2021, downgradient wells show arsenic and cadmium exceeding federal advisory levels

and Vandalia's groundwater standards. R. at 8. Both environmental and industry experts believe leaching likely began at least 5 to 10 years before the first 2021 monitoring data. *Id*.

Stop Coal Combustion Residual Ash Ponds

Stop Coal Combustion Residual Ash Ponds ("SCCRAP") is a national environmental and public-interest organization based in Washington, D.C., with members across Vandalia. R. at 8. It uses both the CWA and the RCRA to hold coal ash impoundment operators accountable. *Id*. Recently, SCCRAP began targeting coal-fired plants with on-site ash ponds causing groundwater issues and PFAS discharges. *Id*. In addition to eliminating coal ash ponds, SCCRAP's goals include protecting public water from fossil-fuel pollutants and transitioning to cleaner energy sources that do not produce harmful by-products like coal ash. *Id*.

SCCRAP suspected the Vandalia Generating Station of releasing PFAS into the Vandalia River, a drinking water source for Mammoth residents. R. at 9. They tested multiple PFAS parameters upstream and downstream of Outlets 001, 002, and 003, finding PFOS at 6 ppt and PFBS at 10 ppt in Outlet 001's mixing zone; levels they did not detect a mile upstream. R. at 9. Through a subpoena in separate litigation, they learned ComGen was aware that Outlet 001 was discharging these PFAS pollutants. R. at 9. Monthly monitoring records produced under that subpoena, dating back to 2015, showed regular PFOS or PFBS discharges, occasionally reaching 15 µg/L or 35 µg/L. R. at 9. ComGen acknowledged responsibility but argued that they were free of reporting requirements because PFAS pollutants were not explicitly listed in the written permit application, being inquired about via email. R. at 4, 9.

SCCRAP is alarmed by ComGen's closure plan for the Little Green Run Impoundment. R. at 9. The plan is flawed because it permanently places coal ash below sea level, allowing contact with water and groundwater that has already shown signs of pollution. *Id*. Additionally,

future storms or rising water levels could elevate groundwater within the Impoundment, causing a disastrous spill of coal ash into the Vandalia River. *Id*.

SCCRAP documented arsenic and cadmium contamination in groundwater downgradient of the Impoundment. *Id*. Health experts concluded that groundwater within 1.5 miles of the site is unsuitable for drinking, given the elevated levels of these metals detected in nearby monitoring wells. *Id*. A housing developer intends to build a large subdivision (to be completed in 2031) within a mile downgradient and plans to use well water. *Id*. SCCRAP members had joined that project's waiting list, but after learning about the contamination, they are reconsidering. *Id*.

PROCEDURAL HISTORY

SCCRAP filed a citizen suit against ComGen in the United States District Court for the Middle District of Vandalia on September 3, 2024, pursuing three separate claims—one under the CWA and two under the RCRA. R. 12. First, SCCRAP sought permanent injunctive relief and civil penalties for the CWA unlawful discharge claim. *Id*. Second, SCCRAP sought injunctive relief for the RCRA illegal Closure Plan claim. *Id*. Third, SCCRAP sought injunctive and declaratory relief, as well as civil penalties for the RCRA imminent and substantial endangerment claim. *Id*. at 13.

ComGen filed a motion to dismiss all three claims brought by SCCRAP on September 20, 2024. *Id*. The District Court issued an order granting ComGen's Motion to Dismiss in its entirety on October 31, 2024. *Id*. First, the Court dismissed SCCRAP's CWA claim and accepted ComGen's argument that there were no disclosure requirement violations on behalf of ComGen, and the permit shield defense was thus applicable. *Id*. at 14. Second, the Court found that SCCRAP did not have standing to challenge ComGen's Closure Plan. *Id*. Third, the Court found SCCRAP's RCRA imminent and substantial endangerment claim failed to allege some form of endangerment to a living population. *Id*.

On November 10, 2024, SCCRAP filed an appeal to this Court, asking for the District Court's rulings to be reversed. *Id*. at 15. This Court issued an order on December 30, 2024, setting forth the issues to be briefed and argued on appeal. *Id*.

SUMMARY OF THE ARGUMENT

First, the District Court erred in finding the permit shield applicable in the present case. The CWA and NPDES permitting scheme were developed to maintain water quality standards by calculating effluent limitations for pollutants discharged by individual permit holders. Permit holders can be shielded from liability for pollutants not listed in their permit only if they adequately disclose the contents of their discharge to permitting authorities during the permit application process so as to give permitting authorities an opportunity to contemplate proper effluent limitations. Thus, ComGen's deceptive behavior cuts against the very essence of the CWA and removes them from the scope of the permit shield defense.

Second, the district court erred by refusing to follow *Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty., MD*, previously adopted by this Court. Despite the Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo*, *Piney Run* is still good law, entitled judicial review under stare decisis. Properly evaluated, these factors make clear that *Piney Run* provided a well-reasoned, workable rule that has engendered significant reliance. Absent a "special justification", this Court should respect long-standing caselaw instead of upending thirty years of consistent interpretation of the CWA. This is especially true given that *Loper Bright* explicitly instructs courts to consider agency guidance when answering technical questions of law, such as the immediate case.

Third, the district court mistakenly argued that because some environmental harm had already occurred, SCCRAP's lawsuit lacked standing because any remedy provided by the court could not redress the asserted injury. However, the type of interest recognized by courts,

aesthetic and recreational enjoyment of the environment, are not wholly depleted interests simply because some harm has occurred. The fact that further degradation to the environment, and SCCRAP's interests, can be mitigated by injunctive relief is enough to satisfy the courts concerns over redressability within the standing analysis.

Finally, the district court misread the statutory text of the RCRA when finding that a claim may only be sustained on the grounds of imminent and substantial endangerment of health alone. As made clear by the text of the statute, the RCRA unquestionably allows suits premised upon either environmental or individual harm and contains no requirement of threats to human health. Both appellate courts addressing the issue have reached the opposite conclusion to the district court's holding, and the case law cited in the district court opinion is meaningfully distinguishable from the case at hand.

ARGUMENT

I. ComGen's Discharge of PFOS and PFBAS from Outlet 001 Is an Unpermitted Discharge Under the CWA

A. The CWA Was Intended to Protect Waters from All Pollutants and Provides Only a Limited Permit Shield Defense

The CWA represents a fundamental change in the federal government's regulation of water pollution. *City of Wilmington v. United States*, 157 Fed. Cl. 705, 710-11 (2022). Prior to 1972, the CWA's ancestral legislation, the Federal Water Pollution Control Act (FWCA), tasked regulators with determining a causal link between polluted waterways and the individual entities degrading the water quality. Pub. L. No. 80-845, 62 Stat. 1155 (1948); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976); *City of Wilmington,* 157 Fed. Cl. at 710. While the law empowered cooperation between Federal and state regulatory agencies, the "scattered state-based system of water pollution control" proved "impractical." *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 115 (D.C. Cir. 1976). Tracing pollutants back to their point-source was technologically infeasible and individual dischargers were ultimately left unaccountable for their contributions to the degradation of water quality. *See* S. Rep. No. 92-414 (1971). *See also Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000).

As a result, Congress tinkered with the law in the years following, implementing various alterations to the water quality control system. *City of Wilmington*, 157 Fed. Cl. at 710. Among other changes, the 1972 amendments created limitations on the "amount of pollutants that could be released into a state's navigable waters." *Id.* at 204. Under this new system, "the discharge of any pollutant by any person" was deemed unlawful unless the polluter obtained a NPDES permit from the EPA or the state. *Friends of the Earth*, 204 F.3d at 151 (quoting 33 U.S.C. § 1311(a)). S*ee Nat. Res. Def. Council, Inc. V. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (stating that "the legislative history makes clear that Congress intended the NPDES permit to be the only

means by which a discharger from a point source may escape the total prohibition of [the CWA]").

Pursuant to the CWA, every NPDES permit must contain "(1) effluent limitations that reflect the pollution reductions achievable by using technologically practicable controls, and (2) list any more stringent pollutant release limitations necessary for the waterways receiving the pollutant to meet 'water quality standards.'" *Am. Paper Inst. v. U.S. E.P.A.*, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. & 1311(b)(1)) (internal citations omitted). Essentially, individual dischargers applying for permits are obligated to account for and disclose the presence of pollutants in their discharges. *Nat. Res. Def. Council*, 568 F.2d at 1374. Permitting authorities then calculate an acceptable level of a pollutant to be discharged while still maintaining water quality standards and evading potential harm to the environment and human health. United States Environmental Protection Agency, *NPDES Permit Basics*, https://www.epa.gov/npdes/npdes-permit-basics (last updated No. 26, 2024). Consequently, the permitting program is "somewhat interdependent; the permitting authority must account for the effluent discharge of others in calculating the appropriate levels for an individual permit holder." *Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty., MD*, 268 F.3d 255, 266 (4th Cir. 2001).

The NPDES permit shield defense is built upon this interdependency. *Id*. Since permit applicants disclose the contents of their discharge during the application process, they are automatically shielded from CWA liability so long as their discharges stay in accordance with the effluent limitations outlined in their permit. *See Winyah Rivers All. v. Active Energy Renewable Power, LLC*, 579 F. Supp. 3d 759 (E.D.N.C. 2022) (holding that the permit shield defense did not apply where defendants were not in compliance with the permit). Permit holders

can only be shielded from liability for pollutants not specifically incorporated in their permit under specific circumstances. *In re Ketchikan Pulp Co*., 7 E.A.D. 605 (1998).

B. ComGen Has Not Met the Requirements to Assert the NPDES Permit Shield Defense

In order to affect the purpose of the shield defense, this court should affirm that the permit defense only applies to unlisted pollutants so long as during the permit application process, the pollutants were: (1) disclosed to the permitting authority, and (2) the discharges were within the reasonable contemplation of the permitting authority. *Piney Run*, 268 F.3d at 268. The primary purpose of the shield defense is to "insulate permit holders from changes in various regulations . . . and to relieve them of having to litigate in an enforcement action the question of whether their permits are sufficiently strict." *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014) (quoting *E.I. du Pont de Nemours & Co. V. Train*, 430 U.S. 112, 138 (1977)). "By rendering permits final, the shield allows permit holders to conduct their operations without concern that an unexpected discharge might lead to substantial liability." *Id.* As a result, permit holders are incentivized to work with permitting authorities and adequality disclose the presence of pollutants in their discharges. *Id.* However, this scheme is dependent upon the permitting authority's ability to accurately analyze the presence of pollutants in permit holders' discharges. *Id.* ComGen frustrated this scheme and degraded the protection afforded by the shield defense and undermined the entire regulatory scheme by explicitly lying about the contents of its discharges. R. at 4.

1. ComGen Withheld Information from Permitting Authorities when Asked About the Presence of PFOS and PFBS Pollutants in Their Discharge

Since the permitting authorities use the disclosures from individual dischargers to develop the NPDES permits, the entire regulatory scheme is dependent on honest disclosure and

cooperation from all involved parties. *S. Appalachian Mt. Stewards*, 758 F.3d at 564. If a prospective permit holder withholds information about the contents of their discharge, the permitting authority's calibration of effluent limitations will be skewed, and state water quality will drop below the allowable standards. *Piney Run*, 268 F.3d at 266. The scope of the shield defense regarding disclosure requirements is best synthesized by the EAD in *Ketchikan*:

> "[W]hen 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, even though the permit does not expressly mention those pollutants. The converse is also true: where the discharger has not adequately disclosed the nature of its discharges to permit authorities, and as a result thereof the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants has been held to be outside the scope of the permit."

7 E.A.D. at 11.

S. Appalachian Mt. Stewards v. A & G Coal Corp is a Fourth Circuit decision that illustrates the importance of disclosure in the function of the permitting scheme. 758 F.3d. Coal company A&G did not disclose the presence of selenium in its waste streams when applying for a permit but nonetheless tried to assert the permit shield defense. *Id.* at 561-63. The company claimed that the application disclosed coal and coal processing, which was known by permitting authorities to result in selenium discharge. *Id*. A&G attempted to argue that their disclosure of coal processing was enough, and they did not need to further disclose the presence of selenium. *Id*. at 570. This argument was rejected by the Fourth Circuit with the Court finding the permit applicant responsible for disclosing the pollutants they know to be present in their discharges. *Id.*

While the immediate case may concern pollutants not automatically listed in applications, this does not mean that PFOS or PFBS are beyond the scope of the CWA or the VPDES permitting scheme. *See Parris v. 3M Co.*, 595 F. Supp. 3d 1288 (N.D. Ga. 2022) (finding liability under the CWA for discharge of PFAS pollutants in waste streams).

PFOS and PFBS are part of a group of synthetic chemicals known as PFAS pollutants that have been used in a wide array of industrial and commercial applications since the 1940s. *Id.* at 1306. PFAS properties that make them commercially useful – "highly stable, oil-and-water repellant, and resistant to heat and chemical reactions" – are the same properties that allow these chemicals to persist in the environment "with no known natural processes to break them down." *Id.* "PFAS are also highly mobile and water soluble and can leach from soil into groundwater, making groundwater and surface waters particularly vulnerable to contamination." *Id*. Even more, the EPA lists a series of health effects that have been linked to exposure of PFAS pollutants including, but not limited to, developmental effects or delays in children, increased risk of some cancers, reproductive effects such as decreased fertility, and interference with the body's natural hormones. United States Environmental Protection Agency, *Our Current Understanding of the Human Health and Enviornmental Risks of PFAS*, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated Nov. 26, 2024).

The Vandalia Generating Station is a coal-fired electric plant, and newer studies have shown PFAS parameters to be present in fly and bottom ash, the byproduct of coal processing. R. at 4. Knowing the potentially detrimental impact of unmonitored PFAS discharge, the Deputy Director of the VPDES corresponded with a ComGen employee via email during the initial application stage inquiring whether any of the outlets might have PFOS or PFBS in its

discharges. R. at 4. Despite monthly ComGen reports showing PFOS and PFBS discharge from Outlet 001 since at least 2015, ComGen assured the Director that neither pollutant was known to be present. R. at 9. ComGen thus actively concealed the existence of dozens of documents that would have provided authorities with critical information during the permit application process. R. at 4.

2. PFAS Pollutants Were Therefore Outside the Reasonable Contemplation of Permitting Authorities Because ComGen Concealed Information During the Application Process

The NPDES permitting scheme is "dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat" to human health or the environment. *Piney Run*, 268 F.3d at 268. Likewise, the NPDES must know enough about these pollutants to be able to institute a monitoring program and determine the acceptable levels of such pollutants to maintain the integrity of the water. *Id.* Consequently, discharges not within the reasonable contemplation of permitting authorities do not come within the protection of the permit shield. *Id.* In other words, permit holders cannot be held liable for discharges that were on the radar of permitting authorities during the application process, but were nonetheless left unlisted. *Id.*

The reasonable contemplation requirement closely relates to the disclosure requirement. *See Id.* If a permit applicant discloses the presence of specific pollutants in their discharge, then those pollutants would be assumed to have been within the reasonable contemplation of permitting authorities. *Id*. In *Piney Run*, commissioners of the discharging plant informed permitting authorities during the application process that the plant was discharging heat. *Id*. In addition to proof of disclosure by the permit applicant, supporting records showed that permitting authorities contemplated the plants discharge of heat when drafting the permit. *Id*. Therefore, the plant was entitled to full protection of the permit shield. *Id*.

The circumstances in the present case differ substantially from those in *Piney Run*. Here, VPDES permitting authorities were not given adequate disclosure to aid them in their contemplation of the proper effluent limitations to list in ComGen's permit. R. at 4. In fact, VPDES explicitly asked ComGen about the presence of PFAS pollutants prior during the application process and were assured that no such pollutants were present. R. at 4. Had ComGen been forthcoming with the pollutants contained in their discharge, then VPDES could have contemplated the proper effluent limitations for PFAS pollutants. However, ComGen's deceptive actions disqualify respondents from the protection afforded by the permit shield defense and as a result, is liable under the CWA.

II. Piney Run Remains Good Law and This Court Should Affirm Its Interpretation of the Permit Discharge Scheme

Loper Bright Enterprises v. Raimondo does not disturb longstanding precedent, and so this Court should show deference to *Piney Run* and the EPA's guidance on unpermitted discharges. 603 U.S. 369 (2024). While *Loper Bright* adjusted the methodology which courts use when considering agency interpretations of statutory provisions, it explicitly avoided overturning cases previously decided upon the *Chevron* precedent, and thus *Piney Run* is entitled to analysis under *stare decisis*. *Id.* at 412. Additionally, *Loper Bright* only found that agency interpretations are not binding, and did not foreclose courts from using agency interpretations as persuasive material. *Id.*

A. Loper Bright Explicitly Demands an Analysis of Stare Decisis for Decisions Following Chevron, Which Counsels in Favor of Preserving Piney Run

First, *Loper Bright* only changed the Court's analysis of future questions of first impression, not those which have already been decided. *Id.* at 412 In fact, the *Loper Bright* court specifically noted that it "[did] not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases . . . . are still subject to statutory *stare decisis* despite our

change in interpretive methodology. *Id.* Adhering to *stare decisis* is a norm this Court should be hesitant to depart from. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (quoting *United States* v. *Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996)). Consequentially, departing from existing case law should be "exceptional" and requires a "special justification." *Randall*, 548 U.S. at 244. However, the *Loper Bright* court specifically noted that "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding." *Loper Bright*, 603 U.S. at 412.

In the immediate case, the district court erred by not evaluating *Piney Run* under the framework of *stare decisis*, despite the recent change in interpretive methodology. In *Loper Bright*, the Supreme Court articulated three factors of importance: the quality of the precedent's reasoning, the workability of the rule it established, and the extent of reliance upon the decision. *Id.* at 407. Since *Piney Run* was well reasoned and provided a workable rule that has been extensively relied upon, this Court should be deeply hesitant to overturn existing case law.

First, *Piney Run* presented a well-reasoned rule. Despite drawing upon the *Chevron* doctrine to draw its conclusion, *Piney Run* did not rubber stamp or mindlessly approve of the EAD's decision. 268 F.3d at 267. Instead, the *Piney Run* court considered the EPA's rationale, and acknowledged the functional impossibility of "identify[ing] and rationally limit[ing] every chemical compound present in the discharge of pollutants." *Id.* As such, the permitting scheme is entirely dependent upon "the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat." *Id.* at 268. Thus, as the Court acknowledged, "the goals of the CWA may be more effectively achieved by focusing on the chief pollutants and

wastestreams . . . . disclosed by permittees." *Id.* at 267-68. This interpretation most effectively protects waterways from pollution, while providing a clear-cut standards and predictability for permit applicants by creating a straightforward scheme of regulation. *Id.* at 269.

Furthermore, while *Piney Run* may have adopted the EPA's decision from *Ketchikan*, the EPA decision itself was an adoption of the Second Circuit's holding in *Atlanta States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). In this sense, *Piney Run* is not the situation where the *Chevron* doctrine has "required courts to violate the APA by yielding to an agency the express responsibility . . . . to decide all relevant questions". *Loper Bright*, 603 U.S. at 406–07. Instead, *Piney Run* adopted an EAD decision that deferred to judicial interpretations of statutory meaning, precisely as *Loper* requires.

Second, *Piney Run* has provided a workable rule for other courts to follow. By establishing a straightforward rule and analysis, *Piney Run* provided a clearcut methodology for resolving permit shield cases that has proved invaluable. Indeed, numerous other court decisions have relied upon *Piney Run* to resolve questions involving permit shields. *See Ohio Valley Envtl. Coalition v. Fola Coal Co., LLC*, 845 F.3d 133, 142 (4th Cir. 2017) (positively noting *Piney Run*'s "careful examination of the history of the Clean Water Act"); *S. Appalachian Mt. Stewards* 758 F.3d at 567 (noting that requiring applicants to disclose pollutants clearly "did not strike the framers of the CWA and its regulations as too high a price to pay for the significant protections of the permit shield"); *Parris*, 595 F. Supp. 3d (refusing the protection of the permit shield where defendant claimed ignorance of waste stream pollutants). Overruling *Piney Run* would thus create substantial uncertainty in the law and disrupt the "evenhanded, predictable, and consistent development of legal principles" that *stare decisis* protects. *Randall*, 548 U.S. at 243 (quoting *Int'l Bus. Mach.* 517 U.S. at 856)

Finally, *Piney Run* has engendered significant reliance upon its permit shield rules, which counsels in favor of preserving its holding. Reliance interests are at their apex in cases involving property and contractual rights, or where "advance planning of great precision is most obviously a necessity" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 (2022) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 856 (1992)). Permit shields are precisely this situation. Companies have invested millions of dollars into waste treatment programs on the assumption that the permitting regime will follow the rule established in *Piney Run*. Since overruling *Piney Run* would thus destabilize property interests in existing permits and property rights, *stare decisis* concerns are "at their acme," and this Court should hesitate carefully before changing course. *Payne v. Tenn.*, 501 U.S. 808, 828 (1991).

B. Judicial Deference Post-Loper Bright Still Counsels in Favor of Piney Run and Ketchikan

While *Loper Bright* has changed the standard by which courts evaluate deference, it did not eliminate the concept, nor prevent lower courts from following agency decisions where appropriate. *See* Jack M. Beermann, *Chevron Deference Is Dead, Long Live Deference*, 2024 Cato Sup. Ct. Rev. 31, 49 (2023-2024). Indeed, *Loper Bright* itself instructs courts to afford "great deference" to the interpretations of executive agencies. 603 U.S. at 370. "In an agency case *in particular*, the reviewing court will go about its task with the agency's 'body of experience and informed judgment' . . . . at its disposal." *Id.* at 374 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added).

While an agency's decision may no longer bind the Court, it may still be "especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Loper Bright*, 603 U.S. at 374 (quoting *Bureau of Alcohol, Tobacco and Firearms v. Fed. Lab. Rel. Auth.*, 464 U.S. 89, 98, n.8 (1983)). Ultimately, the weight given to an agency's interpretation

"depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade". *Id.* at 370 (quoting *Skidmore*, 323 U.S. at 140). Agency interpretations are particularly compelling when cases concern complex scientific concepts or technical expertise. *Tex. v. U.S. Envtl. Protec. Agency*, 91 F.4th 280, 297 (5th Cir. 2024). *Piney Run* concerns a technical matter and reflects longstanding interpretations of the CWA, and so this Court should reaffirm its rationale.

First, the enactment of the CWA is necessarily a complicated, technical process in which the EPA's specific agency knowledge is invaluable, especially in the context of permits. The CWA was a "fundamental change" that shifted the regulatory focus from water quality in general to the direct discharge of pollutants. *Piney Run*, 268 F.3d at 265. The permitting process is thus a "centerpiece" of Congress's regulatory scheme. *Id.* Granting a permit requires the EPA or a state agency to consider all technologically practicable controls to determine the precise impacts of pollutants on local waterways. *Id.* Thus, the EPA's construction of the limits of the permit shield defense necessarily draws upon considerable technical expertise about the impacts of undisclosed pollutants not within the reasonable contemplation of the permit-issuing agency. *Id.* This expertise should weigh heavily on this Court's analysis per the Supreme Court's decision in *Loper Bright*. 603 U.S. at 370.

Second, *Ketchikan*, 7 E.A.D., the Environmental Appeals Board decision adopted in *Piney Run,* is a longstanding decision that encapsulates decades of predictable, consistent jurisprudence on the limits of the permit shield defense. Where an agency interpretation has stood the test of time, a court should grant it "power to persuade," if not control. *Skidmore*, 323 U.S. at 140. *Piney Run* has been on the books for over twenty years, providing clear guidance to

permit applicants and examiners alike. 268 F.3d. Furthermore, *Piney Run* was an adoption of the EPA decision in *Ketchikan*, which dates to 1998. *Id.* As noted by the *Piney Run* court, *Ketchikan* also served as a codification of EPA policy statements dating back to 1994. 268 F.3d at 268, n.11. *Ketchikan* and *Piney Run* thus conform with over three decades of EPA policy and guidance, well over half the lifespan of the CWA itself. Thus, overturning *Piney Run* in favor of the district court's approach would undermine over thirty years of consistent EPA policy, with potentially extreme consequences.

III. SCCRAAP Has Standing to Challenge ComGen's Closure Plan Under the RCRA Because ComGen's Actions Have Created a Redressable Injury-in-Fact.

Contrary to the district court's ruling, SCCRAP has standing to challenge ComGen's closure plan for the Little Green Run Impoundment pursuant to § 7002(a)(1)(A) of the RCRA. SCCRAP is well within its rights to seek injunctive relief, thus preventing ComGen from implementing an illegal and environmentally harmful Closure Plan.

The U.S. Constitution dictates that the federal courts will only adjudicate actual cases or controversies at bar. U.S. Const. art. III, § 2. The Supreme has since expanded upon the doctrine of justiciability, articulating that a plaintiff must have standing to have their claims heard. *Allen v. Wright*, 468 U.S. 737, 756 (1984). In order to establish standing a plaintiff must demonstrate three things: injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury-in-fact prong requires a concrete and particularized injury that is actual or imminent, not hypothetical. *Id*. The causation element requires a fairly traceable connection between the injury and the defendant's conduct. *Id*. Finally, the redressability prong demands a likelihood that a favorable judicial decision will redress the injury. *Id* at 561. This Court reviews legal conclusions of standing *de novo. Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005).

Section 7002 of the RCRA directly authorizes private citizen suits. § 7002 RCRA, 42 U.S.C. Section 6972(a)(1)(A). The statutory language of "any person" is liberal and permissive as to whom congress intended to allow to bring suits. *Id*. The citizen suit mechanism is designed to supplement the enforcement efforts of the EPA and serves as a backstop, ensuring that violations of the RCRA do not go unaddressed. *See id*. As for SCCRAP suing on behalf of its membership, "[an] association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth,* 528 U.S. at 181.

In environmental lawsuits, injuries are not always economic or physical. Courts have recognized that injuries, such as the loss of a recreational resource or diminished environmental quality, can be sufficient. *Id.* at 167. In *Friends of the Earth v. Laidlaw*, the Supreme Court recognized that aesthetic and recreational interests might satisfy the injury-in-fact prong of standing, so long as the injury is particularized and concrete. *See id.* Environmental lawsuit causation is not noticeably different from other types of suits; courts will examine whether the violation is "fairly traceable" to the injury alleged and not too remote or speculative as to the posed environmental threat. *Lujan,* 504 U.S. at 560. Even if a concrete injury is shown, a plaintiff must also demonstrate that the court's decision would likely redress that injury. *Id* at 561. In RCRA citizen suits, such as the one at bar, injunctive relief (i.e., requiring the violator to come into compliance) is the available remedy. *See id.* at 564.

Courts have recognized that stopping an ongoing or imminent injurious action can satisfy the redressability prong. *Friends of the Earth* 528 U.S. at 186 (stating "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents

its recurrence provides a form of redress."). The remedy need not "cure" past injuries but must be sufficient to prevent additional harm. *See id*.

The lower court conceded that SCCRAP had suffered an injury-in-fact, similar to the holding in *Friends of Earth*, in the form of aesthetic and recreational injuries. R. at 14. *See Friends of the Earth*, 528 U.S. at 167. However, the court held—without elaboration—that the causal connection from this injury to ComGen's actions was too attenuated. R. at 14. Further, the court determined that SCCRAP's injuries were not redressable by this lawsuit. R. at 14. The lower court argued, given that ComGen made no standing argument in its motion to dismiss, that "SCCRAP would be injured in the same way even if the Impoundment were not closing at all because the contamination began before any closure activities began." R. at 14. More plainly, they reason that because the impoundment had already been polluting the surrounding groundwater, forcing ComGen to pursue a more compliant Closure Plan would not redress the injuries identified by the court. R. at 14. This holding is not in accord with the goals of the RCRA, the Court's expanded interpretation of standing, and the legislative intent of allowing citizen suits to act as a policing force for EPA regulations.

This case is on appeal from a FRCP 12 motion to dismiss. R. at 1. Therefore, all well-pleaded facts—and inferences reasonably made—are to be decided in favor of the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (stating "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder"). It defies logic that a reasonable finder of fact could not arrive at the conclusion that the contents of the Little Green Run impoundment were contributing to ongoing harm suffered by SCCRAP members. The causal connection between ComGen's actions and SCCRAP

suffering ongoing and worsening injury is neither too speculative nor remote, as it is both fairly traceable and a reasonable inference. At trial, a finder of fact would be able to hear expert testimony and reasonably arrive at this conclusion. Fed. R. Evid. 702(a); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Dismissal is inappropriate, citing causation as a partial basis, given the overwhelming presumption of fact enjoyed by plaintiffs, as well as the reasonable inference that the pollution from ComGen's CCRs is a cause of plaintiff's injuries.

Furthermore, there is no foundational redressability issue when it comes to SCCRAP's standing to bring this lawsuit. *See* R. at 14. As the Supreme Court clarified in *Friends of Earth*, current injury does not create a standing issue where a plaintiff seeks injunctive relief to abate future injurious actions, especially when those actions stem from illegal activity (such as ComGen's noncompliant closure plan). *See Friends of the Earth* 528 U.S. at 186. As properly alleged in the complaint, ComGen's closure plan fails to satisfy the CCR Rule's standard to eliminate free liquids prior to capping in place and will lead to exacerbated continuous harm to SCCRAP's interests. R. at 12. *See* 40 C.F.R. § 257.102(d)(2)(i). The need for, and existence of, these EPA regulations are themselves an acknowledgment that environmental harms stem from improper impoundment closures. *See id*.

The lower court argues that the relief will not fully remedy the injury because the harm is partly in the past. R. at 14. However, as an expert witness could testify at trial, environmental harm is often cumulative and preventing further damage is essential to stopping continued degradation. While monetary damages may not fully restore the environment, injunctive relief is the appropriate tool to halt the closure plan that poses further harm to SCCRAP's interests. The court's relief will effectively prevent, mitigate, or at least halt the progression of the injuries

being suffered by SCCRAP. ComGen's planned activities will further exacerbate an already existing injury and this Court's intervention would indeed redress the harm by forestalling further environmental degradation.

IV. The District Court Misapplied Caselaw to Hold that the RCRA does not Allow for Claims of Environmental Endangerment.

The RCRA explicitly allows appellant's claims, and the district court erred in holding that the RCRA cannot support a claim for imminent and substantial endangerment to the environment itself. The RCRA allows plaintiffs to bring suite when a defendant "(1) has contributed or is contributing to (2) the past or present handling, storage, treatment, transportation, or disposal of (3) any solid or hazardous waste that (4) may present an imminent and substantial endangerment to health or the environment." *Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 263 F. Supp. 2d 796, 835 (D.N.J. 2003) *aff'd*, 399 F.3d 248 (3d Cir.2005). "[I]f an 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 (quoting *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985)). *See also Burlington N. and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007) (quoting the same language affirmatively).

Here, the district court contested the fourth element of action alone, holding that an imminent and substantial threat to the environment alone could not sustain a cause of action. R. at 11. However, this reading is plainly inconsistent with the language of the statute, and inconsistent with all appellate circuit law on the question. The sole reference cited in support was misapplied, and so this Court should reverse the district court's decision.

A. The RCRA Unquestionably Allows Individuals to Bring Suit for Environmental Harms Alone

Both appellate courts that have addressed the issue recognize that the clear, indisputable meaning of the RCRA allows individuals to bring suit for endangerment to the environment

alone, without alleging harm to individuals. *See Interfaith* 263 F. Supp. 2d; *Burlington N. and Santa Fe Ry. Co. v. Grant*, 505 F.3d.

As the Supreme Court has repeatedly stated, courts should give plain meaning to the words of a statute when interpreting its meaning. *See Loper Bright*, 603 U.S. at 393; *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (describing this "basic and unexceptional rule" as a "controlling principle"). The RCRA thus clearly imposes liability upon those who endanger either the environment or an individual's health. 42 U.S.C.A. § 6972(a)(1)(B) (imposing liability for contributing to "an imminent and substantial endangerment to health *or* the environment") (emphasis added). The district court's construction effectively removes the phrase "or the environment" from the statute and thus robs the words Congress chose of their meaning. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (describing such an alternative construction as "strained" and stating "we are obliged to give effect . . . . to every word Congress used).

Interfaith thus correctly surmised that the "RCRA is not only concerned with threats to human health." 263 F. Supp. 2d at 87. The decision cited a wide array of cases and comported with virtually every other court's construction of the statute. *See, e.g., Burlington*, 505 F.3d (adopting *Interfaith*'s reasoning); *PMC, Inc. v. Sherwin–Williams Co.,* 151 F.3d 610, 618 (7th Cir.1998) (finding liability where toxic wastes posed a danger to groundwater); *Aiello v. Town of Brookhaven,* 136 F.Supp.2d 81, 115 (E.D.N.Y.2001) (finding liability despite plaintiffs conceding no harm to human health); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.,* 81 F.Supp.2d 359, 367 (D.R.I. 2000) (finding liability based solely upon contaminated groundwater). Conversely, no authority cited by respondent or the district court supports their interpretation.

B. The District Court Misapplied *Courtland Co.* to Reach Its Decision

The district court's application of *Courtland Co., Inc. v. Union Carbide Corp.* is inapposite. R. at 11, No. 2:18-CV-01230, 2023 WL 6331069 (S.D.W. Va. Sept. 28, 2023). *Courtland* concerned a situation where plaintiffs had produced no evidence at all of damage to the environment or individuals, not a situation where plaintiffs alleged environmental harm alone. *Id.* at 63. The Court found that plaintiff's expert testimony "consist[ed] of nothing more than vague conclusions based upon mere speculation, broad generalities, and sweeping conjecture." *Id.* at 55. Since "the entirety of [the witness's] testimony on this point [was] highly generalized, speculative, and ultimately, useless," the Court found that there was no harm to individuals or the environment. *Id.* By comparison, an alternative study introduced as evidence had concluded that no risks to individuals or the environment were present at the location in question. *Id.* at 61-62.

Comparatively, the immediate case alleges direct environmental harm, actionable under the clear terms of the RCRA. R at 12. *See* 42 U.S.C.A. § 6972(a)(1)(B). ComGen's actions have led to elevated levels of arsenic and cadmium, as well as PFAS discharge into the Vandalia River. R. at 4-7, 12. Arsenic has long been recognized as a poisonous substance that is highly toxic to humans and the environment alike. *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1158-59 (D. Idaho 2012) (noting that there was "no difficulty concluding that discharging water containing arsenic . . . is highly likely to cause long-term environmental damage"). Thus, ComGen's actions pose a clear imminent and substantial endangerment to the environment in the Vandalia River and surrounding area.

CONCLUSION

For these reasons, this Court should reverse the judgment of the United States District Court for the Middle District of Vandalia.

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Appendix B

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing SCCRAP certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2023.

Respectfully submitted,

Team No. 2