**C.A. No. 24-0682**

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**IN THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE TWELFTH CIRCUIT**

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**Stop Coal Combustion Residual Ash Ponds**
*Appellant-Plaintiff*

**v.**

**Commonwealth Generating Company**
*Appellee-Defendant*

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On Appeal From
United States District Court for the Middle District of Vandalia,
C.A. No. 24-0682

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**BRIEF OF APPELLEE-DEFENDANT,**
**Commonwealth Generating Company**

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BRIEF SUBMITTED BY:
Team No. 28
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## JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had jurisdiction over this action under 28 U.S.C. § 1331. The district court's federal question jurisdiction was based on an alleged violation of both the Clean Water Act ("CWA") under 33 U.S.C. § 1365 and the Resource Conservation and Recovery Act ("RCRA") under 42 U.S.C. § 6972.

The Court of Appeals has jurisdiction of this appeal under 28 U.S.C. § 1291, as the district court's order dismissing the action in its entirety constitutes a final decision disposing of all issues in this cause. The district court entered the final order on October 31, 2024. The Notice of Appeal was timely filed within 30 days after the entry of the district court's order, under Fed. R. App. P. 4(a), on November 10, 2024.

## STATEMENT OF ISSUES PRESENTED

With respect to this appeal, the United States Court of Appeals for the 12th Circuit ordered the parties brief the following issues:

**Issue 1:** Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the Clean Water Act.

**Issue 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*.

**Issue 3:** Whether SCCRAP has standing to challenge ComGen's coal ash closure plan for the Little Green Run Impoundment; and

**Issue 4:** Whether SCCRAP can pursue a RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment when there is no allegation of endangerment to a living population but only to the environment itself.

## STATEMENT OF THE CASE

### I. Factual Background

The Vandalia Generating Station is an 80-megawatt ("MW") coal-fired power plant owned and operated by Commonwealth Generating Company ("ComGen"). R. at 3-4. Vandalia Generating Station has provided electricity to the State of Vandalia and surrounding regions for over half a century since its operations began in 1965. R. at 4. Through its operations, ComGen has become a significant contributor to the Vandalia community, employing over 1,500 Vandalia residents and ensuring access to reliable and affordable electricity. *Id.*

The Vandalia Generating Station currently operates under a valid Vandalia Pollutant Discharge Elimination System ("VPDES") permit, issued on July 30, 2020, effective September 1, 2020, and expiring July 29, 2025. R. at 4. The permit, issued under the CWA, authorizes discharges from the plant's three designated outfalls – Outlets 001, 002, and 003 – into the Vandalia River, a navigable water body of the United States. *Id.* The permit limits regulated pollutants, including selenium, aluminum, temperature, and pH. *Id.* However, the permit application and the permit itself do not contain any limits, special conditions, or references to perfluorooctane sulfonic acid ("PFOS") or perfluorobutane sulfonic acid ("PFBS"), two types of per-and polyfluoroalkyl substances ("PFAS"). R. at 4-5.

PFAS were never formally addressed during ComGen's permitting process. R. at 5. A deputy director at the Vandalia Department of Environmental Protection ("VDEP") sent a singular email to an unnamed ComGen employee informally inquiring about the presence of PFOS and PFBS in ComGen's discharge before permit issuance. R. at 4. Based upon the employee's knowledge at the time, they reported that PFAS were not known to be in ComGen's discharge. *Id.* However, ComGen was discharging PFAS, including PFOS and PFBS, from Outlet 001 and

properly monitoring those discharges for the last decade, which it recorded in monthly monitoring records. R. at 9. Nevertheless, the VDEP never formally requested testing, monitoring, or inspection for any PFAS, and no formal disclosure requirements were ever triggered. *Id.* The VDEP subsequently issued a valid permit to ComGen. R. at 4.

Like all coal-fired electric utilities, as a byproduct of coal combustion, the Vandalia Generating Station has historically generated coal combustion residuals ("CCRs"), commonly known as coal ash. R. at 3. Coal ash contains contaminants such as mercury, cadmium, arsenic, and selenium, which may be hazardous to human health. *Id*. As such, the Environmental Protection Agency ("EPA") requires utilities to take necessary precautions in coal ash disposal. *Id.* To that end, ComGen has historically used The Little Green Run Impoundment ("Little Green Run"), a coal ash pond located immediately adjacent to the Vandalia Generating Station and along the Vandalia River, to properly dispose of its coal ash byproduct. *Id.* Little Green Run is an unlined coal ash disposal site that spans approximately 71 surface acres and is held back by a 395-foot-high dam. R. at 5. It currently stores over 38.7 million cubic yards of coal ash, making it one of the state's largest coal ash disposal sites. *Id.*

Although ComGen is committed to providing reliable electricity to the Vandalia region at affordable prices, it also recognizes the importance of environmental stewardship projects throughout its service territory. R. at 4. In 2015, ComGen announced "Building a Green Tomorrow," the company's commitment to reducing pollution. *Id*. As part of the program, ComGen recognized the need to retire several of its older coal-fired power plants in favor of renewable alternatives. *Id.* ComGen has demonstrated its commitment to alternative energy sources in the decade since launching Building a Green Tomorrow, opening seven different renewable facilities that provide more than 100 MW of power. *Id.*

In light of its success and to further demonstrate its commitment to cleaner energy production, in 2018, ComGen announced plans to retire the Vandalia Generating Station by 2027. R. at 4. Although the plant played an important role in powering Vandalia for decades, ComGen felt that the plant's age and limited generation capacity, as well as the cost-prohibitive nature of upgrading its pollution controls to comply with new federal guidelines, made it the best candidate for closure under the Building a Green Tomorrow program. *Id*. The closure also prompted ComGen to prepare a Coal Ash Impoundment Closure Plan for Little Green Run following the EPA's 2015 Coal Combustion Residuals Rule ("CCR Rule"), which sets regulatory requirements for the safe disposal of coal ash, and identical Vandalia state law passed under the Water Infrastructure Improvements for the Nation Act (the "WIIN Act"). R. at 5-6.

In December 2019, ComGen applied to close Little Green Run in place rather than excavating and removing the coal ash. R. at 6. Closure in place is permissible under EPA and state CCR Rules. *Id.* Several environmental groups opposed ComGen's permit application during the public record hearing. *Id.* at 6-7. Nevertheless, after considering the public hearing, comments, and appropriate regulations, the VDEP issued ComGen a closure permit in July 2021, authorizing the continued disposal of CCRs in the unlined impoundment through May 2031. *Id*.

Since beginning its closure-in-place activities, ComGen has spent an estimated $50 million to manage CCRs at Little Green Run in accordance with its permit conditions and applicable regulations. *Id.* ComGen expects to spend over $1 billion to ensure Little Green Run is properly closed in place by 2031. *Id.* Most of ComGen's monetary investment was put into installing 13 upgradient and downgradient groundwater monitoring wells, which have been operational since 2021. R. at 7. Since that time, the monitoring wells have detected elevated arsenic and cadmium concentrations above state and federal drinking water standards. R. at 8. However, there is no

evidence that the contamination has migrated to the Vandalia River or any public drinking water supply or that it will in the next five years. *Id.* Industry professionals agree that Little Green Run was likely leaching these contaminants for several years before ComGen began closure-in-place. *Id.* No Vandalia residents currently rely on groundwater downgradient from Little Green Run for drinking water, and while a housing developer has proposed a subdivision within one mile of the site, any potential use of well water as a primary water source remains speculative and years away from implementation. R. at 9.

## II. Procedural Background

On September 3, 2024, Stop Coal Combustion Residual Ash Ponds ("SCCRAP") initiated a citizen suit against ComGen in the United States District Court for the Middle District of Vandalia, asserting claims under the CWA and the RCRA. R. at 12. SCCRAP is a national environmental organization with members located throughout Vandalia "who recreate, fish, and own property in the Vandalia River and its surrounding watershed." R. at 10. First, under § 505 of the CWA, SCCRAP alleged that ComGen had been unlawfully discharging PFOS and PFBS from Outlet 001 without a permit in violation of the CWA. R. at 12. Secondly, under § 7002(a)(1) of RCRA, SCCRAP challenged ComGen's closure plan for Little Green Run, alleging that it failed to meet federal and state regulatory standards and that the impoundment posed an imminent and substantial endangerment to the environment. *Id.*

On September 20, 2024, ComGen moved to dismiss the Complaint. R. at 13. First, ComGen asserted that SCCRAP's CWA claim failed because PFOS and PFBS are not statutory pollutants included in any permit application. *Id.* Additionally, ComGen asserted that SCCRAP relied on precedent that is now inconsistent with recent Supreme Court rulings. *Id.* Secondly, ComGen asserted that SCCRAP's attack on its closure plan failed to plead sufficient facts to prove

any standards set out in the CCR Rule were violated and that SCCRAP failed to state a claim as a matter of law because the 12th Circuit has never recognized imminent and substantial endangerment claims to the environment itself. *Id.*

On October 31, 2024, the district court granted ComGen's Motion to Dismiss in its entirety, rejecting SCCRAP's claims. *Id.* In dismissing SCCRAP's CWA claim, the court utilized independent statutory interpretation to determine that because PFOS and PFBS are not listed as pollutants in any permit application, no disclosure violations occurred, and ComGen's permit shield applied. R. at 14. Secondly, the court determined that SCCRAP lacked standing to challenge ComGen's closure plan and, as such, did not address substantive issues related to the closure plan. *Id.* Finally, the court found that RCRA does not allow an imminent and substantial endangerment claim based solely on environmental harm. *Id.* This appeal timely followed. R. at 15.

**SUMMARY OF THE ARGUMENT**

The district court correctly dismissed SCRAAP's claims against ComGen in their entirety. First, the district court correctly determined that no CWA violation occurred. ComGen's discharge of PFOS and PFBS does not require an NPDES permit because these substances are not regulated pollutants under the CWA, nor were they required to be disclosed in ComGen's VPDES permit application. Even if PFOS and PFBS were statutory pollutants under the CWA, the permit shield provision of the CWA protects ComGen from liability for their discharge. The district court correctly applied the Second Circuit's decision in *Atlantic States*, which holds that discharges of unlisted pollutants are not CWA violations when the discharger operates under a valid permit and has met all disclosure requirements. ComGen has complied with its VPDES permit and all necessary CWA disclosure requirements, shielding it from further liability.

Secondly, the district court correctly rejected the application of the Fourth Circuit's *Piney Run* decision, and this Court should do the same. The facts of *Piney Run* are incongruous with the facts of this case. *Piney Run* held that an NPDES permit shields its holder from liability for unlisted pollutants only if those pollutants were disclosed during the permitting process. However, *Piney Run* involved statutory pollutants regulated under the CWA, which are explicitly asked about in all NPDES applications. In contrast, PFOS and PFBS are not statutory pollutants under the CWA and were not required to be disclosed in ComGen's VPDES application. Therefore, *Piney Run's* reasoning does not apply here.

Additionally, *Piney Run's* reliance on *Chevron* deference is inconsistent with the Supreme Court's decision in *Loper Bright*, which overturned *Chevron*. *Chevron* deference contradicts Constitutional principles, our nation's history, and the Administrative Procedure Act. Precedents like *Piney Run*, which depend on *Chevron*, are fundamentally flawed. Overturning the district court's ruling based on *Chevron* deference would be improper, especially when *Atlantic States* provides a more reasoned interpretation of the permit shield provision.

Third, the district court correctly determined that SCCRAP lacks standing to challenge ComGen's Coal Ash Closure Plan under RCRA § 6972(a)(1)(A). To establish standing, a plaintiff must satisfy the *Lujan* test, which requires demonstrating an injury-in-fact, a causal link between the injury and the defendant's actions, and redressability by the court. SCCRAP fails on both causation and redressability. SCCRAP's alleged injuries, such as aesthetic and recreational harms, are unrelated to ComGen's closure plan. These injuries stem from past contamination, not from the closure plan itself. Moreover, speculative future harms – like potential housing developments – do not establish standing.

Additionally, invalidating the closure plan would not redress SCCRAP's alleged injuries. The plan is designed to reduce ongoing contamination; halting it would leave the site in worse condition. As the Supreme Court noted in *DaimlerChrysler Corp.*, redressability requires a reasonable likelihood that the requested relief will remedy the injury. Stopping the plan would not resolve existing harms and could exacerbate them.

Finally, the district court correctly dismissed SCCRAP's claim under RCRA § 6972(a)(1)(B). To succeed, SCCRAP must show that the contamination poses an imminent and substantial endangerment to health or the environment. SCCRAP failed to show any direct harm to a living population, and the contamination has not reached public water supplies. As the Supreme Court held in *Meghrig*, an endangerment must be immediate, which SCCRAP's claims do not support. Expanding RCRA's scope to cover environmental contamination without demonstrated risk to human or ecological health would create excessive regulatory burdens and undermine the federal-state balance. The existing regulatory framework effectively addresses imminent and substantial endangerments and any broadening of RCRA must be carefully considered to avoid overreach. For these reasons, ComGen respectfully requests this Court affirm the district court's order dismissing SCRAAP's claims against it entirely.

## STANDARD OF REVIEW

Federal appellate courts review a district court's grant of a motion to dismiss *de novo*. *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 69 (1st Cir. 2005). SCRAAP's CWA unpermitted discharge claim turns not on questions of fact but statutory interpretation. For issues concerning statutory interpretation, such as the interpretation of 33 U.S.C. § 1342(k), the standard of review is also *de novo*. *Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 137 (2d. Cir. 2022). Appellate courts

owe no deference to an agency's statutory interpretation and must exercise independent judgment in resolving questions of law. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

Federal appellate courts review a party's standing to challenge a closure plan under RCRA *de novo*. 42 U.S.C. 6972(a)(1)(A). The appellate court reviews the district court's legal conclusions regarding standing without deference, as standing is a question of law. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Likewise, the standard of review for determining whether a party can pursue an imminent and substantial endangerment claim under RCRA is *de novo*. 42 U.S.C. § 6972(a)(1)(B). When the district court grants a motion to dismiss under Rule 12(b)(6), the federal appellate court gives no deference to the district court's ruling and independently determines whether the allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

## ARGUMENT

### I. ComGen's discharge of PFAS is not an unpermitted discharge under the CWA because ComGen has, at all times, complied with the terms of its validly issued NPDES permit.

The CWA was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve its goal, the CWA declares that "the discharge of any pollutant by any person" is unlawful, except where specifically authorized under the Act. *Id.* § 1311(a). "Discharge of a pollutant" refers to "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "Navigable waters" is defined as the "waters of the United States," and a "point source" is any "discrete conveyance… from which pollutants are or may be discharged." *Id.* § 1362(7), (14).

While the CWA's prohibition on pollutant discharges appears absolute, it is subject to several exceptions. *Id.* § 1311(a). One integral exception is the National Pollutant Discharge

Elimination System ("NPDES"), which allows the EPA to issue permits for pollutant discharges that meet specific effluent limitations set forth by the Act or the permit itself. *Id.* § 1342(a)(1). With EPA approval, states may administer their own NPDES programs to regulate discharges within their jurisdictions. *Id.* § 1342(b). When a state-run program is in place, the EPA defers permit issuance and enforcement to the state. *Id.* § 1342(c).

The State of Vandalia, with EPA approval, administers its own NPDES program under the CWA. R. at 11. ComGen holds a valid VPDES permit covering Outlet 001's effluent discharge into the Vandalia River, a water of the United States. R. at 4. The permit, issued on July 30, 2020, sets effluent limits for various pollutants. *Id.* However, the permit does not establish limits or monitoring requirements for PFOS or PFBS. *Id.*

For two reasons, the district court correctly determined that ComGen's discharge of PFOS and PFBS from Outlet 001 was not an unpermitted discharge under the CWA. First, PFOS and PFBS are not statutory pollutants regulated by the CWA; therefore, ComGen cannot be liable for discharging those substances under the Act. Second, ComGen complied with the express terms of its VPDES permit. As such, even if the CWA regulated PFOS and PFBS, the Act's permit shield provision protects ComGen from liability for their discharge. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.,* 12 F.3d 353 (2d Cir. 1993), *as amended* (Feb. 3, 1994).

A. PFOS and PFBS are not statutory pollutants regulated under the CWA or any NPDES permit application.

It is undisputed that ComGen's Vandalia Generating Station operates under a valid VPDES permit authorizing certain effluent discharge from Outlet 001. R. at 4. SCRAAP argues that the permit does not authorize the discharge of PFOS and PFBS, making ComGen liable for discharging a pollutant without proper authorization. R. at 12; *See* 33 U.S.C. § 1311(a). However, SCRAAP's argument fails to acknowledge that PFOS and PFBS are not explicitly regulated under the CWA

or subject to disclosure requirements on any NPDES or VPDES permit application. *See, e.g.,* 40 C.F.R. § 122.21; *Id.* § 122, App. D; U.S. EPA, Form 3510-1, 3510-2C. Therefore, ComGen's discharge of PFOS and PFBS is not the discharge of a *pollutant* as conceived under the Act.

The term "pollutant" is defined broadly in the CWA, encompassing almost any conceivable chemical, biological, industrial, agricultural, or radioactive material. 33 U.S.C. § 1362(6). Therefore, it is plausible that almost any substance, including the chemical $H_2O$ itself, could be seen as a pollutant under a broad reading of the Act. *Atlantic States,* 12 F.3d at 357. However, the EPA does not require a permit applicant to supply information about the thousands of chemicals and substances that could appear in its discharges. *Id*. Even the EPA has recognized that "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Id*. (quoting Memorandum from Jeffrey G. Miller, EPA Deputy Administrator for Water Enf't, to Reg'l Enf't Dir., Region V, at 2 (Apr. 28, 1976)).

Compliance with a permit employing such a broad definition of pollutant would be nearly impossible, and permittees would be open to nearly endless liability. *Id.* As such, permit applicants need only supply information about statutory pollutants identified by the permitting authority to comply with "(1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls, and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet water quality standards." *Am. Paper Inst., Inc. 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).

ComGen's permit became effective on September 1, 2020. R. at 4. The CWA did not regulate PFA chemicals at that time. It was not until 2021 that the EPA turned its attention to PFAS when it released the *2021 PFAS Strategic Roadmap* ("Roadmap"), its first official recognition of

PFAS. U.S. EPA, EPA-100-K-21-002, *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (Oct. 2021). The Roadmap and subsequent steps taken by the EPA to address PFAS make clear that they were not being monitored or addressed under the CWA when ComGen received its VPDES permit.

In January 2024, the EPA finalized two CWA analytical methods to monitor for PFAS in discharge that it *recommends* permit writers use when issuing NPDES permits. U.S. EPA, EPA-100-K-24-002, *EPA's PFAS Strategic Roadmap: Three Years of Progress* at 10 (Nov. 2024). These proposed methods have not been adopted in the Code of Federal Regulations and, as such, are not nationally required for CWA use. *Id.* at 11. Moreover, while the EPA is working to propose novel Effluent Limitation Guidelines for PFAS, those guidelines do not yet exist and are not required under the CWA. *Id.* at 4. The EPA did not finalize its first-ever water quality standards for protecting aquatic life from PFAS until October 2024. *Id.* Finally, the EPA has stated that it has "plans to *propose* a rule that would require PFAS data to be reported as part of CWA permit applications." *Id.* at 11 (emphasis added). This admission alone is enough to make clear that in 2020, the EPA and states like Vandalia, administering permits under CWA regulations, did not require PFAS data to be reported on permit applications. In fact, they still do not. Four years later, the EPA only *plans* to propose a rule. Those plans certainly fall short of a hard and fast requirement.

EPA internal memoranda also prove that PFAS were not statutory pollutants regulated under the CWA when ComGen's permit was issued. In April 2022, the EPA issued a memorandum to its directors urging them to use the NPDES program to restrict PFAS discharges. Memorandum from Radhika Fox, EPA Assistant Administrator, to Water Div. Dir., EPA Regions 1-10, at 1 (Apr. 28, 2022). In the memorandum, the EPA acknowledged that no technology or water quality-based effluent limits had been set for PFAS. *Id.* However, the memorandum encouraged permit writers

to set certain permit conditions requiring monitoring and best management practices for PFAS for industrial facilities where PFAS are expected or likely to be present in discharges. *Id* at 2. In December 2022, the EPA released a similar memorandum directed to states authorized to administer their own NPDES permitting programs. Memorandum from Radhika Fox, EPA Assistant Administrator, to EPA Reg'l Water Div. Dir., Regions 1-10 (Dec. 5, 2022). These memoranda show that the EPA deployed the NPDES permitting to regulate PFAS in 2022, two years after ComGen received its permit.

The VDEP, as the state agency authorized to administer the VPDES permit program, could have modified ComGen's permit at any time to reflect new information and regulations surrounding PFAS under 40 C.F.R. § 122.62, but it chose not to. Therefore, ComGen's discharge of PFOS and PFBS is not a violation of its VPDES permit. The permit contained no special conditions regulating PFAS, nor did it require monitoring. R. at 4. Additionally, the permit was issued pursuant to CWA guidelines, which did not require monitoring for PFAS at the time. Because PFOS and PFBS are not statutory pollutants regulated under the CWA or any special permit condition, ComGen is not liable for their discharge.

B. <u>The CWA's permit shield provision protects ComGen's discharge of unlisted pollutants.</u>

Even if PFOS and PFBS were statutory pollutants under the CWA, the Act's permit shield provision protects ComGen's discharge of the substances. *Atlantic States,* 12 F.3d at 354. The CWA's blanket prohibition on the discharge of pollutants is tempered by many exceptions, perhaps most importantly, by the NPDES permitting system. *See* 33 U.S.C. § 1342. This system contains a provision, known colloquially as the permit shield provision, which states that "compliance issued pursuant to this section shall be deemed compliance… with… this title." *Id.* § 1342(k). In essence, if a permittee discharges pollutants in compliance with its NPDES permit, that compliance

fulfills its obligations under the CWA and shields the permittee from further liability under the Act. *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013).

In *Atlantic States*, the Second Circuit clarified the scope of the permit shield provision when it ruled that the discharge of unlisted pollutants is not a violation of the CWA once a party is operating under a valid NPDES permit. 12 F.3d at 354. Similarly to this case, in *Atlantic States*, an environmental group brought a citizen suit under the CWA against Kodak, the operator of a wastewater treatment plant discharging various pollutants into a local river. *Id.* Kodak operated under an NPDES permit administered by an authorized state. *Id.* at 355. As part of the permit application process, Kodak provided the state Department of Environmental Conservation ("DEC") with a form describing the estimated discharges of over 150 different substances from each of its outfalls. *Id.* Based on Kodak's disclosures, the state issued a permit establishing effluent limitations for only 25 pollutants. *Id.* The environmental group sued Kodak for discharging pollutants not expressly listed on its permit. *Id.* at 356.

The Second Circuit found that Kodak was not liable for the discharge of unlisted pollutants under the CWA because its permit protected it from liability. *Id.* at 357. The Court emphasized that "the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id.* The Court ultimately concluded that once a polluter holds a valid NPDES permit, it can discharge pollutants "not specifically listed in [its] permits" as long as it complies with any necessary reporting requirements under the Act. *Id.*

It is undisputed that ComGen has a valid VPDES permit. R. at 4. Under the Second Circuit's ruling in *Atlantic States*, ComGen is not liable for its discharge of unlisted pollutants out of Outlet 001 because it complies with that permit. As implied by *Atlantic States*, the VPDES

permit identified the most harmful pollutants in Outlet 001's discharges and limited them by setting necessary effluent standards. Because ComGen holds a valid VPDES permit, under *Atlantic States*, it can discharge pollutants not explicitly identified by its permit as long as it complies with necessary disclosure requirements under the CWA.

SCCRAP cannot show that ComGen failed to comply with any disclosure requirements mandated under the CWA. In *Atlantic States*, Kodak made disclosures pursuant to requests by the DEC on the permit application form and by the Industrial Chemical Survey. 12 F.3d at 355. ComGen's VPDES permit application failed to list PFOS and PFBS because they were not regulated under the CWA when the permit was issued. Vandalia could enact stricter standards for its permitting program than those required under the CWA. 33 U.S.C. § 1342(b). However, Vandalia has chosen to implement its permitting program under CWA and federal guidance. R. at 11. As such, the VDEP permitting process imposed no formal disclosure or monitoring requirements on ComGen related to PFAS.

The informal inquiry by the VDEP deputy director did not create a disclosure obligation. The deputy director did not follow up the informal email with formal requests for monitoring, testing, official reports or results, or an inspection, all of which the director would have been within their right to request. *See* 33 U.S.C. § 1318. The deputy director could have included PFAS parameters in the formal permit documents or application materials. If they had done so or formally requested ComGen's monitoring reports, they would have triggered a formal disclosure requirement. *Id.*; *See also* 40 C.F.R. § 122.21(e)-(g). However, informal emails with an unnamed ComGen employee did not trigger a formal disclosure requirement and are not a substitute for thorough inquiry in a formal application process.

ComGen's adherence to the conditions of its VPDES permit absolves it from any claimed violation of the CWA. The Supreme Court has explained that the purpose of the permit shield provision is to "insulate permit holders… and relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28 (1977). The VDEP issued ComGen's permit and, in doing so, identified and limited the most harmful pollutants. ComGen complied with the formal permit process and allowed the VDEP to determine the stringency of the permit. Because ComGen has complied with the obligations of its VPDES permit, it should be shielded from further liability under the Act.

## II. This Court should reject the application of *Piney Run* because it is incongruous with the facts of this case and inconsistent with the Supreme Court's ruling in *Loper Bright*.

SCRAAP relies on the Fourth Circuit's holding in *Piney Run* and its progeny to argue that ComGen's permit does not shield it from liability under the CWA. R. at 12. In that case, an environmental group sued a county-operated waste treatment plant for discharging warm water into a local stream in violation of the CWA. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 259 (4th Cir. 2001). The county argued a permit shield defense, and the Fourth Circuit, relying on *Chevron* deference to EPA guidance, promulgated a two-part test for determining application of the permit shield defense. *Id.* Under *Piney Run*, a permit shields its holder from liability only if "(1) the permit holder complies with the express terms of the permit and with the CWA's disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted." *Id.* In other words, "to the extent that a permit holder discharges a pollutant that it did not disclose, it violates the NPDES permit and the CWA." *Id.* at 268.

The district court correctly rejected SCCRAP's reliance on *Piney Run* and its subsequent adoption in favor of *Atlantic States*, which provides a more fitting legal framework for this case. *Piney Run* should be rejected for two reasons. First, *Piney Run* and its progeny are distinguishable from the facts of the instant case. Second, *Piney Run's* reliance on *Chevron* deference makes it antiquated in light of the Supreme Court's ruling in *Loper Bright*.

A. *Piney Run* and its progeny are inapplicable to the facts of this case.

In *Piney Run*, the Fourth Circuit determined that a permit does not shield a permit holder's discharges that were not disclosed to the permitting authority during the application process. *Id.* The court was specifically tasked with determining whether the discharge of heat, which the permit at issue did not expressly authorize, was protected by the permit shield defense. *Id.* at 260. Heat is a statutory pollutant regulated under the CWA. *See* 33 U.S.C. § 1362(6). Heat is also a pollutant expressly identified in EPA permit applications and subject to formal disclosure requirements. U.S. EPA, Form 3510-2C at 3-4, 9.

Similarly, in *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, which applied the *Piney Run* test, the Fourth Circuit was required to analyze whether the permit shield defense protected a discharger for discharges of selenium not authorized its permit. 758 F.3d 560, 561 (4th Cir. 2014). The Fourth Circuit found that the company could not avail itself of the permit shield defense because it failed to disclose the presence of selenium in its discharges during the application process. *Id.* Like heat, selenium is a statutory pollutant regulated under the NPDES system. *Id.* at 566. Selenium is specifically asked about in NPDES applications and is a listed pollutant in Table III of 40 C.F.R. § 122, Appendix D. *Id.* The Fourth Circuit held that the company violated CWA disclosure requirements by ignoring the NPDES application instructions, which "unequivocally" required disclosure of selenium discharges. *Id.*

Unlike heat and selenium, PFOS and PFBS are not statutory pollutants regulated under the CWA and were not identified or included in ComGen's permit application. As such, the facts of *Piney Run* and its progeny are inapplicable in this case. Heat and selenium are substances explicitly regulated under the Act and carry specific disclosure requirements on NPDES permit applications. Conversely, PFAS appears nowhere in ComGen's permit application or within the CWA statutory framework. At all times, ComGen has diligently abided by the express terms of its permit and with any disclosure requirements mandated under the permit and the CWA. Because the facts of *Piney Run* do not align with the facts in this case, its reasoning should not be applied here.

B. *Piney Run's* reliance on *Chevron* deference is inconsistent with the Supreme Court's ruling in *Loper Bright*.

The Fourth Circuit promulgated its infamous two-part test in *Piney Run* based exclusively on *Chevron* deference. *Piney Run*, 268 F.3d at 266. Under *Chevron*, when tasked with interpreting statutes governing the work of administrative agencies, courts were required to apply a two-part test. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), *overruled by Loper Bright*, 603 U.S. 369. First, a court had to determine whether Congress had directly spoken to the precise question at issue through the statute's plain language. *Id.* If the intent of Congress was clear, the inquiry was complete, as courts and agencies are required to "give effect to the unambiguously express[ed] intent of Congress." *Id.* at 843. However, if the statute was ambiguous, the court was *required* to defer to the agency's interpretation of the statute as long as the agency's interpretation was reasonable. *Id.* Under *Chevron*, a court must defer, abdicating its judicial responsibility to employ traditional rules of statutory interpretation to provide litigants with the *best* understanding of their rights and duties under the law. *Buffington v. McDonough*, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting).

In *Piney Run*, the Fourth Circuit found the plain language of the permit-shield provision ambiguous in scope. 268 F.3d at 267. Therefore, the Court moved to *Chevron* step two. *Id.* In *In Re Ketchikan Pulp Co.*, the EPA determined that the scope of the permit shield provision extended only so far as to cover the discharge of unlisted pollutants disclosed to permit authorities during the permitting process. 7 E.A.D. 605, 1998 WL 284964 at *10. Based on what the court deemed a reasonable interpretation of the statute by the EPA, the *Piney Run* test was born. The Fourth Circuit did not engage in independent statutory interpretation, nor did it determine whether the EPA's interpretation of the statute was the best. Instead, it merely deferred to the EPA's interpretation because it was permissible. *Piney Run*, 268 F.3d at 268.

ComGen urges this Court to abandon *Piney Run* and its adoption by this Circuit in light of the Supreme Court's recent ruling in *Loper Bright*. In *Loper Bright*, the Supreme Court does not mince words: "*Chevron* is overruled." 603 U.S. at 412. The Court found that the command of *Chevron* deference runs afoul of the Constitution, our nation's history and tradition, and the plain language of the Administrative Procedure Act. *Id.* at 384-86, 391-99. In *Marbury v. Madison*, Chief Justice John Marshall famously wrote, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). As such, if the meaning of an ambiguous statute is at issue, the judicial department must ascertain the Congressional intent of the statute. *Loper Bright*, 603 U.S. at 385. Although interpretations of the Executive Branch may inform the work of the Judiciary, it should *never* supersede it. *Id.* at 387.

These Constitutional principles were reiterated by Congress when it passed the 1946 Administrative Procedure Act ("APA"). *Id.* at 391; *See also* 5 U.S.C. § 706. Although the Judiciary must employ deference to agency policymaking and factfinding under the APA, no deferential standard exists for courts interpreting questions of law – even ambiguous ones. *Loper Bright,* 603

U.S. at 392; *See also* 5 U.S.C. § 706. Thus, the APA is a "clear mandate" for courts to decide questions of law independently and in their own best judgment. *See* J. Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947).

ComGen urges this Court not to decide this matter based upon a test born entirely out of an overruled standard. In *Loper Bright*, the Supreme Court is careful to say that the holdings of cases that rely on the *Chevron* framework are not overruled simply because the interpretive methodology that decided those cases is overruled. 603 U.S. at 412. However, the Court does provide that to say a precedent relied on *Chevron* is "an argument that the precedent was wrongly decided." *Id.* (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). In that vein, ComGen posits that *Piney Run*, which relied exclusively on *Chevron* deference, was wrongly decided. The Fourth Circuit should have engaged in independent statutory interpretation to determine the best reading of the permit shield provision instead of deferring to an agency's interpretation. Insofar as the cases before the *Loper Bright* Court were decided based on *Chevron*, their judgments were vacated. *Id.* at 413. Thus, overturning the district court's ruling based on *Chevron* would be inappropriate in light of *Loper Bright*.

Although agency interpretations cannot control judicial statutory interpretation, they can be persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of that persuasion in a particular case depends on the interpretation's consistency with earlier and later pronouncements, among other factors. *Id.* at 140. The EPA's interpretation of the permit shield provision in *In Re Ketchikan* is hardly consistent with its earlier and later pronouncements regarding the scope of a valid NPDES permit. In one breath, the EPA recognizes that "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants," *Atlantic States*, 12 F.3d at 357 (quoting Memorandum from Jeffrey G. Miller, EPA Deputy Administrator for Water

Enf't, to Reg'l Enf't Dir., Region V, at 2 (Apr. 28, 1976), while in the next breath requiring permit applicants to disclose the presence of every single pollutant it may conceivably discharge to be afforded the liability shield promised by an NPDES permit. *In Re Ketchikan*, 1998 WL 284964 at *11. At other times, the EPA has acknowledged regulatory gaps in the universe of pollutants regulated under the CWA. *Id.* at *9, n 29; *See* 45 Fed. Reg. 33,516, 33,523 (May 19, 1980). Indeed, as discussed at length, *supra*, the EPA has just begun to regulate PFAS – including PFBS and PFOS – under the CWA, a practice that began *after* ComGen was issued a valid permit. Thus, the administrative interpretation promulgated in *In Re Ketchikan* is not persuasive because it is inconsistent with other agency statements and actions.

Reliance on *Piney Run* and *Chevron* deference would be especially inappropriate in this case because a pre-existing judicial precedent independently interprets the statute more reasonably. *Atlantic States,* 12 F.3d 353. *Atlantic States* stands for the proposition that a valid NPDES permit shields its holder from liability for unlisted pollutants as long as the holder complies with the permit's express terms and the CWA's disclosure requirements. *Id.* at 357. Based on deference to EPA guidance under *Chevron*, *Piney Run* stands for the proposition that a permittee is shielded from liability for the discharge of unlisted pollutants only if those pollutants were disclosed to the appropriate agency during the permitting process. 268 F.3d at 269.

The distinction between these two holdings is a very important one. One interpretation places the onus on the agency to determine which pollutants warrant inclusion on a permit application and to ensure that the permit is appropriately stringent. The other places the burden on permit applications to report every conceivable substance that could realistically appear in its discharges, in any combination or amount, however small, to protect itself from later liability. Under the *Piney Run* holding, the permit shield provides almost no shield at all. As the EPA has

stated, under this broad reading of the permit shield provision, any entity could harass a permittee by analyzing their discharge until they find a modicum of a substance not covered under the permit. *Atlantic States,* 12 F.3d at 357. This reading of the provision would be wholly impractical and render it almost meaningless. A permit applicant can comply with all CWA and permit disclosure requirements without reporting every substance appearing in its discharges. The CWA provides that the EPA "is authorized to prescribe such regulations as are necessary to carry out [its] functions," under the Act. 33 U.S.C. § 1361(a). Under § 1361(a), the EPA has broad authority to govern the timing and content of permit applications. Thus, the onus should be on the EPA to determine what pollutants warrant inclusion on a permit application, not on the applicant.

Given the recent change in administrative law promulgated in *Loper Bright*, *Piney Run's* reliance on *Chevron* is no longer a valid basis for determining liability under the CWA. The reasoning of *Atlantic States* is more appropriate in this case. The district court properly followed this reasoning when it dismissed the case, and this Court should uphold that reasoning here.

## III. The district court correctly determined that SCCRAP lacks standing to challenge ComGen's Coal Ash Closure Plan for Little Green Run under RCRA 6972(a)(1)(A).

Under RCRA, a plaintiff may bring a citizen suit against any entity alleged to have violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective" under the Act. 42 U.S.C. § 6972(a)(1)(A). A plaintiff must demonstrate three elements to establish standing in such a suit. *Lujan v. Defs. of Wildlife*, 504 U.S. 555. First, the plaintiff "must have suffered an 'injury in fact' – an invasion of a legally protected interest," that is concrete, particularized, and either actual or imminent, not hypothetical. *Id.* at 560. Second, there must be a causal connection between the injury and the defendant's conduct, making the injury "fairly traceable" to the alleged violation. *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. The burden of

proving these elements rests with the plaintiff. *Id*. In this case, SCCRAP's claim against ComGen's closure plan fails because SCCRAP cannot establish a causal connection between its alleged injury and the defendant's actions, nor can it demonstrate that a favorable ruling would likely redress the injury.

A. <u>SCCRAP's alleged injuries are not fairly traceable to ComGen's closure plan.</u>

The district court correctly determined that SCCRAP's alleged injuries – aesthetic and recreational harms caused by contamination from Little Green Run – were not traceable to ComGen's conduct because the injuries predate and are unrelated to its closure plan. R. at 14.

To establish traceability, a plaintiff must demonstrate that their injuries are causally linked to the defendant's actions. *Dep't of Com. v. New York*, 588 U.S. 752, 767-68 (2019). In a 2024 case, the Southern District Court of Alabama dismissed a lawsuit under 42 U.S.C. § 6972(a)(1)(A), ruling that the plaintiff's injuries were not fairly traceable to the defendant's plant closure plan. *Mobile Baykeeper, Inc. v. Ala. Power Co.,* No. CV 1:22-00382-KD-B, 2024 WL 54118 (S.D. Ala. Jan. 4, 2024). Alabama Power had developed an initial closure-in-place plan for the Plant Barry Ash Bond in compliance with Federal and state CCR regulations. *Id* at 7. Mobile Baykeeper then filed a citizen enforcement action under 42 U.S.C. § 6972(a)(1)(A), arguing that the plan was unlawful for storing over 21 million tons of coal ash and other pollutants in an unlined impoundment. *Id* at 9. The court found that Mobile Baykeeper's alleged injury was the ongoing leaching of coal ash from the plant into the Mobile River. *Id* at 43. However, Baykeeper's challenge focused on a closure plan that the plant had not yet implemented, and the court ruled that the plan was not causally linked to the alleged violations. *Id* at 44. Consequently, Baykeeper lacked standing because its members' injuries were not fairly traceable to the defendant's plan, which it did not enact until years after the leaching had reportedly begun. *Id.*

Like Alabama Power, ComGen initiated the closure of Little Green Run in 2019 in compliance with the CCR Rule. R. at 7. Both companies designed their closure plans to prevent future contamination. SCCRAP's allegations, however, focus on historical contamination, including arsenic and cadmium leaching from the unlined impoundment. R. at 12. This contamination predates the closure plan and has not impacted the Vandalia River or any public drinking water supply, nor is it expected to within the next five years. R. at 8. The arsenic and cadmium detected in downgradient wells can be attributed to past contamination, not the closure plan or ComGen's remedial actions.

SCCRAP has also argued that the groundwater may be used for drinking water in a proposed housing development near Little Green Run. R. at 13. However, the Supreme Court has rejected standing based on speculative future harm, emphasizing that plaintiffs cannot manufacture standing by self-inflicted harm based on fears of hypothetical injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). The alleged injury must be imminent and not speculative. *Id.* In this case, the potential housing development does not establish a direct link between the injury-in-fact and ComGen, as it remains a speculative and hypothetical future event. R. at 9.

Other courts have reached a similar conclusion to *Baykeeper*, even when an initial closure plan fails to comply with the CCR Rule. For example, in a case under RCRA, the Middle District of North Carolina addressed causality and found that "[t]he purported injury here – the diminished use and enjoyment of the Roanoke River Basin… – is not directly linked to Duke Energy's preparation of an initial Closure Plan that allegedly fails to comply with the CCR Rule's requirements regarding its contents." *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 17-CV-707, 2018 WL 2417862 at *4 (M.D. N.C. May 29, 2018). Similarly, SCCRAPP claims that the town of Mammoth is directly harmed by the environmental impacts from Little Green Run

and discharges from the Vandalia Generating Station, diminishing their use and enjoyment of the river. R. at 10. However, even if the closure plan failed to comply with CCR rule requirements, the alleged injury – diminished use and enjoyment of the river – remains unconnected to the closure plan itself.

B. SCCRAP's alleged injuries are not redressable by invalidating the closure plan.

The final prong SCCRAP must prove is that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560. To satisfy the redressability requirement of Article III standing, a plaintiff must show a substantial likelihood that the requested judicial relief will prevent or remedy the claimed injury. *Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 79 (1978). The Supreme Court has consistently held that redressability requires a reasonable likelihood that the requested relief will remedy the alleged injury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). In *Mobile Baykeeper*, the district court dismissed the case not only for lack of traceability but also for failure to establish redressability. The court found that Baykeeper's execution of the closure plan would not substantially increase the likelihood of halting the plant's coal ash leaching. 2024 WL 54118 at *44.

Even if SCCRAP's injuries could be traced to ComGen's operations, invalidating the closure plan would not redress those injuries. The plan is designed to mitigate ongoing contamination by installing a final cover system, eliminating free liquids, and reducing post-closure infiltration. R. at 6-7. Preventing ComGen from implementing its closure plan would leave the impoundment in a worse condition and allow contamination to continue rather than be properly managed according to regulatory guidelines. Halting or altering the closure process would not

redress the existing contamination but could exacerbate SCCRAP's alleged harms by delaying critical remedial measures.

## IV. The district court correctly determined that SCCRAP failed to allege an imminent and substantial endangerment claim under RCRA § 6972(a)(1)(B).

For a claim to prevail under RCRA § 6972(a)(1)(B), a plaintiff must demonstrate:

> (1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

*Interfaith Cmty. Org. v. Honeywell Int.'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005) (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004)). SCCRAP has failed to establish under the third prong of the statute that Little Green Run previously posed an imminent and substantial endangerment to health or the environment. The Middle District of Vandalia correctly concluded that RCRA does not support a claim for imminent and substantial endangerment to only the environment itself.

### A. <u>SCCRAP fails to allege a form of substantial endangerment or exposure pathway to a living population.</u>

To "endanger" means to "put (someone or something) at risk or in danger." *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 454 (E.D. Pa. 2015). "Danger" is "the possibility of suffering harm or injury." *Id.* In *Courtland Co., Inc. v. Union Carbide Corp.*, after reviewing the evidentiary record, the court found that an RCRA claim lacked merit, stating:

> To the extent that [plaintiff] takes the position that the existence of contaminated groundwater and/or surface water demonstrates an endangerment to the environment in and of itself, even absent any secondary effects to humans or ecological organisms, the court rejects such a narrow categorical premise. Indeed, to adopt this principle would be akin to holding that because the presence of contamination in any given environmental media inevitably impairs, to some

> degree, the purity and natural-being thereof, an endangerment to the environment is necessarily present."

No. 2:18-CV-01230, 2023 WL 6331069 at *57 (S.D.W. Va. Sept. 28, 2023).

SCCRAP has not alleged any endangerment to a living population. R. at 12. ComGen's groundwater monitoring wells show no evidence that arsenic or cadmium have reached the Vandalia River or any public water supply, nor will they in the next five years. R. at 8. Therefore, there is no imminent danger of harm to a living population from arsenic and cadmium leaching into unused groundwater.

The Supreme Court has clarified that the phrase "may present" in the third prong of RCRA § 6972(a)(1)(B) implies that endangerment is "imminent" only if it "threaten[s] to occur immediately. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996). This "implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Id.* (quoting *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)). SCCRAP's argument that a developer is *considering* building a large subdivision nearby does not meet the standard established by the Supreme Court. R. at 9. Even if the development proposes using the local groundwater as a primary drinking source, there is no current threat because the existence of the development is still purely speculative. *Id.*

While the facts of *Mobile Baykeeper* are similar to those of the instant case, there are key distinctions in the imminent danger to the population. In *Mobile Baykeeper*, plaintiffs relied on documented health concerns for residents affected by active drinking water supply contamination. 2024 WL 54118 at * 9. In contrast, SCCRAP has presented no evidence that the contamination extends beyond the groundwater R. at 13. This distinction is critical in comparing the success of a 42 U.S.C. § 6972(a)(1)(B) suit in *Mobile Baykeeper* as compared to this case.

B. The Third and Tenth Circuit cases cited by SCCRAP are factually distinguishable from this case.

SCCRAP's reliance on *Interfaith Cmty. Org. v. Honeywell Int.'l, Inc*. and *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), is misplaced. These cases are factually distinguishable from the instant case because they do not address the specific regulatory and factual context of ComGen's operations.

In *Interfaith*, interim measures were implemented to prevent the heaving of waste, which caused holes in a structure, exposing humans to contamination. 399 F.3d at 264. The plaintiffs in *Interfaith* used evidence of trespass on the waste field to establish a direct exposure pathway to humans. *Id.* at 262. By contrast, there is no evidence here that contaminants from ComGen's operations are subject to any dispersion mechanisms that could lead to human exposure. Furthermore, SCCRAP's district court complaint does not allege that arsenic or cadmium exceedances from Little Green Run have impacted drinking water, wildlife, or any other living entities. R. at 12-13. Instead, the complaint focuses solely on groundwater contamination, without presenting evidence that such contamination poses a direct or indirect threat to human or ecological health. *Id.*

In *Burlington*, the Tenth Circuit held that "an endangerment is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm... in the event remedial action is not taken." 505 F.3d at 1021. Unlike in *Burlington*, there is no reasonable cause for concern that any person or ecological receptor is at risk of harm without remedial action. The elevated arsenic and cadmium levels, though above federal advisory levels, do not present a reasonable risk of exposure to harm because there is no evidence that either substance has reached the Vandalia River or any public drinking water supply. R. at 8.

C. Broadening RCRA's scope would lead to unworkable public policy outcomes.

The national policy behind RCRA is to minimize both present and future threats to human health and the environment. *Meghrig*, 516 U.S. at 486. Expanding RCRA to cover environmental contamination without a demonstrated risk to human or ecological health would significantly broaden the statute beyond its intended scope.

Broadening RCRA's scope would lead to unworkable outcomes. A broad reading of RCRA would impose excessive regulatory burdens on industry and create impractical compliance requirements. Furthermore, expanding RCRA could disrupt the precious federal-state balance, which does not align with the statute's aims. The existing regulatory framework under RCRA is designed to address imminent and substantial endangerments. Any expansion must be carefully considered to avoid overreach and ensure effective environmental protection. Allowing RCRA claims without evidence of harm to a living population could open the door to a flood of suits under § 6972(a)(1)(B) based solely on the presence of contamination.

## CONCLUSION

For these reasons, ComGen respectfully requests that this Court affirm the district court's order in favor of appellee ComGen, dismissing this action in its entirety. Appellee further asks this Court to assess all reasonable costs of this appeal to the appellant, SCCRAP.

**Certificate of Service**

Pursuant to *Official Rule* IV, *Team Members* representing Appellee, Commonwealth Generation Company ("ComGen"), 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.* 28