C.A. No. 24-0682

In The United States Court of Appeals for the Twelfth Circuit

STOP COAL COMBUSTION RESIDUAL ASH PONDS,
Appellant,
v.
COMMONWELATH GENERATING COMPANY,
Appellee.

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

OPENING BRIEF OF APPELLEE COMMONWEALTH GENERATING COMAPNY

Team 16

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JURISDICTIONAL STATEMENT

The District Court possessed subject matter jurisdiction because Appellant, Stop Coal Combustion Residual Ash Pond's ("SCCRAP") claims arise under the laws of the United States, including The Clean Water Act ("CWA") and The Resource Conservation and Recovery Act ("RCRA"). 28 U.S.C. § 1331. The District Court entered an Order granting Appellee Commonwealth Generating Company's ("ComGen") Motion to Dismiss in its entirety, on October 31, 2024. The District Court's Order constituted a final appealable order. 28 U.S.C. § 1291. SCCRAP timely filed its Notice of Appeal on November 10, 2024, within 30 days of the Order. FED. R. APP. P. 4(a)(1)(A). Thus, this Court has jurisdiction over this appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether a VPDES permit holder may discharge pollutants not expressly listed on its permit, under the Clean Water Act, when the permit holder has complied with the reporting requirements of the permit application process.

II. Whether in deciding Issue 1, the Court owes deference to its own decision adopting *Piney Run* and to the EPA's guidance on unpermitted discharges following the Supreme Court's decision in *Loper Bright*, that requires courts to no longer defer to agency interpretations of statutes.

III. Whether an environmental group has standing to challenge an impoundment's closure plan, under Article III of the Constitution, when the environmental group fails to establish an injury in fact, and any alleged injury is not redressable or traceable to the closure plan.

IV. Whether an environmental group can pursue an imminent and substantial endangerment claim, under the RCRA when it only alleges endangerment to the environment itself, without demonstrating a realistic exposure pathway, imminent threat, or substantial harm to a living population.

STATEMENT OF THE CASE

The District Court was correct in granting ComGen's Motion to Dismiss SCCRAP's Complaint, and its decision should be affirmed.

This is citizen suit arising from ComGen's announcement of its plan to close the Vandalia Generating Station (the "Generating Station") and the Vandalia Department of Enviromental Protection's ("VDEP") subsequent approval of ComGen's closure plan. SCCRAP filed this action in the Middle District of Vandalia, on September 3, 2024. SCCRAP pursued three separate claims: one under the CWA and two under the RCRA.

In 2015, ComGen unveiled the "Building a Green Tomorrow" program, with the goal of lowering energy costs and reducing pollution. As part of the program, ComGen announced its plan to close the Generating Station in Mammoth, Vandalia by 2027. The Generating Station is a coal-fired electric generating plant that due to age, condition, and limited capacity was deemed the best candidate for closure by ComGen. The Generating Station holds a Vandalia Pollutant Discharge Elimination System ("VPDES") permit, that was issued by VDEP and became effective on September 1, 2020. The permit covers Generating Station's three outfalls – Outlets 001, 002, and 003 – and sets discharge limitations for a wide array of pollutants but does not limit the discharge of or require monitoring for Perfluorooctane sulfonic acid ("PFOS") and Perfluorobutanesulfonic acid ("PFBS"). SCCRAP's Complaint alleged that ComGen violated the CWA by discharging PFOS and PFBS from Outlet 001 but does not acknowledge that ComGen complied with the reporting requirement of the VPDES permit application process. SCCRAP sought injunctive relief to stop such discharges until ComGen obtained a new VPDES permit, declaratory relief, and civil penalties.

Generally, coal ash produced by the Generating Station has been disposed of in the Little Green Run Impoundment (the "Impoundment"). Because the Generating Station will cease

operations by 2027, ComGen has begun the process of closing the Impoundment in place in accordance with the Disposal of Coal Combustion Residual from Electric Utilities rule (the "CCR Rule"). In December 2019, ComGen submitted to the VDEP its initial "Permit Application for CCR Surface Impoundment" at the Impoundment. In February 2021, the VDEP issued a notice of both ComGen's initial Permit Application for CCR Surface Impoundment at the Impoundment and of a public hearing the following month to receive oral comments on the proposed initial issuance of the permit. Additionally, the VDEP received written comments from members of the public. After considering the public hearing record, the written comments, and its CCR Regulations, the VDEP issued ComGen's Coal Combustion Residual Facility Permit to Close for the Impoundment (the "Closure Permit") in July 2021. Under the RCRA, SCCRAP alleged that the closure plan failed to satisfy the CCR Regulations and as such, sought injunctive relief to prevent ComGen from implementing the Impoundment's closure plan.

ComGen's first closure-in-place activity was the installation of upgradient and downgradient groundwater monitoring wells for the Impoundment. ComGen installed 12 monitoring wells that became operational by the end of 2021. While the downgradient monitoring wells have shown elevated levels of arsenic and cadmium, there is no evidence that such pollutants have reached the Vandalia River or any other public water drinking supply or will in the next five years. Although SCCRAP acknowledged that there is no current impact on drinking water, it alleged that the Impoundment presents an imminent and substantial endangerment to the environment due to the presence of arsenic and cadmium in the downgradient monitoring wells. Accordingly, SCCRAP sought declaratory and injunctive relief, as well as civil penalties.

After an expedited briefing schedule, the District Court granted ComGen's Motion to Dismiss in its entirety, on October 31, 2024. The Court adopted the reasoning in *Atlantic States*,

holding that ComGen's permit protected it from liability under the CWA because PFOS and PFBS are not subject to disclosure requirements. Additionally, the Court found that SCCRAP did not have standing to challenge the closure plan because its alleged injuries were not redressable or traceable to ComGen's conduct. Finally, the Court rejected SCCRAP's endangerment claim, concluding that RCRA requires a threat to a living population, not just the environment. Thus, ComGen respectfully asks this Court to affirm the District Court's Order.

SUMMARY OF THE ARGUMENT

ComGen has not violated the CWA because it has complied with the VPDES permit application reporting requirements and as such, is allowed to discharge pollutants not expressly listed on its permit. While the CWA generally prohibits anyone from discharging pollutants into water, states can elect to administer their own permitting programs that allow for controlled pollutant discharge under specific conditions. *See* 33 U.S.C. § 1311(a) & 33 U.S.C. § 1342(a). Consistent with this authority, the state of Vandalia administers VPDES permits. ComGen obtained a permit from the VDEP for the Generating Station. The permit application did not require ComGen to report every potential pollutant – just those required by the CWA and the EPA's federal regulations. As long as a permit holder complies with these reporting requirements, it may discharge pollutants not expressly listed on the permit. Although ComGen did not report the presence of PFOS and PFBS in its Outfalls, it was not required to do so as a part of VPDES permit application process. Therefore, ComGen has not violated the CWA by discharging PFOS and PFBS from Outlet 001.

This Court does not owe deference to its own decision adopting *Piney Run* for two reasons. First, the facts in *Piney Run* do not align with the facts at hand. The pollutant at issue in *Piney Run* was a statutory pollutant under the CWA. 33 U.S.C. § 1362(6). The pollutants at issue here, PFOS

and PFBS, are not statutory pollutants under the CWA. 33 U.S.C. § 1362(6). Nor are they pollutants that are required to be disclosed during the permit application process. 40 C.F.R. § 122.21(g)(7)(iii). Second, the reasoning invoked in *Piney Run* is inconsistent with *Loper Bright*'s holding that courts may not defer to agency interpretations. Further, under *Lope Bright* this Court is no longer required to defer to the EPA's guidance on unpermitted discharges and must instead exercise its own independent judgment.

To establish standing, the plaintiff must have suffered an "injury in fact," and there must be a causal connection between the injury and the conduct alleged, such that the injury is fairly traceable to the defendant's challenged action, and it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). SCCRAP alleges that ComGen closure of the Little Green Run Impoundment caused harm to its members. ComGen does not concede to any injury. However, any injury alleged by SCCRAP is not fairly traceable or redressable by a favorable decision. Thus, SCCRAP cannot establish standing.

SCCRAP has failed to establish a RCRA claim because it has not demonstrated a credible threat of environmental endangerment, as required under 42 U.S.C. § 6972(a)(1)(B). While arsenic and cadmium are listed hazardous substances, SCCRAP has not identified a plausible exposure pathway necessary to show potential harm. Without evidence that these substances have impacted the Vandalia River or any water supply, SCCRAP cannot substantiate its claim. Further, courts have consistently held that environmental endangerment must be more than speculative, remote, or minimal, and SCCRAP's claims rely on hypothetical risks rather than concrete proof.

Even if endangerment were established, SCCRAP fails to meet the "imminent and substantial" threshold under RCRA. The potential development of a housing subdivision or

possibility of severe weather is too speculative to constitute an imminent threat, and there is no evidence that contamination will reach a public water supply within a relevant timeframe. Moreover, substantial endangerment requires a significant risk of harm, not merely the presence of hazardous substances. Since SCCRAP has not demonstrated how the ecological functions of the environment are impaired, its claim lacks the necessary evidence to establish liability under RCRA.

ARGUMENT

I. ComGen's discharge of PFOS and PFBS from Outlet 001 is a permitted discharge under the Clean Water Act.

A. Standard of Review

The standard of review for a motion to dismiss is *de novo*. *Aegis Ins. Servs. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 176 (2d Cir. 2013) (citing *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003)).

B. ComGen is compliant with the CWA because it has obtained a VPDES permit that allows the Generating Station to discharge pollutants consistent with its permit.

The CWA prohibits the "discharge of any pollutant by any person" unless otherwise authorized. 33 U.S.C. § 1311(a). This prohibition was tempered, however, with the establishment of the National Pollutant Discharge Elimination System ("NPDES"), which allows the regulatory authority to "issue a permit for the discharge or any pollutant." 33 U.S.C. § 1342(a). While the Environmental Protection Agency ("EPA") is the federal agency entrusted with the administration and enforcement of the CWA, under the NPDES regulatory scheme, a state may elect to establish its own permit program. 33 U.S.C. § 1342(b)-(c). When a state elects to establish its own program, the EPA suspends its federal permit program, and delegates permit regulatory authority to the state. *Id.*

Consistent with the CWA and the NPDES regulatory scheme, the state of Vandalia elected to implement its own permit program. Through the VDEP, the state of Vandalia administers VPDES permits. On July 30, 2020, ComGen obtained a VPDES permit for the Generating Station from VDEP. Because the EPA has delegated permit regulatory authority to Vandalia, the state had authority to issue the Generating Station's VPDES permit. By obtaining its VPDES permit for the Generating Station, ComGen is compliant with the CWA and its enforcement provisions. Thus, ComGen is compliant with the CWA and may discharge pollutants consistent with the Generating Station's VPDES permit.

C. The VPDES permit application process did not require ComGen to report every potential pollutant that may be discharged from the Generating Station's Outfalls.

The NPDES permitting system is "[t]he primary exception to the blanket liability imposed by the CWA[.]" *Piney Run Preservation Assn. v. Cty. Commrs.*, 268 F.3d 255, 265 (4th Cir. 2001) (citing *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977)). Accordingly, Section 402 of the CWA, allows individuals to apply for permits to discharge limited amounts of pollutants. 33 U.S.C. § 1342(a). Under Section 402(k), an entity who is compliant with an issued NPDES permit is in "compliance with Section 301 for the purposes of the CWA's enforcement provisions." *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) (citing 33 U.S.C. § 1342(k)). According to the Supreme Court, "[t]he purpose of [Section 402(k)] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *Id.* (citing *E.I. du Pont de Nemours & Co. v. Train,* 43 U.S. 112 (1977). Thus, if a permit holder follows the terms of their permit, they avoid CWA liability. *Piney Run Preservation Assn.*, 268 F.3d at 265.

The effectiveness of the permitting process is somewhat interdependent on both the permit holder and the permitting authority. *Id.* at 266. First, the presumptive permit holder must comply "with the CWA's monitoring and reporting requirements." *Id.* (citing 33 U.S.C. § 1318). Second, after receiving "discharge information from all relevant parties … [the permitting authority] calibrates each individual permit to maintain overall state water quality standards." *Id.* Accordingly, while a permit holder may report multiple discharges of pollutants to the permitting authority, "the permit may only contain explicit limitations for some of those pollutants." *Id.*

In its enforcement of the CWA, the EPA has promulgated federal regulations that specify precisely which pollutants must be disclosed during the permit application process. 40 C.F.R. § 122.21. Here, as a part of the permit application process, ComGen was required to report a wide array of pollutants consistent with the EPA's federal regulations. 40 C.F.R. § 122.21. For example, ComGen was required to report quantitative data from Outfalls 001, 002, and 003 for the following pollutants: biochemical oxygen demand, chemical oxygen demand, total organic carbon, total suspended solids, ammonia, temperature, and pH. *Id.* at § 122.21(g)(7)(iii). Additionally, ComGen was required to report quantitative data for organic toxic pollutants, other toxic pollutants (metals and cyanide, and total phenols. *Id.* at § 122.21(g)(7)(v)(A-B). Finally, ComGen was required to disclose whether it knew or had reason to believe that any of the following categories of pollutants were expected to be discharged from Outfalls: organic toxic pollutants, other toxic pollutants, conventional and nonconventional pollutants, and hazardous substances. *Id.* at §122.21(g)(7)(vi)(A-B) & (vii).

Notably, the EPA's federal regulations did not require ComGen to report quantitative data for Per- and polyfluoroalkyl substances (PFAS), including PFOS and PFBS. 40 C.F.R. § 122.21. Moreover, ComGen was not required to disclose whether it knew or had reason to believe that

PFOS and PFBS would be discharged from Outlets 001, 002, and 003. 40 C.F.R. § 122.21. Therefore, ComGen would not be in violation of CWA for failing to disclose the presence of PFOS and PFBS in Outlets 001, 002, and 003, even if it knew or had reason to believe that such pollutants were being discharged from the outfalls.

D. ComGen' has not violated the CWA because it has complied with the CWA's permit application process reporting requirements and pollutants not expressly listed on the VPDES permit may be discharged by the Generating Station.

Although ComGen was not required to report quantitative data or knowledge of PFOS and PFBS, it was, however, required to "provide to the [deputy] [d]irector … such other information as the [d]irector may reasonably require to assess the discharges of the facility." 40 C.F.R. § 122.21(g)(13). Here, the VDEP deputy director did inquire with ComGen prior to the issuance of its VPDES permit, whether any of the Vandalia Generating Station outlets were discharging PFOS and PFBS. A ComGen employee assured the deputy director that neither PFOS or PFBS were known to be discharged from the Generating Station's outlets. The VDEP deputy director could have required ComGen to test and submit quantitative data from its outlets for PFOS and PFBS, but they did not. 40 C.F.R. § 122.21(g)(13).

Instead of inquiring further into the presence of PFOS and PFBS, the VDEP issued the Generating Station's VPDES permit. The permit covers the Generating Station's three Outfalls: Outlets 001, 002, and 003; and sets limits for a wide array of pollutants, such as selenium, aluminum, pH, and temperature, but does not limit or require monitoring of PFOS and PFBS. Because ComGen complied with the CWA's permit reporting requirements and the deputy director's inquiries, it was within the deputy director's discretion to calibrate the VPDES permit to maintain overall state water quality standards. *Piney Run Preservation Assn.*, 268 F.3d at 265.

Thus, if the VDEP was concerned with the presence of PFOS and PFBS from the Generating Station's, it could have included limits or monitoring requirements for such pollutants.

Despite ComGen's compliance with the CWA's reporting requirements, SCCRAP asserts that the PFOS and PFBS discharges are unlawful because they are not listed in the permit. Although the Twelfth Circuit has not spoken on this issue, the Second Circuit has held "that the discharge of unlisted pollutants is not unlawful under the CWA." *Atlantic States Legal Found.*, 12 F.3d at 354. In *Atlantic States*, a non-profit environmental group brought an action asserting that an industrial facility violated Section 301 and 402 of the CWA by discharging pollutants not listed in it permit, however, the pollutants that allegedly violated the CWA were not statutory pollutants under the CWA. *Id.* at 355. The district court entered partial summary judgment in favor of the industrial company; holding that it did not violate the CWA, and the non-profit environmental group appealed. *Id.* at 356. On appeal, the Second Circuit affirmed. The Court reasoned that "the EPA does not demand [] information regarding each of the many thousand chemical substances potentially present in a manufacturer's wastewater because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Id.* at 357 (quotations omitted).

Like in *Atlantic States*, where the defendant discharged pollutants not listed on its permit and the pollutants were not statutory pollutants under the CWA, here PFOS and PFBS were also not statutory pollutants. Moreover, ComGen was not required to report quantitative data of PFOS and PFBS discharges or a knowledge of such discharges. Thus, this Court should find that ComGen has not violated the CWA by discharging PFOS and PFBS from Outlet 001 because such pollutants were not required to be disclosed during the VPDES permit application process.

ComGen has not violated the CWA by discharging PFOS and PFBS from Outlet 001 because (1) ComGen has complied with the CWA by obtaining a VPDES permiting for the Vandalia Generating Station; (2) the CWA or its federal regulations did not require ComGen to disclose the presence of PFOS and PFBS; and (3) ComGen has complied with the VPDES permit application process and thus, the Vandalia Generating Station may discharge pollutants not expressly listed on its permit.

II. In deciding Issue 1, the Court does not owe deference to its own decision adopting Piney Run or to the EPA's guidance on unpermitted discharge following the Supreme Court's decision in Loper Bright.

A. Standard of Review

An appellate court reviews conclusions of law *de novo*. *Nationwide Mut. Ins. Co. v. Dunning*, 252 F.3d 712, 716 (5th Cir. 2001).

B. The Court does not owe deference to its decision adopting Piney Run because the facts in Piney Run are inapplicable to this case.

Stare decisis is a legal doctrine that represents the idea that a court should stand by their previous decisions. *Kimble v. Marvel Entertainment*, 576 U.S. 446, 471 (2015). Adhering to the doctrine is the "preferred course because it 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." *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). Nevertheless, the Supreme Court has noted that *stare decisis* is not an inexorable command. *Id.* Thus, "when governing decisions are unworkable or are badly reasoned.," a court may choose to depart from precedent. *Id.*

SCCRAP asks this Court to rely on the decision reached in *Piney Run* in deciding whether ComGen violated the CWA; but the facts in *Piney Run* do not align with the facts of this case. In *Piney Run* the Fourth Circuit held that a permit holder violates the CWA when it discharges

pollutants not listed in its permit, if those pollutants were not adequately disclosed to the permitting authority during. *Piney Run Preservation Assn.*, 268 F.3d at 269. There, the defendant was accused of violating the CWA by discharging warm water that exceeded the state temperature requirements. *Id.* at 260. Because the defendant's permit did not list heat as a permitted discharge, the plaintiff argued such discharge was unlawful. *Id.* Ultimately, the court found the defendant protected from liability under the CWA because it had adequately disclosed the presence of heat in its discharges during the permit application process. *Id.* at 270-271.

The primary difference between the facts in the case at bar, and the facts in *Piney* Run is the nature of the discharged pollutant. Importantly, heat is a statutory pollutant under the CWA. 33 U.S.C. § 1362(6). Thus, the EPA's regulations require a permit applicant to report quantitative temperature data during the permit application process. 40 C.F.R. § 122.21(g)(7)(iii). In contrast, PFOS and PFBS are not statutory pollutants under the CWA. 33 U.S.C. § 1362(6). Nor are PFOS and PFBS required to be disclosed during the permit application process. 40 C.F.R. § 122.21(g)(7)(iii). Therefore, unlike in *Piney Run* where the defendant was required to report heat, and the defendant would have violated the CWA if it failed to do so, here, ComGen was not required to disclose the presence of PFOS and PFBS. Accordingly, it is unclear how the *Piney Run* reasoning would apply to the facts at bar because the court did not address the discharge of a pollutant that was not required to be disclosed.

This Court may rely on the decision reached in *Atlantic States* because the facts are more consistent with the present facts. Although the defendant in *Atlantic States* had discharged pollutants not expressly listed on its permit, the defendant had complied with disclosure requirements and the permitting authority had opted not to include such pollutants on the permit. *Atlantic States Legal Found.*, F.3d at 354. Moreover, the pollutants that were discharged by the

defendant were not statutory pollutants under the CWA. *Id.* at 356 n.4. Thus, in holding that the defendant had not violated the CWA by discharging pollutants not listed in its permit, the *Atlantic States* court considered facts more like the present facts, than the facts in *Piney Run*.

If this Court were to apply the reasoning of *Piney* Run, such reasoning would be unworkable because ComGen has not discharged statutory pollutants or pollutants that are required to be reported under the federal regulations. Therefore, this Court is asked to apply the reasoning outlined in *Atlantic States* when affirming the District Court's decision that ComGen did not violate the CWA by discharging PFOS and PFBS.

C. The Court does not owe deference to its decision adopting Piney Run because Piney Run relies on Chevron deference, which is inconsistent with the Supreme Court's decision in Loper Bright.

In *Loper Bright*, the Supreme Court overruled *Chevron* deference. *Loper Bright Ents. v. Raimondo*, 603 U.S. 369 (2024). Under *Chevron*, courts applied a two-step test "to interpret statutes administered by federal agencies." *Id.* at 379. First, the court would assess "whether Congress has directly spoken to the precise questions at issue." *Id.* (citing *Chevron U.S.A. Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 842 (1984)). Second, if the court found the statute ambiguous regarding the question at issue, the court was required to "defer to the agency's interpretation if it [was] based on a permissible construction of the statute." *Id.* (internal citations omitted). After *Loper Bright*, however, "[c]ourts must exercise their independent judgment … and [] may not defer to an agency interpretation of the law simply because the statute is ambiguous." *Id.* at 412.

Here, if this Court were to rely on the reasoning from *Piney Run*, it must follow the *Chevron* framework that has been expressly overruled by the Supreme Court. The *Piney Run* court found the language of Section 402 of the CWA to be ambiguous. *Piney Run Preservation Assn.*, 268 F.3d

at 267. Accordingly, the court deferred to the EPA's interpretation of Section 402, which stated that a permit holder who discharges pollutants not listed on its permit is compliant with the CWA, "as long as it only discharges pollutants that have been adequately disclosed to the permitting authority." *Id.* at 268 (citing *In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (1998)). While the court was able to invoke *Chevron* deference because it had not been overturned, it may not have reached the same conclusion without relying on the EPA's interpretation.

Although the Supreme Court did not call "into question prior cases that relied on the *Chevron* framework," it also did not advise how circuit courts should handle precedent that relied solely on the doctrine to reach a decision. *Id.* at 2273. Accordingly, the Twelfth Circuit has not yet addressed whether it will continue to adhere to precedent where the decision was reached with reliance on *Chevron* deference. Other circuits, however, have recognized exceptions to *stare decisis* that would allow courts to disregard past precedent that relied on *Chevron* difference. The First Circuit, has recognized two exceptions to stare decisis:

> (1) "when an existing panel decision is undermined by controlling authority, such as an opinion of the Supreme Court … [or] (2) when authority postdates the original decision, [and] although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."

United States v. Rodriguez-Pacheo, 475 F.3d 434, 441-442 (1st Cir. 2007) (internal citations omitted). Similarly, the Fifth, Sixth, Seventh and Tenth Circuits agree that a court may overrule precedent if a subsequent Supreme Court authority undermines the prior precedent. *See Soc. Of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991); *Kerman v. Commissioner*, 713 F.3d 849, 866 (6th Cir. 2013); *United States v. Rivers*, 108 F.4th 973, 979 (7th Cir. 2024); *United States v. Springer*, 875 F.3d 968, 975 (10th Cir. 2017) (collection of cases recognizing exceptions to *stare decisis*). Thus, this Court is asked to apply this exception to stare decisis

because the Supreme Court's decision in *Loper Bright* undermines the reasoning applied to the decision reached in *Piney Run*.

While this Court need not overturn the decision which adopted *Piney Run*, it is not required to adhere to that precedent because the reasoning is inconsistent with the holding of *Loper Bright*. *See Loper Bright Ents.*, 603 U.S. 369, 376 (stating that a reliance on *Chevron*, alone, cannot justify overruling a previous decision). Here, the decision in *Loper Bright* undermines the rationale applied in those cases because the decisions were reached solely by relying on *Chevron* deference. Following *Loper Bright*, courts may not rely on agency interpretations and must instead exercise their own independent judgment to determine the meaning of a statute. *Loper Bright Ents.*, 603 U.S. at 412. Moreover, "[t]he United States Supreme Court has supervisory authority over the federal courts and may properly use that authority to prescribe rules … that are binding in those courts." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Thus, if this Court applies the reasoning of prior precedent that relies on agency interpretations, it will not only undermine the holding of *Loper Bright* but also defy the authority of the Supreme Court.

D. The Court does not owe deference to the EPA's guidance on unpermitted discharges after Loper Bright.

Following *Loper Bright*, courts are no longer required to defer to agency interpretations when faced with statutory ambiguities. *Loper Bright Ents.*, 603 U.S. at 412. Instead, courts must "exercise their independent judgment." *Id.* Accordingly, this Court is not required to defer to the EPA's guidance Section 402 of the CWA, or its conclusion that discharged pollutants, which were not reported to the permitting authority, are outside the scope of Section 402(k). *In re Ketchikan Pulp Co.*, 7 E.A.D. at 621. Rather, this Court must exercise its independent judgment in determining whether ComGen violated the CWA by discharging PFOS and PFBS from Outlet 001.

This Court does not owe deference to its decision adopting *Piney Run* because (1) the facts

in *Piney Run* do not align with the facts of this case; and (2) the reasoning invoked in *Piney Run* is inconsistent with *Loper Bright*'s holding that courts may not defer to agency interpretations. Similarly, under *Loper Bright* this Court may not defer to the EPA's guidance on unpermitted discharges and must instead exercise its own independent judgment.

III. The District Court properly dismissed SCCRAP's Complaint for lack of standing.

A. Standard of Review

The standard of review for the dismissal of a complaint for lack of jurisdiction including for lack of standing is *de novo. Baughcum v. Jackson,* 92 F.4th 1024, 1030 (11th Cir. 2024).

B. SCCRAP has failed to establish an "injury in fact."

Federal judicial power is confined to the resolution of cases and controversies. *TransUnion LLC v. Ramirez,* 594 U.S. 413, 423 (2021). *See* U.S. Const. art. III, § 2. Under Article III, "[f]or there to be a case or controversy... the plaintiff must have a 'personal stake' in the case—in other words, standing." *Id.* at 423. Article III standing requires a plaintiff to have "suffered an injury in fact, . . . that is fairly traceable to the challenged conduct of the defendant, and . . . that is likely to be redressed by a favorable judicial decision." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent'" *Mobile Baykeeper, Inc. v. Alabama Power Co., N*o. CV 1:22-00382-KD-B, 2024 WL 54118 at *31 (S.D. Ala. Jan. 4,2024) (citing *Lujan*, 504 U.S. at 560). A mere statutory violation does not automatically create legal standing, as "not every statutory wrong causes an injury capable of supporting standing." *Hunstein v. Preferred Collection & Mgmt. Servs*., Inc., 48 F. 4th 1236, 1242 (11th Cir. 2022). To establish standing, an individual must show an "injury in law" (i.e., violation of the statute) and an "injury in fact" (i.e., physical, financial, or other harm to the plaintiff like a

traditional tort). *TransUnion*, 141 S. Ct. at 2205. The Supreme Court has made clear that "an injury in law is not an injury in fact," and a bare statutory violation is insufficient to establish standing. *Id.* at 1241. At the motion to dismiss stage, courts must accept factual allegations as true, but they need not accept legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). General factual allegations must "plausibly and clearly allege a concrete injury." *Lujan*, 504 U.S. at 561.

"In an environmental case, an individual plaintiff may show . . . injury in fact by attesting that he uses, or would use more frequently, an area affected by the alleged violations and that his aesthetic or recreational interests in the area have been harmed." *Mobile Baykeeper*, 2024 WL 54118, at *34 (citing *Sierra Club v. Tenn. Valley Auth*., 430 F.3d 1337, 1344 (11th Cir. 2005). In *Mobile Baykeeper*, the court found sufficient injury when plaintiff alleged they used an area less frequently and derived diminished pleasure from their activities in this area due to pollutants from defendant's coal ash impoundment. *Mobile Baykeeper*, 2024 WL 54118, at *35.

Here, ComGen does not concede that the closure of the Impoundment has violated any law, however, if this court were to find that it has, SCCRAP must adequately allege how any violation actually harms its members Accordingly, SCCRAP's allegation of a statutory violation is insufficient to establish standing, absent evidence that the violation harmed its members. Unlike in *Baykeeper*, where members demonstrated concrete, present injury from ongoing pollution, SCCRAP's alleged injuries are largely speculative. In *Baykeeper*, members alleged their own diminished enjoyment and reduced usage of the affected area. *Id.* at 35. In contrast, SCCRAP's alleges diminished water quality in areas that none of its members claim to use or enjoy. While ComGen's downgradient monitoring wells have shown elevated levels of arsenic and cadmium, there is no evidence that either pollutant has reached the Vandalia River, any public water drinking,

or any area of land or water SCCRAP claims to use or enjoy. Although SCCRAP identified PFOS concentrations of 6 ppt and PFBS concentrations of 10 ppt in the mixing zone of Outlet 001, it has not alleged how any of its members are harmed by such pollutants. A mixing zone is an "allocated impact zone where water quality criteria can be exceeded as long as acutely toxic conditions are prevented." U.S. ENVIRONMENTAL PROTECTION AGENCY, COMPILATION OF EPA MIXING ZONE DOCUMENTS (2006). Put simply, this is a defined area in which wastewater is permitted to empty and water quality standards are suspended. *Id.* Here, SCCRAP does not allege that any of its members used or enjoyed this mixing zone. Therefore, SCCRAP cannot prove that the presence of PFOS and PFBS in this mixing zone diminished its member's use or enjoyment of this location.

Further, fear of future injury fails to establish an "injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). It is well established that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient" to establish standing. Id. Here, SCCRAP alleges that it will be harmed by ComGen's closure plan because future floods, storms, and hurricanes may cause coal ash to spill into the Vandalia River. SCCRAP also seeks damages for potential groundwater contamination that could affect residential wells in a proposed subdivision development. Of course, no such things have happened yet, nor is there any indication that they will. SCCRAP alleges no specific facts by which a flood, storm, and hurricane could cause a spill to occur. SCCRAP merely assumes a failure could happen, but alleges no flaw in design, construction, or maintenance that could lead to a spill in the future. Additionally, the groundwater well in question is currently inactive and not utilized by anyone – including any SCCRAP members. Moreover, the proposed housing subdivision's well that SCCRAP claims its members would rely on has not received approval, and even if approved, would not be operational until 2031. Thus, SCCRAP's allegations of harm

related to future storms and an undeveloped subdivision are largely speculative and are not certainly impending. Therefore, SCCRAP fails to establish an "injury in fact" and thus, lacks Article III standing.

C. SCCRAP's alleged harm is not fairly traceable to ComGen's closure of the Impoundment.

The second element of standing is a causal connection between the injury and conduct complained of, such that the injury is "fairly traceable" to the challenged action of the defendant. *Lujan,* 504 U.S. at 560. Allegations that the defendant acted wrongfully, and the plaintiff suffered an injury are not enough, rather, "[t]here must be a causal link between the two." *Mobile Baykeeper*, 2024 WL 54118, at *38 (citing *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC,* 2018 WL 2417862, at *4 (M.D. N.C. May 29, 2018)). In analyzing this requirement, courts have found traceability to be lacking when the plaintiff "would have been injured in precisely the same way without the defendant's alleged misconduct." *Walters v. Fast AC, LLC*, 60 F.4th 642, 649 (11th Cir. 2023).

Here, there is a mismatch between the injuries alleged by SCCRAP and the conduct SCCRAP challenges, namely the alleged deficiencies in the closure plan for the Impoundment. SCCRAP's assertions that their members do not recreate or enjoy the land or water at issue do not arise from the Impoundment's closure, but from historical pollution and unsubstantiated fears about pollution. ComgGen began closure activities in 2019 with an expected closure date of 2031. The pollution SCCRAP alleges pre-exists any closure activities and therefore it is not fairly traceable to the challenged action of ComGen, the implementation of the Impoundment's closure plan. ComGen --maintains that the detected arsenic, cadmium, PFOS, and PFBS concentrations have not caused harm to SCCRAP, however, both environmental and industry groups agree that the Impoundment was likely emitting arsenic and cadmium 5 to 10 years before the first

monitoring report in 2021, long before any closure activities. Additionally, ComGen produced monthly monitoring records going back to 2015 that measured the discharge of PFOS and PFBS from Outlet 001. In almost every month, there was some recorded discharge of PFOS or PFBS. Thus, any recreational or aesthetic injuries that result from arsenic, cadmium, PFOS, and PFBS alleged by SCCRAP emanate from the Impoundment's purported ongoing leaching, not any closure activities.

Moreover, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

Here, SCCRAP alleges that it will be harmed by ComGen's closure plan because of future storms and alleged groundwater contamination that could affect a residential well in a subdivision development not yet built or even approved. Their arguments rely on speculative fear, rather than any imminent threat. In conclusion, because SCCRAP cannot demonstrate that their alleged injuries are fairly traceable to ComGen's conduct, they fail to establish standing.

D. SCCRAP's sought after injunctive relief will not redress its alleged injury.

Finally, to establish standing, a plaintiff must demonstrate that the claimed injury will likely be remedied by a favorable court decision, rather than relying on mere speculation. *Lujan*, 504 U.S. at 560.

Here, SCCRAP seeks injunctive relief to prevent ComGen from implementing an alleged illegal Closure Plan. However, neither halting the closure plan, nor ordering ComGen to file a new closure plan compliant with the CCR rule would not make it "substantially likely" that the Impoundment's leaching would cease any time soon. Specifically, ordering ComGen to eliminate free liquids before installing the final cover system would not address the alleged ongoing groundwater contamination, as the system is not scheduled for completion until 2031. Further,

ordering ComGen "to implement a closure plan today that both eliminates the post-closure infiltration of liquids and releases of CCR into groundwater and precludes the probability of future impoundment of water, sediment, or slurry cannot redress ongoing leaching when the law only regulates how a CCR unit is closed" *Mobile Baykeeper*, 2024 WL 54118, at *44. ComGen also does not anticipate the closure-in-place project to be completed until 2031. Thus, a hypothetical order to comply with subsection (d)(1)(i-ii) cannot remedy SCCRAP instant harms when the closure performance standard will not truly manifest until much closer to the 2031 estimated project completion date.

Further undermining redressability, SCCRAP's alleged recreational and aesthetic injuries from contaminants stem primarily from arsenic, cadmium, PFOS, and PFBS contamination – pollutants unrelated to any closure activities. 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. Thus, SCCRAP's injuries are not from the Closure Plan or its alleged infractions of the CCR Rule, but from the historical pollution stemming from the Impoundment. In conclusion, because the injuries SCCRAP alleges are not redressable, SCRRAP fails to establish standing. In conclusion, because SCCRAP cannot demonstrate that their alleged injuries would be redressed by injunctive relief, they fail to establish standing.

IV. SCCRAP cannot pursue an imminent and substantial endangerment claim, under the RCRA.

A. Standard of Review

The standard of review for pure questions of law is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

B. SCCRAP fails to provide adequate evidence of environmental endangerment.

The Resource Conservation and Recovery Act ("RCRA") describes who can be held liable in a citizen suit for contributing to the handling or storage of hazardous waste that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C § 6972(a)(1)(B). Under RCRA, the key operative phrase is "may present," meaning plaintiffs need only show that there is a potential for endangerment, rather than actual harm. *Price v. United States Navy,* 39 F.3d 1011, 1019 (1994). This means the court need only determine whether there is a threat of potential harm, not necessarily that harm has already occurred. *Id.* The fact finder has the discretion to review the evidence admitted and consider whether it is potentially harmful to the environment. *PCS Nitrogen Inc. v. Ashley II of Charleston, LLC,* 714 F.3d 161, 186 (4th Cir. 2013).

The fact finder will consider (1) the presence of hazardous waste and (2) the pathway of exposure to such hazardous waste. *Id.* The RCRA charges the Environmental Protection Agency ("EPA") with the identification and listing of hazardous wastes. 42 U.S.C.S. § 6921. Accordingly, the EPA has established a framework that classifies hazardous wastes as either "listed" or "characteristic" of hazardous substances. 40 C.F.R. § 261.3(a). Several hundred substances are "listed" as hazardous wastes, while substances not listed can qualify as hazardous if testing shows it exhibits "characteristics" of hazardous waste. 40 C.F.R. §§ 261.30-261.38 (subpart D), 40 C.F.R. §§ 261.3(a)(2)(i), 261.20(a).

To state a hazardous waste claim under RCRA, a plaintiff must allege the presence of at least one hazardous waste. *Chart v. Town of Parma,* 2012 U.S. Dist. LEXIS 125819 (W.D.N.Y. Aug. 28, 2012). Here, both arsenic and cadmium are "listed" per se as hazardous by the EPA. Like *Chart*, because at least one substance was found present in the groundwater, both are reported above federal advisory levels, and above Vandalia's groundwater quality standards, the court will likely admit this evidence. Therefore, the presence of hazardous waste is satisfied.

Once hazardous waste is identified, the next step involves the identification of current or potential pathways of exposure. *Courtland Co. v. Union Carbide Corp.*, No. 2:18-cv-01230, 2023 U.S. Dist. LEXIS 174306 *186 (S.D.W. Va. Sept. 28, 2023). The pathway of exposure refers to how hazardous waste may encounter receptors, such as humans, animals, or ecological systems. *Id*. A common pathway is groundwater or surface water contamination. *Id*. Absent evidence to show a current or potential pathway of exposure will eliminate the possibility of harm to receptors. *Id*. Courts have consistently interpreted "endangerment" to include threatened or potential harm, not requiring proof of actual harm. *Tri-Realty Co. v. Ursinus College,* 124 F. Supp. 3d 418 (E.D.Pa.2015). Such threats to health or the environment cannot be (1) remote, (2) speculative, or (3) minimal. *Cordiano v. Metacon Gun Club, Inc*., 575 F.3d 199 (2d Cir. 2009). Remote risks are threats that are distant or highly unlikely, speculative risks are hypothetical or unproven dangers, and minimal dangers are trivial or minor risks. *Id.*

For endangerment to the environment in particular, courts typically evaluate both quantitative and qualitative factors. *Meghrig v. Kfc W*., 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). Quantitative factors involve contamination measurements, however, precise measurements beyond state thresholds are not required. *Id*. Qualitative factors assess whether a substance impairs the ecological function of non-living environmental elements, such as soil or water. *Conservation Law Found., Inc. v. Town of Barnstable*, 615 F. Supp. 3d 14 (D.Mass.2022).

Here, even though the presence of hazardous waste was identified, SCCRAP fails to prove it is an endangerment because there is no evidence that either substance has reached the Vandalia River or any other drinking supply. Contrasting *Chart*, there is no evidence to show a potential exposure to humans, animals, or the ecological system itself; therefore, SCCRAP fails to show endangerment to the environment or any other receptor.

C. SCCRAP fails to prove imminent and substantial environmental endangerment.

To be considered "imminent," the threat must present or is reasonably likely to occur in the future. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 485-86 (1996). Imminent endangerment involves a "reasonable prospect of future harm." *Me. People's Alliance*, 471 F.3d at 296. This standard reflects the probabilistic nature of the term "may endanger," which emphasizes the possibility of harm rather than certainty. *Id*. The requirement for imminence ensures that the threat is sufficiently immediate to warrant action and therefore is not considered remote. *Id*.

For endangerment to be deemed "substantial," it must involve a significant risk of harm. *United States v. Union Corp*., 259 F. Supp. 2d 356, 400 (E.D. Pa. 2003). Courts have clarified that this does not require evidence of actual harm but rather a reasonable cause for concern that someone or something may be exposed to serious harm. *Id*. As the Ninth Circuit held, substantial endangerment exists where there is reasonable cause to believe the risk of harm is significant. *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). This interpretation underscores the importance of addressing potential harm that poses a considerable threat to health or the environment and therefore is not considered minimal. *Id*.

Courts have interpreted RCRA in varying ways, with some adopting a broader approach to liability while others impose stricter requirements. In Tri-Realty Co. v. Ursinus College, the court emphasized the necessity of distinguishing between cases of severe contamination and instances where pollution is minimal. *Tri-Realty Co. v. Ursinus College*, 124 F. Supp. 3d 418 (E.D.Pa.2015). The court rejected an overly expansive interpretation of RCRA that would extend liability to any pollution, regardless of its significance. *Id*. Instead, it reaffirmed that RCRA requires a showing of "substantial" endangerment, preventing the statute from being applied to minor or speculative risks. *Id*.

By contrast, in *Interfaith Community Organization v. Honeywell International Inc*., the court supported a broader application of RCRA, finding liability where hazardous substances posed an ongoing threat to human health and the environment. *Interfaith Community Org. v. Honeywell Internatl., Inc*., 399 F.3d 248 (3d Cir.2005). Despite this broader interpretation, *Tri-Realty* demonstrates that courts remain cautious about imposing liability without clear evidence of imminent and substantial endangerment. In *Tri-Realty*, the court rejected an expert report as speculative, reasoning that while the presence of a hazardous substance was undisputed, the expert lacked sufficient evidence to establish that exposure posed a real and imminent risk to human health, animals, or the environment. *Tri-Realty Co. v. Ursinus College* (E.D.Pa.2015).

Here, SCCRAP fails to meet the "imminent" standard because the possibility of a development being built is too remote and speculative to be considered a risk under the RCRA. First, SCCRAP provides a hypothetical scenario by assuming that a housing development will occur despite the lack of any confirmed plans or commitments for such a project. Because the mere consideration of a housing development does not establish a definite risk, there is no concrete evidence that construction will take place. Therefore, without proof that the development will occur, the risk to the environment is hypothetical and therefore speculative.

Second, even if the proposed development were to occur, the alleged risk of water contamination remains speculative and remote. Although the Impoundment has been leaching for at least the past five to ten years, there is no evidence demonstrating that hazardous substances will reach any public water supply or the Vandalia River within the next five years. The absence of evidence establishing a risk of potential threat fails to meet the standard of "imminent endangerment" under the RCRA. Therefore, without proof of a potential risk to the environment's

ecological function, SCCRAP's claim lacks the necessary evidentiary support and fails to demonstrate the substances may present an imminent endangerment to the environment.

Nevertheless, even if imminent endangerment is acknowledged to be present or a potential harm to the environment, the element of "substantial endangerment" is not established because SCCRAP only provides evidence of the mere presence of hazardous waste and does not establish how the environment's ecological functions are impaired; therefore, no serious harm is identified, only minimal harm. Thus, without evidence demonstrating a significant risk of harm or impairment to the environment's ecological functions, the mere presence of hazardous waste is insufficient to establish "substantial endangerment" under the RCRA.

CONCLUSION

For the following reasons, ComGen respectfully requests an Order affirming the District Court's Order:

1. ComGen's discharge of PFOS and PFBS from Outlet 001 is permitted under the CWA because ComGen has complied with the VPDES permit application reporting requirements and the permit allows for the discharge of pollutants not expressly listed by the permit.

2. The Court does not owe deference to its own decision adopting *Piney Run* or to the EPA's guidance on unpermitted discharge following the Supreme Court's decision in *Loper Bright*.

3. SCCRAP does not have standing to challenge ComGen's closure plan, under Article III of the Constitution because SCCRAP fails to establish an injury in fact, and any alleged injury is not redressable or traceable to the closure plan.

4. SCCRAP's RCRA claim fails because it lacks evidence of a realistic exposure pathway, an imminent threat, or substantial environmental harm, and instead relies solely on speculative risks and the mere presence of hazardous substances.

Respectfully submitted,

Team No. 16

Counsel for Appellee Commonwealth Generating Company

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company 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,

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