C.A. NO. 24-0682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION

RESIDUAL ASH PONDS,

Appellant,

-v.- C.A. No. 24-0682

COMMONWEALTH

GENERATING COMPANY,

Appellee.

On appeal from the United States District Court for the District
For the Middle District of Vandalia

BRIEF FOR APPELLANTS

TEAM 8
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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had valid subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which grants federal courts original jurisdiction over civil actions arising under the laws of the United States. Stop Coal Combustion Residual Ash Ponds timely filed an appeal on November 10, 2024, which this Court granted. R. at 15. The District Court entered its final judgment dismissing the case entirely on October 31, 2024. R. at 13-14. This Court has valid jurisdiction pursuant to 28 U.S.C. § 1291, as the appeal arises from a final order of the District Court. The issues presented involve questions of federal statutory interpretation under the Clean Water Act and the Resource Conservation and Recovery Act, which are within the Court's appellate jurisdiction to review.

STATEMENT OF ISSUES PRESENTED

I. Whether a power plant's discharge of two undisclosed forever chemicals constitutes an unpermitted discharge under the Clean Water Act when the facility operator knew of the pollutants' presence, failed to disclose them in permit applications, and misrepresented their existence to regulators who specifically inquired about them.

II. Whether this Court should continue to defer to its *Piney Run* precedent and EPA guidance on unpermitted discharge requirements, despite *Loper Bright's* limitation of agency deference, because a permittee's knowing discharge of undisclosed regulated substances falls outside the Clean Water Act's permit shield protection.

III. Whether an environmental organization has standing to challenge a waste facility's closure plan where its members have suffered concrete aesthetic and recreational injuries from historical contamination that will be exacerbated by the inadequate plan's failure to prevent future groundwater pollution and environmental harm.

IV. Whether an environmental organization can maintain a Resource Conservation and Recovery Act imminent and substantial endangerment claim based solely on groundwater contamination and ecological harm at a coal ash impoundment, where monitoring data shows persistent toxic contamination that threatens potential future water sources, despite the absence of current human exposure.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Commonwealth Generating Company (ComGen) is a multistate electric utility provider that operates several coal-fired power plants, including the Vandalia Generating Station and the adjacent Little Green Run Impoundment. R. at 3-4. ComGen has faced multiple allegations of environmental negligence over the years, including failures to adequately monitor hazardous discharges and to implement modern pollution control technologies. R. at 6.

The Vandalia Generating Station is a coal-fired power plant that has operated for decades with the generation capacity of 80 Megawatts. R. at 4. Now scheduled for closure by 2027 under the "Building a Green Tomorrow" initiative, the Vandalia Generating Station has posed a significant environmental risk due to its outdated environmental protection technologies. R. at 4 & 6. While ComGen markets itself as an innovator in green energy through its "Building a Green Tomorrow" initiative and boasts of employing 1,500 Vandalia locals, it is unwilling to invest the necessary capital to modernize safety standards for Little Green Run Impoundment due to Vandalia Generating Station's 2027 scheduled closing. *Id*. The Vandalia Generating Station's discharge system includes Outlets 001, 002, and 003, which releases effluent into the Vandalia River under the authority of a Vandalia Pollutant Discharge Elimination System (VPDES) permit. R. at 4. This permit, which expires on July 29, 2025, contains operational requirements, including

pollutant limitations, but notably excludes limitations and monitoring parameters for PFOS and PFBS. *Id.*

The Little Green Run Impoundment, located adjacent to the Vandalia Generating Station, is a 71-acre unlined coal ash storage site formed by the construction of a dam across Green Run used for disposing of coal ash. R. at 5. Little Green Run Impoundment contains nearly 38.7 million cubic yards of coal combustion residuals (CCR), and other operational waste material that contains contaminants like mercury, selenium, cadmium, and arsenic. R. at 1 & 5. To monitor if pollutants from the impoundment are leaching, ComGen installed 13 upgradient and downgradient groundwater monitoring wells. R. at 7. The required annual reports, starting in 2021, indicated the downgradient wells finding elevated levels of arsenic and cadmium above both federal advisory levels and Vandalia's groundwater quality standards. R. at 8.

An employee of ComGen admitted in an email to the deputy director of the Vandalia Department of Environmental Protections that the discharge of PFOS and PFBS was not known to regulators, and the pollutants' parameters were never mentioned in any formal permit documents. R. at 8. But, through a subpoena in a separate, ongoing litigation, Stop Coal Combustion Residual Ash Ponds (SCCRAP) discovered that ComGen knew that Outlet 001 was discharging PFAS parameters into the Vandalia River. R. at 4 & 9. Additionally, ComGen's closure permit and groundwater monitoring plans fail to meet the minimum standards set by federal and state environmental laws, including provisions to eliminate free liquid in the impoundment, further exacerbating contamination risks. R. at 10-13.

Stop Coal Combustion Residual Ash Ponds (SCCRAP) is national environmental and public interest organization, composed of local resident and environmental experts, that's mission is to protect public water from pollutants, and hold major polluters accountable for their environmental

practices by ensuring they have complied with federal and state environmental laws. R. at 8-9. SCCRAP has been closely monitoring the groundwater in Vandalia due to their concerns of groundwater contamination from the Little Green Impoundment. R. at 9. An employee of ComGen, responding to questions from Deputy Director of Environmental Protections, claimed they had no knowledge of PFOS or PFBS discharge; however, through a subpoena in a separate, ongoing litigation SCCRAP discovered that ComGen knew that Outlet 001 was discharging PFAS parameters into the Vandalia River. R. at 4 & 9.

The Clean Water Act. In 1972, Congress passed the Clean Water Act (CWA), which effectively regulated the discharge of pollutants into navigable waters. R. at 10. The Act allows the issuance of permits allowing for discharge of pollutants as long as the discharge meets effluent standards. R. at 10-11. The Act also grants the State the power to develop its own program allowing the State to assign discharge permit authorization under both state and federal law. R. at 11.

The Resource Conservation and Recovery Act. In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA) as the primary method to regulate the disposal of solid and hazardous waste. R. at 11. This Act provides citizens the ability to seek relief against both present and future risks of harms to health or the environment created by the negligent handling of any solid or hazardous waste. *Id*. The RCRA was later amended in 2016 by the Water Infrastructure Improvements for the Nation (WIIN) Act which granted states authority to implement their own CCR programs and reinforced federal oversight to ensure complains with environmental standards. R. at 5.

II. NATURE OF PROCEEDINGS

On September 3, 2024, Stop Coal Combustion Residual Ash Ponds ("SCCRAP") filed a citizen suit against Commonwealth Generating Company ("ComGen") in the United States District

Court for the Middle District of Vandalia, arguing that ComGen's discharge of PFOS and PFBS into the Vandalia River violated the Clean Water Act ("CWA"), that ComGen's closure plan for the Little Green Run Impoundment violated the Resource Conservation and Recovery Act ("RCRA") by failing to eliminate free liquids and prevent environmental harm, and that contamination from the impoundment posed an imminent and substantial endangerment to the environment under RCRA. R. at 12-13.

On September 20, 2024, ComGen moved to dismiss raising three primary arguments. R. at 13. First, ComGen asserted that the SCCRAP's first claim should be dismissed because PFOS and PFBS are not statutory pollutants, and the court is no longer required to give agency deference under *Loper Bright Enterprises v. Raimondo*. R. at 13. Second, ComGen argued that the complaint regarding its Closure Plan is too conclusory and SCCRAP failed to provide facts they violated standards set by CCR Rules. R. at 13. Lastly, ComGen claimed that RCRA's imminent and substantial endangerment provision does not extend to the environment itself and doing so would open the flood gates of litigation for any form of contamination. R. at 13.

The District Court granted ComGen's motion to dismiss on all issues on October 31, 2024, and SCCRAP filed a timely appeal on November 10, 2024. R. at 14-15.

SUMMARY OF THE ARGUMENT

I.

The district court erred in granting ComGen's motion to dismiss SCCRAP's Clean Water Act claim. The permit shield defense under 33 U.S.C. § 1342(k) does not protect permittees who fail to disclose pollutants during the permitting process. ComGen deliberately concealed PFOS and PFBS discharges, depriving the Vandalia Department of Environmental Protection (VDEP) of the ability to regulate these pollutants. Because 40 C.F.R. § 122.64(a)(2) states that failure to

disclose all relevant facts is grounds for permit termination, ComGen's omissions render the permit shield defense invalid. The district court's misapplication of *Atlantic States* contradicts the Clean Water Act's statutory framework, which requires full and accurate disclosure to ensure effective permitting. This Court should reverse the district court's dismissal to uphold the Act's regulatory integrity.

II.

The district court misinterpreted *Loper Bright* in concluding that it undermined *Piney Run*'s applicability to permit shield defenses. *Piney Run* remains binding because it is based on statutory compliance rather than *Chevron* deference. Its test—whether pollutants were "reasonably contemplated" by permitting authorities—evaluates factual disclosure obligations, not agency interpretation. ComGen's undisclosed PFOS and PFBS discharges were neither listed in its application nor reasonably contemplated by VDEP, precluding the permit shield defense. Additionally, under *Skidmore*, the EPA's expertise on PFAS pollution remains persuasive. Upholding *Piney Run* ensures regulatory accountability and prevents permit holders from evading liability through nondisclosure. This Court should reverse and reaffirm *Piney Run* as controlling precedent.

III.

The district court erred in dismissing SCCRAP's claims for lack of standing. SCCRAP satisfies the requirements for associational standing: its members suffer concrete injuries from ComGen's PFAS and coal ash contamination, the lawsuit aligns with SCCRAP's mission of protecting water resources, and injunctive relief does not require individual member participation. The contamination of the Vandalia River and groundwater deters SCCRAP members from fishing and boating, satisfying Article III's injury-in-fact requirement. Under *Sierra Club v. Cedar Point*

Oil Co. and *United States v. SCRAP*, environmental harm diminishing the use and enjoyment of natural resources is a cognizable injury. Because SCCRAP's claims are directly traceable to ComGen's pollution and redressable through injunctive relief.

IV.

The district court erred in dismissing SCCRAP's Resource Conservation and Recovery Act (RCRA) claim by incorrectly concluding that environmental harm alone is insufficient. RCRA's imminent and substantial endangerment provision explicitly protects against threats to "health or the environment," confirming that human exposure is not required for liability. The Little Green Run Impoundment, an unlined 71-acre coal ash site, continues to leach arsenic and cadmium into groundwater at levels exceeding regulatory limits. This contamination, coupled with the site's below-sea-level location and proximity to the Vandalia River, presents an ongoing risk of pollutant migration, particularly during storms and floods. Circuit courts, including the Third and Tenth Circuits, have affirmed that RCRA claims may be based on environmental harm alone. This Court should reverse the district court's judgment.

ARGUMENT AND AUTHORITIES

Standard of Review. The United States District Court for the Middle District of Vandalia disposed of SCCRAP's Clean Water Act claim and RCRA claim by granting ComGen's motion to dismiss. R. at 14. A motion to dismiss is proper when the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss for failure to state a claim is reviewed de novo, meaning this Court owes no deference to the district court's legal conclusions. *Coal. for Competitive Electricity v. Zibelman*, 906 F.3d 41, 48-49 (2d Cir. 2018). In reviewing a Rule 12(b)(6) dismissal, courts must construe the complaint liberally, accept all well-

pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *Id*. A claim survives dismissal if it is plausible on its face, meaning the alleged facts allow the court to reasonably infer liability for the plaintiff's alleged injury. *Id*. at 49.

I. COMGEN'S DELIBERATE CONCEALMENT OF PERFLUOROOCTANE SULFONATE AND PERFLUOROBUTANE SULFONATE DISCHARGES DURING THE NPDES PERMITTING PROCESS CONSTITUTES A MATERIAL MISREPRESENTATION THAT INVALIDATES THE PERMIT SHIELD DEFENSE UNDER 33 U.S.C. § 1342(K) OF THE CLEAN WATER ACT.

The Clean Water Act's permit shield defense categorically excludes protection for facilities that deliberately misrepresent or conceal the presence of known pollutants during the permitting process. 33 U.S.C. § 1342(k) *See* 33 U.S.C. § 1311(a). While the shield may protect against inadvertent discharges of unlisted pollutants, it cannot and does not shelter knowing deception that undermines the fundamental integrity of the permitting system. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, MD, 268 F.3d 255, 259 (4th Cir. 2001).

ComGen's discharge of PFOS and PFBS from Outlet 001 exemplifies precisely the type of intentional misconduct that vitiates permit shield protection. When specifically questioned by VDEP about the potential presence of these forever chemicals before the 2020 permit issuance, ComGen falsely "assured the deputy director that neither PFOS nor PFBS were known to be in the discharge." R. at 4. In reality, ComGen's own monitoring records, revealed through subsequent litigation, documented consistent PFOS and PFBS discharges beginning in 2015—reaching concentrations as high as 15 μg/L and 35 μg/L respectively. R. at 9. This deliberate concealment of known pollutant discharges strikes at the heart of the CWA's permitting regime, which depends on accurate self-reporting to function effectively.

The implications of allowing the permit shield to protect such calculated deception would be devastating to the CWA's regulatory framework. If facilities could knowingly withhold information about pollutant discharges while retaining permit shield protection, the entire

permitting system would be reduced to a hollow exercise in selective disclosure rather than the comprehensive pollution control mechanism Congress intended. *See Atl. States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) (recognizing permits must effectively "identify and limit the most harmful pollutants").

ComGen's conscious choice to conceal its PFOS and PFBS discharges from regulators invalidates any claim to permit shield protection as a matter of law and public policy.

A. The Clean Water Act's plain language requirement that "any" pollutant be disclosed during the permitting process directly contravenes the *Atlantic States* ruling's narrower interpretation of the disclosure mandate.

The Clean Water Act's comprehensive permitting scheme mandates disclosure of all pollutants during the application process, regardless of explicit enumeration in statute or permit forms, as established through the Act's text, structure, and fundamental purpose of protecting water quality through informed regulatory oversight. This disclosure requirement derives from Congress's deliberately expansive definition of "pollutant" and the Act's carefully constructed system of cooperative federalism that depends on complete information exchange between dischargers and permitting authorities. 33 U.S.C. § 1362(6); *See Nat'l Cotton Council of Am. v. United States EPA*, 553 F.3d 927, 930 (6th Cir. 2009).

The Act's operative language demonstrates Congress's intent to establish an all-encompassing regulatory framework. By prohibiting "any addition of any pollutant" without qualification, Congress created a presumption of disclosure that places the burden of reporting squarely on the discharger. 33 U.S.C. § 1362(12). This reading aligns with the Act's fundamental purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The statutory structure reflects a considered legislative

judgment that effective water quality protection requires complete information about pollutant discharges to enable meaningful regulatory oversight.

The Second Circuit's seminal analysis in *United States v. Plaza Health Laboratories* provides a framework for interpreting the scope of regulated pollutants that powerfully supports this reading. *United States v. Plaza Health Laboratories*, 3 F.3d 643, 647 (2d Cir. 1993). The court's functional approach, focusing on a substance's potential to degrade water quality rather than its explicit enumeration, reflects Congress's intent to create a dynamic regulatory system capable of addressing evolving environmental threats. *Id*. This interpretation gains particular force when applied to PFAS compounds—synthetic "forever chemicals" whose profound environmental persistence and documented health risks epitomize the hazards Congress sought to regulate. American Cancer Society, *Teflon and Perfluorooctanoic Acid (PFOA)*, https://www.cancer.org/cancer/risk-prevention/chemicals/teflon-and-perfluorooctanoic-acid-pfoa.html (last visited Jan. 17, 2025).

ComGen's conduct illustrates precisely why Congress designed the Act to require comprehensive disclosure. Despite direct inquiry from VDEP regarding PFAS discharges, ComGen withheld critical information about known contamination. This strategic nondisclosure frustrated VDEP's statutory duty to establish appropriate permit limitations and effectively neutered the Act's protective framework. The permit shield defense was never intended to reward such deliberate opacity.

The legislative history further illuminates Congress's intent to require comprehensive pollutant disclosure. The 1972 amendments to the Federal Water Pollution Control Act specifically sought to strengthen the permitting process by ensuring regulators had complete information about discharges. S. Rep. No. 92-414, at 3735 (1971). Allowing dischargers to selectively withhold

information about known pollutants would create precisely the regulatory blindness Congress worked to eliminate.

Moreover, the Act's carefully balanced system of cooperative federalism depends on accurate information flow between dischargers and state permitting authorities. When companies like ComGen deliberately withhold data about known pollutants, they undermine states' ability to exercise their delegated authority effectively. This threatens not only water quality, but the entire federal-state partnership Congress established as the Act's implementing mechanism.

The practical consequences of accepting ComGen's position would be severe. If dischargers could shield themselves from liability simply by failing to disclose known pollutants, the permit system would devolve into a regulatory shell game where companies are incentivized to withhold rather than report contamination. This would render the Act's carefully constructed permitting scheme essentially meaningless, transforming what Congress designed as a proactive regulatory tool into little more than a voluntary disclosure program.

The Clean Water Act requires full disclosure of all known pollutants during the permitting process as a fundamental prerequisite for lawful discharge authorization.

B. ComGen's failure to satisfy statutory disclosure requirements precludes invocation of the Clean Water Act's permit shield defense, as the defense demands strict adherence to all mandatory disclosure obligations.

The company's intentional concealment of PFOS and PFBS discharges contradicts both the express terms of 40 C.F.R. § 122.64(a)(2) and the Clean Water Act's foundational purpose. Unlike the factual circumstances in *Atlantic States*, where the court addressed incidental omissions of unregulated chemicals, ComGen's conduct represents an intentional misrepresentation in direct response to regulatory inquiry. *Atl. States,*12 F.3d at 357-58. This distinction is critical because it implicates the core integrity of the permitting process itself.

The Clean Water Act's permit shield defense operates within a carefully constructed statutory framework that imposes unambiguous disclosure obligations on permit applicants. Under 40 C.F.R. § 122.64(a)(2), "the permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time" constitutes explicit grounds for permit termination. 40 C.F.R. § 122.64(a)(2). This disclosure mandate serves as the primary mechanism through which Congress implemented its declared objective of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

The statutory structure reflects Congress's deliberate choice to predicate permit shield protection on complete and accurate disclosure. Any interpretation that would allow permit holders to deliberately withhold or misrepresent material information about known pollutant discharges would fundamentally undermine this carefully balanced regulatory scheme.

The Fourth Circuit's decision in *Piney Run Pres. Ass'n v. County Comm'rs*., articulates the controlling analytical framework for evaluating permit shield claims. Under *Piney Run,* the permit shield defense requires both: (1) compliance with express permit terms and (2) disclosure of pollutants reasonably anticipated by the permitting authority. This two-pronged approach properly balances administrative practicality with environmental protection imperatives. *Piney Run Pres. Ass'n v. County Comm'rs.*, 268 F.3d 255, 259 (4th Cir. 2001).

The "reasonable contemplation" standard established in *Piney Run* finds direct support in the Clean Water Act's legislative history, which envisions the permitting system as a cooperative regulatory scheme predicated on transparent disclosure. *Id*.; *S. Appalachian Mountain Stewards v. A & G Coal Corp.,* 758 F.3d 560, 569 (4th Cir. 2014). This standard creates a workable framework

that preserves administrative flexibility for truly unexpected pollutants while maintaining robust incentives for honest disclosure of known discharges.

The district court's reliance on *Atlantic States* fundamentally misinterprets both statutory construction and legislative intent. While *Atlantic States* correctly recognizes that permits need not exhaustively enumerate every conceivable pollutant, it cannot be read to shelter intentional misrepresentations from regulatory consequences. 12 F.3d 353 at 357. Such an interpretation would create an untenable regulatory regime by incentivizing strategic non-disclosure of known pollutants and reducing the permit process to a mere procedural formality rather than a substantive regulatory tool.

The Fourth Circuit's subsequent decision in *S. Appalachian Mountain Stewards v. A & G Coal Corp.* reinforces the proper interpretation of permit shield requirements. 758 F.3d 560, 567 (4th Cir. 2014). There, the court held that failure to properly disclose selenium discharges violated permit requirements and precluded permit shield protection. *Id*. This holding demonstrates that the permit shield defense cannot survive deliberate concealment of known pollutants.

ComGen's conduct represents a direct contravention of the Clean Water Act's disclosure obligations. The company maintained detailed internal records documenting consistent PFOS and PFBS discharges from Outlet 001. R. at 9. When specifically questioned about these substances by the Vandalia Department of Environmental Protection's deputy director, ComGen provided false assurances regarding their absence. R. at 4. This deliberate misrepresentation transforms the case from one of administrative oversight to active obstruction of the permitting process.

The gravity of ComGen's disclosure violation is amplified by the nature of the concealed pollutants. PFOS and PFBS belong to a class of "forever chemicals" that persist indefinitely in the environment and pose documented public health risks. Am. Cancer Soc'y, *Teflon and PFOA*,

supra. The EPA has specifically identified these substances as priority pollutants requiring careful regulatory scrutiny. *Id*. *See* U.S. Envtl. Prot. Agency, PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024 (Oct. 2021), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf. Allowing ComGen's permit shield to remain intact despite its deliberate concealment of these particularly dangerous substances would create precedent enabling regulated entities to strategically withhold information about their most harmful discharges.

The practical implications of accepting ComGen's permit shield defense would severely compromise the Clean Water Act's effectiveness. ComGen's deliberate failure to disclose its PFOS and PFBS discharges constituted a clear violation of the Clean Water Act's disclosure requirements, rendering its permit shield defense invalid as a matter of law. The district court's dismissal warrants reversal and reinstatement of the underlying Clean Water Act claims. Any contrary result would create dangerous precedent undermining the fundamental integrity of the national water quality protection framework.

II. *PINEY RUN*'S FOCUS ON FACTUAL COMPLIANCE REMAINS THE APPROPRIATE FRAMEWORK FOR EVALUATING PERMIT SHIELD CLAIMS AFTER *LOPER BRIGHT*.

The *Piney Run* framework for analyzing Clean Water Act permit compliance remains vital and binding precedent even after *Loper Bright* because it rests on fundamental statutory interpretation and factual analysis rather than administrative deference. *Piney Run,* 268 F.3d 255 at 268-70. Where, as here, a regulated entity knowingly conceals the discharge of harmful pollutants during the permitting process, that conduct falls outside the Clean Water Act's permit shield protection whatever standard of deference applied. The preservation of *Piney Run* aligns with core principles of statutory *stare decisis* while advancing Congress's objective of protecting

water quality through comprehensive permitting programs that mandate full disclosure of pollutants.

ComGen's intentional concealment of PFOS and PFBS discharges illustrates precisely why *Skidmore* deference remains appropriate for EPA's technical expertise even absent *Chevron*. The EPA's decades of scientific research and regulatory experience with PFAS compounds, as reflected in its Strategic Roadmap, exemplifies the type of specialized experience and investigative inquiries that warrants judicial respect under *Skidmore*'s framework. EPA, PFAS Strategic Roadmap, supra. This accumulated technical knowledge enables EPA to evaluate both the risks posed by undisclosed pollutants and the feasibility of monitoring and treatment options - precisely the type of scientific determinations that benefit from agency expertise while preserving ultimate judicial interpretive authority.

The continued application of *Piney Run* advances crucial environmental protection objectives while respecting post-*Loper Bright* jurisprudence. The framework ensures accountability by requiring honest disclosure during permitting, preventing strategic concealment of known pollutants, and protecting water quality through comprehensive permit coverage.

This Court should reaffirm that *Piney Run* remains binding precedent and provides the appropriate framework for evaluating ComGen's undisclosed discharges of PFAS compounds into the Vandalia River.

A. ComGen's Intentional Concealment of Known PFAS Discharges Violates The Clean Water Act Even After *Loper Bright* Because *Piney Run*'s Framework Relies on Statutory Interpretation And Factual Analysis Rather Than Agency Deference.

The Commonwealth Generating Company's discharge of PFOS and PFBS into the Vandalia River represents a stark example of regulatory evasion through strategic nondisclosure. Despite internal monitoring records documenting consistent discharges of these harmful chemicals since

2015, ComGen explicitly denied their presence when questioned by regulators. These discharges threaten the drinking water supply for Mammoth's residents while undermining the Clean Water Act's fundamental objective of protecting water quality through comprehensive permitting.

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* while eliminating *Chevron* deference generally, explicitly preserves prior statutory interpretations and frameworks that do not fundamentally rely on agency deference. 603 U.S. 369, 376 (2024). For interpretations grounded in statutory analysis and factual examination, like the *Piney Run* permit shield framework, the abrogation of *Chevron* has no destabilizing effect. This principle ensures stability in regulatory frameworks while respecting the Court's refined approach to agency authority.

The preservation of *Piney Run* aligns with core principles of statutory *stare decisis* and the Clean Water Act's fundamental objectives. As courts since *Loper Bright* have consistently held, prior precedents remain binding unless "clearly irreconcilable" with new Supreme Court authority. *Rorie v. McDonough*, 37 Vet. App. 430, 443-444 (2024). This standard reflects the judiciary's careful balance between legal evolution and stability, particularly in regulatory contexts where consistent interpretation enables effective environmental protection. *Id*. The *Piney Run* framework, focused on factual compliance with disclosure obligations rather than deference to agency interpretations, continues to provide the consistent structure needed to evaluate permit compliance and protect water quality. *Tennessee v. Becerra*, 117 F.4th 348, 364 (6th Cir. 2024) (rejecting argument that *Loper Bright* abrogated prior precedent merely because they referenced *Chevron*).

Indeed, *Piney Run*'s core analysis of whether pollutants were "within the reasonable contemplation" of permitting authorities examines factual questions about disclosure and compliance, not statutory ambiguity requiring deference. 268 F.3d 255 at 268-270. This focus on evaluating actual compliance with statutory obligations, rather than deferring to agency

interpretations of ambiguous provisions, demonstrates why *Piney Run* survives *Loper Bright* intact. The framework's emphasis on factual analysis and statutory requirements provides essential structure for implementing the Clean Water Act's mandate to protect water quality through robust permitting programs.

Maintaining *Piney Run* is crucial for environmental protection and regulatory certainty. Abandoning this established framework would create dangerous gaps in environmental protection and invite regulatory evasion through strategic nondisclosure of known pollutants. Such an outcome would fundamentally undermine the Clean Water Act's structure of cooperative federalism and its core objective of maintaining water quality through informed regulatory oversight.

The continued vitality of *Piney Run* after *Loper Bright* reflects sound jurisprudential principles and environmental policy, preserving critical Clean Water Act protections while respecting the Supreme Court's refined approach to agency authority.

B. *Skidmore* Deference Remains Vital Framework for Judicial Review of EPA's PFAS Expertise Post-*Loper Bright,* Compelling Preservation of *Piney Run*'s Permit Shield Analysis.

Even after *Loper Bright* eliminated *Chevron* deference, courts must still accord respect to agency interpretations based on their persuasiveness where the agency demonstrates specialized expertise, thorough consideration, and consistency in its regulatory approach, particularly in complex technical domains where Congress has explicitly charged the agency with implementation authority. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001). The EPA's comprehensive PFAS Strategic Roadmap exemplifies the type of expert agency guidance that continues to warrant judicial respect under *Skidmore*'s framework. *See* EPA, PFAS Strategic Roadmap, supra.

The Supreme Court's decision in *Loper Bright*, while curtailing *Chevron* deference, did not disturb the foundational principle that agency interpretations represent "a body of experience and informed judgment" deserving weight based on their power to persuade. *Skidmore*, 323 U.S. 134 at 140. Indeed, *Skidmore*'s focus on the persuasive value of agency expertise provides a more nuanced framework for judicial consideration of agency interpretations, one that remains vital in our modern administrative state. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (noting *Skidmore* deference reflects the agency's interpretive method and substantive expertise).

The continuing validity of Skidmore deference post-*Loper Bright* is particularly relevant in technical regulatory domains where Congress has explicitly recognized the need for agency expertise. *Lopez v. Garland*, 116 F.4th 1032, 1036 (9th Cir. 2024). The EPA's approach to PFAS regulation illustrates why *Skidmore* remains essential: for over two decades, the agency has developed sophisticated scientific understanding and regulatory expertise across multiple statutory frameworks, including the Clean Water Act, Safe Drinking Water Act, and Toxic Substances Control Act. 5 Law of Hazardous Waste § 17.06 (2024). This accumulated expertise, reflected in the agency's Strategic Roadmap, demonstrates precisely the kind of "thoroughness evident in its consideration" and "validity of its reasoning" that *Skidmore* contemplates. *Skidmore*, 323 U.S. at 140.

Congress's recent actions further reinforce the appropriateness of according to *Skidmore* respect to EPA's PFAS guidance. The 2020 National Defense Authorization Act's mandate to add PFAS compounds to the Toxic Release Inventory reflects legislative recognition of EPA's technical expertise in this domain. 5 Law of Hazardous Waste § 17.06 (2024). This congressional validation of EPA's role in PFAS regulation demonstrates why *Skidmore* deference remains vital

even absent *Chevron*: it allows courts to benefit from agency expertise while maintaining ultimate interpretive authority.

The EPA's 2021 Strategic Roadmap exemplifies how *Skidmore* deference operates in the post-*Loper Bright* landscape. The Roadmap's comprehensive approach to research, restriction, and remediation reflects both technical expertise and regulatory consistency - factors that remain relevant to judicial analysis even after *Chevron*'s demise. *See* EPA, PFAS Strategic Roadmap, supra. Moreover, the Roadmap's alignment with congressional mandates for PFAS regulation demonstrates the kind of reasoned decision-making that warrants judicial respect under *Skidmore*'s framework. *Id*.

In an era of increasingly complex environmental challenges, *Skidmore*'s balanced approach to agency expertise remains essential for effective judicial review of technical regulatory programs, providing courts with crucial expert guidance while preserving judicial interpretive authority. The EPA's carefully reasoned approach to PFAS regulation, as embodied in its Strategic Roadmap, warrants judicial respect under this enduring framework.

III. SCCRAP HAS STANDING TO CHALLENGE COMGEN'S COAL ASH CLOSURE PLAN FOR THE LITTLE GREEN RUN IMPOUNDMENT.

Under Article III's standing framework, environmental organizations may establish organizational standing by demonstrating that at least one member has suffered a concrete injury fairly traceable to the challenged conduct, that the organization's mission encompasses the interests it seeks to vindicate through litigation, and that neither the claim asserted, nor the relief requested demands individualized member participation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

SCCRAP readily satisfies these requirements through its challenge to ComGen's coal ash disposal practices and PFAS discharges. The organization's members have curtailed their

recreational activities in the Vandalia River watershed due to well-documented contamination, exemplifying the type of concrete environmental injury that has long supported organizational standing. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). These recreational and aesthetic harms stem directly from ComGen's unpermitted PFAS discharges and inadequate coal ash containment, as confirmed by the company's own monitoring data showing elevated levels of arsenic and cadmium in downgradient wells. R. at 9-10.

Moreover, SCCRAP's organizational mission of protecting water resources from coal ash contamination aligns precisely with the interests it seeks to vindicate through this litigation. The organization has specifically targeted facilities like the Little Green Run Impoundment that combine groundwater contamination with PFAS discharges, reflecting its dual objectives of safeguarding public waters and promoting sustainable energy practices. R. at 8. This targeted focus demonstrates the required nexus between SCCRAP's institutional purpose and the environmental harms it challenges.

SCCRAP's requested injunctive relief – requiring proper PFAS permitting and adequate closure planning - would directly address its members' injuries without demanding individual participation. R. at 12-13. Courts have consistently recognized that such prospective remedies are particularly suited for organizational standing, as they vindicate collective environmental interests through institutional litigation. *Int'l Union v. Brock*, 477 U.S. 274, 287-88 (1986).

The district court erred in dismissing SCCRAP's claims for lack of standing, as the organization has demonstrated all elements required for organizational standing under well-established Supreme Court precedent.

A. SCCRAP Members Have Individual Standing Because They Have Demonstrated Concrete Injuries from ComGen's Documented PFAS and Heavy Metal Discharges into the Vandalia River System, Which Have Directly Impaired Their Recreational Activities and Property Interests In Ways That Court-Ordered Relief Would Meaningfully Address.

The first element for organizational standing requires SCCRAP to show that at least one of its members has standing. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555 (5th Cir. 1996). This element is easily met here.

The dispute over SCCRAP members' standing arises in the context of one of the nation's most pressing environmental challenges - the safe closure and remediation of coal ash impoundments. The Little Green Run Impoundment, containing approximately 38.7 million cubic yards of coal combustion residuals in an unlined facility, exemplifies the complex intersection of energy infrastructure legacy issues and modern environmental protection imperatives. R. at 5. This case presents fundamental questions about citizens' ability to challenge potentially hazardous waste management practices before environmental degradation becomes irreversible.

Under Article III's standing doctrine, individual members of an association must demonstrate: (1) a concrete and particularized injury in fact that is actual or imminent; (2) a causal connection between that injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable court decision. *Friends of the Earth, Inc.*, 528 U.S. 167 at 180-81. This tripartite framework ensures that courts adjudicate genuine controversies while preserving Congress's intent to enable citizen enforcement of environmental protections.

SCCRAP members have suffered concrete injuries to their aesthetic, recreational, and property interests – classic examples of cognizable environmental harms under Supreme Court precedent. Members of SCCRAP's Mammoth chapter have curtailed their recreational activities in and around the Vandalia River due to well-founded concerns about PFAS, arsenic, and cadmium

contamination. R. at 10. The Supreme Court has explicitly recognized that such self-imposed restrictions on recreational activities, based on reasonable fears of contamination, constitute injury in fact. *Friends of the Earth*, 528 U.S. 167 at 183-84. Moreover, several SCCRAP members have concrete economic interests at stake, having placed deposits on homes in a planned development that may be impacted by groundwater contamination. R. at 9. These combined recreational and property interests present precisely the type of "concrete and particularized" harm that supports standing.

The causal connection between ComGen's conduct and SCCRAP members' injuries is clear and direct. Environmental plaintiffs need not establish causation with scientific certainty; they must show the defendant's actions contribute to the environmental harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, ComGen's own monitoring data reveals elevated levels of arsenic and cadmium in downgradient wells, while independent testing has confirmed PFAS contamination in the mixing zone of Outlet 001. R. at 9. The Fifth Circuit's three-part test for "fairly traceable" injuries is readily satisfied: ComGen has discharged pollutants without proper permits, into waters SCCRAP members use, causing the type of injuries alleged. *Sierra Club, Lone Star Chapter*, 73 F.3d 546, 557-558. The fact that monitoring wells have consistently shown elevated levels of arsenic and cadmium since testing began in 2021 also strengthens the causal link between ComGen's operations and members' injuries.

The redressability requirement is satisfied because the requested relief would directly address the sources of SCCRAP members' injuries. A favorable ruling would require ComGen to obtain proper permits for PFAS discharges and implement an adequate closure plan for the Impoundment, thereby reducing future risk of contaminant releases to both groundwater and surface water. Courts have consistently held that even partial remediation satisfies redressability; the mere fact that some

contamination may persist does not defeat standing. *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980-81 (4th Cir. 1992). Indeed, RCRA's statutory purpose of preventing future environmental harm would be frustrated if citizens needed to demonstrate complete elimination of contamination to establish standing. 42 U.S.C. § 6972(a)(1)(B)

SCCRAP's members meet all elements required for Article III standing. Thus, SCCRAP meets the first element required for organizational standing.

B. SCCRAP's Mission to Protect Water Resources from Coal Ash Contamination Is Directly Germane to The Environmental Interests It Seeks to Vindicate Through This Litigation.

SCCRAP satisfies the second element of organizational standing because its interest in preventing water pollution from coal ash impoundments is germane to its organizational mission of environmental protection and advocacy for sustainable energy practices.

An organization satisfies the germaneness requirement for associational standing when it seeks to protect interests that are intrinsically related to its organizational mission and purpose. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Courts have consistently held that environmental organizations meet this standard when challenging conduct that threatens the natural resources their members use and enjoy, particularly where the organization's core mission involves protecting those specific environmental interests. *See Friends of the Earth, Inc.*, 528 U.S. 167 at 181-83.

SCCRAP's challenge to ComGen's conduct falls squarely within the organization's foundational purpose of holding coal ash impoundment operators accountable and protecting water resources from industrial contamination. The record demonstrates that SCCRAP "has specifically begun targeting coal-fired power plants with coal ash ponds on site that have both groundwater problems and PFAS discharges," as these facilities present the precise environmental threats

SCCRAP was established to combat. R. at 8. This targeted focus reflects SCCRAP's dual mission of "protect[ing] public water from pollutants from the fossil fuel industry and [] transition[ing] to a cleaner, more sustainable energy supply that does not create harmful by-products, like coal ash." *Id.*

The interests SCCRAP seeks to vindicate through this litigation - preventing PFAS contamination of the Vandalia River and addressing groundwater pollution from the Little Green Run Impoundment - are intimately linked to its organizational objectives. SCCRAP's Mammoth chapter members have curtailed their recreational activities in the Vandalia River due to concerns about PFAS, arsenic, and cadmium pollution – precisely the type of environmental degradation SCCRAP works to prevent through regulatory enforcement. R. at 10. By seeking to compel ComGen's compliance with the Clean Water Act and RCRA, SCCRAP is fulfilling its core purpose of ensuring that coal ash disposal does not imperil public waterways.

Because SCCRAP's organizational mission directly aligns with the environmental interests it seeks to protect through this action, the germaneness requirement for associational standing is satisfied.

C. SCCRAP's Request for Prospective Injunctive Relief to Remedy Environmental Violations Eliminates Any Need for Individual Member Participation.

SCCRAP readily satisfies the third prong of associational standing by seeking prospective injunctive relief that aligns perfectly with its organizational mission and does not require individual member participation. The organization's claims challenging ComGen's environmental compliance fall squarely within established precedent for associational standing.

Courts have consistently held that the third element of associational standing is met when an organization pursues injunctive or declaratory relief to enforce environmental regulations, rather

than individualized monetary damages or fact-specific claims requiring member testimony. *Hunt*, 432 U.S. 333 at 343. This requirement ensures judicial efficiency while allowing organizations to vindicate collective interests through institutional litigation. *Int'l Union*, 477 U.S. 274 at 287-88. The policy underlying this rule recognizes that organizational plaintiffs are often best positioned to efficiently pursue broad environmental compliance through injunctive relief.

Here, SCCRAP seeks purely prospective remedies requiring ComGen to comply with the Clean Water Act and RCRA regulations regarding its coal ash disposal practices. The organization's request for injunctive relief to prevent ongoing environmental violations falls squarely within the type of claims courts have deemed appropriate for associational standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). No individualized proof from SCCRAP's members is necessary to establish ComGen's regulatory violations or the appropriate injunctive remedy. Moreover, allowing SCCRAP to pursue these claims promotes efficient resolution of regional environmental concerns affecting the broader community. The organization's institutional capacity to litigate complex environmental regulations serves both judicial economy and effective environmental enforcement.

Therefore, because SCCRAP seeks forward-looking injunctive relief to remedy systemic environmental violations rather than individualized damages, it satisfies the third requirement for organizational standing. The nature of SCCRAP's claims and requested relief align perfectly with established precedent confirming associational standing in environmental enforcement actions.

IV. COMGEN'S CONTAMINATED COAL ASH IMPOUNDMENT PRESENTS AN IMMINENT AND SUBSTANTIAL THREAT TO GROUNDWATER AND SURFACE WATERS THROUGH DOCUMENTED ARSENIC AND CADMIUM LEACHING THAT REQUIRES RCRA PROTECTION INDEPENDENT OF CURRENT HUMAN EXPOSURE.

The Resource Conservation and Recovery Act's (RCRA) citizen suit provision creates a broad private right of action to address environmental contamination that "may present an

imminent and substantial endangerment," reflecting Congress's intent that RCRA serve as a comprehensive environmental protection scheme. 42 U.S.C. § 6972(a)(1)(B). The statute's plain language and structure establish that environmental degradation alone constitutes an actionable harm, independent of demonstrated human exposure. Courts have consistently interpreted this provision liberally to effectuate RCRA's remedial purpose of preventing future environmental harm, without requiring proof of actual harm to human health. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005).

ComGen's Little Green Run Impoundment exemplifies precisely the type of environmental threat that Congress sought to address through RCRA's endangerment provision. The uncontroverted evidence shows persistent arsenic and cadmium contamination in downgradient monitoring wells at levels resulting in the drinking water being unsuitable for human consumption. R. at 9. This contamination has persisted for years and, as both environmental and industry experts agree, likely began 5-10 years before the first monitoring report in 2021. R. at 8. The impoundment's proximity to the Vandalia River, coupled with its unlined construction and location below sea level, creates an ongoing risk of contaminant migration into surface waters - exactly the type of environmental degradation that motivated Congress to enact RCRA's protective framework.

The district court's contrary interpretation effectively reads the phrase "or the environment" out of the statute, violating fundamental principles of statutory construction that require giving effect to every word Congress employs. RCRA's plain language, reinforced by its structure and purpose, establishes that environmental contamination alone constitutes an actionable endangerment, independent of demonstrated human exposure. Therefore, this Court should

recognize RCRA's explicit statutory protection of the environment and reverse the district court's dismissal of SCCRAP's endangerment claim.

A. The Resource Conservation and Recovery Act's Plain Language and Congressional Intent Establish Independent Environmental Protection Absent Human Exposure.

The RCRA explicitly authorizes citizen suits to address imminent and substantial endangerment to "health or the environment," establishing distinct and independent bases for liability that do not require human exposure. 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Congress's deliberate use of the disjunctive "or" manifests an unambiguous intent to protect environmental resources independently from human health concerns. The statutory text, structure, and purpose demonstrate that environmental degradation alone constitutes an actionable harm under RCRA's endangerment provision.

The clear statutory language finds robust support in jurisprudential interpretation. In *Burlington N. & Santa Fe Ry. v. Grant*, the Tenth Circuit conducted a comprehensive analysis of RCRA's endangerment provision, emphasizing that "imminency" refers to the nature and severity of the threat rather than temporal proximity of harm. *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007). The court articulated that an endangerment is "substantial" when there is reasonable cause for concern that environmental resources may be exposed to risk absent remedial intervention. *Id*. at 1021. This interpretation advances RCRA's fundamental purpose of preventing environmental degradation before it materializes into acute harm.

The Third Circuit's analysis in *Interfaith Community Organization* provides particularly instructive guidance. There, the court explicitly rejected arguments that endangerment claims require a "potential population at risk," finding such interpretation irreconcilable with RCRA's plain text and congressional purpose. *Interfaith Cmty. Org.*, 399 F.3d 248 at 259-60. The court

emphasized that § 6972(a)(1)(B)'s disjunctive phrasing deliberately creates independent grounds for environmental protection, absent human exposure.

Here, ComGen's Little Green Run Impoundment exemplifies the type of environmental threat RCRA was designed to address. The uncontroverted evidence shows persistent arsenic and cadmium contamination in downgradient monitoring wells at levels exceeding federal advisory standards and Vandalia's groundwater quality requirements. This contamination has persisted for years and, as both environmental and industry experts agree, likely began 5-10 years before the first monitoring report in 2021. The impoundment's proximity to the Vandalia River and its unlined construction create an ongoing risk of contaminant migration into surface waters, precisely the type of environmental degradation Congress sought to prevent through RCRA's endangerment provision.

The district court's contrary interpretation effectively reads the phrase "or the environment" out of the statute, violating fundamental principles of statutory construction that require giving effect to every word Congress employs. RCRA's plain language, reinforced by its structure and purpose, establishes that environmental contamination alone constitutes an actionable endangerment, independent of demonstrated human exposure.

Therefore, this Court should recognize RCRA's explicit statutory protection of the environment and reverse the district court's dismissal of SCCRAP's endangerment claim.

B. *The District Court's Misplaced Reliance on Tri-Reality Co. v. Ursinus College Improperly Restricts RCRA's Citizen Suit Provision By Requiring Proof of Active Harm Rather Than Risk a Future Environmental Endangerment.*

The Resource Conservation and Recovery Act's citizen suit provision creates a broad private right of action to address environmental contamination that "may present an imminent and substantial endangerment," reflecting Congress's intent that RCRA serve as a comprehensive

environmental protection scheme. 42 U.S.C. § 6972(a)(1)(B). Courts have consistently interpreted this provision liberally to effectuate RCRA's remedial purpose of preventing future harm to the environment, without requiring proof of actual harm to human health. *See Interfaith Cmty. Org*, 399 F.3d 248 at 258.

ComGen's reliance on *Tri-Realty Co. v. Ursinus College*, is misplaced given the materially different factual circumstances and the case's departure from RCRA's statutory objectives. In *Tri-Realty*, the court dismissed an RCRA claim where the contamination was historical and static, with no evidence of ongoing migration or pathways for environmental exposure. 124 F. Supp. 3d 418, 455 (E.D. Pa. 2015). The *Tri-Realty* court's narrow interpretation effectively required proof of actual harm, rather than the possibility of harm that Congress specified in the statutory text.

This case stands in contrast. SCCRAP has presented concrete evidence through ComGen's own groundwater monitoring data showing elevated levels of arsenic and cadmium above federal advisory levels and Vandalia's groundwater quality standards. This contamination stems from an unlined 71-acre impoundment containing 38.7 million cubic yards of coal ash that continues to leach pollutants. R. at 5. Unlike the contained historical contamination in *Tri-Realty*, the Little Green Run Impoundment presents an active, ongoing source of contamination that environmental groups agree has likely been leaching for 5-10 years before the first monitoring report in 2021.R. at 8.

Moreover, ComGen's proposed closure plan would permanently store coal ash below sea level and in contact with groundwater, creating additional pathways for future contamination through floods, storms, and hurricanes. These circumstances precisely match the type of environmental risk that Congress sought to address through RCRA's citizen suit provision. The presence of an unlined impoundment actively leaching hazardous substances into groundwater,

with clear pathways for continued and increased future contamination, establishes an imminent and substantial endangerment under RCRA's plain text and purpose.

CONCLUSION

This Court should REVERSE the judgment of the United States District Court for the Middle District of Vandalia's.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 8