C.A. No. 24-0682

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

STOP COAL COMBUSTION RESIDUAL ASH PONDS,

Appellant,

v.

COMMONWEALTH GENERATING COMPANY,

Appellee.

On appeal from the United States District Court

for the Middle District of Vandalia

BRIEF OF APPELLEE

Team Six

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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had subject matter jurisdiction due to the federal question presented by the allegations of Stop Coal Combustion Residual Ash Ponds ("SCCRAP") that the Commonwealth Generating Company ("ComGen") violated federal law under the Clean Water Act (the "CWA") and the Resource Conservation and Recovery Act ("RCRA"). R. 12. Jurisdiction is proper in this Court because SCCRAP is appealing the district court's final decision to grant ComGen's Motion to Dismiss in its entirety on October 31, 2024. 28 U.S.C. § 1291; R. 13. SCCRAP filed a notice for this appeal on November 10, 2024, within 30 days, timely per Fed. R. App. Proc. 4(a)(1)(A). R. 13, 15.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ComGen's discharge of PFOS and PFBS from Outlet 001 constitutes an unpermitted discharge under the CWA when these substances are not regulated under the CWA or required to be disclosed during the permitting process.

II. Whether the recent Supreme Court decision to limit deference to agency guidance in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) renders the Reasonable Contemplation standard set forth in *Piney Run* inapplicable.

III. Whether SCCRAP has standing to challenge ComGen's closure plan for the Little Green Run Impoundment under RCRA when SCCRAP's alleged injuries stem from historical discharges that predate the closure activities and are not fairly traceable to the implementation of the closure plan itself.

IV. Whether SCCRAP can pursue an imminent and substantial endangerment claim under RCRA based exclusively on environmental harm to groundwater, absent any allegation of endangerment to a living population.

STATEMENT OF THE CASE

I. Factual Background

ComGen operates the Vandalia Generating Station, a coal-fired electric generating plant that has provided Vandalia residents with reliable and affordable energy for over a century. R. 3–4. In 1965, ComGen opened the Vandalia Generating Station, a coal-fired power plant that generates coal combustion residuals ("CCRs" or "coal ash"), which are byproducts of coal combustion. *Id*. at 3. These residuals are disposed of in the Little Green Run Impoundment, a surface impoundment adjacent to the Vandalia Generating Station. *Id*. at 5. The impoundment has been in use for decades and currently contains about 38.7 million cubic yards of coal ash and related materials. *Id*. The impoundment is unlined, but ComGen has been actively working to comply with federal and state regulations regarding its closure. *Id*. at 5–7.

In its commitment to the responsible production and provision of energy, ComGen works to keep the functional necessities of its business balanced with appropriate considerations of the environmental implications of its practices. *Id.* at 4. In recognition of this delicate balance, ComGen engages in many local environmental stewardship projects and implemented the "Building a Green Tomorrow" initiative in 2015. *Id*. This initiative aims to reduce pollution without sacrificing affordability for ComGen's customers by transitioning its energy generation portfolio to renewable sources, including solar and wind. *Id*. ComGen's dedication to implementing this initiative has resulted in the generation of over 110 megawatts of renewable energy across seven newly constructed solar and wind farms. *Id*. This success has allowed ComGen to begin the next phase of the "Building a Green Tomorrow" initiative and begin to retire its older coal-fired power plants, including the Vandalia Generating Station. *Id*. Given the global urgency in transitioning towards renewable energy sources, ComGen has worked diligently with the Vandalia Department of Environmental Protection ("VDEP") to retire the Vandalia Generating

Station by 2027. *Id*. In preparation for the plant's closure, ComGen submitted a closure plan for the impoundment to VDEP in December 2019. *Id*. at 6. The plan proposes to close the impoundment in place, in accordance with the Environmental Protection Agency's ("EPA") CCR Rule and state regulations. *Id*. ComGen expects to spend over $1 billion to complete this closure plan and has already invested approximately $50 million in its implementation, including the installation of groundwater monitoring wells. *Id*. at 7.

ComGen has installed 13 groundwater monitoring wells around the impoundment to ensure compliance with environmental regulations. *Id*. at 7, 8 fig. 1. These wells have been in operation since 2021, and annual monitoring reports have shown elevated levels of arsenic and cadmium in the downgradient wells. *Id*. at 8. However, there is no evidence that these contaminants have reached the Vandalia River or any public drinking water supply. *Id*. Both environmental and industry groups agree this contamination has been leaching for at least five to ten years before the first monitoring report in 2021, predating the closure activities by at least three years. *Id*. at 7–8.

The Vandalia Generating Station operates under a Vandalia Pollutant Discharge Elimination System ("VPDES") permit. *Id*. at 4. This permit covers discharges from three outfalls into the Vandalia River. *Id*. This permit was issued in 2020 and does not include limits or monitoring requirements for perfluorooctane sulfonic acid ("PFOS") or perfluorobutane sulfonic acid ("PFBS"). *Id*. ComGen has consistently maintained that it is not required to monitor or report PFOS or PFBS under its VPDES permits, as these substances are not regulated under the CWA, nor were they listed in the permit application, and were not specifically requested by VDEP during the permitting process. *Id*. at 4, 9.

II. Procedural History

On September 3, 2024, SCCRAP filed a citizen suit alleging three claims against ComGen in the United States District Court for the Middle District of Vandalia. R. 12. First, SCCRAP

alleged ComGen violated the CWA for discharging PFOS and PFBS from Outlet 001 without a permit and seeks civil penalties as well as declaratory and injunctive relief. *Id*. Secondly, SCCRAP alleges the Impoundment closure plan is "inadequate" under RCRA, for which it seeks injunctive relief for its alleged recreational and aesthetic injuries by preventing the closure plan's implementation—though it did not present any evidence that contaminates would reach any area owned or used by its members other than the possibility of a hypothetical natural disaster causing contaminates to disperse or a future housing development at an undefined point in the future wishing to use groundwater near the impoundment no sooner than 2031. *Id*. at 8, 9, 10, 12. Finally, SCCRAP filed an RCRA imminent and substantial endangerment claim based solely on contamination to groundwater (which is unused by any living population), seeking declaratory and injunctive relief as well as civil penalties. *Id*.

On September 20, 2024, ComGen filed a motion to dismiss SCCRAP's complaint. *Id*. at 13. The district court granted ComGen's motion to dismiss in its entirety on October 31, 2024. *Id*. The court held that SCCRAP's CWA claim failed because PFOS and PFBS were neither regulated under the permit nor did ComGen have an obligation to disclose them. *Id*. at 14. As to the challenge against the closure plan, the court, *sua sponte*, found SCCRAP lacked standing to bring such a claim because its alleged injuries are not fairly traceable to the challenged closure plan, nor would a favorable ruling redress the alleged injuries. *Id*. Finally, the court dismissed the RCRA imminent and substantial endangerment claim because RCRA does not support claims based solely on environmental harm, absent any evidence of endangerment to a living population. *Id*.

On November 10, 2024, SCCRAP filed an appeal to the United States Court of Appeals for the Twelfth Circuit, challenging the district court's dismissal of its claims. *Id*. at 15. On December 30, 2024, this Court issued an order setting forth the issues to be briefed and argued on

appeal, including the applicability of the CWA to PFOS and PFBS discharges, SCCRAP's standing to sue the impoundment closure plan, and the viability of an RCRA imminent and substantial endangerment claim based solely on environmental harm. *Id*. at 1–2, 15.

SUMMARY OF THE ARGUMENT

I. The discharge of PFOS and PFBS from ComGen's Vandalia Generating Station does not constitute a CWA violation because ComGen's permit did not require disclosure of these substances, and the permitting authority imposed no monitoring or effluent limits on them. 33 U.S.C. § 1311(a) prohibits the discharge of pollutants into navigable waters unless authorized by an NPDES permit. However, the permit shield provision states that compliance with an NPDES permit is deemed compliance with the CWA, protecting permit holders from liability for unlisted pollutants. 33 U.S.C. § 1342(k). Courts have held that discharges of unlisted pollutants do not violate the CWA if there was no legal obligation to disclose them during the permitting process. *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). The *Atlantic States* court specifically held that the EPA does not require permit applicants to disclose every possible pollutant in wastewater and that unlisted pollutants do not violate the CWA unless their disclosure was explicitly required.

II. The reasoning in *Piney Run Preservation Association v. County Commissioners of Carroll County*, 268 F.3d 255 (4th Cir. 2001) is inapplicable because it relied on the now-overruled standard established in *Chevron* as to EPA's interpretation of the CWA's permit shield provision. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), overruled by, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The Supreme Court overruled *Chevron*, eliminating judicial deference to agency interpretations of ambiguous statutes.

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). Without *Chevron*, *Piney Run*'s "reasonable contemplation" standard lacks legal grounding. The correct framework is found in *Atlantic States*, which holds that discharges of unlisted pollutants do not violate the CWA unless disclosure was explicitly required by the permitting authority.

III. SCCRAP fails to establish standing under Article III of the Constitution as to its challenge against the Impoundment's closure plan for three key reasons: speculative injury, as well as a lack of causation and redressability. Firstly, the alleged injuries require a significant chain of uncertain events to occur, making them insufficient and too speculative to be deemed "actual or imminent" under the Supreme Court's guidance. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Secondly, the aesthetic and recreational injuries SCCRAP alleges are not fairly traceable to the challenged conduct (i.e., the closure plan). Rather, they are the result of historical discharges, evidenced by undisputed data that the materials began leaching before any closure activities commenced. Finally, a favorable court ruling could not redress SCCRAP's alleged injuries because it would enjoin the closure plan, leaving the site in its current state and allowing contaminants to leach without mitigation. As such, it is clear under the *Lujan* framework that SCCRAP lacks the necessary requirements to establish standing, and this Court should affirm the district court's order.

IV. SCCRAP's imminent and substantial endangerment RCRA claim is based purely on environmental harm in and of itself. Although some courts have left the door open for such a claim, this RCRA claim has conventionally been understood as requiring harm or threat of harm to a living population (e.g., humans or other animals, plants). *See, e.g.*, *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D.W.

Va. Sept. 28, 2023). An overbroad interpretation to the contrary would flaunt the legislative history and place a substantial strain on the judiciary and regulated entities (such as ComGen) as a result of the legal uncertainty it would create. Thus, this Court should recognize harm and threat of harm to living populations as a requirement to prevail on an RCRA imminent and substantial endangerment claim.

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of ComGen's motion to dismiss *de novo*. *See, e.g.*, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

II. Because ComGen has a VPDES permit for outfalls 1, 2, and 3 of the Vandalia Generating Station, the CWA's permit shield provision protects ComGen's discharges of PFOS and PFBS.

The CWA permit shield provision explicitly protects permit holders from liability for discharges of pollutants that were not required to be disclosed during the permitting process. The Permit Shield defense is available to a permittee who is discharging pollutants not listed in the permit unless disclosure of those pollutants was required by the permitting authority. *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). Liability under the CWA does not extend to the PFOS and PFBS that were found to be discharged Because the EPA does not require applicants to list every possible chemical discharged by a permittee. *Id* at 357–58 (explaining that "the EPA does not demand even 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'") (quoting Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976)). In this case,

ComGen's 2020 VPDES permit did not include PFOS or PFBS, nor did the VDEP formally request information about them. R. 3–4. Under the *Atlantic States* framework, ComGen had no obligation to disclose these substances, and their discharge is protected by the permit shield. Finally, even if the reasonable contemplation standard were good law ComGen would not be in violation of the CWA because the discharged pollutants were with the reasonable contemplation of the permitting authority.

A. The plain language of the Permit shields ComGen from liability for the discharge of PFOS and PFBS because the Clean Water Act does not require permit holders to disclose these substances.

The CWA does not mandate that National Pollutant Discharge Elimination System ("NPDES") permit holders disclose every potential pollutant in their permit applications. *Atlantic,* 12 F.3d 353. Applicable case law and regulations promulgated by the EPA has established that the permitting process does not require exhaustive disclosure of every conceivable pollutant, and permit shield protections remain available so long as the permittee complies with applicable reporting requirements. *See Alaska Community Action on Toxics v. Aurora Energy Services, LLC,* 765 F.3d 1169 (9th Cir. 2014) (establishing that polluters may discharge pollutants not specifically listed under NPDES or the state's equivalent, so long as they comply with appropriate reporting requirements and abide by new limitations when imposed on such pollutants); *also In Re Ketchikan Pulp Co*., 7 E.A.D. 605 (EAB 1998). Under the CWA, the discharge of any pollutant is unlawful unless authorized by an NPDES permit. 33 U.S.C. § 1311(a). However, compliance with an NPDES permit constitutes compliance with the CWA, shielding the permittee from liability. 33 U.S.C. § 1342(k). The CWA does not require permittees to disclose and seek authorization for every potential pollutant in their discharge. *Atlantic,* 12 F.3d 353. Instead, the permitting process is designed to regulate the most significant pollutants through express permit limitations, while others are addressed through separate disclosure requirements where necessary. *Id.* at 357. When

evaluating whether discharges not explicitly listed in a general permit violated the CWA, the court held that not every pollutant must be disclosed in the permitting process. *Id*. Furthermore, in *Natural Resources Defense Council, Inc. v. County of Los Angeles*, the court explained that *the language of the permit must be considered* in light of the structure of the permit, in cases where the permit provisions are "plain and capable of legal construction, the language alone must determine the permit's meaning." *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1204–05 (9th Cir. 2013). Therefore, a discharge of a pollutant that is not explicitly limited or prohibited and is not required to be disclosed, a permittee is not automatically in violation of the CWA for the discharge of such a pollutant.

The same principle is explained in *Atlantic*, which rejected the argument that an NPDES permit functions as an exhaustive list of permissible pollutants. 12 F.3d 353, at 357. The court recognized that the permitting scheme does not require identification and regulation of every chemical in wastewater discharges because doing so would be impractical. *Id*. Instead, permit holders must comply with disclosure requirements as directed by the permitting authority, rather than preemptively listing every possible pollutant in their application. *Id*.

B. ComGen followed disclosure requirements as mandated by the regulation by 40 C.F.R. § 122.21

Further, EPA regulations confirm that the permitting process does not require comprehensive disclosure of every chemical present in an applicant's wastewater. 40 C.F.R. § 122.21(g)(7). Under this regulation, applicants are required to disclose pollutants that they believe to be present and that meet specific regulatory thresholds. *Id*. The EPA has explicitly stated that a permittee's discharge of an unlisted pollutant does not automatically result in a violation when applicable reporting requirements are triggered. *See* 45 Fed. Reg. 33,516, 33,523 (1980) (noting that "a permittee may discharge a large amount of a pollutant not limited in its permit, and EPA

will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements"). Together, these authorities demonstrate that the CWA does not impose a blanket requirement that permittees disclose every potential pollutant in their permit application. Instead, liability depends on whether a pollutant is explicitly regulated by the permit or subject to applicable reporting obligations. The Fourth Circuit also explained as much when it explained that:

> Under the permitting scheme, a person wishing to discharge one or more pollutants applies for an individual permit from the proper state or federal agency. See 40 C.F.R. § 122.21. Using the disclosures from the application, as well as other available information, the agency then develops a draft permit made available to the public for notice and comment. After the administrative process has run its course, the agency can issue the permit. See 33 U.S.C. § 1342(a)(1), (b)(3); 40 C.F.R. §§ 122.41, 122.44, 124.10. Federal regulations require that the permit application include significant detail regarding the nature and composition of the expected discharges. 40 C.F.R. § 122.21(g).

S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 563 (4th Cir. 2014).

ComGen's permit does not list PFOS or PFBS as regulated pollutants, nor was ComGen required to disclose them in its permit application. ComGen's permit contains no such prohibition against PFOS or PFBS, nor does it impose any specific reporting requirements for these substances. R. 4. Additionally, there was no regulatory requirement to disclose such discharges to the permitting authority. 40 C.F.R. § 122.21. Because ComGen's discharges were not explicitly regulated under its permit, its compliance with permit terms shields it from liability under 33 U.S.C. § 1342(k). Since no such requirement existed at the time of permitting, ComGen's omission of PFOS and PFBS does not constitute a violation.

III. *Piney Run*'s "reasonable contemplation" standard is no longer valid after *Loper Bright* because its reasoning depends on *Chevron*

The Supreme Court's decision in *Loper Bright* overturned *Chevron* deference and fundamentally altered how courts must interpret ambiguous statutory provisions. *Loper Bright*

Enters. v. Raimondo, 603 U.S. 369 (2024). *Chevron* required courts to defer to federal agencies' interpretations of ambiguous laws, so in the absence of the doctrine, courts must exercise independent judgment when interpreting statutes rather than deferring to agency interpretations. *See generally* 467 U.S. 837. This ruling directly undermines *Piney Run*, which relied on *Chevron* to justify the "reasonable contemplation" standard for determining permit shield applicability. *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 259 (4th Cir. 2001). Because *Piney Run* was premised on deference to agency discretion, it is no longer an applicable standard to determine the viability of the permit shield defense. *Id*. Instead, courts must apply the CWA plain text, which does not impose liability for unlisted pollutants absent an explicit disclosure requirement. *Atlantic*, 12 F.3d at 357; *S. Appalachian*, 758 F.3d at 563; *Alaska Community Action on Toxics*, 765 F.3d at 1172.

In *Loper Bright*, the Supreme Court established that the Administrative Procedure Act ("APA") requires courts to exercise independent judgment when reviewing agency actions, including questions of statutory interpretation. 5 U.S.C. § 706; *Loper Bright*, 603 U.S. at 385. The Court ruled that *Chevron* deference, which required courts to defer to reasonable agency interpretations of ambiguous statutes, improperly transferred judicial authority to administrative agencies and conflicted with the APA's mandate that courts "decide all relevant questions of law." *Id*. at 2264; *Chevron*, 467 U.S. at 843. As a result, courts must apply traditional tools of statutory interpretation to determine the lawful interpretation of a given statute, regardless of agency input. *Id*. at 403. *Chevron*'s presumption that agencies should resolve statutory ambiguities was deemed a legal fiction, and the Court explicitly rejected the notion that ambiguity equates to delegation. *Id*. at 404. These principles directly invalidate *Piney Run*, which relied on *Chevron* to justify expanding the CWA's permit shield provision beyond its plain text. The court in *Piney Run* court

reasoned that *Chevron* required it to adhere to the interpretation provided by the EPA, and as a result:

> [the NPDES permit shields] its holder from liability under the Clean Water Act as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted.

Piney Run, 268 F.3d at 265. Because *Loper Bright* eliminated *Chevron*, *Piney Run*'s rationale no longer has a legal foundation. The *Piney Run* court's adoption of the "reasonable contemplation" standard was explicitly grounded in agency deference. 268 F.3d at 265. Under this standard, a pollutant was shielded from liability only if the permitting authority could have reasonably anticipated its presence. *Id*. at 267. This interpretation extended permit holder liability beyond the text of the permit, allowing agencies to impose restrictions on pollutants that were neither listed in a permit nor subject to an explicit disclosure requirement. *Id*.

The Supreme Court made clear that courts must independently interpret statutes without assuming that agencies have the authority to resolve ambiguities. 603 U.S. at 404. This means that the *Piney Run* court's deference to agency discretion was improper and cannot serve as a basis for expanding liability beyond the CWA's text. The Supreme Court also reaffirmed that statutory interpretation is fundamentally a judicial function. *Id*. at 2264. In rejecting *Chevron*, the Court emphasized that agency expertise does not justify transferring interpretive authority from the judiciary to administrative agencies. *Id*. at 402.

Courts must now interpret 33 U.S.C. § 1342(k) independently, without relying on agency discretion. This means that *Piney Run*'s "reasonable contemplation" standard is no longer a valid test for determining the scope of permit shield protections. Instead, courts must look solely to the statutory text, which does not impose liability for unlisted pollutants absent an explicit prohibition or disclosure requirement. 40 C.F.R. § 122.21; *see also Atlantic States*, 12 F.3d at 357 (holding

that permit holders are required to disclose only those pollutants explicitly mandated by the permitting authority). Because this reasoning was not based on *Chevron*, it remains valid following *Loper Bright*. Additionally, the court in *S. Appalachia*, clarified that the permit shield provision is meant to prevent permit holders from being forced to change their procedures due to changes in regulations, or to face enforcement actions over "whether their permits are sufficiently strict." As the record reflects the potentially harmful effects of substances like PFOS and PFBS are new to CWA permitting regime and as such, would go against the purpose of the permit shield provision. R. 4. Applying these principles to this case would make it clear that *Piney Run* cannot govern permit shield determinations. Instead, the statutory text of 33 U.S.C. § 1342(k) must control, and under that text, ComGen's compliance with its permit shields it from liability for unlisted pollutants. Because *Piney Run*'s rationale is no longer legally valid, it should not be applied in this case.

IV. SCCRAP's speculative injuries are not fairly traceable to the Impoundment's closure plan, nor would the relief sought provide redress to its alleged injuries, necessitating the dismissal of this claim for want of standing.

The district court correctly ruled that SCCRAP lacked standing to challenge ComGen's coal ash closure plan for the Impoundment. R. 14. SCCRAP fails to satisfy the constitutional requirements of causation and redressability, and this Court should affirm the district court's dismissal of SCCRAP's challenges to the coal ash closure plan for want of standing.

Article III of the U.S. Constitution limits federal courts to adjudicating only "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1. To establish standing, a plaintiff must demonstrate (1) an injury-in-fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury would be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). When an organization sues on behalf of its members, it must show that at least one member would have Article III standing to sue in their own right.

Warth v. Seldin, 422 U.S. 490, 511 (1975). The injuries SCCRAP alleges lack the requisite imminence, and its challenge to ComGen's coal ash closure plan also fails to meet the causation and redressability requirements of Article III standing.

A. SCCRAP's alleged injuries are too speculative and lack the requisite imminence to establish standing because they are based entirely on an uncertain chain of events.

An injury can only satisfy the standing requirements of Article III of the U.S. Constitution if it is "actual or imminent," not "conjectural or speculative." *Warth v. Seldin*, 422 U.S. at 511; *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin*, 489 F.3d 1279, 1293–94 (D.C. Cir. 2007) (rejecting standing in part because no one could know when the alleged future harm would occur); *Lujan*, 504 U.S. at 560 (finding plaintiffs lacked standing for asserting injuries that were too hypothetical and not tied to any specific, impending action by the defendants).

In *Lujan*, the plaintiffs alleged injuries in the form of the potential future destruction of endangered species in foreign countries, but the Court found no standing because the alleged injuries were speculative and not sufficiently concrete or imminent. *Lujan*, 504 U.S. at 560. Similarly, SCCRAP's alleged injuries in this case are speculative and lack the requisite imminence to establish standing. R. 8, 10, 12. SCCRAP does not present evidence that the challenged closure plan will result in coal ash reaching the Vandalia River, a public drinking water supply, or any other area where its members recreate or own property. R. 8, 10. However, SCCRAP notes a housing project is being considered, and that it contemplated using the contaminated groundwater *if* it were to go through. R. 9. Just as the speculative injury to foreign endangered species is inadequate to establish standing in *Lujan*, so is the speculated and unsubstantiated allegation of future harm due to the closure plan. *Id*.

SCCRAP also alleges injury because it believes a possible future natural disaster could elevate groundwater in the Impoundment and spill into the Vandalia River, akin to the possible

future car accidents alleged by plaintiffs in *Public Citizen* as its injury. R. 9. It provides no evidence of this risk, implying it identified a major oversight by VDEP without the help of any experts (notable in light of SCCRAP's ability to furnish human health experts and conduct their own quantitative tests for its other factual allegations). *Id*.

Like the plaintiffs in *Lujan* and *Public Citizen*, SCCRAP's injuries are based on a chain of uncertain events, which is insufficient to establish standing under Article III of the Constitution. Therefore, just as the Court in *Lujan* found the plaintiffs' injuries too speculative to confer standing, SCCRAP's claim should be dismissed.

B. The injuries SCCRAP purports are not fairly traceable to the coal ash closure plan itself, negating the evidence of causation required by Article III of the Constitution.

To satisfy the causal requirement in Article III of the U.S. Constitution, a plaintiff must demonstrate that its injury is "fairly traceable" to the defendant's conduct by showing a substantially likely causal link between the injury and the challenged action, not merely a tangential or speculative link. *Lujan*, 504 U.S. at 560; *see Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (1990) ("substantial likelihood of the alleged causality meets the test"); *Mobile Baykeeper, Inc. v. Alabama Power Co.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, at *13 (S.D. Ala. Jan. 4, 2024), reconsideration denied, No. CV 1:22-00382-KD-B, 2024 WL 3506708 (S.D. Ala. July 22, 2024) (finding a lack of standing because the plaintiff's injury was not caused by the coal ash closure plan but instead by the ongoing leaching of contaminants and therefore not "fairly traceable").

SCCRAP's alleged aesthetic and recreational injuries result from the slowly leaching contaminates from the Impoundment and are thus not "fairly traceable" to the contested coal ash closure plan. R. 10. Just as was the case in *Mobile Baykeeper*, the purported injury results from the leaching of contaminants, which significantly pre-dates ComGen's closure activities. R. 8. As

the district court correctly noted, SCCRAP would suffer the same injuries had the Impoundment not closed, which clearly indicates the closure plan is not causing the asserted aesthetic and recreational injuries. *Id*. at 14. Conversely, there is a "substantial likelihood" that the historical discharges may cause the alleged injuries, satisfying the test as explained in *Competitive Enterprise Institute. Id*. at 113. Thus, under the *Competitive Enterprise Institute* framework, SCCRAP lacks the causal standing requirement because it is not substantially likely that the closure plan could have caused the alleged injuries.

C. Even if SCCRAP could establish causation, the sought injunctive relief to prevent ComGen from implementing the closure plan would not redress alleged aesthetic and recreational injuries caused by the ongoing pollution.

To establish standing under Article III, a plaintiff must demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (rejecting standing based on "hypothetical future harm"). The plaintiff must show a "substantial likelihood" that the requested relief would effectively address the harm by a favorable decision from the court. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 79 (1978) (finding standing for neighbors of a proposed nuclear power plant asserting environmental and health injuries because there was a "substantial likelihood" that it would not be constructed if the contested law was struck down).

As was the case for plaintiffs in *Lujan*, a ruling in SCCRAP's favor could not redress its members' alleged aesthetic and recreational injuries caused by the historical discharge of pollutants from the Impoundment as it would merely ensure the ongoing leaching of contaminants would continue unmitigated. Just as the foreign endangered species in *Lujan* could not have been protected had the plaintiffs in *Lujan* received their sought-out remedy, it would be impossible to protect the Vandalia River or any other public water supply by granting SCCRAP's injunction

stopping ComGen's implementation of the closure plan. R. 12. The closure plan, approved by the VDEP, is designed to comply with all state and federal regulations. *Id*. 6–7. To the extent that SCCRAP alleges the VDEP-approved closure plan is purportedly insufficient, enjoining this effort to minimize pollution would not redress SCCRAP's injuries. *Id*. 12. Halting the closure plan would leave the impoundment in its current state, and the leaching to continue unabated.

V. SCCRAP fails to show any actual, non-speculative risk posed to a living population by the leaching contaminates, compelling affirmation of the district court's order.

RCRA was enacted to protect "human health and the environment" from hazardous or solid waste. 42 U.S.C. § 6902(a)(4). The Act includes a private cause of action provision against those who "contribut[e] to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). To prevail on such a claim, a plaintiff must show:

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

Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 258 (3d Cir. 2005) (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014-15 (11th Cir. 2004)); 42 U.S.C.S. § 6972(a)(1)(B). ComGen does not dispute either the first or second element of the claim; however, this Court should affirm the decision of the district court because SCCRAP has failed to show any "imminent and substantial endangerment." 42 U.S.C.S. § 6972(a)(1)(B).

A. Because no living populations are imminently and substantially threatened by the contaminates slowly leaching into the unused groundwater, this Court should affirm the district court's order.

Under RCRA, a successful imminent and substantial endangerment claim requires a plaintiff to show (1) a living population (i.e., humans, animals, or plants) (2) is imminently and substantially threatened by the presence of solid or hazardous waste at levels unacceptable by state or federal standards (3) and a pathway for current or near-term exposure to the waste. *See Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069 at *57 (S.D.W. Va. Sept. 28, 2023) (holding groundwater contamination in the absence of harm to humans or living populations did not constitute imminent and substantial endangerment); *Meghrig v. Kfc W.*, 516 U.S. 479, 485 (1996) (narrowly interpreting "imminent" to exclude remediated oil spills); *Interfaith*, 263 F. Supp. 2d at 814 (requiring a "pathway for current and/or future exposure" to establish an imminent and substantial endangerment claim); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 442 (E.D. Pa. 2015) ("[I]njunctive relief is inappropriate 'where the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree.'") (quoting *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982)); *also IOSTAR Corp. v. Stuart*, No. 1:07-CV-133, 2009 U.S. Dist. LEXIS 9476, at *15-16 (D. Utah Feb. 2, 2009) (noting that factual allegations "must be based on more than speculation to survive a motion to dismiss") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Furthermore, the involvement of state environmental agencies in monitoring and addressing the contamination weighs against prevailing on an imminent and substantial endangerment claim. *See Bd. of Cty. Comm'rs v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1111 (D. Colo. 2011) (noting that the state environmental agency's awareness of the contamination and allowance for the defendant to proceed with its remediation is evidence the agency did not consider the contamination imminent and substantial).

SCCRAP's claim fails for the same reason it did in *Courtland*, because it does not allege any endangerment to humans, animals, or plants. R. 12–13. SCCRAP's reliance and interpretation of *Interfaith* carries water for the Third Circuit, as environmental harm in and of itself was not found to be a *per se* violation of the imminent and substantial endangerment clause, the court merely held that environmental harm in and of itself "*may*" suffice under the clause. *Interfaith*, 399 F.3d at 261. No court has established how changes to an unused groundwater source, with no one planning to use it in a defined amount of time, could satisfy the requirement of establishing a pathway for exposure. SCCRAP's reliance on the possibility of a future housing development using the contaminated groundwater as a "living population" is speculative and temporally remote rather than imminent. R. 9. Furthermore, because no one has committed to building the housing development and using the water, this potential threat is not considered "imminent" under *Meghrig*. In their ruling, the Supreme Court narrowly interpreted imminence as an endangerment that "'threatens to occur immediately'" even if the harms are felt later. 516 U.S. at 485–86 (quoting *Webster's New International Dictionary of English Language* 1245 (2d ed. 1934). No matter how much time passes, no harm could be felt by any living population absent a hypothetical developer had committed or begun constructing the housing development.

Even if the developer committed to building and using the groundwater at issue, the development would not be completed until at least 2031. R. 9. It would nevertheless be difficult to reconcile 'imminence' with a temporal gap of six or more years and the speculative nature of the threat, especially given that speculation and temporal remoteness were both factors precluding injunctive relief in *Reilly Tar & Chemical Corp.* and *Tri-Realty*.

Given that injunctive relief is inappropriate due to the temporal remoteness and speculative nature of the claim per *Reilly Tar & Chemical Corp.* and *Tri-Realty*, what remains are SCCRAP's

sought-out declaratory relief and civil penalties. R. 12. However, it has been well established across various circuits and by the Supreme Court that citizens bringing RCRA "imminent and substantial endangerment" claims are not entitled to damages or civil penalties. *See, e.g.*, *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) ("While injunctive relief is available under [the citizen suit provision], the statute does not provide a private action for damages."); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 316 (6th Cir. 1985) (rejecting a claim for civil penalties because it was not expressly allowed for in the statute's text); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17–18 (1981) (declining to find civil penalties allowed by implication in two other environmental acts with analogous citizen suit provisions after a thorough analysis into the statues' construction and legislative histories); *Coburn v. Sun Chem. Corp.*, C.A. NO. 88-0120, 1988 U.S. Dist. LEXIS 12548, at *24 (E.D. Pa. Nov. 9, 1988) ("Under [the citizen suit provision], the relief to be provided is an order restraining any person identified in subsection (1)(B).").

Thus, SCCRAP's imminent and substantial endangerment claim fails because it does not allege a present or near-term threat to a living population and lacks evidence of a pathway for exposure. The claim is based on speculative future harm that would be remote in time, which is insufficient under RCRA, and bars a claim for injunctive relief. Moreover, the civil penalties sought are improper under the longstanding and unanimous case law. Thus, this Court should affirm the district court's dismissal of SCCRAP's claim. Even if this Court liberally interpreted the citizen suit provision, only declaratory relief could be issued.

B. This Court should not interpret "imminent and substantial" overbroadly and allow such claims absent an endangerment to a living population as it would undermine RCRA's purpose and strain the judiciary by creating uncertainty for regulated entities.

RCRA's text and legislative history emphasize the protection of human health, with environmental protection serving as a means to that end, particularly within the context of open

dumping. *See* 42 U.S.C. § 6902(a)(4) (stating the objective of RCRA is to protect "human health *and* the environment") (emphasis added); 42 U.S.C. 6901 (asserting a purpose for the statute's enactment was the growing volume of municipal and industrial waste threatening human health and the environment); S. Rep. No. 94-988, at 25 (1976) (noting that attention must be given to "potential hazards to public health"); 42 U.S.C. § 6901(b)(4) (underscoring that "open dumping is particularly harmful to health"). Violations of the CCR rule constitute open dumping. 40 C.F.R § 257.1(a)(2). Thus, for alleged violations of the CCR rule, the citizen suit provision should be interpreted as requiring a nexus between the alleged harm and its impact on human health or living populations. *See, e.g.*, *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D.W. Va. Sept. 28, 2023). This interpretation best aligns with the statute's construction and legislative history.

Reversing the district court's dismissal of SCCRAP's imminent and substantial endangerment claim would be tantamount to adopting an overbroad interpretation of RCRA would flaunt the statute's purpose and open the floodgates of litigation. If entities regulated under RCRA could be liable for environmental changes that pose no threat to humans, plants, or animals (a possibility suggested in *Interfaith*), the impacts would be severe on the regulated entities and the judiciary alike. *Interfaith*, 399 F.3d at 263. Regulated entities, such as ComGen, would incur a substantial economic burden to fend off litigation over speculative or *de minimis* environmental changes. Similarly, courts would bear the burden of adjudicating such claims and, thus, would have fewer resources and greater delays in resolving cases in which humans or ecosystems are legitimately threatened.

While protecting the environment is a critical goal, RCRA's imminent and substantial endangerment provision must be interpreted in a way that provides clear legal standards.

Expanding the provision to cover environmental changes that have no impact on living populations would create uncertainty for regulated entities like ComGen, making it difficult for them to predict when their actions might trigger liability. As articulated by the Supreme Court of Louisiana regarding an RCRA claim, "because the object of the court in construing a statute is to ascertain the legislative intent, where a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result." *State ex rel. Tureau v. BEPCO, L.P.*, 351 So. 3d 297, 314 (La. 2022). The uncertainty inherent in giving too much weight to the endangerment clause's "human health *or* the environment" language would discourage investment in environmental remediation and innovation, undermining RCRA's broader goals, and producing an unreasonable result. 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

CONCLUSION

For the aforementioned reasons, the judgment of the United States District Court for the Middle District of Vandalia should be affirmed.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generation 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,

Team No. 6