C.A. No. 24-0682

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 MIDDLE DISTRICT OF VANDALIA

BRIEF OF APPELLEE

Team #14

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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia had jurisdiction over Appellee's claims because they arose under federal law. Appellee's first claim is brought under 33 USC 1365, which states that the district courts have original subject matter jurisdiction over enforcement of effluent standards. Appellee's second and third claims were brought in federal district court under 42 USC 6972(a)(2), which requires that any action against a person in alleged violation of an EPA permit scheme be brought in the district court where the alleged violation occurred. The alleged violations are purported to have occurred in the Middle District of Vandalia, where Appellees filed their initial suit.

Appellant appeals the district court's ruling dismissing their claims in their entirety. This dismissal is an appealable final judgement under FRAP 4. Under 28 USC 1291, 12th Circuit Court of Appeals has jurisdiction over Appellant's appeal of a final order from a district court in its circuit. Appeal is timely under FRAP 4 because it was filed less than thirty days after the entry of the judgment appealed from.

STATEMENT OF THE ISSUES PRESENTED

1. Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge according to the Clean Water Act?
2. Does the Court owe deference to its decision adopting Piney Run and EPA Guidance in deciding the first issue?
3. Does the Appellant have standing to challenge the coal ash closure plan for the Little Green Run Impoundment despite the pre-existing pollution?
4. Does an RCRA imminent and substantial endangerment claim require a threat to a living population?

STATEMENT OF THE CASE

A. Factual Background

1. Commonwealth Generating Company and "Building a Green Tomorrow"

This case concerns a dispute over an energy company's attempts to reduce its environmental impact and lower its costs. (R. at 4). Appellee Commonwealth Generating Company (ComGen) is an electric utility company that is proud to have provided affordable electricity to the State of Vandalia for more than a hundred years (R. at 3–4). In addition to providing power and over 1,500 jobs to the people of Vandalia, ComGen is also active with many environmental initiatives. (R. at 4). For instance, ComGen has established five solar power facilities and two wind farms, together producing over 110 megawatts worth of power entirely from renewable resources. (Id.). The company has made these innovations in the name of its "Building a Green Tomorrow" initiative. (Id.). Introduced by the company in 2015, this program further reduces ComGen's costs while simultaneously minimizing pollution, replacing older coal-fired power plants with newer facilities that specialize in renewable energy like wind and solar. (Id.).

In 2018, ComGen's commitment to "Building a Green Tomorrow" led to the decision to close the Vandalia Generating Station, one of their older, more outdated coal-fired plants. (Id.). Since 2015, that facility has had pollution covered by a permit issued per the Vandalia Pollutant Discharge Elimination System (VPDES). (Id.). This Permit covers the plant's three outfalls into the Vandalia River: Outlets 001, 002, and 003. (Id.). It establishes limits for substances like aluminum and selenium while excluding others like PFOS or PFBS—which are completely absent from the Permit itself and its application, and are only known to have been touched upon

in an informal email between a deputy director of the Vandalia Department of Environmental Protection (VDEP) and a ComGen employee before the permit was issued. (Id.).

Furthermore, the "Building a Green Tomorrow" initiative—in tandem with new federal and state coal combustion residuals (CCRs) regulations—also led ComGen to close the Little Green Run Impoundment, which is the depository where the coal ash from the Vandalia Generating Station is stored. (R. at 6). In accordance with those parallel regulations, ComGen put together a "closure-in-place" plan, which was included in ComGen's permit application and eventually approved by the EPA when they issued a "Closure Permit" in 2021. (R. at 6–7). The first segment of ComGen's closure-in-place plan was installing upgradient and downgradient groundwater monitoring wells around the Little Green Run Impoundment. (R. at 7). These measures give the company the ability to ensure that the Impoundment is containing its contents and not suffering from any leakages. (Id.). As of now, ComGen has put nearly $50 million towards these closure and monitoring efforts, and they plan to spend over $1 billion into the next decade. (Id.).

2. Appellant's Involvement

Appellant is Stop Coal Combustion Residual Ash Ponds (SCCRAP), an organization from Washington, D.C. that targets coal-fired power plants with coal ash ponds on site. (R. at 8). Appellant had been suspicious of the Vandalia Generating Station's interaction with the Vandalia River, and their focus on ComGen sharpened when it judged its Closure Plan for the Little Green Run Impoundment to be "inadequate." (R. at 9). So, they acted on their suspicions. (Id.).

Appellant performed their own testing of the waters surrounding the Vandalia Generating Station's three outfalls, detecting the presence of PFOS and PFBS from Outlet 001. (Id.).

Additionally, they monitored the groundwater via the downgradient monitoring wells of the Little Green Run Impoundment, looking particularly at the levels of arsenic and cadmium in them. (Id.). Both environmental and industry groups agree that the Impoundment may have been leaching these substances at least five to ten years before the monitoring system went into place. (R. at 8). The levels of both were elevated, but there is no evidence that these substances have reached a drinking water supply or that they will anytime in the next five years. (Id.). Nonetheless, from this, Appellant warned against using the groundwater around the impoundment site as drinking water—which no one does. (R. at 9).

Appellant alleges that its members are "directly affected" by chemicals like these emanating from the Vandalia Generating Station and the Little Green Run Impoundment. (R. at 10). These members recreate, fish, and own property around the Vandalia River; they claim that the presence of these aforementioned substances offends them and lessens their use and enjoyment of the river. (Id.). Several of Appellant's members had shown interest in a proposal for building a subdivision housing complex within a mile of the Impoundment, but are now having second thoughts because the development—which would not be finished until at least 2031—would use well water from the area as the primary source of drinking water. (R. at 9). All of this gave rise to a Complaint. (R. at 12).

B. Procedural Background

1. Appellant's Complaint

The litigation in question began when Appellant filed its Complaint against ComGen following their announcement of the Vandalia Generating Station closure and the approval of the Little Green Run Impoundment Closure Plan. (R. at 12). Their Complaint, filed in the District Court for the Middle District of Vandalia, made three claims. (Id.).

First, the Complaint asserted that ComGen violated the Clean Water Act (CWA) by discharging PFOS and PFBS out of Outlet 001. (Id.). Appellant sought declaratory and injunctive relief on the theory that these pollutants were not "within the reasonable contemplation of the permitting authority at the time the permit was granted" and ComGen was without a permit from the National Pollutant Discharge Elimination System (NPDES). (Id.).

Second, Appellant challenged the Little Green Run Impoundment Closure Plan under § 7002(a)(1)(A) of the Resource Conservation and Recovery Act (RCRA), seeking injunctive relief to stop its continuation. (Id.).

Third, Appellant sued under § 7002(a)(1)(B) of the RCRA, alleging that the arsenic and cadmium in the groundwater around the Little Green Run Impoundment presented an "imminent and substantial endangerment" to the environment. (Id.). Because there was no evidence that the affected groundwater had reached a drinkable water source or, by extension, a living population, they argued that this contamination presented a threat to the environment itself. (Id.).

2. ComGen's Dismissal

ComGen responded to these claims with their Motion to Dismiss all of them. (R. at 13).

As to the alleged CWA violation, ComGen explained that Appellant's argument relied on a case—Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.—that leaned on *Chevron* Deference, which has since been overruled by Loper Bright Enterprises v. Raimondo and thus rendered inapplicable. (Id.). This makes another case—Atl. States Legal Found., Inc. v. Eastman Kodak Co.—the one that controls here instead, and it dictates that ComGen cannot be expected to be responsible for substances that are not considered in the formal permit application. (R. at 13–14).

As to the first RCRA challenge, ComGen denied that Appellant had stated a claim, saying that their allegations were conclusory and insufficient to show that their closing procedures were inadequate under the state and federal CCR regulations. (R. at 13).

For the second RCRA challenge, ComGen again argued that Appellant had failed to state a claim, relying on precedent from the Twelfth Circuit that has never allowed an RCRA imminent and substantial endangerment claim to stand on a threat to the environment itself. (Id.). Indeed, some kind of exposure pathway to a living population is necessary for the statute to stay focused in its application. (R. at 13–14).

The District Court ultimately granted ComGen's entire motion to dismiss. (R. at 13). The Court found that Appellant lacked standing to bring suit on the RCRA inadequate closure challenge, and completely embraced ComGen's arguments in regards to the CWA violation and RCRA imminent and substantial endangerment claims. (R. at 14).

SUMMARY OF THE ARGUMENT

As to the first issue, ComGen cannot be liable for discharge of PFOS and PFBS from Outlet 001 because it has a Vandalia state NPDES permit, and that permit does not impose limits on those pollutants. Under the *Atlantic States* rule, a state permit holder is shielded from liability for discharge of materials not listed in that permit.

Additionally, in deciding the first issue, this Court is not bound by either the *Piney Run* precedent it adopted in 2018 nor the EPA guidance from that case. The *Loper Bright* Supreme Court case has invalidated the reasoning of *Piney Run*, so this Court should instead apply the more relevant *Atlantic States* rule. Furthermore, under *Loper Bright*, no court is bound to defer to any agency interpretation of statute, including the EPA's interpretations of the Clean Water Act.

As to the third issue, Appellant does not have standing to challenge the ComGen's Closure Plan because it failed to meet fairly traceable and redressability prongs for standing. Appellant's injury is not fairly traceable to the Closure Plan because there was leaching of arsenic and cadmium before the plan demonstrating that there is not a causal connection to challenged conduct. The prior pollution also supports that the plan does not meet the requirement of being a factual cause of Appellant's injury. Appellant can only speculate about whether any alleged leaching after ComGen initiated its Closure Plan has caused its injury, meaning the plan fairly traceable to Appellant's injury. The injury is also not redressable by changing ComGen's Closure Plan because it is unlikely that changing the plan would redress Appellant's injury because of the prior pollution.Appellant can only speculate changing the plan will redress its injury given the prior pollution. The injury not being fairly traceable to ComGen's Closure Plan also means that it is doubtful that changing the plan would redress the issue. There is little evidence that changing the plan would redress the injury given the prior pollution and delayed effect changing the plan would have. Finally, granting standing in this case would diminish the standing doctrine and would allow the court to review far more legislative and executive actions. Courts having this much broader review power would allow them to invalidate far more of the other branches' actions. This increased power would allow the courts to practically invalidate any decision they disliked. Therefore, the judicial branch would subsume the power of the representative branches upsetting the separation of powers.

As to the fourth issue, Appellant cannot bring an RCRA imminent and substantial endangerment claim on the sole grounds of alleged harm to the environment itself. Analysis of the language and function of the statute demonstrates that this is an unworkable reading, because the environment itself and its living populations are so inextricably tied that showing harm to the

former necessarily entails showing harm to the latter. Many federal courts across the country agree with this, and even those that don't tacitly show why it is the only way the statute can work. Appellant's RCRA imminent and substantial endangerment claim fails, because they fail to allege that groundwater contamination around the Little Green Run Impoundment endangered any living populations. They could not allege as much even if they did try, because the facts show that no living populations are drinking from this water supply or that any will within any time span that could make the threat from it an "imminent" one.

ARGUMENT

A. The discharges of PFOS and PFBS from Outlet 001 are not unpermitted discharges because ComGen is covered by the permit shield provision of the Clean Water Act.

ComGen is shielded from liability by the "permit shield" provision of the Clean Water Act (CWA). Whether or not this permit shield protects ComGen from liability for the discharge of chemicals unmentioned in its state National Pollutant Discharge Elimination System (NPDES) permit is a question of law. Wisconsin Resources Protection Council v. Flambeau Min. Co., 737 F.3d 700, 707 (7th Cir. 2013). Questions of law regarding a state NPDES are reviewed *de novo*. Nat. Res. Def. Council, Inc. v. County of Los Angeles, 725 F.3d 1194, 1203 (9th Cir. 2013).

The Clean Water Act (CWA) provides for the EPA Administrator to approve state-level implementations of the NPDES. 33 U.S.C. § 1342. One such state permit program, the Vandalia Pollutant Discharge Elimination System (VPDES), is at issue in this case. (R. at 4). The CWA states that, as long as a state permit holder is in compliance with their state NPDES program, they are also compliant with § 301 of the Clean Water Act. 33 U.S.C. § 1342(k). The requirements of individual state NPDES programs may deviate from the EPA's own NPDES guidance and still retain full legal effect so long as the state program is approved by the EPA

administrator. 33 U.S.C. § 1342. Therefore, whether or not Outlet 001's discharges are "unpermitted discharges" turns on whether they were permitted by the Vandalia state permit program, not the federal NPDES. If a state permit program established under 33 U.S.C § 1342 makes no requirement that a specific pollutant be limited, the permit holder has no legal burden to limit that pollutant. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 357 (2d Cir. 1993).

Here, Comgen's discharges of PFOS and PFBS into the Vandalia River are not "unpermitted discharges" under § 301 of the CWA because ComGen's Vandalia Pollutant Discharge Elimination System (VPDES) permit for Outlet 001 sets no limits on those two pollutants. (R. at 4). The Clean Water Act, as interpreted by the Atlantic States ruling that the District Court adopted, does not require state permit holders to report discharge of pollutants not listed in those state permits. In other words, Comgen's discharge of PFOS and PFBS cannot be "unpermitted discharges" because it does not need permission for those discharges at all.

The Vandalia NPDES system is administered by the Vandalia Department of Environmental Protection (VDEP) and sets its own pollutant monitoring requirements. (R. at 4, 11). ComGen applied for, obtained, and is covered by a permit from the VPDES. (R. at 4). Neither the VPDES application nor the permit itself require disclosure, monitoring, or prevention of discharge of PFOS or PFBS. (R. at 4). In fact, those two pollutants are not mentioned in the VPDES permit at all. (Id.).

As long as a state permit holder complies with their state permit, they are shielded from liability under the CWA itself. This is the "permit shield" provision of the CWA, found in 33 U.S.C. § 1342(k). Furthermore, courts have held that the 33 USC §1342(k) "permit shield"

provision not only protects state permit holders from liability under § 301 of the CWA, it also "protects a CWA permit holder from facing suits challenging the adequacy of its permit." Coon ex rel. Coon v. Willet Dairy, LP, 536 F.3d 171, 173 (2d Cir. 2008). In Coon ex rel Coon v. Willet Dairy, LP, the 2nd Circuit held that 33 U.S.C § 1342(k) shielded the defendant-appellee dairy farm from liability for heat discharges that were illegal under the CWA but legal under their state permit. Id. In this case, just as in Coon, a state permit holder is being challenged under the CWA itself. (R. at 12). And, just like in Coon, the state permit holder is in full compliance with their state permit. (R. at 4). This court should read §1342(k) consistently with the 2nd Circuit and shield ComGen from liability under §301 of the CWA.

The rule of the Atlantic States decision can also be neatly applied to the immediate case. In Atlantic States, the 2nd Circuit concisely articulated a rule that is singularly on-point for this litigation: "The discharge of unlisted pollutants is not unlawful under the CWA". Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 354 (2d Cir. 1993). The 2nd Circuit reasoned that, while the EPA catalogues "tens of thousands" of pollutants, it is impossible to expect a permit to "identify and rationally limit" every pollutant present in a given discharge. Atl. States, 12 F.3d at 357. The court held that it would be impractical and illogical to find a state permit holder liable for any of the myriad pollutants not listed in their state permit, and instead to limit their responsibility to only what the state determines should be monitored–i.e., what is listed in the state permit. Id.

The District Court saw the wisdom in applying the Atlantic States rule to this case and correctly dismissed Appellant's claim. (R. at 14). This Court should apply the same rule for the same outcome, and affirm the district court's ruling.

But even if this court accepts the condition on the permit shield imposed by the Piney Run case, Appellee should still prevail. If this Court accepts the reasoning of Piney Run, then it must consider whether PFOS and PFBS were "within the reasonable contemplation of the permitting authority during the permit application process". Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD, 268 F.3d 255, 268 (4th Cir. 2001). Under the Piney Run precedent, a state permit holder is only liable for discharge of unlisted pollutants if those pollutants were outside the contemplation of the permitting entity. Id. Under the Piney Run rule, if PFOS and PFBS were not "within the reasonable contemplation" of VPDES when ComGen applied for their permit, then Comgen's discharge of those pollutants from Outlet 001 is not covered by the permit shield. But the record shows unequivocally that these two pollutants were within VPDES' contemplation. A deputy director of VDEP inquired as to those pollutants in the leadup to the permit's issuance, and nevertheless declined to include them. (R. at 4). That the VDEP asked about those pollutants but did not actually mandate limiting them demonstrates not only that PFOS and PFBS were "within the reasonable contemplation" of VDEP, but also that VDEP does not consider those two pollutants worth monitoring or limiting. ComGen should not be penalized for discharging pollutants that the state of Vandalia has demonstrated it is unconcerned with.

For these reasons, this Court should uphold the District Court's ruling because ComGen is protected by its § 1342(k) permit shield. Under the Atlantic States precedent that the District Court adopted, that shield extends to the discharge of pollutants not listed in the permit. Atl. States, 12 F.3d at 354. Put simply, the discharge of PFOS and PFBS from Outlet 001 cannot be "unpermitted discharges" because ComGen does not need permission to discharge them. In fact, ComGen already has permission, given to it by the state of Vandalia.

B. In deciding the preceding issue, this Court owes no deference to its prior adoption of Piney Run and its reasoning, nor to the EPA guidance cited in that case.

Circuit courts are generally bound by the prior decisions of their panel unless either an inconsistent Supreme Court decision requires that the "circuit law" be changed or an *en banc* proceeding overrules the precedent-setting case. Salmi v. Sec'y of Health and Human Servs., 774 F.2d 685, 689 (6th Cir. 1985). This question of *stare decisis* must be reviewed *de novo*. Id.

Because Piney Run was decided on precedent that the Supreme Court has since invalidated, this Court is not bound by its reasoning. This Court furthermore need not defer to the EPA guidance cited in Piney Run. Although the 12th Circuit previously accepted Piney Run and its reasoning, that holding and reasoning has been discarded by the Supreme Court. (R. at 12). In the absence of Piney Run, the Atlantic States case is the most pertinent precedent. Consequently, this Court should uphold the District Court's application of Atlantic States instead of applying the defunct rule of Piney Run.

In Loper Bright Enterprises v. Raimondo, the Supreme Court ruled that the Chevron "two-step" framework was a violation of the Administrative Procedure Act. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 406 (2024). The Supreme Court furthermore held, in regards to the level of *stare decisis* applied to those that relied on Chevron, that "the holdings of those cases that specific agency actions are lawful" remain valid precedent. Id. at 412. No other aspect of cases that relied on Chevron is protected by the Loper Bright decision. Id. By making this specific, limited carveout to the broad effects of Loper Bright, the Supreme Court meant to prevent the re-litigation of cases that relied on Chevron. By that same token, rulings that do not invoke the legality of an agency action are not protected by *stare decisis*, and neither is the Chevron-based reasoning of even those cases that do.

This Court previously adopted Piney Run and its reasoning. (R. at 12). In Piney Run, a state NPDES permit holder was sued for discharging pollutants not explicitly mentioned in its permit. Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD, 268 F.3d 255 (4th Cir. 2001). The 4th circuit court held that the "permit shield" of a county-run power plant only applied to those pollutant discharges that were either named in the permit or disclosed by the permit holder; the permit shield did not shield the permit holder from liability for unlisted pollutants or undisclosed pollutants. Id.

Piney Run fails to bind this Court because of how the 4th Circuit arrived at its ruling. When the 4th Circuit was "determining the proper scope of an NPDES permit"–the "central issue" of Piney Run–it relied entirely on the Chevron deference framework. Piney Run, 268 F.3d at 266. The 4th Circuit found § 1342(k) of the CWA to be ambiguous and bound itself to defer to what guidance the EPA had offered on the issue. Id. at 268. The EPA had declared that the NPDES permit covered only *disclosed* pollutants. Id. at 267. Therefore, the 4th Circuit held that the permit shield at issue in Piney Run covered only disclosed pollutants. This is the two-step process articulated in Chevron. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). This two-step process is no longer valid reasoning. Loper Bright at 406.

In Loper Bright, the Supreme Court ruled that "[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of Chevron itself—are still subject to statutory stare decisis." Loper Bright at 412. A close reading of that sentence clearly shows that Loper Bright protects only the *holdings* of cases–not their *reasonings*–and the protection itself extends only to cases where the issue in question was the legality of a "specific agency action." Not only does the immediate case *not* involve a challenge to the legality of an agency action, Piney Run involved no such challenge. In Piney Run, as in this case, the issue was

whether a specific kind of discharge from a plant into a water source was permissible under a state NPDES scheme. Piney Run, 268 F.3d at 260. In Piney Run, no EPA "specific agency action," protected by Loper Bright, was actually in question.

In other words, not only is the reasoning used in Piney Run invalidated by Supreme Court precedent, but the ruling itself is not on-point. The ruling of Atlantic States, which did not rely on Chevron, is a more apt rule to govern this litigation.

Furthermore, even if the Outlet 001 discharge is noncompliant with EPA guidance, that guidance does not control this case. Vandalia's state permit system controls here, and ComGen is in compliance with Vandalia's state permit program. (R. at 4). This reading does limit the EPA's influence in states which have an approved state NPDES, and that is the intended effect. The Supreme Court held in Rapanos v. United States that the purpose of § 1342 of the CWA is to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." Rapanos v. United States, 547 U.S. 715, 722 (2006). Other circuits have accepted similar outcomes. For example, "[i]n the State of New York, an SPDES permit issued by the DEC has the same force as an NPDES permit issued by the EPA." Peconic Baykeeper, Inc. v. Suffolk Cnty., 600 F.3d 180, 185 (2d Cir. 2010). Vandalia permits control here, not the EPA's standards. Vandalia does not instruct permit holders to monitor and limit the release of PFOS and PFBS; therefore, Vandalia state permit holders have no burden to do so.

This Court is not bound to defer to its prior adoption of the Piney Run decision because Piney Run's reasoning has been invalidated by the Supreme Court. Furthermore, this Court does not need to rely on EPA unpermitted discharge guidance because federal agency guidance does not govern the effusion limits of state permit holders.

C. Appellant does not have standing to challenge ComGen's coal ash Closure Plan for the Little Green Run Impoundment.

Standing is a question of law, meaning appellate courts review the issue *de novo*. Corbett v. Transportation Security Administration, 930 F.3d 1225, 1228 (11th Cir. 2019) When ruling on standing at the pleading stage, reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. Warth v. Seldin, 422 U.S. 490, 501 (1975).

Appellant fails to establish that they have standing to challenge ComGen's Closure Plan under 42 U.S.C. § 6972(a)(1)(A) (which allows private any person may commence a civil action on his own behalf against any person who is alleged to be in violation of any regulation effective pursuant to Chapter 82 of Title 42 of US Code) for the Little Green Run Impoundment. 42 U.S.C. § 6972(a)(1)(A). More specifically, Appellant failed to establish it had standing to challenge GomGen's Closure Plan for violating 40 C.F.R. § 257.102 (d) (1-2) in regard to limiting releases of CCRs. 40 C.F.R. § 257.102 (d) (1-2). Therefore, there is no case or controversy, and they cannot bring a cause of action.

Article III of the U.S. Constitution limits the judicial power to cases or controversies. U.S. Const. art. III § 2, cl. 1. A case or controversy can exist only if a "plaintiff has standing to sue–a bedrock constitutional requirement that this Court has applied to all manner of important disputes." U.S. v. Texas., 599 U.S. 670, 675 (2023). To establish standing, a plaintiff must show the existence of three elements: 1) injury in fact, 2) the injury is fairly traceable, and 3) the injury is redressable. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Firstly, in order to demonstrate injury in fact, there must have been an invasion of a legally protected right that was both concrete and particularized and actual or imminent. Id. Secondly, for the injury to be retractable, there must be a causal connection between the injury and the conduct complained of,

such that the injury is "fairly traceable" to the challenged action. Id. Finally, to show an injury is redressable, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561. It is the burden of the plaintiff to show all three of these elements and establish that they have standing to bring suit. Id.

In the present case, Appellant has failed to establish standing because it has failed to satisfy the latter two prongs of the standing test. Granting them standing in spite of this failure would upset the power of the two other branches of government. Therefore, this Court should affirm the lower court's dismissal because Appellant's injury is not traceable to the closure plan, and is not redressable because of the existing pollution, and granting standing for it would usurp the power of the other two branches of government.

1. Appellant's injury is not fairly traceable to ComGen's Closure Plan.

The second prong of the standing test requires that the injury be "fairly traceable." To satisfy this prong, a plaintiff must demonstrate that there is "a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41–42 (1976).

In the present case, it is not a question of whether the injury is fairly traceable to the ComGen's actions, but whether the injury is a result of the challenged conduct. There is no evidence that the Closure Plan is causing injury to the Appellants in any way. While the record indicates since 2021 the groundwater around the Impoundment has had elevated levels of arsenic and cadmium above federal advisory levels and above Vandalia's groundwater quality standards, it also shows the impoundment was likely leaching arsenic and cadmium five to ten years prior to the enactment of the Closure Plan. (R. at 8) There is also no evidence these harmful

substances have reached the river or any current drinking water supply. Id. Therefore, there is no evidence that ComGen did not cause Appellant's injury solely through the leaching that occurred before the closure plan or that Appellant would be any better off had ConGem never initiated the Closure Plan.

The prior pollution is particularly important given that traceability requires de facto causation. Department of Commerce v. New York, 588 U.S. 752, 768 (2019). De facto causation, meaning that the conduct factually caused the injury in question is not met in this case given the pre-existing pollution. The Supreme Court in Department of Commerce v. New York reiterated this de facto causation requirement. The case centered on a group of states challenging a citizenship question on the census, arguing that the Secretary of Commerce violated the Administrative Procedure Act in instituting it. Id.at 761-64. The states argued that the question injured them by repressing non-citizen responses to the census, thus repressing the federal funds these states would receive. Id.at 767. The government argued that this injury was not traceable, given it relied on the third-party intervention of the citizens not filling out the census. Id.at 767-68. However, the court ruled that the injury was fairly traceable because the states only had to establish de facto causation, which the states met given that their theory of standing relied on the predictable effect of government action on the decisions of third parties. Id.at 768

ComGen’s Closure Plan can hardly be called the de facto cause of the Appellant’s injury. The impoundment had been leaching years before GomGen began its closure plan. (R. at 8). Thus, the leaching polluted the water before the Closure Plan and any change to the plan would not change this fact. In fact, the injury would have existed had the closure of the impoundment had never begun. Therefore, ComGen’s Closure plan is not a de facto cause of the Appellant's injury.

Furthermore, Appellant can only speculate as to whether the closure plan *will* cause any potential harm given the prior pollution; therefore the injury is not fairly traceable to the plan, as demonstrated in Clapper v. Amnesty Intern. USA. 568 U.S. 398, 413 (2013). In Clapper, several legal and media groups brought suit seeking to declare that a provision of the Foreign Intelligence Surveillance Act (FISA) allowing surveillance of non-citizens outside of the United States was unconstitutional. Id. at 401. The plaintiffs argued that they suffered a harm that was "fairly traceable" to the provision in question because it was reasonably likely that the government would intercept their communications at some point. Id. at 410. However, the Court ruled that even if the plaintiffs could show that the interception of their communications was imminent, they could only speculate whether the government would use the actual provision in question or another provision that allows such an interception. Id. at 413.

In the present case, Appellant can only speculate whether ComGen's Closure causes any injury as opposed to the initial leaching of arsenic and cadmium before the plan. (R. at 8). Since the Appellant, like the parties in Clapper, can only speculate about the cause of their harm, it is not fairly traceable to the challenged conduct. Therefore, the Appellant fails to satisfy the second prong of the standing framework.

2. Appellant's injury is not redressable due to the leaching before closure began.

The Appellant also fails to satisfy the third prong of the standing framework because it fails to show that a favorable decision is likely to redress the injury.

The third prong of the standing test, redressability, requires that it is likely that a favorable decision will redress the alleged injury. This proposition means that parties cannot merely speculate about redressability but show it is probable. For instance, in Lujan v. Defenders of Wildlife, Defenders of Wildlife brought suit against the Secretary of Interior under the

Endangered Species Act (ESA), which provided litigants the right to initiate a civil suit to enjoin anyone in violation. 504 U.S. 555, 558-59 (1992). However, the Supreme Court found the injury in question to be speculative rather than likely, and it ruled the complaining party claiming the harm would be redressed is not enough to qualify for redressability. Id. at 571.

In this case, Appellant similarly speculates that its injury will be redressed by this Court enjoining ComGen, despite the fact that there is no evidence its injury was not caused by the leaching before the Closure Plan. (R. at 8.) Any future injury Appellant seeks to avoid may be unavoidable due to the prior pollution. A finding that the injury in this case is not fairly traceable would almost dictate that injury is not redressable. As illustrated in Sprint Communications Co., L.P. v. APCC Services, Inc., traceability and redressability are often "flip sides of the same coin." Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 288 (2008). It is often the case if the complaining party fails to meet one of these prongs, it also fails to meet the other. Here, if this Court finds that Appellant's injury is not fairly traceable to ComGen's closure plan then it can not be redressed by changing the plan. Put simply, if Appellant's injury was caused by the pollution before GomGen implemented the Closure Plan, changing the plan would not fix or redress the injury.

Finally, the relief sought must alleviate a discrete injury to the plaintiff. Massachusetts v. E.P.A., 549 U.S. 497, 525 (2007). This requirement means that there must be evidence that the remedy sought must at least reduce the injury in question; however, there is no evidence in this case that a new closure plan will do so, unlike in Massachusetts v. E.P.A. In Massachusetts v. E.P.A., Massachusetts led a group of states that brought suit against the EPA, seeking declaratory relief on the issue of whether they had the statutory authority to regulate greenhouse gas emissions under the Clean Air Act. Id. at 505. The EPA argued that even if the agency regulated

greenhouse gas emissions, this would not redress the injury due in part to the fact that other industrialized countries, such as China and India, would continue to produce the gas at their normal levels. Id. at 523-24. But the Court held that, in order for something to be redressable, the relief sought must only alleviate a discrete injury instead of completely solving the issue. Id. at 525.

In the present case, there is no evidence that amending the closure plan will alleviate the leaching issue. Given the fact that there was leaching before the closure plan, there is no indication that changing the closure plan will alleviate the Appellant's injury. There is no evidence that changing the closure plan would do anything to prevent arsenic or cadmium from reaching drinking water, given the prior contamination. Thus, since there is no evidence that changing the closure plan would alleviate the injury of the Appellant, doing so would not redress its injury. Also, none of the requested relief would not immediately stop any alleged ongoing leaching. 40 C.F.R. § 257.102 requirements to "eliminate free liquids prior to capping in place," "will result in the continued impoundment of water, sediment, or slurry, and fails to preclude the probability of future impoundment of water, sediment, or slurry," and to "minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste or releases of CCR pollution to ground or surface waters" does not address ongoing leaching as these apply prior to installing the cover system. 40 C.F.R. § 257.102 (d) (1-2). ComGen is currently set to apply the cover system by 2031, so the leaching can go on for years. (R. at 7).

3. This Court granting standing would diminish the separation of powers.

Furthermore, this Court should not rule that the Appellant has standing since doing so would derogate the standing doctrine and the separation of powers. The standing doctrine is essential to maintaining the separation of powers between the three branches. In fact, the U.S.

The Supreme Court has said that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37 (1976). The standing requirement prevents the judiciary from gaining too much power and overtaking the other two branches. Clapper v. Amnesty Intern. USA, 568 U.S. 398, 408 (2013). If there was no standing requirement or if the doctrine was severely limited, then courts could hear cases brought by any individual for any alleged injury. Courts would then effectively be able to review any legislative or executive action, assuming at least one person challenged the action. This broader review power would allow the judicial branch to subsume the powers of the other two branches as it could invalidate any action of the other branches as long as someone challenged the action. The judiciary having such authority over the other two branches would effectively place it above the representative branches and upset the separation of powers. Therefore, it is paramount that the doctrine of standing not be diminished. If this Court found that Appellant has standing, it would diminish the doctrine as it would greatly alleviate the burden in meeting its second and third prongs.

For all these reasons, this Court should hold that Appellant does not have standing to challenge ComGen's Closure Plan. Appellant has failed to demonstrate that their injury is fairly traceable to the closure of the Little Green Run Impoundment or that enjoining the closure plan would redress the injury. If this Court holds that the Appellant has standing, the doctrine of standing would be greatly diminished, thereby eroding the separation of powers among the three branches of government. Thus, this Court should uphold the district court's decision.

D. Appellant cannot pursue a RCRA imminent and substantial endangerment claim against ComGen without an allegation of endangerment to a living population.

When a party appeals a district court's dismissal for failure to state a claim, the appellate court reviews that dismissal de novo. Pendleton v. Jividen, 96 F.4th 652, 656 (4th Cir. 2024); Cook v. George's, Inc., 952 F.3d 935, 938 (8th Cir. 2020); Newbauer v. Carnival Corp., 26 F.4th 931, 934 (11th Cir. 2022). And a complaint will only survive a motion to dismiss if its allegations, accepted as true, establish "a plausible claim for relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). So, appellate courts should affirm such a dismissal if the allegations indeed fail to amount to a valid cause of action. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).

Here, the Appellant appeals the Middle District of Vandalia's dismissal of an RCRA imminent and substantial endangerment claim, requesting that the Twelfth Circuit allow their claim to stand on endangerment to the environment in-and-of-itself. (R. at 12, 14–15). This holding would constitute an illogical interpretation of the RCRA and contravene precedent from the Twelfth Circuit and many others, which have held (sometimes explicitly, other times implicitly) that a threat to a living population is a necessary part of any RCRA endangerment claim. Accordingly, the Twelfth Circuit should maintain its harmony with the other circuits by rejecting the Appellant's proposition of law and affirming the lower court's dismissal.

Under the Resource Conservation and Recovery Act (RCRA), plaintiffs may bring private civil actions against individuals and entities that contribute 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. Per § 6972(a)(1)(B), a prima facie case of imminent and substantial endangerment entails three elements: 1) a defendant who was or is a generator or transporter of solid or

hazardous waste, or an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; 2) that they have contributed or are 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. Cox v. City of Dallas, 256 F.3d 281, 292 (5th Cir. 2001) (citing United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1382 n.9 (8th Cir. 1989)). If a litigant pursues such a claim but fails to first establish any of these three essential elements, their complaint should be dismissed. See Bell Atl. Corp., 550 U.S. at 558.

While the first two of these elements are relatively straightforward, the third has been extensively explicated by federal courts across the country, with case law carefully defining when a defendant's conduct "may present an imminent and substantial endangerment to health or the environment."

First of all, the word "may" grants the provision a broad scope; litigants do not need to show that the defendant's conduct *has* presented an imminent and substantial endangerment, only that it *may*. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004).

Second, an endangerment is only "imminent" if it threatens to occur "immediately." Meghrig v. Kfc W., 516 U.S. 479, 485 (1996) (internal quotations omitted). The Supreme Court has interpreted this to mean that, in RCRA actions, the solid or hazardous waste in question must present a danger *now*, even if its impacts will not be felt until later. Id. at 486.

Third, in addition to being imminent, any potential endangerment must also be "substantial," which generally means that it must be "serious…[with] reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened

release, of hazardous substances." Burlington Northern & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1021 (10th Cir. 2007). See also Parker, 386 F.3d at 1015. Legislative history clarifies that, because the RCRA covers endangerments that are *both* imminent and substantial, the law does not cover "cases where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree. See W.R. Grace & Co. v. United States EPA, 261 F.3d 330, 339–40 (3rd Cir. 2001). See also Tri-Realty Co. v. Ursinus Coll., 124 F. Supp. 3d 418, 442 (E.D. Pa. 2015).

Lastly—and most crucially—the waste must endanger health *or* the environment. Courts have made plentiful note of "or" as the operative word here, with some taking it to mean that an RCRA action may be brought upon a threat of harm to a living population or to the environment itself. See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 259 (3rd. Cir. 2005). But closer analysis in the context of the "imminent and substantial" provision reveals that this reading of the statute is unworkable in practice. The RCRA's imminent and substantial endangerment civilian suit is meant to protect against waste substantially *endangering* health or the environment, with its potential release threatening "someone or something" with a risk of serious *harm*. 42 U.S.C § 6972. See Burlington Northern, 505 F.3d at 1021. This protection cannot be extended to the environment itself, because substantial harm to the environment is quantifiable only through the extent to which its living populations are affected. The environment itself is not a living, breathing thing; it is a conglomerate of earth, water, and air that creates the hospitable conditions that living things like humans, animals, and plants rely on. In this way, the general concept of the environment cannot be—in a legally measurable sense—harmed. What can be harmed is the environment's ability to provide safe resources and conditions for the living populations that utilize it every day. For these reasons, harm to the

environment itself and harm to its living populations are inextricably linked, so no one pursuing an RCRA claim can demonstrate the former without including examples of the latter.

Many federal courts have recognized this practical reality. Courtland Co., Inc. v. Union Carbide Corp., No. 2:18-CV-01230, 2023 WL 6331069, at *57 (S.D. W. Va. Sept. 28, 2023) ("[A] substance that is present in the environment but threatens no harm does not pose an imminent and substantial endangerment.") (internal citations omitted); City of Evanston v. N. Ill. Gas Co., 381 F. Supp. 3d 941, 963 (N.D. Ill. 2019) (criticizing a RCRA claim that lacked "probative evidence that the [wastes] are likely to be encountered or cause any actual harm to humans or wildlife"); Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Ca. 1992) (including "a population at risk" and "pathway of exposure" as factors necessary to create an imminent and substantial endangerment), *aff'd*, 39 F.3d 1011 (9th Cir. 1994); Liebhart v. SPX Corp., 917 F.3d 952, 959 (7th Cir. 2019) ("RCRA…requires that they show that contaminants on the property are seriously dangerous to human health (or will be, given prolonged exposure over time)."); Leister v. Black & Decker (U.S.), No. 96-1751, 1997 U.S. App. LEXIS 16961, *9 (4th Cir. Jun. 4, 1997) (finding that water contamination did not give rise to a RCRA claim because the people that drank it used filtration systems, thereby eliminating the exposure pathway).

And even when courts have embraced the idea that the environment itself can be harmed, their subsequent inquiry proves the position unfeasible, because it inevitably leads them to measure the environmental endangerment by how it endangers living populations. Burlington Northern, 505 F.3d at 1021–22 (affirmatively asserting that danger to a living population is not required, then proceeding to couch its discussion of excessive contamination in terms of *human* health screening levels and threats to pets and wildlife). See also Tri-Realty, 124 F. Supp. at 456 ("[A]n imminent and substantial endangerment to the environment in and of itself may exist if

contamination threatens the ability of a non-living element of the environment to serve some potential function in the *local ecosystem*…if the original freshwater from the lake could potentially support the growth of certain *plants* in the local ecosystem, then the addition of salt to the lake may present an imminent and substantial endangerment to the lake in and of itself.") (emphasis added).

All this goes to show that the Appellant cannot pursue an imminent and substantial endangerment claim based solely on an allegation of harm to the environment in-and-of itself. Alleging endangerment to a living population is the only way to establish a tangible threat of harm and state a claim under the RCRA. Here, the only waste exposure in question is the arsenic and cadmium that the downgradient monitoring wells have detected in the groundwater around the Little Green Run Impoundment. (R. at 9). Altogether, the record contains no evidence that this groundwater contamination has endangered a living population. There is no evidence that this contaminated groundwater has reached the Vandalia River or any other public water drinking supply. (R. at 8). This alone puts the Appellant's imminent and substantial endangerment claim on the rocks, because many courts have rejected RCRA claims centered on groundwater where they failed to allege the possibility of a living population actually drinking that water. Miller v. City of Fort Myers, 424 F. Supp. 3d 1136, 1147 (M.D. Fl. 2020) (collecting cases). See also Davies v. National Coop. Refinery Ass'n, 963 F. Supp. 990, 999 (D. Kan 1997).

Any insistence by the Appellant that the contamination may still prove to be an imminent and substantial endangerment in the future would be too speculative to pass muster. The Appellant might point to the housing developer who is considering building a large subdivision, which would sit within one mile of the Little Green Run Impoundment and would utilize well water as its primary drinking water source. (R. at 9). They may try to lean on the RCRA's lenient

standard and claim that the arsenic and cadmium in the groundwater *may* still prove harmful later on, but this contention would violate the element of imminency.

As explained previously, the Supreme Court believes that a danger is "imminent" if it threatens to cause harm immediately. Meghrig, 516 U.S. at 485. This means that, even if the harm is not felt until later, the risk is present *now*. Id. And complementing that definition of imminence is the point of law that no such threat may be too remote in time or speculative in nature. W.R. Grace & Co., 261 F.3d at 339–40. The risk the groundwater contamination poses to this potential housing development is indeed both of these things. There is no guarantee that the housing development will be built, and it actually looks less likely now that the Appellant's knowledge of the groundwater contamination is inciting hesitation. (R. at 9). Housing developers are merely "considering" it and interested parties are merely putting their names down on a waiting list. (Id.). And even if the project was commenced, it would not come to fruition until 2031 at the earliest. (Id.). A health threat from groundwater that has a mere chance of being consumed *at least* six years from now definitely cannot be called "imminent."

Overall, the Appellant's failure to demonstrate that the groundwater downgradient from the Little Green Run Impoundment threatens a living population prevents them from bringing a valid action against ComGen, and the record presents no facts that suggest they could do otherwise. As such, their Complaint was properly dismissed, and the Twelfth Circuit should affirm that dismissal here.

CONCLUSION

For the reasons explained above, this Court should reject the Appellant's appeal and reaffirm the dismissal of the District Court.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 14