Team No. 13

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 24-001109

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and HIGHPEAK TUBES, INC.,

Defendants-Appellees-Cross-Appellants.

On Appeal From The United States District Court
For The District Of New Union for Review of a Challenge to the Water Transfer Rule Codified at 40 CFR 122.3(i)

BRIEF OF CRYSTAL STREAM PRESERVATIONISTS, Plaintiff-Appellant-Cross-Appellee

Oral Argument Requested

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Measuring Brief

Cases

Statutes

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STATEMENT OF JURISDICTION

The challenge to the National Pollution Discharge Elimination System Water Transfer Rule, codified at 40 C.F.R. § 122.3(i) and promulgated by the U.S. Environmental Protection Agency, was brought forth on February 15, 2024, by Crystal Stream Preservationists, Inc., an environmental group incorporated in the State of New Union. The United States District Court for the District of New Union had jurisdiction pursuant to 33 U.S.C. § 1365 and 28 U.S.C. § 1331. The jurisdiction of this Court is invoked under 28 U.S.C § 1291, as this matter is an appeal of a final decision and order of the district court, dated August 1, 2024. This appeal was timely filed of the district court's affirmation of the Water Transfers Rule's promulgation by the U.S. Environmental Protection Agency.

STATEMENT OF ISSUES

I. Does Crystal Stream Preservationists, Inc. have standing to bring suit against Highpeak for environmental and aesthetic injuries associated with Highpeak's unregulated discharge of pollutants into Crystal Stream?

II. Did CSP timely file the complaint when it filed suit four years after the organization was first injured and within six years of the tolling period under the Administrative Procedures Act in accordance with the standard announced in *Corner Post v. Bd. Of Governors of the Fed. Rsrv. Sys.*?

III. Was the Water Transfers Rule arbitrary, capricious, and against the Clean Water Act's plain text language by wholly exempting the addition of pollutants between distinct water bodies, thus rendering the rule improperly promulgated?

IV. Does a water transfer that itself introduces pollutants to the water conveyed require a National Pollutant Discharge Elimination System permit under the Water Transfers Rule?

STATEMENT OF CASE

A. Factual Background

On February 15, 2024, in the State of New Union, Crystal Stream Preservationists (CSP), an environmental non-profit incorporated in New Union, filed a Clean Water Act (CWA) citizen suit Complaint against Highpeak Tubing Inc. (Highpeak), related to an unpermitted water discharge into the Crystal Stream (the Stream). Order at 3. CSP's Complaint also brought an Administrative Procedure Act (APA) claim against the Environmental Protection Agency (EPA) for the invalid promulgation of the CWA's Water Transfers Rule (WTR), which provides a permit exception that Highpeak claims to fall under. *Id*. CSP argues that even if the WTR is valid, Highpeak's discharge still requires a National Pollutant Discharge Elimination System (NPDES) permit. *Id*. EPA is responsible for CWA permitting in New Union. *Id*. Highpeak has never sought, and was never granted, an NPDES permit from EPA for the tunnel connecting the stream and Cloudy Lake (the Lake) to facilitate recreational tubing between the two distinct bodies of water. *Id*. at 5.

Highpeak has operated a recreational tubing company in Rexville, New Union for 32 years. *Id*. at 4. Highpeak launches its patrons on the Crystal Stream, a stream fed primarily through natural groundwater springs. *Id* at 4, 5. In 1992, Highpeak obtained permission from New Union to construct a tunnel connecting Cloudy Lake, which is situated on the northern part of its land, to the Stream. *Id*. Compared to the Stream, the Lake has higher levels of naturally occurring minerals like iron and manganese, and higher levels of total suspended solids (TSS). *Id*. at 5. The tunnel

allows Highpeak to use a valve system to augment the flow of water in the Stream by adding water from the Lake, which enhances patrons' tubing experience. *Id*. The tunnel was built using iron pipe and by carving through rock at portions. *Id*. With State permission, Highpeak has regularly released water from the Lake into the Stream since 1992. *Id*.

CSP is an environmental group made up of thirteen Rexville residents, with some members owning land along the Stream. *Id*. Twelve members have lived in Rexville for more than fifteen years, but Jonathan Silver (Mr. Silver) moved to Rexville from Arizona in 2019. *Id*. CSP's members are invested in the preservation of the Stream in its natural state for environmental and aesthetic reasons. CSP was formed on December 1, 2023, to advance its stated environmental protection goals. *Id*.

Two members of CSP submitted declarations to the court identifying how Highpeak's actions have affected them. Cynthia Jones (Ms. Jones) recounts her use of the public walking trail which runs adjacent to the Stream where the Highpeak tube discharges water. *Id.* at 14. The water introduced from the tunnel makes the otherwise clear Stream cloudy, thereby diminishing its aesthetic value. *Id*. Mr. Silver also walks along this trail with his dogs and has observed this phenomenon in the Stream. Mr. Silver is hesitant to let his dogs drink out of the Stream because he fears it is contaminated with pollutants. *Id*. at 16. Both Ms. Jones and Mr. Silver state that they would recreate more often on the Stream if not for Highpeak's pollutant discharge, and that they joined CSP to stop this discharge. *Id*. at 15, 16.

CSP sent Highpeak and EPA a notice of intent to sue letter under the CWA regarding the discharge from the tunnel into the Stream on December 15, 2023. *Id*. at 4. This letter characterized the tunnel as a CWA point source that discharges pollutants into the Stream, which requires a

permit. *Id*. In the letter, CSP asserts that EPA's WTR was not properly promulgated, making the discharge subject to NPDES permitting under the CWA. *Id.* at 5.

The letter also details CSP samples taken from the mouth of the tunnel in Cloudy Lake and samples from the outfall of the tunnel at Crystal Stream. *Id.* These samples reveal that levels of iron, manganese, and TSS are two to three percent higher at the Stream outfall than at the Lake intake. *Id*. Considering this data, CSP contends that the pollutants clouding the water of the Stream are introduced by the water transfer process itself – which takes Highpeak's discharge out of the scope of the WTR permitting exception. *Id*. Highpeak responded to CSP's intent to sue letter stating that an NPDES permit is not required for its tunnel under the WTR, because pollutants added to water being transferred by natural processes, like erosion, do not qualify as an introduction. *Id*. at 5, 11.

CSP filed its Complaint sixty days after sending the intent to sue letter, and incorporates the same allegations outlined in the letter against the EPA and Highpeak. *Id*. Highpeak moved to have the citizen suit dismissed on lack of standing, alleging it is time-barred, and for failure to state a cause of action because the tunnel discharge is permissible under the WTR. *Id.* EPA moved to have the APA suit against it dismissed. *Id*. at 6.

B. Procedural Background

The district court granted EPA's motion to dismiss CSP's APA suit against it, finding that the WTR was properly promulgated. The district court denied all of Highpeak's motions to dismiss the citizen suit against it, finding that CSP has standing, is not time-barred from suing, and that an NPDES permit is required for the discharge.

SUMMARY OF THE ARGUMENT

The district court properly held that CSP meets all the necessary standing requirements to file suit against Highpeak and challenge EPA. Under the *Lujan v. Defenders Wildlife* analysis, a plaintiff must have suffered injury, that is both concrete and particularized and actual or imminent as a result of the defendant's conduct, where a court can provide a remedy for that harm. 504 U.S. 555 (1992). A showing of aesthetic injury or curtailed recreational use is a sufficient means of injury for standing purposes. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC). Inc.*, 528 U.S. 167 (2000). Members of CSP have shown both aesthetic injury and curtailed recreational use as a direct result of the defendant's act – specifically that of polluting the Stream without a permit, violating the CWA. CSP members have successfully shown their vested interest in preserving the pristineness of the Stream, however Highpeak's conduct of disregarding a permitting process for the discharge of pollutants has denigrated the water quality – showing both causation and a mechanism for redressability. This reflects CSP's showing of standing.

CSP's complaint was timely filed, as it meets the statute of limitations test. *Corner Post v. Bd. Of Governors of the Fed. Rsrv. Sys.* provides that the statute of limitations "clock" begins once the plaintiff has been injured by the regulation being challenged. 144 S. Ct. 2440, 2450 (2024). CSP's non-profit status does not bar it from utilizing this six-year statute of limitations period, as the Court in *Corner Post* did not mandate a distinction to be made between for-profit and non-profit entities. Highpeak and EPA propose a reading of an unsupported and unstated requirement in the Supreme Court's analysis in *Corner Post*, by presuming that one who is injured should not have the equal access to judicial review, based on whether the entity produces economic revenue. Nowhere in the standing jurisprudence is such a distinction drawn as it is well-settled that not-for-profit organizations may claim standing if they otherwise meet the elements required. With CSP forming in 2023, its injury could only have accrued at this point – well within the six-year time period. If the injury accrual period is to be set at the time of the most recent member joining, then

the clock rolls back to 2019, when Mr. Silver moved to New Union and suffered injury. In either circumstance, CSP timely filed as both time periods meets the *Corner Post* statute of limitations test.

The district court erred when it held the WTR was properly promulgated because it violates the plain text of the CWA's NPDES requirements. Courts prior to the rule's promulgation found that unpermitted water transfers were a *prima facie* violation of the Act because they are a discharge of a pollutant into waters of the United States, from a point source without a valid permit. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) (*Catskill I*). Further, these courts relied on the *Skidmore* deference standard that Courts have returned to following the overturning of the *Chevron* deference standard. *Id.* Considering that this rule runs counter to the Act's mandates and fails to pass muster under the correct deference standard, this Court should find that the rule is not entitled to deference and should be invalidated.

Even if this Court finds that the WTR was properly promulgated, Highpeak must still obtain a permit to legally operate the tunnel and continue discharging water into the Stream. The final sentence of the WTR states that when a water transfer activity itself introduces pollutants, the exception does not apply and an NPDES permit is required. 40 C.F.R. § 122.3(i) (2024). Because of the sampling done at both ends of the tunnel showing that concentrations of iron, manganese, and TSS are higher at the Stream outfall, those pollutants are introduced to the water at some point in the water conveyance. Highpeak advocates that this sentence should only apply when human activity causes the introduction of pollutants during a water transfer, but courts have not interpreted cases with similar facts in that way. Additionally, principles of statutory

interpretation like purposivism, ordinary meaning, and casus omissus counsel against Highpeak's construction of this part of the WTR.

ARGUMENT

I. CRYSTAL STREAM PRESEVATIONISTS HAS STANDING TO CHALLENGE HIGHPEAK'S DISCHARGE AND THE PROMULGATION OF THE WATER TRANSFERS RULE BY MEETING ALL NECESSARY ELEMENTS.

The district court's finding that CSP met all the necessary standing requirements was properly decided and should not be disturbed. CSP's formation was legitimate, and its members suffered injury caused by the actions of Highpeak. CSP has properly shown causation by establishing the nature of their injury being a direct result of Highpeak's conduct. Additionally, the element of redressability is met upon a showing that a desired remedy is within the Court's authority to provide. Lastly, this is not a case in which prudential considerations weigh against a finding of standing as this matter is within the zone of interests of the regulation at issue.

A. Crystal Stream Preservationists suffered a cognizable injury through the association of its members.

CSP includes among its members individuals who own property alongside the now-polluted Crystal Stream. Their injury stems from owning land adjacent to this polluted water. CSP has additional members who have experienced aesthetic or recreational harm by being deterred from using the nature pathway near the Stream due to the pollution.

Plaintiffs must show that they have suffered a cognizable injury, which bears a causal connection to the conduct being challenged before the Court, where a favorable decision is able to redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that a plaintiff must have suffered injury due to the defendant's conduct, where a court can provide a remedy for that harm). The injury must be 'in fact', meaning it's both (a) concrete and particularized and (b)

actual or imminent. *Id*. This arises from the Constitution's cases and controversies requirement, where a generalized aggrievance does not suffice. *See, e.g., Fairchild* v. *Hughes,* 258 U. S. 126, 129-130 (1922). Proof of injury does not imply a traditional sense of harm. Injuries such as aesthetic harms, economic impacts, or reduced recreational use of property have been legally recognized by Courts, including the Supreme Court, as a basis for standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC). Inc.*, 528 U.S. 167 (2000) (holding that curtailed recreational use of a waterway that subjects' plaintiffs to economic or aesthetic harm is a recognized harm). Standing additionally requires a causal connection between the experienced harm and the conduct being challenged. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The record reflects written statements that CSP members regularly walk alongside the pathways of the Stream, making use of and enjoying its formerly pristine waters. Order at 7. A declaration from Cynthia Jones, a CSP member, shares her experience of the now cloudy water impairing her ability to see clearly through the Stream, and her overall pleasure in strolling alongside this Stream. *Id*. Another CSP member, Jonathan Silver, also regularly walks along Crystal Stream, accompanied by his dogs. *Id*. Mr. Silver submitted statements show his concern for walking this path with his dogs, due to concerns about the Stream being contaminated by pollutants – which impacts his dogs as they may drink from the Stream. *Id*. These documented experiences, of altered recreational use, constitute adequate harm to provide legal standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC). Inc.*, 528 U.S. 167 (2000). Additionally, the mere sight of the pollutants, which causes injury to one's aesthetic and recreational enjoyment, meets the threshold of 'injury' to confer standing. *Lower Susquehanna Riverkeeper v. Keystone Protein Co.*, 520 F. Supp. 3d 625, 633 (M.D. Pa. 2021).

CSP is a legitimate environmental nonprofit corporation with members that suffer actual injury as a result of Highpeak's actions. A critical component of CSP's legitimacy is that it states a claim through the lived experiences of its members, rather than the organization. In *Sierra Club v. Morton*, the Court found that the plaintiffs lacked standing by failing to show any injury to their members. *Sierra Club v. Morton*, 405 U.S. 727 (1972). With CSP members living near the Stream and physically making use of the property, it bars the applicability of such precedent.

B. The harm that Crystal Stream Preservationists members experienced, and the pollution of the Stream are causally connected.

The reduced desire to make use of Crystal Stream is directly attributable to the discharge of pollutants by Highpeak, affirming causation. Members of CSP with an interest in the cleanliness of the Stream are suffering a reduced desire to enjoy the Stream by Highpeak specifically acting outside of permit regulations. The members have expressed their fondness of the Stream, walking alongside it with animals, and would even go into the Stream or allow their dogs to drink directly from the water, if not for the cloudiness of the waters from Highpeak's discharged pollutants. Showing that the pollutant causes the injury experienced by the plaintiff successfully meets the traceability requirement of standing. *Public Int. Research of N.J. v. Powell Duffryn*, 913 F.2d 64, 72 (3d Cir. 1990). The plaintiffs have shown here that Highpeak manipulating the flow of the stream for the benefit of tubing introduces new materials into the Stream, causing it to be polluted. Order at 4. Therefore, the nature of the injury – harm to the aesthetic and recreational use – is adequately traced to the actions of Highpeak to provide standing to CSP.

C. Crystal Stream Preservationists present a claim that can be redressed by the Courts.

CSP seeks to bar Highpeak from discharging the pollutants into Crystal Stream altogether, and at minimum, requiring a permit to continue their actions to ensure the health of the water and those who make use of the Stream for recreational activities. CSP additionally seeks to have the WTR promulgation assessed and ultimately deemed as being not properly promulgated – a decision within this Court's judicial authority. If the WTR is found to be promulgated, CPS's claim and therefore standing position, does not become moot. The WTR, if determined to be properly promulgated, does not exempt Highpeak from needing a permit under its standards.

This presents an adequate showing of redressability, where it is not speculative that a favorable decision by this Court will redress the injury being experiencing CSP members. Requiring Highpeak to comply with permit regulations to ensure the health of the Stream will directly impact the injury at issue through the causal relationship of Highpeak and the pollution – forming a redressable claim.

CSP makes a sufficient showing of standing by successfully showing injury, as its members, which the organization represents, are deterred from using the walking pathways near the Stream. That deterrence is directly connected to the actions of Highpeak, where the discharge of pollutants is the cause of their apprehension to recreationally use the Stream. This means that without the pollution, harm would not occur – providing the Court with a remedy to offer CSP, showing standing is met.

II. CRYSTAL STREAM PRESERVATIONISTS' COMPLAINT WAS TIMELY FILED, AS BINDING SUPREME COURT PRCEDENT STATES THAT THE STATUTE OF LIMITATIONS CLOCK BEGINS ONCE A PLAINTIFF

EXPERIENCES INJURY.

A. Regardless of whether the statute of limitations starts at the onset of Crystal Stream Preservationists' formation, or upon injury, the claim is timely filed.

CSP's complaint was timely filed, as it meets the statute of limitations test. Formerly, under the APA, a plaintiff was afforded six years after a regulation was published to challenge it, such as the WTR. 28 U.S.C. § 2401(a). The recent Supreme Court decision of *Corner Post* alters this, allowing for the statute of limitations clock to begin once the plaintiff has been injured by the regulation. *Corner Post v. Bd. Of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024). Combined, these two rules can be interpreted to mean that a plaintiff has six years to challenge a promulgated regulation once they have experienced injury.

CSP was formed on December 1, 2023, and thereafter, officially filed a challenge to the WTR on February 15, 2024 – well within *Corner Post*'s six-year requirement. Order at 8. EPA and Highpeak argue that "the formation of a nonprofit group to mount a fresh challenge to business practices and a regulation that have been in place for decades" is distinct from a "corporation … [with] a legitimate business interest[]… formed for the purpose of conducting that business." *Id.*

EPA and Highpeak claim that the for-profit classification of the entity in *Corner Post* provides it with a heightened ability to experience injury as a result of regulation. *Id*. The gross generalization that non-profits are unable to experience 'injury' as a result of regulation in the same capacity as for-profit entities, fails to grasp the purpose and nature of organizations like CSP. Upon formation, both non-profit and for-profit entities collectively organize shared motives, principles, practices, and other goals. Therefore, it is only through the formation process that regulatory harm could be experienced, as the nature of that injury would not be fully understood prior to the organization's purpose being identified. EPA and Highpeak imply that CSP has no legitimate business interests, and therefore their claim cannot be considered timely filed. This fails

to consider that CSP does have a legitimate interests to protect, though they are not confined to economic means.

Corner Post does not distinguish between the ability of a for-profit and non-profit entity's ability to bring suit. *See generally* 144 S. Ct. 2440. The district court recognized the danger of reading in a restriction on the new *Corner Post* rule to preclude an entire class of plaintiffs with legitimate injury from bringing suit, simply because their primary purpose is not to generate profit. Giving legitimacy to Highpeak and EPA's reasoning would go against the spirit of the Supreme Court's explicit analysis in *Corner Post*. This reasoning emphasizes the "*plaintiff-centric*" text of the APA provision in question – not exclusively some implied *for-profit-plaintiff* that Highpeak and EPA insist upon. 144 S. Ct. at 2459 (emphasis added).

The reasoning in *Corner Post* reveals that the Supreme Court would likely reject Highpeak and EPA's argument. For example, "[the plaintiff-centric accrual rule] vindicates the APA's 'basis presumption' that *anyone* injured by agency action should have access to judicial review." *Id*. (emphasis added). Here, the Supreme Court has the opportunity to explicitly exclude a group of plaintiffs, yet it did not. Further, the Court notes that the plaintiff-centric rule respects our nation's "deep-rooted historic tradition that *everyone should have his own day in court*." *Id*. (quoting *Richards v. Jefferson County*, 517 U. S. 793, 798 (1996) (emphasis added)). Again, the Court is unequivocal: those with legitimate injury are entitled to judicial review.

The Supreme Court's interpretation of the APA statute of limitations in *Corner Post* should not be unnecessarily narrowed, as they made their intent clear by declining to identify organizational classifications for this rule.

B. A six-year statute of limitations that is applicable to all entity types promotes sound public policy.

Encompassing the type of business that CSP conducts, promotes good public policy, as having various judicial rules for a statute of limitations test would provide parties and the Courts with a lack of clarity in the application of these procedures. For example, If EPA and Highpeak's interpretation of limiting injury for a *Corner Post*-test is limited to only regulatory harm that is formed through conducting business, courts may be tasked with scrutinizing various organizational activities to determine if they meet a definition of for-profit. Not all businesses are conducted similarly, nor do they all operate in a traditional for-profit capacity, which would make the application of this test subject to judicial and party scrutiny when determining its applicability. Requiring courts to create and implement a complex test does not promote judicial economy, nor is it required by the Court in *Corner Post*.

Additionally, expanding the extension of a statute of limitations for organizations like CSP allows courts to build sufficient precedent, compared to an immediate challenge. The Court in *Corner Post* specifically alludes to this policy standpoint by asserting that the extension of time does not render a more favorable outcome for plaintiffs but rather allows the Supreme Court to obtain binding precedent to inform analysis for a later challenge. 144 S. Ct. 2440, 2459 (2024).

Further, there is a powerful argument for the simplicity of returning to the APA's purpose, which is to provide parties who are claiming injury because of agency action, a medium to have that claim heard and possibly redressed. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Allowing judicial review of regulations that cause injury to organizations in the form of economic, aesthetic, recreational, or environmental harms is a well-established tenet of good public policy that this Court should uphold.

C. Crystal Stream Preservationists is not bound to a specified timeline for filing.

As the district court correctly noted, the fact that CSP formed as an organization for the purposes of this lawsuit in December 2023 does not negatively impact CSP's standing in light of the Supreme Court's Corner Post decision. Order at 8-9. Just as in Corner Post, CSP formed several years after the rule at issue was promulgated; nonetheless, CSP's claim is timely filed as the organization's injury did not accrue until its formation. Id. It is well-settled law that an organization may properly claim standing based either on injury to the organization itself or in a representative capacity on behalf of its members who have been injured in fact and thus could have sued on their own. *See generally, Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 (1976). As the district court stated, any controversy as to the timeliness of the asserted standing is obviated by the fact that Mr. Silver – a CSP member who moved to the area four years prior to the initiation of the instant lawsuit – could only claim injury after he moved to the area. Order at 9. As such, CSP, in its representative capacity on behalf of Mr. Silver, clears the six-year statute of limitations which accrued from the time of his personal injury in 2019 upon his arrival in New Union.

Case law precedent also supports CSP's timeliness in filing the claim even considering the organization was formed in 2023 for the purposes of challenging the 2008 WTR. An organization does not need to wait a given period of time to claim standing if it meets the other elements required of organizational standing, even if the organization was formed for the purposes of filing a given claim. *See Emanuel Displaced Persons Ass'n 2 v. City of Portland*, 704 F. Supp. 3d 1088, 1103 (D. Or, 2023) (finding plaintiff, an organization formed shortly before filing an action against defendant, had standing to maintain its lawsuit). In *Corner Post*, the rule at issue was promulgated in 2011 by the Board of Governors of the Federal Reserve System. 144 S. Ct. at 2448. However, the Plaintiff, a North Dakota business, was not incorporated until 2017. *Id*. The Court found that, under the Administrative Procedure Act (APA), a given plaintiff may bring a suit to challenge a

regulation when injury accrues to the plaintiff, thus giving it a "complete and present cause of action." *Id*., at 1250.

The district court was correct in finding Corner Post controlling because much like the plaintiff in that case, CSP's injury only accrued upon its formation in 2023, or in the alternative, in 2019 when Mr. Silver moved to New Union. In both instances, CSP timely filed the instant lawsuit well within the six-year statute of limitations available under the APA.

III. THIS COURT SHOULD FIND THAT THE CLEAN WATER ACT'S WATER TRANSFERS RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS INCONSISTENT WITH THE STATUTORY MANDATES, INAPPROPRIATELY SEEKS TO REGULATE AWAY AN ENTIRE CLASS OF POLLUTANTS AND LACKS REASONABLE PERSUASIVE POWER.

The district court erred by finding that the WTR was validly promulgated and entitled to continued deference under the principles of *stare decisis* because the WTR cuts directly against the clear statutory mandates, of the CWA, rendering it arbitrary and capricious. This Court should apply the statutory interpretation maxim of ordinary meaning in this instance to give effect to Congress' intent and find that the law's architects intended to include water transfers in the NPDES scope. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, 19 (last updated March 10, 2023).

The CWA clearly prohibits "the discharge of any pollutant by any person shall be unlawful" except where the discharge is authorized pursuant to the National Pollution Discharge Elimination System (NPDES) permit program. 33 U.S.C. § 1331. While § 1331 does not make specific reference to water transfers, it is well-settled that "[t]o establish a CWA violation, [a] plaintiff[] must prove that (1) there has been a discharge; (2) of a pollutant; (3) into waters of the United States; (4) from a point source; (5) without an NPDES permit." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004).

Congress established the NPDES program with "the purpose of…transform[ing] generally applicable provisions of the CWA into specific obligations on the part of an individual polluter." *South River Watershed All., Inc. v. DeKalb Cty.*, 484 F. Supp. 3d 1353, 1362-63 (N.D. Ga. 2020). As such, the NPDES program is best thought of as Congress' primary enforcement mechanism to enact the CWA's broad mandates "to restore and maintain the chemical, physical, and biological integrity… [of the] waters of the United States," embodied in 33 U.S.C. § 1251, because the presence or absence of a permit either renders the polluting activity legal or illegal.

In promulgating the WTR, the EPA clearly ignored the CWA's statutory mandates, thus attempting to inappropriately shirk its statutory duties for the sake of administrative convenience without proper consideration of Congress' intent in crafting a broadly applicable permitting program designed to ensure the environmental integrity of the waters of the United States. Despite the fact that the U.S. Courts of Appeals for the Second and Eleventh Circuits have previously found that the EPA's promulgation of the WTR is entitled to deference, the Supreme Court's recent abrogation of *Chevron* deference permits a court to overturn a prior holding applying that deferential framework if there is "special justification" to do so. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

We believe this Court should find that special justification exists to overturn the district court's decision that the WTR was validly promulgated in light of the highly unreasonable manner in which the EPA ignored § 1331 requirements in arbitrarily and capriciously.

A. Case law prior to the Water Transfers Rule's adoption demonstrates that a proper statutory interpretation of the Clean Water Act would require water transfers to be approved under the National Pollution Discharge Elimination System program.

Before the WTR was promulgated EPA's numerous attempts to informally excuse water transfers from NPDES permitting were rejected by federal courts, which held that § 1331, plainly

interpreted, would require a permit. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996) (finding that water being pumped from one water body to another having no natural connection and differing water qualities constituted the addition of a pollutant to the receiving water body, thus necessitating an NPDES permit); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002) (concluding the pumping of water from one water body to another water body containing a different chemical composition constituted the addition of pollutants subject to the scope of the NPDES program); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) (*Catskill I*) (explaining that the addition of pollutants originating from a one body of water to another was covered conduct under the Act, and as such, allowing this conduct to be excluded was inconsistent with the statutory mandates).

The CWA defines "pollutants" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

"Navigable waters," under the CWA are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This definition clearly applies to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features" like oceans, rivers, and lakes. *See Rapanos v. United States*, 574 U.S. 715, 739 (2006). Much like other CWA provisions, the Court has interpreted the law to have an expansive view of these terms to include "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters." *Sackett v. EPA*, 598 U.S. 651, 684 (2023) (*quoting Rapanos*, 574 U.S. at 742 (2006)). Thus, it is clear from these decisions that Congress intended for the meaning of "waters of the United States" to have a broad meaning.

See also, Cty. Of Maui v. Hawaii Wildlife Fund, 590 U.S. 165, 170 (2020) (Holding that "the addition of pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters").

Point sources are defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts have interpreted what constitutes a point source broadly to give effect to the CWA's statutory purpose. *See Parker*, 386 F.3d at 1009 (finding debris and excavation equipment which collected water that later flowed into navigable waters to be a point source); *See also, United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976) (finding discharges into a city sewer system which ultimately emptied into the Mississippi River to be a point source even though the discharge occurred through an intermediary conduit before reaching a navigable water).

Because of the Court's expansive reading of the above-stated key jurisdictional terms used in the CWA, water transfers were appropriately understood as falling within the NPDES program's ambit as these transfers are capable of discharging pollutants from one water body to another, through a point source (e.g., a drainage channel), into another water of the United States, causing impairment to the receiving water body. *Catskill I*, 273 F.3d at 485-93.

B. The Environmental Protection Agency's promulgation of the Water Transfers Rule was an inappropriate attempt to back-door the kind of exclusions prohibited by the courts by taking advantage of *Chevron* deference.

This well-established precedent mandating an NPDES permit to facilitate a water transfer between distinct bodies of water was only disturbed when EPA promulgated the WTR at issue in this case. The EPA began the process of promulgating the WTR in August 2005, when the agency's general counsel, Ann R. Klee, authored a memorandum which argued that Congress did not intend

for water transfers to be subject to the NPDES program. *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 504 (2017) (*Catskill III*). After the EPA proposed the WTR in June 2006, the agency provided notice and solicited public comment consistent with the APA. *Id.* Two years later, the WTR was formally adopted. *Id.* The final version of the WTR excludes from the NPDES permitting program any "[d]ischarges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use…" 40 CFR 122.3(i).

In effect, the agency used a bad-faith rule making process to make legal what the courts deemed illegal. Since its codification, the WTR has enabled water transfers to evade judicial scrutiny on the basis of *Chevron* deference. *See Catskill III*, 846 F.3d at 533 (noting "even though, as we note again, we might conclude that it [the EPA's reasons for adopting the WTR] is not the interpretation that would most effectively further the CWA's principle focus on water quality… it survives deferential review under *Chevron*…").

C. *Loper-Bright's* abrogation of *Chevron* deference and reincorporation of the *Skidmore* deference standard provides sufficient authority to find the Water Transfers Rule was improperly promulgated.

In *Loper-Bright*, the Court announced the end of *Chevron* deference and instructed lower courts to apply the less deferential *Skidmore* standard. *Loper-Bright Enterprises,* 144 S. Ct. at 2265-67. While the majority in *Loper-Bright* noted that the opinion was not intended to overturn all prior judgments which relied upon the *Chevron* deference standard, the Court left the door open to review past decisions where there is a "special justification" to reevaluate a prior opinion. *Loper-Bright Enterprises*, 144 S. Ct. at 2273. While the Court has had no occasion to expand on the meaning of "special justification," this Court should find it present here because of the degree to which the WTR inappropriately evades the CWA's statutory obligations, and the numerous

opinions prior to the WTR's promulgation which held that water transfers not pursuant an NPDES permit undermine Congress' intent.

Under the *Skidmore* deference standard, an agency judgment is entitled to judicial deference where "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This Court is not without guidance on *Skidmore's* applicability to unpermitted water transfers as that standard was applied in cases prior to the WTR's adoption—and under the *Skidmore* deference standard, the various circuits found the agency's interpretation of the CWA as applied to water transfers was not entitled to deference. *See Catskill I*, 273 F.3d at 491.

In *Catskill I*, the court explained that *Skidmore* deference controlled because the decision to exempt the water transfer from NPDES permitting was not pursuant to a validly promulgated rule entitled to *Chevron* deference. *Id*. In that case, the court correctly held that a water transfer should appropriately be considered to be an "addition" of a pollutant to the receiving water body because the pollutant came from "the outside world;" put differently, the source of the pollution originated from somewhere else but the receiving water body and was introduced via a tunnel, which was found to be a point source. *Id*. (*quoting Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

Here, the WTR similarly should not be entitled to *Skidmore* deference even in light of the voluminous administrative record developed prior to its promulgation for the very reason it was found inapplicable in case law preceding its adoption. The reasoning present in the WTR does not comport with other provisions of the Act because all of the constituent parts of § 1331 are interpreted broadly so as to give the statute a maximal effect in line with congressional intent to

not arbitrarily limit its applicability. It would be an error to uphold the WTR simply on the basis of *stare decisis* because to do so would ignore the "earlier… pronouncements" of past courts in the years before its adoption where *Skidmore* deference was applied. This Court should consider the affirmation of the WTR under the *Chevron* standard to be the historical aberration unworthy of precedential weight as it even failed to persuade the *Catskill III* court on the merits and was only upheld because of the prevailing consensus on *Chevron's* applicability. As such, this Court should reverse the finding of the district court and find the WTR was not validly promulgated under the *Skidmore* standard.

IV. EVEN IF THE WATER TRANSFERS RULE WAS PROPERLY POMULGATED, HIGHPEAK MUST STILL OBTAIN AN NPDES PERMIT BECAUSE THE WATER TRANSFER INTRODUCES POLLUTANTS, REMOVING IT FROM THE WATER TRANSFERS RULE EXEMPTION.

The district court correctly concluded that the CWA requires Highpeak to obtain a permit. The CWA proscribes discharges of pollutants into waters of the United States; discharge is defined as "any addition of any pollutants to navigable waters from any point source." 33 U.S.C. § 1362(12). Any discharge of a pollutant is subject to an NPDES permit. *See* 40 C.F.R. § 122.1(b)(1) (2024). This general NPDES permit requirement rule is subject to certain exceptions, such as the WTR:

> Discharges from a water transfer [do not require NPDES permits]. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i) (2024). Highpeak claims that the tunnel from Cloudy Lake to Crystal Stream falls under this exception, making an NPDES permit unnecessary. Order at 5.

The last sentence of the WTR is highly relevant to the present facts and renders Highpeak's argument against permitting unpersuasive. Given CSP's collected data that Highpeak's tunnel outfall into Crystal Stream reveals a two to three percent higher concentration of iron, manganese,

and total suspended solids when compared to the intake at Cloudy Lake, it is evident that said pollutants are "introduced by the water transfer activity itself." Order at 5; 40 C.F.R. § 122.3(i) (2024).

A. Courts have interpreted water conveyances in which pollutants are added during a water transfer to require a National Pollution Discharge Elimination System permit.

The Supreme Court has not weighed in explicitly as to the WTR's provision regarding the exclusion of pollutants that are introduced by the transfer activity itself from the NPDES permitting exception. However, in 2018 the Supreme Court declined to review the Second Circuit's upholding of the WTR. *See* 3 Waters and Water Rights § 53.01 (2024) (in which the Second Circuit concluded that EPA's reasoning for not requiring NPDES permits in the enumerated situations was valid). However, some federal district courts around the nations have reached the question of what qualifies as the introduction of pollutants removing activity from the scope of CFR § 122.3(i). *See generally Na Kia 'i Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Haw. 2019); *Bang v. Lacamas Shores Homeowners Ass'n*, 707 F. Supp. 3d 1013 (W.D. Wash. 2023).

The CWA broadly defines "pollutant" to encompass a wide range of substances, including naturally occurring materials when they are discharged into water. 33 U.S.C. § 1362(6). Biological materials, such as iron, manganese, and total suspended solids, are classified as pollutants under the CWA. *See id.*

1. A federal district court held that an unlined drainage system allowed for the introduction of pollutants during a water transfer activity and required a National Pollution Elimination Discharge System permit.

In *Na Kia 'i Kai v. Nakatani*, a Hawaii federal district court found that the state's management of an unlined, earthen drainage system conveying waters from natural wetlands approximately forty miles to the Pacific Ocean was subject to an NPDES permit because chemical pesticides, sediments, phosphorous, and heavy metals were added to the conveyed waters during

the transfer. *See* 401 F. Supp. 3d at 1100, 1108. The outfalls into the Pacific Ocean receiving the conveyed water via this canal system was not meeting state water quality standards due to the pollutants, interfering with recreational uses. *See id.* at 1100. The court emphasized the "unlined, earthen canals" were "integral parts of the [water transfer activity]" and the "unvegetated and unstable banks [were] sources of detached sediment […] contaminated with pesticides […]" meant that the drainage system was not an exempt water transfer activity since it added pollutants. *See id.* at 1103-04.

In the present case, Highpeak's construction of the tunnel is similar to the unlined canal in *Na Kia 'i Kai* in that it is partially carved through rock and earth. *See* order at 4, 11. Thus, Highpeak's tunnel is unlined at parts. *See id*. Although the canal system in *Na Kia 'i Kai* was significantly longer and completely unlined, the reasoning that a lack of impermeable surfaces contributed to the water transfer activity picking up pollutants is analogous. As in *Na Kia 'i Kai*, where the water conveyance allowed for the introduction of biological pollutants such as phosphorous and sediment, so too did Highpeak's tunnel conveyance allow for the introduction biological pollutants such as iron, manganese, and TSS. *See* order at 5.

2. A federal district court held that the introduction of pollutants in a water transfer activity from a natural process still required a National Pollution Elimination Discharge System permit, despite no human activity contributing to the introduction.

In *Bang v. Lacamas Shores Homeowners Ass'n*, a Washington federal district court found that a homeowner association's failure to maintain a stormwater collecting wetland biofilter intended to remove natural pollutants prior to the water's transfer to a nearby lake was a point source that added biological pollutants during the transfer process, thus removing it from the WTR permit exemption. *See* 707 F. Supp. 3d 1013, 1022. Defendants in *Bang* used a Ninth Circuit appellate court definition of "biological material" in the context of pollutants to argue that

introduced pollutants classified as biological material must be "the waste product of a human or industrial process," or "materials that are transformed by human activity." *See id*. at 1022, 1024 (quoting *Ass'n to Protect Hammersley v. Taylor Res., Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002)). However, the *Bang* court factually distinguished[1] the Ninth Circuit case and found that it was not controlling, which resulted in the conclusion that the pollutants in question – despite being naturally produced – required an NPDES permit.

Furthermore, in *Bang*, the court found that "whether [the] [d]efendant is itself actively adding pollutants, or is merely allowing the addition of pollutants as a consequence of its continuing inaction – that is, its failure to maintain the Biofilter – is not relevant under the CWA." 707 F. Supp. 3d at 1022. Defendants there asserted that because the addition of pollutants occurred through a *natural* process resulting from decaying vegetation, rather than any particular action taken by the homeowners association, they could not be liable for the introduced pollutants. *See id*. The court rejected this argument, emphasizing that the CWA does not require that pollutants added to the discharged water be caused by human activity *See id*.

In the present case, Highpeak contends that the introduction of pollutants from a *natural* process such as erosion cannot be what the CWA intended to regulate. *See* order at 11. Highpeak interprets the WTR's use of the word "introduced" to mean as a result of human activity. *See id*. However, as in *Bang* where the court found pollutants occurring naturally from decaying vegetation and the addition of pollutants from human activity to be a distinction without a difference under the CWA, so too should this court. Like the pollutants naturally introduced in

[1] The Washington court found that the Ninth Circuit's definition relating to human activity was specific to the facts of that precise case. *See Bang*, 707 F. Supp. at 1024. The Ninth Circuit excluded "...shells and other materials released from mussels..." from the definition of "biological materials" under the Act because the Act explicitly articulates the goal of protecting shellfish. *Id*. Thus, for the court to include a byproduct of a shellfish as a pollutant would be inconsistent to the purpose of the CWA. *See id*.

Bang, the process of erosion is naturally occurring, and there the court found that fact irrelevant for the purposes of the CWA. In the absence of Highpeak's construction of the tunnel connecting Cloudy Lake and Crystal Stream, the iron, manganese, and TSS would not be *introduced* into the stream. Because the CWA does not specify natural and human activity introducing pollutants, Highpeak should be held accountable for the pollutants introduced by the transfer activity.

B. Purposivism and semantic canons of construction in statutory interpretation support giving effect to the final sentence of the Water Transfers Rule.

1. Purposivism, ordinary meaning, and *casus omissus*.

A common semantic canon of construction is ordinary meaning. When interpreting a statute, courts often begin by looking for the plain meaning of the statutory text. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, 21 (last updated March 10, 2023). Courts assume that if a word is left undefined, Congress uses the common meaning of the word – the definition that the population at large would understand the word to mean. *See id*. The semantic canon of *casus omissus* suggests that "a matter not covered by a statute should be treated as intentionally omitted." *Id*. at 51.

Purposivism is a major theory of interpretation positing "that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose." *Id*. at 12 (quoting ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014)). The CWA's stated goal is broad: to protect the "chemical, physical and biological" integrity of the nation's waters by way of preventing pollution. 33 U.S.C.S. § 1251(a) (2024).

Highpeak argues that pollutants introduced into a water transfer from a "natural process[] like erosion" is not the intent of the WTR's final sentence, and only applies to human activity that introduces pollutants. Order at 5, 11. Highpeak takes issue with construction of the definition of

"introduced" to allow any amount of new pollutants picked up by water moving through the tunnel to be included. Order at 11.

Merriam-Webster defines "introduce" as "a general term for bringing or placing a thing or person into a group or body already in existence." Merriam-Webster, *Introduce*, https://www.merriam-webster.com/dictionary/introduce (last visited Nov. 11, 2024). Highpeak's reading of the WTR narrows the broad effect the Act is intended to have, by reaching beyond the plain meaning of "introduce" and reading in an unstated limitation: human activity must be the cause of the introduction. The canon of *casus omissus* advises against reading in an unstated assumption to a statute to avoid frustrating the Act's purpose, and case law has also interpreted the human activity requirement – to be incorrect. *See Bang*, 707 F. Supp. 3d at 1022.

Even if Highpeak was correct in arguing that "trace" amounts of pollutants will always be picked up by a water transfer activity, order at 11, the tunnel introduced more than a trace amount of pollutants to Crystal Stream. Trace is defined by Merriam-Websters as "a minute and often barely detectable amount or indication." Merriam-Webster, *Trace*, https://www.merriam-webster.com/dictionary/trace (last visited Nov. 11, 2024). The fact that testing was able to determine a two to three percent increase in the concentration of pollutants at the Crystal Stream outfall means the pollution *is detectable*. Order at 5. Additionally, the pollutants are detectable with the naked eye in the stream, which is the entire basis for this suit. Order at 14, 16. Highpeak's implied argument that they only discharge trace amounts of pollutants is thus demonstrably false.

CONCLUSION

CSP's maintains standing against Highpeak as the organization, through its members, properly alleged aesthetic harm to the river, accompanied by a diminished willingness to recreate along its path. These injuries were caused by Highpeak's polluting activity, thus causing the once-

pristine river to become cloudy with pollutants originating from the nearby lake. Such injuries are redressable as it is within the Court's authority to issue an injunction against Highpeak from engaging in polluting conduct.

With respect to CSP's challenge to EPA's WTR exempting such water transfers from NPDES permitting, CSP also maintains standing. The injury to the river was caused by EPA's arbitrary and capricious decision to leave unpermitted and unregulated water transfers out of it's regulatory authority. As such, this Court should find the WTR contrary to the CWA.

This Court should affirm the district court's finding that the claims against EPA were timely filed on the basis of *Corner Post's* clarification of the APA's statute of limitations tolling. As an organization, CSP only began accruing injury once it was incorporated in 2023. Additionally, CSP, in its representative capacity on behalf of its members, clearly falls within the time limitations on behalf of Mr. Silver, who individually suffered injury beginning in 2019 upon moving to the area.

On the merits of the challenge to the WTR, this Court's analysis of the rule should remain confined to the text of the CWA's text itself. A proper reading of the statute's permitting requirements demonstrates that Congress intended for the provision to be broadly applicable. Prior to the adoption of the rule, courts found that the NPDES requirements plainly required a permit to effectuate a water transfer. In light of the Supreme Court's abrogation of the *Chevron* deference standard, this Court should find the agency rule is no longer entitled to deference and reinstate the judiciary's prior holdings which required a permit for water transfers.

Lastly, even if the WTR is deemed to be properly promulgated, this Court should give effect to the Rule's plain language and find that the water transfer at issue in this case introduces pollutants in a manner not covered by the rule's scope.

For the foregoing reasons, CSP respectfully requests that this Court affirm the district court's conclusions that CSP had standing to file suit, that the lawsuit was timely filed, and that Highpeak's discharges run afoul of the WTR's requirements thus necessitating Highpeak to obtain a permit. Additionally, CSP requests this Court to reverse the district court's decision to uphold the WTR as it is arbitrary and capricious and contrary to law, and thus not entitled to deference under the *Skidmore* standard.