Team 14

C.A. No. 24-001109

In the United States Court of Appeals
for the Twelfth Circuit

CRYSTAL STREAM PRESERVATIONIST, INC.,

Plaintiff-Appellant-Cross-Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

AND

HIGHPEAK TUBES, INC.,

Defendant-Appellee-Cross-Appellants.

On Appeal from the United States District Court
of New Union
Honorable T. Douglas Bowman, Judge Presiding
District Court No. 24-CV-5678

BRIEF OF PLAINTIFF-APPELLANT-CROSS-APPELLEE, CRYSTAL STREAM PRESERVATIONIST, INC.

Non-Measuring Brief

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JURISDICTIONAL STATEMENT

The United States District Court of New Union had jurisdiction over this action under 28 U.S.C. §1331 (federal question) and 33 U.S.C. §1365 (citizen suits). Crystal Stream Preservationist, Inc. ("CSP") brought this action against Highpeak Tubes, Inc. ("Highpeak") alleging it was violating the Clean Water Act ("CWA" or "Act") and against the United States Environmental Protection Agency ("EPA") for the promulgation of the rule under the CWA. The United States District Court of New Union entered its Order on August 1, 2024. CSP, the EPA and Highpeak each filed timely motions seeking leave to appeal pursuant to Fed. R. App. P.4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. §1291, which gives courts of appeal jurisdiction of appeals from all final decisions of the district courts; and under 28 U.S.C § 1292, which gives courts of appeal jurisdiction of appeals from interlocutory orders of the district courts. The Order entered by the district court was final and thus appealable.

STATEMENT OF THE ISSUES

I. Did CSP satisfy standing when its members loss enjoyment of Crystal Stream because of Highpeak's discharge?

II. Under the Administrative Procedures Act's six-year statute of limitations to challenge a promulgated regulation, does CSP's right of action accrue, as it would if it were a for profit business, when it was formed and thus able to be injured by Highpeak?

III. Did EPA act arbitrarily and capriciously and outside the scope of its authority when it promulgated a rule that circumvents the NPDES permitting process?

IV. Is it reasonable to interpret Highpeak's discharge as falling outside the scope of the Water Transfer Rule, when the discharge from Highpeak's tunnel contains higher concentrations of iron, manganese and TSS?

STATEMENT OF THE CASE

The Formation of Crystal Stream Preservationist, Inc.

On December 1, 2023, thirteen residents of Rexville, New Union came together and formed a non-profit organization, Crystal Stream Preservationist, Inc. ("CSP"). Order at 4. The organization has a board comprised of a President, Vice President and Secretary. Ex. A. at Par. 4. All CSP members are concerned with the preservation of Crystal Stream ("Stream"). Order at 4. The express mission of CSP "is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations." Ex. A. at Par. 4. Multiple CSP members live near and use Crystal Stream Park ("the Park"), a public park that has a walking trail which runs along the Stream. Order at 14 and 16. For a couple of CSP's members the preservation of the stream sits even closer to home; two members own land which they also reside in, directly along Crystal Stream. Order at 4. Their homes are "approximately one mile south of Highpeak's tube run," which places them only five miles south of the discharge point. Order at 5.

Members of CSP have stated they would "recreate more frequently on the Stream," wade directly in the Stream and be more comfortable letting their dogs drink from the Stream, if Highpeak's unpermitted discharge was halted. Ex. A. at Par. 12; Ex. B. at Par. 9. The Secretary of CSP, Cynthia Jones, declared her "ability to enjoy the Stream has significantly diminished" since 2020 when she first learned of Highpeak's discharge. Order at 15. While many of CSP's members have been a part of the Rexville community for more than 15 years, the non-profit has also welcomed newer residents such as Jonathan Silver who moved to Rexville in 2019. Order at 4. Ultimately, CSP is a community membership organization that is built on the members shared interest in preserving Crystal Stream "in its natural state for environmental and aesthetic reasons." Order at 4.

Highpeak Tubes, Inc.'s Violation of the Clean Water Act

Highpeak Tubes, Inc. ("Highpeak") is a corporation that has, for 32 years, threatened the preservation of Crystal Stream to increase its profits. Order at 4. In 1992 Highpeak built a tunnel connecting Cloudy Lake to Crystal Stream that not only exposes water to sediment from carved out rock, but also to iron pipes. Order at 4. Although Highpeak "obtained permission from the State of New Union to construct a tunnel," it has never applied for a National Pollution Discharge Elimination System permit ("NPDES permit"). Order at 4.

Data collected by CSP shows that Highpeak has introduced Crystal Stream to "additional iron, manganese, and TSS." Order at 5. Specifically, water samples taken from Cloudy Lake and Crystal Stream indicate "the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of these pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day." Order at 5. Still, Highpeak argues this transfer fits within the WTR. Order at 5.

Procedural History

"On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak," and copies to the EPA, and . . . "the New Union Department of Environmental Quality ("DEQ")." Order at 5. On December 27, 2023, Highpeak responded to CSP stating it did not need an NDPES permit due to the WTR. Order at 5. On February 15, 2024, CSP brought a citizen suit under the CWA against Highpeak. Order at 3. In the same complaint, CSP brought a separate claim under the Administrative Procedure Act ("APA") against the Environmental Protection Agency ("EPA"). The claim against the EPA challenged the promulgation of the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule"). Order at 3.

On August 1, 2024, the United States District Court for the District of New Union entered an Order holding that CSP did have standing, that its challenge to the WTR was timely, but found

that "the WTR was not arbitrary, capricious, or contrary to law." Order at 3. The court also held that the transfer at issue did not fall under the WTR exception and "CSP's citizen suit against Highpeak could proceed." Order at 3. The United States District Court for the District of New Union "grant[ed] the motion to dismiss the challenge to the WTR" and "denie[d] the motion to dismiss the citizen suit against Highpeak." Order at 6.

SUMMARY OF THE ARGUMENT

The lower court found that Crystal Stream Preservationist, Inc. ("CSP") had standing and timely filed its claims, and this court should affirm. Organizational standing allows an organization to meet the elements of standing through its members, and this is what CSP has done. As CSP proved to the lower Court, and will prove to this Court, it is a valid organization that was injured by Highpeak's actions.

While the lower court restricted itself to the corners of *Loper* and relied on dicta, this Court should not unnecessarily restrict itself. This Court can and should find that it is well within its power to reconsider the validity of rules which were previously upheld pursuant to *Chevron*. While *Loper* does attempt to close the floodgates, it does not lock all doors.

As has been the standard even before *Loper*, this Court has the power, within *stare decisis*, to reconsider decisions, when there is a "special justification." There is a special justification here because the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule") goes completely against Congresses intent when it created the Clean Water Act, and the Rule should never have been upheld under *Chevron*. The EPA arbitrarily promulgated this exception to the National Pollution Discharge Elimination System ("NPDES") permitting process.

Without the Water Transfer Rule creating an exception to the NPDES permitting process, Highpeak would not have had the opportunity to hide behind a confusing rule and cause injury to CSP.

This brief's focus is not on trying to get this Court to take a stand or risk acting outside its authority, this brief focuses on showing this Court that it does have the power to reconsider the WTR. *Stare decisis* has never been understood to require courts to ignore what is in front of them. *Ramos v. Louisiana,* 590 U.S. 83, 105 (2020). And *Loper* does not limit stare decisis principles. *Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244, 2273. It is fully within this Courts authority to overturn the WTR. And to follow the reasoning of other circuits and find that a water transfer from a point source does constitute a regulated discharge, and does require an NPDES permit.

ARGUMENT

Crystal Stream Preservationist, Inc. ("CSP") validly brought its claims against Highpeak and the Environmental Protection Agency ("EPA"). First, CSP has standing in both claims, and second CSP did timely file its claims. Third, the EPA overstepped its authority when it promulgated the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule"). Finally, as the WTR is not valid, Highpeak must obtain a permit to comply with the Clean Water Act ("CWA" or "Act"). Even if the WTR was valid, Highpeak's discharges are not exempt from National Pollution Discharge Elimination System permit ("NPDES permit") requirements.

I. Crystal Stream Preservationist, Inc. has organizational standing to bring its claims against Highpeak Tubes, Inc. and United States Environmental Protection Agency.

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." *Gallapoo v. Wal-Mart Stores, Inc.,* 475 S.E.2d 172, 174 (1996). The issue here is whether a non-profit organization should be treated with the same standing standard as a for profit business. As this is a question of law this Court should consider this issue *de novo*. In *NAACP v. Alabama*, the Supreme Court held an association may have standing in its own right to seek judicial relief from an injury to itself and may assert the rights of its members to secure said relief. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 458-460 (1958). Additionally, even in the

absence of an injury to the association itself, the association has standing solely as the representative of its members. *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). An organization has standing on behalf of its members when: (a) its members would have Article III standing to bring the claims in their own right; (b) the interests of the organization are germane to the association; and (c) neither the claims asserted, nor the relief requested require the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

CSP meets all three of the elements for organizational standing under *Hunt*. CSP's individual members have standing in their own right, as their actual and procedural injuries meet the requirements of Article III. As the district court recognized, CSP is a validly formed organization, whose main purpose is to protect the environmental integrity of Crystal Stream ("Stream" or "the Stream"), and the current litigation is to further those interests and ensure the continued protection of the Stream. CSP does not require individual participation of its members to attain an injunction or a permit as its relief. Finally, CSP's injuries are within the zone of interest of the CWA. Thus, CSP meets all three elements and has valid organizational standing to bring this suit on behalf of its members.

A. <u>Crystal Stream Preservationists, Inc. members have standing in their own right.</u>

CSP's members have alleged a valid aesthetic injury under the CWA, and have standing in their own right to bring forth a claim against Highpeak and EPA.

Any citizen may file a civil action against any violator of the CWA under a Citizen Suit pursuant to 33 USC §1365. The citizen-suit provision also allows any citizen to bring a claim against "the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary." 33 USC §1365. Citizen suits incorporate Article III standing

and require the plaintiff to establish: (1) a concrete and particularized injury; (2) which is fairly traceable to the challenged conduct; and (3) can be redressed by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 180-81 (2000). In addition to Article III standing, a plaintiff suing for a statutory violation must demonstrate the injury falls within the zone of interests of the law invoked. *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

CSP's members have suffered an (1) aesthetic injury from the discharge by Highpeak into Crystal Stream, and (2) a procedural injury because EPA's failure to validly promulgate the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule") deprived CSP and its members of a public process and access to public information. Had this permit been sought and enforced, members of CSP and CSP would not have suffered an aesthetic or procedural injury. CSP seeks to redress this injury via an injunction and a permit to decrease or stop the flow of pollutants into Crystal Stream.

1. Crystal Stream Preservationist, Inc. and its members have suffered an aesthetic injury that is concrete, particularized and imminent in nature.

CSP and its members have suffered a valid aesthetic injury in fact pursuant to the requirements under Article III. Under Article III standing, a plaintiff must establish an injury in fact that is "concrete, particularized, and actual or imminent in nature." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). A concrete injury does not need to be "tangible" and is adequately particularized if it affects the plaintiff in a personal and individual way. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), *as revised* (May 24, 2016). An injury is considered imminent when the threatened injury is "certainly impending;" allegations of possible future injury are insufficient. *Lujan*, 504 U.S. at 560-561 (holding that "some-day" intentions to visit an area that may suffer environmental damage was not "imminent" enough to satisfy Article III); see also *Los Angeles v.*

Lyons, 461 U.S., 95, 105 (1983) (holding the likelihood of an illegal chokehold reoccurring was not established, thus the plaintiff failed to establish Article III for a valid future injury). The Supreme Court has recognized that environmental plaintiffs allege an injury in fact under Article III, when the challenged activity affects the use, aesthetic, and recreational value of the affected area. *Laidlaw*, 528 U.S. at 183; *Lujan* 504 U.S. at 562-63; *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). The Fourth Circuit holds an affiant has sufficiently alleged an injury in fact under the Clean Water Act ("CWA" or "Act") when NPDES permit violations threaten the environmental quality of the waters adjoining an affiant's property, absent evidence of environmental degradation. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155-61 (4th Cir. 2000). A plaintiff does not have to wait until his lake becomes barren and sterile or assumes an unpleasant color and smell before he can invoke the protections of the CWA. *Id.* at 160. A threatened injury is sufficient to provide an injury in fact, as demanding more would eliminate claims to those who are directly threatened but not yet impacted by an unlawful discharge. *Id*.

In addition to Article III, the CWA's zone of interests includes aesthetic and recreational interests related to waters of the United States. *See Laidlaw*, 528 U.S. at 183 (holding a plaintiff has standing to bring a suit under the CWA for aesthetic and recreational injuries caused by the discharge); *see also Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 263 (4th Cir. 2001) (holding plaintiff had standing to sue under CWA where changes to a stream on plaintiff's property "significantly interfered with her use and enjoyment" of the stream); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039 (9th Cir. 2009) (standing to sue under CWA where members of plaintiff organization used affected area for "hiking, horseback riding[,] and other activities.").

In *Laidlaw*, a company's illegal discharge caused nearby residents to curtail their recreational use of the affected area thus subjecting the residents to aesthetic harm. *Laidlaw*, 528 U.S. at 180-81. The Court recognized affidavits provided by the plaintiff (Friends of the Earth or "FOE") to allege an aesthetic injury under the CWA. *Id*. For example, FOE members mentioned they would occasionally drive over the North Tyger River and it "looked" and "smelled" polluted. *Id*. Other concerns came from members who had previously canoed in the river but had refrained from doing so due to concerns the water contained harmful pollutants. *Id*. at 181–83. Similarly, in *Ecological Rights Found v. Pac. Lumber Co.,* the court recognized proximity to the area impacted by environmental degradation is not necessary when a person uses an area for recreational purposes. 230 F.3d 1141, 1149 (9th Cir. 2000). Repeated recreational use itself, accompanied with credible allegations of desired future use, is sufficient even if relatively infrequent, to demonstrate that the environmental degradation is injurious to the person. *Id.* at 1150-51.

In *Pacific Lumber Co*., the court found the plaintiff organizations had sufficient factual averments to survive a summary judgment on the standing issue. 230 F.3d at 1150-55 (recognizing plaintiff organizations' longstanding recreational and aesthetic interests in the affected area due to two members of the organization whose previous recreational use of the creek was impaired due to their concerns and fears of pollutants discharged by Pacific Lumber's facilities).

CSP has alleged similar injuries to those expressed in *Laidlaw* and *Pacific Lumber Co*. Similar to FOE in *Laidlaw*, members of CSP such as Cynthia Jones and Johnathan Silver, both allege an averment to using the Stream for recreational and aesthetic purposes. The injuries alleged by Cynthia Jones and Johnathan Silver are similar to the ones alleged in *Laidlaw* and *Pacific Lumber Co.*, wherein members of CSP have alleged that upon learning of the illegal discharge, and witnessing the cloudiness of the water, they have avoided partaking in activities that they had

done before. While the discharge has been continuous throughout the residency of both members, it is apparent once the members understood that the cloudiness in the Stream was a result of the illegal discharge, they stopped using the Stream for recreational purposes. This passes the muster for alleging an adequate aesthetic environmental injury under the CWA and *Laidlaw*. The discharge is illegal and can be harmful, and members of CSP upon finding out the source of the cloudiness have refrained from activities that they had previously enjoyed. Further, while members of CSP did not allege a smell or another symptom of the discharge as the affiants in *Laidlaw* and *Pacific Lumber Co.*, a plaintiff does not have to wait until their environment has been significantly degraded to allege injuries under the CWA.

Thus, CSP members do not have to wait until the cloudiness in Crystal Stream escalates to higher levels of environmental degradation consequently putting CSP members at risk to suffer more aesthetic, recreational, and potentially other injuries. Finally, aesthetic and recreational injuries are within the zone of interests the CWA intends to protect, CSP has alleged a valid aesthetic and recreational injury-in-fact.

2. Crystal Stream Preservationists, Inc., and its members have suffered a procedural injury due to the EPA's violation of the Clean Water Act, which deprived them of public process and access to information.

CSP and its members have suffered procedural injuries due to EPA's failure to adhere to the CWA. Under the CWA, the EPA must ensure the public receive notice for each application for a permit and provide an opportunity for a public hearing before ruling on each permit application. 33 U.S.C. § 1342(b)(3). Further, the CWA mandates all copies of permit applications and issued permits be available to the public to access and reproduce. 33 U.S.C. §1342(j). Finally, 33 U.S.C. § 1365 allows for a citizen to enforce effluence standards or limitations, which include 33 U.S.C.§§ 1342(b)(3), (j); 33 U.S.C. § 1365(f). The Supreme Court holds a person who has been accorded a procedural right to protect his concrete interests can satisfy Article III standing without meeting

all the normal standards for redressability and immediacy. *Summers v. Earth Island Inst.*, 555 U.S. 488, 488-89 (2009); *Spokeo, Inc. v. Robins*, 578 U.S. 330, at 341 (2016); see also *Lujan*, 504 U.S. at 572. Thus, deprivation of a procedural right is insufficient if said deprivation does not affect the plaintiff's related concrete interests. *Id.* To establish a procedural injury, a party must (1) identify a constitutional or statutory procedural right that the government has violated, (2) demonstrate a reasonable probability the deprivation of the procedural right will threaten a concrete interest of the party's, and (3) show that the party's interest is one protected by the statute or constitution. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009); *Five Corners Family Farmers v. State*, 173 Wash. 2d 296, 303 (2011). The third element is the zone of interest test, wherein the plaintiff must show the injury is within the zone of interests the statute seeks to protect. *Id*. To determine a concrete interest, the Ninth Circuit has required a geographic nexus between a plaintiff and the location suffering the environmental impact. *Citizens for Better Forestry*, 341 F.3d at 971. *Nw. Env't Advocs. v. U.S. Dep't of Com.*, 322 F. Supp. 3d 1093, 1099 (W.D. Wash. 2018). Concrete interests arise out of aesthetic or recreational interests in the area affected. *Id.* at 1099. (holding members of the plaintiff organization have a concrete interest in the area due to their recreational use of Washington's shorelines). Similarly, an increased risk of harm from lack of public information can itself be an aesthetic or recreational injury. *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 825, 833–34 (9th Cir. 2021). Permit violations deprive the public of information on past and new discharges, and possession of that information may reduce the risk of injury to a plaintiff who wishes to know whether a body of water is safe. *Id.*

CSP and its members have suffered a procedural injury in violation to the CWA, as they have been deprived of a public process and hearing to voice their opinions on Highpeak's discharge

into Crystal Stream. CSP and its members also have been deprived of publicly available information on Highpeak's discharge, as the EPA has invalidly promulgated the WTR to create exemptions from the permitting process. The EPA has failed to adhere the WTR to the plain meaning of the CWA which demands any discharge into waters of the United States requires a permit. As a result, Highpeak has erroneously relied on the WTR to not pursue a permit. Order at 5. Further, the inability to access public records on this discharge has led to a threat of undetected past and future polluted discharge, and this increased risk is itself a concrete injury to CSP members.

CSP's members meet all elements required to establish a procedural injury as set by Ninth Circuit, as well as the expectations laid out by the Supreme Court. First the exemption of a permit due to the WTR is in violation of the CWA. Second, CSP members have been deprived of their right to participate in a public commenting period and deprived of access to public records, since they do not exist. Third, CSP members have a concrete interest in Crystal Stream due to their geographic proximity to the Stream, and past and future recreational use. Fourth, the lack of a permit impacts CSP members' concrete interests, as the absence of the permit has allowed for the pollution to reach levels detectable by the naked eye and has negatively impacted CSP members' capacity to enjoy and recreate near the Stream out of fear of exposure to the pollutants. Fifth, both the procedural injury and concrete interest are within the zone of interests of the CWA, as the absence of the permit violated provisions of the §§ 1341 (b)(3), (j) of the CWA, and allows for CSP and its members to bring this suit to enforce said provisions under § 1365 of the CWA. Further, it is well established the aesthetic and recreational injuries fall within the zone of interests of the CWA.

Thus, CSP members have suffered a procedural injury as they were deprived of a public process and public information regarding Highpeak's discharge.

3. Crystal Stream Preservationists, Inc.'s injuries are traceable to Highpeak's discharge and EPA's failure to validly promulgate the Water Transfer Rule.

CSP's injuries are a result of the illegal discharge conducted by Highpeak and EPA's failure to validly promulgate the WTR.

Within environmental law, Article III requires the plaintiff to establish their injury is fairly traceable to the challenged activity. *Lujan* 504 U.S. at 560. Plaintiffs must show a causal connection between the injury and the challenged conduct, and ensure the resulting injury is due to the actions of the defendant and not some other third party." *Id*. The Fourth and Ninth Circuits have held a plaintiff satisfies Article III's traceability requirement by showing that a defendant is discharging a pollutant in the alleged geographic area of concern. *Gaston Copper Recycling Corp.*, 204 F.3d at 16; *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000). The Third Circuit has formulated a test to determine traceability under the CWA: a plaintiff must show a defendant has: (1) discharged some pollutant in concentrations greater than allowed for by its permit; (2) into a waterway in which the plaintiffs have an interest that may be adversely affected by the pollutant; and (3) the pollutant causes or contributes to the injuries alleged by the plaintiffs. *Pub. Int. Rsch. Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990). The Fifth Circuit applied this test and found: (1) absence of a permit for a discharge generally means a discharge has exceeded what is allowed under the CWA; (2) participation in educational trips and future intentions to continue activities is enough to establish interest in the location that is adversely affected; and (3) the discharges contributed to the plaintiff's aesthetic injuries. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 558 (5th Cir. 1996).

The traceability prong of Article III for procedural injuries is relaxed, but it is not completely done away with. *Summers*, 555 U.S. 488, 488-89 (2009). The Ninth Circuit has held to satisfy Article III standing in cases where a plaintiff is challenging an agency regulation, the plaintiff must show the injuries subject of the suit are traceable to EPA's failure to promulgate its rules. *NRDC v. United States EPA*, 542 F.3d 1235, 1245-46 (9th Cir. 2008). The court in *NRDC*, found the plaintiffs satisfied Article III requirements of both redressability and traceability by showing that the discharge which caused their injuries would be addressed by the effluent limitation guidelines and new source performance standards, and promulgation of these are likely to reduce the risk of the pollution causing their injury. *NRDC*, 542 F.3d at 1246.

CSP aesthetic injuries are traceable to Highpeak's illegal discharge of pollutants into Crystal Stream, and its procedural injuries are traceable to EPA's failure to validly promulgate the WTR pursuant to the CWA, which forbids any discharge of any pollutant into a water of the United States. 33 U.S.C § 1311. CSP's injuries against Highpeak meet all three elements established by the Third Circuit. First, Highpeak has discharged in excess to limitations set in a permit, as they have not sought one. All parties have agreed that Highpeak's tunnel is a point source, and it releases water during the Spring and Summer seasons which contain pollutants such as iron, manganese, and TSS. Irrespective of the Water Transfers Rule exception on the matter, EPA has agreed here that Highpeak's discharge requires a permit and violates the CWA without one. Secondly, CSP and its members have a valid interest in the area as there are members who live near the Stream, have previously used the Stream for recreational purposes, and have expressed a future interest in returning to those activities. Finally, Highpeak's discharge has directly caused CSP and its members aesthetic injuries such as cloudiness in the water and an averment from partaking in recreational activities near Crystal Stream. Additionally, similar to the plaintiff's fear

of pollutants in *Cedar Point Oil Co.*, CSP and its members have also averred from recreational activities out of fear of coming into contact with the illegally discharged pollutants in the water. Thus, it is apparent Highpeak's discharge has caused CSP and its members to suffer an aesthetic injury.

CSP has also established that its members environmental injuries from the discharge are traceable to EPA's failure to promulgate its WTR in accordance with the plain meaning of the CWA. While the matter about EPA's inadequate promulgation will be fully addressed later in this brief, EPA's inadequate promulgation has resulted in CSP and its members injuries. Highpeak failed to attain a permit as it incorrectly relied on the WTR, believing it was exempt under the Rule. Order at 5. EPA stated Highpeak's discharge does require a permit. If EPA had promulgated the WTR rule according to the plain meaning of the CWA, which explicitly forbids any discharge of pollutants into the waters of the United States, then Highpeak would have obtained a permit which would require it to comply with effluent limits pursuant to its NPDES permit.

Thus, CSP members' injuries are directly traceable to Highpeak's discharge into Crystal Stream, and EPA's failure to promulgate the WTR within the plain meaning of the CWA.

4. Crystal Stream Preservationists, Inc.'s injuries are redressable by a favorable decision from this court.

CSP members' injuries will be redressed by a favorable decision by this court. A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998). Under *Laidlaw*, injunctive relief or civil penalties can redress plaintiffs in CWA cases when the unlawful discharge is ongoing or could continue if undeterred. *Laidlaw*, 528 U.S. at 186-88. "Plaintiffs may establish that violations are ongoing by proving that defendant's violations continued on or after the date the complaint was

filed or by providing 'evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations.'" *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Generally, an injunction or compliance with the CWA and its NPDES program satisfies the redressability requirement under Article III for cases involving CWA violations. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Conant*, 657 F. Supp. 3d 1341, 1354-55 (E.D. Cal. 2023). Redressability of an injury involving an invalid promulgation is satisfied when said injury would be redressed by EPA promulgating the rule and reducing the risk of the pollution causing the injury. *NRDC*, 542 F.3d at 1246. Finally, regarding procedural injuries, the Supreme Court has held that the normal standards of redressability do not have to be met if the plaintiff has a procedural right to protect his concrete interest. *Summers*, 555 U.S. at 496.

CSP's injuries are due to Highpeak's ongoing and anticipated discharge of pollutants into Crystal Stream. Given that Highpeak has been discharging pollutants during the spring and summer months every year since 1992, it is reasonable to infer Highpeak will continue to discharge. An injunction will redress CSP and its members injuries, as the pollution will cease. Alternatively, a permit will lead to a similar result, as a permit will mandate Highpeak reduce its discharge of pollutants to meet legal effluent limits. A permit will allow CSP and its members to no longer fear the pollutants and return to pursuing recreational activities near and in the Stream. If EPA were to validly promulgate the WTR pursuant to the CWA, Highpeak would not have erroneously decided it was exempt from obtaining a permit. Without the WTR Highpeak would clearly be required to obtain a permit, thus reducing the risk of such pollutants being discharged into Crystal Stream and allowing for CSP and its members to no longer fear adverse effects of the pollutants in the Stream. Thus, a favorable judicial decision, ordering an injunction or a permit, will redress CSP members' injuries.

B. <u>The interest of the association are germane to Crystal Stream Preservationists, Inc.'s purpose.</u>

The interests of the members that comprise the association are germane to CSP's purpose. The doctrine of associational standing recognizes that the primary reason people join an organization is to create an effective vehicle to vindicate interests they share with others. *International Union, United Auto., etc. v. Brock*, 477 U.S. 274, 290 (1986). In the Seventh Circuit, the court found the interests of an association to be germane to the organization's ("Waterkeeper") purpose, when the members voluntarily associated with the organization and their financial contributions were used to fund litigation that involved Waterkeeper's purpose of protecting and promoting the conservation of bodies of water and wetlands of the Quad cities in Illinoi sand Iowa. *Quad Cities Waterkeeper v. Ballegeer*, 84 F. Supp. 3d 848, 860 (C.D. Ill. 2015). *Hunt* established the indicia of membership test for non-voluntary organization's members stating an organization is equipped to represent the interests of its members if it (a) elects members within its association, (b) can serve as members in the organization, and (c) if members alone finance the organization's activities.

In the Fifth Circuit, the court found members of Friends of the Earth met the indica of membership test from *Hunt. Friends of the Earth v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997). The court held it is reasonable to assume individuals joined the organization for the organizations stated purpose when the members voluntarily associated themselves with FOE, FOE has a clearly articulated an understandable membership structure, and the suit was within the scope of FOE's central purpose. *Friends of the Earth v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997).

CSP was formed to protect Crystal Stream from contamination resulting from industrial uses and illegal transfers of polluted waters and thus preserve the Stream for use by future

generations. Similar to *Ballegeer and Chevron*, the organization's members have voluntarily joined CSP to stop Highpeak's discharge. Ex. A. at Par. 12, Ex. B. at Par 8. CSP also has a clearly understandable membership and hierarchical structure; Cynthia Jones serves is the Secretary for the organization and there are other board members including a President and Vice President. Ex. A. at Par. 4. Further, this suit is well within the scope of CSP's central purpose of stopping illegal discharges into Crystal Stream. Multiple members stated they joined the organization for that very purpose. Ex. A. at Par. 11, Ex. B. at Par. 8. Thus, CSP's interests are germane to the associations interests to protect Crystal Stream from illegal discharges and transfers and preserve it for use by future generations.

Although Highpeak and EPA assert that CSP is an invalidly formed organization because it was recently formed and only has 13 members, those factors are not dispositive. As the District Court and *Hunt* have stated, the legitimacy for organizational standing is not whether the entity was primarily formed in the interest of litigation, but rather if one of the members of the organization would have standing in their own right. At least two members of CSP have suffered an injury in fact which provides associational standing and legitimizes CSP to bring forth this suit on behalf of its members. Thus, CSP is a validly formed organization whose interests are germane to the associations interests to protect Crystal Stream from illegal discharges.

C. The relief sought does not require the participation of the individual members in the lawsuit.

CSP seeks relief in the form of an injunction or a permit and does not require the participation of its individual members in this lawsuit. When examining if an association has standing to invoke the court's remedial powers on behalf of its members, it depends on the nature of the relief sought. *Warth*, 422 U.S. at 515. If an association seeks a declaration, injunction or other forms of prospective relief, it is reasonable to conclude that a favorable judicial decision will

inure to the benefit of the members of the association. *Id*. This extends to cases where the litigation is brought by an organization on behalf of its individual members. *Hunt*, 432 U.S. at 342-44 (holding the request for declaratory and injunctive relief did not require individual proof and thus met the final prong of organizational standing). The Supreme Court has held while unique facts of each member's claim will have to be considered, an organization can still litigate a case without participation of those individual claimants when the remedy will benefit all members of the association injured. *Brock*, 477 U.S. at 288.

In *Pac. Lumber Co.*, the court held the requested declaratory and injunctive relief would benefit the organization and its members collectively without requiring individualized proof or consideration of individual members' specific circumstances. 469 F. Supp. 2d at 817-18. (holding individualized proof was not required when the claim was based on aesthetic injuries related to Bear Creek and its surrounding watershed). The Second Circuit held civil penalties and injunctive relief do not require individualized proof and thus satisfy the third prong of the *Hunt* test. *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006) (holding as the Trades Council sought civil penalties and injunctive relief only, and not money damages, its claims do not require "individualized proof" defined by *Hunt*).Similar to *Downtown Dev., Inc., and Pac. Lumber Co.,* CSP is seeking a permit or injunctive relief for its members' aesthetic and procedural injuries. This relief does not require any specific participation of CSP members beyond providing affidavits alleging their injuries. If such relief is granted, all members will benefit from the relief. A permit or injunction will reduce the amount of pollution contaminating the water, allowing all members of CSP to no longer suffer a fear of illegal pollutants in Crystal Stream. Similarly, promulgating the WTR in accordance with the CWA will have a similar result, as it will require a permit for Highpeak's current and future discharges. Thus,

the relief requested does not require the individual participation of any of CSP's members and meets the final element necessary for associational standing.

II. Crystal Stream Preservationists, Inc. timely filed the challenge to the NPDES Water Transfer Rule.

When it comes to determining whether a statute of limitations bars a party's claim this court should apply a de novo standard of review. *See Humphrey v. Eureka Gardens Pub. Facility Bd.,* 891 F.3d 1079, 1081 (2018). Crystal Stream Preservationist, Inc. ("CSP") brought its claim against the EPA within six years of its injury. Section 2401 of the Administrative Procedures Act ("APA") states every civil action commenced against the United States is barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C.S. § 2401. A right of action to file a suit under the APA accrues when the plaintiff has a complete and present cause of action. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys*., 144 S. Ct. 2440, 2450 (2024) (quoting *Green* v. *Brennan*, 578 U. S. 547, 554 (2016)). An APA plaintiff's cause of action is not complete until she suffers an injury from final agency action, thus the statute of limitations under § 2401 does not run until she is injured. *Id*

To file a lawsuit under the APA, parties must (1) know or have reason to know that the challenged agency action caused them a "legal wrong" or made them "aggrieved" under the statute, and (2) ensure that the agency action is final. 5 U.S.C. § 702, 704; *Sackett v. EPA*, 132 S. Ct. 1367, 1371-72, (2012); *see Herr v. United States Forest Serv.*, 803 F. 3d 809. 818-19 (6th Cir. 2015) (holding the plaintiff could not have been "aggrieved" by the Forest Service' invasion of their property right until they became owners of their property in 2010, thus their right of action only accrued once they purchased their property, even though the final agency action was issued in 2007."); *see Stupak-Thrall v. Glickman*, 346 F.3d 579, 584 (6th Cir. 2003). As a general matter, a plaintiff may either become "aggrieved" at that time, or suffer an "injury." *Herr*, 803 F. 3d at 819-

20. A classic example is an agency issuing a rule without following all requirements under notice-and-comment. *Id*.

In *Corner Post*, the Court held the plaintiff organization ("Corner Post") only had a complete cause of action well after the six-years from the formation of the regulation, as Corner Post did not exist at the time the regulation was passed. *Corner Post, Inc,* 144 S. Ct. at 2459. Reasoning the traditional accrual rule cites to the injury as the starting point of the statute of limitations, and Corner Post would not have been unable to be injured until it formed. Further, the Court explained that taking an injury-based approach respects the tradition that everyone should have his day in court, otherwise only those who have an injury within six-years of an agency decision may bring suit, anyone injured after has no recourse. *Id.*

In *Herr*, the plaintiffs claimed the Forest Service's 2007 order invaded their property right to use their gas-powered motorboat, a right protected by State law. *Herr*, 803 F. 3d at 819-20. The deprivation of this property right aggrieved the plaintiffs. However, the Forest Service alleged the statute of limitations had passed at the time of the suit in 2014. *Herr*, 803 F. 3d at 819-20. The court in *Herr*, held the plaintiff only purchased their property in 2010, meaning their injury under State law could only apply once they had purchased the property, thus their statute of limitations only began once they were injured by the final agency action. *Herr*, 803 F. 3d at 819-20. CSP has timely brought its claim on behalf of its members who have suffered procedural and aesthetic injuries due to EPA's failure to validly promulgate the Water Transfers Rule.

Similarly to *Corner Post*, CSP did not exist at the time the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule") was promulgated, thus CSP could not have brought a claim on behalf of its members prior to December 1, 2023. Further, CSP's claim is based on its members' injuries, the statute of limitations began not when the EPA first promulgated the Water

Transfers Rule, but when only when CSP's members suffered injury from the final agency action. The two affiants in this case testified that, although they noticed Crystal Stream's ("Stream" or "the Stream") water appeared cloudy at times, they did not become fully aware of the actual pollutants in the water until much later and well after the WTR had been promulgated. Cynthia Jones learned of the contaminants in 2020, while Johnathan Silver learned of the pollutants in 2023. Ex. A. at Par. 10, Ex. B. at Par. 6. Furthermore, similar to the plaintiffs in *Herr,* Johnathan Silver moved near the Stream in 2019, thus his right of action could not accrue until many years after the WTR was promulgated. Ex. B. at Par. 4. Both Cynthia Jones and Johnathan Silver only became aware of Highpeak's discharge more than a decade after the pollution had started. Upon learning of the pollution, they both averred that their usual activities near the Stream were impacted, and they feared the imminent danger posed by the pollutants. Ex. A. at Par. 10, Ex. B. at Par. 5. Both affiants' cause of action accrued only when they learned of the illegal discharge and recognized it was unpermitted due to the EPA's failure to promulgate the WTR under the CWA. They could not access this information independently, as the absence of a permit process denied them public process and accessible information about High Peak's discharge. Additionally, even if CSP had not been denied an opportunity for public participation, Johnathan Silver could not have participated, as he did not live in the affected area until 2019. Thus, under the Supreme Court's decision in *Corner Post*, CSP members' injuries could have accrued in 2019, 2020, or 2023, placing CSP's claim against the EPA well within the statute of limitations for challenging an agency rule or decision.

High Peak and EPA argue CSP's status as an environmental group exempts it from the *Corner Post* decision, but this narrow interpretation has been rejected by the District Court and should be dismissed by this Court as well. The language in *Corner Post* clearly states that the right

of action depends on when the "particular plaintiff" has a complete and present cause of action, with no exclusion for environmental organizations while including business organizations. Even so, CSP's organizational standing arises from the injuries of at least one member, so this Court may examine when those injuries occurred to determine when the right of action accrued.

III. The United States Environmental Protection Agency Did Not Validly Promulgate the NPDES Water Transfer Rule

There is no ambiguity as to whether water transfers were regulated as pollutant discharges, and this Court should exercise its judicial authority to invalidate the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule") and reverse the district court's ruling. Finding an ambiguity as to whether water transfers were regulated as pollutant discharges creates a regulatory gap in the Clean Water Act ("CWA" or "Act") that erodes its primary purpose. Congress, in its promulgation of the CWA sufficiently closed this gap by its clear intent through its plain language to include water transfers under the umbrella of pollutant discharges.

Courts can invalidate agency actions if in review of the agency action, it was "arbitrary and capricious." 5 U.S.C. § 706(2)(A). Because a review of the Act reveals a lack of ambiguity, and thus the agency's action was arbitrary and capriciousness, the Rule can rise to a "special justification" of reevaluation. *See Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (2024). Therefore, this Court, in finding no ambiguity in the Act, should conclude that *Chevron* deference should not have been applied.

A. The Clean Water Act is not ambiguous about the transfer of pollutants from one body of water to another.

The CWA's primary purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). When statutory language is clear, courts must give effect of interpretation to its plain meaning. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The CWA's statutory language is clear and interpretable

through the plain language canon; "restore" and "maintain" signify two complementary goals—to rehabilitate impaired Nation waters and to protect healthy Nation waters. Together, these terms outline both remedial and preventative measures to meant to safeguard the Nation's waters. Moreover, by comprehensively addressing all aspects of potential degradation, the Act's reference to "chemical, physical, and biological integrity" reflects a broad approach against potential pollutants by Congress in safeguarding the Nation's waters.

If a water transfer was simply the movement of water from one source identical to another, there would be no "addition." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) *(Catskill I)* ("If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.") But a water transfer is not simply the movement of identical water from one source to another, rather it is as if there were two separate pots of soup on a stove top. If there is a pot of chicken soup, and a pot of tomato soup, ladling the chicken soup into the tomato soup affects its integrity by introducing new components like carrots and celery.

The CWA's comprehensive approach to protecting against degradation encapsulates the transfers of such ingredients as violations of the intent to safeguard the integrity of the Nation's waters. Water transfers (ladling of the chicken soup) can carry chemical pollutants like nutrients (e.g., nitrogen and phosphorus), pesticides, and industrial contaminants. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101-02 (2004). Introducing such chemical pollutants to the receiving waterway can degrade its ecosystem, causing algal blooms, oxygen depletion, and water toxicity. *Arkansas v. Oklahoma*, 503 U.S. 91, 110-111 (1992) (nutrient pollution, which can cause eutrophication, is important to the consideration of water quality under the Act).

Furthermore, not only can water transfers chemically affect a receiving water's ecosystem, but by introducing excessive sediments or changing the natural flow regime–causing erosion, turbidity, and habitat destruction–water transfers can alter receiving bodies physical characteristics. *See PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-715 (1994). Finally, aquatic nuisance species transferred from a source to receiver can disrupt a water's biological integrity. *See* U.S. Envt'l. Prot. Agency, Aquatic Nuisance Species (ANS) (2024). Such species can outcompete native organisms, alter food webs, and cause long-term damage to biodiversity. *Id*. Thus, the inclusion of "restore and maintain" and "chemical, physical, and biological integrity" in § 1251(a) demonstrates Congress's intent for the CWA to adopt a comprehensive preventative framework against degradation to the Nation's waters. Because water transfers can degrade the integrity of the Nation's waters, and failing to regulate them would contradict the Act's primary purpose and clear language, there is no ambiguity that Congress's intent was to regulate water transfers as pollutant discharges.

Moreover, in the CWA's passage, Congress established a comprehensive permit system under the NPDES to ensure pollutants entering U.S. waters are subject to regulatory oversight. 33 U.S.C. § 1342. The term "pollutant" is broadly defined. 33 U.S.C. § 1362(6). A discharge is defined as the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The NPDES permitting process was designed to ensure clarity, accountability, and public engagement in regulating pollutant discharges. 40 C.F.R. Part 122.

The WTR therefore subverts the permitting process framework and *creates* a regulatory ambiguity when there was none. This Rule fails to provide notice to impacted communities and undermines accountability for water degradation. Creating this contradiction through an exemption via the Rule erodes the CWA's primary purpose of restoring and maintaining the

integrity of the Nation's waters and the design of the NPDES permitting process. Congress chose not to exempt water transfers when drafting the Act, instead defining NPDES permit requirements in a way that suggests an intent to include water transfers within its scope.

B. The NPDES Water Transfer Rule is Arbitrary and Capricious

Under the Administrative Procedure Act ("APA"), courts can invalidate agency actions deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is used by courts to review federal agency actions to ensure they are the product of reasoned decision-making and within the bounds of the intent of Congress. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). An agency action is arbitrary and capricious if it "offered an explanation for its decision that runs counter to the evidence before the agency." *Id*.

In 2008, the EPA formally exempted water transfers from NPDES permitting requirements, stating that such transfers do not constitute an "addition" of pollutants under the CWA. 73 Fed. Reg. 33,697 (June 13, 2008). In the preamble, the EPA outlined in the final rule that Congress intended water transfers to be managed by state water allocation systems rather than the CWA's pollution control framework. *Id*. The Rule is grounded in the agency's interpretation that there was an ambiguity as to if water transfers were regulated as pollutant discharges. As the section above outlines, this ambiguity does not exist.

Before the WTR was promulgated by the EPA, the First and Second Circuits ruled that a water transfer constitutes a pollutant discharge. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2d Cir. 2001) *(Catskill I)*; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) *(Catskill II)*. The courts in *Dubois* and *Catskill II* concluded pollutant-laden water transfers between distinct waters require NPDES

permits, finding "addition" includes introducing pollutants from one distinct body of water to another. *Dubois*, 102 F.3d at 1299 ("[If] the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required. The Forest Service's determination to the contrary was arbitrary and capricious and not in accordance with law."); *see Catskill II*, 451 F.3d at 81.

Therefore, the EPA's promulgation of the WTR fails the arbitrary and capricious standard, as its explanation runs counter to the evidence before the agency, the Court should invalidate the Rule.

C. **This Court has authority under *Loper*, and *Skidmore* to overturn the NPDES Water Transfer Rule**

This Court is not required to uphold the Water Transfer Rule under *Chevron* deference. *Chevron* deference, as established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, permitted courts to defer to agency's reasonable interpretations of ambiguous statutes through application of a two-step framework. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984). Even when relying on *Chevron*, Courts had a responsibility to decide legal questions and ensure agencies acted pursuant to Congress's explicit intent. *Id*. at 842-43 ("If the intent of Congress is clear, that is the end of the matter.") When the FDA attempted to regulate tobacco products as "drugs" and "devices" under the Food, Drug, and Cosmetic Act, the Court rejected the FDA's interpretation, reasoning that Congress had been clear and unambiguous in earlier legislative action that tobacco was not to be regulated by the FDA in this manner. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

While *Loper Bright* held that prior cases relying on *Chevron* are preserved absent a "special justification" for revisiting them, and Crystal Stream Preservationist, Inc. ("CSP") contends that this is mere dicta, the WTR presents such justification. *Loper Bright,* 144 S.Ct. at 2273. The WTR

should not have passed *Chevron's* first step, thus its application was unwarranted. As the Court clarified in *Dobbs v. Jackson Women's Health Organization*, courts revisit precedents when they no longer align with the law's original meaning, or when they create unreasonable interpretations. *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 231 (2022). Whether water transfers were regulated as pollutant discharges was *not* ambiguous, and the Rule is arbitrary and capricious because it disregards the clear intent of Congress without sufficient explanation. The failure to meet this standard rises to the level of special justification because the WTR precedent is both misaligned with the CWA and creates an unreasonable interpretation. Therefore, this Court, in finding no ambiguity in the Act, should conclude that *Chevron* deference should not have been applied.

Moreover, *Loper Bright* reinforces judicial authority in statutory interpretation, affirming the court's responsibility to "say what the law is," a principle deeply rooted in *Marbury v. Madison* and emphasized by the Administrative Procedure Act ("APA") (5 U.S.C. §706) which states that courts, not agencies, should decide all relevant legal questions. *Loper Bright* 144 S.Ct. at 2248, 2261-2262. Additionally, while in *Loper Bright*, the Court instructed a return to the less deferential standard established in *Skidmore v. Swift & Co.* —*Skidmore* is irrelevant to the interpretation of the WTR. *Loper Bright*, 144 S.Ct. at 2251. *Skidmore* affords respect for agency interpretations but only when they are persuasive and consistent with statutory objectives. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). The weight of respect enables a court to "consider the consistency of an agency's views." *Bittner v. United States*, 598 U.S. 85, 97 (2023) (citing *Skidmore*). The EPA fails to outline sufficient persuasiveness because it is arbitrary and capricious. And, the question of ambiguity has not been consistently interpreted, therefore, the Court should not apply *Skidmore.*

Finally, there is additional authority for this Court to invalidate the WTR under major question doctrine. The Supreme Court has announced major question doctrine, limiting agency power when the issue involves significant economic or political implications. *West Virginia v. EPA*, 587 U.S. 687, 721 (2022). Ambiguity of "pollutant discharges" may be relevant under the major questions doctrine because the WTR rule's expansive reading of the term significantly alters the balance of federal versus state regulatory powers. Broad regulatory consequences from an exemption of water transfer as a pollutant discharge suggest a policy shift which Congress would need to explicitly authorize, as required under *West Virginia v. EPA*. Because major questions doctrine limits an agencies regulatory authority without clear congressional intent, this court should hesitate and not validate a rule outside the scope of EPAs authority. Regulating water transfers as discharges is consistent with the Act and foregoes such consequences and considerations.

In conclusion, the promulgation of the WTR by the EPA should be found invalid because there was no ambiguity as to whether water transfers were regulated as pollutant discharges and not regulating them violates the intent of Congress in the promulgation of the CWA.

IV. Highpeak Tubes, Inc. Must Obtain a Permit Under the Clean Water Act.

Under the Administrative Procedures Act ("APA") when a court is determining how to interpret a regulation it should give *Auer* deference to an agencies reasonable reading of a genuinely ambiguous regulation. *Kisor v. Wilkie,* 588 U.S. 558, 563 (2019). If this Court finds the EPA validly promulgated the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR" or "Rule"), it should give deference to the EPA's interpretation of the Rule, and in line with that interpretation, find that Highpeak's discharge is not in compliance with the Rule.

The discharging of pollutants by Highpeak is not exempted by the Rule and violates effluent limitations outlined by 40 C.F.R. § 122. Therefore, to obtain compliance with the

regulation and the CWA, Highpeak must apply for an NPDES permit. As promulgated by the EPA, the WTR *does not* exempt discharges where pollutants are "introduced by the water transfer activity itself." 40 C.F.R. § 122.3(i). From the source of Cloudy Lake, the water which moves through Highpeak's tunnel and iron pipe discharge system introduces pollutants—TSS, manganese, and iron—into the receiving Crystal Stream ("Stream" or "the Stream"). Therefore, Highpeak's pollutant discharges are not exempt from NPDES permitting requirements. *See* 40 C.F.R. § 122.

Water transfers can constitute a pollutant discharge. *See Dubois*, 102 F.3d at 1296-99 (water transfer from the source river to a receiving lake constituted a pollutant discharge because the transfer introduced pollutants present in the river into the lake); *Catskill I*, 273 F.3d at 491-94 (the transfer of turbid water constituted a pollutant discharge because sediment from the source degraded the water quality of the receiving stream); *Catskill II*, 451 F.3d 77 at 82-87 (concluded that transfer of the polluted source water to another navigable water constitutes an "addition").

The CWA outlines "[t]he term 'pollutant' means . . . chemical. . . [and] industrial . . . waste discharged into water." 33 U.S.C § 1362(6). A pollutant need not be classified on the list of toxic pollutants outlined under § 1311(b)(2) to constitute a pollutant discharge. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176-77 (D.C. Cir. 1982) (substances not listed as toxic can still be "pollutants" under the CWA). This broad reading of a "pollutant" is fundamental to maintaining and achieving the intent of the Act. *Id*. at 77. Even *de minimis* levels of pollutants necessitates a permit. *See Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1099 (S.D.N.Y. 1990) (quoting *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1374 (D.C.Cir. 1977) (cannot "exempt entire classes of 'point sources' just because they represent insignificant sources of pollution or are not amenable to numeric effluent standards.")

Thus, because the transfer of water from Cloudy Lake to the Stream mobilizes sediments or solids that were not previously present in the Stream at those levels, the percentage increase of TSS can qualify as "industrial...waste discharged into water," particularly because the water transfer is part of a managed activity for a recreational business purpose. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 112 (2004) (the mobilization of a water transfer which elevates "pollutant" levels in the receiver can qualify as a "discharge of pollutants" under the Act).

TSS is a conventional pollutant under the CWA, as defined in 40 C.F.R. § 401.16. As a conventional pollutant, TSS is subject to the Best Practicable Control Technology, Best Conventional Pollutant Control Technology, and New Source Performance Standards. *See* 33 U.S.C. § 1311(b)(1)(A)–(B); 40 C.F.R. § 401.16. These standards are designed to ensure that pollutants are effectively controlled to maintain water quality. Because Highpeak operates a recreational tubing business, its activities fall outside the specific industries regulated by these standards. Nevertheless, Highpeak's discharges, which increase TSS in the Stream, are subject to the general regulatory framework that requires a permit for the discharge of *any* pollutants into U.S. waters. In conclusion, Highpeak cannot evade its responsibilities to adhere to regulations under the CWA simply because no specific effluent limit exists for the recreational tubing industry.

Additionally, even if manganese and iron are naturally present in the source and receiving waters, because the levels are elevated through the transfer, they can fall under "chemical wastes" if their levels impact water quality. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (holding that naturally occurring materials, such as fish remains, can constitute "pollutants" under the CWA if their discharge alters water quality). Furthermore, the

fact that this is a managed water transfer for a recreational business may influence interpretation of regulation because "anthropogenic activity" (human-caused), can raise naturally occurring substances to classifiable as pollutants when intentionally mobilized. *See Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (naturally present sediment, when mobilized and discharged, constitutes a pollutant under the CWA).

The NPDES outlines that "the Administrator [EPA] may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants" so long as it is aligned in compliance with the Act. 33 U.S.C. § 1342(a)(1). But the EPA has long held that water transfers should not introduce pollutants into the receiving waters themselves. 40 C.F.R. § 122.3(i). As a result, the discharge from Highpeak's tunnel, which clearly introduces pollutants into the Stream, falls outside the WTR's protection and requires an NPDES permit.

Finally, because the Court has independent authority to determine that the WTR does not exempt Highpeak's pollutant discharges from NPDES permitting, it can issue injunctive relief to compel Highpeak to apply for an NPDES permit. *W. Va. Highlands Conservancy, Inc. v. Huffman*, 645 F.3d 159, 161 (4th Cir. 2010). If Highpeak fails to appropriately apply for an NPDES permit as issued by this Court, compliance may be enforced. 33 U.S.C. § 1319. This enforcement may include issuing penalties or orders for Highpeak to completely cease its discharges. *Id.* Whether through judicial review of the statute or deference to the EPA's interpretation, this Court can and should conclude Highpeak's pollutant discharges from Cloudy Lake to the Stream through its tunnel and piping system must be regulated under an NPDES permit.

CONCLUSION

For these reasons, this Court should affirm the district court's findings that Crystal Stream Preservationist, Inc. has standing, timely filed its claims, and find that the discharge here does not fit within the NPDES Water Transfer Rule ("Water Transfer Rule" or "WTR"). This

Court should reverse the district courts finding that the Water Transfer Rule was promulgated within the scope of the Clean Water Act, and hold that the Rule is invalid.