TEAM 15

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 24-001109

CRYSTAL STREAM PRESERVATIONISTS, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STAATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee-Cross-Appellant,

-and-

HIGHPEAK TUBES, INC.,
Defendant-Appellee-Cross-Appellant.

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered an order denying the EPA and Highpeak's motion to dismiss CSP's suit under the Clean Water Act (CWA) and granting Defendants' motion to dismiss CSP's challenge to the Water Transfers Rule (WTR) in case 24-CV-5678 on August 1, 2024. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The Twelfth Circuit Court of Appeals has jurisdiction for this appeal under 28 U.S.C. § 1292(b), which states that appeals over interlocutory motions are appealable when a district judge "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The petitioners Highpeak and the EPA timely sought leave to appeal. Jurisdiction has not been contested by the parties after this Court granted leave to appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule?

II. Did the District Court err in holding that CSP timely filed the challenge to the Water Transfers Rule?

III. Did the District Court err in holding that the Water Transfers Rule was validly promulgated pursuant to the Clean Water Act?

IV. Did the District Court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act?

STATEMENT OF THE CASE

In 1992, Highpeak, a recreational tubing company, obtained permission from the State of New Union to construct a 100 yard long, four-foot diameter (2-foot radius) tunnel connecting Cloudy Lake to Crystal Stream for their tubing operation. Record at 4. Under an agreement with the State of New Union, Highpeak is not allowed to use the tunnel unless permitted by the State to release water, usually in the spring and summer months. *Id*. The tunnel, constructed in 1992, is carved through rock and uses iron pipe. The tunnel uses valves to close and regulate the flow of water from the lake into Crystal Stream. *Id*.

The State of New Union does not have a delegated CWA permitting program, so the EPA issues permits under the National Pollution Discharge Elimination System (NPDES).

Crystal Stream Preservationists (CSP) is a non-profit corporation that was created on December 1, 2023. *Id*. There are thirteen members of CSP, all of whom live in Rexville, New Union, and two members own land along Crystal Stream. *Id*. CSP organizes around "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." *Id*. The mission statement for CSP's incorporation states that "The Crystal Stream Preservationists' mission 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, Decl. of Cynthia Jones at Par. 4.

All but one member of CSP has lived in Rexville for more than 15 years. The two members who own property on the Crystal Stream both live approximately five miles south of the discharge point and one mile south of the end of Highpeak's tube run. Record at 4 One such property owner and secretary of CSP, Cynthia Jones, says that she "regularly walked along the Stream" since 1997 and her home is within 400 yards of Crystal Stream Park. Ex. A at Par. 5. She states that the discharges "make the otherwise clear water cloudy" and that if not for the discharge she would

"recreate even more frequently on the Stream." *Id*. at Par. 15. Jonathan Silver, member of CSP and property owner since 2019, has stated that he hesitates to "allow [his] dogs to drink from Stream due to the pollutants" and that "[he] would recreate more frequently on the Stream" if not for the discharge. Ex. B at Par. 7, 9.

On December 15, 2023, CSP sent a CWA notice of intent to sue letter to Highpeak, the New Union Department of Environmental Quality, and the EPA. 33 U.S.C. 1365(b)(1)(A). Record at 4. The NOIS alleges that Highpeak's tunnel is a point source under the Act, which regularly discharges into the Crystal Stream, a "water of the United States" under the Clean Water Act, without a permit. CSP alleges that multiple pollutants are discharged into the Crystal Stream from Cloudy Lake because the lake has significantly higher levels of iron, manganese, and total suspended solids (TSS) relative to the stream. *Id*. at 5 Indeed, the discharge into Crystal Stream contains higher concentrations of the pollutants than samples taken from the lake, showing that additional pollutants are added from the tunnel discharge. *Id*. The Crystal Stream is fed by groundwater springs, and thus is not as polluted as the lake with these minerals. *Id*. Each time Highpeak opens the valves, it releases high concentrations of pollutants from Cloudy Lake into the Crystal Stream.

CSP filed its complaint on February 15, 2024, including the citizen suit claims under 33 U.S.C. 1365(a)(1) against Highpeak and an APA § 706 claim arguing that the Water Transfer Rule (WTR) was not validly promulgated and is inconsistent with the statutory language of the Clean Water Act. In the alternative, CSP argues that even if the WTR was validly promulgated, Highpeak is still required to obtain a permit from the EPA for the pollutants discharged into the Crystal Stream.

On August 1st, 2024, The Twelfth Circuit Court of Appeals granted leave to appeal regarding the novel and complex issues raised in the district court's decision.

SUMMARY OF THE ARGUMENT

The district court has properly found that CSP has standing under Article III to challenge the EPA's promulgation of the Water Transfers Rule (WTR) and to file a citizen suit under the Clean Water Act (CWA) against Highpeak's continued discharges into the Crystal Stream without an NPDES permit. CSP has demonstrated its Article III standing through its injured recreational and aesthetic interests in the stream. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000). CSP's continued injuries are traceable to the WTR, which has allowed Highpeak to transfer polluted water into the Crystal Stream. CSP has demonstrated statutory standing to challenge the WTR under the APA and to enforce the NPDES permit requirements under a CWA citizen suit.5 U.S.C. § 702; 33 U.S.C. § 1365(a)(1). CSP has also demonstrated associational standing to file suit on behalf of its members, who have a common injury and interest in protecting the stream's water quality. The members interests are germane to the organization's environmental interests in protecting the Crystal Stream and no member of the organization require their own individual participation in the suit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977).

The district court also properly found that CSP's filing of its suit was timely under the APA's 6-year statute of limitations. Since the recent decision in *Corner Post*, the Court has recognized that these statutes of limitations are plaintiff-centric, and that the 6 years under the rule do not start until a plaintiff has a "complete and present cause of action." *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve System*, 603 U.S. ----, 144 S.Ct. 2440 (2024); 28 U.S.C. § 2401(a). This is determined by when the plaintiff is actually injured by the final agency action, and not by

default when the final rule is published. *Id*. at 2447. As the Court found that a business organization could file a challenge to the Federal Reserve's Regulation II, the holding naturally extends to other forms of business entities, such as non-profit corporations.

The Water Transfers Rule has not stood the test of time...First, the EPA's interpretation of "addition" and "navigable waters" using the unitary waters theory has routinely been admonished by the courts prior to the promulgation of the WTR and has not survived scrutiny under *Skidmore* deference. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th. Cir. 2009); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001). Second, applying the canon of statutory construction, the WTR directly contrasts with the express Congressional intent indicated by the 1972 amendments which added express exemptions to the NPDES permitting systems. *See* 33 U.S.C. § 1342(l). Third, the EPA also was arbitrary and capricious in its promulgation of the rule, which ultimately failed to consider the effects the WTR would have on water quality in the nation, which is contrary to the CWA's express directive to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Following *Loper Bright*, courts are now inclined to apply *Skidmore* deference to agency's interpretation of ambiguous statutes *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2267 (2024). While the Court in *Loper Bright* suggested that its overruling of *Chevron* was not meant to overturn all the decisions decided using that standard, it has also left open that some cases are worth revisiting under a "special justification." *Id*. at 2273. The court cases that have upheld the WTR using *Chevron* warrant this exception because prior precedent has shown the unitary waters theory does not survive review under *Skidmore* and because the reasoning in both *Catskill III* and *Friends I* were unworkable and flawed. In all, the district court erred in finding that the Second

and Eleventh Circuit precedent controls because of the conflicting lines of decisions before and after the WTR's promulgation.

Finally, even if this Court finds that the Water Transfers Rule was validly promulgated or that Eleventh Circuit precedent controls, the district court properly found that Highpeak's discharge still does not apply. The Supreme Court has spoken to NPDES permits being required for transfers among "meaningfully distinct" waterbodies. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,*541 U.S. 95 (2004); *see also Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165 (2020). Cloudy Lake and Crystal Stream are hydrologically distinct, as Crystal Stream is fed entirely through groundwater springs. Record at 5. And under the EPA's interpretation, which does have more significant deference in interpreting its own regulation under *Auer* deference, the tunnel discharges into Crystal Stream are shown to introduce additional pollutants through the conveyance itself, and thus does not satisfy the definition of a water transfer exempted under the rule from NPDES permitting. Furthermore, Highpeak would ask this Court go against the precedent set in *Miccosukee* and *Cnty. of Maui* that transfers between "meaningfully distinct" waterbodies are still covered by the NPDES system.

STANDARD OF REVIEW

This Court reviews the trial court's order granting a motion to dismiss *de novo*. *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169 (2d Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, (2007)). A plaintiff "need not prove [their] injury" nor disprove the defendant's defenses to survive standing challenges under a motion to dismiss, a plaintiff must merely plead facts plausible on their face demonstrating injury.

Tyler v. Hennepin Cnty., Minn., 598 U.S. 631, 637, 143 S. Ct. 1369, 1375 (2023) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

ARGUMENT

I. CSP HAS STANDING TO BRING THE CHALLENGE TO THE WTR AND THE CITIZEN SUIT AGAINST HIGHPEAK

CSP asserts constitutional and statutory standing to both bring its challenge to the WTR and for its citizen suit enforcing the NPDES against Highspeak. To have Article III standing, CSP must demonstrate an "injury in fact," causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A concrete injury for the purposes of standing does not need to be tangible or physical. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). A plaintiff bears the burden of establishing their own standing. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 459 (4th Cir. 2008). CSP's statutory standing stems from the APA and CWA for its challenge and citizen suit respectively. 5 U.S.C. § 702; 33 U.S.C. § 1365(a)(1).

A. CSP has Article III, statutory, and associational standing to challenge the promulgation of the Water Transfers Rule from its common recreation and aesthetic interests in protecting the Crystal Stream.

The promulgation of the Water Transfers Rule is a "final agency action" that may be reviewed under 5 U.S.C. 704 of the APA. *See Abbott Lab'ys. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507 (1967). As the Supreme Court has stated, an agency action is "final" when it affects the involved parties, establishes rights or obligations, and resolves the agency's decision-making in the matter. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

To begin, the harm CSP faces is concrete and particularized, satisfying the injury-in-fact requirement. Each time Highpeak discharges into the Crystal Stream, CSP and its members' recreational use of the stream becomes more limited, the water becomes cloudier, and the aesthetic value of the stream diminishes. Notwithstanding the damage to property values near the Crystal

Stream and Crystal Stream Park that the discharges may inevitably cause, CSP has a real interest in maintaining the pleasant use and enjoyment of the stream. CSP's injury is ongoing since its inception in 2023. This harm alone is sufficient to demonstrate an injury in fact.

The Supreme Court has supported this argument and has opined that a company's continued discharges of pollutants can limit recreational use and aesthetic value for interested owners and thus present an economic injury to plaintiffs. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000). Courts have routinely upheld that the limitation of recreation and aesthetic value is sufficient for Article III standing. *See NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007) (air pollution resulting from industrial plywood processing inhibited organization members from going gardening and recreating); *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 825, 832 (9th Cir. 2021) (stormwater discharge); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (industrial discharge).

This sort of injury is not unique to the CWA and has also been applied to actions under other environmental acts. Under the Endangered Species Act, a plaintiff who alleges an injury "must allege harm to a protected animal and 'injury to those who enjoy them.'" *Animal Leg. Def. Fund v. Natl. Found. for Rescued Animals*, 645 F.Supp.3d 629, 633-34 (E.D. Tex. 2022) (quoting *Arkansas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (finding that the death of cranes and injury to those who enjoy them was sufficient for standing)); *see also Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (asserting that plaintiff must allege a particular interest in a protected animal and impaired "aesthetic or recreational interest").

The Water Transfers Rule, by allowing the transfer of waters from Cloudy Lake to the Crystal Stream, has caused injury to petitioner CSP and its members. The promulgation of the final rule is "fairly traceable" to the conduct of Highpeak in this matter. But for the EPA's promulgation

of the rule, Highpeak would not be able to discharge into the Crystal Stream without first obtaining an NPDES permit. Thus, the promulgation of the final rule has caused the conduct giving rise to CSP's injury.

Finally, CSP's injury would be remedied by a favorable decision, invalidating or modifying the Water Transfers Rule under the CWA. CSP's injuries stem from the continued discharges into the Crystal Stream and require that such discharges be subject to NPDES permits. A holding in favor of CSP would fully redress CSP's injury by reducing the environmental harms of the frequent discharges and would allow its members to "enjoy [ ] the crystal clear color and purity" of the stream. Ex. A at Par. 7.

Organizations generally have the capacity to sue on behalf of their own interests and those of their members: "[an] association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43, 97 S.Ct. 2434, 53 (1977). Here, CSP is a legitimate environmental nonprofit corporation interested in protecting the Crystal Stream from contamination. CSP was formed in December of 2023 to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." Ex. A at Par. 4.[1]

[1] Notwithstanding associational standing, CSP may have standing on its own right on behalf of its own interests: "[in] those cases where an organization is suing on its own behalf, it must establish concrete and demonstrable injury to the organization's activities… the organization must allege that discrete programmatic concerns are being directly and adversely affected…" *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). CSP has a direct and programmatic concern in maintaining the stream, which does not fall into the same category as an "abstract social [interest]" suggested by the D.C. Circuit. Rather, CSP's stewardship has a tangible, measurable interest in preserving the sanctity of the stream and its pristine condition. As previously addressed, these

The organization has associational standing to challenge the promulgation of the Water Transfers Rule of the Clean Water Act through its membership. Following the requirements of *Hunt*, the members of CSP have standing to sue in their own right. Jonathan Silver, is such a member of CSP and has recently resided in Rexville, New Union, since 2019. He has demonstrated through his declaration that he is affected by Highpeak's discharge into the Crystal Stream Ex. B, Decl. of Jonathan Silver at Par. 9. As a property owner located less than a mile from Crystal Stream Park, he is "deeply concerned about the presence of toxic chemicals" polluting the Crystal Stream and "making it cloudy." *Id*. at 5.

Already establishing the components of Article III standing, Mr. Silver's interests at stake are also germane to CSP's purpose in "[protecting] the Stream from contamination." Ex. A at Par. 4. His interests of enjoying and maintaining the aesthetic and recreational use of the stream is inherently aligned with preventing the stream from being polluted by industrial contaminants. Such an interest is shared by the membership of CSP, who are all property owners in the Rexville community.

Accordingly, the associational standing demonstrated by CSP is best analogized to the Article III standing civic associations have to protect the collective interests of their membership. *See Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36 (D.C. Cir. 2016) (upholding associational standing to a challenge contesting the placement of overhead wires above neighborhood property); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992) (finding that a nonprofit citizens association had standing based on its interests in preserving historic character of the community). To that point, two members of CSP have owned property on the Crystal Stream since 2008 and all

environmental concerns regarding recreation and aesthetic values are directly related to its programmatic concerns.

members of CSP live within the community of Rexville, in which Crystal Stream Park is located. Ex. A at Par. 5. Such shared injury occurring from mutual property and aesthetic interests provide this similar basis that CSP relies on in this matter.

Further, the claims asserted and the relief requested by CSP are not individualized to Mr. Silver or Ms. Jones. CSP is not asserting a claim for individualized damages to each of its members, rather it merely seeks relief from the continued discharges of pollutants into the Crystal Stream. This injury is common to both CSP and its members and represents the same injury to all the members. As the injuries relate to aesthetic and recreational concerns, this Court need not be concerned with varying damages or degrees of harm.

Addressing Highpeak and the EPA's central argument, CSP was not formed as a device to mount a legal challenge. The timing of CSP's formation bears no significant as to the creation, intent, and legitimate interests of the organization. CSP was formed half a year before the overturning of *Chevron* and the holdings in *Loper Bright* and *Corner Post*. To suggest that the founders of CSP preordained the outcomes of those two cases defies common sense and asks this court to apply a deeply cynical perspective to come to that conclusion. In fact, even if CSP had such divinatory capacity, the mere fact that it formed in anticipation of new Supreme Court precedent does not in itself evidence that the organization was formed solely "to mount a legal challenge."

And turning to the merits of Highpeak and the EPA's assertion that CSP has "manufactured" standing, petitioners are patently incorrect. Courts have recognized this sort of standing argument when a plaintiff voluntarily creates their own injury, under the principle *volenti non fit injuria*, not when an organization forms and suffers an independent injury that it did not create. *See Stoops v. Well Fargo Bank, N.A.*, 197 F.Supp.3d 782, 793 (W.D. Pa. 2016). That Cynthia Jones declared that

she "joined CSP to try to stop this discharge," Ex. A at Par. 11, should not convince this court to find that organization itself was merely formed to "manufacture" standing to challenge the Water Transfers Rule. As it has already been established, members such as Jonathan Silver have standing regardless of CSP, and the fact that CSP was recently formed does not discredit its injury in fact and standing to sue under the APA and CWA.

B. CSP is authorized under the CWA and has standing to file a citizen suit to enforce the NPDES against Highpeak, Inc.

CSP also has express statutory standing to file a citizen suit under 33 U.S.C. § 1365(a)(1) to enforce the CWA against Highpeak's violation of its effluent standards. Any person, including non-profit organizations, can bring a suit against private actors such as Highpeak when their conduct conflicts with the statutory requirements of the Act, limited by Article III standing. *See Inland Empire Waterkeeper*, 17 F.4th 825 (9th Cir. 2021). As has been alleged in the Complaint, Highpeak continues to convey polluted water from Cloudy Lake into Crystal Stream. These discharges are carried out without an NPDES permit, thereby violating the CWA's strict prohibition against discharging pollutants into navigable waters. 33 U.S.C. § 1311(a).

Complying also with the notice requirements of the Act, CSP gave adequate 60-day notice to the EPA, Department of Environmental Quality, and to Highpeak. 33 U.S.C. § 1365(b)(1). The notice of intent to sue letter, NOIS, indicated that Highpeak's tunnel constituted a point source and regularly discharges polluted water into the Crystal Stream, a water of the United States, without a permit.

As has been evidenced by the declarations of CSP's members, CSP has Article III standing from its members, who all suffer injuries in fact from Highpeak's discharges into the Crystal Stream. The members of CSP have indicated that the frequent discharges have affected their use and enjoyment of Crystal Stream Park and the aesthetic value of the stream. The declarations of

Cynthia Jones and Jonathan Silver express deep concern over the "contamination from toxins and metals" and these pollutants "making [the water] cloudy." Ex. A at Par. 8, Ex. B at Par. 6. As referenced earlier, these environmental harms, coupled with the degradation of recreational use and aesthetic value, pose a particularized and concrete injury. *See Friends of the Earth*, 528 U.S. 167 (2000). The continued discharges are directly caused by Highpeak's tunnel valve system in its tubing run. These discharges have diluted the water quality of the Crystal Stream as far away as 5 miles away from the tunnel discharge. Record at 5. Moreover, enforcing the CWA's NPDES requirements against Highpeak's discharge would provide adequate redress for CSP's citizen suit claim by improving the overall water quality of the Crystal Stream and restore its recreational value.

This is sufficient for the purposes of establishing a claim that is "plausible on its face" *Iqbal*, 550 U.S. at 678. CSP's detailed allegations, supported by declarations and by water testing of the Crystal Stream and Cloudy Lake, have more than demonstrated the ecological harm caused by Highpeak's tunnel. Taking these factual allegations as truthful, CSP has presented a claim with sufficient for a citizen suit under the Act.

II. CSP TIMELY FILED THE CHALLENGE TO THE WTR

The APA permits a plaintiff to challenge a promulgated rule six years after the right of action first accrues. 28 U.S.C. 2401(a). Under the recent holding in *Corner Post*, the Supreme Court has carved out that the right of action accrues when the plaintiff is first injured by the regulation. *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve System*, 603 U.S. ___, 144 S. Ct. 2440 (2024). The Water Transfers Rule was promulgated in June of 2008. While this regulation was promulgated much earlier than CSP's formation, the holding in *Corner Post* has extended the right for newly formed organizations to challenge these regulations.

A. CSP has obtained a "complete and present" cause of action under *Corner Post* from the continued discharges from Highpeak.

A plaintiff's right to bring a suit does not accrue until they have obtained a "complete and present" cause of action, suffering from some injury. *Green v. Brennan*, 578 U.S. 547, 554 (2016); *U.S. v. Lindsay*, 346 U.S. 568 (1954)*; Gabelli v. SEC*, 568 U.S. 442 (2013). In other words, such a cause of action does not accrue in this way until they are injured. For the Court in *Corner Post*, that meant that a newly formed convenience store could challenge the Federal Reserve's promulgation of Regulation II, setting minimum interchange fees on debit card payments, despite that rule being published in 2011. *Corner Post*, 144 S.Ct. at 2448. In doing so, the Court has abrogated the default rule that the statute of limitations ran from the date of the final agency action, otherwise when the final rule was published.

As addressed above, CSP has associational standing to suit for its membership and CSP timely filed its suit under the APA. CSP is a newly formed organization, founded in December of 2023, and has demonstrated standing through its continued injury created by Highpeak's discharges and the promulgation of the Water Transfers Rule. It has obtained a "complete and present" cause of action in its ongoing injury to the recreational and aesthetic interests in the Crystal Stream.

CSP's membership bolsters this claim of a complete and present cause of action. Jonathan Silver is one such member of CSP and has recently moved to Rexville as of 2019. Mr. Silver himself may have timely filed his own challenge under the rule in *Corner Post*, as his right of action did not accrue until his arrival in Rexville, around 5 years ago. Ex. B at Par. 4. It does not matter that other members of CSP have been homeowners in Rexville for a decade longer.[2] And

[2] Furthermore, it is indicated that some members within CSP have only recently become aware of Highpeak's discharges into the Crystal Stream. Ex. A at Par. 8. This would lend to applying the common-law discovery rule, where a plaintiff's injury does not accrue until it is discovered. *See*

this aligns with the holding in *Corner Post*, that "[no] precedent suggests that the traditional rule contemplates the [agency's] hypothetical 'when could someone else have sued' sort of inquiry." *Corner Post*, 144 S.Ct. at 2455. When looking at the statute of limitations, one looks to the person injured. *Id*. In this case, it is CSP and its associated membership.

While the EPA and Highpeak would argue that the time to challenge the final rule and Highpeak's discharges has been time-barred, the plaintiff-centric statute of limitations under the APA demand otherwise. But the agency's "pleas of administrative inconvenience ... never 'justify departing from the statute's clear text.' " *Id*. at 2458; (*Niz-Chavez v. Garland*, 593 U.S. 155, 169, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021) (quoting *Pereira v. Sessions*, 585 U.S 198, 217 (2018)). The statute of limitations under the APA, like all such statutes, "[promotes] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349 (1944)). It is not meant to prophylactically extinguish the claims of future generations for agency convenience.

B. The Court's holding in *Corner Post* did not establish nor intend to establish a distinction between the interests of for-profit businesses with non-profit entities.

Highpeak and the EPA suggest that *Corner Post* would not extend to grant a newly formed environmental non-profit a new statute of limitations. Their argument advances that the economic interests of for-profit businesses are the singular type of injuries that the Supreme Court was concerned with when interpreting the statute of limitation. Allegedly, the legitimate business

Cada v. Baxter Healthcare Group, 920 F.2d 446 (7th Cir. 1990) (denying application of the rule based on factual findings that plaintiff had already discovered his injury). Applying this rule would entail that more members, like Cynthia Jones, who were previously unaware of the discharges, will not be unduly time-barred for their former lack of knowledge.

interests of a newly formed corporation are somehow distinct from the legitimate public interests of a newly formed nonprofit organization, despite that nonprofit having otherwise legitimate interests for purposes of standing.

Highpeak's reading of *Corner Post* relies on an assumption that because the plaintiff in that case was a business entity that filed suit under the APA, that the Court only suggested that for-profit businesses should benefit from the plaintiff-centric statute of limitations. This has no basis in the reasoning of *Corner Post* nor a solid basis in the contemporary framework of business organizations.[3] Rather, while *Corner Post* did consider the injury to plaintiff in that case concerning its profits, the Court did not indicate any distinctive element of business interests being in any way more persuasive. To the contrary, Justice Kavanaugh in his concurrence forewarned that the government's argument in *Corner Post* would potentially eradicate environmental claims regarding agency approval of new development, since the injuries are so far delayed from those agency decisions. *Corner Post*, 144 S.Ct. at 2465 (Kavanaugh, J., concurring).

In all, CSP has timely met the statute of limitations because its cause of action did not accrue until its formation in 2023, well within the time frame of filing suit under the APA and CWA. Further, CSP timely provided notice to the EPA through the NOIS and has otherwise followed the procedural letter of the law in its Complaint.[4]

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[3] Highpeak and the EPA suggest an otherwise untenable rule to distinguish for-profit and non-profit interests where that line has become more indistinct. *See Taxing Social Enterprise*, Lloyd Hitoshi Mayer & Joseph R. Ganahl, 66 Stan. L. Rev. 387 (2014). The distinction between for-profits and non-profits has, since the proliferation of social enterprise models like benefit corporations and L3Cs, has become less meaningful than Highpeak and the EPA would purport.

[4] This Court should also note that 33 U.S.C. § 1369(b), limiting judicial review of certain actions does not apply here, applying only to the: (A) promulgation of standards under 1316; (B) determinations under 1316(b)(1)(C); (C) promulgating standards under 1317; (D) making determination as to State permit programs under section 1342(b); (E) approving or promulgating effluent limitations under 1311, 1312, 1316, or 1345; (F) issuing or denying permits under 1342;

III. THE WTR TRANSFERS RULE WAS NOT PROMULGATED VALIDLY UNDER THE CLEAN WATER ACT

Under the APA, an agency's alleged unlawful decision is reviewed according to an arbitrary, capricious, an abuse of discretion, or contrary to law standard. 5 U.S.C. § 706 *et seq*.. The agency's actions, findings, and conclusions must be supported by substantial evidence. *Id*. This Court reviews the whole record in reviewing agency action. *Id*.; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Since the holding in *Loper Bright v. Raimondo*, the prior interpretive scheme of *Chevron* deference has been overruled and courts no longer apply deference to agency interpretation of ambiguous controlling statutes. Instead, courts may revert to *Skidmore* deference. *Loper Bright*, 144 S.Ct. at 2267 (2024).

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 following national concerns with the nation's waters. The amendments came to be known as the Clean Water Act, which was enacted to maintain the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress intended that "[e]very point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). Further, Congress clearly stated that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Costle v. Pac. Legal Found.*, 445 U.S. 198, 202 (1980). Congress established the NPDES program of the CWA specifically "to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007).

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or (G) promulgating individual control strategies under 1342. As an APA challenge and CWA citizen suit, the statutory limitations fail to apply and should not be read to preclude CSP's seeking of judicial review.

The Water Transfers Rule was promulgated by the Environmental Protection Agency on June 13, 2008 following notice and comment rulemaking. *See* 40 C.F.R. 122.3(i). The EPA had statutory authority to promulgate this rule under 33 U.S.C. § 1342(a) and 33 U.S.C. § 1361(a), allowing the agency to "prescribe such regulations as are necessary to carry out his functions under [the] chapter." The proposed rule gave adequate notice of the final rule and flowed as a "logical outgrowth" of the notice and comment rulemaking. *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1105 (1985).

But throughout the promulgation of the final rule, the EPA has derived undeniable contention with environmental groups and numerous states at every possible juncture. The EPA has contradicted the language of the CWA, it has not reasonably interpreted its statutory language, and was sorely deficient in promulgating the final rule after significant concerns from state environmental departments and advocates regarding national water quality.

A. <u>The Water Transfers Rule directly contradicts the plain language of the Clean Water Act and was promulgated in a manner that was arbitrary, capricious, and contrary to law.</u>

Section 301(a) of the Clean Water Act strictly prohibits "the discharge of any pollutant" from any "point source" into the waters of the United States without an NPDES permit. 33 U.S.C. § 1311(a); *See also Dubois v. USDA*, 102 F.3d 1273, 1296 (1st Cir. 1996). Indeed, the statutory language of the Clean Water Act is unambiguous: "the discharge of any pollutant by any person shall be unlawful" unless in compliance with another provision of the Act. 33 U.S.C. § 1311(a). The term discharge of a pollutant means "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphasis added). The Act also defines such navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

There is a "strong presumption that the plain language of the statute expresses congressional intent [which] is rebutted only in rare and exceptional circumstances," *Rubin v. United* States, 449 U.S. 424, 430 (1981) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12 (1987)). Statutes should not be read in "roundabout" ways or in manners contrary to a common sense understanding of the language. *Kloeckner v. Solis*, 133 S.Ct. 596, 605 (2012). Courts assign the ordinary and plain meaning to the words left undefined in a statute. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

An agency is thus bound by the unambiguous language of its controlling statute. Here, the controlling statute of the CWA has spoken expressly to include any addition of pollutants to "navigable waters." And in contradiction of this statute, the EPA has defined exempt water transfers as "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).

Transferring polluted water from one water of the United States necessarily entails an addition of pollutants to another water of the United States and logically falls within the clear prohibition under the Act. Thus, the Final Rule promulgated by the EPA fails to comport with the direct mandate of the Clean Water Act, which requires the agency to "prescribe such regulations as are necessary" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

i. <u>The unitary waters theory is not a reasonable interpretation in lieu of the express prohibition under the Clean Water Act.</u>

The EPA has relied primarily on the language "addition" in 502(12) to suggest that because water transfers do not constitute "additions" that they merely move water from one waterbody to

another. The EPA derives its logic in a way best analogized from the first of the *Catskill* line of cases: "[i]f 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." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001) (*Catskill I*).

In essence, the EPA has relied on what is known as the "unitary waters theory" since the promulgation of the rule to justify its reasoning that a transfer from one waterbody into another does not constitute an "addition" because all "navigable waters" are a singular entity and thus transfers among individual constituents are excluded under the NPDES.. As it stands, there is no definition of "addition" in the language of the Clean Water Act. The EPA purports that this itself creates ambiguity that it could interpret in its favor. And while the allegedly ambiguous language of "addition" may have struck in the EPA's favor using *Chevron* deference, this is no longer the legal standard for reviewing an agency's statutory interpretation in a final rule. Under *Skidmore* deference, which courts now apply to such review following *Loper Bright*, give the agency a "power to persuade, if lacking power to control" an interpretation of the governing statute. *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2267 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Indeed, this interpretation of "addition" has been widely dismissed by the courts under *Skidmore* deference. Under such deference, the Second Circuit found that a "point source must introduce the pollutant into navigable water from the outside world" to show an addition. *Catskill I*, 273 F.3d at 491 (quoting *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)). There, the court held that New York City's transfer of water from a reservoir to a creek "plainly qualifie[d] as a point source". *Catskill I*, 273 F.3d 493-494. The court distinguished this ruling from precedent in *Gorsuch* and *Consumers Power*. First, it held that EPA's interpretation

was instead "based on a series of informal policy statements ... and ... litigation positions" and thus did not merit deference *Id.* at 490. Second, although it agreed with EPA's and other courts' interpretation that an "addition" of a pollutant required that the pollutant be introduced "from the outside world," it defining that term as "any place outside the particular water body" *Id.* at 491 (internal quotation marks omitted)."

The entire theory on which the EPA has relied has also failed to survive judicial muster in the First Circuit. In *Dubois*, the court suggested that "[t]here is no basis in law or fact for the district court's 'singular entity theory.'" *Dubois*, 102 F.3d at 1296. That case, involving a ski resort's transfer of water from a polluted river in Maine into a pristine mountain lake to create more snow, found that such a transfer was strictly prohibited and required an NPDES permit. *Id*. at 1278.

Moreover, the unitary waters theory can and might often lead to illogical and inconceivable outcomes contrary to the intention of the CWA.[5] In *Northern Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003), the Ninth Circuit could not credit the notion that salt water from the Atlantic Ocean could be piped into the Great Lakes without being subject to the Act. (to allow salt water from the Atlantic Ocean to be piped into the Great Lakes or sulfur water into drinking water without liability under the Act "cannot sensibly be credited")

Signaling a final death knell to the EPA's interpretation of unitary waters, the Supreme Court has expressed its own discontentment to the theory. In previous cases, the Court carved out its own distinctions for "meaningfully distinct" waterbodies. *S. Fla. Water Mgmt. Dist. v.*

[5] Chin's dissent in *Catskill III* went so far as to say that the WTR will lead to "absurd results," and was an illogical construction of the Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 546 (2d. Cir. 2017) (Chin, J., dissenting) (citing *Michigan v. EPA*, 576 U.S. 743, 752 (2015).

Miccosukee Tribe of Indians, et al., 541 U.S. 95 (2004) (*Miccosukee*). In that case, a pumping facility that transferred water from a canal into a local reservoir was challenged by the Miccosukee Tribe for failure to obtain an NPDES permit. *Id*. at 98. The Court rejected the argument that the Act did not extend to pollutants already present in "navigable waters." *Id.* at 105. Rather, the point source only needed to convey the pollutant to "navigable waters" for the Act to apply. *Id*. The Court did consider the EPA's argument in its memorandum that "such permits are not required when water from one navigable water body is discharged, unaltered, into another navigable water body," but ultimately declined to weigh against it as a novel argument not previously espoused or raised in the lower courts. *Id*. at 105–07 (quotation marks omitted). Moreover, the Court remarked that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id*. at 107. While not a silver bullet, the Court's cursory review of the theory has only spelled plain rejection.

ii. The Water Transfers Rule was contrary to Congress' designated purpose and intention behind the Act shown through the legislative record and subsequent amendments speaking to NPDES permit exemptions.

This Court may also be empowered to look to Congressional intent for the exemption of water transfers. Under *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487, 121 S.C.t. 903 (2001), an agency's interpretation of an ambiguous statue cannot be given deference when the agency constructs it in a manner opposed to the manifest purposes of the statute. Understandably, the "measure of deference to an agency administering its own statute has been understood to vary with circumstances," and this interpretation "has produced a spectrum of judicial responses, from great respect at one end ... to near indifference at the other." *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted). In certain circumstances, an agency's interpretation of a statute "is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And courts

"must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

To determine that it was never within the purview of Congress to exclude water transfers, this Court need only look at the express exemptions created in the original amendments or look to the subsequent exclusions added to the Clean Water Act in 1977, 1987, and 2008.[6] That water transfers were meant to be excluded contradicts express Congressional action which considered and reviewed additional exemptions to the Act. If Congress has already spoken to the issue of NPDES exemptions and has chosen not to include water transfers, then the EPA may not suggest that Congress had any hidden intention to do so through administrative fiat. Further, if Congress has "explicitly [enumerated] certain exceptions to a general prohibition, additional exceptions are not to be implied." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (internal quotation marks omitted).

The limited interpretation of "navigable waters" to mean a singular, homogenous entity is also contrary to what Congress has elucidated. "In light of the sweeping goals of the Act, the Senate Conference Report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation" *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1226-1279 (11th Cir. 2009) (*Friends I*) (quoting S. Rep. No. 92–1236

[6] *See* 33 U.S.C. § 1342(l)(1) (1977, agricultural return flows); 33 U.S.C. §§ 1342(p), 1342(l)(2), 33 U.S.C. § 1362(14) (1987, stormwater discharges); and 33 U.S.C. § 1342(r) (2008, recreational vehicles) Indeed, the 1977 amendments regarding agricultural return flows suggest that Congress did not mean to exempt water transfers, as this amendment was in partial response to an EPA determination subjecting flows to NPDES requirements. *See Moore v. Sun Bank of North Florida, N.A.*, 923 F.2d 1423, 1428, 1431 (11th Cir. 1991), reinstated, 963 F.2d 1448 (11th Cir. 1992) (Exclusions should not be read into a law when Congress chose not to create them it had the opportunity).

(1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776, 3822). To perceive "navigable waters" and all the distinctive water bodies that comprise it as an indivisible monolith, as opposed to a set of complex hydrological systems, runs antithetical to the Senate's intention for this phrase.

And this expansive construction of "navigable waters" to specifically mean every waterbody has been upheld through the courts. The Supreme Court in *Rapanos* recognized that the plural "waters" has more significant and accurate meaning when squared with the directive of the CWA. *Rapanos v. U.S.*, 547 U.S. 715, 736-737 (2006). The Court interpreted this to mean that the CWA's definition of discharge, emphasizing the operative prepositions "from" and "to" suggest that "navigable waters" references distinct waterbodies, and not a general "water of the United States" as the Army Corps of Engineers had proposed. *Id*.

The Water Transfers Rule is, in other words, "manifestly contrary to the statute." *Mead*, 533 U.S. at 227. Further, the rule is also not supported by congressional intent or through the support of the courts. The EPA even acknowledges this in its final rule which acknowledged the many cases that rejected the unitary waters theory. 73 Fed Reg. 33,697, 33,699 (June 13, 2008).

iii. <u>The EPA's failure to consider the effect of the Water Transfers Rule on the Nation's waters was arbitrary and capricious and contravenes the express goals of the Clean Water Act.</u>

An agency's action is considered arbitrary and capricious if the agency fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.' Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 464 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 158 (1962); *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2nd Cir. 2005); *Michigan v. EPA*, 576 U.S. 743 (2015) (EPA's decision to disregard economic costs to power plants was found to not satisfy "reasoned decision making").

Here, the EPA failed to consider the consequences of the Water Transfers Rule as it affected the nation's waters. Because it failed to research and provide any detailed information on the actual consequences of the rule on national water quality, the EPA did not meet the standard for reasoned decision-making through the rule. It did not "[consider] the relevant factors" and it wholly neglected to "[articulate] a rational connection between the facts found and the choice made." *Dubois*, 102 F.3d at 1284 (quoting *Baltimore Gas and Elec. Co. v. Nat. Resources Def. Council, Inc.*, 462 U.S. 87 (1983)).

When the EPA first issued the proposed rule in June 7, 2006, the EPA received over 18,000 comments on the rule. National Pollutant Discharge Elimination System (NPDES) Water Transfers, 71 Fed.Reg. 32,887 (proposed June 7, 2006), (to be codified at 40 C.F.R. Part 122), https://www.regulations.gov/docket/EPA-HQ-OW-2006-0141/comments. Of those comments, many state EPA agencies and environmental advocates were foremost concerned with the effects the WTR would have on national water quality standards. *See* Comments: National Pollutant Discharge Elimination System (NPDES) Water Transfers Final Rule (to be codified at 40 C.F.R. Part 122), (proposed June 7, 2006) (Comment submitted by Eliot Spitzer, Attorney General, New York et. al. (Docket #: EPA-HQ-OW-2006-0141-1383), Comment submitted by Bill Fischbein, Deputy Director for Legal Affairs, State of Ohio Environmental Protection Agency (OhioEPA) (Docekt #: EPA-HQ-OW-2006-0141-1310); Comment submitted by Richard A. Powers, Chief, Water Bureau, Michigan Department of Environmental Quality, Water Bureau Chief (Docket #: EPA-HQ-OW-2006-0141-0035), Comment submitted by Dione C. Carroll, General Counsel, Miccosukee Tribe of Indians of Florida (Docket #: EPA-HQ-OW-2006-0141-1401)), https://www.regulations.gov/docket/EPA-HQ-OW-2006-0141/comments.

In response to the numerous public comments made concerning the ramifications the rule would have on the Nation's waters, the EPA issued the final rule two years later on June 13, 2008. NPDES Water Transfers Rule, 73 Fed Reg. 33,697. What resulted was primarily a legal analysis, and not a factual determination of how this new rule would affect the Nation's waters and water quality standards. Nor did the EPA consider how the rule would "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the primary directive of the CWA. 33 U.S.C. § 1251(a). What the EPA primarily considered were the economic consequences of including water transfers under the NPDES permitting system and concerns with burdening state water allocation management. 73 Fed Reg. 33,697, 33,699 (June 13, 2008).

While these were important considerations, it did not absolve the agency of considering the environmental impacts. The agency was required to consider the facts about water quality impacts in exercising its discretion. EPA cannot permit a legal interpretation that "ignores the directive given to it by Congress in the Clean Water Act, which is to protect water quality." *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009). Failure to acknowledge, much less comport with the directive of the Act, does not satisfy that requirement, and does "entirely [fail] to consider an important aspect of the problem." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

The EPA cannot also turn a blind eye to the impacts the Water Transfers Rule has had on the Nation's waters, and instead it must look to the relevant factual considerations when promulgating a final rule. *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (finding a temporal requirement of discharges ran counter to the directive of the CWA). And in fact, because of the WTR, waterbodies around the nation including those in water-scarce states have dramatically deteriorated. In one such case in Colorado, it has lead to toxic algal blooms in an otherwise clear

Grand Lake and devastation to the lake's marine ecosystem . *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, Chris Reagen, 83 Univ. of Col. L. Rev. 308, 334 (2013). The EPA chose to neglect the ramifications of this rule as it would apply to water quality, the express directive that the EPA had in administering the Act, and thus the rule was promulgated in an arbitrary and capricious manner that has endangered the Nation's water quality.

B. The contested precedent of the Water Transfers Rule merits special justification following the Court's holding in *Loper Bright*.

The Court provided that regulations previously upheld under *Chevron* remain valid unless there is "special justification" for revisiting prior decisions. *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (2024). The Court stated in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 that precedent " 'special force' " "in respect to statutory interpretation" because "'Congress remains free to alter what we have done.'" (quoting *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008). But "beyond workability," a court considers the "antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-793 (2009) (quoting *Pearson v. Callahan*, 555 U.S. 223, 234-235 (2009)).

Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827-828 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Thus, when courts produce bad law based on flawed reasoning, courts are in turn empowered to contest such precedent. Here, precedent suggests that the reasoning upholding the WTR is flawed, beyond the overturning of *Chevron*, and that because the unitary waters theory has never been fully embraced by any court, that it merits reconsideration.

i. Courts have routinely rejected the unitary waters theory and the rationale the EPA has used to promulgate the WTR.

In *Friends I*, the court set forth a litany of previous decisions rejecting the unitary waters theory, stating that it "has struck out in every court of appeals where it has come up to the plate." *Friends I*, 570 F.3d at 1217; *see also Concerning Catskill: Missed Opportunity, Broken Precedent and the Plight of American Waters*, Chase Corey, 44 Wm. & Mary Envtl. L. & Pol'y Rev. 597 (2020). While that case upheld the Water Transfers Rule on a tenuous reliance on *Chevron* deference, it also chose to reject the rationale that the EPA employed in promulgating the final rule.

Further, the Supreme Court has specifically addressed water transfers relating to different portions of the same water body. *See Los Angeles Cnty. Flood Control Dist. v. NRDC*, 568 U.S. 78 (2013). There, the Court addressed the issue of whether stormwater runoff from the county's sewer system constituted discharges under the CWA. The Court recognized that water flowing from one improved system to an unimproved portion of the waterbody does not amount to a discharge of pollutants under the Act. This holding creates a significant distinction and indicates that while there may be a legal basis to exempt water transfers within the same waterbody, that transfers that direct water from one distinct body of water into another are not protected by the Act in the same way.[7]

The holdings in the *Los Angeles County* and *Miccosukee* are at odds with the Water Transfer Rule. Both apply a more particular approach that recognizes the characteristics and hydrological differences between separate bodies of water. And this has only been indicated over a long history

[7] The Court emphasized the transfer occurring in the same system of water: "an improved portion of a navigable waterway into an unimproved portion *of the very same waterway* does not qualify as a discharge of pollutants under the CWA" *Los Angeles Cnty Flood Control Dist.*, 568 U.S. at 83. (emphasis added).

of challenging the rule. This Court thus has more than sufficient reason that the following cases upholding the EPA's unitary waters theory are unworkable or otherwise badly reasoned.

ii. The Eleventh Circuit's decision in *Friends I* and the Second Circuit's decision in *Catskills III* do not survive renewed scrutiny.

The Eleventh Circuit has said that "That precedent and those statements take the view that the transfer of pollutants from one meaningfully distinct navigable body of water to another is an "addition ... to navigable waters" for Clean Water Act permitting purposes. If nothing had changed, we might make it unanimous." *Friends I*, 570 F.3d at 1218. Further, the court there was wary of embracing the unitary waters theory, and instead chose merely to allow the agency to obtain deference over a "reasonable" construction of the statute. The court said that "we might agree with the Friends of the Everglades that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act." *Id*. at 1226.

But the court in *Friends I* chose not to apply the canon of statutory construction to its full extent. The traditional tools of statutory construction include "examination of the text of the statute, its structure, and its stated purpose." *Miami–Dade County v. EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). While paying notice to the text, structure, and stated purpose of the statute, the Eleventh Circuit largely neglected to apply its understanding of legislative intent in constructing the statutory language. The court said that it will "interpret and apply statutes, not congressional purposes." *Friends I*, 570 F.3d at 1226.

It confounds the purpose of the court to merely apply statutes without also applying the Congressional purpose behind those statutes. Further, the Eleventh Circuit recognized that the final rule did not comport with the goals of the CWA nor the intent of Congress but chose to ultimately

ignore those considerations in light of *Chevron* deference. *Id*. at 1222-1223. The Eleventh Circuit's decision in *Friends I* was decided on flawed reasoning to obtain a flawed result. This Court should not nor should be required to defer to this precedent. Because it has relied on otherwise faulty premises and has obtained a result contrary to the Clean Water Act, the Eleventh Circuit's precedent fails to control.

Finally, *Catskill III* has also created a flawed, unworkable precedent. There, one of the most recent cases addressing a challenge to the EPA's WTR rulemaking, the court looked legislative history, and concluded that Congress "[had] not left us a trace of a clue as to its intent" and that the "3,000-page legislative history of the Clean Water Act appears to be silent, or very nearly so, as to the applicability of the NPDES permitting program to water transfers. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 515 (2d. Cir. 2017) (*Catskill III*). Through this finding, the court ultimately refused to acknowledge that the CWA, through its amendments, delineated statutory exceptions to the NPDES permit system. The court did not consider this and in turn overlooked an incredible detail: that Congress has in fact spoken to NPDES permit exemptions, has created a statute, and that water transfers were considered and ultimately never extended to this protection. 33 U.S.C. § 1342(l). The Second Circuit tentatively concluded that the WTR "is not the interpretation that would most effectively further the Clean Water Act's principal focus on water quality, [but] it is reasonable nonetheless." *Catskill III,* 846 F.3d. at 533. But what this precedent has suggested is that statutes directly speaking to an issue can be superseded by an agency's interpretation of another statute, and can contravene the purpose of its statute, so long as it is a reasonable interpretation. More than its reliance on *Chevron*, the Second Circuit created an unworkable set of precedent following *Loper Bright*.

And if this Court does not find that the Supreme Court's statements in *Loper Bright* regarding prior rulings were mere dicta, this Court should recognize the distinction between such prior rulings for the unique issue of precedent at issue in this case. This Court is presented with two contradictory lines of decisions, the latter of which have created an unworkable solution to a pervasive. The APA thus requires a reviewing court to "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. § 706(2)(A), (C). The long and contested history of the Water Transfers Rule warrants review in this case and a revisiting of this long-debated rule under contemporary Supreme Court precedent.

IV. HIGHPEAK MUST STILL OBTAIN A PERMIT UNDER THE CLEAN WATER ACT

In the alternative, even if the Water Transfer Rule was validly promulgated under the Clean Water Act, Highpeak must still obtain an NPDES permit because the exemption would still not apply under modern Supreme Court precedent. Because Highpeak has also failed to take appropriate measures to mitigate additional pollutants being added through the transfer and has transferred water between distinct bodies of water, it has not established that the Water Transfers Rule applies to its tunnel. Rather, CSP has offered evidence to the contrary that the transfer itself has added additional minerals and total suspended solids through its permeable tunnel that brings it outside the WTR's protection. To further that point, the EPA has interpreted in this case that the WTR does not apply in this instance, and its determination, even under an invalid regulation, is still afforded some degree of deference.

A. Highpeak cannot rely on the Water Transfers Rule when its transfer introduces additional pollutants between Cloudy Lake and Crystal Stream as meaningfully distinct bodies of water.

The Water Transfers Rule does not extend so far as to permit discharges of pollutants where the transfer of water would introduce additional pollutants not occurring naturally in the transferred

water. *See Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 183 (2020) (finding that the "functional equivalent" of a discharge was delivered through nearby groundwater). Courts have recognized a substantive distinction between moving water from one improved portion of a waterbody to another unimproved portion of the same waterbody.

This analysis was recognized in *Dubois*, where the First Circuit understood that a ski resort's transfer of water from a river into a pond via a system of pumps and pipes used to make snow was a "discharge of a pollutant" into the pond because the pipe was a "point source," and the river and the pond were "not the same body of water." *Dubois*, 102 F.3d at 1296–97. Further, distinguishing its rationale form the First Circuit in *Consumers Power*, the court held that the water "lost its status as waters of the United States" because "the water [left] the domain of nature and [was] subject to private control rather than purely natural processes." *Id*. at 1297.

The water transferred by Highpeak's tunnel constitutes a "point source" under the CWA, as a "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) (emphasis added).

The parties have stipulated to Cloudy Lake and the Crystal Stream as "waters of the United States," and thus navigable waters as applied by the CWA. Record at 5. The source of contention then rests on whether water transfers between these two water bodies are "meaningfully distinct" under the Court's interpretation of how these two bodies of water are related.

Cloudy Lake and Crystal Stream are "meaningfully distinct" as to be considered two separate water bodies. To determine whether two systems were distinct, the Court in *Miccosukee* was inclined to look towards whether there were hydrological connections between the water

systems, such as through groundwater aquifers. *Miccosukee,* 541 U.S. at 110. The Ninth Circuit has also recently spoken to this issue of determining whether waters are meaningfully distinct by testing the relationship between the source water and receiving water. *Cottonwood v. Env't L. Ctr. v. Edwards*, 86 F.4d 1255 (9th Cir. 2023).

Here, Crystal Stream, as indicated through CSP's NOIS, is fed by groundwater springs, as opposed to Cloudy Lake. Record at 5. This is just the sort of hydrological distinction that the Court in *Miccosukee* considered. In fact, the two water systems don't appear to be connected naturally by any means, and the tunnel is the only conveyance delivering water from the Cloudy Lake into Crystal Stream, based on the differing water levels. Record at 4. To that point, Highpeak had to dig a tunnel and lay down pipe through 100 yards of solid rock simply to transfer the water. *Id*. Because the two waterbodies do not share a common flow, but for Highpeak's intervening tunnel, they are two separate bodies of water.[8]

Anticipating Highpeak's alleged defense, CSP has sampled the water, demonstrating that additional pollutants, iron, manganese, and TSS are brought into the Crystal Stream from the tunnel. Indeed, the sampling data shows that the water discharged into the Crystal Stream from Cloudy Lake contains 2-3% higher concentrations of each of these contaminants than the water sampled from the lake itself. Record at 5. Highpeak's transfer of water discharges more pollutants than would occur from Cloudy Lake's natural flow into Crystal Stream, indicating that its tunnel is indeed polluting the Crystal Stream. In other words, Highpeak's discharge is anything but a "natural" addition of pollutants, as it results from a man-made conveyance that takes the water outside the definition of "navigable waters" and its accorded protections.

[8] For further discussion of determining factually whether waterbodies are "meaningfully distinct," *see Meaningfully Distinct Waters, the Unitary Water Theory, and the Clean Water Act*, Priscillia de Muizon, 32 Ecology L.Q. 417 (2005).

B. The EPA is entitled to deference in interpreting its own regulation against Highpeak.

Here, the EPA is interpreting its own regulation. The administrative interpretation of the agency's own regulation is given greater deference than the agency's interpretation of a congressional statute. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Though the Supreme Court has since upheld *Auer* deference, it has limited that the statutory language being interpreted must still be "genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558 (2019). The rationale for this is that as the agency responsible for promulgating the rule, the agency has both the expertise and the reflected authority to speak to its application and interpretation. In other words, that it is "in a better position [to] reconstruct" its original meaning." *Id*. at 570 (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991)).

The EPA in this instance is applying its interpretation of the WTR through its argument in this matter. And as the EPA had said and relies in the same on its publication of its final rule, suggesting that "[water] transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred." 73 Fed Reg. 33,697, 33,705 (June 13, 2008). The EPA also went to clarify that NPDES permits are still required when "water transfers introduce pollutants to water passing through the structure into the receiving water." 73 Fed Reg. 33,697, 33,705 (June 13, 2008). These explicit caveats are significant and speak to some limitation on the WTR which has largely been regarded by the courts following its promulgation.

Here, Highpeak's tunnel has introduced pollutants to the transferred water from Cloudy Lake based on its semi-permeable, semi-impermeable construction of pipe and rock carving. It has taken the water from the Cloudy Lake and has transferred it through its tunnel, which sheds

additional iron, manganese, and TSS. The EPA's interpretation applies to this specific occurrence under the WTR.

Even if this Court does not recognize *Auer* deference to EPA's interpretation, then this Court may interpret on its own terms that applying the WTR to Highpeak's discharges is inconsistent with the holdings in *Cnty. of Maui*, *Dubois*, and *Miccosukee*. Courts have reasonably interpreted that the WTR does not apply to instances such as these, involving the addition of pollutants through the transfer, for over 20 years. Note that those interpretations were not reliant on *Chevron* nor significant administrative deference.

Highpeak contends that water passing through any man-made conveyance inevitably takes on "new" pollutants. But this directly contradicts the interpretation that the EPA had adopted in promulgating the final rule and it goes against decades of Supreme Court precedent. Highpeak's simultaneous reliance on agency deference in upholding the WTR, while simultaneously using *Loper Bright* to challenge the agency's own interpretation should give this Court pause as it reviews the decision of the district court. Highpeak simply asks too much of this Court and insists that it go against the precedent established in *Miccosukee* and extend the holding in *Loper Bright* to have overturned *Auer* deference.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the district court's determination that the Water Transfers Rule was validly promulgated under the Clean Water Act and should uphold the determination that CSP has standing, has timely filed its citizen suit and challenge to the Water Transfers Rule, and that Highpeak remains obligated to obtain a NPDES permit under the existing regulatory scheme.