C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWETFTH CIRCUIT

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

v.

UNITED STATES 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

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

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STATEMENT OF JURISDICTION

The Environmental Protection Agency (EPA) had authority over the issuance or denial of permits for the discharge of pollutants. 33 U.S.C. § 1342. The District Court had jurisdiction over Crystal Stream Preservationists, Inc. (CSP)'s claims brought under the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(1) and (2), and federal-question jurisdiction under 28 U.S.C. § 1331. On August 1, 2024, the District Court granted the EPA's and Highpeak Tubes, Inc. (Highpeak)'s motion to dismiss CSP's challenge of the validity of the Water Transfers Rule (WTR). Highpeak moved to dismiss CSP's citizen suit for lack of standing, failure to timely file suit, and failure to state a claim. The District Court denied Highpeak's motion to dismiss each issue. Every party timely filed a notice of interlocutory appeal on the same day. This Court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF 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 Act was a valid regulation promulgated pursuant to the Clean Water Act?

IV. Did the District Court err in holding that the 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

Highpeak is a small, family-owned business located in Rexville that provides recreational river tubing activities to individuals. (Decision and Order p. 3). Highpeak owns a 42-acre tract of land that borders both Cloudy Lake and Crystal Stream, where it has conducted its recreational tubing business for over thirty years. *Id*. at 4. All Parties agree that Cloudy Lake and Crystal Stream are "waters of the United States" as defined in the Clean Water Act. *Id*. at 4-5. Highpeak depends

on the Stream to conduct its business and launches its customers into Crystal Stream. *Id*. at 4. Thirty years ago, in 1992, Highpeak obtained permission from the State of New Union to operate a tunnel (the discharge point) from Cloudy Lake to Crystal Stream to create a more voluminous, fast-moving waterway for Highpeak's customers. *Id*. Highpeak cannot use the tunnel unless New Union determines that the water levels in the Lake are high enough to allow release into the Stream without adverse impact to the Lake. *Id*. The tunnel is both carved rock and iron piping. *Id*.

CSP is an advocacy group incorporated on December 1, 2023, comprised of resident landowners who, save one, have lived in Rexville for over 15 years. *Id*. Only two of the thirteen members own land along the Stream, and both plots are five miles south of Highpeak's tunnel. *Id*. The two member-landowners have owned their plots since at least 2008. *Id*. Both landowners purchased their downstream parcels after the tunnel was constructed and fully operational. *Id.*

The state of New Union does not have a delegated CWA permitting program, so the EPA issues CWA permits within New Union. *Id*. Even though the EPA has authority over CWA permits in the State, it did not require a National Pollution Discharge Elimination System (NPDES) permit at the time Highpeak constructed the tunnel, nor has it required a yearly operation permit, despite the tubing business and tunnel being active for over thirty years. *Id*. Until now, no one, including the EPA, has ever challenged the discharge or argued that Highpeak requires a permit. *Id*.

On December 15, 2023, two weeks after incorporating, CSP sent a notice of intent to sue (NOIS) letter to Highpeak, alleging that Highpeak's state-approved tunnel was discharging pollutants into Crystal Stream without a valid permit and was therefore violating the Clean Water Act. *Id*. CSP also sent copies of the NOIS to both the EPA and the State's Department of Environmental Quality. *Id*. CSP further alleged that the discharge contained numerous pollutants, including iron and manganese, and included a single water quality sample. *Id*. at 5. In its NOIS,

CSP also asserted that the Water Transfers Rule (WTR) was invalidly promulgated. *Id*. In the alternative, CSP alleged that the minerals found in Crystal Stream were introduced during the transfer process from the tunnel, thus removing Highpeak's water transfer activity from the scope of the Water Transfers Rule. *Id*.

Highpeak responded to CSP's NOIS with its own letter, stating that it did not need to respond to CSP's NOIS on the merits, did not need a NPDES permit, and that any "additional" pollutants did not bring the water transfer outside the scope of the WTR. *Id*. CSP responded by filing a lawsuit on February 15, 2024, realleging all its claims from the NOIS. *Id*. CSP alleged two causes of action: (1) that the WTR was invalidly promulgated and is inconsistent with the CWA and (2) alternatively, even if the WTR is valid, Highpeak is required to obtain a permit from the EPA because the transfer activity introduces pollutants and thus brings it outside the scope of the WTR. *Id*. Highpeak moved to dismiss the complaint, challenging CSP's suit on standing grounds, timing grounds, and failure to state a claim. *Id*. The EPA moved to dismiss CSP's lawsuit on the same grounds. *Id*. at 6. However, the EPA agreed with CSP's alternative argument that Highpeak must obtain a NPDES permit for its discharge. *Id*. The District Court granted the motion to dismiss as to the WTR challenge but denied the remainder of Highpeak's motions to dismiss. *Id*.

SUMMARY OF THE ARGUMENT

The District Court incorrectly denied Highpeak's motion to dismiss the claims against it for lack of standing, timeliness, and failure to state a claim. First, CSP is not a legitimate organization, and thus cannot have standing. Even if CSP is a legitimate organization, the District Court incorrectly found that CSP has standing because: (1) it has suffered only, at most, an aesthetic injury and not a concrete, particularized injury-in-fact (2) it has not alleged a sufficient causal connection between the alleged injury and Highpeak's action, and (3) it cannot seek judicial redress

for the alleged injury because the alleged injury is caused by natural aspects of the waterbody. Further, CSP has not satisfied the required elements of standing for organizations. Second, the District Court incorrectly applied the *Corner Post* decision and held that CSP filed its action within the statute of limitations. This is incorrect because: (1) The *Corner Post* decision applied to for-profit businesses directly impacted by regulations, not non-profits seeking to use regulations to sue others, and (2) CSP was formed after the statute of limitations ran out for all of its members, who could have sued earlier but chose not to, making it an impermissible end-around to the statute of limitations. Third, the District Court incorrectly held that Highpeak required a NDPES permit because it incorrectly applied the *Auer* deference standard to this case embracing the EPA's unreasonable interpretation of the Rule over Highpeak's more reasonable interpretation, and because CSP did not allege enough facts to find that Highpeak's water transfer activity constituted an "addition" of pollutants taking the activity outside of the scope of the WTR. However, the District Court was correct in holding that the WTR was validly promulgated because it was within the EPA's authority to promulgate the Rule, it is consistent with the purpose of the Clean Water Act, and it has been upheld by the Second and Eleventh Circuits.

STANDARD OF REVIEW

An Appellate Court reviews a grant of summary judgment *de novo*, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011). The legal conclusions of the District Court, "including its interpretation and application of a statute of limitations district court's legal conclusions," are also reviewed *de novo*. *Id*.

ARGUMENT

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

When an organization is created to mount a legal challenge, additional scrutiny is required to determine if the organization has standing. Decision and Order p. 7. In the present case, the lower court incorrectly found that CSP has standing despite the alleged harm being aesthetic in nature and the organization being formed solely to challenge the WTR and Highpeak. Decision and Order p. 8.

A. The District Court erred in holding that CSP is a legitimate corporation.

When an organization is legally formed under state law, the court looks to see if the organization engages in substantial or legitimate business practices to determine whether it has standing to challenge the actions of others. (Decision and Order P. 7).[1] In *Stoops v. Wells Fargo Bank,* a District Court found that purchasing cell phones does not give rise to an injury in fact when done for the purpose of filing a lawsuit. 197 F. Supp. 3d 782, 801 (W.D. Pa. 2016). Therefore, the petitioner did not have standing when they purchased the cell phones to facilitate a lawsuit, because they deliberately put themselves in a position to be "harmed." *Id*.

CSP was formed strictly for the purpose of filing a lawsuit, and therefore, like the petitioners in *Stoops*, lacks standing to sue. No member of CSP previously challenged the discharge, even though Highpeak has been lawfully transferring water from Cloudy Lake to Crystal Stream with the State's permission for 32 years. (Decision and Order p. 4, 6). Since its incorporation, CSP has not pursued its mission statement in any way which demonstrates that it is

[1] CSP was legally formed under the state law of New Union. Decision and Order p. 7.

a legitimate corporation looking to pursue its mission for purposes of this lawsuit.[2] Therefore, CSP is not a legitimate corporation and cannot bring a suit against Highpeak.

B. Even if CSP is a legitimate corporation, it does not have standing to sue.

Three elements must be met for a plaintiff to have standing: (1) the plaintiff must have suffered a concrete and particularized injury-in-fact that is actual or imminent, (2) there must be a causal connection between the concrete injury and the action of the defendant, and (3) the injury must be able to be redressed by a favorable court decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff has the burden to prove these elements are met. *Clapper v. Amnesty Int'l U.S.A*, 568 U.S. 398, 412 (2013). In addition, because CSP is an organization representing its members, it is required to meet the three elements of organizational standing: (1) CSP's "members would otherwise have standing to sue in their own right" (2) the interests CSP "seeks to protect are germane to the organization's purpose" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). CSP fails to meet the elements of standing as well as the institutional standing elements, and thus cannot bring this case forward.

1. CSP has not suffered a concrete and particularized injury-in-fact that is actual or imminent.

To satisfy the first prong of standing, the plaintiff must prove each component to be true: that the injury is concrete and particularized, the harm is actual or imminent, and the injury is an injury-in-fact. *Lujan,* 504 U.S. at 560. A "concrete injury must be *de facto*; that is, it must actually

2 Other organizations with missions similar to CSP have engaged in activities to support their missions, such as hosting a trail work day to preserve access to the stream, *See* Presumpscot Regional Land Trust, *Events*, https://www.prlt.org/events (Last visited Nov. 15, 2024), or hosting trash pickup days for a specific waterway, *see* Adilson González Morales, *Cleaning Up Great Bay Can Help Us Tackle Trash Pollution*, CONSERVATION LAW FOUNDATION (Jan 26, 2023). Counsel brings up these points to highlight what CSP has failed to do in order to distinguish itself from an organization that simply exists to bring a lawsuit.

exist." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 340 (2016) (internal quotes omitted). Particularized means that the injury directly impacts the plaintiff in a personal and individual way. *See* Marisa Martin & James Landman, *Standing, Who Can Sue to Protect the Environment*, American Bar Association (Oct. 9, 2020). An actual or imminent injury is currently occurring, previously occurred, or will occur in the immediate future. *Lujan*, 504 U.S. at 560. The injury must not be "conjectural or hypothetical." *Id.* An injury-in-fact is a harm that meets both the concrete and particularized *and* the actual or imminent requirement. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). CSP fails to allege an injury-in-fact from environmental pollution, damage to recreational use, and aesthetic injury. Decision and Order p. 7.

In the present case, the lower court improperly relies on the holding in *Friends of the Earth, Inc v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167 (2000), to determine that CSP has suffered an injury-in-fact and therefore satisfies the first prong of standing. Decision and Order p. 8. In *Friends of the Earth*, an environmental group brought a citizen suit against the defendant alleging that the defendant's discharges increased pollution in the waterbody, which impacted the group's recreational use of the waterbody and caused economic harm. *Friends of the Earth*, 528 U.S. at 173. The polluter discharged more than the amount authorized by their NPDES permit. *Id* at 167. The illegal pollution rendered the waterbody unusable by the petitioners because it looked and smelled polluted. *Id.* The court held in *Friends of the Earth* that petitioners had standing because they were suffering an injury in fact caused by the actions of the defendant.[3] 528 U.S. at 181.

The facts in *Friends of the Earth* differ from the facts of this case in several respects. First, no members of CSP are suffering direct harm, they are simply *alleging* potential harm. Being "very

[3] The Court also determined that the issue in this case was redressable by a favorable ruling, further giving rise to standing for the petitioners. *Id.* at 186. However, the issue of redressability laid out in this case is not mentioned in the Decision and Order.

concerned about contamination from toxins and metals, including iron and manganese," Decl. of Cynthia Jones at Par. 9, does not rise to the same level of concrete injury-in-fact caused by illegally discharged water contamination. Nowhere in the record do members of CSP argue that the water is too polluted or smells too bad to use anymore, unlike the petitioners in *Friends of the Earth.* 528 U.S. at 167. While members of CSP state that the water looks cloudy, there is no evidence in the record that the cloudiness is harmful. Decision and Order p. 7. Therefore, under the precedent set in *Friends of the Earth,* CSP does meet the injury-in-fact prong, and does not have standing.

In addition, under Supreme Court precedent, the desire to preserve aesthetic and environmental well-being does not give rise to an injury-in-fact. *Sierra Club v. Morton,* 405 U.S. 727, 731 (1972) (holding that construction of a resort which spoiled plaintiff's views is not an injury-in-fact). Applying the holding of *Morton* to this case, it's evident CSP cannot sue for aesthetic injury alone. If the construction of a resort does not give rise to an injury-in-fact, water occasionally appearing "cloudy" to CSP's members does not give rise to an injury-in-fact. Decl. of Jonathan Silver at Par. 6-7. Thus, the alleged aesthetic injury does not create an injury-in-fact.

In conclusion, the lower court incorrectly relied on *Friends of the Earth* in finding that CSP satisfies the first prong of standing. Further, under Supreme Court precedent, CSP does not have a definitive injury-in-fact that is actual or imminent; CSP only alleges an aesthetic injury.

2. There is no causal connection between the alleged harm and the actions of Highpeak.

CSP argues the water quality has diminished due to the actions of Highpeak but fails to provide sufficient data to prove this point. Decision and Order p. 5. The extremely limited body of data CSP points to only has six data points total taken from one day of water quality sampling and does not consider the unique makeup of Crystal Lake and how other environmental factors may be impacting the waterbody. *Id.* These minimal data points are not enough to demonstrate causation between the actions of Highpeak and the heightened mineral content in Crystal Stream. *See id.* The

NOIS specifically alleges that, “due to natural conditions,” the water in Cloudy Lake has higher levels of certain minerals and suspended solids. *Id*. There is no causal connection between the alleged harm and the actions of Highpeak in the record.

In *Massachusetts v. Environmental Protection Agency,* the Supreme Court found that “a well-documented" rise in greenhouse gas emissions that many “respected scientists” believed to be happening based on the data was sufficient to prove an injury-in-fact for the plaintiff. 549 U.S. 497, 504 (2007). Specifically, the Court looked to immense scientific data captured by different branches of federal government going back to the 1950’s and reports from the United Nations to find a causal connection between greenhouse gas emissions and rising sea levels. *Id.* at 507. Unlike the case before us, the Supreme Court in *Massachusetts* relied on extensive testimony from experts and detailed scientific literature. *Id.* Data was pulled from hundreds of scientific studies, funded and conducted by different entities. *Id.* In the present case, only six data points and limited scientific literature on the mineral composition of Cloudy Lake and Crystal Stream, provided by the petitioner, are not sufficient to prove a causal connection between the alleged harm and the actions of Highpeak. Decision and Order p. 7. The samples are coming from a biased source and are not comprehensive enough to declare a scientific finding. Therefore, in its complaint, CSP has failed to allege the facts necessary to satisfy the second prong of the standing analysis.

3. The alleged injury cannot be solved by a favorable judicial decision.

A party only satisfies the third prong of the standing analysis if “the dispute sought to be adjudicated ...[] ... [is] capable of judicial resolution.” *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Specifically, the court looks to confirm that the issue can be redressed by a ruling favorable to the petitioner. *Clapper,* 568 U.S. at 409. Here, CSP is requesting a judicial resolution that orders Highpeak to stop discharging water into Crystal Stream or receive a permit for the discharge that

would limit the amount of water. Decision and Order p. 3. However, there is no guarantee that prohibiting the lawful discharge would mitigate the alleged injury-in-fact that CSP is suffering.

Based on the limited data laid out in the NOIS, the water quality could remain the same in Crystal Stream if Highpeak is forced to discontinue its lawful discharge; there is no proof otherwise. *Id*. at 7. CSP states in its NOIS that "due to natural conditions, the water in Cloudy Lake has significantly higher levels of certain minerals, such as iron and manganese. Cloudy Lake also has a much higher concentration of total suspended solids ('TSS') compared to the water in Crystal Stream." *Id*. at 5. Because the condition of the water is caused by natural conditions, *id*., and a NPDES permit would result in the same quality of water being discharged, the alleged injury to CSP cannot be solved by judicial review.

C. CSP does not satisfy the three prongs of institutional standing

In addition to meeting the standing requirements laid out in *Lujan,* an organization like CSP is required to meet the institutional standing requirements. In most cases, an institution has organizational standing if one member has standing on their own. *United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 545 (1996). If the first prong is satisfied because an individual member has standing, the court looks to the second two *Hunt* factors to determine whether an organization has institutional standing.

CSP does not satisfy the first prong of institutional standing because none of its members meet the individual requirement of standing. As explained above, none of the individual members of CSP are suffering an injury-in-fact due to the actions of Highpeak that could be redressed by a court. Therefore, CSP does not meet the requirements to demonstrate institutional standing based on the *Hunt* factors.[4]

[4] While it is likely that CSP would satisfy the second and third prongs of institutional standing, CSP cannot satisfy the first prong, so there is no need to analyze the remaining prongs.

In conclusion, CSP did not allege facts demonstrating that it meets the three prudential elements of standing laid out in *Lujan,* nor does it likely meet the requirement of institutional standing set out in *Hunt*, and therefore does not have standing.

II. CSP did not file a timely challenge because the Supreme Court's decision in *Corner Post* cannot be taken to extend to non-profit entities.

The District Court misapplied the logic and reasoning of *Corner Post* to find that CSP filed a timely challenge. In *Corner Post*, the Supreme Court held that the six-year statute of limitations of the Administrative Procedures Act (APA), only starts running once the plaintiff is actually injured by the "final agency action." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2448 (2024). Because *Corner Post* overruled the majority approach to deciding when APA actions accrued, it is key to discuss the opinion to understand why it does not apply here.

A. The *Corner Post* Decision

Corner Post was a for-profit truck stop that was incorporated in 2017 and open to the public for business in 2018, more than six years after the Federal Reserve Board promulgated Regulation II. *Id*. Regulation II, published on July 20, 2011, set standards for interchange fees. *Id*. Corner Post challenged the regulation, the District Court dismissed the claim for timeliness and the Eighth Circuit affirmed because the claim was a facial challenge, which must be brought within six years of publication of the challenged rule. *Id*. at 2448-49.

In resolving a Circuit split on whether the statute of limitations began upon a final agency action or when the plaintiff is actually injured, the Supreme Court in *Corner Post* looked to the statutory provisions in play: 5 U.S.C. § 702 (creating a cause of action), § 704 (finality requirement), and 28 U.S.C. § 2401(a) (statute of limitations). *Id*. at 2449. The Court previously held that section 702 only authorizes judicial review of an agency action if a plaintiff can show that they were injured by the agency action. *See Dir., Off. of Workers' Compensation Programs v.*

Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 127 (1995). Section 704, the APA's finality requirement, works together with section 702 to limit challenges to anything other than a "final agency action." *Corner Post*, 144 S. Ct. at 2450. Further, the Court found that the word "accrues," when used in the applicable statute of limitations, 28 U.S.C. § 2401(a), means when "the plaintiff can file suit and obtain relief." *Id*. at 2451 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal*., 522 U.S. 192, 201 (1997)). Thus, both injury and finality are required to sue under the APA, and a cause of action isn't complete until the party is injured. *Corner Post*, 144 S. Ct. at 2452-53.

The Court also concluded that the distinction between a "facial" challenge and an "as-applied" challenge is immaterial when considering the timeliness of the action because section 2401(a) "does not refer to the date of the agency action's 'entry' or 'promulgat[ion]'; it says 'right of action first accrues.'" *Id*. at 2453. The fact that Congress chose not to adopt a "final-agency action" approach to the statute of limitations is highly important to the Court in reaching this conclusion.[5] *Id*. at 2454. Further, the Court stressed that the traditional accrual rule for causes of action is both plaintiff-centric and plaintiff-specific. *Id*. at 2455. The Court notes that this is a statute of limitations, which is measured from the date of the injury, and not a statute of repose, which measures the timeliness of claims from the last culpable act of the defendant. *Id*. at 2452.

The Court was also unpersuaded by any policy concerns raised by the Board who promulgated the rules.[6] *Id*. at 2458-60. Thus, having dispensed with any potential

[5] It is worth noting that in the CWA Congress specifically adjusted the statute of limitations for certain actions to be 120 days. *See* 33 U.S.C. § 1369(b)(1).
[6] The Court found that any concerns about a flood of claims being filed in response to this were overblown, as parties have always had the ability to challenge long-standing regulations utilizing as-applied challenges. *Corner Post,* 144 S. Ct. at 2458-59.

counterarguments, the Court held "[a]n APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action." *Id*. at 2460.

B. *Corner Post*'s ruling does not extend to non-profits such as CSP.

The plaintiff in *Corner Post* was a for-profit business that was created for the purpose of conducting business. *See id*. at 2448. CSP, however, is a non-profit business created solely for the purpose of suing Highpeak. *See* Decision and Order p. 4. The Supreme Court in *Corner Post* was concerned with regulations being unchallengeable by legitimate entities who seek to do business in good faith, but this concern does not extend to non-profit businesses. *See Corner Post*, 144 S. Ct. at 2448 (describing the impacts of interchange fees on businesses and consumers, as well as the history of the regulation at issue). The Court finds that the underlying policy concerns weigh in favor of lending a hand to for-profit businesses struggling under the burden of regulations, rather than in favor of administrative convenience. *See id.* at 2458.

If the Court was not swayed by the fact that Corner Post was a struggling for-profit business, there would have been no reason to devote the amount of space the Court did to the financial background implicated in the case. *See id*. at 2448. The Court sympathetically discussed how a struggling for-profit business would be unable to seek judicial review simply because the company had not yet been established but still felt the impacts of the regulations. *Id*. ("Corner Post...did not exist when the Board adopted Regulation II...[b]ut after opening its doors, it too became frustrated by interchange fees…."). The suggestion that this ruling was affected by the for-profit status of Corner Post is further strengthened by the nature of the amicus briefs filed on both sides, which exclusively focused on the impact of regulations on for-profit businesses. *See generally* Brief for Small Business Assoc's., as Amici Curiae Supporting Respondents, *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, (No. 22-1008), 2023 WL

8894562.[7] The Court's decision in *Corner Post* hinges on the for-profit business model and the inability of the business to seek redress for regulations with great financial impacts.

The logic behind the *Corner Post* decision does not apply to this case. Corner Post was established as a for-profit entity and brought its suit in order to protect itself from a regulation that would have been effectively unreviewable and financially detrimental. *See Corner Post*, 144 S. Ct. at 2450 n.2. CSP, a non-profit, was established to bring a lawsuit against a small, family-owned business. Full stop. Because CSP is a non-profit created for litigation and is in no way affected financially like Corner Post was, the policy rationales underlying the Court's decision in *Corner Post* are inapplicable here. In fact, CSP is even further removed from the facts of *Corner Post* given its makeup of individuals who all suffered personal injuries before bringing suit.

C. Applying the *Corner Post* interpretation of §2401(a), CSP is barred from bringing its suit because its members all suffered injuries over six years ago.

CSP brought its suit in a representative capacity, something the District Court felt was not "dispositive," s*ee* Decision and Order p. 8, in finding that CSP was within the statute of limitations. Nothing could be further from the truth. The Supreme Court stated in *Corner Post* that "[i]t . . . may be that some injuries can only be suffered by entities that existed at the time of the challenged action." *Corner Post*, 144 S. Ct. at 2459 n.8. However, the Court then explicitly chose not to address this question. *Id.* ("We need not resolve [whether some injuries can only be suffered by entities that existed at the time of the challenged action] here…"). Considering the Court's refusal

[7] *See also* Brief for National Federation of Independent Business Small Business Legal Center, Inc., as Amici Curiae Supporting Petitioner, *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, (No. 22-1008), 2023 WL 8236566; Brief for Chamber of Commerce of United States of America, as Amici Curiae Supporting Petitioner, *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 144 S. Ct. 2440, (No. 22-1008), 2023 WL 8236577 at *3 ("In the context of an agency rule challenge, a right of action for a particular plaintiff may not arise until many years after the promulgation of the rule, such as where the plaintiff enters a new line of business….").

to address this issue and its holding in *Corner Post*, it becomes clear that this suit is untimely as to all but one member.

In performing its textual analysis on section 2401(a), the Court in *Corner Post* concluded that the standard accrual rule that the statute of limitations represents is "plaintiff specific." *Id*. at 2455. The Supreme Court definitively declared section 2401(a) to reflect a cause of action of *six years* from the date of injury, or when the "particular plaintiff" has the ability to sue. *Id*. The "particular" plaintiffs in this case, save one, had a complete cause of action well over six years ago, and could have sued at any time in the past fifteen years. In its representative capacity, CSP is made up of 13 individuals, Decision and Order p. 4, twelve of whom have lived in Rexville for over fifteen years. *Id*. Notably, the two property-owning members have lived on their respective properties for over eight years. *Id*. Yet the individuals who formed CSP did not sue Highpeak individually, despite the opportunity to do so.[8] The individuals comprising CSP missed their bite at the apple and now seek an end-around for their mistake.

This cannot be the same situation the Supreme Court was contemplating when it decided *Corner Post*. To hold that section 2401(a) permits a non-profit, which was founded for the sole purpose of litigation, to file a suit upon its creation for injuries members suffered that are now time barred by the statute of limitations would be an absurd outcome. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided…."). Beyond being an absurd outcome, the Court was concerned with the inherent unfairness of subjecting an entity to a regulation that it could not dispute in

[8] Highpeak concedes that CSP member Jonathan Silver could arguably have a timely cause of action if this Court decides to find that *Corner Post*'s ruling extends to dissimilar non-profit entities. However, the proper course of action would be to remand this decision and direct the District Court to dismiss this suit from CSP *sua sponte* and have Mr. Silver file in a personal capacity. *See* Fed. R. Civ. P. 12(b)(6).

Corner Post. The "entity" here is comprised of individuals who had an alleged injury at the "time" of the challenged action and chose not to pursue any meaningful recourse.

This end-around is not fair nor equitable and encourages creation of non-profits to be used in bad-faith litigation. CSP would stretch *Corner Post* to cover any suit brought by any non-profit against a small, private business as long as the non-profit was recently founded. This would result in an absurd outcome and a misapplication of the policies underlying *Corner Post*, as well as a decision that is contrary to Congressional intent and opens the floodgates to new litigation.

D. Applying the plaintiff specific statute of limitations to all newly founded entities under the CWA is against Congress's intent

Section 2401(a) of the APA controls the statute of limitations unless "[u]nless Congress has told us otherwise in the legislation at issue." *Corner Post,* 144 S. Ct. at 2451 (quotations and citation omitted). The Clean Water Act was not at issue in *Corner Post*, but it is here. While CSP brought its suit under the APA, the underlying legal arguments are based on the Clean Water Act. *See* Decision and Order p. 4; 33 U.S.C. § 1365(b)(1)(A). The CWA sets different time limits than the APA, creating a statute of limitations of 120 days for any review of, among other sections, "[any determination made] as to a State permit program submitted under section 1342(b) [NPDES permits] of this title." § 1369(b)(1)(D). Congress has told us otherwise in the legislation at issue that 120 days is the time in which an injured plaintiff can file suit and seek recovery.

Assuming, *arguendo*, that a NPDES permit is required, as CSP claims, the CWA statute of limitations would then be controlling. To apply the APA in this context would be to ignore clear Congressional intent that, in claims involving NPDES permits, claimants must file suit within 120 days. After all, as the Court noted in *Corner Post*, "Congress [knows] how to depart from the traditional [statute of limitations] rule." 144 S. Ct. at 2452. Congress could have chosen to apply APA section 2401(a) to the Clean Water Act, instead, "[i]t chose a different path." *Id*. at 2454. This

concept melds perfectly with the principles of protecting small, for-profit businesses from onerous governmental regulation that underlie the *Corner Post* decision. Thus, it is crystal clear that Congress intended the CWA's 120 day statute of limitations to apply to claims involving NDPES permits, not the APA's six-year statute of limitations.

III. The Water Transfers Rule is a validly promulgated rule under the Clean Water Act.

The Water Transfers Rule was validly promulgated by the EPA under the Clean Water Act and has been upheld as consistent with the Act by the Second and Eleventh Circuits. See *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1128 (11th Cir. 2009) (*Friends I*); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 525 (2017) (*Catskill III*). Because the Supreme Court's decision in *Loper Bright* is contained to "regulations that have not been previously challenged and upheld," Decision and Order p. 10, and there is no special justification for revisiting the cases upholding the Water Transfers Rule because the prior caselaw is not contradictory, this Court should decline to revisit the validity of the Water Transfers Rule. Even if, however, this Court finds that the prior caselaw is somewhat contradictory and that constitutes a special justification for revisiting the cases upholding the Water Transfers Rule, the WTR should be upheld under the *Skidmore* framework.

A. <u>The Water Transfers Rule was a valid exercise of EPA's authority under the Clean Water Act, is consistent with the Act, and has been upheld by federal courts.</u>

CSP argues that "the plain language of the CWA forbids *any* discharge of *any* pollutant into a water of the United States" and that "EPA cannot simply regulate away an entire category of discharges (i.e., water transfers) from the express requirements of the Act." *Id*. at 9. While the Clean Water Act does plainly and expressly forbid any discharges from any pollutant, that prohibition is qualified by the phrase "[e]xcept as in compliance with this section and [other] sections . . . of this title . . ." 33 U.S.C. § 1311(a), demonstrating that Congress explicitly allowed

discharges under the Act. Additionally, section 1361(a) grants the EPA the authority to promulgate rules to carry out the Act, including those provisions expressly allowing for discharges. CSP's reading of the statute falls short and would have the Court ignore the other half of Congress's directive, which expressly allows for discharges in certain circumstances. This is contrary to the intent of Congress as well as inconsistent with the broader purpose and the legislative intent of the Clean Water Act. Instead, EPA's interpretation of the Act, as set forth in the Water Transfers Rule, is (1) a more consistent reading of the Act as a whole, (2) consistent with "the balance Congress created between federal and State oversight of activities affecting the nation's water," 73 Fed. Reg. at 33, 701, and (3) has been upheld by the Second and Eleventh Circuits.

In response to major environmental catastrophes such as the Cuyahoga River Fire, *see* Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, But No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019) https://www.nps.gov/articles/story-of-the-fire.htm, and the Santa Barabara Oil Spill, *see* Joe Hamilton, *How California's Worst Oil Spill Turned Beaches Black and the Nation Green*, NAT'L PUB. RADIO (Jan. 28, 2019) https://www.npr.org/2019/01/28/688219307/how-californias-worst-oil-spill-turned-beaches-black-and-the-nation-green, Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To achieve that goal, the CWA prohibits "the discharge of any pollutants by any person" unless in compliance with sections 1312, 1316, 1317, 1328, 1342, or 1344. § 1311(a). Section 1342, the National Pollutant Discharge Elimination System (NPDES), allows EPA to issue permits placing limits on the kind and quantity of pollutants discharged into waterbodies from point sources.

Section 1361(a) of the Clean Water Act grants the EPA the authority to promulgate "such regulations as are necessary to carry out [the] functions [of the Clean Water Act]." CITE The EPA,

pursuant to this authority, and consistent with the notice and comment requirements of the APA, 5 U.S.C. § 553, adopted the final National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697-708 (codified at 40 C.F.R. § 122.3(i)), colloquially known as the Water Transfers Rule. The WTR exempts water transfers from NPDES permitting requirements. 73 Fed. Reg. at 33,697. A water transfer is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id*. The WTR was adopted in direct response to ongoing litigation about "whether a water transfer . . . constitutes an 'addition' within the meaning of section 502(12) [definition of discharge]." *Id*. at 33,700. The EPA interpreted the term "addition" to be "limited to situations in which, 'the point source itself physically introduces a pollutant into a water from the outside world'" such as through an industrial, municipal, or commercial use. *Id*. (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982)).

First, though Congress broadly sought to restore and maintain the Nation's waterbodies, it did not enact a statute banning all discharges into the waters of the United States. *See* 33 U.S.C. §§ 1312 (granting the EPA the authority to establish water quality related effluent limitations, 1316 (relating to national standards of performance), 1317 (relating to toxic and pretreatment effluent standards), 1328 (allowing certain discharges from aquaculture), 1342 (establishing the NPDES Program), 1344 (allowing permits for dredged or fill material). In the wake of environmental catastrophes such as the Cuyahoga River Fire, caused by decades of dumping waste and garbage into the river, *see The 1969 Cuyahoga River Fire*, NAT'L PARK SERV., https://www.nps.gov/articles/story-of-the-fire.htm#:~:text=Railroad%20bridges%20near%20Republic%20Steel,damage%20to%20the%20railroad%20bridges. (last visited Nov. 19, 2024), and the Santa Barbara Oil Spill, Congress instead sought to prohibit "the discharge of toxic

pollutants in toxic amounts." 33 U.S.C. § 1251(a)(3). Compare the following two situations: one takes a ladle of soup from one pot and transfers it to a second pot, nothing is added nor subtracted; or one takes a ladle of soup from one pot, adds rocks, toxic chemicals, and garbage to the ladle, and then adds it to the second pot. The former situation is a mere water transfer and is the interpretation of "addition" the EPA embraces in the Water Transfers Rule. The latter situation is a not a water transfer, but instead rises to a discharge from an industrial, commercial, or municipal operation. It is crystal clear that the interpretation of "addition" within the Water Transfers Rule is consistent with the Clean Water Act's purpose of maintaining the Nation's waterbodies because no pollutants are added during the transfer activity.

Second, the Clean Water Act employs cooperative federalism, by which the federal government sets the minimum standards for water quality in waters of the United States, but states may, through statute or regulation, set standards which exceed the federal standards. *See* § 1251(g) (directing the EPA to work with state and local agencies on developing "comprehensive solutions" to water pollution problems "in concert with programs for managing water resources"). In enacting the Clean Water Act, Congress struck a balance between restoration of the Nation's waters and recognizing "that the States have primary responsibilities with respect to the 'development and use (including restoration, preservation, and enhancement) of land and water resources.'" 73 Fed. Reg. 33,702 (quoting 33 U.S.C. § 1251(b)). When promulgating the Water Transfers Rule, the EPA found that

> "[w]ater transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocation of water rights, this section [of the rule] provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers."

Id. Exclusion of water transfers from NPDES permitting is just one example of the EPA working with states to manage water resources and address pollution. To be crystal clear, the Water Transfers Rule does not mean that the transfers are entirely unregulated. Instead, it is up to the States to set water quality standards for the transfer activities, as many of these activities are carried out to bring clean drinking water to local municipalities. *Id*.

When viewing the Clean Water Act as a whole, it is evident that Congress did not intend to regulate water transfers, but rather "intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities." *Id*. at 33,703. Additionally, the legislative history "supports the conclusion that Congress generally did not intend to subject water transfers to the NPDES program." *Id*. (citing H.R. Rep. No. 92-911, at 96 (1972) (explaining that "Congress encouraged States to obtain approval of authority to administer the NPDES program . . . so that the NPDES program could work in concert with water resource agencies' oversight of water resource management activities" such as flow management)).

Finally, despite multiple challenges, the Water Transfers Rule has been upheld by the Second and Eleventh Circuits. After the Water Transfers Rule was promulgated, the Rule was challenged in the First, Second, and Eleventh Circuits. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 505 (2017) (*Catskill III*). These cases were consolidated into *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) (*Friends II*), and randomly assigned to the Eleventh Circuit, which stayed the proceedings until the Eleventh Circuit's decision in *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (*Friends I*). *Catskill III*, 846 F.3d at 505. The Eleventh Circuit upheld the Water Transfers Rule in *Friends I*. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009). Friends II

was dismissed for lack of original jurisdiction over the petitions for review. *Friends II*, 699 F.3d at 1280.

The Water Transfers Rule was upheld again by the Second Circuit in *Catskill III*. There, the court applied the *Chevron* two-step framework and found that the Clean Water Act "does not speak directly to the precise question of whether NPDES permits are required for water transfers" and "[a]lthough the Rule may or may not be the best or most faithful interpretation of the Act in light of its paramount goal of restoring and protecting the quality of U.S. waters, it is supported by several valid arguments." *Catskill III*, 846 F.3d at 501, 520. The court found that the Rule was based on a "holistic interpretation of the Clean Water Act that took into account the statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position . . . and the importance of water transfers to U.S. infrastructure." *Id*. at 524 (citing 73 Fed. Reg. at 33,699-33,703). The Supreme Court declined to review this case which implies that the Supreme Court agreed with the Second Circuit's finding that the EPA's interpretation of "addition" is consistent with the Act as a whole. *Id*., *cert. denied*, 138 S. Ct. 1164 (2018).

In conclusion, CSP's reading of the Act is entirely unworkable because it does not embrace Congress's express inclusion of other provisions allowing discharges under the Act. Additionally, the Water Transfers Rule was validly promulgated by the EPA and is consistent with the purpose of the Clean Water Act's dual, competing goals of preserving the Nation's waterbodies and ensuring federal and state cooperation in achieving that goal. Finally, the Rule has been upheld by other Circuit courts and the Supreme Court declined to review the Second Circuit's decision upholding the Rule.

B. The Supreme Court's decision in *Loper Bright* does not direct this Court to revisit the cases upholding the Water Transfers Rule and there is no "special justification" to do so otherwise.

This Court should give no weight to the existence of seemingly inconsistent prior caselaw for two reasons. First, the Supreme Court's decision in *Loper Bright* has no bearing on this Court's review of the Water Transfers Rule because the *Loper Bright* decision is proactive and forward-looking and does not "call into question prior cases that relied on the *Chevron* framework." *Loper Bright*, 144 S. Ct. at 2273. Second, the prior caselaw is not inconsistent and therefore does not rise to a "special justification" for revisiting the Water Transfers Rule.

First, the *Loper Bright* decision is forward-looking and this Court should uphold the District Court's finding that the holding *of Loper Bright* should "be limited to regulations that have not been previously challenged and upheld." (Decision and Order at 10). The Supreme Court's decision in *Loper Bright* removed the *Chevron* two-step analysis from the toolkits of federal courts deciding whether an agency interpretation of a statute was permissible. It is proactive and forward-looking instead of retroactive; it does not "call into question prior cases that relied on the *Chevron* framework." *Id*. at 2273. It is merely a "change in interpretive methodology" in future cases. *Id*. Two prior cases, *Friends I* and *Catskill III*, upheld the Water Transfers Rule. *See Friends I*, 570 F.3d 1210; *Catskill III*, 846 F.3d 492. Additionally, the Supreme Court declined to review the Second Circuit's decision in *Catskill III*, suggesting that the Water Transfers Rule was validly promulgated and is consistent with the Clean Water Act. *Catskill III*, 846 F.3d 492, *cert. denied*, 138 S. Ct. 1164 (2018). Because there are prior cases upholding the Water Transfers Rule and the Supreme Court declined to review one of these cases, the *Loper Bright* decision does not direct this Court to revisit the cases upholding the Water Transfers Rule.

Second, the Supreme Court's decision in *Loper Bright* has no bearing on this Court's review of the Water Transfers Rule or previous cases upholding the Rule because "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding" and the cases "are

still subject to statutory stare decisis." *Id*. (citations omitted). "Principles of stare decisis . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008); s*ee also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (noting that in "overturn[ing] a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."). "[O]verturning a long-settled precedent . . . require[s] 'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 266 (2014). The Supreme Court has long required "special justification" to depart from settled precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see also Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966) because it was settled, workable, and has "become part of our national culture"); *Haliburton Co.*, 573 U.S. at 266 (declining to overturn settled precedent because the petitioner failed to demonstrate that the underlying premises the initial case rested upon "fundamentally shifted"). *Contra Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (overturning precedent when following the precedent "actually impedes the stable and orderly adjudication of future cases"); *Am. Legion v. Am. Humanist Ass'n*, 139 S. C.t 2067, 2080-81 (2019) (overturning the *Lemon* test after two decades of the Supreme Court expressly declining to apply the test and outright ignoring it). Here, the Water Transfers Rule does not "actually impede[] the stable and orderly adjudication of future cases," *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts,

C.J., concurring) it makes future cases more predictable, and unlike the *Lemon* test, courts have not declined to use the Water Transfers Rule. *Am. Legion*, 139 S. Ct. at 2080-81.

CSP argues that the "special justification" for revisiting the cases upholding the Water Transfers Rule is that the prior caselaw is "contradictory." Decision and Order p. 10. On the surface, the prior caselaw seems contradictory, but upon closer inspection it is a demonstration of the judiciary and the EPA working simultaneously to interpret an ambiguous law. This unique function of our Nation and the tension between courts and administrative agencies is far from a special justification for overturning precedent.

The prior caselaw on what is an "addition" within the meaning of discharge is not contradictory, but rather a demonstration of the judiciary and EPA working simultaneously to interpret an ambiguous law. Prior to the promulgation of the Water Transfers Rule, cases were brought under the strict language of the Clean Water Act prohibiting "any discharge of any pollutant," 33 U.S.C. § 1311(a), to determine whether certain water transfer activities were an "addition" within the meaning of "discharge." The earlier cases, the "dams cases," held that dams and hydropower facilities do not add pollutants, they merely recirculate the water and thus are not required to obtain a NPDES permit. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (finding that water released from a reservoir through a dam into a stream is a transfer of water and does not require a NPDES permit; *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (finding that water drawn from Lake Michigan, pumped through hydroelectric generators, and back into the lake with pureed fish was not an "addition" of pollutants because the fish had been in the water prior to the transfer activity). Later cases, the "pumping cases," relied on here by CSP, held that "the diversion of pollutant-containing reservoir water through a tunnel and into creeks that would not naturally be connected to the reservoir, constitutes

'an "addition" of a "pollutant" from a "point source"'" Sara Colangelo, *Transforming Water Transfers: The Evolution of Water Transfer Case Law and the NPDES Water Transfers Proposed Rule*, 35 ECOLOGY L. QUARTERLY 107, 117 (2008); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2001) (*Catskill I*) (requiring a NPDES permit for a water transfer from a reservoir with higher TSS and turbidity into a naturally cooler and clearer "premier trout fishing streams in the Catskill Region"); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996) (requiring a NPDES permit for the expansion of a ski resort that would result in the transfer of water from a more polluted waterbody into one of the most "pristine" waterbodies in northern New England because the degradation of the receiving waterbody would have been so great it would have been contrary to the purpose of the Clean Water Act and the court could not justify such a "watering down of Congress' clear statutory protections"); *N. Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003).

In both the "dams cases" and the "pumping cases" the courts were interpreting the plain language of the Act, keeping in mind the goals of the Act, and affording *Skidmore* respect to the EPA's informal stance that water transfers were not subject to NPDES permits. Although the courts in the "pumping cases" reached a different outcome than the courts in the "dams cases," the results are consistent with one another. Under the plain language of the Act, prohibiting *any* discharge of *any* pollutant, recirculation of water that does not add any pollutants, is not an "addition" of pollutants and therefore not a discharge. This is the holding of the "dams cases." Also under the plain language of the Act, water transfers from a more polluted waterbody to a less-polluted and hydrologically disconnected waterbody constitutes an "addition" of pollutants and therefore is a discharge. This is the holding of the "pumping cases." Prior to the promulgation of the Water Transfers Rule, the courts looked to the plain language of the Clean Water Act, interpreted it

consistently with the Congressionally dictated goals, and gave little weight to the EPA's informal stance under the *Skidmore* framework.

After the EPA promulgated the Water Transfers Rule, several suits were brought challenging the validity of the regulation. *See Friends I*, 570 F.3d 1210; *Catskill III*, 846 F.3d 492. In hearing these cases, the courts again looked at the plain language of the Clean Water Act as well as the language of the Water Transfers Rule, and interpreted it consistently with the Congressionally dictated goals, but this time applied the more deferential *Chevron* two-step analysis. Because the EPA validly promulgated the Rule, it was within its authority to promulgate the Rule, and it became the agency's formal opinion, the reviewing courts were required to apply *Chevron* deference, which required courts to uphold an agency's interpretation of an ambiguous statute if it was a reasonable interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Under this standard of review, courts upheld these cases as consistent with the "statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position . . . and the importance of water transfers to U.S. infrastructure." *Catskill III*, 846 F.3d at 524. Like the courts interpreting the plain language of the Act prior to the promulgation of the Water Transfers Rule, these courts correctly interpreted the language of the Water Transfers Rule and the Clean Water Act and found that water transfers are not an "addition" of pollutants and therefore do not require NPDES permits.

The prior caselaw is anything but inconsistent. It is a demonstration of the tension between the judiciary and administrative agencies working concurrently to interpret ambiguous statutes with no further insights from the legislature and is not unique to the Water Transfers Rule. *See* Rodney A. Morris, *Sssmokinnn': The Supreme Court Burns the FDA's Authority to Regulate Tobacco in FDA v. Brown & Williamson Tobacco Corp.*, 34 CREIGHTON L. REV. 1111 (2001)

(outlining the FDA's and courts' interpretation of the FDA's authority to regulate tobacco under the Federal Food, Drug, and Cosmetic Act); Hailey Rizzo, *What Did SCOTUS do to WOTUS?*, 30 OCEANS & COASTAL L.J. (2025) (detailing the interpretive history of "waters of the United States").

In conclusion, because the *Loper Bright* decision has no bearing on this Court's review of the Water Transfers Rule and because there is no "special justification" for revisiting the Rule, this Court should give no weight to the existence of seemingly inconsistent prior caselaw.

C. Even if there is a "special justification" to revisit the cases upholding the Water Transfers Rule, the Rule should be upheld under the *Skidmore* framework.

Even if this Court finds that the prior caselaw constitutes a "special justification" for revisiting the cases upholding the Water Transfers Rule, the WTR should be upheld under the *Skidmore* framework. This is true for three reasons: (1) the EPA demonstrated thoroughness in its reasoning, (2) the WTR reflects agency expertise, and (3) the EPA has consistently defended the WTR rule.

The Supreme Court's decision to overturn *Chevron* in *Loper Bright* took one tool out of the toolkit for courts deciding whether a regulation is valid, but it left intact the *Skidmore* framework. Moving forward, courts reviewing the legitimacy of an agency regulation will still determine whether the statute is ambiguous, "but when the court determines the provision is ambiguous, ascertaining Congress' intent and evaluating the agency's decision will shift form deference to the agency to de novo review." Chris S. Leason & Liam Vega Martin, *Supreme Court Overrules Chevron*, 54 ENVTL. L. REP. (ELI) 10731, 10734 (2024).

Under the *Skidmore* framework, "courts may extend respectful consideration to another branch's interpretation of the law, but the weight of those interpretations must always depend upon," *Loper Bright*, 144 S. Ct. at at 2284 (internal quotes omitted), the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade…" *Skidmore v. Swift &*

Co., 323 U.S. 134, 140 (1944)). Here, the EPA demonstrated thoroughness and agency expertise in its reasoning when promulgating the Water Transfers Rule as evidenced by nearly four pages of rationale outlining the legal framework, statutory language and structure, and legislative history of the Clean Water Act as well as responding to a myriad of public comments about environmental issues, states' rights, and water supply levels in the west. *See* 73 Fed. Reg. 33,697-01. The EPA thoroughly considered the goals of the Clean Water Act and the needs of states in the western United States that heavily rely on water transfers to provide clean drinking water to citizens and came to a well-informed, well-reasoned decision based on its agency expertise to exempt water transfers from NPDES permitting requirements. *Id*.

Finally, the EPA has been consistent with its defense of the Water Transfers Rule across four presidential administrations and has maintained that water transfers do not require NPDES permits in cases since the 1980's. *See Gorsuch*, 693 F.2d at 156 (EPA arguing that water transfers from dams are exempt from NPDES permits); *Consumers Power Co.*, 862 F.2d at 580 (6th Cir. 1988) (EPA arguing that water transfers through a hydroelectric dam are exempt from NPDES permits); *Catskill III*, 846 F.3d at 481 (EPA arguing that a water transfer from a reservoir to a creek does not require a NPDES permit because there was no introduction of pollutants from an outside source); Memorandum from Ann R. Klee, EPA General Counsel et al., to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (Aug. 5, 2005), available at https://www3.epa.gov/npdes/pubs/water_transfers.pdf (last visited (Nov. 3, 2024); *Catskill II*, 451 F.3d at 77 (EPA maintaining its argument from *Catskill I* that a water transfer does not require a NPDES permit); Water Transfers Rule, 73 Fed. Reg. 33,697; *Catskill III*, 846 F.3d at 505 (EPA defending the Water Transfers Rule).

In conclusion, the Water Transfers Rule was validly promulgated by the EPA and has been

upheld by the Second and Eleventh Circuits. The differing opinions in case law do not constitute a "special justification" for revisiting this issue after the Supreme Court's decision in *Loper Bright*. Because the prior caselaw is not "contradictory" but instead a demonstration of the courts and EPA attempting to simultaneously interpret an ambiguous statute. Even if the existence of somewhat contradictory cases constitutes a "special justification" for revisiting the cases upholding the Water Transfers Rule, the WTR should be upheld under the *Skidmore* framework.

IV. The District Court erred 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.

The District Court erred in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule for two reasons. First, the District Court incorrectly afforded a higher level of respect to the EPA's interpretation of the Rule than Highpeak's instead of reviewing the Rule *de novo*. Second, even if the District Court correctly relied on the EPA's interpretation of the Rule, CSP did not allege sufficient facts to determine whether Highpeak needed a permit. Therefore, this Court should reverse and remand this case to determine the correct interpretation of the Rule and for further development of the record.

A discharge is defined as "any addition of any pollutant to navigable water from any point source." 33 U.S.C. § 1362(12)(A). Under the Clean Water Act, pollutants include, among other things, "solid waste, . . . biological materials, . . . rock, sand, . . . and industrial, municipal, and agricultural waste discharged into water." § 1362(6). Navigable waters are defined as "waters of the United States." § 1362(7).[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel, . . . from which pollutants are or may be discharged." § 1362(14). The issue in this case is what constitutes an "addition" of pollutants.

[9] All parties stipulate that Cloudy Lake and Crystal Stream are "waters of the United States," Decision and Order p. 4-5, therefore Cloudy Lake and Cystal Stream are "navigable waters.".

A. EPA's interpretation of the Water Transfers Rule is not entitled to a higher level of respect than Highpeak's because interpretation of the Rule is a question of law for the court to decide.

"It is emphatically the province of and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This foundational principle in American jurisprudence, that courts decide questions of law, was reaffirmed in the Supreme Court's decision in *Loper Bright*, which removed the *Chevron* deference framework from federal court's toolkits and directed courts to review issues of law *de novo* while affording *Skidmore* respect to agency interpretations. *Loper Bright*, 144 S. Ct. at 2273. Although not explicitly stated in *Loper Bright*, it may be inferred that interpreting a regulation, like interpreting a statute, is a question of law solely for the courts to decide. *Id.* This means that federal courts should no longer employe the *Auer* deference standard, which, like *Chevron*, substitutes judicial decision-making for deference to the agency when interpreting ambiguous agency regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019). This reasonable inference is supported by three major points: deferring to agencies when interpreting regulations is (1) contrary to the fundamental principle of separation of powers; (2) contrary to the Administrative Procedure Act; and (3) unfair to regulated parties. Instead, reviewing courts should decide the correct interpretation of the regulation *de novo* and afford *Skidmore* respect to the agency interpretation.

First, deferring to agencies in interpreting ambiguous regulations, like statutes, is contrary to the principle of separation of powers. In *Loper Bright*, the Supreme Court gave a clear directive to courts to exercise their own independent judgments on issues of law instead of deferring to agencies. *Loper Bright*, 144 S. Ct. at 2273. Though the Court only addressed the *Chevron* deference doctrine, the *Auer* deference doctrine equally undermines judicial review by "essentially letting an unelected body issue rules with the force of law and act as its own court in interpreting those rules and their authorizing statutes." Duncan M. Bryant, *Modern Challenges to Agency*

Deference, TENN. B.J., November/December 2020, at 36. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates law to interpret it as well." *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68-69 (2011) (Scalia, J., concurring). It is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch at 177, not administrative agencies which are a function of the executive branch.

Second, mandating courts to defer to agency interpretations of regulations is contrary to the APA which directs "the reviewing court [to] decide all relevant questions of law." 5 U.S.C. § 706. "[I]f the deference rule requires the court to approve any reasonable interpretation of the agency, the court decides which interpretations are not reasonable, but the agency gets to decide which of the reasonable interpretations to follow." Michael B. Rappaport, *Chevron and Originalism: Why Chevron Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1289 (2022). Under both the *Chevron* and *Auer* frameworks the agency is deciding the relevant questions of law, not the court, which is directly contrary to the mandate of the APA.

Finally, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," which "frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government." *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 564 U.S. at 68-69. This practice is unfair to regulated parties, such as small, family operated businesses seeking reliability and predictability.

In conclusion, because deferring to agency interpretations of regulations is contrary to the principle of separation of powers, contrary to the APA, and unfair to regulated parties, this Court should reverse the lower court's decision to apply *Auer* deference to the EPA's interpretation of the WTR and remand with a directive to determine, *de novo*, the correct interpretation of the Rule.

B. Under either Highpeak's or the EPA's interpretation, CSP did not allege enough facts to determine whether Highpeak needs NPDES permit for its water transfer activity.

This Court, in reviewing this issue *de novo*, is free to determine which interpretation naturally flows from and is consistent with the goals of the Clean Water Act. This Court, however, should find that the EPA's interpretation of the Rule is unreasonable, and instead should embrace Highpeak's interpretation of the Rule. Alternatively, if the Court finds the EPA's interpretation to be reasonable, the Court should reverse and remand for further development of the record because CSP did not allege sufficient facts to determine whether Highpeak's water transfer activity constitutes an "addition" of pollutants, thus bringing it out of the scope of the WTR.

For the reasons stated above, this Court should not rely on *Auer* deference and should instead apply *Skidmore* respect to this issue. However, should the Court choose to apply *Auer* deference, it should find that EPA's interpretation of the WTR is inconsistent with the CWA and is not entitled to higher respect than Highpeak's interpretation. When an agency's regulation is ambiguous, courts may afford the interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Auer v. Robbins*, 519 U.S. at 461. *Kisor v. Wilkie* provides a three step analysis to determine if an agency's interpretation of a regulation is appropriate: (1) the court determines whether the regulation is ambiguous; (2) if the regulation is ambiguous, the court determines whether the agency's interpretation is reasonable; and (3) if the agency's interpretation is reasonable, the court determines whether the interpretation is appropriate. 588 U.S. at 563. An agency's interpretation is appropriate if it is the agency's official position, it implicates the agency's substantive expertise, and it is a fair and considered judgment. *Id*. A judgment is fair if it does not include *post hoc* rationalizations or new interpretations that are unfair to regulated parties. *Id*.

Under the first step, the Water Transfers Rule is ambiguous; it is uncertain what is meant

by "pollutants introduced by the water transfer activity itself." 40 C.F.R. § 122.3(i). This could mean a *de minimis* addition of pollutants are allowed because water transfers will *always* introduce some trace amount of "new" pollutants. Decision and Order p. 11. Or it could mean absolutely no pollutants may be introduced. The latter interpretation is the position that CSP and the EPA would have the Court embrace and, under the second step, is unreasonable.

Under the second step, CSP and EPA's interpretation is unreasonable because water transfers always introduce trace amounts of pollutants and much of the western United States relies on water transfers to bring clean drinking water to towns, municipalities, and even the largest cities in the U.S. *See* 73 Fed. Reg. at 33,703. To require every state in the west transferring water via aqueduct to obtain a NPDES permit for trace or *de minimis* amounts of pollutants from the aqueduct is unfair and contrary to Congress's intent when enacting the Clean Water Act. *Id*. Barring *any* introduction of pollutants eviscerates the rule and therefore this interpretation is unreasonable. The only reasonable interpretation of the Water Transfers Rule is that a *de minimis* amount of "new" pollutants may be added during the water transfer. However, what is *de minimis* is a question of fact that should be further developed before this Court determines whether Highpeak's water transfer activity constitutes an "addition" of pollutants.

Finally, under the third step, the EPA's interpretation of the WTR is inappropriate because it is contradictory to the EPA's official position and is not fair to regulated entities. In promulgating the WTR, the EPA defined a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 73 Fed. Reg. 33,699. The EPA's official position in promulgating and defending this rule is that some *de minimis* amount of pollutants will be introduced during water transfers, but more than *de minimis* amounts from intervening industrial, municipal, or commercial uses take

the transfer activity out of the scope of the Rule. *Id*. The EPA is now attempting to provide a post-hoc rationalization and abandon its longstanding position to regulate a small, family owned business that has been operating, without challenge, for over thirty years. New interpretations of rules and post hoc rationalizations are unfair, *Kisor v. Wilkie*, 588 U.S. at 563, and therefore the EPA's interpretation of the WTR in this case is unreasonable and inappropriate.

Additionally, in its complaint, CSP did not allege enough facts for the lower court to conclusively find that Highpeak's water transfer activity constitutes an "addition" of pollutants taking it outside of the scope of the WTR. First, this Court should reverse and remand because what is or is not a *de minimis* addition of pollutants is a question of fact that the lower court should decide. Second, if the court does not embrace the *de minimis* approach, the Court should still reverse and remand for further development of the record because six data points are not enough to determine that Highpeak's water transfer activity, and not natural processes, is the cause of pollutants being "added" to the Stream. *See infra* I.B.2.

In conclusion, this Court should reverse and remand this case to determine the correct interpretation of the Rule and for further development of the record to determine whether Highpeak's activity is an "addition" of pollutants under either EPA's or Highpeak's interpretation.

CONCLUSION

Because of the foregoing, this Court should hold that: (1) CSP does not have standing to bring a cause of action against Highpeak; (2) the holding of *Corner Post* does not apply to the APA's statutory provision when entities are formed after the statute of limitations to bring a lawsuit; (3) The WTR was validly promulgated by the EPA; and (4) that Highpeak does not need a NDPES permit for its continued operations. In the alternative, the Court should remand for more factual development on issues one, two, and four.