Team 46

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
HIGHPEAK TUBES, INC.,
Defendants-Appellees-Cross-Appellants

On Appeal from the United States District Court for the District of New Union,
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 issued a Decision and Order in case no. 24-CV-5678 on August 1, 2024. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (for the challenge to the Water Transfer Rule, which falls under appeals of agency action), 28 U.S.C. § 1331 (as a civil action pursuant to the Clean Water Act, 33 U.S.C. § 1251). The Crystal Stream Preservationists ("CSP"), the United States Environmental Protection Agency ("EPA"), and Highpeak Tubes ("Highpeak") all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeal jurisdiction over appeals from final decisions of the district courts.

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 Rule was a valid regulation 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

I. Statement of Facts

A. The Source of Discharge into Crystal Stream

For the past 32 years, Highpeak has owned and operated a recreational tubing operation in Rexville, New Union. Cloudy Lake exists on the northern border of Highpeak's 42-acre property. Crystal Stream exists on the southern border of Highpeak's property and is the stream that Highpeak utilizes to launch customers in rented innertubes.

Pursuant to enhancing Highpeak's tubing operation, Highpeak obtained permission from the State of New Union to construct a tunnel connecting Cloudy Lake to Crystal Stream in 1992. The tunnel, partially constructed with an iron pipe, has valves at the northern and southern ends that Highpeak's employees utilize to regulate water flow from Cloudy Lake to Crystal Stream. Under Highpeak's agreement with New Union, water flow can be altered only when the State determines that water levels in Cloudy Lake are adequate to allow the release of water.

The EPA issues CWA permits in New Union under the National Pollution Discharge Elimination System ("NPDES permits"). Highpeak has never had an NPDES permit to discharge waters from Cloudy Lake into Crystal Stream.

B. Crystal Stream Preservationists Formation

Crystal Stream Preservationists is a not-for-profit corporation formed on December 1, 2023. The organization is made up of thirteen total members, all of whom live in Rexville, New Union, and all have lived there for fifteen or more years, except for Jonathan Silver, who moved to Rexville in 2019. Two members of the organization own land along Crystal Stream, downstream from Highpeak's operations.

Crystal Stream Preservationists was formed by the individuals as they shared a common interest in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." This is evident in the organization's mission statement: "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." This mission is at odds with the activities of Highpeak under the approval of the EPA, as members of the organization complain of a reduced ability to enjoy the stream. Specifically, CSP members complain of an increase in suspended solids within the stream that affect the aesthetic clarity of the water as well as its utility, as they are no longer letting their pets drink from it.

C. Notice

On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak and sent copies to the New Union Department of Environmental Quality ("DEQ") and EPA in compliance with regulatory requirements. 33 U.S.C. § 1365(b)(1)(A); *see also* 40 C.F.R. § 135.3 (2023). In the notice, CSP alleged that, under the CWA, Highmark's tunnel constitutes a "point source" that is discharging pollutants into Crystal Stream and that Highmark has not acquired a permit for it. The NOIS specified that the discharge contains multiple pollutants, including higher levels of iron and manganese and more total suspended solids ("TSS") than the water of Crystal Stream. Further, in the NOIS, CSP included claims that the water transfer used by Highpeak introduced additional pollutants to the discharge going into Crystal Stream. This was supported by water sample data indicating around 2-3% higher concentrations of the pollutants alleged were found in the water transfer itself as compared to the waters of Cloudy Lake.

On December 27, 2023, Highpeak sent a reply letter to CSP in response to the NOIS. Within, Highpeak stated CSP was due no response as Highpeak did not require a permit for their water transfer activities. They further claimed that any natural addition of pollutants during the water transfer does not remove their activities from the scope of the WTR.

D. Current Litigation

On February 15, 2024, following the statutorily required sixty days after sending Highpeak the NOIS, CSP filed their complaint. This complaint included both a citizen suit action against Highpeak as well as an APA challenge against the EPA. The complaint largely reiterated the issues addressed in the NOIS, and the EPA joined CSP in its claim that Highpeak must require a permit to operate their water transfer regardless of the WTR. In response, Highpeak filed motions to dismiss based on lack of standing and timeliness, which the EPA joined. The EPA additionally moved to dismiss CSP's challenge to the WTR. The district court found that CSP had adequate standing to bring their actions against Highpeak and the EPA and that they had brought such action in a timely manner, rejecting Highpeak's motions to dismiss. The court there also granted the EPA's motion to dismiss CSP's APA challenge to the WTR. Finally, the district court sided with CSP and the EPA on the issue of the WTR's applicability to Highpeak's water transfer activities holding that they must still obtain a permit, denying Highpeak's motion to dismiss.

SUMMARY OF THE ARGUMENT

The district court properly held that CSP has standing to bring the citizen suit against Highpeak and the APA challenge to the WTR. The foundation of Article III standing focuses on the alleged injury, a causal connection to the defendant's actions, and redressability by a favorable decision. Considering those principles, CSP and its members satisfy standing requirements in the

citizen suit against Highpeak. Organizations can assert associational standing on behalf of its members when (1) its members have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organizations purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. CSP meets the requirements for associational standing on behalf of its members, solidifying its standing in the citizen suit being brought against Highpeak.

Whether CSP was formed to bring a claim against Highpeak is irrelevant to the standing analysis. Standing precedents concerning questions about an organization's reason for formation do not concern the timing or purpose of such formation. Instead, the standing challenges focus on whether the injury itself was manufactured by the plaintiff. CSP in no way manufactured a claim.

The district court properly held that CSP timely filed the challenge to the WTR. The EPA's promulgation of the WTR does not fall within the types of agency action that are subject to the 120-day statute of repose in the CWA. Accordingly, CSP is subject to the six-year APA statute of limitations.

The Supreme Court's recent decision in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024), dictates here. Accordingly, CSP's injury accrued at the time of its formation, not the time of the rule's promulgation.

The district court erred in finding that the WTR was validly promulgated by the EPA because the interpretation relied on in creation of the WTR is inconsistent with the plain language and legislative intent and goals of the CWA and courts are not bound by this interpretation.

The EPA's interpretation of the CWA that it relied on in the creation of the WTR is inconsistent with the plain language and legislative goals of the act. Under the APA, the courts

have a duty to "hold unlawful and set aside agency action, findings, and conclusions found to be" not in accordance with law. 5 U.S.C. § 706. The EPA's interpretation of the ambiguous word "addition" in the definition of a "discharge" under the CWA as allowing for an exemption of water transfers is not compatible with the plain language of the statute forbidding "discharge of any pollutant by any person" without being subject to the act. Even if this court should remain unconvinced that this interpretation is incompatible with the plain language of the CWA, the legislative goals stated in the statute are clearly against the EPA's interpretation. Congress expressly notes in the CWA that the goal of the act is to completely eliminate "the discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251(a). The EPA's interpretation of the act as allowing for a complete exemption for water transfers clearly runs against this stated end goal.

This court is not bound by the EPA's interpretation of the CWA when determining if their promulgation of the WTR was within statutory bounds. In the recent Loper Bright Supreme Court case, the Court ended Chevron deference to agency statutory interpretations and instead stipulated that reviewing "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." This mode of minimal deference is similar to that used in Catskill, where a court found a water transfer exception to the CWA to be invalid, despite an EPA interpretation of the act to the contrary. Thus, because the court must exercise their independent judgment in their review of the language of the CWA, the EPA's interpretation of the statute that was relied on in the creation of the WTR is not binding on the court.

Because the prior relevant caselaw relied on by Highpeak and the EPA fails to receive the protection of *stare decisis* and is the very type of decision sought to be eliminated by the *Loper Bright* court, this court should not be bound by the decisions. Although the EPA and Highpeak

contend that the question posed to this court has previously been answered, those cases expressly relied on the *Chevron* deference framework. However, *stare decisis* "is not an inexorable command," and things like the reasoning of the decision and courts subsequent reliance should be weighed in determining whether it receives protection. *Payne v. Tennessee*, 501 U.S. 808, 828 (1911); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (Citing *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)). Because the reasoning was found to be flawed in *Loper Bright* and little reliance has likely taken place since the 2017 *Catskill III* decision, this caselaw should not receive *stare decisis* protection.

Further, it is contended that the *Loper Bright* Court expressly validated prior caselaw such as this, however that note was made in dicta and the Court's true intent can be seen in their reasoning for overturning *Chevron* where the Court blames *Chevron* for forcing courts to overturn precedent in the name of agency deference. Thus, the Court in its limiting instruction was likely not referring to cases such as the present one and therefore this court should not be bound to the cases proffered by the EPA and Highpeak and, further, should not be bound to the EPA's interpretation of the CWA.

The district court properly held that pollutants introduced in the course of the water transfer took the discharge out of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act.

Highpeak's discharges do not qualify for exemption under the water transfer rule, because the record contains evidence that pollutants were added to the water during the transfer process. Evidence in the record proves that the transfer process introduced new pollutants, taking the transfer out of the scope of the Water Transfers Rule.

In the alternative, Highpeak has failed to meet its burden of proving that they qualify for such an exception. Because defendant-pollutants have the burden of showing that they qualify for statutory exceptions, they were required to show proof that their transfers did not introduce pollutants. In the absence of such proof, Highpeak has failed to carry its burden and cannot claim the protection of the Water Transfers Rule regardless of how the court rules on the above arguments.

STANDARD OF REVIEW

In reviewing a district court's grant or denial of a motion to dismiss, reviewing courts use *de novo* review. *See Horton v. Reliance Standard Life Ins. Co.,* 141 F.3d 1038, 1040 (11th Cir. 1998) (conclusions of law receive de novo review). On appeal, reviewing courts "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Lafaro v. New York Cardiothoracic Group, PLLC*. 570 F.3d 471, 475 (2nd Cir. 2009). To survive a motion to dismiss, a complaint must merely state a plausible claim for relief. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1950 (2009).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT CSP HAS STANDING TO BRING THE CITIZEN SUIT AGAINST HIGHPEAK AND CHALLENGE THE WTR.

CSP has standing in its claim challenging the EPA's WTR and in the citizen suit against Highpeak. The timing of CSP's claims in relation to when the organization was formed do not affect the core of the standing analysis, which CSP clearly satisfies. CSP's standing in the citizen suit against Highpeak should be considered separate from the APA claim against the EPA.

A. CSP Has Article III Standing in the Citizen Suit Against Highpeak.

CSP has Article III standing in the claim against Highpeak, and the government has not commenced an enforcement action against Highpeak for its CWA violation. In the absence of diligent government enforcement, private litigants are free to proceed as a statutory matter. 33 U.S.C. § 1365(a)(2).

Under the CWA, Congress has empowered citizens to bring their own lawsuits to stop illegal discharges into "waters of the United States." Citizen suit authority is found in Section 505 of the CWA, where it states that any person or entity that is adversely affected by any violation has the right to file a citizen suit against the violator. 33 U.S.C. § 1365. The broad language that Congress chose the CWA citizen suit provision suggests that CSP has standing in its claim against Highpeak.

1. Background of Standing Jurisprudence.

Congress has not restricted who may initiate environmental citizen suits, but the US Supreme Court established guidelines pursuant to the doctrine of justiciability which governs whether a "case or controversy" is appropriate for adjudication in a federal court. U.S. CONST. art. III, § 2. The core of the standing doctrine focuses on whether a plaintiff has a sufficient stake in the outcome of the litigation to justify a right to sue in federal court. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

In the context of citizen suits under federal environmental laws, the Court clarified the standing requirement in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In the opinion, Justice Scalia explained that there are three elements which establish the constitutional minimum of standing. *Id*. at 560–61. First, the plaintiff must have suffered an "injury in fact," which is described as an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id*. Second, there must be a causal

connection between the injury and the conduct complained of. *Id*. The causal connection requires that the injury be fairly traceable to the challenged action of the defendant and not the result of the independent action of a third party not before the court. *Id*. Third, it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Id*.

The Court has clarified the kinds of injuries that are considered permissible for standing purposes in some of its later decisions. In *Friends of the Earth v. Laidlaw Envtl Servs. (TOC), Inc.*, several environmental groups brought an action under the citizen suit provision of the CWA, alleging violations of a permit authorizing the discharge of treated industrial wastewater. 528 U.S. 167 (2000). The petitioners in *Laidlaw* claimed several injuries on behalf of their members, including that the river "looked and smelled polluted," which created a recreational injury. *Id*. at 181–82. Justice Ginsburg held that the allegations in *Laidlaw* were consistent with the standard for injury that was applied in *Lujan*, because the petitioners used the affected area and the "aesthetic and recreational values of the area" would be harmed by the challenged activity. *Id*. at 183. Important to the standing inquiry, Justice Ginsberg stated that the relevant showing under Article III is not injury to the environment but injury to the plaintiff. Id. at 184–85. For that reason, the aesthetic and recreational injuries demonstrated by the petitioners were sufficient for injury in fact.

Similarly, in *Sierra Club v. Morton* the Court held that to have standing to sue a party must demonstrate a personal stake in the outcome, showing that they have suffered an injury in fact, which can be economic, conservational, or recreational in nature. 405 U.S. 727, 735 (1972). In *Morton*, the Sierra Club did not have standing because it failed to allege that its members would be directly affected by the development of a ski resort. *Id*. This decision clarified that for an injury

to be particularized for an organization like the Sierra Club, it should allege that its members used the area and would be directly affected.

In a more recent case, the Court considered the issue of standing in *Massachusetts v. EPA*, where the state of Massachusetts sought review of the EPA's denial of their petition to regulate greenhouse gas emissions. 549 U.S. 497 (2007). Writing for the Majority, Justice Stevens held that Massachusetts met all three requirements of standing: (1) injury from the loss of coastal land due to climate change induced sea level rise, (2) causation from the EPA's refusal to regulate greenhouse gas emissions which contribute to climate change, and (3) redressability because the EPA's regulation of emissions could slow or reduce the effects of climate change. *Id*. at 521–23.

(a) CSP's Claim Against Highpeak Meets The Standing Requirements of Injury in Fact, Causation, and Redressability.

Considering the Court's standing precedents, CSP clearly meets the requirements set forth in *Lujan*. CSP has suffered an injury, which is demonstrated by the fact that all of its members live near Crystal Stream, and that the organization's mission is to protect the stream from contamination resulting from industrial uses and illegal transfers. Much like the petitioners in *Laidlaw* who suffered recreational and aesthetic injuries from the alleged conduct, several CSP members have asserted an interference with their enjoyment of Crystal Stream as a result of the declining water quality. Two named members of CSP submitted declarations describing the extent of the injuries they have experiences. Because all of the members have a direct interest in the preservation of the stream, their injuries should be considered concrete and particularized. Furthermore, in *Laidlaw*, the Court clarified that the relevant injury was that of the plaintiff's, not the environment. Therefore, the fact that CSP and its members assert a recreational and aesthetic injury due to Crystal Stream's declining water quality is sufficient.

The causation element of standing is met because the cumulative discharges from Highpeak can be fairly traced to the declining water quality. In a water quality test included in the record, the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of iron, manganese, and total suspended solids than water samples taken directly from the water intake in Cloudy Lake. This water quality data along with the observations of CSP members support that pollutants are added in the course of Highpeak's water transfers. Another indication that Highpeak's conduct is fairly traceable to the injury is that the pipe that they installed in 1992 is partially constructed with iron. Considering that the iron levels in Cloudy Lake were recorded as lower than Crystal Stream, the increased iron levels could be attributed to the deterioration of the pipe. Considering that the Court found the causation element to be met in *Massachusetts*, where the EPA failed to adequately address greenhouse gas emissions, surely causation should be met here. Although the Court correctly recognized that failing to regulate greenhouse gas emissions contributes to climate change and its subsequent impacts, that causal connection is far more attenuated than Highpeak's direct discharges into Crystal Stream.

Finally, it is likely that the injury would be addressed by a favorable decision because if Highpeak is required to obtain an NPDES permit for their discharges into Crystal Stream, there will be increased oversight of their activity and limitations on the pollutants that can be emitted. Without regulation of Highpeak's activity, the water quality will continue to decline, resulting in further injury to CSP.

2. Standing for Organizations.

An organization has standing to sue when it has itself experienced an injury as a result of another party's conduct. In other words, an organization has standing if it can satisfy the same inquiry as in the case of an individual. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

Accordingly, this requires that the organization must have a direct stake in the outcome which translates to a causal and redressable injury rather than merely an organizational interest. *Morton*, 405 U.S. at 740. An example of an organizational injury is economic harm, such as expenditures necessitated by the challenged action. *See, e.g.*, *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993). Litigation expenses alone are typically insufficient to demonstrate organizational injury. *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78-79 (3d Cir. 1998). Additionally, a general injury to an organization's ideological goals usually is not sufficient. *See Morton*, 405 U.S. at 739.

An organization may also assert associational standing, which permits it to bring a claim on behalf of its injured members. To satisfy associational standing, an organization must satisfy a three-part test established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Under the *Hunt* test, an organization may bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id*. at 343. To have associational standing, an organization typically must identify the members that it is bringing suit for. *Id*. Associational standing only requires injury to a single member. *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 441 (6th Cir. 2020). However, the requirement of naming the affected members has been dispensed with where all the members of the organization are affected by the challenged activity. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009).

Regarding the germaneness requirement for associational standing, it has been described as a due process consideration that is used to determine if an organization can bring a case. *Int'l Union, United Auto., Aerospace, and Agric. Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986).

In *Waskul*, the Sixth Circuit held that the germaneness requirement was met where ensuring that budgets were correctly calculated and sufficient was germane to the organization's mission and purpose of advocating for persons with developmental disabilities and their families to help them obtain and maintain services. 979 F.3d at 442.

The third prong of the *Hunt* test is typically satisfied when an organization seeks injunctive or declaratory relief benefitting the organization and its members. *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

(a) CSP Satisfies The Three-Prong Test in *Hunt* for Associational Standing.

In the present case, CSP meets the requirements for associational standing under the *Hunt* test. As stated in the previous section, CSP's members have standing to sue in their own right, with two named members even submitting declarations describing the extent of their injuries. The declarations from members should be sufficient to demonstrate CSP's associational standing. Further supporting that CSP has satisfied this prong, essentially all of its members have suffered an injury because of their use and enjoyment of Crystal Stream, which dispenses of the requirement to name the affected members according to *Summers*.

The germaneness prong is satisfied because the mission of CSP is to protect Crystal Stream from contamination resulting from the industrial uses and illegal transfers of polluted waters. Certainly, ensuring that Highpeak's illegal discharges are properly regulated is germane to CSP's mission.

Lastly, the final prong is satisfied because the CWA citizen suit against Highpeak is seeking injunctive relief for their actions. Ending the unregulated pollution into the waters of Crystal Stream is CSP's ultimate goal, and that result will benefit the organization and its members.

3. Whether CSP Was Formed to Bring a Claim Against Highpeak is Irrelevant to the Standing Analysis.

The central analysis for Article III standing in this case is limited to the considerations expressed in *Lujan* and the related issue of organizational standing. Highpeak's assertion that CSP was created solely for the purpose of challenging Highpeak's discharges is irrelevant to assessing CSP's standing in this case.

In *Clapper v. Amnesty Int'l USA*, the issue was not whether the organization was created solely to bring a challenge, but that the alleged injuries were entirely self-inflicted. 133 S. Ct. 1138 (2013). Justice Alito explained that the respondents could not manufacture standing by inflicting harm on themselves based on their fears of hypothetical future harm that was not certainly impending. *Id*. at 1151. Similarly, in *Stoops v. Wells Fargo Bank, N.A.* the standing issue was that the plaintiff manufactured an injury by purposefully buying 35 cell phones to receive calls that violated the statute in question. 197 F.Supp.3d 782, 796-800 (W.D. Pa. 2016). These cases focus on whether the plaintiff's suffered an actual and concrete injury, which is a relevant inquiry of Article III standing. *See also Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 386-93 (2024) (plaintiffs that did not prescribe or use a regulated drug did not suffer injury from use of the drug and do not have standing to challenge regulation which permits distribution of the drug).

Furthermore, in *Pennell* the Court recognized associational standing for a group that was created for the purpose of representing the interests of members in that specific lawsuit. 485 U.S. at 7 n.3. A crucial point in *Pennell* is that associational standing also applies to ad hoc organizations formed only for the purpose of bringing a particular case, so long as an actual injury still exists. *Id*.

In this case, the allegation that CSP was created to bring suit against Highpeak and challenge the WTR is irrelevant to the standing analysis because it does not change the fact that CSP's members have suffered an actual injury. Like in *Pennell*, CSP is able to assert associational standing on behalf of its members, regardless of the timing or reasons for its formation. The nature of the injuries that CSP alleges and the organization's standing have already been described, and the relevant distinction is that CSP in no way "manufactured" an injury. Instead, the injury is a direct result of Highpeak's discharges into Crystal Stream.

Additionally, CSP's challenge to the WTR is related to the claim against Highpeak, but ultimately separate. CSP maintains that even if this Court finds that the WTR was validly promulgated by the EPA, Highpeak requires an NPDES permit because the discharges into Crystal Stream are not exempted by the WTR. The argument that CSP was formed to manufacture a challenge to the WTR is negated by the fact that CSP has a claim against Highpeak that is isolated from the challenge to the WTR and that would remain intact even with a finding that the WTR is valid.

B. CSP Has Standing in the APA Challenge to the WTR.

CSP has standing in its claim against the EPA under the APA, 5 U.S.C. § 551, challenging the WTR. Much of the standing analysis for CSP's APA claim overlap with what has been previously analyzed because the injury that has been caused by Highpeak's discharge is relevant to all water transfers. Therefore, a finding that the WTR was invalidly promulgated by the EPA will ensure that Highpeak's discharge is subject to an NPDES permit, resolving CSP's injury.

1. APA Standing Requirements.

Section 10 of the APA provides that "a person suffering a legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute,

is entitled to judicial review thereof." 5 U.S.C. § 702. The term "person" also extends to businesses and persons seeking review of agency action. 5 U.S.C. § 551(2). Agency action includes rulemakings promulgated by an agency. 5 U.S.C. § 551(5). The agency action must be "final," meaning that (1) the action must mark the completion of the decision-making process, and (2) the action must be one by which rights or obligations have been determined or from which legal consequences flow. *See Bennett v. Spear*, 520 US 154, 177 (1997).

In *Data Processing Service v. Camp* the Court held that a plaintiff has standing to obtain judicial review of federal agency action under § 10 of the APA when they allege that the challenged action has caused "injury in fact," and the interest that the plaintiff is trying to protect must be arguably "within the zone of interests to be protected or regulated by the statute" that the agency was claimed to have violated. 397 U.S. 150, 152–53 (1970).

In *Morton*, the Court noted that aesthetic and environmental injuries may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. 405 U.S. at 734. The reason the Sierra Club's APA challenge failed was that they did not demonstrate that their members would be among the injured. *Id*.

(a) The EPA's promulgation of the WTR has caused CSP's "injury in fact" and CSP's interest is arguably within the zone of interests protected by the CWA.

CSP has standing in its APA challenge against the EPA. The WTR amounts to final agency action, and there is no other adequate remedy in a court regarding the EPA's promulgation of the rule. CSP has suffered an injury caused by the EPA's actions because the WTR allows for violations of the CWA. Highpeak has engaged in a violation of the CWA that was made possible only by the EPA's formation of the WTR. The aesthetic and environmental injury that CSP's members have suffered is sufficient to show "injury in fact" based on the analysis in *Morton*. If the EPA had not removed an entire category of discharges that are likely to violate the CWA, then

damages to Crystal Stream probably would have been avoided. The injury has directly affected CSP's members, which makes this case distinguishable from *Morton*.

The interests that CSP is trying to protect are certainly within the zone of interests protected by the CWA. The CWA prohibits the illegal discharge of pollutants into waters of the United States. The discharge of pollutants into Crystal Stream falls within the interests that the CWA intends to protect.

II. THE DISTRICT COURT PROPERLY HELD THAT CSP TIMELY FILED THE CHALLENGE TO THE WTR

CSP's challenge to the WTR was timely because the EPA's promulgation of this rule could not have affected CSP until its formation. The Supreme Court's recent decisions govern that the timing for such challenges begins at the time of injury, and CSP could not have claimed injury until it was formed. Despite the 120-day statute of limitation to CWA challenges that Congress has imposed, the new precedent warrants evaluating this challenge.

A. Judicial review under the CWA.

Under 28 U.S.C. § 2401, claimants typically must bring challenges to agency action within six years after the right of action first accrues. This statute of limitations applies to challenges to agency rules, unless Congress has specified a different statute of limitations for a particular class of challenges. Under the CWA the review of agency actions has been limited to "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Certain actions taken by the EPA on a regular basis are listed in § 509(b)(1) of the CWA, and those actions are subject to the 120-day limit to challenge in a federal court of appeals.

The agency action enumerated in § 509(b)(1) that would be relevant to the WTR is "making any determination as to a State permit program submitted under section 1342(b) of this title." *Id.*

The rule itself states that it is issued under the authority of sections 402 and 501 of the Clean Water Act., 33 U.S.C. 1342 and 1361. 40 CFR 122(I)(C). The authority of the administrator to prescribe regulations is stated in 33 U.S.C. § 1361(a), which explains that "the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." Section 1361 is not among the authorities for agency actions enumerated in § 509(b)(1).

The final version of the WTR states the following: "Under section 509(b)(1) of the Clean Water Act, judicial review of the Administrator's action can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is considered issued for purposes of judicial review." 40 CFR 122.

Although the WTR has implications for state permit programs and which discharges are subject to NPDES permits, the extent of the WTR goes well beyond that. Congress carefully selected the types of agency action that would be subject to the 120-day limit on challenges. The WTR does not fit neatly within any of those categories. Therefore, the time limit on CSP's challenge to the WTR should be the six-year statute of limitations under 28 U.S.C. § 2401. The EPA was incorrect in stating that challenges to the WTR were subject to the 120-day limit, because the agency action is not among those stated in § 509(b)(1).

This distinction is relevant because the decision in *Corner Post* makes a distinction between statutes of limitation, such as the six-year limitation under the APA, and statutes of repose, which set outer limits based on the date of agency action. See *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014). The EPA's promulgation of the WTR does not apply to the 120-day statute of repose. For that reason, this case does not present the issue of whether the Corner Post decision also applies to congressionally implemented statutes of repose, such as the § 509(b)(1) of the CWA.

B. CSP's injury from the EPA's promulgation of the WTR accrued when CSP was formed.

In *Corner Post* the Court addressed when a plaintiff may bring a facial challenge to a final agency action under the APA. 144 S.Ct. 2440 (2024). *Corner Post* involved a challenge to a regulation adopted by the Federal Reserve that set maximum swipe fees that banks may charge retailers when customers use debit cards. *Id*. at 2448. Corner Post, the convenience store that joined the lawsuit, opened in 2018 and argued that they were not injured by the Federal Reserve's regulation until they were formed. *Id*. The Court held that the six-year statute of limitations does not accrue until the plaintiff is injured by the regulation. *Id*. at 2450. An entity may challenge a federal agency's regulation from the time the entity suffers an injury from the final agency action. The Court focused on interpreting the phrase "first accrues" in a manner specific to the plaintiff. *Id*. The majority in *Corner Post* also rejected the previously held notion that the APA includes a statute of repose, reading the six-year limit on challenges as a statute of limitations that impacts plaintiffs individually. *Id*. at 2452–53.

The Court's interpretation of the APA in *Corner Post* allows for entities that did not exist at the time a regulation was promulgated to relitigate the issue, regardless of the fact that the regulation may be settled. *Id*. at 2480–81. Casting some light on the kinds of injuries that allow for challenging agency action, the Court suggested that only entities in existence at the time of agency action, such as when a regulation was promulgated, may bring procedural claims. *Id*. At 2459 n.8. Conversely, procedural claims would apply at the time that the injury accrued.

In Justice Kavanaugh's concurrence, he explains that the regulation in question applied to banks, not retailers. Accordingly, Corner Post is described as an "unregulated plaintiff" in the sense that it suffered adverse downstream effects from the promulgation of the rule. *Id*. at 2460 (Kavanaugh, J., concurring).

In this case, CSP was not injured by the promulgation of the WTR until its formation. The WTR is directly averse to CSP's mission, and that mission did not materialize until CSP was formed. Additionally, CSP was not able to assert associational standing on behalf of its members until it was formed. Similar to *Corner Post*, CSP and its members may have been aware of the WTR and its harmful effects prior to the challenge. However, this was not the pertinent question in *Corner Post*. The owner of the convenience store conceivably could have entered into the business at an earlier time, but the Court still permitted them to form and challenge a longstanding regulation. Because CSP and its members have been injured by the promulgation of the WTR, they are permitted to challenge the rule within six years of when the injury accrued, which in this case is December 1, 2023.

The fact that CSP is an environmental organization rather than a for-profit corporation has no effect on the Court's analysis in *Corner Post*. The only element that changes is the kind of injury that is being alleged. In *Corner Post,* the convenience store suffered an economic injury from the regulation even though it was in existence well before Corner Post was formed. In this case, it should also make no difference that the impacts of the WTR existed and affected CSP's members prior to CSP's formation.

The fact that the injury that CSP has suffered from the WTR is an environmental and aesthetic one is also of significance. The kind of injury that has been caused by the WTR takes time to materialize. Highpeak's illegal discharges that have gone unregulated due to the WTR are not the kind of injury that would be immediately apparent to CSP or its members. Only after years of pollution did CSP's members identify a noticeable decline in water quality and appearance. This kind of injury is entirely different from costs that immediately accrue when a corporation commences operations. This distinction further supports the idea that CSP, as a new organization,

was injured at the time of formation. CSP's members recognized a decline in the aesthetic quality of Crystal Stream, and CSP formed to protect those interests and prevent further environmental deterioration. To place consideration on when the injuries that CSP alleges actually began to materialize for CSP's members would go against the principles set forth in Corner Post.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE WATER TRANSFERS RULE WAS VALIDLY PROMULGATED BY THE EPA.

A. The CWA does provide for the EPA's interpretation of the statutory language regarding the WTR.

Because the plain language of the CWA as well as its stated statutory intent and goals conflict with the WTR, the EPA's interpretation is inconsistent with the statute. United States courts are tasked with the duty to "hold unlawful and set aside agency action, findings, and conclusions found to be" not in accordance with law. 5 U.S.C. § 706. The EPA's view that an "addition" under the CWA does not include water transfers is not consistent with the statute's language expressly forbidding the "discharge of *any* pollutant by *any* person" without being subject to the act. 33 U.S.C. § 1311 (emphasis added). Further, this interpretation by the EPA goes directly against the stated goal of the legislature "that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251. Therefore, the EPA's interpretation of the CWA is wholly inconsistent with the organic statute and thus the WTR, relying on this interpretation, was not validly promulgated by the EPA.

1. The EPA's WTR is inconsistent with the plain language of the CWA.

Because the plain statutory language of the CWA does not allow for the EPA's interpretation that they relied on in in their creation of the WTR, the rule was not validly promulgated by the agency. The CWA prohibits the "discharge of any pollutant" which is defined by the statute as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C § 1311; 33 U.S.C. § 1362 (emphasis added). However, the statute does not define what

constitutes as an "addition". *See* 33 U.S.C § 1362. In its creation of the WTR, the EPA contends that the term "addition" means an introduction of an outside pollutant not present in the waters of the United States and thus a transfer from one water to another would not constitute as an "addition".

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 (2nd Cir. 2001) (Catskill I), the Second Circuit found this argument to be inconsistent with the language of the statute. The court there reasoned that the language of the CWA prohibiting the addition of pollutants could not possibly allow for the interpretation that, just because a pollutant is already contained in a water of the United States, its discharge into another water of the United States creates no net increase in pollutants present and therefore does not qualify as an "addition" under the CWA. *Id* at 487. Therefore, the WTR established by the EPA that relied on this interpretation was not validly promulgated and the EPA.

2. The EPA's WTR is inconsistent with the stated congressional intent and goals of the CWA.

Even if this court deems this language to be sufficiently ambiguous to allow for the WTR's interpretation of the CWA, because the stated legislative intent and goals point to the WTR being against their initiative, the EPA's interpretation of the CWA was inconsistent with the act. The CWA states its goal as completely eliminating "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a). The EPA's interpretation of the statute (that an entire category of "discharges" be exempt from the provisions therein) is so contrary to this goal that the WTR that it spawned must be set aside as agency action not in accordance with law. *See* 5 U.S.C. § 706.

This issue was again addressed by the Second Circuit in its *Catskill I* decision. *See Catskill Id.* at 494. The court there reasoned that the EPA's WTR relied on this interpretation of an "addition" in complete contradiction to the goals of the statute, stating that "the CWA also

expressly includes a broad and uncompromising policy of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters'" and that the promulgation of this rule can quite easily be read to be contrary to that sentiment. *Id*. Thus, because the EPA's WTR is so inconsistent with the CWA's stated congressional goals and intent, the CWA does not allow for the EPA's interpretation of its language regarding the WTR and therefore this court should set aside the rule as agency action not in accordance with law.

B. This court is not bound by EPA's interpretation of the CWA.

1. This court owes minimal deference to the EPA's interpretation of the CWA.

Because this court may reach its own conclusions on the interpretation of congress's statutes, it is not bound to the EPA's interpretation of the CWA. In the recent Supreme Court decision of *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), the Court stated that "[c]ourts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority. This overruled the longstanding *Chevron* doctrine, and eliminated the elevated level of judicial deference owed to agency interpretations that came with it. *Id.* Further, the Court stipulated that it is "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id*. at 2249. Thus, while this court is afforded the option to defer to properly reasoned agency interpretation, they are by no means bound to any interpretations made by the EPA through the promulgation of their rules.

2. This court is not bound by prior decisions made under *Chevron*.

Because the prior relevant caselaw relied on by Highpeak and the EPA fails to receive the protection of *stare decisis* and is the very type of decision sought to be eliminated by the *Loper Bright* court, this court should not be bound by the decisions. The EPA and Highpeak contend that

the question of the validity of the WTR has already been answered by previous courts and that these decisions are due *stare decisis*. However, "*stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1911). The Court in *Loper Bright* outlines two of the factors to consider when determining if prior caselaw receives the protection of *stare decisis* as "the quality of [the precedent's] reasoning . . . and reliance on the decision." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (Citing *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)). Here, the EPA and Highpeak urge the court to follow caselaw from the Second Circuit that, under a *Chevron* deference framework, validated the EPA's WTR. *See generally Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492 (2d Cir. 2017) (*Catskill III)*. However, the Supreme court found this *Chevron* methodology to be lacking in *Loper Bright*, and thus is not quality reasoning under the doctrine of *stare decisis*. *See Loper Bright* at 2273 ("Chevron is overruled"). Further, this rule of law that spawned with the *Catskill III* court was created in 2017, and thus has had little time for meaningful reliance to have grown on it.

Further, the EPA and Highpeak contend that the Court's decision in *Loper Bright* expressly held that prior caselaw under the *Chevron* standard cannot be overturned merely for using that methodology in its reasoning. However, this statement was made in dicta and, further, the Court in likely was not referring to this type of precedent in that point: "Still worse, [Chevron] forces courts to [afford binding deference to agencies] even when a pre-existing judicial precedent holds that the statute means something else." *Loper Bright* at 2265. This is exactly the case for interpreting the CWA in regards to the WTR. *Catskill I* originally found the EPA's interpretation used in *Catskill III* to be invalid under a less deferential framework, like the one established in *Loper Bright*. *See Catskill I* at 86. Clearly then, the Court's statements in dicta likely were not

referring to cases such as the present issue. Thus, this court should not be bound to the cases urged by the EPA and Highpeak and, further, should not be bound to the EPA's interpretation of the CWA relied on in creation of the WTR.

Therefore, since the CWA does not allow for the EPA's interpretation of the statutory language regarding the WTR and reviewing courts owe no substantial deference to the agency's interpretation of the statute, the district court erred in finding that the water transfers rule was validly promulgated by the EPA.

IV. HIGHPEAK'S DISCHARGES DO NOT QUALIFY FOR EXEMPTION UNDER THE WATER TRANSFER RULE

The lower court did not err in holding that the addition of pollutants took the discharge out of the scope of the Water Transfers Rule. The Water Transfers Rule ("WTR") states that the permitting exclusion does not apply to pollutants added to the water during the transfer process. 40 CFR 122.3(i). Evidence in the record proves that pollutants were added during the transfer process, taking the discharges out of the scope of the WTR. In the alternative, Highpeak cannot claim the WTR because they have failed to meet their burden of proving that they qualify for exempted status.

A. Highpeak's discharges are not covered by the WTR because the record contains evidence that pollutants were added to the water during the transfer process.

When evaluating whether the WTR excludes a discharge from permitting requirements, courts have found that the presence of introduced pollutants such as sediment and metals disqualifies a discharge from the WTR. In *Na Kia'i Kai v. Nakatani*, the state of Hawaii ("the State") ran, without a permit, a system of drainage canals which discharged water into the ocean in order to prevent flooding in an agricultural zone. 401 F. Supp. 3d 1097, 1100 (H.D.C. 2019). Testing by the plaintiff found the presence of heavy metals and sediment in the water, which are

considered pollutants. Id. at 1103-4. See generally 40 CFR 401.16 (listing suspended solids as a conventional pollutant); see also *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (interpreting 33 U.S.C. § 1362 to include "sediment" as a pollutant under the meaning of the Clean Water Act); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (holding that the broad definition of "pollutant" in the Clean Water Act includes sediment).

At issue was whether the State could use the WTR to escape the CWA requirement of obtaining a permit for their discharges. *Na Kia'i Kai*, 401 F. Supp. 3d at 1107. The court held that they could not. Id. The court reasoned that the plain text of 40 CFR 122.3(i) excluded pollutants added during a transfer from the permitting exemption and that the WTR could therefore not be used to escape permitting when pollutants are added during a transfer. *Na Kia'i Kai*, 401 F. Supp. 3d at 1107-8.

The holding in *Na Kia'i Kai* clearly parallels the present issue because here the record attests to the presence of the same types of pollutants that were disqualifying in *Na Kia'i Kai*. Specifically, testing by the plaintiff revealed elevated levels of iron and manganese in the Stream as a result of Highpeak's discharges. Furthermore, sworn testimony from members of CSP attests to the presence of suspended solids, a type of sediment, in the Stream due to Highpeak's discharges.

Because pollutants were added during Highpeak's transfer of the water, this Court should uphold the lower court's ruling that Highpeak's discharges do not qualify for exemption under the Water Transfer Rule.

B. Highpeak has failed to meet its burden to prove that they qualify for the WTR exemption because they have not brought evidence to show that their transfers do not add pollutants.

Highpeak cannot claim the WTR exemption because they failed to carry their burden at the trial level of proving that they qualify for the exemption in the first place. When claiming an

exemption to the CWA, the defendant-pollutant carries the burden of proving that they qualify for the exemption. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001.

In *N. Cal. River Watch v. City of Healdsburg*, the analysis of the defendant's claims was evaluated through the lens of whether they met this burden. In *N. Cal. River Watch*, defendant city was alleged to have improperly discharged pollutants into a local pond without CWA permit approval. *Id*. at 996. At issue was whether the city qualified under a statutory exception which would have classified the pond as not under the jurisdiction of the CWA. *Id*. at 997. The court held that the city did not qualify for the statutory exception, reasoning that the "appellant had the burden to prove [the] exception applie[d] to its discharge. . . ." *Id*. at 1001.

This reasoning is in line with the longstanding general rule that individuals seeking the refuge of statutory exceptions must prove that they qualify as such. *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (holding that "[w]hen a proviso . . . carves an exception out of the body of a statute[,] . . . those who set up such exception must prove it.") (citing *Schlemmer v. Buffalo R. & P. R. Co*., 205 U.S. 1, 10 (1907); *Ryan v. Carter*, 93 U.S. 78 (1876); and *United States v. Cook*, 84 U.S. 168 (1872)).

Here, Highpeak is seeking to use the WTR to avoid statutory permitting requirements. Under *N. Cal. River Watch* and the general rule, they have the burden of proving that they qualify for the exception. In failing to provide evidence that the transfer of water introduces no new pollutants, Highpeak has failed to meet its burden. Therefore, Highpeak cannot claim to fall under the exception provided by the WTR, regardless of what CSP has or has not proven in regards to additional pollutants in the Stream.

CONCLUSION

Therefore, for the foregoing reasons, this Court should affirm the district court's denial of the EPA and Highpeak's motions to dismiss regarding standing, timeliness, and the permit mandate, and reverse the district court's granting of the EPA and Highpeak's motion to dismiss CSP's APA challenge to the WTR.