THIRTY-SEVENTH ANNUAL JEFFREY G. MILLER NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

2025 Competition Problem

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 24-001109

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

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

Defendants-Appellees-Cross-Appellants.

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

ORDER

Following the issuance of a Decision and Order of the United States District Court for the District of New Union, dated August 1, 2024, in case 24-CV-5678, Crystal Stream Preservationists, Inc. ("CSP"), the United States Environmental Protection Agency ("EPA") and Highpeak Tubes, Inc. ("Highpeak"), each filed motions seeking leave to appeal different parts of the district court's order. Specifically, the district court held that:

1. CSP had standing to challenge a regulation (NPDES Water Transfers Rule; 40 C.F.R. 122.3(i) (2023)) promulgated by EPA and had standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the Clean Water Act;
2. CSP's regulatory challenge was timely filed;
3. The Water Transfers Rule was not arbitrary, capricious, or contrary to law; and
4. CSP's citizen suit against Highpeak could proceed, as Highpeak's discharges introduce additional pollutants into Crystal Stream during the water transfer, thus taking the discharge out of the scope of the Water Transfers Rule.

Highpeak appeals from the first, second, and fourth holdings. EPA appeals from the first and second holdings. CSP appeals from the third holding. Each party filed a motion for leave to file interlocutory appeals. Given the novel and complex issues raised in the lower court's decision, this Court granted leave to appeal.

Therefore, it is hereby ordered that the parties brief the following issues:

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

CSP argues it did not; EPA and Highpeak argue it did.

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

CSP argues it did not; EPA and Highpeak argue it did.

3) Did the District Court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act?

EPA and Highpeak argue it did not; CSP argues it did.

4) 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?

EPA and CSP argue that it did not; Highpeak argues that it did.

SO ORDERED.

Entered this 1st day of August 2024.

[NOTE: No court decisions or documents dated after August 1, 2024 may be cited in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW UNION

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross Appellee,

v.

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

Defendants-Appellees-Cross Appellants.

DECISION AND ORDER

This case arises from a citizen suit brought on February 15, 2024 by the environmental group Crystal Stream Preservationists, Inc. ("CSP") under the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1251 *et seq.* CSP filed this action against Highpeak Tubes, Inc. ("Highpeak"), a family-owned recreational company that operates a tubing business on the Crystal Stream in the western part of the State of New Union. CSP alleges that Highpeak is discharging pollutants into the Crystal Stream without a permit, in violation of the CWA, as part of its business operations. In the Complaint, CSP also brought a separate claim against the United States Environmental Protection Agency ("EPA") under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, challenging a regulation promulgated by EPA known as the NPDES Water Transfers Rule ("Water Transfer Rule" or "WTR"), which Highpeak claims exempts the discharge in question from the permitting requirements of the Act. *See* 40 C.F.R. 122.3(i) (2023). Alternatively, CSP contends that, even if the WTR is valid, Highpeak's discharge still requires a permit because pollutants are introduced during the water transfer, and thus the discharge falls outside of the scope of the WTR.

Highpeak moved to dismiss the action on multiple grounds. First, Highpeak argues that CSP lacks standing to bring either the citizen suit or the regulatory challenge, and second, contends that the challenge to the WTR was not timely filed. Finally, Highpeak moves to dismiss the citizen suit against it, alleging that EPA validly promulgated the WTR under the Clean Water Act and that Highpeak's discharge is exempted by the WTR from the permitting requirements of the Clean Water Act.

EPA also filed a motion to dismiss on multiple grounds. First, EPA joined Highpeak's standing and timeliness arguments and also defended the WTR as validly promulgated under the Act. Separately, EPA joined CSP's arguments in opposing Highpeak's motion to dismiss the citizen suit, arguing that under EPA's interpretation of the WTR, Highpeak's discharge is not

exempt because pollutants are introduced during the transfer process, and, therefore, Highpeak's discharge requires a permit.

FACTUAL AND LEGAL BACKGROUND

The following facts, except where noted otherwise, are taken from CSP's Complaint and are accepted as true for the purposes of these motions to dismiss.

For the past 32 years, Highpeak has owned and operated a recreational tubing operation in Rexville, New Union. Highpeak owns a 42-acre parcel of land in Rexville. On the northern border of the property lies Cloudy Lake, a 274-acre lake in the Awandack mountain range. On the southern portion of the parcel runs Crystal Stream ("the Stream" or "Crystal Stream"), which is the stream upon which Highpeak launches its customers in rented innertubes.

In 1992, Highpeak sought and obtained permission from the State of New Union to construct a tunnel connecting Cloudy Lake to Crystal Stream. The tunnel, which is four feet in diameter and approximately 100 yards long, is equipped with valves at the northern and southern ends that Highpeak's employees can open and close to regulate the flow of water from Cloudy Lake into Crystal Stream. The tunnel is partially carved through rock and partially constructed with iron pipe installed by Highpeak in 1992. Under an agreement with the State of New Union, Highpeak is prohibited from using the tunnel unless the State determines that water levels in Cloudy Lake are adequate to allow the release of water, which typically occurs from spring through late summer due to seasonal rains. The purpose of these releases, from Highpeak's perspective, is to increase the volume and velocity of Crystal Stream to enhance tubing recreation.

As New Union does not have a delegated CWA permitting program, the Court notes that EPA, rather than New Union's own environmental agency, issues CWA permits in the state under the National Pollution Discharge Elimination System ("NPDES permits"). Highpeak has neither had nor sought an NPDES permit for the discharge of waters from Cloudy Lake into Crystal Stream. Until this case, nobody has ever challenged the discharge.

CSP is a not-for-profit corporation formed on December 1, 2023. It is a membership organization and, according to declarations filed with the Complaint, its thirteen total members all live in Rexville, New Union. Two of its members own land along Crystal Stream. CSP invites individuals interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." All but one of the members have lived in Rexville for more than 15 years; the lone exception, Jonathan Silver, moved to Rexville in 2019. The two members who own land along the Stream both reside approximately one mile south of the end of Highpeak's tube run (five miles south of the discharge point). Both moved to their current homes prior to 2008.

On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak, and, as required by regulation, sent copies to the New Union Department of Environmental Quality ("DEQ") and to EPA. 33 U.S.C. § 1365(b)(1)(A); *see also* 40 C.F.R. § 135.3 (2023). The NOIS alleged that Highpeak's tunnel constitutes a point source under the Act, which has regularly discharged and continues to discharge pollutants into the Crystal Stream without a permit. The Parties have stipulated that both Cloudy Lake and Crystal Stream are

"waters of the United States" under the CWA. The NOIS specifically alleged that this discharge contains multiple pollutants and was supported by sampling results showing 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. The NOIS contended that Crystal Stream is fed in significant part by natural groundwater springs and is less burdened by these pollutants, so every time Highpeak opens the valves, it is discharging pollutants into the Stream in violation of the Act.

Likely anticipating Highpeak's reliance on the WTR, CSP further alleged in the NOIS that the WTR was not validly promulgated by EPA, and, alternatively, argued that additional iron, manganese and TSS are introduced during the transfer process, thereby taking the discharge out of the exemption provided by the WTR. CSP supported this claim with data indicating that the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of these pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day. Specifically, the sampling reflected in the NOIS and CSP's Complaint include the following data:

Sample Location	Iron	Manganese	TSS
Cloudy Lake at Intake	.80 mg/L	.090 mg/L	50 mg/L
Outfall into Crystal Stream	.82 mg/L	.093 mg/L	52 mg/L

On December 27, 2023, Highpeak sent a reply letter to CSP, stating simply that it need not respond to the NOIS on the merits, as Highpeak did not need a NPDES permit due to the WTR. Furthermore, Highpeak argued that a "natural" addition of pollutants during the transfer did not bring the discharge outside of the scope of the WTR.

After waiting the required sixty days, CSP filed its Complaint on February 15, 2024, reiterating the allegations from the NOIS. The Complaint included both the citizen suit claims against Highpeak and a claim under the APA against EPA, challenging the WTR as invalidly promulgated and inconsistent with the statutory language of the CWA. As noted above, CSP also argued, alternatively, that even if the WTR were valid, Highpeak would require a permit due to the pollutants allegedly introduced during the water transfer. The Complaint repeats all the foregoing allegations from the NOIS, and, for the purposes of these motions to dismiss, the Court will treat all of these allegations as true. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023).

Highpeak moved to dismiss on multiple grounds. First, Highpeak argued that the challenge to the WTR should be dismissed for lack of standing and as time-barred. Next, Highpeak similarly challenged CSP's standing in the citizen suit, arguing that CSP was created solely for the purpose of challenging Highpeak's discharges in order to "manufacture" a future challenge to the WTR in the event the United States Supreme Court altered the legal framework surrounding such challenges. Therefore, Highpeak argues, CSP suffers no actual injury as a result of Highpeak's discharge. Finally, Highpeak argued that the Complaint fails to state a cause of action. According to Highpeak, the WTR was validly promulgated, and, as a result, no permit was required for the tunnel discharge.

EPA also moved to dismiss CSP's challenge to the WTR. EPA joined Highpeak in challenging CSP's standing and timeliness. Similarly, EPA defended the WTR as a valid promulgation under the CWA.[1] Conversely, EPA agreed with CSP that, even if this Court should uphold the WTR, Highpeak nonetheless needs to obtain a permit for the pollutants introduced to the water during the discharge.

At the urging of CSP, and after the motions were fully briefed in April 2024, this Court refrained from ruling on the pending motions given two cases pending before the Supreme Court, which, CSP argued, could provide additional legal foundation for CSP's claims: *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024).

Now that the Supreme Court has issued those rulings, for the reasons stated below, this Court grants the motions to dismiss the challenge to the WTR, but denies the motion to dismiss the citizen suit against Highpeak. The Court will address the standing and timeliness issues first, and we will then turn to the remaining merits of the two motions to dismiss.

I. CSP Has Standing to Bring the Challenge to the WTR and the Citizen Suit Against Highpeak.

Highpeak and EPA challenge CSP's standing and assert it suffers no cognizable injury, alleging CSP was formed to manufacture a claim challenging the WTR and not on the basis of any genuine environmental, recreational or aesthetic concerns. As support for this contention, EPA and Highpeak first point to the timing. It is undisputed that Highpeak has been in operation for over thirty years and has been utilizing the tunnel for that entire time, both before and after the promulgation of the WTR. However, no individual or entity, including any current member of CSP, has ever previously challenged the discharge. The organization was not formed until the Supreme Court took up the *Loper Bright* and *Corner Post* cases, and, moreover, Highpeak and EPA emphasize that the mission statement for CSP's certificate of incorporation specifically includes a reference to "transfers":

> 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.

Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 4. Finally, Highpeak and EPA emphasize that CSP's standing declarations show that the organization has only 13 members, three of whom are also officers and directors. *Id.* Therefore, Highpeak and EPA contend that neither the organization nor its members suffer any real constitutionally protected injury because the entire organization was formed not for environmental protection or conservation, but rather to take advantage of a new Supreme Court precedent to challenge a long-standing regulation and long-standing practices by Highpeak.

[1] The parties have stipulated that no discovery is necessary in this case with respect to promulgation of the WTR, so the Court can dispose of that issue based on the motion papers.

This Court acknowledges these facts and agrees that an organization formed primarily to mount a legal challenge warrants additional scrutiny in determining standing. However, the mere fact that an organization or individual seeks to initiate a legal challenge does not, by itself, invalidate the alleged injuries for standing purposes. Rather, the Court must carefully review the legitimacy of the alleged injury. If an entity is formed solely to sue and cannot show how it is, or will be, concretely affected by the regulation it challenges, its standing to sue may be questionable. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-14 (2013) (plaintiffs cannot manufacture standing by taking action based on a speculative future harm that is not certainly impending). The plaintiff must face actual, concrete injury as a result of the challenged regulation. *See Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 386-93 (2024) (plaintiffs that do not prescribe or use regulated drug are not injured by the use of the drug and do not have standing to challenge regulation which permits distribution of the drug).

The issue here is whether CSP is a legitimate environmental nonprofit corporation whose members are suffering environmental injury or merely a tool created for the purpose of manufacturing a challenge to the WTR and to Highpeak. While the formation of a corporation in a proper legal manner is generally recognized by courts, courts can, and sometimes do, look beyond the mere existence of corporate formalities to the intent behind that corporation's formation. If it appears that an entity was primarily formed to obtain standing in court, this could weaken the plaintiff's credibility regarding its claims of injury. For example, courts may consider whether the entity engages in substantial or legitimate business activities apart from the litigation. An entity that conducts meaningful business operations is more likely to be viewed as having a legitimate interest in challenging a regulation affecting its operations. If the entire purpose of the corporation is to create an avenue for litigation, then the Court need not find a constitutional injury. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F.Supp.3d 782, 796-800 (W.D. Pa. 2016) (finding plaintiff lacked standing under Telephone Consumer Protection Act by purposefully buying 35 cell phones to receive calls that violate that statute) .

Here, although a close call, the Court finds that CSP has standing. It is undisputed that CSP was properly formed under the laws of New Union. Further, it is undisputed that CSP has 13 members, some of whom own property on the Crystal Stream. One member, Cynthia Jones, submitted a declaration stating that she "regularly walk[s] along the Stream and enjoy[s] its crystal clear color and purity." She further states that "the suspended solids and metals in the Stream are upsetting to [her], as they make the otherwise clear water cloudy," and she is "very concerned about contamination from toxins and metals, including iron and manganese." *See* Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7-9. Likewise, Jonathan Silver, who, as noted above, moved to Rexville in 2019, submitted a declaration stating that he "regularly walks [his] dogs along" Crystal Stream and is "deeply concerned about the presence of toxic chemicals polluting the water." He stated that he is "hesitant to allow [his] dogs to drink from the Stream due to the pollutants" he believes are present. *See* Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 5-9. Both say they would enjoy the Stream more regularly were it not for the pollution from Highpeak's discharge.

Such harms have been recognized as sufficient for environmental standing, as in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), in which the

Supreme Court found standing for environmental group plaintiffs on "the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id.* at 184. This Court will not further attempt to discern what is in the minds of CSP's members regarding their motivation, as the evidence demonstrated in the declarations of CSP's members is sufficient to find environmental standing. The Court finds that the timing of CSP's formation does not undermine its standing.

Accordingly, Highpeak and EPA's motions to dismiss on standing grounds are denied.

II. CSP Timely Filed the Challenge to the WTR.

Highpeak and EPA further argue that, even if it has standing, CSP did not timely file the challenge to the WTR. CSP brought this challenge under the APA. The APA allows six years for a plaintiff to challenge a promulgated regulation "after the right of action first accrues." 28 U.S.C. § 2401(a). The WTR was promulgated in 2008, more than sixteen years ago, but that alone does not answer the question of timeliness. On July 1, 2024, the Supreme Court decided *Corner Post*, where the Court held that the statute of limitations under the APA does not accrue until the *plaintiff* is injured by the regulation. *Corner Post,* 144 S.Ct. at 2450. Here, CSP asserts that it could not have suffered injury until December 1, 2023, the date of CSP's formation. Since this challenge was filed on February 15, 2024, CSP alleges it was well within the relevant statute of limitations following the Supreme Court's holding in *Corner Post*.

In response, Highpeak and EPA argue that the "formation" of an environmental group like CSP, as opposed to a for-profit, regulated business, does not give rise to a new statute of limitations under *Corner Post.* Both argue that the corporation at issue in *Corner Post* had legitimate business interests and was formed for the purpose of conducting that business. As a result, the injury caused by the regulation in *Corner Post* could not have occurred until after the entity was formed and began conducting business, thus giving rise to a "new" statute of limitations. This, they argue, is entirely distinct from the formation of a *nonprofit group* to mount a fresh challenge to business practices and a regulation that have been in place for decades. Highpeak and EPA argue that this is especially true where, as here, CSP is bringing suit in a representative capacity, and any of its members (except perhaps Mr. Silver, who moved to the area from Arizona in 2019) could theoretically have brought this challenge within six years of 2008. Both defendants argue that the formation of a new not-for-profit environmental corporation should not give the members a second chance to bring a challenge a decade after their personal statute lapsed.

The Court finds no meaningful distinction between the pertinent facts of *Corner Post* and that of the instant case. Though the plaintiff in *Corner Post* was a for-profit business entity, there exists no reason why CSP should be held to a different standard as a nonprofit entity. It is undisputed that CSP did not exist until December 2023, and, like the plaintiffs in *Corner Post*, could not have brought this challenge until that date. That CSP is bringing the challenge in a representative capacity on behalf of its members does not alter that conclusion. Indeed, none of the members themselves are parties to the litigation, so the fact that they may not be able to timely bring this challenge is not dispositive. By analogy, any owner of the plaintiff corporation in *Corner Post* could hypothetically have entered into the business at an earlier date, but the Supreme Court nonetheless allowed them to form a corporation and challenge an existing

regulation many years after the regulation was promulgated. Any doubts the Court has are resolved by the fact that Mr. Silver is a member of CSP and moved to the area four years prior to the action being filed. Indeed, Mr. Silver could not have been injured until he moved to the area. The Court sees no reason to distinguish *Corner Post* on the basis that this matter involves an environmental nonprofit, and, therefore, deems CSP's challenge to the WTR as timely.

For the foregoing reasons, EPA's and Highpeak's motions to dismiss on timeliness grounds are denied.

III. The Water Transfers Rule was Validly Promulgated by EPA.

Having decided that CSP has standing and that its challenge to the WTR was timely filed, the next question is whether the WTR was validly promulgated by EPA. In short, CSP argues that the plain language of the CWA forbids *any* discharge of *any* pollutant into a water of the United States without complying with the Act, including obtaining a permit. *See* 33 U.S.C. § 1311. CSP argues that EPA cannot simply regulate away an entire category of discharges (i.e., water transfers) from the express requirements of the Act.

This question has been answered previously by multiple United States Courts of Appeals, but those answers have varied depending on the type of judicial review employed by those courts. Before the WTR was promulgated as a regulation, courts concluded that a water transfer between distinct waters of the United States *does* constitute a discharge of pollutants under the Act, and EPA's interpretation that those transfers did not require a permit was rejected. *See Dubois* v. *U.S. Dept. of Agriculture, et al.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) (*Catskill II*); *Miccosukee Tribe of Indians* v. *S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002), *vacated* by *S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 112 (2004). As explained by the Second Circuit, the term "addition" includes an addition of pollutants from one distinct body of water to another, and thus, the exclusion of those pollutants under the water transfers policy was inconsistent with the Act. *Catskill I*, 273 F.3d at 491.

Once the WTR was promulgated as a regulation, however, that view changed. The Second Circuit and Eleventh Circuit both upheld the WTR as a valid interpretation of the Act in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d Cir. 2017) (*Catskill III*) and *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) (*Friends I*), respectively. Those decisions, however, relied expressly on the deference formerly applicable under the Supreme Court's holding in *Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As urged by CSP, the decisions upholding the WTR are now called into question by the Supreme Court's decision in *Loper Bright*, which overturned *Chevron* and instructed courts to return to the less deferential standard of review laid out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under that standard, as discussed above, circuit courts had previously rejected the exclusion embodied in the WTR as inconsistent with the Act. Thus, the question before this Court is the degree of weight these somewhat contradictory cases should be given.

CSP contends that this Court should follow the reasoning and holdings of the earlier opinions such as *Catskill I* and *Catskill II*, wherein both courts rejected EPA's interpretation of the Act in the context of water transfers and applied the appropriate standard of review. Therefore, CSP maintains EPA's prior interpretation of the Act, and, consequently, the WTR itself, are no longer due judicial deference. However, *Loper Bright* emphasized that regulations upheld under the *Chevron* framework remain valid under *stare decisis* unless there is a "special justification" for revisiting those prior rulings. *Loper Bright*, 144 S.Ct. at 2273 ("...[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology."). Accordingly, CSP must establish that such a justification exists to overcome prior rulings like *Catskill III*, which upheld the WTR under *Chevron*. Despite the language of *Loper Bright*, CSP attempts to distinguish this statement as mere dicta and asserts that *Loper Bright* did not involve the precedent at issue here: circuit courts reviewing a regulation under *both Skidmore* and *Chevron* and holding the regulation's validity to be lacking under the former precedent.

While the Court is sympathetic to this argument, it reads *Loper Bright* as requiring respect for the decisions of the Second and Eleventh Circuits under *Chevron*. Though stated only in dicta, the Supreme Court's guidance that lower courts should not overturn settled regulations previously upheld under *Chevron* reflects the court's awareness of *Loper Bright*'s broader impact. *Loper Bright*, 144 S.Ct. at 2273. *See also*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (noting that "overturning a long-settled precedent … require[s] 'special justification,' not just an argument that the precedent was wrongly decided."). Even if the *Chevron* framework has significantly changed the interpretive methodologies used to analyze agency action by federal courts, "[p]rinciples of *stare decisis*, after all, 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). *See 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."). The plain language of *Loper Bright* evinces a clear intent that the holding be limited to regulations that have not been previously challenged and upheld. This Court feels bound by that interpretation and accordingly declines to revisit the WTR's validity here.[2]

[2] Alternatively, EPA and Highpeak argue that, even under the less deferential standard of *Skidmore*, the WTR should be upheld. There, the Supreme Court held that an agency's interpretation of ambiguous statutory language is entitled to respect based upon the "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. Though we need not reach the issue, the Court finds that EPA has demonstrated thoroughness in its reasoning, as EPA provided extensive consideration of environmental and statutory factors in its promulgation of the WTR, evidenced by its detailed rulemaking process. EPA's expertise in water transfers, along with the reasoning behind exempting certain transfers from CWA permitting requirements, reflects agency expertise. EPA has also been consistent in its defense of the WTR across four subsequent administrations. As such, even under *Skidmore* review, the WTR should be upheld.

For these reasons, we hold that the WTR was a valid exercise of EPA's authority under the CWA and consistent with the Act.

IV. Highpeak Must Still Obtain a Permit under the CWA.

Having upheld the WTR, the Court now turns to the final issue: whether Highpeak nevertheless needs a permit for its discharges into Crystal Stream. EPA and CSP argue that the final sentence of the WTR excludes Highpeak's discharge from the regulation's protection. Specifically, the WTR states that "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i) (2023). EPA and CSP argue that since the discharge from Highpeak's tunnel contains higher concentrations of the contaminants at issue (iron, manganese and TSS), pollutants are, by definition, "introduced" by the water transfer. Therefore, both contend a permit is needed for these pollutants, which are not exempt under the WTR.

Highpeak responds by noting that water passing through any tunnel inevitably picks up some amount of "new" pollutants, and, accordingly, this fact alone does not qualify as an "introduction" of pollutants under the exception to the WTR. According to Highpeak, any contrary interpretation of the WTR would eviscerate the entire rule, as water will always pick up some trace pollutants during transfer. Therefore, Highpeak contends the only reasonable interpretation of the rule is that the "introduction" of pollutants must result from human activity and not natural processes like erosion.

In resolving this dispute, the first question for the Court is whether, and to what extent, EPA's interpretation of the WTR is entitled to a higher level of respect than Highpeak's argument. An agency's interpretation of its own regulation has long been entitled to a high level of respect. Indeed, the Supreme Court has stated that "the ultimate criterion" in interpreting what a regulation means "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, the Supreme Court recently warned that respect for an agency's interpretation of its own regulation is only due where "the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019). The agency's interpretation must be reasonable, "within the zone of ambiguity the court has identified after employing all its interpretive tools," and the agency's interpretation of "the character and context" must entitle the interpretation "controlling weight." *Id*. at 575-76.

Highpeak challenges that standard of review, citing the Supreme Court's decision in *Loper Bright*. It argues that interpreting a regulation, like a statute, is a question of law solely for the courts, warranting at most a *Skidmore* analysis. Although *Loper Bright* did not directly address this issue, its reasoning seems relevant. Citing the foundational case of *Marbury v. Madison*, 1 Cranch 137 (1803), the Supreme Court in *Loper Bright* noted that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright*, 144 S.Ct. at 2257. Therefore, Highpeak contends deference to EPA's interpretation of its own regulation is similarly inappropriate.

The Court finds Highpeak's argument unpersuasive. There is a significant difference between interpreting a statute drafted by Congress and a regulation drafted by an agency. While both involve legal interpretation, the fact that the agency drafted the regulation itself necessarily gives that agency's interpretation more weight. Thus, something more than mere *Skidmore* respect, which applies to statutory interpretation by an agency, is appropriate in the instant case. Notwithstanding that *Skidmore* and *Seminole Rock* were decided only a year apart, this Court understands that, going forward, the Supreme Court is unlikely to use the term "controlling weight" in the context of assessing an agency's interpretation of law. Nevertheless, in the absence of the Supreme Court altering or overturning *Seminole Rock* and *Auer*, this Court must give respect to EPA's interpretation.

With that respect in mind, the Court finds EPA's and CSP's interpretation to be reasonable and consistent with the language of the WTR. According to the allegations in the Complaint, which this Court accepts as true for the purposes of these motions, Highpeak elected to carve the tunnel at issue through rock and soil and only partially used metal conduits. As EPA stated in promulgating the final rule:

> Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required.

NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,705 (June 13, 2008).

In further support of this argument, CSP argues pollutants were "introduced" due to Highpeak's poor construction and maintenance of the tunnel. By choosing not to build a pipe through the length of the tunnel or installing another impermeable conduit, Highpeak allowed more than trace amounts of pollutants to enter the water during transfer. As set forth above, CSP's sampling shows approximately a 2-3% increase in concentrations of all three contaminants of concern. Thus, Highpeak "introduced" pollutants during its water transfer activity, bringing the discharge outside of the protection of the WTR. After discovery, Highpeak may attempt to refute allegations of sloppy construction, but, for the purposes of this motion, these allegations are sufficient to exclude the discharge from the scope of the WTR. This conclusion aligns with EPA's interpretation, which is entitled to respect in the instant case.

For these reasons, Highpeak's motion to dismiss the citizen suit claim is denied.

CONCLUSION

It is therefore **ORDERED** that:

EPA's and Highpeak's motions to dismiss CSP's challenge to the Water Transfers Rule are **GRANTED**.

Highpeak's motion to dismiss CSP's Clean Water Act citizen suit cause of action is **DENIED**.

IT IS SO ORDERED.

This 1st day of August, 2024.
T. Douglas Bowman
United States District Judge

CSP COMPLAINT EXHIBIT A

Declaration of Cynthia Jones

DECLARATION OF CYNTHIA JONES IN SUPPORT OF CRYSTAL STREAM PRESERVATIONISTS

1. I am over the age of eighteen (18), am competent to testify about the following matters, and would testify about these matters if called upon to do so.

2. I submit this declaration in support of the Complaint of Plaintiff Crystal Stream Preservationists ("CSP") against Highpeak Tubes, Inc. ("Highpeak") and the United States Environmental Protection Agency ("EPA").

3. I am a member and Secretary of CSP, a nonprofit organization dedicated to saving and preserving the Crystal Stream ("the Stream") in the State of New Union. I have been a member of CSP since December 1, 2023.

4. CSP was formed with the express purpose of protecting the Stream, and its mission is as follows: "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." CSP consists of 13 members and includes a President, Vice President and Secretary. I serve as Secretary for CSP.

5. I reside at 771 Lark Road, in the Town of Lexville. I have lived at this address since February of 1997, when my family moved here. My house is approximately 400 yards from Crystal Stream Park ("the Park").

6. The Park sits next to the Stream and has a walking trail right along the edge of the Stream. The Highpeak tube run operates in the same area of the Stream.

7. Throughout my time in Rexville, I have regularly walked along the Stream and enjoy its crystal clear color and purity.

8. Recently, I have learned that Highpeak has been allowing a discharge of polluted water into the Stream. The discharge and the suspended solids and metals in the Stream are upsetting to me, as they make the otherwise clear water cloudy.

9. I am very concerned about contamination from toxins and metals, including iron and manganese. I understand that these are added to the Stream by Highpeak's discharge.

10. My ability to enjoy the Stream has significantly diminished since learning about the pollutants introduced by Highpeak's discharge, which I first heard about in approximately 2020.

11. I joined CSP to try to stop this discharge.

12. If not for Highpeak's discharge, I would recreate even more frequently on the Stream. I would also like to walk directly in the Stream, but am afraid to walk in the Stream due to the pollution.

13. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 13, 2023

s/ Cynthia Jones
Cynthia Jones

CSP COMPLAINT EXHIBIT B

Declaration of Jonathan Silver

DECLARATION OF JONATHAN SILVER IN SUPPORT OF CRYSTAL STREAM PRESERVATIONISTS

1. I am over the age of eighteen (18), am competent to testify about the following matters, and would testify about these matters if called upon to do so.

2. I submit this declaration in support of the Complaint of Plaintiff Crystal Stream Preservationists ("CSP") against Highpeak Tubes, Inc. ("Highpeak") and the United States Environmental Protection Agency ("EPA").

3. I am a member of CSP, a nonprofit organization dedicated to saving and preserving the Crystal Stream ("the Stream") in the State of New Union. I have been a member of CSP since December 3, 2023.

4. I reside at 243 S. Eagle St., in the Town of Lexville. I moved to this address from Phoenix, Arizona, in August of 2019. My house is approximately one half mile from Crystal Stream Park, which is a public park alongside the Stream with a walking trail. The trail runs along the Stream for 2 miles. The Highpeak Tube run operates in the same area of the Stream.

5. Throughout my time in Rexville, I have regularly walked my dogs and walked with my children along the Stream. I am deeply concerned about the presence of toxic chemicals polluting the water.

6. Since moving to the area, I have observed that the water in the Stream occasionally appears cloudy. In the days leading up to this Complaint being filed, I learned through members of CSP that this cloudiness, at least in part, is due to a discharge from Cloudy Lake. I also learned that Highpeak causes this discharge.

7. I am now hesitant to allow my dogs to drink from the Stream due to the pollutants, which I understand include metals. I am concerned with pollutants entering the Stream and making it cloudy.

8. I joined CSP to try to stop this discharge.

9. If not for Highpeak's discharge, I would recreate more frequently on the Stream. I would also allow my dogs to drink from the Stream.

10. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 12, 2023

s/ Jonathan Silver
Jonathan Silver