



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:

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1. CSP had standing to challenge a regulation (NPDES Water

UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW UNION

CRYSTAL STREAM PRESERVATIONISTS, INC.,

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

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

“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



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.<sup>1</sup> Conversely, EPA agreed with CSP that, even if this Court should uphold the WTR, Highpeak nonetheless needs to obtain a permit for the

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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

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 economic and aesthetic harms.” 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.

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.



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 on the basis that this matter involves an environmental nonprofit, and,

CSP contends that this Court should follow the reasoning and holdings of the earlier opinions such as *Chertoff v. INS* and *INS v. St. Cyr*, 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, *Chertoff v. INS* emphasized that regulations upheld under the Chevron framework remain valid under Chevron unless there is a "special justification" for revisiting those prior rulings. *Chertoff v. INS*, 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 review despite our change in interpretive methodology."). Accordingly, CSP must establish that such a justification exists to overcome prior rulings like *Chertoff v. INS*, which upheld the WTR under Chevron. Despite the language of *Chertoff v. INS*, CSP attempts to distinguish this statement as mere dicta and asserts that *Chertoff v. INS* did not involve the precedent at issue here: circuit courts reviewing a regulation under Chevron and holding the regulation's validity to be lacking under the former precedent.

While the Court is sympathetic to this argument, it reads *Chertoff v. INS* 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 *Chertoff v. INS*'s broader impact. *Chertoff v. INS*, 144 S.Ct. at 2273. *Chertoff v. INS*, 144 S.Ct. at 2273, 575 U.S. 258, 266 (2014) (noting that

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For these reasons, we hold that the WTR was a

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 respect, which applies to statutory interpretation by an agency, is appropriate in the instant case. Notwithstanding that \_\_\_\_\_ and \_\_\_\_\_ 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 \_\_\_\_\_ and \_\_\_\_\_, 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 support 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

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

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 Rexville. I have lived at this

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

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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 Rexville. 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