
IN THE 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

APPELLEE'S ANSWERING BRIEF

Attorneys for Appellee
United States Environmental Protection Agency

QUESTIONS 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 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?

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the District Court for the District of New Union upon granting a petition for a writ of certiorari pursuant to 33 U.S.C. § 1251 and 5 U.S.C. § 551.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*, including the validity of an agency's interpretation of its own regulations. *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 500 (2004). When an agency interprets its own regulation, the interpretation is subject to deference under *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

STATEMENT OF THE CASE

1. Statement of Facts

Plaintiff-Appellant-Cross-Appellee Crystal Stream Preservationists, Inc. ("CSP") sued Highpeak Tubes, Inc. ("Highpeak") under the Clean Water Act ("CWA" or "the Act") for discharging pollutants into Crystal Stream without a permit. R. at 3. CSP also sued the United States Environmental Protection Agency ("EPA") under the Administrative Procedure Act ("APA"), challenging the Agency's Water Transfers Rule ("WTR"). R. at 3.

For over three decades, Highpeak has operated a recreational tubing business in Rexville, New Union, using water from Crystal Stream to facilitate tubing runs. R. at 4. To increase stream flow, Highpeak utilizes a four-foot-wide, 100-yard-long tunnel made of an iron pipe and carved rock, equipped with manual valves that allows them to direct water from Cloudy Lake into Crystal Stream. R. at 4. Highpeak has "neither had nor sought" a National Pollution Discharge Elimination System ("NPDES") permit for its discharge. R. at 4.

CSP is a nonprofit organization dedicated to preventing pollution and safeguarding Crystal Stream's environmental and aesthetic value. R. at 4. All thirteen of CSP's members, excluding Jonathan Silver, who moved to Rexville in 2019, have lived in Rexville for more than fifteen years. R. at 4. CSP Member Cynthia Jones and Silver regularly use the trails alongside the stream for recreation. R. at 14, 16. Jones and Silver have noticed the water of the stream to be visibly cloudy and claim their ability to enjoy the stream has "significantly diminished" since learning about Highpeak's water transfers. R. at 14, 16. Both Jones and Silver, fearing exposure to the pollutants introduced by Highpeak, have modified how they use the trails along the stream and refrain from touching the water. R. at 16. CSP's water sampling shows concentrations of iron, manganese, and total suspended solids ("TSS") are 2–3% higher at the tunnel's outfall in Crystal Stream than the intake at Cloudy Lake. R. at 4.

2. Procedural History

On December 15, 2023, CSP sent a CWA notice of intent to sue ("NOIS") to Highpeak and EPA, alleging that the tunnel was a point source under the CWA because it discharges pollutants into Crystal Stream. R. at 4. CSP also alleged that the WTR was not a validly promulgated regulation, and even if it was, that the pollutants introduced during the transfer process took the discharge out of the exemption. R. at 5. Highpeak did not respond to the NOIS on the merits, so CSP filed its citizen suit on February 15, 2024. R. at 5.

Highpeak moved to dismiss the two claims for CSP's lack of standing, untimeliness, and failure to state a cause of action for either claim. R. at 5. EPA moved to dismiss the WTR challenge on the same grounds, but claimed that Highpeak required an NPDES permit. R. at 6.

Before ruling, the court below awaited the Supreme Court decisions in *Loper Bright Enterprises v. Raimondo*, and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*. *Loper Bright*, 144 S. Ct. 2244 (2024); *Corner Post*, 144 S. Ct. 2440 (2024); R. at 6.

On August 1, 2024, the district court granted EPA's and Highpeak's motion to dismiss CSP's WTR challenge but denied Highpeak's motion to dismiss CSP's CWA citizen suit. R. at 2, 12. The district court held that: (1) CSP had standing for the WTR challenge and citizen suit; (2) CSP's WTR challenge was timely filed; (3) the WTR is not arbitrary, capricious, or contrary to law; and (4) Highpeak's discharge was outside of the WTR's scope, enabling the citizen suit. R. at 2. CSP appealed the third holding, EPA appealed the first and second holdings, and Highpeak appealed the first, second, and fourth holdings. R. at 2. The United States Court of Appeals for the Twelfth Circuit granted leave to appeal on August 1, 2024. R. at 2.

SUMMARY OF ARGUMENT

This Court should affirm the district court's decisions to dismiss CSP's challenge to the Water Transfers Rule and deny Highpeak's motion to dismiss CSP's Clean Water Act citizen suit.

First, CSP has established standing in its citizen suit under the CWA because it sufficiently alleges an injury in fact. However, CSP fails to establish standing in its regulatory challenge because its claim does not fall within the WTR's zone of interest.

Second, CSP untimely filed its WTR challenge beyond the CWA 120-day limitation period. And even if the APA's six-year statute of limitations applied, CSP's regulatory challenge would still be untimely. Under *Corner Post*, the statute of limitations for regulatory challenges begins running after the right to file an action first accrues. However, this default rule will be superseded by specified statutory timing provisions. First accrual is in turn based upon the WTR's original promulgation, over fifteen years ago. Even under the APA's statute of limitations, the timing of CSP's injury indicates that the statute of limitations has run.

Third, even if this Court were to find CSP had standing for its regulatory challenge, the WTR would remain valid because the CWA has never contemplated water transfers as pollutant discharges, yet has always promoted water resource management. Tough courts have held that the WTR was validly promulgated under *Chevron* deference, the overruling of *Chevron* under *Loper Bright* does not invalidate the regulation. This is because CSP cannot present any "special justification" required to overcome *stare decisis*, and even if the Court were to revisit the WTR's validity, the Court would interpret the CWA the same way the EPA does.

Fourth, regardless of CSP's standing or the validity of the WTR, Highpeak's discharge requires an NPDES permit because introduction of new pollutants in the course of the water transfer are outside the scope of the WTR. Highpeak's discharge, which adds pollutants to

Crystal Stream, does not constitute a WTR exclusion. Ultimately, the Court should defer to EPA's reasonable interpretation of ambiguity within its own regulation under *Seminole Rock* and *Auer*, especially when the regulation falls within the *Kisor* zone of ambiguity.

For these reasons, this Court should affirm dismissal of CSP's regulatory challenge and denial of Highpeak's motion to dismiss the citizen suit.

ARGUMENT

I. THE DISTRICT COURT PARTIALLY ERRED IN ITS HOLDING BECAUSE WHILE CSP HAS STANDING TO SUE IN ITS CITIZEN SUIT, IT DOES NOT HAVE STANDING TO BRING A REGULATORY CHALLENGE TO THE WTR DUE TO FALLING OUTSIDE THE SCOPE OF WTR'S ZONE OF INTEREST.

CSP has standing to bring its citizen suit under the Clean Water Act because its members have sufficiently pled an injury in fact and the organization has satisfied organizational standing's three-prong test. However, the Twelfth Circuit should partially reverse the district court's decision and hold that CSP has no standing to bring its challenge to the Water Transfers Rule, because despite establishing injury, the claim does not fall within WTR's zone of interest.

Article III of the Constitution grants courts the power to adjudicate only actual ongoing cases or controversies. U.S. Const. art. III. To invoke jurisdiction, a party seeking review must establish standing, entitling litigants who have a "sufficient stake in an otherwise judiciable controversy to obtain judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). Standing requires a plaintiff to show: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury is redressable by judicial intervention. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party seeking to establish jurisdiction bears the burden of satisfying all elements. *Id.* at 561.

The APA affords a right to judicial review to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a

relevant statute." 5 U.S.C. § 702. An APA claim may be brought against the United States or one of its agencies. 5 U.S.C. § 702. Under the APA, a litigant must plead that (1) the challenged action caused them an injury in fact; and (2) the alleged injury was within the "zone of interest" protected or regulated by the statute that is being challenged. *Sierra Club*, 405 U.S. at 733.

To survive a motion to dismiss, the complaint must contain statements, accepted as true, that show a pleader is entitled to relief. Fed. R. Civ. Pro. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). So long as a plaintiff's allegations raise the relief above a speculative level, a claim will be ruled to have "facial plausibility" where factual contentions allow the court to "draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, CSP only has standing to bring its CWA citizen suit because its APA claims do not fall within the WTR's zone of interest.

C. CSP Has, at Minimum, Established Article III Standing to Receive Judicial Review for Its Citizen Suit, Including a Showing of Injury in Fact.

A requisite showing of injury by the plaintiff serves as a mechanism to ensure that review will be granted to "those who have a *direct* stake in the outcome." *Sierra Club*, 405 U.S. at 739 (emphasis added). Courts may review CWA citizen suits so long as they are initiated by a "citizen," or "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a),(g); *Friends of the Earth v. Laidlaw Env't Services (TOC)*, 528 U.S. 167, 174 (2000). Similarly, in an APA challenge, a litigant may not obtain judicial review "unless and until [the party] suffers an injury." *Corner Post*, 144 S. Ct. at 2449. A plaintiff must have suffered an "injury in fact," or "an invasion of a legally protected interest" that is (a) concrete and particularized, and (b) actual or imminent." *Defenders of Wildlife*, 504 U.S. at 555.

The threshold question of standing is "whether an individual can show that [they have] been injured in [their] use of a particular area," based on an alleged violation of the statute.

Ecological Rts. Found. v. Pac. Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000). An injury must be *de facto* concrete, or otherwise actually exist. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Furthermore, the test requires injury to be "particularized," where the plaintiff is affected in a "personal and individual way." *Id.* at 339. Particularity may be adequately alleged when a plaintiff indicates that "they use the affected area [in question]" and are part of the class of persons "for whom . . . aesthetic and recreational values of the area will be lessened" due to the challenged activity. *See Friends of the Earth*, 528 U.S. at 183. [1] Declarations attesting recreational harm to plaintiffs may suffice in documenting an injury in fact, because a relevant showing of standing for purposes of Article III is "not injury to the environment, but injury to the plaintiff." *Id.* at 181–83. [2]

Here, CSP's alleged harm involves interests expressly articulated in the text of the CWA, satisfying the concreteness inquiry. Congress declared a list of interests and policies protected under the Act, including a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited," in which violation may expressly grant a citizen's right to bring suit. 33 U.S.C. § 1251(a)(3); 33 U.S.C. § 1365(a)(1). CSP's actual injury is the curtailing of its members' recreational activities in response to Highpeak's pollutant discharge, which not only directly violated the CWA, but also deprived members of statutory protections afforded under the WTR. R. at 14, 16. Sworn statements, like CSP's, adequately document a plaintiff's firsthand response

[1] *See Defenders of Wildlife*, 504 U.S. at 562–63. ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

[2] *See Friends of the Earth*, 528 U.S. at 169. ("To insist upon [injury to the environment] rather than [injury to the plaintiff] as part of the standing inquiry . . . raise[s] the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.").

to the alleged environmental harm and declare a keen interest in not only maintaining Crystal Stream as a natural resource, but in preserving their interest in using Crystal Stream recreationally for years to come. R. at 14, 16. CSP's declarations therefore satisfy the particularity prong of injury in fact because members aver to reduced personal enjoyment of Crystal Lake as a response to Highpeak's pollutant discharge.

1. In determining whether a threat is actual or imminent, courts will consider injuries that are intermittent or continuous under the CWA.

Under the CWA, a litigant may plead an increased risk of harm arising out of a statutory violation to show the harm is imminent. *Ecological Rts. Found.*, 230 F.3d at 1151. A plaintiff's averred reluctance recreate, based on concerns about the effects of a defendant's pollutant discharge may establish an imminent injury, even without scientific certainty. *Id.* at 1152.

The most natural reading of "to be in violation" in the CWA's citizen suit provision is that a plaintiff must assert either a continuous or intermittent violation. 33 U.S.C. § 1365(a)(1); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). In *Gwaltney*, the Supreme Court held that while a citizen may not bring a claim for wholly past violations, a plaintiff need only allege a "reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57, 64. The Court further highlighted that the purpose of the Act's sixty-day notice requirement is to give opportunity for the alleged violator "to bring itself into complete compliance with the Act," rendering a citizen suit unnecessary. *Id.* at 60. Ultimately, in a CWA citizen suit, a court will confer jurisdiction where there is a "good-faith allegation of continuous or intermittent violation." *Id.* at 64.

The injury raised by CSP supports a stronger finding for actual harm than in *Ecological Rights Foundation*, since CSP's allegations include research supporting its claims. R. at 5. Unlike *Ecological Rights Foundation*, CSP's contention that Highpeak's discharge constituted a

CWA violation was supported by sampling results obtained by the group, which go *beyond* what a court has recognized as sufficient for a showing of an imminent threat to a plaintiff from a CWA violation. R. at 5. Additionally, as in *Gwaltney*, CSP's fear of harm by Highpeak's routine discharge exemplify the same prospective interest a plaintiff is required to plead under 33 U.S.C. § 1365. CSP will likely find itself injured in the future due to Highpeak's continued business operations, which is injury not from an entirely past violation, but more than speculative intermittent injury. R. at 4. Moreover, CSP's NOIS was to give Highpeak an opportunity to ensure compliance, as a result of its routine violation. Accordingly, CSP has sufficiently plead an injury that is not only concrete and particular, but that also places its members in a position of imminent harm due to Highpeak's pollutant discharge.

2. CSP meets the requisite requirements to seek judicial review under organizational standing.

An organization may establish standing when seeking judicial review "solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Organizational standing is satisfied when (1) "members would otherwise have standing to sue in their own right"; (2) the interests at stake are "germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181. The first prong of organizational standing amounts to an *injury in fact*, in which an association may seek judicial relief for injuries it has sustained or, in the absence of injury to itself, assert the rights of its members in a representational capacity. *Warth*, 422 U.S. at 511. In claiming organizational standing, the

association must allege that at least one of its members is suffering immediate or threatened injury as a result of the challenged action, triggering an injury in fact analysis. *Id.* at 511. [3]

Claims "central to the [organization's] purpose of protecting and enhancing" members' interest may satisfy the germaneness required for organizational standing. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). In *Hunt*, the Supreme Court ruled that a nexus between the organization's activities and benefits enjoyed by its members will inform a court on whether the litigation sought by the plaintiff organization pursues its primary purpose to protect and promote membership interests. *Id.* at 344. In addressing the third prong, *Hunt* emphasized that the relief sought by a plaintiff organization may determine whether individual member participation would be necessary. *Id.* at 343. A court can reasonably suppose that declaratory, injunctive, or some sort of other equitable relief would be for the direct benefit of injured members, giving rise to a court's jurisdictional power. *Id.*

As seen in *Warth*, CSP members have sufficiently alleged an injury in fact to afford the nonprofit organizational standing. As discussed above, members of CSP have articulated a direct and personal injury arising from Highpeak's discharge, in which they imminently fear the health and environmental dangers that may arise from pollutant contamination. CSP, as a forum for its members to advance their collective interests, adequately represents its members through its CWA suit. CSP's mission is rooted in the preservation of Crystal Stream for "environmental and aesthetic reasons," the same interests served in this litigation. R. at 4. Nor does the relief sought require individual CSP member participation, because the nonprofit is demanding an injunction that Highpeak obtain a NPDES permit. R. at 6. This broad injunctive relief leads to a reasonable

[3] *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) ("We can give vitality . . . only by a generous construction which gives standing to sue.").

presumption of direct benefit to CSP members. Through germane litigation, CSP can ensure the future preservation of Crystal Stream, provided Highpeak obtains an NPDES permit.

D. CSP Does Not Establish Sufficient Standing For Its Regulatory Challenge of the WTR Because Its Zone of Interest Conferred Is Not Satisfied.

Under an APA claim, an injury in fact must fall within the "zone of interest" enumerated by the relevant regulation, violations of which form the complaint's legal basis. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). [4] The relevant statute's zone of interest may reflect aesthetic, conservational, recreational, and economic values. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970).

The breadth of the zone of interest varies by the law at issue, in which the language of a particular provision limits the scope of parties that may obtain judicial review. *Bennett v. Spear*, 520 U.S. 154, 163 (1997). Standing involves both constitutional limits on federal court jurisdiction and prudential limitations on its exercise. *Id.* at 162. But unlike constitutional limits, self-imposed judicial limits on the exercise of jurisdiction may be modified or abrogated by Congress. *Id.* In *Bennett*, a suit brought by two irrigation districts alleged an APA violation premised on an Endangered Species Act ("ESA") provision requiring agencies to use the best scientific and commercial data available in pursuing the ESA's objectives. *Id.* at 160. Whether a plaintiff has an interest protected by the relevant statute requires an inquiry into the alleged violations of the substantive provisions that "serve as the gravamen of the complaint," not the

[4] *See Data Processing*, 397 U.S. at 153 ("The question of standing is . . . whether the interest sought to be protected by the complainant is arguably within the zone of interests *to be protected or regulated by the statute*[.]").

overall purpose of the statute in question. *Id.* at 175. [5] The Supreme Court stated that beyond mere conservation values, the ESA provision intended to avoid the same kind of "needless economic dislocation" alleged by the plaintiffs, and thus held that the APA suit fell within the zone of interest protected by the relevant ESA provisions. *Id.* at 177.

Despite the potential breath of the zone of interest, courts will still foreclose judicial relief to a party whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute" that a court can reasonably assume Congress did not intend to permit such a suit. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). To determine a zone of interest, the Supreme Court in *Lexmark* held that it would consider whether the plaintiff's claim was encompassed by the "legislatively conferred cause[s] of action" incorporated by the relevant statute. 572 U.S. at 127. Identifying the statute's zone of interest "requires no guesswork" when a statement of the statute's purpose is imbedded in its provisions. *Id.* at 131. Thus, a court cannot apply its own policy judgment over the statute's enumerated policies, when determining whether a claim falls within the statute's zone of interest. *Id.* at 128.

Under the CWA, Congress restricted the kind of plaintiffs that may bring a regulatory challenge to "[any] person . . . having an interest which is or may be adversely affected" by violation of the statute. 33 U.S.C. § 1365(g). These interests are confined to CSP's claims in its challenge to the WTR, which CSP alleges is inconsistent with the statutory language of the CWA. R. at 5. For purposes of a facial challenge under the WTR, the zone of interest protected under the regulation is for those potential violations that involve water distribution. While the statutory language is not exhaustive of the kinds of plaintiffs applicable to the WTR, the general

[5] *See Nat'l Wildlife Fed'n*, 497 U.S. at 883 ("plaintiff must establish that the injury he complains of . . . falls within the 'zone of interest' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint*.") (emphasis added).

purpose of the WTR is to facilitate public water supply, irrigation, and environmental restoration. 73 Fed. Reg. 115 33,697 (2008). CSP does not assert participation in these kinds of activities, but instead pleads merely conservational interests in protecting Crystal Stream. R. at 4. While CWA's main purpose is to prohibit illegal pollutant discharges, the WTR is an exclusion that serves water distribution needs. 33 U.S.C. § 1251; 40 C.F.R. § 122.3(i).

Analyzing the CWA's own detailed declaration of goals and policies leads to a similar conclusion as *Lexmark* about the WTR's zone of interest. While in *Lexmark*, the Supreme Court applied the zone of interest test within the framework of a trademark statute, the zone of interest limitation applies to all statutorily created causes of action. 572 U.S. at 129; *Bennett*, 520 U.S. at 163; *see also Data Processing*, 397 U.S. at 154. While Congress expressly recognized the need to prevent and eliminate pollution through the CWA, the WTR's promulgation involves a subset of agency administration that "conveys or connects waters" without subjecting the transfer to "intervening industrial, municipal, or commercial use." 33 U.S.C. § 1251(b); 40 C.F.R. § 122.3(i). While intended to support the CWA's overall value in protecting water supply management, the zone of interest enforced under the WTR does not apply to CSP because CSP does not allege injury regarding that end. Instead, CSP's contentions relay the individual harms sustained by citizens that recreationally participate in Crystal Stream and its surrounding area. R. at 14, 16.

Even if CSP did not have standing to bring its CWA citizen suit, EPA would still independently pursue action against Highpeak for its discharge falling outside the scope of the WTR, and thus requiring an NPDES permit. 33 U.S.C. § 1319(b).

II. CSP DID NOT TIMELY FILE ITS REGULATORY CHALLENGE BECAUSE THE APA'S SIX YEAR STATUTE OF LIMITATIONS IS SUPERSEDED BY THE WTR'S SPECIFIED LIMITATION PERIOD.

Under an APA claim, it is generally held that litigation is barred unless the complaint is filed within six years *after* the right of action first accrues. 28 U.S.C. § 2401(a). The applicable six-year statute of limitations is generally applied to all suits against the United States and its agents, *unless* "the timing provision of a more specific statute displaces it." *Corner Post,* 144 S. Ct. at 2450. Here, the Clean Water Act expressly imposes its own deadline to challenge the validity of its promulgated regulations. Plaintiff here has filed drastically beyond this deadline. Even if the APA's six-year statute of limitation applies to CSP's challenge against the Water Transfers Rule's validity, the organization's claim has expired.

A. The WTR Only Permits Administrative Challenges to Be Brought for Judicial Review Within 120 Days After the Decision Is Considered Issued.

While the APA's standard rule may be displaced by a shorter limitation period, a court will not do so absent a statutory limitation period. *Id.* at 2452. In *Corner Post*, the Supreme Court addressed the issue of when a plaintiff may bring a facial challenge to a final agency action under the APA. *Id.* at 2449. The Supreme Court highlighted Congress's skill to depart from APA's default rule when creating a statutory limitation period. *Id.* at 2452. As a matter of policy, statutes that set a filing deadline from the "entry" of the agency order reflect Congress's intent to free a defendant from liability after the legislatively determined period of time. *Id.*

While a statute of limitations is measured against a claim's accrual based on "when the injury occurred or was discovered," a statute of repose, on the other hand, "puts an outer limit on the right to bring a civil action." *CTS Corp v. Waldburger*, 573 U.S. 1, 8 (2014). A limit imposed by a statute of repose is measured by the "date of the last culpable act or omission of the defendant." *Id.* at 8. In *CTS Corp*, the Supreme Court differentiated between the application of a state's statute of repose and a federal statute of limitations, after plaintiffs brought a claim against a former manufacturing plant under a federal statute. 573 U.S. at 5, 7. The Supreme

Court emphasized that while both a statute of limitations and a statute of repose encourage timely filings, a statute of repose reflects the legislative judgment that as a matter of policy, "there should be a specific time beyond which a defendant should no longer be subjected to the protracted liability." *Id.* at 9. Moreover, it is not dispositive whether a federal statute uses the precise language of "statute of repose" when defining its limitation period. *Id.* at 13. Rather, the term "statute of limitations," even with its precise meaning, may refer to any provision restricting the time in which a plaintiff must bring suit, including in cases where Congress is enacting statues of repose. *Id.* A statute of repose is therefore not based on a plaintiff's injury, but instead "defines the scope of the cause of action." *Id.* at 16–17.

As highlighted by *Corner Post*, CWA's express limitation period for judicial review of an Administrator's final action is finality-focused, embodying Congress's judgment that a defendant, at some point, should be free from liability. Here, the statutory language of the CWA imposes its own limitation period for challenges arising out of an agency's promulgated regulation. 33 U.S.C. § 1369(b)(1). Like *CTS Corp.*, the Act's limitation period need not expressly call itself a "statute of repose" to function as one. CWA's limitation period for review of the Administrator's action triggers when agency action becomes final and runs for 120 days from the date of such issuance. 33 U.S.C. § 1369(b)(1). The Act's clear restriction on when a plaintiff may bring a regulatory challenge is also incorporated in the WTR's final rule. EPA plainly provided that judicial review of the rule's promulgation would only be permitted "within 120 days after the decision is considered issued," with the effective issuance date set as August 12, 2008. 73 Fed. Reg. 115 at 33,697. CSP's regulatory challenge comes roughly sixteen years too late, as the WTR's specified limitation period displaces the APA's default filing provisions.

B. Even If CSP's Challenge to the WTR Falls Under the APA's Default Six-Year Statute of Limitations, CSP's Claims Have Expired.

The APA embraces a plaintiff-centric traditional rule, in which the statute of limitations only begins to run when a plaintiff has a "complete and present cause of action." 28 U.S.C. § 2401(a); *Corner Post*, 144 S.Ct. at 2452. For a plaintiff to have a complete and present cause of action, the litigant must suffer an injury from final agency action, triggering the statute of limitations period to only when injury has been sustained. *Id.* Within the text of the APA, a right to bring a claim against the United States first "accrues" when "it comes into existence," meaning the statute of limitations first begins "on [the] date that damage is sustained." *Id.* at 2451. This is distinguishable from commencing the statute of limitations on the "date when causes are set in motion which ultimately produce injury." *Id.*

In *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, the Supreme Court examined when a six-year statute of limitations triggered on a plaintiff's right to sue its employer for multiple violations spanning almost a decade. 552 U.S. 192, 195 (1997). Like the APA, the six-year statute of limitations in *Bay Area Laundry* began when a plaintiff had "a complete and present cause of action." *Id.* at 201. While the plaintiff had timely filed its action for those violations that were within the six-year limitation period, the Court's ruling was limited to the statute's installment obligation provision, which created a separate cause of action for each violation, and therefore multiple limitation periods. *Id.*

Here, the CWA does not impose its own statutory limitation period for regulatory challenges and instead defaults to the APA's filing provision. Unlike *Bay Area Laundry*, the CWA does not contain any provisions that impose a separate limitation period for every statutory violation incurred. Instead, for the reasons described above, in the context of the CWA, intermittent violations sustained by a plaintiff will are interpreted as a single injury. CSP's regulatory challenge is further time-barred because a right of action first accrues at the time of

"final agency action" and when an injury first arises. 5 U.S.C. § 702. EPA's final agency action for the WTR officially issued in 2008, roughly sixteen years before CSP brought its regulatory challenge. 73 Fed. Reg. 115 at 33,697. Additionally, Highpeak has continued to discharge water into Crystal Stream via its tunnel connecting Cloudy Lake since 1992. R. at 4. While residing in Rexville, or even near Crystal Stream, is insufficient to show regular use of the Stream, declarations provided on behalf of the nonprofit attest to decades-long enjoyment of its recreational and aesthetic values. R. at 14. Within that time, CSP members were in a position to bring a regulatory challenge, assuming their injuries fell within the WTR's zone of interest, and yet no challenges were brought. R. at 4. Moreover, even if CSP's regulatory challenge was timely, the challenge fails under the zone of interest test. Thus, the Twelfth Circuit should affirm the district court's order and dismiss CSP's regulatory challenge of the Water Transfers Rule.

III. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE WTR WAS A VALID REGULATION UNDER THE CWA, BECAUSE THE ACT DOES NOT INTEND TO REGULATE WATER TRANSFERS AS POLLUTANT DISCHARGES BUT TO PROMOTE WATER RESOURCE MANAGEMENT.

The water transfer rule is valid under the Clean Water Act because excluding water transfers from regulation facilitates state water management and focuses attention on the actual threats to national water quality. While the primary goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity" of national waters, the Act also aims to "protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and *enhancement*) of land and water resources." 33 U.S.C §§ 1251(a), 1251(b) (emphasis added). 33 U.S.C §§ 1251(g) also specifically subsumes the Act to state water resource management, mandating:

> "It is the policy of Congress that the authority of each state to allocate water within its jurisdiction shall not be . . . impaired by this chapter. . . . Federal agencies shall cooperate

with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Because water transfers are that very solution, EPA's Water Transfers Rule excluding them from unnecessary regulation should be upheld as a valid means to achieve the Act's dual ends.

Illegal "discharge of a pollutant" is defined as "any addition of any pollutant *to* navigable waters *from* any point source." 38 U.S.C. § 1362(12) (emphasis added). However, the EPA Administrator may issue a permit for such discharge *if* they meet "all applicable requirements," *or* "such conditions as the Administrator determines are necessary to carry out the provisions of [the Clean Water Act]." *Id.* § 1342(a)(1). The statutory text thus expressly details CWA goals and Administrator discretion in regulating pollutant discharges towards achieving those goals.

The CWA's legislative history sheds some light on the type of pollutant discharges the Act intended to address. From the Federal Water Pollution Control Act of 1948 to the inception of the NPDES program in 1972 to the CWA today, the Act's primary target has always been industrial and municipal point sources. Moreover, Congress has always contemplated that water protection and water management are not mutually exclusive but rather cooperative efforts. [6]

Finally, developing CWA jurisprudence has supported these interpretations of the statute and provided more context on what waters can be polluted and what sources can pollute. These evolving legal doctrines show how consideration of EPA expertise leads to faithful execution of the CWA. For all these reasons, the WTR is thus a valid regulatory promulgation under the Act.

A. <u>A Water Transfer Cannot Be a Pollutant "Addition," when a Direct Transfer Results in a Single Body of Two "Waters of the United States," Neither of Which Are a Discharging Point Source Regulated by the CWA</u>.

[6] *See, e.g.*, 80 Cong. Ch. 758, June 30, 1948, 62 Stat. 1155 (". . . policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution . . . to support and aid technical research to devise and perfect methods of treatment of industrial wastes . . . and to provide Federal technical services to State and interstate agencies and to industries, and financial aid to State and interstate agencies and to municipalities . . . .").

Water transfers are appropriately not considered as pollutant discharges because the resulting connection between navigable waters creates a single water of the United States that cannot "add" pollution to itself. Viewed from another angle, a body of navigable water itself cannot be considered a point source that "adds" pollution to another such water body.

Though the CWA provides definitions for "pollutant," "point source," and even "navigable waters," it provides no definition for "addition." 33 U.S.C. § 1362. Without a given definition in the statute, interpretation of a term turns to its ordinary meaning. *See S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 376 (2006). The dictionary defines "addition" as "'to join, annex, or unite' so as to increase the overall number or amount of something." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.* (*Friends I*), 570 F.3d 1210, 1217 (11th Cir. 2009) (citing *Webster's Third New International Dictionary* 24 (1993)). [7]

The Act's legislative history offers no definitive clarification either. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill I*), 273 F.3d 481 (2d Cir. 2001) (citing *Gorsuch*, 693 F.2d at 175). However, the Act's text and legislative history does suggest Administrator discretion regarding the interpretation of "pollutant" and "point source," which in turn suggests discretion as to the interpretation of "addition." *See Gorsuch*, 693 F.2d at 175 ("We consider it likely that Congress would have given EPA similar discretion to define "addition" had it expected the meaning of the term to be disputed."). [8]

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[7] *See also Addition*, Merriam-Webster, https://www.merriam-webster.com/dictionary/addition (2024) ("increase").

[8] *See also* Sen. Ed Muskie (CWA sponsor), 177 Cong. Rec. 38,816, 38,838 (1971) ("Guidance with respect to . . . 'point sources' . . . will be provided in regulations and guidelines of the Administrator."; "[D]efining or applying . . . definitions to particular kinds of pollutants . . . is an administrative decision to be made by the Administrator.")

But *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* adhered to the ordinary meaning of "addition" and held that a water transfer from a contaminated water body to a pristine water body would contravene the CWA's broad policy to "restore and maintain the . . . integrity of the Nation's waters." *Catskill I*, 273 F.3d 481, 493–94 (2d. Cir. 2001). However, the court held that when polluted water is transferred "from one body of water to another, *distinct* body of water[,]" a pollutant discharge requiring an NPDES permit occurs. *Id.* at 491 (emphasis added). The Second Circuit reheard the case in 2006 and reiterated the distinction between NPDES-exempt intrabasin water transfers within the same body of water and interbasin transfers between two distinct water bodies requiring a discharge permit. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill II*), 451 F.3d 77, 81, 83 (2d Cir. 2006). And yet, after the promulgation of EPA's WTR in 2008, the Second Circuit reversed course and granted 40 C.F.R. § 122.3(i) then-valid *Chevron* deference as a reasonable agency interpretation of an unambiguous statute. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* (*Catskill III*), 846 F.3d 492, 501 (2d. Cir. 2017) (holding that agency interpretation was not preferred interpretation but still "supported by valid considerations").

Ultimately, the CWA instead seeks to regulate the actual sources of pollution upstream or outside navigable waters themselves. *See Gorsuch*, 693 F.2d at 175 ("[A]ddition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world."). Thus, the exclusion of "an activity that connects or conveys waters of the United States[,]" and nothing more, from NPDES requirements is a more than reasonable interpretation of the Act by EPA. 40 C.F.R. § 122.3(i).

1. Connecting two bodies of indistinguishable navigable waters results in one contiguous body of United States waters with shared pollutants.

First, the result of a water transfer between two waters of the United States is a singular body of navigable waters. Under the unitary waters theory, the mixture of any existing pollutant from one water of the United States into another would not constitute a pollution addition under the CWA. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004). Therefore, because a lack of pollutant addition obviates the need for an NPDES permit, water transfers are properly excluded from the statutory and regulatory scheme.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the respondent Tribe filed a Clean Water Act citizen suit against the petitioner district for operating a water transfer pumping facility without an NDPDES permit. 541 U.S. at 98–99. While the facility helped control flooding, one pump ("S-9") transferred water from a canal ("C-11"), contaminated with elevated levels of phosphorus from nearby fertilizer runoff, into a wetland water conservation area ("WCA-3"), causing unnatural algal and plant growth. *Id.* at 101–02.

The district argued that there could be no addition of pollutant necessitating an NPDES permit, when C-11 and WCA-3 were both waters of the United States. *Id.* at 106. While the Court left resolution of the unitary waters argument to remand, the Court did hold that if two water bodies are not "meaningfully distinct," then a water transfer activity does not require an NPDES permit. *Id.* at 109, 112.

The Supreme Court has also since provided more guidance on conveyances within the same body of navigable waters. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the petitioner district transferred polluted stormwater from one part of a navigable river downstream to a lower part of the same river through concrete channels. 568 U.S. 78, 80–82 (2013). The Supreme Court unanimously held that "the flow of water from

an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA." *Id.* at 83.

The contiguous water body resulting from a water transfer falls well within the bounds of navigable waters as contemplated by the CWA and interpreted by the Supreme Court. In its 2008 Final Rule, EPA described different forms and purposes of thousands of existing water transfers. 73 Fed. Reg. 115 at 33,698 (2008). Generally, water transfers continuously route and transport water between bodies of navigable waters. Uses such as "public water supply, irrigation, power generation, flood control, and environmental restoration" demonstrate how water transfers serve to interconnect waters of the United States, reinforcing the concept of unitary waters. *Id.* at 33,698. The more proximate the bodies of water, the less "meaningfully distinct" they will tend to be. And the less "meaningfully distinct" the bodies of water, the less applicable NPDES permitting will be to the water transfer conveyance, as *Miccosukee* outlined and *Los Angeles County* held was true for interrupted flows within the same water body. The latter would be the very result of water transfers. By simply facilitating the extension or connection of navigable waters, water transfers would thus not be subject to the Act, supporting the validity of the WTR.

2. Point sources are extrinsic to United States waters, so neither original water body can pollute the other through direct transfer.

Second, navigable waters not acting as conveyances themselves are not point sources. Examining the text of CWA, a water body itself is not one of the enumerated examples of a point source. Although § 1362(14) contains a non-exhaustive list of possible conveyances, under § 1362(12), "*to* a navigable water" suggests the destination of pollution, not the origin as suggested by "*from* a point source[.]" 33 U.S.C. §§ 1362(12), 1362(14) (emphasis added). Even the Supreme Court's expansion of point sources in *County of Maui v. Hawaii Wildlife Fund* to

include "functional equivalents" of a direct discharge would not seem to be applicable to navigable water that does not convey itself to another water. 590 U.S. 165, 172, 181 (2020).

Further, while *Los Angeles County* held that a conveyance transferring water between two parts of the *same* navigable waters would not be subject to NPDES regulation, *Rapanos* held that a conveyance of intermittent or ephemeral flows between two *different* waters would not be a navigable waters itself. 568 U.S. at 83; 547 U.S. at 739. *Rapanos* emphasized the distinction between navigable waters and point sources under 33 U.S.C § 1362(14), and how conflating the two would render the very definition of "discharge" as making "little sense." 547 U.S. at 735. This further suggests the inability of one water of the United States to pollute another.

Instead, in the context of water transfers, the NPDES permitting regime under the Clean Water Act is designed to regulate existing pollution in navigable waters at the original point source. Controlling pollution at points downstream of the pollution's origin but not the origin itself would be a self-defeating endeavor counter to the intent and purpose of the CWA.

Additionally, even if waters of the United States were held to be capable of adding pollutants to another navigable water, the CWA would contemplate their regulation as non-point sources. Such waters would not fit the definition of a point source as a "discernible, confined[,] and discrete conveyance" under 33 U.S.C. § 1362(14). Bodies of water would also be physically more akin to broad, pervasive discharges such as agricultural stormwater and irrigation return flows, which are both expressly not classified as point sources under 33 U.S.C. § 1362(14). Therefore, waters of the United States would also not be point sources subject to federal NPDES permitting, and would at best be regulated as non-point sources by state programs.

In sum, whether seen as non-discharges of pollutants or constructive non-point sources, navigable waters are not point sources subject to NPDES regulation. This is true even when a

non-polluting conveyance exists between two such bodies of water. Thus, the WTR's exclusion of water transfers from NPDES permitting is again a valid implementation of the CWA.

B. EPA Interpretation of the CWA Still Warrants Court Concurrence Under *Loper Bright*, Because No "Special Justification" for Overruling Valid Precedent Exists and Agency Interpretation Here is Nonetheless Correct.

This Court should still hold that EPA's Water Transfers Rule is a valid regulation under the CWA, because there is no requisite "special justification" to revisit its validity granted under *Chevron*. And even without a judicial mandate to defer to agency interpretation, EPA's promulgation of 40 C.F.R § 122.3(i) is still a valid implementation of the Act.

With the Supreme Court's decision in *Loper Bright v. Raimondo*, courts no longer afford automatic deference to reasonable agency interpretations of ambiguous statutes. 144 S. Ct. 2244, 2273 (2024). But when made to review the validity of administrative regulations, just because courts need not defer does not mean that they *should* not concur with the agency's interpretation. *See id.* ("But courts need not and under the APA may not defer . . . *simply* because a statute is ambiguous." (emphasis added)). Indeed, when agency interpretation aligns with the court's interpretation, the court *will* inevitably concur with the agency.

1. CSP cannot present any "special justification" to overcome *stare decisis*, thus standing precedent should not be overruled.

The doctrine of *stare decisis* is a high bar for a challenge to any established precedent. Though *Loper Bright* overruled the interpretive framework of *Chevron*, the Supreme Court was express in maintaining the validity of agency interpretations that relied on the framework. *Loper Bright*, 144 S. Ct. 2244, 2273 ("The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive

methodology.") Moreover, there must be a "special justification" to overrule a *Chevron*-reliant holding beyond being "wrongly decided." *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 267 (2014) (citing *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

Stare decisis for decisions involving statutory interpretation carries particularly "enhanced force," because courts need not disrupt precedent when "Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). [9] The primary special justification is "subsequent legal developments—'either the growth of judicial doctrine or further action taken by Congress'—that have removed the basis for a decision." *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), *superseded by statute on other grounds*). The secondary special justification is the emergent unworkability of existing precedent. *Id.*

In *Halliburton Co. v. Erica P. John Fund*, the petitioner argued that developing economic theory suggested that markets were not as efficient as assumed, contravening a federal statute and undermining existing securities fraud precedent. *Id.* at 269. Since both arguments had already been addressed in prior decisions, the Court did not consider them to be sufficient "special justification" to overrule precedent, leaving it to Congress to clarify its statutory intent. *Id.* at 269–74. But in *State Oil Co. v. Khan*, the Supreme Court overruled precedent which held that maximum price fixing schemes were *per se* violations of antitrust law. 522 U.S. 3, 12 (1997). The Court held that later decisions and developing scholarship suggested that reasonable restraints can actually stimulate competition and align with antitrust law intended to protect consumers. *Id.* at 15. This was a "fundamental shift in economic theory" and sufficient "special justification" for the Court to overturn the *per se* illegality of maximum price fixing. *Id.* at 3, 22.

[9] *But see Allegheny Defense Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) ("*Stare decisis* principles do not require [circuit courts of appeal] to continue down the wrong path. . . . [*S*]*tare decisis* applies differently to circuit precedent than it does at the Supreme Court.")

Here, the Supreme Court in *Miccosukee* ultimately provided that water transfers between water bodies that are not "meaningfully distinct" will not require an NPDES permit. 541 U.S. at 112. The emerging doctrine in *Miccosukee* was then reflected in EPA's promulgation of the WTR in 2008. 73 Fed. Reg. 115 at 33,697. Jurisprudence on CWA water transfer exclusions further evolved with *Catskill III* and *Friends I*, both upholding the validity of the WTR through *Chevron* deference. 846 F.3d at 524–33; 570 F.3d, 1227–28. Though the Supreme Court has now abandoned *Chevron*, it also provides an express directive to reexamine precedent decided under *Chevron* only when there is a "special justification" to do so. *Loper Bright,* S. Ct. at 2273.

There is none here. The legal developments regarding the WTR even arc towards its establishment as a valid interpretation of the CWA. Both the courts and EPA have contributed to this trend, and Congress has remained silent as to legislation regarding any contrary view. Nor has upholding the validity of the WTR led to unworkability in interpreting or implementing the CWA. Like in *Halliburton*, the issues here regarding the exemption of water transfers from NPDES requirements have been thoroughly addressed by courts at all three levels. Courts have not only provided answers to this question, but they have also refined those answers in favor of the WTR's validity. And unlike in *State Oil*, developing perspectives on water transfers actually suggest an increase in reliance on their use to facilitate continued growth. Thus, without "special justification" to revisit recent WTR cases decided under *Chevron*, decisions like *Catskill III* and *Friends I* will remain as valid as the regulation they upheld.

2. Even if this Court revisited the WTR's validity, its promulgation would still comport with the CWA's text, intent, and purpose.

Even without the deference required by *Chevron*, the WTR remains a valid regulation, implemented through the authority delegated by Congress to the Administrator under the CWA. Courts in prior *Chevron*-based cases still had to find or hold EPA's interpretation of the Act

reasonable to uphold the WTR's validity. *Catskill III*, 846 F.3d at 507. Were a court to find that the interpretation of the CWA countered its text, contravened its intent, or frustrated its purpose, that interpretation would be rendered unreasonable and the WTR invalid. *Id.* The Water Transfers Rule does none of these to the CWA.

Furthermore, before and after *Chevron*, courts have afforded and still afford some level of deference to agency interpretations of statutes. *See Gorsuch*, 693 F.2d at 167 ("First as a general rule, courts must give "'great deference to the interpretation given the statute by the officers or agency charged with its administration.'") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965))).

With the CWA's dual mandate to protect water quality and water supply in mind, EPA crafted the WTR as a narrow exemption for non-polluting activities that facilitate management of respective water supplies. EPA further contemplated the integrity of the waters of the United States by adding language about conditions that would cause an activity to fall within NPDES regulation. 40 C.F.R. § 122.3(i) (intervening municipal, commercial, or industrial use; pollutant discharged caused by the activity itself). The alignment of the WTR with the CWA's intent and purpose, without any express prohibition of exempting water transfers from NPDES permitting anywhere in the statute, suggests that EPA's interpretation is indeed at minimum reasonable.

EPA also interpreted the CWA and promulgated the WTR based on its authority over and expertise in national water quality regulation and cooperation with state water management efforts. Congress tasked the EPA Administrator with administration of the entire CWA. 38 U.S.C. § 1251(d). Because of EPA's breadth and depth of involvement in water pollution control, both nationally and amongst the states, there is little dispute that the Agency is best equipped to determine what constitute pollutant discharges under the very statute it administers.

Because EPA, as the authority and expert in national water pollution regulation, has reasonably interpreted the CWA to allow for water transfers to be exempt from NPDES requirements, this interpretation should be given considerable weight in the spirit of longstanding deference to agency expertise, from before *Chevron* to *Loper Bright* today.

IV. THE DISTRICT COURT CORRECTLY HELD THAT HIGHPEAK'S DISCHARGE REQUIRES A PERMIT UNDER THE CWA BECAUSE POLLUTANTS INTRODUCED IN THE COURSE OF THE WATER TRANSFER TAKE THE DISCHARGE OUT OF THE SCOPE OF THE WTR.

In accordance with CSP's citizen suit, the District Court correctly held that Highpeak's discharge requires a permit under the Clean Water Act because the introducing pollutants during the water transfer takes the discharge out of the scope of the Water Transfers Rule and definitionally falls under an NPDES permit. 33 U.S.C. § 1365; R. at 11. When creating the CWA, Congress declared the "restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters" a national priority, aiming to eliminate the discharge of pollutants into navigable waters. 33 U.S.C. § 1251. Therefore, even without CSP's citizen suit, EPA would still enforce Highpeak's discharge as a violation of the CWA. The CWA states that *any* discharge of pollutants is unlawful unless compliant with the NPDES permitting process. 33 U.S.C. § 1311. As *Gorsuch* noted, Congress views the NPDES program as "its most effective weapon against pollution," giving its requirements substantial weight in the context of their ability to achieve the CWA's overarching purpose. 693 F.2d 156, 175–76 (D.C. Cir. 1982).

Highpeak's discharge, facilitated through a poorly-constructed and ill-maintained tunnel—a point source—introduces pollutants directly from Cloudy Lake into Crystal Stream. R. at 5. This subjects it to the NPDES permitting system, the very administrative apparatus that Congress created to achieve the CWA's goals. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981). A water transfer is defined as an activity that "conveys or connects waters

of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. §122.3(i). Accordingly, the WTR does *not* shield Highpeak's commercial use from permitting requirements, as the pollutants introduced during the transfer go beyond its protective scope.

A. Highpeak's Discharge Violates the CWA, Is Thus Definitionally Subject to NPDES Permitting, and Does Not Fall Under a WTR Exclusion.

Under the CWA, the discharge of any pollutant into navigable waters is prohibited unless specifically authorized by a permit. 33 U.S.C. §1311(a). Further, the construction of infrastructure which results in the discharge of pollutants into U.S. waters, such as Highpeak's tunnel, requires an NPDES permit—authorization that Highpeak does not have. *See* 33 U.S.C. §1342(h). Highpeak has only obtained *state* permission for the tunnel that it uses to "enhance tubing recreation" on Crystal Stream. R. at 4.

As defined in the CWA, "discharge of a pollutant" includes "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(a) (emphasis added). Pollutants include solid waste, biological materials, and rock—all of which Highpeak is adding into the water every time it opens the tunnel connecting the two water bodies. 33 U.S.C. § 1362(6); *see* R. at 5. Finally, "point source" is defined under the CWA as "*any* discernible, confined and discrete conveyance, which can include any pipe. . . tunnel, or channel from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Highpeak's tunnel therefore meets the CWA's definition of a point source and is subject to the appropriate permitting requirements.

In *Colorado Trust for Protection & Benefits v. Souder, Miller & Associates, Inc.*, the court specified that to establish a CWA violation, it must be shown that a defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source and (5) without a permit. *Colo. Tr.*

for Prot. & Benefits v. Souder, Miller & Assocs., Inc., 870 F. Supp. 2d 1173, 1176 (D. Colo. 2012), citing *Sierra Club v. El Paso Gold Mines, Inc.,* 421 F3d. 1133, 1135 (10th Cir. 2005). Highpeak fulfills (1), (2), and (3) by periodically using the tunnel to discharge water that contains iron, manganese, and TSS into Crystal Stream. Prongs (4) and (5) are discussed below.

1. Highpeak's tunnel is a point source under the CWA.

Highpeak's tunnel acts as a conduit for pollutants, qualifying it as a point source under the CWA. 33 U.S.C. § 1362(14). In *Maui*, the Supreme Court held that an indirect discharge of treated wastewater from wells to the ocean by way of a clearly ascertainable path was the "functional equivalent" of a direct discharge and therefore still subject to CWA permitting. 590 U.S. 165, 172 (2020). The Court additionally held that when pollutants travel a short distance to navigable waters with minimal delay they are more likely to be considered functionally equivalent to direct discharges. 590 U.S. 165, 186 (2020). Relevant factors for determining "functional equivalence" include transit time, distance traveled, and the amount of pollutant entering the navigable waters relative to the amount that leaves the point source. *Id.* at 184–85. While the record does not indicate precise timing, the seasonal purpose of Highpeak's tunnel use indicates that the discharge is nearly immediate and therefore should be considered a functional equivalent to a direct discharge under the CWA. R. at 3, 4. Further, Highpeak's tunnel constitutes a clearly ascertainable path between Cloudy Lake and Crystal Stream and is relatively short and direct at 100 yards long. R. at 4–5. Highpeak's discharge includes measurable amounts of iron, manganese, and TSS. R. at 5. TSS is considered a conventional pollutant under the CWA and iron and manganese are recognized under secondary drinking water standards in

the Safe Drinking Water Act ("SDWA"). [10] 33 U.S.C. 1314(a)(4); 42 U.S.C. §300(f). Despite not being primary pollutants, the introduction of iron and manganese in elevated levels disrupts the ecological balance of Crystal Stream and raises its overall pollutant concentrations, underscoring the need for an NPDES permit. Just as in *Maui*, the court below found that the introduction of pollutants here qualifies as a direct discharge and requires an NPDES permit. 590 U.S. 165 at 184–185; R. at 12. Highpeak's water transfer is therefore functionally equivalent to a direct discharge and falls under NPDES permitting requirements. 33 U.S.C. § 1342(a)(1); R. at 4.

2. Highpeak introduces pollutants without a permit.

Highpeak operates without a NPDES permit, which is required under the CWA. 33 U.S.C. § 1342(a)(1); R. at 4. In *Cottonwood Environmental Law Center v. Edwards*, the Ninth Circuit found that water from an aquifer that would otherwise naturally flow to other waters could not be considered "meaningfully distinct" and therefore did not require an NPDES permit. 86 F.4th 1255, 1263 (2023). In Highpeak's case, water within the tunnel during its periods of operation similarly would not otherwise reach Crystal Stream. Cloudy Lake and Crystal Stream are therefore meaningfully distinct, necessitating an NPDES permit for Highpeak's discharge. Although the Ninth Circuit found in *ONRC Action v. Bureau of Reclamation* that water flowing through a human-made channel did not introduce pollutants, the facts are distinguishable here. 798 F.3d, 933, 936 (9th Cir. 2015). In *ONRC*, the waters in question were a part of a pre-existing connection that was restored, and because of this were not meaningfully distinct. *Id.* In contrast,

[10] Iron (Fe) and Manganese (Mn) are recognized in the scientific community for their adverse impacts on aquatic life. See Dandara Silva Cabral et al., *Do Iron and Manganese Affect the Health of the Estuarine Oyster Crassostrea Rhizophorae?*, 268 ESTUARINE, COASTAL & SHELF SCI. 107800 (2022). ("The metals. . . are not biodegradable. . . can be bioaccumulated. . . [and] can cause damage in aquatic organisms, including death."

Highpeak's tunnel disrupts natural geological barriers between Cloudy Lake and Crystal Stream, connecting meaningfully distinct waters. R. at 12. Highpeak's discharge is therefore an "addition" of pollutants under the CWA and does not fall within a WTR exception. R. at 12.

For Highpeak to continue discharging iron, manganese, and TSS into Crystal Stream from Cloudy Lake without a permit, it must demonstrate that a statutory or regulatory exemption applies. *See* 33 U.S.C. § 1311. Because no CWA exemption applies here, Highpeak must rely on a WTR exclusion. The WTR defines an exempt water transfer as an activity that "conveys or connects waters of the United States *without* subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (emphasis added). Highpeak's activities fail this exemption for two reasons: (1) Highpeak's tunnel introduces pollutants, and (2) Highpeak does so for a commercial use. R. at 4. Highpeak's tunnel adds pollutants into Crystal Stream rather than simply transferring water and the WTR does not extend its exemptions to transfers that *add* pollutants to the water. 40 C.F.R. § 122.3; R. at 5. Highpeak's activities introduce new materials into the stream each time the valves are opened and therefore fail the WTR's requirement that transferred water remains "untouched" by pollutants. 40 C.F.R. § 122.3. *Miccosukee* upheld this principle, concluding that even *non*-generative structures such as tunnels or conduits require permits if they convey pollutants. 541 U.S. 95, 105 (2004) ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters[.]'"). Additionally, because the WTR exclusion was not intended to allow unpermitted discharges that benefit commercial activities, and Highpeak's tunnel discharges pollutants while supporting a family tubing business, Highpeak should be disqualified from protections under the WTR. Highpeak's discharge is thus outside of the WTR's scope because it does not fall under applicable exclusions.

B. The Interpretation of the WTR Here Succeeds Under *Seminole Rock* and *Auer* Deference and Because It Is Within the Zone of Ambiguity Set Forth in *Kisor*.

Established precedent strongly supports EPA's interpretation of the WTR in the instant case. In *Auer*, the Supreme Court held that agencies are allowed to interpret their own regulations when there is ambiguity. 519 U.S. at 463. Here, EPA's interpretation of its own regulation—the WTR—warrants deference under the same principles. *Bowles v. Seminole Rock & Sand Co.* establishes how to assess when agency interpretations deserve deference, highlighting that an agency's expertise is to be trusted where regulations are ambiguous. 325 U.S. 410 (1945). *Seminole Rock* emphasizes that deference should apply, noting that the "[T]he administrative interpretation. . .becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. Because EPA has historically held a prominent role in the management of water resources, the interpretation here is credible.

Finally, under *Kisor v. Wilkie*, deference to the agency will apply if its interpretation is within the "zone of ambiguity", after employing all possible interpretive tools. 588 U.S. 558, 576 (2019). This will determine if the interpretation lies within the agency's discretion and is afforded deference. *Id.* Here, the zone of ambiguity is met for the WTR because it is reasonably interpreted, genuinely ambiguous, and reflects expert judgment and agency expertise.

1. The WTR succeeds under *Auer* deference because precedent demonstrates that an agency's interpretation of its own regulation receives a high level of respect.

Under *Auer*, courts should defer to an agency's interpretation of its own ambiguous regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 460. Here, EPA's interpretation of the WTR deserves deference because it falls within a reasonable scope of interpreting "water transfers" to exclude scenarios where pollutants are added. Further, Highpeak's discharge into Crystal Stream is definitionally a water transfer.

The Supreme Court's decision in *Seminole Rock* similarly supports this interpretation, holding that an agency's reading of its regulation should be controlling unless it is "plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. This standard acknowledges that the agency is the expert of its own rules and ensures that it maintains proper latitude in defining regulatory boundaries, particularly in highly technical areas such as water transfers and pollutant discharge. *Id*. Additionally, in *Los Angeles County*, the Supreme Court held that transferring water within the *same* water body does not constitute pollutant discharge under the CWA, as no "addition" of pollutants occurs, aligning with the EPA's interpretation of the WTR. 568 U.S. at 83. In contrast, because Highpeak is adding *new* pollutants to *different* water bodies, their acts constitute a discharge.

a. The WTR's plain text is ambiguous and leaves ample room for agency interpretation.

The plain language of the WTR is ambiguous and leaves ample room for interpretation, particularly regarding the term "introduced." 40 C.F.R. § 122.3(i). The absence of definitions or further elaboration on this term allows EPA to interpret and clarify both the scope and application of the rule. This ambiguity is significant because of its direct effects on how various water transfers are regulated under the CWA. Further, the legislative history and purpose of the CWA support broad environmental protection through the regulation of pollutant discharges. *See* 33 U.S.C. § 1251. The CWA primarily targets intentional pollutant discharges from discrete sources but is less clear on water transfers. This gap underscores the reasonableness of EPA's interpretation, which seeks to clarify regulatory boundaries while advancing the Act's objectives.

b. The interpretation of the WTR here is not plainly erroneous or inconsistent.

EPA's interpretation that Highpeak's discharge falls outside of the WTR's scope is not plainly erroneous or inconsistent. This interpretation aligns with the CWA's framework because

both aim to regulate pollutant discharge in a way that balances environmental protection with operational feasibility for non-industrial transfers. Highpeak's discharge likely falls outside of the exemption scope of the WTR because the transfer introduces pollutants into a distinct water body that would not otherwise naturally mix. In *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, the Supreme Court deferred to the EPA's discretion in balancing the CWA's environmental goals with practical industry concerns. 551 U.S. 644, 650 (2007). Similarly, EPA's interpretation of the WTR here supports the CWA's purpose by exempting transfers without added pollutants. However, the WTR's exemption does *not* apply here because Highpeak's addition of pollutants subjects the transfer to regulation. 33 U.S.C. § 131; R. at 9.

By differentiating between pollutant discharges and water transfers that convey solely water, EPA's interpretation of the WTR ensures consistency with the CWA's goals while balancing environmental protection and allowances for water management and control practices. This approach is consistent with the deferential standard articulated in *Kisor,* and appropriately applies here due to Highpeak's unpermitted discharge of pollutants. 588 U.S. at 576.

In *Catskill I,* the court found that water transfers via a tunnel from a reservoir to a creek that introduced pollutants such as TSS and turbidity were subject to NPDES permits as "additions" of pollutants under the CWA. 273 F.3d at 485. Further, under natural conditions, the waters from the reservoir and the creek would never mix, and the artificial mixing of these waters directly contradicted the purpose of the CWA to restore and maintain the integrity of the Nation's waters. *Id.* at 484. By diverting water from its natural course, the process of transferring it through the tunnel interfered with the chemical, physical, and biological integrity of *both* water bodies. *Id.* at 492. Similarly here, Highpeak is transferring water from Cloudy Lake to Crystal Stream via a tunnel, introducing pollutants into distinct waters that would not

naturally mix, and interfering with their biological integrity. This extends the CWA's prohibitions beyond agricultural discharges, underscoring that transfers between watersheds involving the addition of pollutants fall under the CWA. *Id.* at 494.

2. The WTR also succeeds under the *Kisor* zone of ambiguity test because it is reasonably interpreted, genuinely ambiguous, and reflects expert judgment and agency expertise.

Under *Kisor*, a regulation falls within the "zone of ambiguity" when its terms are unclear or susceptible to multiple reasonable interpretations, and the agency is tasked with resolving this ambiguity based on its expertise. 588 U.S. at 575–76. The *Kisor* Court emphasized that ambiguity arises not only from unclear wording but also from regulations that lack sufficient guidance on complex issues. *Id.* at 566. If a regulation is genuinely ambiguous and requires specialized agency judgment to apply it consistently with the statute's purpose, the agency's interpretation is entitled to deference. *Id.* Similarly, the WTR remains ambiguous in its application to complex water transfer scenarios, particularly where pollutants are introduced.

Given EPA's expertise in managing water resources, its interpretation of the WTR falls within the "zone of ambiguity" and should be afforded deference. As the *Kisor* Court noted, when a regulation is ambiguous and the agency has applied its expertise to interpret it, the agency's interpretation is entitled to deference. *Id.* at 573. EPA's interpretation of the WTR here demonstrates an appropriate exercise of regulatory discretion consistent with *Kisor*.

CONCLUSION

For the foregoing reasons, Appellee United States Environmental Protection Agency respectfully requests this Court to affirm the decisions of the District Court for the District of New Union granting dismissal of Appellant CSP's regulatory challenge and denying Appellee Highpeak's motion to dismiss Appellant CSP's Clean Water Act citizen suit.