C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellee-Cross-Appellant

-and-

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

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

Brief of Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union issued a Decision and Order in case No. 24-CV-5678 on August 1, 2024, addressing motions to dismiss filed by the United States Environmental Protection Agency ("EPA") and Highpeak Tubes, Inc. ("Highpeak") against Crystal Stream Preservationists, Inc.'s ("CSP") federal claims. The district court had subject-matter jurisdiction under 5 U.S.C. § 702 (appeals of agency action) and 28 U.S.C. § 1331 (federal question), given 33 U.S.C. § 1365 (Clean Water Act citizen suit provision). The EPA, Highpeak, and CSP filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 28 U.S.C. § 1292(b), which allows interlocutory appeals involving a "controlling question of law" with "substantial ground for difference of opinion" and where resolution may "materially advance the ultimate termination of the litigation."

Questions of law are controlling if their resolution could "materially affect the outcome of the case." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). Substantial grounds for difference of opinion exist when "novel and difficult questions of first impression" are involved. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (citations omitted). An immediate appeal materially advances litigation if it may remove a defendant or claims against a defendant. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

Denials of motions to dismiss are interlocutory orders. *District of Columbia v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). This appeal concerns an interlocutory order involving novel and complex controlling legal questions about the validity and interpretation of the Water Transfers Rule. Resolving these questions will materially affect the case's outcome and advance the litigation's

ultimate termination regarding CSP's claims.

STATEMENT OF ISSUES PRESENTED

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

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

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

IV. Did the District Court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act?

STATEMENT OF THE CASE

A. The Clean Water Act

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments, known as the Clean Water Act ("CWA" or "Act"), at 33 U.S.C. § 1251 *et seq*. The goal of the Act was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at § 1251(a). Congress designed the Act to federally regulate point-source pollution while leaving non-point pollution and intrastate water management to the states. *Id.* at §§ 1311(a), 1362(12); 73 Fed. Reg. 33,700,33,701-02 (June 13, 2008) (to be codified at 40 C.F.R Part 122).

The Act prohibits the discharge of pollutants into navigable waters without a permit, and establishes the National Pollutant Discharge Elimination System ("NPDES") permitting program. 33 U.S.C. § 1311(a), 1342. The Act defines "discharge of a pollutant" as "any addition of pollutants from a point source to navigable waters," and a "point source" as "any discrete

conveyance." *Id.* at §§ 1362(12), 1362(14). In addition to the NPDES system, the Act also regulates based on water quality standards. *Id.* at §1313.

In 2008, the EPA promulgated the Water Transfers Rule ("WTR" or "the Rule") to clarify regulatory obligations for inter-basin water transfers, which frequently involve natural bodies of water, and to exempt certain water transfers from NPDES permitting requirements. 40 C.F.R. § 122.3(i). The WTR exempts water transfers from NPDES permits unless pollutants are introduced by the water transfer activity itself, such as through erosion, sedimentation, or structural deficiencies in the transfer system. 73 Fed. Reg. 33,705 (June 13, 2008). The Rule defines "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). The EPA designed the WTR to streamline permitting while maintaining protections for receiving waters, emphasizing that water transfers must not degrade water quality by adding pollutants. *Id.* Before the WTR's promulgation, courts held that water transfers between distinct waters of the United States constituted a discharge of pollutants requiring NPDES permits under the CWA. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). Following the Rule's enactment, courts upheld it by relying on *Chevron* deference, which gave significant weight to EPA's interpretation of the CWA. *See Catskill Mountains Chapter of Trout Unlimited v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d Cir. 2017). However, the WTR's scope remains contested, as the Rule does not explicitly define what constitutes the "introduction" of pollutants, leaving room for disputes over activities like Highpeak's tunnel discharges.

B. Highpeak's Operation

Highpeak operates a recreational tubing service in Rexville, New Union, on Crystal

Stream. To enhance the tubing experience, Highpeak constructed a tunnel in 1992 connecting Cloudy Lake to Crystal Stream, with valves to regulate water flow. Record at 4. While the EPA administers the NPDES program in New Union, Highpeak has never sought a permit for these discharges, and the discharge was not challenged until this suit. *Id.* The parties have stipulated that both Cloudy Lake and Crystal Stream are "waters of the United States" under the CWA. *Id.* at 5. The tunnel, carved through rock and soil with limited use of metal conduits, has been poorly maintained, allowing pollutants such as iron, manganese, and total suspended solids ("TSS") to enter the water during transfers. *Id.* at 12. Sampling data shows the Stream contains 2-3% higher concentrations of these pollutants than the Lake, possibly due to erosion and contact with the tunnel's interior. *Id.* EPA and CSP argue these elevated levels qualify as pollutants "introduced" by the transfer process, placing the discharge outside the Water Transfers Rule exemption and requiring a NPDES permit.

C. *Loper Bright* and *Corner Post* Certiorari

On May 1, 2023, the Supreme Court of the United States granted certiorari on *Loper Bright Enterprises v. Raimondo*, specifically, on the question of whether a regulation promulgated by the National Marine Fisheries Service should be afforded *Chevron* deference and ultimately, whether *Chevron* deference should continue to be afforded to administrative agencies' interpretation of statutes. *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023).

On September 29, 2023, the Supreme Court of the United States granted certiorari on *Corner Post Inc., v. Board of Governors of the Federal Reserve System*, which examined whether a statute of limitations for a challenge to a regulation under the Administrative Procedures Act ("APA") would begin to run upon its promulgation, or upon injury to the plaintiff. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (2023).

D. CSP's Suit

CSP is a not-for-profit corporation formed on December 1, 2023, composed of thirteen members who live in Rexville. Record at 4. All but one of these members have lived in Rexville for more than fifteen years, and the lone exception moved there in 2019. *Id.* Two members own land along the stream, five miles south of the discharge point, and moved there prior to 2008. *Id.* CSP's mission statement decrees that they wish to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." *Id.* at 6. Two members submitted affidavits; Cynthia Jones is CSP's Secretary and lives about 400 yards from the Stream. *Id.* at 14. She moved there in 1997 and has regularly walked along the Stream, enjoying its "crystal clear color and purity." *Id.* She recently learned that Highpeak's discharges are making the otherwise clear water cloudy, which upsets her and diminishes her ability to enjoy the stream, as she claims she is afraid to walk in a polluted stream and therefore does not recreate as frequently as she otherwise would. *Id.* at 14-15. The other affidavit is from Johnathan Silver, who moved to Rexville in 2019, about half a mile from the Stream. *Id.* at 16. He regularly walks along the Stream, and after CSP members told him that cloudiness in the water is the result of pollutants discharged by Highpeak, he became concerned about the pollutants. *Id.* Similarly, he claims he would recreate more frequently on the stream if not for Highpeak's discharges. *Id.*

On December 15, 2023, CSP sent a notice of intent to sue under the CWA to Highpeak and the EPA, alleging that their tunnel constituted a discharge from a point source that requires a NPDES permit because it introduces pollutants from the Lake and the tunnel into the Stream, as shown by higher pollutant levels in the Stream. *Id.* at 4. CSP alleged that the WTR does not apply because the transfer process introduces additional pollutants, and additionally, that it invalid. *Id.* at 5. CSP filed their citizen suit against Highpeak and regulatory challenge against

the EPA on February 15, 2024. *Id.* On August 1, 2024, the district court found that CSP had standing to bring the suit, that it was timely, that the WTR was validly promulgated, and that Highpeak must nonetheless obtain a permit under the CWA. *Id.* at 8, 9, 10, 12. The EPA responds to Highpeak's appeal of this decision.

SUMMARY OF THE ARGUMENT

Although CSP lacks standing to challenge the WTR or file a citizen suit, they correctly argued that Highpeak's operation requires an NPDES permit.

First, CSP lacks standing under the CWA's citizen suit provision because it was formed solely to exploit legal developments, not to address specific injuries to its members. CSP's 13 members, most of whom have lived near the stream for 15 years, failed to act earlier despite longstanding discharges. *See Animal Lovers Volunteer Ass'n Inc. v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985) (noting organizational standing is undermined by lack of prior history or activities). CSP filed this suit two weeks after forming, showing no injury beyond a generalized interest in clean water. Thus, the district court erred in finding standing for a citizen suit.

CSP also lacks standing to challenge the WTR because its alleged injuries are not "fairly traceable" to the rule. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The WTR does not apply to Highpeak's operation and therefore does not excuse Highpeak from needing an NPDES permit. CSP presented no evidence that the WTR contributed to the stream's cloudiness, as this condition and Highpeak's discharges predate the rule's promulgation in 2008.

Second, CSP's claim is untimely under 28 U.S.C. § 2401(a). *Corner Post Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024) held that the statute of limitations begins when a plaintiff is injured, not when the regulation is promulgated. CSP's members experienced cloudy water for over 15 years, so their claims are already time-barred. Creating a

new organization to "restart" the clock undermines the statute's purpose of ensuring diligence. Id. at 2452.

Third, the WTR was validly promulgated under the CWA. While *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), eliminated *Chevron* deference, it upheld respect for established precedents unless explicitly overruled. *Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d 492, 525-33 (2d Cir. 2017) and *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009), which upheld the WTR's validity, remain binding. Overturning them would disrupt numerous related cases and reliance interests, and the WTR also survives *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), given its thorough notice-and-comment process and reasoned analysis.

Finally, Highpeak's discharge requires an NPDES permit. The WTR exempts water transfers unless pollutants are introduced by transfer activities. *See* 40 C.F.R. § 122.3(i). Highpeak's operation increased iron, manganese, and TSS levels by 2-3% due to substandard construction, which constitutes an introduction of pollutants. *See* 73 Fed. Reg. 33,705 (June 13, 2008). The EPA's interpretation aligns with Auer deference principles under *Kisor v. Wilkie*, 588 U.S. 558, 577–79 (2019), as it resolves ambiguity and reflects expertise, consistency, and deliberation.

Additionally, the EPA's interpretation merits *Skidmore* deference, as it demonstrates thorough analysis and predictable application. During rulemaking, the EPA clarified that pollutants added by transfer mechanisms, including operational discharges or poor construction, require permits, advancing the CWA's goals of protecting water quality while respecting state authority. *See* 33 U.S.C. §§ 1251(a), (b). Highpeak's actions directly violated this guidance, justifying the district court's ruling that an NPDES permit is required.

STANDARD OF REVIEW

A district court's determinations regarding standing and statutes of limitations are reviewed *de novo*. *Fair Housing of Marin. v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002); *Wershe v. City of Detroit, Michigan*, 112 F.4th 357, 365 (6th Cir. 2024). Likewise, appeals of a motion to dismiss – including those for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) – are reviewed *de novo*. *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). For the purposes of a motion to dismiss, all factual allegations contained in the complaint are regarded as true. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023). Surviving a 12(b)(6) motion to dismiss requires that the plaintiffs sufficiently plead "enough facts to state a claim that is plausible on its face" that rises "above the speculative level." *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

When an agency action is challenged, however, "[t]he entire case on review is a question of law." *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Where a court reviews whether an agency acted arbitrarily or capriciously under the APA, the sufficiency of the complaint at the 12(b)(6) stage is therefore a question on the merits based on the agency record. *See id.*; *see also Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009).

ARGUMENT

I. CSP does not have standing either to file a citizen suit under the CWA or to challenge the WTR

The Supreme Court has noted that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court enumerated three elements necessary to find standing. First, the plaintiff must have suffered an

'injury in fact' – an invasion of a legally protected interest which is concrete and particularized, and actual and imminent, not 'conjectural' or 'hypothetical.' *Id.* Second, there must be a causal connection between the injury and the defendant's conduct – the injury must be "fairly traceable" to the challenged conduct. *Id.* Third, it must be likely, not just speculative, that the injury will be "redressed by a favorable decision." *Id.* A plaintiff must establish standing for each kind of relief they seek. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Here, CSP seeks both to vacate the Rule and force Highpeak to obtain an NPDES permit, and must therefore establish standing for both claims.

A. CSP does not have standing to file a citizen suit under the CWA because it formed only to benefit from novel changes in the law, not address an injury

An organization has associational standing to bring suit on behalf of its members. *See Hunt. v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1997). To have standing, a party must demonstrate an interest that is "distinct from the interest held by the public at large." *Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985). "While an organization's standing is not simply a function of its age or fame, those factors become highly relevant when the organization… has no history which antedates the legal action it seeks to bring and can point to no activities which demonstrate its interest, other than pursuing a legal action." *Id.* "If an 'organization' seems to have been formed specifically for the purpose of bringing an action, standing may be denied to protect standing doctrine against the mere will of a would-be plaintiff." *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (2009).

CSP has no valid injury based on a concrete and particularized injury that is actual and imminent because, while the Supreme Court has recognized aesthetic and recreational injuries in *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), the injuries that members of CSP allege here are a ruse designed to manufacture standing in order to take advantage of anticipated novel legal

developments, namely, the *Loper Bright* and *Corner Post* cases, which the Supreme Court had granted certiorari on earlier that year.

In *A.L.V.A.*, an environmental organization claiming emotional distress resulting from alleged animal cruelty lacked standing because the organization did not have longevity, nor indications of commitment to prevent cruelty to animals to indicate that they had a stake in the outcome of the litigation. *Id.* at 939-39. Their youth and lack of any fame were "highly relevant" factors where they had no history before filing the legal action and could not point to any activities demonstrating their interest other than the legal action at hand. *Id.* CSP is in the same position - they were founded on December 1, 2023, sent a notice of intent to sue only two weeks later, and have no record of activities beyond this litigation. Record at 4. Their mission statement focuses solely on water transfers, further suggesting their primary purpose is litigation, and not to preserve the stream. Record at 6. Therefore, just as in *A.L.V.A.*, CSP has not shown any interest that is distinct from the general public because their interest is in filing a lawsuit, not in redressing the injury of a clouded stream.

Furthermore, all members of CSP but one could have brought a suit to challenge Highpeak's conduct at any time in the past fifteen years they've lived in Rexville, but chose to do so only in anticipation of two decisions that could strengthen a challenge to Highpeak's discharges: *Loper Bright*, which strips agency regulations of *Chevron* deference, and *Corner Post*, which begins the statute of limitations only when the plaintiff accrues an injury from a regulation. Because CSP formed specifically for the purpose of bringing an action in light of this anticipated change to the legal landscape, the Court may deny them standing to protect the doctrine from an organization that has demonstrated no real injury.

CSP would allege that, as in *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC),*

Inc., 528 U.S. 167, 183-184 (2000), affidavits from the organization's members showed their reasonable concerns about the effects of discharges into water, affecting their aesthetic interests and demonstrating that they would not use the stream for recreation because of the discharges. Record at 16. However, unlike in *Friends of the Earth* in which there were three environmental organizations, one of which had been established decades before they brought suit, CSP is one, small, new organization made up of twelve people, only two of which actually live near the river, and almost every one of which could have challenged the discharges at any point in the last fifteen years since they've lived there. Record at 4.

Therefore, because CSP has not demonstrated any real concern for the stream in light of their inaction, and therefore has presented no concrete and particularized injury, the Court should find that the district court erred in holding that CSP had standing to file a citizen suit under the Clean Water Act against Highpeak.

B. CSP does not have standing to challenge the WTR because it is not fairly traceable to the members' impaired enjoyment of Crystal Stream

CSP's alleged injuries of members experiencing cloudy water are not the cause of the EPA's WTR because the Rule is not fairly traceable to the cloudy water and as a result, vacating the Rule would not likely redress their harm. Rather, it is only through a speculative chain of inferences that CSP ties the Rule to the Stream. *Clapper*, 568 U.S. at 410.

First, there must be a causal connection between the injury and the conduct complained of; the injury must be fairly traceable to the defendant's action, not a third party. *Lujan*, 504 U.S. at 560-61. Because the Rule does not apply to Highpeak's operation and a NPDES permit is therefore required to discharge pollutants, vacating the Rule would not aid CSP.

Second, it must be "likely," and not merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 561. CSP offers no evidence that the Rule contributed

to the Stream's cloudiness, complaints of which have only recently arisen. Ms. Jones moved to Rexville in 1997, long after Highpeak began operation of their tunnel discharges, and has stated that throughout her time living only 400 feet away from the stream, she has regularly enjoyed its "crystal clear color and purity." Record at 14. If the Rule caused, contributed to, or exacerbated the cloudy waters in any way after the EPA promulgated it in 2008, complaints would be expected sooner, especially from members living nearby before 2008. Record at 4. Instead, "concern" regarding the Stream materialized only after the Supreme Court had granted certiorari on cases that would facilitate their legal claim, indicating that the injury, if there is one, stems from Highpeak's unpermitted discharge and not the Rule.

CSP may argue that the Rule led to Highpeak's lack of a permit and continual discharges, but this assumes that the Rule applies to Highpeak, that the EPA would enforce the NPDES permitting if it did not, that a NPDES permit would actually reduce pollutants, and that members of CSP would therefore notice clearer water. True, the EPA now enforces the NPDES permit requirement, but it did not do so before the Rule was in effect, from 1992 to 2008. Therefore, there is no reason to believe that the Rule's promulgation stopped any such enforcement efforts. Thus, this speculative chain of events fails to link the Rule to cloudy water, and vacating it would not likely redress the alleged injury. *See Clapper* 568 U.S. at 410, (finding that there is no standing where the plaintiffs allege a speculative chain of possibilities regarding government action's affect on their activities). Therefore, the Court should find that the district court erred in holding that CSP had standing to challenge the Water Transfers Rule.

II. CSP failed to timely file a challenge to the Water Transfers Rule because *Corner Post* does not apply to non-profits made up of members whose individual claims are barred, nor where it would fail to incentivize promptly bringing a claim

Even if CSP had standing to challenge the Rule, their claims are barred by the statute of

limitations. Under the APA, 5 U.S.C. §§ 702 and 704 allow judicial review of "final agency actions," but 28 U.S.C. § 2401(a) bars actions filed more than six years after the right of action first accrues. In *Corner Post*, the Supreme Court held that the statute of limitations for a regulatory challenge begins when the plaintiff suffers an injury resulting from the regulation. *Corner Post, Inc. v. Bd. Of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024). However, *Corner Post* should not apply where no new injury has materialized within the last six years, or where the statute of limitations would not incentivize claims brought in a timely manner.

Corner Post was a truck stop that opened for business eight years after promulgation of a regulation that set the fee on debit card purchases, causing them to pay hundreds of thousands of dollars in higher fees on those transactions. *Id.* at 2448. The Court found that the six-year statute of limitations began when Corner Post's action first accrued, that is, when they first suffered their injury, and not when the regulation itself was promulgated. *Id.* at 2452. They held that the accrual of the claim occurs when the plaintiff could file suit for it. *Id.*

However, CSP's claim is not analogous. Corner Post's injury arose from hundreds of thousands of dollars of higher business fees incurred only after conducting transactions past the six-year limit. Here, CSP consists of thirteen individuals, most of whom do not live near the stream, who have presumably experienced cloudy water in Crystal Stream since they moved there over fifteen years ago. Record at 4. Even assuming the Rule contributes to this"injury," CSP members would have been affected since the EPA promulgated it in 2008. *Id*. As organizational standing relies on its members' injuries, any claims by members living near the stream for over fifteen years would have been barred in 2014, six years after their claims would have accrued in 2008. *Id.* Creating CSP as a new entity does not reset this timeline, as the members' injuries predate its formation and there is no "new" injury. Simply forming an

organization not change that Highpeak has been discharging for over thirty years. Unlike *Corner Post*, where injury could not occur until the company began transactions, CSP's members have had opportunity to contest their "injury" for decades, even before the Rule's promulgation.

One CSP member, Mr. Silver, moved near Crystal Stream in 2019 and in 2023, learned through CSP that cloudy water in the stream was a result of Highpeak's discharges. Record at 16. CSP will argue his right accrued when he observed the cloudy water, within six years of their suit. However, *Corner Post* itself emphasizes the statute of limitations' purpose to ensure "diligent prosecution of known claims." *Corner Post* 144 S. Ct. at 2452. Unlike a business navigating a known regulatory landscape, a lone individual, manipulated by others with expired claims, should not qualify to resurrect a challenge to a longstanding regulation. Finding otherwise would enable perpetual challenges against a regulation on which generations of businesses have relied. Record at 16. This wouldn't just give CSP a second chance, but an unlimited number of chances each time they gained a new member, effectively destroying any incentive to "pursue diligent prosecution."

Therefore, *Corner Post* should not apply to CSP and its members, and they should be time barred by 28 U.S.C. § 2401(a). The Court should find that the district court erred in holding that CSP timely filed their challenge to the Water Transfers Rule.

III. Because *Loper Bright* does not invite the reconsideration of precedents decided under *Chevron*, overriding stare decisis principles require adherence to the decisions affirming the validity of the WTR

Given pressing stare decisis considerations, this Court must affirm the district court in holding that the WTR is a validly promulgated regulation pursuant to the Clean Water Act.

Stare decisis is of "fundamental importance" to the rule of law. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987). In most matters, it is more important that the applicable rule of law be settled than that it be settled right. *Knick v. Township of Scott*,

588 U.S. 180, 202 (2019). Overturning precedent should thus be exercised sparingly, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 465 (2015), and a "considerable burden" is imposed upon those who seek to unnecessarily unsettle precedents. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451-52 (2008). Because stare decisis carries such persuasive force that overturning precedent always requires some special justification, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal citations omitted), even a good argument that a case was wrongly decided, by itself, is insufficient to satisfy this justification. *See Kimble*, 576 U.S. at 455.

A. Precedents decided under *Chevron* are not inherently overturned by *Loper Bright*, which merely reflects a change in interpretive methodology for new judicial decisions that interpret agency actions

Despite the Supreme Court's overruling of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), precedents that relied upon *Chevron* to uphold a specific agency action nevertheless continue to be valid law. Principles of stare decisis demand respect for precedent, regardless of whether "judicial methods of interpretation change or stay the same." *CBOCS*, 553 U.S. at 457. Even where a change in interpretive approach takes place, it does not justify reexamination of well-established prior law. *Id.*

The *Loper Bright* decision merely reflects a change in interpretive methodology that does not invite reconsideration of settled regulations upheld through *Chevron* deference. Following the EPA's formal promulgation of the WTR, two of the three federal courts of appeals that had formerly repudiated this interpretation later upheld it through the *Chevron* analytical framework. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d. Cir 2017) ("*Catskill III*"); *see also Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) ("*Friends*"). A line of other decisions by federal appellate courts have relied upon reasoning or principles similar to these cases in

discussing the applicability of the WTR and similar regulations.[1] Accordingly, CSP asks the Court to reconsider a long line of established cases solely on the basis that they were wrongly decided through *Chevron* deference. *Loper Bright*, however, presents precisely the kind of change in interpretive approach that the Supreme Court has sought to limit through stare decisis. Prior cases that relied on *Chevron* are therefore entitled to respect. *See CBOCS*, 553 U.S. at 449-52, 457 (holding that the Supreme Court's shift to textualism as its primary manner of statutory interpretation did not justify departing from a long line of precedents whose well-embedded interpretation of law relied primarily on legislative history).

Courts do not overturn a long line of earlier cases without mentioning the matter. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008). Inapposite to CSP's position, *Loper Bright* expressly cautioned against overruling any other precedent solely due to their reliance on *Chevron*. 144 S. Ct. at 2273. Likewise, as recently recognized by the Fourth Circuit, *Loper Bright* only "opens the door" to challenges based on "*new* agency actions interpreting statutes," but forecloses challenges based on agency actions "that were already resolved via *Chevron* deference analysis." *Tennessee v. Becerra*, 117 F.4th 348, 363 (6th Cir. 2024); *see also United States v. Trumbull*, 114 F.4th 1114, 1125 (9th Cir. 2024) (Bea, J., concurring) (affirming *Loper Bright*'s stare decisis limitation supporting adherence to prior *Chevron* holdings that upheld agency actions). *Loper Bright* therefore constrains the reexamination of settled precedent decided under *Chevron*, absent a special justification.

[1] *See, e.g., South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010); *National Cotton Council of America v. Envtl. Protection Agency*, 553 F.3d 927, 939-40 (6th Cir. 2009).

B. There is no special justification for overturning *Catskill III* or *Friends*, whose reasoning remains valid, sets forth a workable rule, is consistent with related decisions, and implicates substantial reliance interests

No special justification exists to overturn the *Chevron* decisions that upheld the WTR prior to the Supreme Court's holding in *Loper Bright*. Stare decisis in respect to statutory interpretation has "special force." *John R. Sand & Gravel Co.*, 552 U.S. at 139. Because Congress remains free to correct a court's mistakes, statutory stare decisis does not ordinarily bend to arguments that a decision was wrong on the merits. *Kimble*, 576 U.S. at 462. The judicial interpretation of a statute therefore has a "strong presumption of continued validity," and courts are reluctant to overrule such decisions. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Relevant factors in deciding whether to overrule a past decision include the quality of its reasoning, the workability of the rule it established, its consistency with other related decisions, and reliance on the decision. *Knick*, 588 U.S. at 203 (internal citations omitted).

1. The quality of reasoning of the *Catskill III* and *Friends* decisions remains valid and has received no substantial negative treatment

First, the quality of reasoning of the cases upholding the WTR present no special justification to overturn them. Precedent may be overruled for poor quality of reasoning when a decision has received substantial criticism, such that its doctrinal or conceptual underpinnings have been eroded. *Dickerson*, 530 U.S. at 443; *Knick*, 588 U.S. at 203. Evidence of a decision's faulty quality of reasoning may also exist where the cases it relied on have been repudiated, or where it remains an anomaly among similar case law. *See U.S. v. Gaudin*, 515 U.S. 506, 520 (1995); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 923 (2018).

In *Kimble*, the Supreme Court refused to overturn a precedential antitrust holding where its statutory and doctrinal underpinnings had not been eroded. *Kimble*, 576 U.S. at 458.

Specifically, Congress never chose to reverse the decision's antitrust rule by amending the patent law upon which that holding rested. *Id.* at 456-57. Likewise, the case on which the precedent primarily relied remained good law. *Id.* at 458. The Court additionally found that, even if arguments about the precedent's misguided economic or technological assumptions may be founded, they are better reserved to Congress's action, rather than the Court's. *Id.* at 460-62.

Similar circumstances exist here. Not only has Congress acquiesced to the EPA's water transfers interpretation for over 40 years, but it has never superseded the WTR since its formal promulgation in 2008. *Catskill III*, 846 F.3d at 525. The EPA has also refused to remove the WTR, despite more recently amending the specific provision where the WTR is codified. 78 Fed. Reg. 38,591 (June 27, 2013) (removing a permitting exemption for pesticide discharges, after a Sixth Circuit decision repudiating that rule). Furthermore, *Catskill III* and *Friends* have not received the sort of sustained criticism that might contemplate a departure. In fact, the only case providing for negative treatment of these decisions merely distinguished *Friends* on the facts in determining the definition of a "water transfer activity"; it never questioned the validity of the WTR or *Friends*'s reasoning. *Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1109 (D. Hawai'i 2019). The cases upon which *Catskill III* relied, including *Friends* and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95 (2004), similarly remain good law, as do the subsequent decisions interpreting those holdings. *Catskill III*, 846 F.3d at 526. Therefore, like the precedent discussed in *Kimble*, the quality of reasoning present in *Catskill III* and *Friends* do not support this Court's revisitation of their well-established holdings.

CSP contends that *Catskill III* and *Friends* were erroneous because the plain language of the CWA forbids "any discharge of any pollutant" into navigable waters. 33 U.S.C. § 1311. CSP fails to consider that this statutory language argument was already apparent and rejected in the

majority's holding in *Catskill III*. 846 F.3d at 524. *See CBOCS*, 553 U.S. at 453 (refusing to overturn a precedent's holding on the basis of a linguistic argument "that was apparent, and which the [precedent's] Court did not embrace at that time"). Any issues that CSP may have with this determination are better suited for Congress, which may supersede the decisions upholding the WTR at any time. After all, an assertion that the precedential court made the wrong call, "even if itself dead-right, fails to clear stare decisis's high bar." *Kimble*, 576 U.S. at 462.

2. The workability of the WTR provides for clear and consistent application that would otherwise be undermined by the substantial costs associated with requiring permits for all transfers

Second, the WTR, as set forth by *Catskill III* and *Friends*, is a workable rule. A rule is workable where it can be understood in a consistent and predictable manner, especially when compared to the alternative. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 220 (2022); *see Dickerson*, 530 U.S. at 444. Courts find a rule unworkable where its application is inherently confusing, produces disagreement, or fails to consider significant consequences. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Janus*, 585 U.S. at 919.

Catskill III recognized that the alternative to the WTR—namely, requiring a NPDES permit for every single instance in which waters may be transferred between distinct navigable waters—presents "serious and disruptive practical consequences." 846 F.3d at 533. In light of the 40 years in which water transfers have almost never required NPDES permits since the passage of the CWA, requiring such permits for water transfers is likely to be burdensome and costly for permittees, and may disrupt existing water transfer systems. *Id.* at 529. Even a Second Circuit decision that rejected the EPA's water transfers interpretation prior to the WTR nevertheless acknowledged the administrative burden entailed by its holding. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 87 (2d Cir. 2006) ("*Catskill II*").

Moreover, the Supreme Court itself has recognized that construing the NPDES program

to cover water transfers would "raise the costs of water distribution prohibitively," as thousands of new permits might have to be issued, and these diversions might also require expensive treatment to meet water quality criteria. *Miccosukee*, 541 U.S. at 108. Some western states, whose water supplies often rely on water transfers, have in fact filed amicus briefs in fear that decisions like *Catskill II* may upend state regulation of water rights. 451 F.3d at 83. Consequently, it cannot be said that the EPA's predictable, decades-long practice is unworkable— especially when compared to the alternative. *See Dickerson*, 530 U.S. at 444 (holding that a precedent's rule was workable despite its one possible disadvantage, where the alternative rule was more difficult to comply with and to apply in a consistent manner). Thus, there is no special justification to overturn *Catskill III* or *Friends* on the basis of unworkability.

3. Overturning *Catskill III* and *Friends* would require the reconsideration of a long line of consistent, related case law

Third, related decisions under the CWA have been consistent with related decisions upholding the WTR under *Chevron*. This consistency exists where courts have adhered to and reaffirmed a precedential rule in subsequent cases, such that overruling the precedent would also require the reconsideration of a number of other decisions. *Welch*, 483 U.S. at 494.

Following the decisions handed out by *Catskill III* and *Friends*, a number of other federal appellate and district courts have followed suit in their application of the WTR.[2] In 2009, the Sixth Circuit's reasoning in *National Cotton Council* relied upon the WTR as a valid EPA interpretation of the CWA's statutory text. 553 F.3d at 939-40. In 2010, the Fourth Circuit cited *Friends* to hold that the WTR did not apply to the defendants' conduct where they were discharging pollutants, rather than transferring them. 625 F.3d at 167. The Sixth Circuit again

[2] The consistency of *Catskill III* and *Friends* to cases that repudiated the EPA's water transfers interpretation *before* 2008 are irrelevant here, as they were decided prior to the EPA's formal promulgation of the WTR, and thus utilized a different analytical framework to determine deference to agency interpretations.

reaffirmed the WTR in 2022, where it cited directly to *Catskill III* in holding that a creek diversion fell within the scope of the WTR. *South Side Quarry*, 28 F.4th at 699. Other district court decisions, including those in other circuits, have similarly relied upon *Catskill III*, *Friends*, or the WTR itself, thereby reaffirming its precedential power. *See, e.g.*, *Bang v. Lacamas Shores Homeowners Association*, 638 F.Supp.3d 1223, 1227-28 (W.D. Wash. 2022); *Na Kia'i Kai v. Nakatani*, 401 F.Supp.3d 1097, 1109 (D. Haw. 2019); *Florida Wildlife Federation, Inc. v. Jackson*, 853 F.Supp.2d 1138, 1171 (S.D. Cal. 2009). Accordingly, the well-established consistency of *Catskill III* and *Friends* with a long line of related cases provides persuasive support for this Court's adherence to statutory stare decisis principles. *See Kimble*, 576 U.S. at 458 (following the Court's preference "not to unsettle stable law," given that a decision's close relation to "a whole web of precedents" means that reversing it could threaten others).

4. Substantial and tangible reliance interests depend upon the longstanding practice of the WTR as a guide to lawful compliance with the CWA

Finally, states, facilities, and individuals across the nation hold substantial reliance interests in the holdings set out by *Catskill III* and *Friends*. Reliance provides a "strong reason" for adhering to established law. *Janus*, 585 U.S. at 917. Traditional reliance interests arise where "advance planning of great precision is most obviously a necessity." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). These interests provide for adherence to stare decisis where a rule serves as a "guide to lawful behavior." *Knick*, 588 U.S. at 205.

The WTR has served as a guidepost for entities and individuals throughout the U.S. to plan their water supply and ensure that their behavior complies with the CWA. As mentioned, water transfers generally have never been subject to NPDES permitting requirements in the 40 years since the passage of the CWA. *Catskill III*, 846 F.3d at 525. The EPA has defended this interpretation of the CWA for over 20 years by defending court challenges, issuing interpretive

memos, promulgating the formal WTR, and providing for clarification and examples of its application. 73 Fed. Reg. 33,697, 33,699, 33,704 (June 13, 2008). Pennsylvania alone is the only NPDES permitting authority that regularly issues permits for water transfers. *Id.*

The validity of the WTR approved by *Catskill III* and *Friends*, which has never been repudiated by subsequent case law, thus provides for an established rule upon which stakeholders may rely. The EPA itself has already done so in its promulgation of other final rules, which identically stated that they did not affect existing regulatory exemptions from NPDES permitting requirements—such as "the status of water transfers." 88 Fed. Reg. 3,004, 3,068 (January 18, 2023); 80 Fed. Reg. 37,054, 37,055 (June 29, 2015). Given that the CWA prescribes circumstances under which those discharging pollutants are required to obtain a NPDES permit, the WTR serves as a guide for lawful behavior. 33 U.S.C. § 1311. Entities or individuals involved in water transfers, including the thousands of water transfers in place in the country, must therefore rely on the settled status of the WTR in order to appropriately plan their activities without violating the CWA. 73 Fed. Reg. at 33,698. Substantial and tangible reliance interests therefore deny the existence of a special justification for this Court to depart from the *Catskill III* or *Friends*. *See Janus*, 585 U.S. at 927 (finding that reliance interests were not present where the precedent did not provide a clear standard, and regulated entities were on notice for years about the "uncertain status" of the rule's constitutionality).

C. The WTR should also be accorded *Skidmore* deference because the EPA's use of extensive rulemaking procedures provide the rule with the persuasive force of law

Even if *Catskill III* and *Friends* are not accorded deference through stare decisis, however, the WTR still survives a *Skidmore* analysis. Under *Skidmore*, an agency's interpretation of ambiguous statutory language is entitled to respect based upon 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." *Skidmore v. Swift & Co.*, 323 U.S.134, 140 (1944).

Like a *Chevron* analysis, *Skidmore* requires that the statutory text at issue is ambiguous. *Catskill III*, 846 F.3d at 510. *Catskill III* and *Friends* independently determined through traditional tools of statutory interpretation that the relevant text of the CWA is ambiguous. *Id.*; *Friends*, 570 F.3d at 1227. *Catskill III* additionally demonstrated that the Second Circuit's previous decisions, despite repudiating the EPA's water transfers interpretation, did not in fact foreclose the ambiguity of the relevant statutory text. *Catskill III*, 846 F.3d at 510. Absent any special justification for overturning this precedent, we need not examine ambiguity here.

The primary contention of many of the cases that criticized the EPA's water transfers interpretation was that the interpretation was informal and thus had no persuasive force of law. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490-91 (2d Cir. 2001); *Catskill II*, 451 F.3d at 83; *Miccosukee*, 541 U.S. at 107. Although the EPA had consistently defended this practice across litigation and an interpretive memo in 2005, it proceeded with formal notice-and-comment rulemaking to provide exactly that force of law.

The EPA's proposed rule established a reasoned analysis to support the WTR, and solicited comments regarding the rule for the next two years. 71 Fed. Reg. 32,887 (June 7, 2006). This detailed process provided for the extensive consideration of various environmental and statutory factors, such as existing state water quality programs and cooperative federalism principles. 73 Fed. Reg. at 33,699, 33,705. The EPA also responded to extensive comments following exacting public scrutiny, and even decided against an additional subprovision of the WTR in light of these comments. *Id.* at 33,706. The EPA's promulgation of the WTR thus constitutes "a body of experience and informed judgment to which courts and litigants may

properly resort for guidance." *Skidmore*, 323 U.S. at 509. This Court should, accordingly, affirm the district court in holding that the WTR was validly promulgated under the EPA's authority.

IV. The district court correctly determined that Highpeak's discharge falls outside the WTR's protection and requires a permit under the CWA

The district court correctly held that Highpeak's discharge requires a NPDES permit under the CWA. While the CWA's framework generally exempts water transfers from permitting under the EPA's WTR, this exemption does not apply if the transfer introduces pollutants. 33 U.S.C. § 1342; 40 C.F.R. § 122.3(i). The EPA interprets this exclusion to include pollutants added through human activity or elevated by transfer mechanisms. This interpretation aligns with the WTR's goal of preventing water transfers from degrading receiving waters, placing Highpeak's discharge outside its protections.

A. *Loper Bright*'s reversal of the Chevron doctrine does not impact the validity of *Auer* deference

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* did not overrule *Auer v. Robbins* or *Kisor v. Wilkie*, which established deference to agency interpretations of their own ambiguous regulations. Instead, *Loper Bright* addressed statutory interpretation under the APA, requiring courts to exercise independent judgment on agency authority, eliminating *Chevron* deference for statutory ambiguities. *See Loper Bright Enterprises*, 144 S. Ct. 2244, 2247 (2024). However, the Court did not address regulatory interpretation under the *Auer/Kisor* framework, which remains binding precedent. *See Friends of the Floridas v. U.S. Bureau of Land Mgmt.*, No. CIV 20-0924, 2024 WL 3952037, at *60 (D.N.M. Aug. 27, 2024).

Loper Bright focused narrowly on rejecting deference where agency interpretations imposed significant economic burdens, without broadly undermining *Auer/Kisor*. Lower courts, including the Fourth and Ninth Circuits, have confirmed *Auer/Kisor* remains intact. *See U.S. v. Trumbull*, 114 F.4th 1114, 1118 n.2 (9th Cir. 2024); *U.S. v. Boler*, 115 F.4th 316, 322 n.4 (4th Cir.

2024). The Supreme Court's decision to cite *Kisor* and avoid overruling it underscores that *Auer* deference still applies when agency interpretations are reasonable, consistent, and within their expertise. *See Loper Bright Enterprises*, 144 S. Ct. at 2261.

B. The EPA's interpretation of the WTR warrants *Auer* and *Seminole Rock* deference because the WTR is ambiguous, EPA's interpretation is reasonable, and it reflects EPA's authoritative position, substantive expertise, and fair and considered judgment

In *Kisor v. Wilkie*, the Supreme Court outlined a two-step test for determining if an agency's interpretation of its own regulation warrants deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *See Kisor v. Wilkie*, 588 U.S. 558, 558-60 (2019). First, courts must determine if the regulation is genuinely ambiguous by exhausting traditional tools of statutory interpretation, including textual analysis, structure, history, and purpose. *See id.* at 559. If the regulation is clear, deference is not warranted. If ambiguity persists, courts must then assess whether the agency's interpretation is reasonable and falls within the identified ambiguity. *See id.*

The WTR exempts water transfers unless "pollutants [are] introduced by the water transfer activity itself." 40 C.F.R. § 122.3(i). The regulation is ambiguous, however, as it does not clarify whether "water transfer activity" includes naturally occurring pollutants elevated by transfer mechanisms, as the EPA argues, or direct human intervention, as Highpeak contends.

1. The ambiguity of the WTR fulfills the first requirement for *Auer* and *Seminole Rock* deference

a. The WTR is ambiguous because its plain language can be read reasonably in more than one way

Courts interpret regulations like statutes, determining their plain meaning based on ordinary definitions. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414–15 (1945); *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997).

The WTR exempts water transfers unless pollutants are introduced "by the activity itself." However, it does not clarify whether this includes naturally occurring pollutants elevated by transfer mechanisms or only pollutants introduced solely through human activity. The key question is whether the transfer mechanism elevates pollutant levels to a degree constituting an "introduction," regardless of origin. Similarly, the WTR does not define "introduced" or specify whether it requires direct human intervention or includes effects like erosion or sediment transport from poorly maintained infrastructure.

Merriam-Webster defines "introduce" as "to place, insert" or "to lead or bring in," which could apply to pollutants elevated by natural processes or human activity. *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/introduce (last visited Nov. 20, 2024). *Pollutant* is broadly defined as "something that makes an environment unsuitable or unsafe for use," without distinguishing between natural and human-made sources. *Id.* The absence of qualifiers like "human-caused" leaves the regulation open to interpretation, lacking definitive resolution.

b. The WTR is ambiguous because its structure and placement in the regulatory framework fail to clarify whether the exclusion applies to naturally occurring substances whose concentrations are elevated by transfer mechanism

The WTR, 40 C.F.R. § 122, implements sections 318, 402, and 405 of the CWA, requiring NPDES permits for pollutant discharges from point sources into U.S. waters. *See* 40 C.F.R. § 122.1(b). While "pollutant" broadly includes substances like rock, sand, and dirt, it does not clarify if the WTR applies to naturally occurring substances mobilized by transfer mechanisms, such as erosion from poorly maintained infrastructure. *See* 40 C.F.R. § 122.2. Similar exclusions, like those for agricultural runoff and irrigation flows, focus on discharge types without distinguishing between natural and human-caused pollutants. *See* 40 C.F.R. § 122.3(a), (e), (f). This ambiguity leaves unclear whether naturally occurring pollutants elevated

by transfer mechanisms are treated differently from those introduced solely by human activity.

c. The WTR is ambiguous because its legislative history and purpose do not clarify whether the exclusion includes naturally occurring pollutants elevated by transfer mechanisms and those from human activity

The WTR's legislative history emphasizes whether pollutants are introduced by the water transfer activity itself, without clarifying whether their source – natural processes or human activity – is relevant. *See* 40 C.F.R. § 122.3(i); 73 Fed. Reg. 33,700, 33,703–04 (June 13, 2008). While EPA excludes naturally occurring pollutants in their ambient state from permitting, it considers pollutants elevated by transfer mechanisms, like sediment from poor maintenance, as "additions" requiring a permit. *Id.* Natural changes during transfers, such as temperature or pH fluctuations, are similarly excluded. *Id.* Congress's dual intent – regulating point-source pollution while deferring nonpoint-source pollution and water transfers to states – supports the WTR's exemption for inter-basin transfers. *See* 33 U.S.C. §§ 1311(a), 1362(12); 73 Fed. Reg. at 33,701-02. However, this framework leaves ambiguity about whether the exclusion applies to naturally occurring pollutants elevated by transfer mechanisms.

2. The reasonableness of EPA's interpretation of the WTR fulfills the second requirement for *Auer* and *Seminole Rock* deference

a. The EPA's interpretation of the WTR addresses and aligns with the ambiguities in its terms.

Under the second step of the *Kisor* test, an agency's interpretation must be "reasonable" and "fall within the scope of the identified ambiguity." *See Kisor*, 588 U.S. at 584. The EPA argues that Highpeak's tunnel discharge contains elevated levels of contaminants like iron, manganese, and TSS, making these pollutants "introduced" by the transfer and requiring a permit. Record at 11. The EPA asserts that the WTR exemption does not apply, as transferring water with elevated pollutant levels constitutes a discharge under the NPDES program when

transfer mechanisms increase pollutant concentrations, regardless of their origin. This interpretation hinges on whether the WTR exclusion applies to pollutants exacerbated by transfer processes, an issue within the regulatory ambiguity.

b. The EPA's interpretation of the WTR merits controlling weight because it originates from an authoritative position, is grounded in its substantive expertise, and reflects its fair and considered judgment.

Under *Kisor*, an agency's interpretation within the "zone of ambiguity" must be entitled to "controlling weight" based on its "character and context." *Id.* at 576. This requires the interpretation to reflect the agency's "authoritative" position, substantive expertise, and "fair and considered judgment." *Id.* at 577-79.

i. EPA's interpretation of the WTR qualifies as an authoritative position under Kisor because it reflects the agency's official stance, communicated through formal channels, and provides clarity on regulatory application.

The "authoritative interpretation" prong of *Kisor* ensures the agency's interpretation reflects its official position, not an ad hoc statement. *See Kisor*, 588 U.S. at 577. To meet this standard, the interpretation must come from policy-making bodies or individuals and be communicated through formal or semi-formal channels, such as Federal Register notices. *Id.* Public-facing publications like the Federal Register that clarify regulatory application further support authoritativeness. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-64 (1980).

The EPA's WTR interpretation stems from its rulemaking process and is published in the Federal Register, a recognized formal channel. The statement that "where water transfers introduce pollutants...NPDES permits are required" is part of the agency's official explanation accompanying the WTR rule. *NPDES Water Transfers Rule*, 73 Fed. Reg. at 33,705.. By addressing scenarios like Highpeak's tunnel, where pollutants are "introduced" through transfer mechanisms, the EPA provided clear, authoritative guidance, ensuring transparency and

predictability, consistent with *Milhollin*.

ii. The EPA's interpretation of the WTR warrants deference due to its specialized expertise and policy judgments in a complex regulatory framework

An agency's interpretation warrants controlling weight when it reflects its substantive expertise, as Congress delegates interpretive authority to entities with specialized knowledge. *See Kisor v. Wilkie*, 588 U.S. 558, 577-78. Deference is particularly appropriate when an agency exercises its broad rulemaking authority to implement complex regulatory frameworks, especially in technical areas requiring policy judgments. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (holding that deference is owed to agency interpretations of statutes they administer, especially when Congress delegates broad rulemaking authority, as with the Federal Reserve Board under TILA, to ensure practical implementation and reliance by regulated entities); *Waters v. Pizza to You, LLC*, 538 F. Supp. 3d 785, 796 (S.D. Ohio 2021) (finding that deference is warranted when an agency applies a regulation to a factual scenario involving policy judgments, particularly in areas requiring technical expertise or addressing complex issues).

The EPA's interpretation of the WTR reflects its expertise in administering the CWA's NPDES program, which regulates pollutant discharges while balancing state water management authority. *See* 33 U.S.C. §§ 1311(a), 1362(12). The EPA concluded in the WTR rulemaking that water transfers generally do not require NPDES permits unless pollutants are introduced during the transfer process. *See* 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). This interpretation aligns with the CWA's dual goals of protecting water quality and respecting state autonomy.

The EPA applied its regulation to a complex scenario involving pollutants from Highpeak's tunnel construction. It determined that pollutants introduced through inadequate construction or maintenance, such as carving the tunnel without proper conduits, fall outside the WTR exclusion. Record at 11. While Highpeak argues that naturally occurring pollutants should

not trigger NPDES permitting, the EPA reasonably concluded that the transfer significantly increased pollutant concentrations (2-3% for iron, manganese, and TSS), far exceeding trace levels and directly linked to Highpeak's actions. Record at 12. This determination, grounded in technical expertise, reflects the EPA's role in navigating the interplay of natural processes and human contributions within the WTR framework to achieve the CWA's goals.

iii. The EPA's interpretation of the WTR reflects fair and considered judgment and avoids unfair surprise

To receive controlling weight under *Kisor*, an agency's interpretation must reflect fair and considered judgment, not a mere litigating position or post hoc rationalization. *See Kisor v. Wilkie*, 588 U.S. 558, 2417-18. Courts uphold interpretations consistent with established precedents, particularly those developed through notice-and-comment rulemaking. *See United States v. Trumbull*, 114 F.4th 1114, 1120-21 (9th Cir. 2024) (holding that fair and considered judgment was evident where an agency's interpretation was published in the Federal Register with opportunities for review and comments, reflecting deliberate decision-making rather than convenience). Similarly, interpretations consistent with prior precedents and practices avoid unfair surprise. *See Diamond Servs. Corp. v. Curtin Maritime Corp.*, 99 F.4th 722, 730–31 (5th Cir. 2024) (holding that the Coast Guard's interpretation did not create unfair surprise as it aligned with established practices).

The EPA's WTR interpretation reflects fair judgment, aligning with its prior guidance that "[w]ater transfers should...not themselves add pollutants to the water being transferred." *NPDES Water Transfers Rule*, 73 Fed. Reg. at 33,705.. This consistency confirms it is a deliberate policy application, not a post hoc rationalization. *See United States v. Duke Energy Corp.*, 981 F. Supp. 2d 435, 445-46 (M.D.N.C. 2013).

Additionally, the EPA's interpretation avoids unfair surprise. Highpeak's construction

practices, which introduced pollutants, violate the agency's longstanding emphasis on preventing pollutant introduction through proper operation. *See* 73 Fed. Reg. at 33,705. This consistent stance made the interpretation foreseeable and grounded in established policy.

Finally, the EPA need not exhaustively explain its reasoning to demonstrate fair judgment. Even implicit interpretations can suffice. *See Goffney v. Becerra*, 995 F.3d 737, 745-46 (9th Cir. 2021) (finding that an implicit interpretation in an agency's order reflected fair and considered judgment). Here, the EPA's interpretation, grounded in its regulatory authority and Federal Register guidance, reflects deliberate and reasoned decision-making.

C. The EPA's interpretation of the WTR warrants *Skidmore* deference because it reflects thorough consideration, valid reasoning, consistent application, and persuasive expertise

Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), courts afford an agency's interpretation of its own rule a measure of deference proportional to "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." *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). These factors recognize the agency's specialized expertise, its ability to gather relevant information, and the importance of maintaining legal uniformity. *See United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (discussing *Skidmore*).

1. The EPA's interpretation of the WTR warrants *Skidmore* deference because it reflects thorough, structured, and deliberate consideration

Courts assess an agency's deliberative process to determine if its interpretation reflects thoughtful and structured consideration. *See Doe v. Leavitt*, 552 F.3d 75, 81-82 (1st Cir. 2009) (granting *Skidmore* deference to HHS's interpretation because it resulted from thorough deliberation). This includes incorporating public input, detailed analysis, and agency expertise.

Id. Conversely, interpretations issued hastily or without public input are less likely to meet this standard. *See Hernandez v. Grisham*, 508 F. Supp. 3d 893, 1006-07 (D.N.M. 2020) (denying deference to USDOE's COVID-19 guidance issued within four days of school closures, lacking public input and detailed reasoning).

The EPA's interpretation of the WTR reflects the deliberate and thorough process required for *Skidmore* deference. The WTR was developed over several years through extensive analysis and public input, ensuring alignment with the CWA's statutory purpose. The process included an interpretive memorandum, a proposed rule, and a final rule informed by public comments. *See NPDES Water Transfers Rule*, 73 Fed. Reg. at 33,697.

The EPA actively sought public comments, receiving input from state agencies, municipalities, environmental groups, and industry stakeholders. *See* 73 Fed. Reg. at 33,698. It substantively responded to these comments, clarifying key aspects of the rule, such as the scope of exempt activities and when pollutants introduced by water transfer facilities would require NPDES permits. *Id.* at 33,705.

2. The EPA's interpretation of the WTR warrants Skidmore deference because it provides clear and valid reasoning that aligns with statutory intent and avoids contradictions

An agency's reasoning must provide clear explanations and avoid contradictions to merit deference. *See Draper v. Colvin*, 779 F.3d 556, 561 (8th Cir. 2015) (granting *Skidmore* deference to SSA's interpretation of special-needs trusts because it aligned with Congress's intent to count most assets for SSI eligibility). Courts find interpretations persuasive when they coherently address statutory provisions and further the law's purpose. *See Thompson v. Regions Sec. Servs., Inc.*, 67 F.4th 1301, 1309 (11th Cir. 2023) (upholding DOL's interpretation for aligning with the FLSA's purpose of reducing overtime and ensuring fair compensation); *Env't Integrity Project v. U.S. EPA*, 969 F.3d 529, 541-46 (5th Cir. 2020) (finding EPA's interpretation persuasive for

aligning with Title V's text, purpose, and cooperative federalism principles).

The EPA's interpretation avoids contradictions by consistently applying the WTR exclusion criteria. The rule exempts water transfers from NPDES permitting unless pollutants are introduced by the transfer activity itself, distinguishing between natural water movement and human-caused pollutant additions. *See* 40 C.F.R. § 122.3(i); 73 Fed. Reg. at 33,705. Highpeak's discharge, which caused a measurable 2-3% increase in pollutants due to substandard tunnel construction, qualifies as pollutant introduction. This interpretation aligns with the EPA's guidance that water transfers should avoid adding pollutants. *Id.*

The EPA's interpretation reflects a careful evaluation of the CWA's language, structure, and legislative history. The agency defined "water transfer" to exclude activities introducing pollutants via the transfer mechanism, relying on prior court decisions and statutory construction principles. *See* 73 Fed. Reg. at 33,699; *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (upholding EPA's interpretation of "addition"). By addressing Congress's intent to balance federal oversight with state water management, the EPA analyzed the regulatory framework's complex interplay with environmental protection. *See* 33 U.S.C. § 1251(b); 73 Fed. Reg. at 33,702.

3. The EPA's interpretation of the WTR warrants Skidmore deference because it demonstrates consistent application over time, reinforcing reliability and predictability in regulatory policy.

Agency interpretations gain credibility when maintained consistently over time. *See Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1012 (9th Cir. 2017) (finding longstanding interpretations particularly persuasive due to their reliability). Conversely, courts hesitate to defer to interpretations that contradict prior statements, undermining trust and predictability. *See Hernandez*, 508 F. Supp. 3d 893, 1008 (denying deference due to inconsistent

agency guidance).

The EPA has consistently emphasized that the WTR exemption does not apply when transfer activities introduce pollutants into the conveyed water. *See* 73 Fed. Reg. at 33,705. This aligns with the EPA's original guidance that "[w]ater 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." *Id.* Highpeak's claim that naturally occurring pollutants elevated by transfer mechanisms are exempt under the WTR contradicts the EPA's longstanding focus on preventing pollutants introduced by transfer activities themselves. The EPA's clear and consistent distinction between natural pollutant movement and pollutants introduced through human activity underscores its reliable application of the WTR.

4. The EPA's interpretation of the WTR warrants *Skidmore* deference for its clarity, consistency, and practical application, demonstrating persuasive power through sound reasoning and expertise.

Persuasive power depends on the agency's expertise and sound reasoning. *See Hayes v. Harvey*, 903 F.3d 32, 44-45 (3d Cir. 2018) (affording deference to interpretations that enhance consistency across complex regulatory frameworks). Transparent, practical, and easy-to-apply interpretations further strengthen their persuasiveness. *See Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 80 (2d Cir. 2009) (upholding SSA's interpretation for its clarity and ease of application).

The EPA's expertise in water quality and resource management underpins the WTR's design and interpretation, enabling it to address complex regulatory frameworks. The Agency emphasized that water transfers must not degrade receiving waters through preventable pollutant introduction, requiring NPDES permits for facilities introducing such pollutants. *See* 73 Fed. Reg. at 33,705. This policy judgment reflects the EPA's specialized understanding of

hydrological systems and pollution control, ensuring consistent application across diverse contexts, such as municipal water supplies and agricultural irrigation projects. By narrowly defining the WTR exemption to exclude pollutants introduced by transfer activities, the EPA balances water quality protection with respect for state authority. *See* 33 U.S.C. § 1251(b).

The EPA's interpretation is clear, practical, and easy to apply, enhancing its persuasive power. It explicitly distinguishes between inherent pollutants and those introduced by transfer activities, providing regulated entities like Highpeak with predictable compliance standards. For instance, the EPA determined that pollutants arising from substandard construction, such as Highpeak's incomplete metal conduit tunnel, trigger NPDES permitting, aligning with the CWA's goal to "restore and maintain the integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a). This transparent and enforceable interpretation reflects the EPA's technical expertise, sound reasoning, and commitment to advancing the CWA's purpose while ensuring consistency.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determinations that CSP has standing to pursue its regulatory challenge and citizen suit, and that CSP timely filed its challenge to the Water Transfers Rule. In the alternative, this Court should affirm the district court's dismissal of CSP's challenge to the Water Transfers Rule as a validly promulgated regulation, and also affirm the district court's denial of Highpeak's motion to dismiss CSP's citizen suit under the Clean Water Act.