Non-Measuring Brief
TEAM 17

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
Defendants-Appellant-Cross-Appellants

-and-

HIGHPEAK TUBES, INC.,
Defendants-Appellant-Cross-Appellants

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

Brief of Appellee, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered summary judgment in case 24-CV-5678 on August 1, 2024. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (judicial review of agency action), 28 U.S.C. § 1331 (federal question jurisdiction), and 33 U.S.C. § 1365 (Clean Water Act citizen suit provision). CSP filed a timely Notice of Appeal pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which grants courts of appeals jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final decisions and thus appealable. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

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. Overview of the Clean Water Act

The Federal Water Pollution Control Act of 1972, commonly known as the Clean Water Act ("CWA" or "the Act"), was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the "discharge of any pollutant by any person" except in compliance with specific provisions. *Id.* § 1311(a). The Environmental Protection Agency (EPA) administers the CWA in coordination with authorized states to develop comprehensive programs to reduce pollution. *Id.* §§ 1251(d), (g).

The CWA establishes the National Pollutant Discharge Elimination System (NPDES) to regulate pollutant discharges from point sources into waters of the United States. *Id.* § 1342. Under the NPDES framework, a "point source" is defined as any discernible, confined, and discrete conveyance, such as pipes, ditches, or tunnels, from which pollutants are discharged. *Id.* § 1362(14). States are authorized to administer NPDES programs with EPA oversight, maintaining the balance between federal regulatory authority and state-led implementation. *Id.* § 1251(b). However, when no partnership exists in a state, applicants must apply to the EPA directly.

B. The Water Transfers Rule

The EPA promulgated the Water Transfers Rule ("WTR") in 2008 to exempt water transfers from NPDES permitting requirements when the water is conveyed between distinct water bodies without intervening industrial, municipal, or commercial use. 40 C.F.R. § 122.3(i) (2008). The EPA explained that the rule was intended to clarify ambiguities in the CWA regarding whether water transfers constitute an "addition" of pollutants. This clarification was

necessary to resolve conflicting judicial interpretations and maintain regulatory consistency with the agency's longstanding position that water transfers are not subject to NPDES permitting unless they involve pollutants introduced from an external source. 40 C.F.R § 122, at 33,697, 33,698–99 (2008). The rule reflects the EPA's view that water transfers, when they do not involve intervening industrial, municipal, or commercial uses, are not discharges requiring permits under the CWA. *Id.*

States can administer NPDES programs under EPA oversight, maintaining a balance between federal regulatory authority and state-led implementation. 33 U.S.C. § 1251(b). However, where no partnership between EPA and state exists, applicants must apply directly to the EPA for such permits.

C. Factual Chronology and Procedural History

Highpeak Tubes, Inc. ("Highpeak") operates a recreational tubing business on 42 acres of land in Rexville, New Union. Order at 4. Cloudy Lake, a 274-acre lake, lies to the north of Highpeak's property, while Crystal Stream runs along the southern border and serves as the launch site for tubing activities. *Id.*

In 1992, Highpeak constructed a 100-yard tunnel connecting Cloudy Lake to Crystal Stream with permission from the State of New Union. *Id*. The tunnel, partially carved from natural rock and partially constructed with iron piping, is equipped with valves that Highpeak employees use to release water into Crystal Stream when authorized by the State of New Union. *Id*. This typically occurs during the rainy season, when water levels in Cloudy Lake are sufficient to allow a release. *Id*. The purpose of these releases is to increase the stream's volume and velocity to enhance recreational tubing. *Id.* Highpeak has never sought an NPDES permit for the tunnel's operations, nor has it been previously challenged for discharges. *Id.*

On December 1, 2023, Crystal Stream Preservationists, Inc. ("CSP") was formed as a nonprofit organization dedicated to protecting Crystal Stream from pollution. *Id.* CSP consists of 13 members, including landowners with property along Crystal Stream, who observed increased turbidity and suspected contamination in the water. *See* Jones Decl., Exhibit A, p.14. CSP conducted water sampling at Cloudy Lake and the tunnel's outfall into Crystal Stream, finding significantly higher concentrations of iron, manganese, and total suspended solids ("TSS") in the stream compared to the lake. Order at 5. CSP concluded that Highpeak's tunnel introduces pollutants into Crystal Stream in violation of the CWA. *Id.*

On December 15, 2023, CSP sent Highpeak a Notice of Intent to Sue ("NOIS") letter pursuant to 33 U.S.C. § 1365(b)(1)(A), alleging that the tunnel constitutes a point source discharging pollutants without a permit. Order at 4. CSP's analysis showed that the water discharged into Crystal Stream contained pollutant concentrations 2–3% higher than those directly sampled from Cloudy Lake, indicating the addition of pollutants during the transfer process. *Id.*

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

CSP also sent copies of the NOIS to the EPA and the New Union Department of Environmental Quality. *Id.*

Highpeak responded on December 27, 2023, asserting that its activities fall within the WTR exemption and that any pollutants added during the transfer were "natural" and did not remove the discharge from the rule's protections. *Id.*

After the 60-day notice period expired, CSP filed suit against Highpeak on February 15, 2024, alleging violations of the CWA. *Id.* CSP also filed an Administrative Procedure Act (APA) claim against the EPA, challenging the WTR as inconsistent with the CWA's statutory language. *Id.* The District Court concluded that Highpeak's activities constituted the addition of pollutants and required an NPDES permit. *Id.* The court further found the WTR inapplicable because the discharge introduced pollutants during the transfer process, exceeding the rule's scope. *Id.*

Highpeak, CSP, and the EPA all filed motions for summary judgment. Order at 11. Based on the evidence presented, the District Court granted CSP summary judgment on its CWA citizen suit claim against Highpeak, finding that Highpeak's discharges introduce pollutants into Crystal Stream during water transfers, thereby exceeding the scope of the WTR. Order at 15. The District Court also granted summary judgment to the EPA, upholding the validity of the WTR under the Administrative Procedure Act (APA). Order at 17. The court denied Highpeak's motion for summary judgment on the basis that its reliance on the WTR exemption was misplaced. Order at 18. This appeal followed.

SUMMARY OF THE ARGUMENT

CSP challenges Highpeak's unpermitted discharges into Crystal Stream and the WTR. CSP contends that Highpeak's discharges introduce pollutants into Crystal Stream, falling outside the WTR exemption and requiring NPDES permitting. CSP also argues that the WTR is invalid because it contravenes the plain language of the CWA. The District Court partially agreed, finding that CSP's claims were timely and that Highpeak's discharges were not exempt under the WTR, but it erred in upholding the validity of the WTR.

The District Court correctly held that CSP has standing to bring its citizen suit against Highpeak and its regulatory challenge to the WTR. CSP's members demonstrated concrete

injuries, including diminished recreational and aesthetic enjoyment of Crystal Stream, traceable to Highpeak's discharges. *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180–81 (2000); Order at 4–6. CSP also satisfied the causation and redressability requirements of Article III standing, as CSP's injuries are directly linked to Highpeak's pollutant discharges, which could be addressed by requiring NPDES compliance. *Friends*, 528 U.S. at 180–81.

CSP's regulatory challenge was also timely. The APA's 6-year statute of limitations begins to run only when a plaintiff suffers an actual, concrete injury, not at the time of the regulation's promulgation. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. ---- (2024); *Green v. Brennan*, 578 U.S. 547 (2016). CSP's cause of action accrued upon its formation in December 2023, when it became capable of experiencing harm, consistent with Supreme Court precedent.

However, the District Court erred in holding the WTR valid. Historically, courts deferred to agency interpretations under *Chevron* deference (*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)), but that framework has been overturned. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Following *Loper Bright*, courts must independently resolve ambiguities in statutory text without deferring to agency interpretations. *Loper Bright*, 144 S. Ct. 2244. Applying the less deferential standard in *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944), it becomes clear that the WTR is arbitrary, capricious, and contrary to the CWA's plain language, which prohibits unpermitted discharges of pollutants into navigable waters. 33 U.S.C. §§ 1311(a), 1362(12).

The WTR creates a blanket exemption for water transfers, even when they introduce pollutants into receiving waters. This exemption directly contravenes the CWA's plain language, which defines a "discharge of a pollutant" as the "addition of any pollutant to navigable waters

from any point source." 33 U.S.C. § 1362(12). Highpeak's discharges, which introduce pollutants such as iron, manganese, and TSS into Crystal Stream during conveyance, illustrate this contradiction. See Order at 5. By exempting such pollutant-laden transfers, the WTR undermines the CWA's goal of restoring and maintaining the integrity of the nation's waters. 33 U.S.C. § 1251(a).

Finally, the District Court correctly held that Highpeak's discharges fall outside the WTR's exemption and require NPDES permitting. CSP's sampling evidence confirmed that water discharged from Highpeak's tunnel contained pollutant concentrations 2–3% higher than those found at the intake from Cloudy Lake. Order at 4. These pollutant increases, which occur during conveyance, exceed the WTR's limited exemption for unaltered water transfers. Courts have consistently held that pollutant additions during water transfers remove discharges from the scope of the WTR. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) (Catskill III); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (7th Cir. 2004).

This Court should affirm the District Court's findings on CSP's standing, the timeliness of its claims, and Highpeak's permitting obligations but reverse its holding that the WTR is valid under the CWA and the APA.

STANDARD OF REVIEW

This Court reviews the issue of standing de novo. Standing is a jurisdictional prerequisite, and appellate courts must independently evaluate whether a plaintiff satisfies the requirements of Article III, including injury-in-fact, causation, and redressability. *Friends,* 528 U.S. at 180-81.

Similarly, the timeliness of an Administrative Procedure Act (APA) challenge is also reviewed de novo, as it involves legal questions concerning claim accrual. *Village of Barrington v. Surface Transp. Bd*., 892 F.3d 252 (7th Cir. 2018).

Review of an agency's action under the APA applies the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The Court must "determine whether the agency considered the relevant data and rationally explained its decision." *WildEarth Guardians v. U. S. EPA,* 728 F.3d 1075, 1081 (10th Cir. 2013).

Finally, grants of summary judgment are reviewed de novo. *Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reviewing summary judgment, the Court views the evidence in the light most favorable to the non-moving party. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003).

ARGUMENT

I. The District Court correctly held CSP had standing to challenge EPA's Water Transfer Rule and Highpeak's discharge.

The District Court correctly held that CSP has standing to challenge both Highpeak's discharge under the CWA and the WTR promulgated by the EPA. To establish standing, a plaintiff must satisfy both constitutional and statutory requirements. CSP satisfies constitutional standing under Article III by demonstrating injury-in-fact, causation, and redressability. CSP also meets statutory standing requirements under the CWA by qualifying as a "citizen" and complying with the Act's procedural prerequisites. CSP's standing to bring its citizen suit against Highpeak and its regulatory challenge to the WTR should therefore be affirmed.

A. CSP has standing to bring a citizen suit against Highpeak because its members demonstrated injury-in-fact, causation, and redressability, and CSP complied with procedural requirements under the CWA.

To satisfy standing, a plaintiff must meet both statutory and constitutional requirements. Statutory standing under the CWA requires the plaintiff to qualify as a "citizen" and comply with procedural prerequisites for filing suit. 33 U.S.C. §§ 1365(a), (b)(1)(A), (g). Constitutional standing under Article III places limits on federal-court jurisdiction to certain cases and controversies. "[O]ne element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). A plaintiff must demonstrate: (1) injury-in-fact, (2) causation, and (3) redressability. *Friends of the Earth,*528 U.S. at 180–81. Injury-in-fact requires a concrete and particularized harm that is actual or imminent. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Causation requires a reasonably traceable connection between the harm and the defendant's conduct. *Pub. Int. Rsch. Grp. v. Powell Duffryn Terminals*, 913 F.2d 63, 72 (3rd Cir. 1990). Redressability requires that a favorable decision is likely to remedy the plaintiff's harm. *Friends of the Earth*, 528 U.S. at 181.

CSP meets these requirements to bring its citizen suit against Highpeak's discharges into Crystal Stream.

1. Statutory Standing under the CWA

Under the CWA, "any citizen" may bring a civil action to enforce violations of effluent standards or limitations. 33 U.S.C. § 1365(a)(1). A "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." *Id.* § 1365(g). Before filing suit, a plaintiff must provide a 60-day notice of intent to sue, which must include specific allegations

and evidence supporting the alleged violation, such as pollutant sampling data. *Id.* § 1365(b)(1)(A).

CSP satisfies these statutory requirements. It qualifies as a "citizen" because it represents members whose interests in the recreational and aesthetic value of Crystal Stream are directly affected by Highpeak's pollutant discharges. Order at 4–5. CSP provided the required 60-day notice on December 15, 2023, detailing specific violations of the CWA and supporting its claims with pollutant sampling data. This evidence showed that water discharged from Highpeak's tunnel into Crystal Stream contained pollutant levels 2–3% higher than those found in Cloudy Lake, including elevated concentrations of iron, manganese, and TSS. *Id.* CSP filed its citizen suit against Highpeak on February 15, 2024, complying with all procedural prerequisites. Order at 5.

2. Constitutional Standing under Article III

To meet constitutional standing, CSP must demonstrate injury-in-fact, causation, and redressability. *Friends of the Earth*, 528 U.S. at 180–81.

An injury-in-fact must be actual or imminent and not merely conjectural or hypothetical. *Lujan*, 504 U.S at 564 (holding that injury-in-fact was not met based on "some day intentions" to visit another country halfway across the world). CSP's members experience concrete, particularized harm resulting from Highpeak's discharges into Crystal Stream. For example, Cynthia Jones, a CSP member, lives 400 yards from Crystal Stream Park and regularly walks along the stream. She noticed that the discharge of suspended solids and metals has turned the water cloudy, stating, "the discharge and suspended solids and metals . . . make the otherwise clear water cloudy," and her "ability to enjoy the Stream has significantly diminished since learning about the pollutants introduced by Highpeak's discharge." Jones Decl., Exhibit A, p. 14.

Similarly, Jonathan Silver, another CSP member, lives half a mile from the stream and has reduced his recreational use, explaining, "I am now hesitant to allow my dogs to drink from the Stream due to the pollutants, which I understand include metals. If not for Highpeak's discharge . . . I would allow my dogs to drink from the stream." Silver Decl., Exhibit B, p. 16. These injuries satisfy the injury-in-fact requirement because they are concrete, particularized, and directly attributable to Highpeak's activities. *Friends of the Earth*, 528 U.S. at 184.

Further, causation requires a fairly traceable connection between the injury and the defendant's conduct. A plaintiff must show some perceptible environmental degradation to the resources used, and that the kinds of pollutants discharged cause the degradation observed. *Powell Duffryn Terminals*, 913 F.2d at 72 (holding plaintiffs need not show "to a scientific certainty" that the defendant's effluent alone caused harm to the plaintiffs). CSP demonstrates that its members' injuries are directly traceable to Highpeak's discharges. Sampling data confirms that water discharged from Highpeak's tunnel contains higher pollutant concentrations than water from Cloudy Lake. Order at 4–5. CSP satisfies this requirement because its members' injuries stem directly from the increased pollutant levels in Crystal Stream.

Finally, redressability requires a likely injury that can be redressed by a favorable decision. To show redressability for an alleged procedural violation, a plaintiff "needs to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision." *WildEarth,* 759 F.3d at 1207. CSP's injuries are redressable through judicial enforcement of the CWA's permitting requirements. A court order requiring Highpeak to obtain an NPDES permit would regulate its discharges, reducing pollutant levels and addressing CSP members' concerns. By demonstrating that its injuries are directly attributable to

Highpeak's discharges and that these injuries can be remedied by judicial enforcement of the CWA, CSP satisfies the redressability requirement.

B. CSP has standing to challenge the EPA's Water Transfers Rule because it demonstrated injury-in-fact and procedural compliance under the CWA.

CSP also meets statutory and constitutional standing requirements to challenge the validity of the WTR as inconsistent with the CWA.

As discussed above, CSP meets constitutional standing requirements under Article III because it has injury-in-fact, causation, and redressability. In addition, CSP also satisfies statutory standing requirements under the CWA. The Act authorizes citizens to sue the EPA Administrator for failing to perform non-discretionary duties. 33 U.S.C. § 1365(a)(2). Before filing suit, plaintiffs must provide a 60-day notice of intent to sue, which must include specific allegations and supporting evidence. *Id.* § 1365(b)(1)(A). On December 15, 2023, CSP provided the required 60-day notice, specifying its challenge to the WTR and the environmental harm caused by its application. CSP's notice included sampling data demonstrating that water discharged from Highpeak's tunnel into Crystal Stream contained pollutant levels 2–3% higher than those found in Cloudy Lake. Order at 4–5. After fulfilling this requirement, CSP timely filed its challenge to the WTR on February 15, 2024. Order at 5.

The WTR's blanket exemption for water transfers undermines the CWA's purpose of preventing unpermitted discharges. By enabling transfers of pollutant-laden water without permits, the WTR harms CSP's members and contravenes the Act's goal of protecting the integrity of the nation's waters. 33 U.S.C. § 1251(a). CSP's procedural compliance, combined with the concrete injuries suffered by its members, establishes standing to challenge the WTR.

The District Court correctly concluded that CSP meets the requirements for statutory and constitutional standing to challenge the WTR, and this Court should affirm that conclusion.

II. The District Court Correctly Found CSP's Challenge Timely

The District Court correctly held that CSP's challenge to the EPA's WTR was timely. The APA prescribes a 6-year statute of limitations, which begins when the plaintiff's cause of action "first accrues." CSP's claim did not accrue upon the rule's issuance in 2008; rather, it accrued on December 1, 2023, when CSP was formed and thus became capable of experiencing harm. Order at 4. CSP filed suit within three months of its formation, on February 15, 2024, making its claim indisputably timely. *Id.* at 5.

A. The APA's 6-year statute of limitations governs CSP's challenge because CSP's claim accrued when it suffered an actual injury.

The APA imposes a general 6-year statute of limitations on actions against federal agencies unless a more specific statutory deadline applies. 28 U.S.C. § 2401(a). This period begins when the right of action "first accrues." *Id*. The Supreme Court has held that, for APA challenges, accrual occurs when the plaintiff experiences an actual, concrete injury resulting from the agency action. e.g. *Corner Post,* 603 U.S. ---- , "[O]nly after [plaintiff] has a complete and present cause of action does a limitations period ordinarily begin to run." *Green v. Brennan*, 578 U.S. at 555.

This 6-year period is designed to ensure that APA claims are reviewed based on actual injury, rather than merely when a regulation is issued. 28 U.S.C. § 2401(a). The Court's decision in *Corner Post* reaffirms this approach, emphasizing that accrual under the APA focuses on when a plaintiff suffers a specific harm, not on a general regulatory issuance date. *Corner Post*, 603 U.S. ----. CSP challenged the validity of the WTR as arbitrary and capricious under the

APA, and its first actionable injury occurred on December 1, 2023, when the organization formed (Order at 4) and gained standing to bring this claim. Therefore, the 6-year statute of limitations governs CSP's challenge. 28 U.S.C. § 2401(a).

B. CSP's cause of action accrued upon its formation, not upon the WTRs promulgation, because it could not experience harm until it legally existed.

The statute of limitations begins to run when a plaintiff suffers injury that completes a cause of action. *Green*, 578 U.S. at 555. CSP formed on December 1, 2023, specifically to advocate for Crystal Stream's water quality, experienced its first injury upon its creation. Order at 4. Prior to this, CSP had no legal existence and could not have suffered harm from the WTR, rendering any earlier "accrual" irrelevant for this plaintiff. A claim accrues only "when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (inner citations omitted). Thus, the right to challenge the WTR accrued only upon CSP's formation in December 2023.

As noted above, CSP's standing to challenge the WTR stems from its organizational purpose, which aligns with the environmental concerns of its member, Jonathan Silver, who moved to the area in 2019. Silver Decl., Exhibit B, p.16. Silver's proximity to waters affected by the WTR reinforces that CSP represents a local interest directly impacted by the rule's application. CSP's cause of action therefore did not accrue with the WTR's promulgation in 2008, but rather with CSP's establishment in 2023, when the organization became capable of asserting and defending its members' interests against regulatory actions under the APA.

Additionally, Silver individually has standing to bring suit against Highpeak due to his moving to the affected area (only one-half mile from Crystal Stream Park), CSP's representational standing is valid under the 6-year statute of limitations. *Id.* Accordingly, the

District Court was correct in holding that CSP's claim did not accrue until CSP itself became subject to injury.

III. The District Court erred in holding that the Water Transfer Rule was a valid regulation promulgated pursuant to the Clean Water Act.

The District Court erred in holding the Water Transfer Rule was a valid regulation promulgated pursuant to the CWA.

The APA governs the court's review of an agency regulation, and the court may defer to agency interpretation if the statutory language is ambiguous. The APA provides courts the ability to apply their judgement for agency cases through independently interpreting the statute and recognizes any constitutional boundaries of the delegated authorities. *See Loper Bright*, 144 S.Ct. at 2261. The court will not likely overturn the agency's decision "unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *WildEarth Guardians,* 728 F.3d at 1081.

Under the APA's arbitrary and capricious standard, the court "must determine whether the agency considered the relevant data and rationally explained its decision." *Id.* Agency action is considered arbitrary or capricious if:

> "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The CWA's plain language forbids *any* discharge of *any* pollutant into water of the United States without complying with the CWA. 33 U.S.C. § 1311. The WTR allows for transfer water between two U.S. bodies of water without introducing pollutants in the transfer and

exempts these water transfers from NPDES permit requirements. 40 C.F.R. § 122.3(i) (2008). A water transfer introducing pollutants through intervening industrial, municipal, or commercial use would need a permit. *Id.* However, the EPA provided an exemption that the WTR does not apply if pollutants are introduced by the water activity itself.

CSP challenges the statutory language of the WTR under the APA for being contrary to law under the CWA and allowing the exception of pollutants between two U.S. bodies of water. 5 U.S.C. § 551 et seq. Since the WTR is no longer entitled to judicial deference under *Chevron,* the court should follow the reasoning of prior interpretations, deciding that the addition of pollutant from one U.S. body of water to another is additional pollutants, and therefore the WTR is inconsistent with the CWA.

A. The WTR is arbitrary and capricious because it contravenes the CWAs plain language, which prohibits unpermitted discharges of pollutants.

A court reviewing agency regulation under APA will not overturn the agency's decisions "unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *WildEearth Guardians,* 728 F.3d at 1081. Under the APA's arbitrary and capricious standard, an agency action is considered arbitrary or capricious if the outcome is implausible or contrary to the evidence. *Id.*

CSP argues the CWA plain language forbids *any* discharge of *any* pollutant into water of the United States without complying with the Act. 33 U.S.C. § 1311. Accordingly, the WTR exempts water transfers that introduce pollutants, directly contravening the CWA's plain language prohibiting the unpermitted discharge of pollutants into navigable waters. *Id.* §§ 1311(a), 1362(12). By allowing pollutant discharges without NPDES permits, the WTR directly

contravenes the CWA's unambiguous requirements, rendering it arbitrary, capricious, and contrary to law under the APA.

B. Under *Loper Bright*, *Skidmore* provides the proper standard to evaluate the WTR's inconsistency with the CWA.

The District Court erred in rejecting the reasoning and holdings of past cases that utilized the deferential standard of Skidmore.

Prior to the 2008 promulgation of the WTR, courts concluded under varied judicial review, including the deferential standard of review in *Skidmore*, that the water transfer between distinct waters of the United States did constitute discharge under the CWA and permits were required. *See Skidmore,* 323 U.S. at 134; *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–94 (2nd Cir. 2001) (Catskill I); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82–87 (2d Cir. 2006) (Catskill II). After the WTR was promulgated as a regulation in 2008, courts expressly used the Chevron deference and upheld the WTR as a valid interpretation of the CWA for discharge. *See Catskill Mountains,* 846 F.3d at 524–33 (Catskill III); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist*., 570 F.3d 1210, 1227–28 (11th Cir. 2009).

The 1944 Supreme Court decision of *Skidmore* created a standard of review for courts to give weight to agency interpretation for ambiguous statuary language. *Skidmore,* 323 U.S. at 134. Specifically, "[t]he weight of judgement in a particular case will depend 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." *Id.* at 140. This allowed courts the flexibility to resort to an agency for guidance, but did not provide agency's any controlling authority over the court's decision. *Id.*

The 1984 Supreme Court's seminal decision of *Chevron* created the *Chevron* doctrine of agency deference. *Chevron,* 467 U.S. at 837. This required courts to not just ask an agency for guidance, like *Skidmore*, but mandated courts defer to an agency for ambiguity within the agency's statute. *Id. Chevron* created a two-part test to guide judicial review of an agency's statutory interpretation, the courts determine in step one if the statute is ambiguous. *Id.* The courts reviewed whether "Congress has directly spoken to the precise question at issue." *Id.* at 843. If the interpretation is clear and unambiguous, then the court finds no further issue. *Id.* If, after step one, the expressed intent of Congress is still found ambiguous or silent on the specific issue, then the court would proceed to step two. *Id.* Step two defers to the agency's interpretation based on the construction of the statute itself. *Id*.

The Supreme Court's 2024 opinion in *Loper Bright* expressly overruled *Chevron'*s doctrine of deference for agency interpretation of ambiguous federal statutes. *See Loper Bright,* 144 S.Ct. at 2273 Although *Loper Bright* overturned *Chevron,* the regulations held under the *Chevron* framework still remain valid unless there is a "special justification" for revisiting prior rulings. *Id.*

Past decisions to uphold the WTR in cases such as Catskill III were made under the now-overturned *Chevron* deference. *See Catskill,* 846 F.3d at 492 (Catskill III). The Supreme Court's *Loper Bright* decision instructed courts to return to the less deferential standard of review laid out in *Skidmore. See Loper Bright* 144 S.Ct. at 2309. Past decisions under *Skidmore*, such as Catskills I and II, found the WTR was inconsistent with the CWA. Order at 10.

The WTR is no longer due judicial deference based the overturn of *Chevron* deference under the *Loper Bright decision.* The District Court's failure to apply *Skidmore* after *Loper Bright* resulted in improper deference to the WTR, warranting reversal.

C. CSP demonstrated a special justification for revisiting prior rulings supporting the WTR due to significant legal inconsistencies.

The District Court erred in holding CSP did not establish a special justification to overcome prior rulings under *Chevron* that upheld the WTR.

CSP claims the District Court should utilize the deferential standard of *Skidmore* instead of past cases utilizing *Chevron* deference. The District Court focused on *Loper Bright*, specifically stating the decision does not "call into question prior cases that relied on the *Chevron* framework." *Loper Bright*, 144 S.Ct. at 2273. *Loper Bright* also emphasized that regulations upheld under the *Chevron* framework remain valid unless there is a "special justification" for revisiting prior ruling. *Id.* A special justification is not just an argument that the precedent was wrongly decided but showing substantial reasons such as the precedent being unworkable, unsound, or significantly detrimental to legal coherence and consistency. *Id.* at 2280.

It is understood that the change in interpretative method has not changed the holding of past cases. *Id.* However, *Loper Bright* did not set a precedent for a statutory regulation being reviewed under the weight of two different judicial deferences. The WTR under the CWA have been viewed under both the lens of *Skidmore* and *Chevron* deference. Accordingly, the discrepancy of past cases cause a detrimental legal inconsistency for the validity of the WTR and allows a special justification under *Loper Bright*.

The conflicting precedents under *Chevron* and *Skidmore* create significant legal inconsistency, providing the special justification required under *Loper Bright* to revisit and invalidate the WTR.

IV. The District Court's Holding Was Correct That Transfer of Pollutants with Water from One Body of Water to Another Falls Outside the Scope of the Water Transfers Rule.

The District Court correctly held that Highpeak's discharge falls outside the scope of the WTR and requires a permit under the CWA. The WTR exempts only unaltered water transfers from NPDES permitting, and Highpeak's operation introduces pollutants, such as iron, manganese, and TSS, during the transfer process. These additions to Crystal Stream fundamentally alter the quality of the receiving water, taking the discharge outside the WTR's limited exemption and making it subject to the CWA's permitting requirements.

A. The plain language of the CWA requires a permit for the addition of pollutants into waters of the United States.

The CWA defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Courts have consistently interpreted "addition" to include the transfer of pollutants from one water body to another, as such transfers result in a net increase of pollutants in the receiving water body. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109 (2004) (holding that transferring pollutants between meaningfully distinct water bodies constitutes an "addition."). This interpretation reflects the CWA's emphasis on protecting the integrity of receiving waters, ensuring they are not degraded by unregulated pollutant discharges, regardless of the pollutant's origin.

Notably, a "discharge of a pollutant," for which a NPDES permit is required under the CWA includes point sources that do not themselves generate pollutants. *Miccosukee*, 541 U.S. at 95. Highpeak's tunnel does not generate the iron, manganese, or TSS that are discharged into Crystal Stream, but it is the mechanism by which these pollutants are conveyed into the receiving

water body. The CWA imposes permitting requirements because the point source facilitates the addition of pollutants to Crystal Stream, altering its water quality.

Highpeak's operations fall squarely within the CWA's permitting framework. The transfer of water through its tunnel introduces elevated concentrations of iron, manganese, and TSS to Crystal Stream, a distinct body of water. Order at 5. These pollutants, which are not naturally present in Crystal Stream at comparable concentrations, degrade the receiving water body. As the Court in *Miccosukee* explained, the focus is on the net increase of pollutants in the receiving water, and discharges from point sources that facilitate such increases must be regulated under the CWA. *Miccosukee*, 541 U.S. at 95.

The District Court properly concluded that Highpeak's discharge constitutes an addition of pollutants under the CWA. By transferring pollutant-laden water from Cloudy Lake to Crystal Stream, Highpeak's operations fundamentally alter the quality of the receiving water body. Requiring an NPDES permit for such discharges ensures compliance with the CWA's overarching goal of restoring and maintaining the integrity of the nation's waters.

B. The WTR does not exempt pollutants added during the transfer process.

The WTR exempts water transfers from NPDES permitting only if no additional pollutants are introduced during the transfer process. 40 C.F.R. § 122.3(i). Courts have consistently held that the WTR does not apply to transfers that add pollutants. *See Catskill Mountains Chapter of Trout Unlimited v. EPA,* 846 F.3d 492 (2017) (Catskill III) (holding that the WTR applies only to transfers of unaltered water and does not shield discharges that add new pollutants to receiving waters; *see also Greenfield Mills*, 361 F.3d at 934 (holding that pollutants introduced during conveyance, even if originating from the transfer infrastructure itself, remove the discharge from the WTR's protection and require a permit under the CWA).

Highpeak's tunnel introduces new pollutants into Crystal Stream during the transfer process, the evidence demonstrating that water discharged from the tunnel contains increased concentrations of iron, manganese, and TSS compared to water sampled from the intake point. Order at 5. Since such discharges that add pollutants during the transfer process are not exempt under the WTR, it follows that pollutant additions during conveyance violate the CWA's permitting requirements. *See Catskill Mountains*, 846 F.3d at 492 (Catskill III)*; see also Greenfield Mills,* 361 F.3d at 934. Therefore, Highpeak's reliance on the WTR is misplaced.

The District Court correctly held that the pollutants introduced during the water transfer remove Highpeak's discharge from the scope of the WTR. This interpretation aligns with judicial precedent and the WTR's explicit limitation to unaltered transfers. By requiring NPDES permitting for such discharges, the District Court properly enforced the CWA's regulatory framework and upheld its purpose of protecting water quality.

Conclusion

For the foregoing reasons, this Court should affirm the District Court's holdings that CSP had standing to bring its claims, CSP's regulatory challenge was timely, and Highpeak's discharge falls outside the scope of the WTR, requiring a permit under the CWA. However, this Court should reverse the District Court's finding that the WTR is a valid regulation. The WTR is arbitrary, capricious, and contrary to the CWA's plain language prohibiting unpermitted discharges of pollutants.