NO. 24-001109 TEAM 19

UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

CRYSTAL STREAM PRESERVATIONIST, INC.,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANT-APPELLEE-CROSS-APPELLANT,

-AND-

HIGHPEAK TUBES, INC.,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeal From the United States District Court
for the District of New Union,
Case No. 24-CV-5678
The Honorable Judge T. Douglas Bowman, Presiding

**BRIEF OF DEFENDANT-APPELLEE-CROSS-APPELLANT,
HIGHPEAK TUBES, INC.**

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STATEMENT OF JURISDICTION

This case involves an interlocutory appeal following the issuance of the Decision and Order of the United States District Court for the District of New Union, granting Highpeak Tubes, Inc. ("Highpeak") and the United States Environmental Protection Agency's ("EPA") motions to dismiss Crystal Stream Preservationists, Inc. ("CSP") challenge to the Water Transfers Rule ("WTR") and denying Highpeak's motion to dismiss CSP's Clean Water Act ("CWA") citizen suit cause of action. R. at 1. The United States District Court for the District of New Union had proper subject matter jurisdiction to hear the case. *See* 33 U.S.C. § 1365(a); 28 U.S.C. § 1331; 5 U.S.C. § 702. This Court has jurisdiction over the parties' interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which permits appellate review of non-final orders when the district court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The district court issued such certification in its Decision and Order dated August 1, 2024. R. at 2. Following the District Court's certification, the parties each filed timely motions for leave to appeal. *Id.* This Court subsequently granted leave to appeal, recognizing the novel and significant legal issues presented.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

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

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

IV. Whether the District Court erred 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

I. Factual History

For thirty-two years, Highpeak has owned and operated a recreational tubing operation that runs through their forty-two-acre parcel of land in Rexville, New Union. R. at 4. Bordering the northern portion of Highpeak's parcel lies a 274-acre lake in the Awandack mountain range named Cloudy Lake. *Id*. On the southern portion of Highpeak's parcel runs Crystal Stream, which is where Highpeak launches its customers in rented innertubes. *Id*.

In 1992, Highpeak obtained approval from the State of New Union to build a tunnel connecting Cloudy Lake to Crystal Stream. *Id*. The four-foot-diameter tunnel spans about one hundred yards and includes valves at both ends, allowing Highpeak staff to regulate the flow of water from Cloudy Lake into Crystal Stream. *Id*. The tunnel, partially carved through rock and partially constructed with iron pipe, was installed in 1992. *Id*. Under an agreement with the State, Highpeak is allowed to use the tunnel when the State determines Cloudy Lake's water levels are sufficient to allow the release of water. *Id*. The purpose of these releases is to increase Crystal Stream's water volume and velocity to enhance tubing recreation. *Id*.

Since the State of New Union lacks a delegated CWA permitting program, the EPA, not the state's environmental agency, issues permits under the National Pollution Discharge Elimination System ("NPDES"). *Id*. Highpeak has not needed to apply for or hold an NPDES permit for discharging water from Cloudy Lake into Crystal Stream, and until now, this discharge has gone unchallenged. *Id*.

On December 1, 2023, the not-for-profit group CSP was formed with all thirteen of their members living in New Union. *Id*. The purpose of the formation of CSP was to preserve Crystal Stream. *Id*. Most CSP members have lived in Rexville for over fifteen years, with one exception: Jonathan Silver, who moved to the area in 2019. *Id*. Two CSP members, who live approximately one mile south of Highpeak's tubing run (five miles from the discharge point), own land along Crystal Stream. *Id*. These two landowning members have resided at their current properties since before 2008. *Id*.

II. Procedural History

This case stems from a citizen brought on February 15, 2024, by the environmental group CSP under the CWA, 33 U.S.C. § 1251. R. at 3. CSP filed this action against Highpeak, a family-owned recreational company that operates a tubing business on the Crystal Stream in the western part of the State of New Union. *Id*. The CSP complaint alleged that Highpeak's operations involve discharges into the Crystal Stream that require a permit under the CWA. *Id.* Highpeak, however, maintained that its activities are expressly exempt from permitting requirements under the WTR, 40 C.F.R. § 122.3(i) (2023), as promulgated by the EPA. *Id.* In its complaint, CSP also challenged the validity of the0 WTR through a separate claim against the EPA under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et eq. *Id.* Alternatively, CSP argued that even if the WTR is valid, Highpeak's discharges still fall outside its protections because pollutants are allegedly introduced during the water transfer. *Id.*

Highpeak moved to dismiss on four separate grounds: (1) CSP lacked standing to bring either the citizen suit or the regulatory challenge; (2) CSP's challenge to the WTR was not timely filed; (3) the EPA validly promulgated the WTR under the CWA; and (4) Highpeak's discharge is exempted by the WTR from the permitting requirements of the CWA. *Id.* EPA also moved to

dismiss on multiple grounds. EPA joined Highpeak's motion as to CSP's standing, timeliness, and defended the WTR as validly promulgated under the CWA. *Id.* However, EPA diverged from Highpeak regarding the citizen suit and contended that under its interpretation of the WTR, Highpeak's discharge required a permit because pollutants are introduced during the transfer process. *Id.*

On August 1, 2024, the district court held that: (1) CSP had standing to challenge the WTR, 40 C.F.R. 122.3(i) and bring its citizen suit; (2) CSP's regulatory challenge was timely filed; (3) the WTR was not arbitrary, capricious, or contrary to law; and (4) CSP's citizen suit could proceed as Highpeak's discharges introduce additional pollutants during the water transfer, thus taking the discharge out of the scope of the WTR. R. at 1. Following issuance of a Decision and Order from the district court, the parties each filed timely motions for leave to file interlocutory appeals. *Id.* Specifically, Highpeak appeals from the first, second, and fourth holdings. Id. EPA appeals from the first and second holdings. *Id.* CSP appeals from the third holding. *Id.*

SUMMARY OF ARGUMENT

This Court should not grant CSP standing to challenge the WTR and standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the Clean Water Act. CSP's mission statement and timing of their formation show that CSP was created for the sole purpose of manufacturing litigation. Further, the affidavits from CSP's members are merely concerns and generalized grievances that do not show a concrete and particularized injury. CSP's attempt to manufacture standing and their failure to show a concrete and particularized injury are insufficient to satisfy the injury-in-fact requirement of U.S. Const. art. III ("Article III") standing.

Second, this Court should find that the district court erred in holding that CSP timely filed their challenge to the WTR. The holding in *Corner Post* should not extend to not-for-profit

organizations like CSP. Extending the holding of *Corner Post* to not-for-profit organizations would encourage the creation of these organizations to bypass the statute of limitations and revive old claims.

Third, this Court should affirm the district court's decision and rule that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act. As a starting point, the Second Circuit in *Catskill* and the Eleventh Circuit in *Friends of the Everglades* found that the WTR was validly promulgated by the EPA under the CWA. The court in *Catskill* found that the language in the CWA was ambiguous and that the EPA's interpretation of the CWA by using the WTR was reasonable. Similarly, the court in *Friends of the Everglades* found that the Water District's use of the unitary waters theory aligned with the EPA's use of the WTR, and once again, this was a reasonable interpretation of the CWA. Due to the highly analogous factual scenario between the present case, *Catskill*, and *Friends of the Everglades*, the WTR should again be found as a reasonable interpretation of the CWA.

Next, *Loper Bright* explicitly stated that past cases should not be overturned solely due to their reliance on *Chevron*. Both *Catskill* and *Friends of the Everglades* were decided by the courts using *Chevron* deference. *Loper Bright* though held that by overturning *Chevron* "we do not call into question prior cases that relied on the *Chevron* framework." Courts cite to legal stability when talking about the reasons for upholding *stare decisis*. In turn, this reasoning puts to bed any thoughts of overturning *Catskill* and *Friends of the Everglades* which means that the WTR is still a valid promulgation of the CWA.

Lastly and alternatively, even under the less deferential standard of *Skidmore*, the WTR should be upheld. Under *Skidmore* deference, courts may look to administrative agencies for guidance when trying to interpret an ambiguous statute, but these interpretations of administrators

are not controlling on the courts. The Court in *Skidmore* held that the weight of an administrative judgment will depend on the thoroughness of its consideration, the validity of its reasoning, an agency's consistency with earlies and later pronouncements, and all factors that give it power to persuade. The EPA consistently and thoroughly defended the WTR, which allows courts to give weight to the EPA's opinion under *Skidmore* deference. In sum, the WTR is a valid promulgation of the CWA.

Fourth, Highpeak is not required to obtain a permit under the Clean Water Act because its discharge falls squarely within the scope of the WTR. The district court erred by deferring to the EPA's interpretation, contrary to the principles of *Kisor*, which limits deference to agency interpretations only when a regulation is genuinely ambiguous and the agency's reading reflects fair and considered judgment. The WTR unambiguously exempts Highpeak's discharges from NPDES permitting because the regulation applies only to pollutants introduced by human activity during the water transfer, not natural processes. Even if ambiguity is found, the EPA's interpretation is not reasonable because it does not reflect its fair judgment, as it creates an unfair surprise for regulated parties like Highpeak. The EPA's interpretation undermines the WTR's cooperative federalism framework and its purpose of balancing federal water quality oversight with state control of water allocation. Highpeak's activities comply with state-approved regulations, and its longstanding operation without federal permits further supports its exemption under the WTR. For these reasons, deference to the EPA's interpretation is unwarranted, and the court should hold that Highpeak does not need a permit under the CWA.

STANDARD OF REVIEW

Defendants-Appellees-Cross-Appellants appeal to the Court of Appeals for the Twelfth Circuit following the issuance of a Decision and Order of the United States District Court for the District of New Union. The District Court's statutory and legal interpretations are reviewed *de novo*. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995). This appeal presents four legal issues de novo, "viewing all the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in his favor." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

ARGUMENT

I. CSP LACKS STANDING TO CHALLENGE THE WATER TRANSFERS RULE AND THE CITIZEN SUIT AGAINST HIGHPEAK.

This Court should not grant CSP Article III standing because CSP suffers no injury-in-fact and was created for the sole purpose of manufacturing standing to challenge the WTR and standing in the citizen suit. The "constitutional minimum" requirements for standing under Article III are set forth in *Lujan v. Defenders of Wildlife* as follows:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted).

For an organization to meet these constitutional requirements, the organization must show that it has individual standing "in its own right" or that it has representational standing to pursue the lawsuit on behalf of a member of the organization. *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1250 (4th Cir. 1991). To have representational standing, an organization

must show, among other things, that "its own members would have standing to sue in their own right …." *Id.* at 1251 (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). CSP has failed to show that they have suffered injury-in-fact caused by Highpeak's discharge.

To satisfy the injury-in-fact requirement under Article III standing, a plaintiff must demonstrate a concrete and particularized harm that personally affects them. *Lujan*, 504 U.S. at 560. CSP does not suffer this kind of harm because CSP was formed as a tool solely for litigation purposes. First, the primary purpose of CSP as an organization as evidenced in its mission statement is to challenge "transfers" aimed at Highpeak. R. at 6. Second, the timing of CSP's creation further shows that it is manufacturing standing to try and take advantage of the latest decisions in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024). Finally, the affidavits that CSP offers are mere generalized grievances and conclusory allegations that are insufficient to demonstrate injury-in-fact.

A. CSP's Mission Statement Shows That CSP was Formed to Manufacture Standing and Therefore Suffers No Injury-In-Fact.

To establish an injury-in-fact, CSP must demonstrate a concrete and particularized harm that directly affects it in a personal way. *See e.g., Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 386-93 (2024) (holding that plaintiffs who neither prescribed nor used the drug lacked standing to challenge the regulation permitting its distribution because they had not suffered any personal injury). In the case at hand, CSP cannot claim injury-in-fact as there is no concrete and particularized harm because CSP was formed solely for litigation purposes evidenced by the emphasis of "transfers" in their mission statement. R. at 6.

In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-14 (2013), the Supreme Court held that plaintiffs cannot manufacture standing by taking action based on speculative future harm that is not "certainly impending." Likewise, CSP was created as a tool to bring litigation, and any injury is speculative and not certainly impending. This is similar to *Stoops v. Wells Fargo Bank, N.A.*, 197 F.Supp.3d 782, 796-800 (W.D. Pa. 2016), where the court found that a plaintiff who purchased 35 cell phones to receive calls that were violations under the Telephone Consumer Protection Act lacked standing. The creation of an organization to manufacture harm is similar to the purchasing of cell phones to manufacture violations and therefore inconsistent with the injury-in-fact requirement.

In an opinion from Judge Gould in *Gordon v. Virtumundo*, 575 F.3d 1040, 1068 (9th Cir. 2009), the judge articulated that courts should be intolerant of manufactured claims:

> "[F]or a person seeking to operate a litigation factory, the purported harm is illusory and more in the nature of manufactured circumstances in an attempt to enable a claim. In my view, manufactured claims should not be tolerated absent a clear endorsement from Congress."

CSP's mission statement demonstrates that its primary purpose is to manufacture standing to the WTR and standing in the citizen suit:

> The Crystal Stream Preservationists' mission is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations.

R. at 6.

The explicit reference to "transfers" underscores that the primary purpose of CSP is to manufacture litigation. CSP's mission statement is narrowly focused on the litigation against Highpeak. CSP's litigation-focused primary purpose reinforces that CSP was not formed to address an injury-in-fact but to manufacture standing.

B. The Timing of CSP's Formation was an Attempt to Manufacture Standing in Anticipation of the *Loper Bright* and *Corner Post* Decisions.

Second, a significant factor undermining CSP's standing is the timing of its creation. The organization was formed shortly before the decisions in *Loper Bright* and *Corner Post*. While it is not inherently problematic for organizations to arise in response to legal developments, the specific timing in this case strongly suggests CSP was created for the primary purpose of manufacturing litigation. CSP is a not-for-profit corporation that was formed on December 1, 2023, in anticipation of the upcoming decisions in *Loper Bright* and *Corner Post*. Highpeak has been in operation for 32 years, and CSP is now challenging Highpeak's construction of its tunnel, which use was and continues to be permitted by the State of New Union. Further, all but one of CSP's members have lived in Rexville for more than 15 years. The timing of CSP's formation also suggests that it was not responding to any actual injury caused by Highpeak, but rather in response to the legal landscape. This distinction is critical because Article III standing requires a direct connection between CSP and Highpeak's conduct. *Lujan*, 504 U.S. at 560-61. The creation of CSP in response to the *Loper Bright* decision demonstrates that CSP was created in response to the changing legal landscape and CSP does not suffer injury-in-fact.

C. The Affidavits from CSP Members Show Only Mere Concerns and Generalized Grievances that are Insufficient to Demonstrate Injury-In-Fact.

Additionally, in an attempt to demonstrate standing, CSP has submitted affidavits from individuals claiming harm from Highpeak's discharge. However, these affidavits do not show specific concrete injuries but only conclusory allegations. *See Lujan*, 504 U.S. at 888. (refused to find standing based on the "conclusory allegations of an affidavit."). Instead, they express generalized grievances that are insufficient to meet the injury-in-fact requirement. A generalized

grievance is a broad complaint that affects many people in an undifferentiated way, as opposed to a specific particularized injury suffered. The statements from the affiants are as follows:

Cynthia Jones

- "[R]egularly walk[s] along the Stream and enjoy[s] its crystal clear color and purity." R. at 7.
- "[T]he suspended solids and metals in the Stream are upsetting to [her], as they make the otherwise clear water cloudy," and she is "very concerned about contamination from toxins and metals, including iron and manganese." R. at 7.

Jonathan Silver

- "[R]egularly walks [his] dogs along" the stream and is "deeply concerned about the presence of toxic chemicals polluting the water." R. at 7.
- "[H]esitant to allow [his] dogs to drink from the stream due to the pollutants" he believes are present. R. at 7.

The affidavits offered by CSP contain vague assertions about harm to the environment but fail to demonstrate how any individual member or the organization has suffered a concrete injury. As the dissent in *Laidlaw* reasoned, the Court should not allow allegations of "concern" be "adequate to prove injury-in-fact and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 201 (2000) (Scalia, J., dissenting). The affidavits do not identify specific environmental damage or harm to the organization's operations. While it is theoretically possible for a plaintiff to be harmed even if the environment is not, the plaintiff would bear the burden of clearly articulating and proving the nature of that injury. *Id.* Merely expressing ongoing "concerns" about the environment is insufficient, as "the reality of the threat of repeated injury" is what matters in the standing inquiry, "not the plaintiff's subjective apprehensions." *Id.*

The harm expressed is potential or hypothetical damage to the environment and to aesthetic pleasure. These generalized grievances are not enough to satisfy the injury-in-fact requirement. A

plaintiff stating that they are concerned about a stream is not enough to satisfy the injury-in-fact requirement of Article III standing. Article III standing should not be so lenient that a plaintiff organization that has members that live near discharges has standing from their concerns. *Id.*

Furthermore, CSP itself has not demonstrated how its activities or mission have been hindered by Highpeak's conduct. The affidavits offered in support of its claim are insufficient to establish the necessary injury-in-fact, and therefore the organization lacks standing on both the WTR and the citizen suit.

CSP fails to meet the requirements for Article III standing because it has not demonstrated injury-in-fact. The organization's mission statement, the timing of its creation, and the generalized grievances presented in its affidavits all point to the conclusion that CSP was formed to manufacture standing, not to address any actual harm. For the foregoing reasons this Court should not find standing for CSP to challenge the WTR and should not find standing in the citizen suit against Highpeak.

II. CSP'S CHALLENGE TO THE WTR IS UNTIMELY BECAUSE THE HOLDING IN *CORNER POST* SHOULD NOT APPLY TO NOT-FOR PROFIT ORGANIZATIONS LIKE CSP.

This Court should dismiss CSP's challenge to the WTR as untimely. The holding from *Corner Post* should not be extended to not-for-profit organizations as a work around the statute of limitations. CSP's members had every opportunity to challenge the WTR when it was first promulgated in 2008 but failed to do so. The relevant part of § 2401(a) is "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

In *Corner Post, Inc. v. Board of Governors of Federal Reserve System,* 144 S.Ct. 2440 (2024), Corner Post is a for-profit corporation formed in 2017 and opened for business in 2018

that operates a truck stop and convenience store. *Id.* at 2448. Corner Post accepts debit cards, and every debit card transaction requires Corner Post to pay an interchange fee, resulting in hundreds of thousands of dollars in fees. *Id.* Although the regulation being challenged was adopted in 2011 before Corner Post existed. *Id.* In 2021, Corner Post Joined litigation that sought to challenge the regulation that governed these interchange fees. *Id.*

The Supreme Court has clarified that "[a] right of action 'accrues' when the plaintiff has a 'complete and present cause of action.'" *Corner Post*, 144 S.Ct. 2440, 2450 (*quoting Green v. Brennan*, 587 U.S. 547, 554 (2016)). This established that a cause of action does not arise until the plaintiff experiences an injury resulting from the final agency action. *Corner Post*, 144 S.Ct. at 2450. With this reasoning, the Supreme Court held that claims under the APA do not accrue for purposes of § 2401(a)'s six-year statute of limitations until the plaintiff is injured by the agency action. *Id.* at 2460. For Corner Post, the statute of limitations did not begin until it was incorporated in 2017 and began incurring interchange fees under the challenged regulation. *Id.* Finding that Corner Post's claim is timely under § 2401(a). *Id.*

In *Corner Post*, the plaintiff formed the business for legitimate commercial purposes and later incurred specific injuries under the challenged regulation. In contrast, CSP's challenge to the WTR is different. CSP was a not-for-profit organization that was created to work its way around the statute of limitations. Unlike the business in *Corner Post*, which suffered harm from the regulation only after its incorporation, CSP's members had every opportunity to challenge the WTR when it was first promulgated in 2008 but failed to do so.

All but one of CSP's members were in a position to bring a timely challenge within the six-year limitations period after the WTR's being promulgated. Instead, CSP was established a work around for its members to start the clock over on the statute of limitations. This distinction

is important because *Corner Post* involved a for-profit business with legitimate operations and grew tired of the regulation which it challenged. *Corner Post* should not be extended to not-for-profits created to restart the clock on the statute of limitations.

Allowing CSP to proceed would incentivize the creation of not-for-profit organizations as a way to get around time barred claims. CSP's members had every opportunity to challenge the WTR after it was originally promulgated in 2008. Highpeak had been in operation for nearly a decade before the WTR and every member had the opportunity to challenge the WTR during the six years after it was originally promulgated. This Court should reject the extension of *Corner Post* to not-for-profit organizations because it would provide a work around for time barred claims and damage the predictability a statute of limitations provides.

Extending the reasoning of *Corner Post* to CSP would encourage the formation of not-for-profit organizations to revive time-barred claims. CSP's members had every opportunity to challenge the WTR when it was first promulgated in 2008 but failed to do so. This Court should find CSP's challenge as untimely and dismiss their challenge.

III. THE WATER TRANSFERS RULE WAS VALIDLY PROMULGATED BY THE EPA.

The District Court did not err when it found that the Water Transfers Rule was validly promulgated by the EPA. First, the Second and Eleventh Circuit's findings that the WTR was validly promulgated by the EPA are still valid due to the court in *Loper Bright* explicitly stating that past cases that relied on *Chevron* are not overturned. Second and alternatively, even under the less deferential standard of *Skidmore*, the WTR should still be upheld as a validly promulgated regulation.

A. The Second and Eleventh Circuit's Findings of the Water Transfers Rule Being Validly Promulgated by the EPA are Still Valid Because *Loper Bright* Does Not Overturn Cases Solely Due to Their Reliance on *Chevron*.

The WTR was validly promulgated by the EPA. First, the Second Circuit in *Catskill* and the Eleventh Circuit in *Friends of the Everglades* held that the WTR was a valid interpretation of the Clean Water Act by the EPA. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d Cir. 2017); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009). Second, the Supreme Court in *Loper Bright* explicitly stated that previous cases decided under the rule of *Chevron* were still valid under *stare decisis*. *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (2024).

1. The Second and Eleventh Circuit found that the Water Transfers Rule was validly promulgated by the EPA.

First, the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Environmental Protection Agency* held that the WTR was a valid interpretation of the CWA by the EPA. 570 F.3d at 533. *Catskill* arose out of a lawsuit filed against the EPA by a group of environmental conservation and sporting organizations in response to the EPA's formalized position on the WTR. *Id*. at 505. The conservation groups were specifically concerned with the transfer of water from the Schoharie Reservoir through the Shandaken Tunnel into Esopus Creek that then, through many more transfers, eventually made its way into New York City to supply the City's five boroughs with water. *Id*. at 499-500. In 2005, the EPA issued a memo declaring that its' interpretation of the CWA was that Congress did not intend for water transfers to be subject to the NPDES permitting system. *Id*. at 504. The district court decided that the EPA's promulgation of the WTR was an unreasonable interpretation of the CWA. *Id*. at 500. The Second Circuit Court of Appeals reviewed the case *de novo* and reversed the district court's decision by ruling that the WTR was actually a valid interpretation of the CWA. *Id*. at 506, 533.

The court on review, similar to the district court, applied the *Chevron* framework to decide whether the EPA's Waters Transfers Rule was a valid interpretation of the CWA. *Id*. at 507. Now

overturned case law, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, employed a two-step framework that gave deference to administrative agencies when interpreting a statute. 467 U.S. 837 (1984). Under step one of the *Chevron* framework, the court in *C* found that the statutory language in the CWA was indeed ambiguous, namely "addition of any pollutant to navigable waters." 846 F.3d at 512. Then, under step two of the framework the court held that the EPA's employment of the WTR was a reasonable interpretation of the CWA. *Id*. at 520.

Second, the Eleventh Circuit in *Friends of the Everglades v. South Florida Management District* also found that the WTR was properly promulgated by the EPA. 570 F.3d at 1228. This case was brought by two environmental organizations who sought an injunction to force the Water District to obtain a permit under the NPDES permitting system for their continual pumping of polluted canal water in Lake Okeechobee. *Id*. at 1214. Like *Catskill*, *Friends of the Everglades* largely hinged on statutory interpretation under the guise of *Chevron* deference. *Id*. at 1218.

The Water District's main argument was the unitary waters theory that held that it is not an "addition" to navigable waters to simply move existing pollutants from one navigable water to another. *Id*. at 1217. The "addition" only occurs the first time the pollutant is added to a navigable water. *Id*. At first, the unitary waters theory was not generally accepted by courts, but then the EPA promulgated 40 C.F.R 122.3(i) on June 13, 2008, that clarified that water transfers were not subject to regulation under the NPDES permitting program. *Id*. at 1217-19. This new EPA regulation accepted the unitary waters theory by allowing pollutants to be transferred between navigable waters and clarifying that this action was not an "addition…to navigable waters." *Id*. at 1227.

With all this in mind, the court in *Friends of the Everglades* had to then go through the two step *Chevron* deference framework. *Id*. at 1218. Under the first step of *Chevron* deference, the court concluded that there were two reasonable ways to read the language of "any addition of any

pollutant to navigable waters from any point source." *Id*. at 1227. The two ways one could read the statute, thus making it ambiguous, was "any addition … to any navigable waters," and the other way one could read it was through the lens of the unitary waters theory or "any addition … to navigable waters as a whole." *Id*. After declaring the CWA statute ambiguous, the court had to decide whether the unitary waters theory was a permissible interpretation by the EPA. *Id*. The court held that "[b]ecause the EPA's construction is one of the two readings we have found reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id*. at 1228. Suffice to say, the court found the WTR and the unitary waters theory a permissible interpretation of the CWA by the EPA and the Water District. *Id*.

Lastly, the current case before the court with respect to Highpeak's water transfers is extremely analogous to the scenarios in *Catskill* and *Friends of the Everglades*. Just like in *Catskill*, with the multiple water transfers heading into New York City and in *Friends of the Everglades*, with groups trying to make the Water District obtain a NPDES permit for pumping canal water into Lake Okeechobee, CSP in the current case is trying to force Highpeak to obtain a NPDES permit for their transfer of water through tunnels from Cloudy Lake to Crytal Stream. In both *Catskill* and *Friends of the Everglades*, both courts found that the WTR was a valid promulgation of the CWA by the EPA. Due to the current case's highly analogous factual situation to *Catskill* and *Friends of the Everglades*, the Court in this case should do the same and rule that the WTR is a valid interpretation of the CWA. There are no different factual scenarios in the current case that would meaningfully distinguish it from *Catskill* and *Friends of the Everglades*. All three involve environmental groups suing the EPA to force a change away from the WTR. This change should once again be denied.

2. *Loper Bright* explicitly stated that past cases should not be overturned solely due to their reliance on *Chevron*.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court held that under the Administrative Procedure Act, courts do not need to defer to an agency's interpretation of the law solely because a statute is ambiguous. 144 S.Ct. at 2244-73. By doing so, the Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. Id*. Because of this overruling of *Chevron*, there was a prevalent question of whether every single past case that primarily relied on *Chevron* to guide them through an ambiguous statute would be overturned. Thankfully, the Court in *Loper Bright* did not keep everyone guessing. The court held that by overturning *Chevron* "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Id*. at 2273. The Court continued by saying that simply relying on *Chevron* does not qualify as a "special justification" for overturning a holding. *Id*. At most, asserting that a precedent relied on *Chevron* solely amounts to arguing that the precedent was incorrectly decided. *Id*. This suggestion, in itself, is not enough to justify overruling a precedent. *Id*.

Additionally, *Loper Bright* is not the only case that has held that a change in interpretive methodology does not call in question prior cases that relied on an overturned precedent. *Id*. *CBOCS West, Inc. v. Humphries* reasoned that "even if we were to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the existence of such a change would justify reexamination of well-established prior law." 553 U.S. 442, 457 (2008). The Court went on to say that principles of *stare decisis* dictate respect for precedent whether the interpretive methods courts use stay the same or change. *Id*. The whole reasoning behind adhering to principles of *stare decisis* is legal stability, which is a pillar upon which the rule of law depends. *Id*.

Furthermore, *John R. Sand & Gravel Co. v. U.S.* also expressed the importance of *stare decisis* when the Court said, "To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others." 552 U.S. 130, 139 (2008). The Court reasoned that by doing this it could "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." *Id*.

Because of these holdings in *Loper Bright*, *CBOCS West,* and *John R. Sand & Gravel*, *Catskill* and *Friends of the Everglades* should not be overturned solely due to their reliance on *Chevron*. This explicit language in *Loper Bright*, "we do not call into question prior cases that relied on the *Chevron* framework," instantly puts to bed any thoughts of overturning *Catskill* and *Friends of the Everglades*.

Additionally, if this Court were to overrule *Catskill* and *Friends of the Everglades*, it would threaten the legal stability of this area of law. Many companies and organizations have relied on the WTR since its promulgation by the EPA in 2008 and there is a whole line of case law that has relied on the WTR. If the Court were to overturn *Catskill*, *Friends of the Everglades,* or any of its progeny, it would "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." Since *Catskill* and *Friends of the Everglades* cannot be overturned solely due to their reliance on *Chevron*, this Court must respect the precedent that *Catskill* and *Friends of the Everglades* represent, namely the WTR is still a valid promulgation of the CWA.

B. Alternatively, Even Under the Less Deferential Standard of *Skidmore*, the Water Transfers Rule Should be Upheld.

In *Loper Bright*, the Court instructed future courts to return to a less deferential standard of review that was first laid out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Loper Bright*, 144 S.Ct. at 2247. The Court ruled that future courts could still seek aid about the interpretations from those who implemented the statutes, but at the end of the day, it was the role of the reviewing

court "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.*

The Court in *Skidmore* held that courts and litigants may look to administrative agencies for guidance when interpreting an ambiguous statute, but these interpretations and opinions of administrators are not controlling upon the courts. 323 U.S. at 140. Next, the Court addressed how much weight a Court should give administrative agencies' interpretations and opinions. *Id*. The Court held that "[t]he weight of such a judgment 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*.

The court in *Mayfield v. United States Department of Labor* interpreted what *Skidmore* deference actually entailed after *Loper Bright* was decided. 117 F.4th 611 (2024). The court in *Mayfield* held that the Department of Labor ("DOL") had the authority to promulgate a rule of a minimum-salary requirement within the Fair Labor Standards Act. *Id*. at 620. When grappling with the DOL's interpretation of the statute, the court applied *Skidmore* deference. *Id*. at 619-20. One factor the *Mayfield* court looked at regarding consistency with earlier and later pronouncements under *Skidmore* was how the DOL's position that it had the authority to promulgate a minimum-salary requirement had stayed consistent. *Id*. at 620. The DOL had been consistently issuing minimum salary rules for over eighty years. *Id*.

This is analogous to the present case's situation with the EPA staying consistent in its defense of the WTR under the CWA. Since 2008, when the EPA issued its' first regulation about the WTR, through multiple different political administrations, the EPA has consistently defended the WTR. The EPA defended the WTR in *Friends of the Everglades* in 2009, the EPA defended

the WTR in *Catskill* in 2017, and now the EPA is defending the WTR in the current case in 2024. The EPA has stayed consistent over sixteen years since they first issued the regulation regarding the WTR. Under *Skidmore* deference, the fact that the EPA has stayed consistent when defending the WTR should allow the EPA's judgment to hold weight with this court as it pertains to the WTR under the CWA.

Furthermore, this consistency of interpretation by the EPA over multiple cases in different circuits over many years, namely *Catskill* in the Second Circuit and *Friends of the Everglades* in the Eleventh circuit, also demonstrates thoroughness by the EPA. Having to repeatedly litigate cases about its interpretation of the WTR like the EPA has had to do, forces them to pay attention to detail and further develop their stance on the WTR. This shows "thoroughness evident in consideration."

Additionally, the EPA shows "thoroughness evident in consideration" in its explanation of the WTR in the Federal Registrar in 2008. NPDES Water Transfer Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008). The EPA concluded that the language and structure of the CWA "indicate that Congress generally did not intend to subject water transfers to the NPDES program." *Id*. The EPA continued by stating, "Interpreting the term 'addition' in that

context, EPA concludes that water transfers, as defined by today's rule, do not constitute an 'addition' to navigable waters to be regulated under the NPDES program." *Id*. This language and the EPA's explanation of the WTR as a whole in the Federal Registrar in 2008 show a great deal of in-depth analysis and thought put forth by the agency when it comes to its interpretation of the CWA. The EPA thoroughly considered the WTR when interpreting the CWA. Due to the EPA's consistency and thoroughness when defending the WTR under the CWA, the EPA can be allowed deference under the *Skidmore* standard.

To summarize, this Court should affirm the district court's decision and rule that the Water Transfers Rule was validly promulgated by the EPA. First, the Second and Eleventh Circuit's findings of the Water Transfers Rule being validly promulgated by the EPA are still valid because *Loper Bright* does not overturn cases solely due to their reliance on *Chevron*. *Catskill* and *Friends of the Everglades* found that the WTR was a valid interpretation of the Clean Water Act by the EPA. Additionally, *Loper Bright* explicitly stated that past cases should not be overturned solely due to their reliance on *Chevron*. Second and alternatively, even under the less deferential standard of *Skidmore*, the Water Transfers Rule should be upheld.

For the foregoing reasons, Highpeak respectfully requests this Court to affirm the district court's decision and rule that the WTR is a valid promulgation of the CWA. Even if this Court finds in favor of Highpeak by deciding the WTR was a valid promulgation of the CWA, it must also find that the District Court erred 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 CWA.

IV. HIGHPEAK DOES NOT NEED TO OBTAIN A PERMIT UNDER THE CWA BECAUSE ITS DISCHARGE FALLS WITHIN THE SCOPE OF THE WATER TRANSFERS RULE.

The district court erred in holding that Highpeak must still obtain a permit under the CWA because the court improperly deferred to EPA's interpretation of the WTR by failing to recognize the limitations of regulatory deference under *Kisor v. Wilkie*, 588 U.S. 558 (2019). *See Kisor*, 588 U.S. at 573 ("*Auer* [or *Seminole Rock*] deference is not the answer to every question of interpreting an agency's rules. Far from it.").

A. Deference to the EPA's Interpretation Under Kisor is Unwarranted Because the Water Transfers Rule Unambiguously Exempts Highpeak's Discharges from NPDES Permitting and the EPA's Interpretation is Neither Reasonable nor Reflective of its Fair and Considered Judgment, Creating Unfair Surprise.

To determine if an agency's interpretation is entitled to *Seminole Rock* or *Auer* deference, the court first determines whether the regulation is genuinely ambiguous. *Id.* at 573. If it is, the court next decides whether the agency's interpretation of the regulation is reasonable. *Id.* at 574. However, not every reasonable reading of a genuinely ambiguous rule by an agency receives *Auer* deference. *Id.* at 576. A court must make an independent inquiry into "whether the character and context entitles it to controlling weight." *Id.* In short, courts retain the final authority to approve—or not—the agency's reading of a rule, and "no binding of anyone occurs merely by the agency's say-so." *Id.* at 584.

Deference to the EPA's interpretation under *Kisor* is improper for two reasons. First, the text, structure, history, and purpose of the WTR lead to the unambiguous conclusion that Highpeak's discharges are exempt under the WTR. Even if this Court finds the exemption in the WTR ambiguous, the EPA's interpretation is not Reasonable as it does not reflect its fair and considered judgment of the water transfer activity here and would create an unfair surprise to Highpeak.

1. The Text, Structure, History, and Purpose of the WTR Lead to the Unambiguous Conclusion that Highpeak's Discharges are Exempt Under the WTR.

Deference is warranted only if a regulation is genuinely ambiguous; that is, where the traditional tools of construction—examination of the text, structure, history, and purpose of the regulation—have been exhausted and no single interpretation prevails. *Kisor*, 588 U.S. at 575. Regulatory interpretation begins with the language of the regulation, the plain meaning of which

is derived from its text and structure. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). If the meaning is clear from that investigation, then "that is the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120, (1994). If not, the court must look to other sources, including the history and purpose of the regulation, to discern its meaning; "only when [the] legal toolkit is empty and the interpretive question still has no single right answer" can the court conclude that the regulation at issue is genuinely ambiguous. *Kisor*, 588 U.S. at 575.

The text, structure, history, and purpose of the WTR reveal that Highpeak's discharges fall within the scope of the WTR. At issue here is the meaning of the final sentence of 40 C.F.R. § 122.3(i): "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." A "water transfer" is 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). Such transfers "take a variety of forms," *Catskill*, 846 F.3d at 503, routing "water through tunnels, channels, and/or natural stream[s]" for uses like "irrigation, power generation, [and] flood control." NPDES Water Transfer Rule, 73 Fed. Reg. at 33,698. It is undisputed Highpeak's tunnel that connects Cloudy Lake to Crystal Stream "coveys . . . waters of the United States." R. at 4–5. And those waters are not subject to any "intervening industrial, municipal, or commercial use." *Id.* The tunnel, in other words, is the kind of water transfer or allocation generally exempt from the EPA's permitting system. Yet, CSP and EPA contend that the existence of the *higher* concentrations of iron, manganese, and total suspended solids (TSS) exempt Highpeak's discharge from the WTR's protection. But that is not what the WTR says and this Court should refrain from reading such language in. *See e.g. Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation. This [regulation] is so carefully drawn as to leave little room for conjecture."). If this interpretation of

the exemption was accepted by this Court, then it would eviscerate the entire rule. See William N. 5e, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 105 (1994) (describing the "narrow interpretation of statutory exemptions" as a canon"). For example, let's assume there are no existing pollutants present in Cloudy Lake. If Highpeak were transferring water from Cloudy Lake to Crystal Stream through the same tunnel, but the transferred water nevertheless picked up a trace amount of soil, sand, or rock during the transfer, then Highpeak would no longer be protected by the WTR. *See* 33 U.SC. § 1362 (defining "pollutant"); Petitioners' Petition for a Writ of Certiorari at 8, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 10-196 (11th Cir. filed Aug. 5, 2010) ("Given the broad definition of 'pollutant,' transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already in 'the waters of the United States' before, during, and after the water transfer."). This novel interpretation advanced by CSP and EPA would not only threaten the life of the WTR, but virtually every water transfer in the United States.

Rather, this Court should find that that the "introduction" of pollutants within the meaning of the final sentence of 40 C.F.R. § 122.3(i) must result from human activity. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (a facility must "add" pollutants in order to be a point source); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982) (same).

Moreover, the history and purpose of the WTR counsels against requiring Highpeak to obtain a permit under the CWA. Historically, the EPA has taken a hands-off approach to water transfers, opting not to regulate them under the NPDES permitting program introduced by the CWA in 1972. *Catskill*, 846 F.3d at 500. Recognizing that water transfers are integral to U.S. infrastructure for public water supply and flood control, the WTR aims to prevent unnecessary

federal permitting burdens. By excluding water transfers from NPDES permitting, the rule intends to provide certainty to stakeholders while reserving states' rights to regulate transfers under local law. *See* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,699–703.

While the broad and sweeping goal of the CWA is to protect water quality, the purpose of the WTR is to maintain a balance between federal water quality oversight and state and local water quantity management responsibilities. NPDES Water Transfer Rule, 33 Fed. Reg. at 33,703 ("[I]t is the purpose of this [provision] to insure that Sate [water] allocation systems are not subverted.") (internal citations and quotations omitted). However, the EPA seeks to undermine the foundation of the WTR—cooperative federalism—and require Highpeak to obtain a permit, despite its contractual agreement with the State of New Union to construct a tunnel connecting Cloudy Lake and Crystal Stream 32 years ago. R. at 4. The EPA's and CSP's proposed reading of the WTR—requiring Highpeak to obtain a permit due to the incidental, higher concentration of existing pollutants—contradict's the WTR's purpose, the history of the EPA's hands-off approach, and the principle of cooperative federalism underpinning the WTR. Such an interpretation would render the WTR functionally meaningless and create unnecessary regulatory burdens, jeopardizing water management infrastructure across the United States. Highpeak's activities fall squarely within the scope of the WTR's protections, as the discharge in question does not introduce pollutants, but instead reflects natural processes inherent to water transfers.

2. Even if this Court Finds the Exemption in the WTR Ambiguous, the EPA's Interpretation is Not Reasonable as it Does Not Reflect its Fair and Considered Judgment of the Water Transfer Activity Here and Would Create an Unfair Surprise to Highpeak.

Even if this Court still finds that the exemption under the WTR is ambiguous after review of the text, structure, history and purpose of the regulation, EPA's interpretation is not reasonable. *Auer* or *Seminole Rock* deference is appropriate only when the proffered interpretation is

reasonable. *Kisor*, 588 U.S. at 575. To start, the regulatory interpretation must represent the agency's actual determination, such that it must be the agency's "authoritative" or "official position" rather than any mere ad hoc statement that does not reflect the agency's views. *Id.* at 577. Next, the agency's interpretation must implicate the agency's expertise. *Id.* Moreover, the agency's reading must reflect the agency's "fair and considered judgment," not a "convenient litigating position" or post hoc rationalization to "defend past agency action against attack." *Id.* at 579. And when the reasons underlying deference "do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the 'power to persuade.'" *Id.* at 573 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The District Court appropriately cited to an official position of the EPA in ruling that CSP and EPA's interpretation was reasonable, yet it failed to adjudge whether the EPA's interpretation reflects the EPA's fair and considered judgment of water transfers like the one here and whether it would create an unfair surprise to regulated parties like Highpeak.

The EPA's interpretation does not reflect the agency's fair and considered judgment of water transfers like the one here. *Kisor*, 588 U.S. at 579 ("[A] court should decline to defer to a merely convenient litigating position or *post* hoc rationalizatio[n] advanced to defend past agency action against attack."). In the "Public Comment" section of the final rule, EPA addressed various feedback categories received during the notice-and-comment process. In response to concerns that the WTR conflicts with existing interpretations of NPDES and other CWA provisions, the EPA clarified that the rule does not modify existing interpretations or programs. *See* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,703 (responding to comments that the rule could interfere with water-quality-standards programs by addressing that argument only as it applies to certain kinds

of waste-treatment systems); *id.* (responding to comments that the rule is inconsistent with the § 404 permitting program for dredged or fill material); *id.* at 33,705 (responding to comments that the rule might subject certain hydroelectric operations to NPDES permitting requirements). In the preamble's sole paragraph addressing concerns, "that water transfers may have significant impacts on the environment, including (1) the introduction of invasive species, toxic blue-green algae, chemical pollutants, and excess nutrients; (2) increased turbidity; and (3) alteration of habitat," EPA responded that the WTR "does not interfere with any of the states' rights or authorities to regulate the movement of waters within their borders." *Id.* at 33,705. Not only are none of these potential environmental impacts the subject of this appeal, but the EPA expressed that "these additions will probably be rare." *Id.* EPA further anticipated that "the likelihood of such additions to be similar to the frequency of additions of leaks of oil from turbines at hydroelectric dams." *Id.* Requiring Highpeak to obtain a permit here flies in the face of EPA's cooperative federalism approach to regulating water transfers. Furthermore, the regulation of water transfer activities involving pumps and tunnels for recreational tubing purposes was wholly unconsidered by the EPA in promulgating the final rule. This omission highlights the lack of fair and considered judgment needed for deference to EPA's interpretation.

Moreover, the EPA's interpretation lacks a "fair warning" and would create an "unfair surprise" not only to Highpeak, but to all other actors facilitating recreational water transfer activities concerning tunnels. *Kisor*, 588 U.S. at 579. Highpeak not only sought and obtained permission from the State of New Union to construct the tunnel connecting Cloudy Lake to Crystal Stream, it also has been operating without incident for the past 32 years. No where in the official agency position does the agency suggest a requirement, let alone guidance, that tunnels used for water transfers be constructed or maintained in a certain way so as to avoid the introduction of

pollutants. Nor is there any caselaw suggesting so. To the extent that the agency does address such amorphous "maintenance" or "construction" in its official interpretation, those statements relate to concentrated animal feeding operations or storm water discharges, neither of which are relevant here. *See* 40 C.F.R. §§ 122.23 and 122.26. If the EPA wanted to subject Highpeak to NPDES permitting on the basis of higher concentrations of existing pollutants in the water transfer, then standards and guidelines should have been issued regarding what amount of pollutants are permissible.

In sum, Highpeak is not required to obtain a NPDES permit under the CWA because its discharges fall squarely within the WTR. The district court erred in deferring to the EPA's interpretation, which fails the *Kisor* standard for regulatory deference. The text, structure, history, and purpose of the WTR unambiguously exempt water transfers like Highpeak's, and the EPA's attempt to impose permitting requirements is both unreasonable and inconsistent with its prior interpretations. Even if ambiguity were found, the EPA's interpretation does not warrant deference. It lacks fair and considered judgment, creates unfair surprise, and undermines the cooperative federalism framework upon which the WTR is based. Highpeak's 32 years of incident-free operation further underscore the inequity of the EPA's position. Requiring a permit now, based on naturally occurring pollutant concentrations, contradicts the WTR's purpose and imposes undue burdens on water transfer infrastructure nationwide. This Court should reject the EPA's interpretation and uphold the protection afforded to Highpeak under the WTR.

CONCLUSION

For the foregoing reasons, this Court must find that CSP lacks standing, CSP did not timely file a challenge to the WTR, that the WTR was validly promulgated pursuant to the CWA, and that Highpeak does not need to obtain a permit under the CWA.