TEAM 2

Case No. 24-001109

In the United States Court of Appeals
For the Twelfth Circuit

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

and HIGHPEAK TUBES, INC.,

Defendants-Appellees-Cross Appellants.

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

BRIEF OF APPELLEE-CROSS APPELLANT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

In this appeal, the Court will consider the requirements for standing, the application of a "plaintiff-specific" statute of limitations rule to associations that represent their members' injuries, the validity of regulations promulgated in the era of *Chevron* deference, the ability of federal agencies' interpretation of their own regulations to be controlling, and the practical effects of the Court's decisions on these issues.

Specifically, the Court will determine whether Highpeak Tubes, Inc. ("Highpeak") can rely on the Water Transfers Rule ("WTR" or "the Rule") to use a tunnel that transfers water from Cloudy Lake to Crystal Stream ("Stream" or "Crystal Stream"), or whether it must acquire a National Pollutant Discharge Elimination System ("NPDES") permit.

Pursuant to its authority under the Clean Water Act ("CWA"), the United States Environmental Protection Agency ("EPA") promulgated the WTR, which creates an exception to the NPDES permitting requirements for water transfers that do not subject transferred water to industrial, municipal, or commercial use. 40 C.F.R. § 122.3(i). The WTR is a *Chevron* era regulation, and under *Chevron* agencies had deference to promulgate regulations based on their reasonable interpretation of ambiguous statutes.

Crystal Stream Preservationists ("CSP") challenged the validity of the WTR, relying on new Supreme Court precedents *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) and *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024). *Loper Bright* overturned *Chevron* deference, and instructed courts to apply their independent judgment in interpreting the meaning of a statute instead of deferring to an agency's reasonable interpretation. *Loper Bright*, 144 S. Ct. at 2263. *Corner Post* created a "plaintiff-specific" statute of limitations, which allows parties to challenge an agency action within six years of

suffering an injury, instead of within six years of the action's promulgation. *Corner Post*, 144 S. Ct. at 2450.

CSP also brought a citizen suit under the CWA, arguing that Highpeak's tunnel should be subject to a NPDES permit because its discharges do not fit within the WTR's scope, which is consistent with EPA's interpretation of that regulation. Despite the Supreme Court precedent, *Kisor v. Wilkie*, Highpeak argues that EPA's interpretation of the WTR should not be entitled to deference given *Loper Bright*'s limitation of agency deference when interpreting statutes.

EPA acknowledges the Court must grapple with the new precedents handed down by the Supreme Court and apply the law. However, this new case law has raised additional questions. Can a plaintiff satisfy the requirements for statutory standing but fail to meet the requirements for Article III standing? Does an associational plaintiff first accrue a right of action when it adopts its founding members' injuries? Are *Chevron* era regulations protected by the principles of statutory s*tare decisis*? Does *Skidmore* allow courts to give weight to an agency's expertise when interpreting a statute? Should agency interpretations of their own regulations be controlling? For the reasons herein, the answer to all of these questions is yes.

EPA asks the Court to affirm the district court's order granting EPA's motion to dismiss CSP's challenge to the WTR and denying Highpeak's motion to dismiss CSP's CWA citizen suit.

Specifically, EPA asks the Court to find that CSP does not have standing to challenge the WTR or bring a CWA suit, and that CSP did not file a timely claim. Additionally, the Court should hold the WTR was validly promulgated under, and that Highpeak must obtain a permit under the CWA.

JURISDICTIONAL STATEMENT

All parties timely appeal a Decision and Order that grants and denies, in part, the motions to dismiss filed by Highpeak and EPA, entered on August 1, 2024, by the Honorable T. Douglas Bowman in the United States District Court for the District of New Union, Case No. 24-CV-5678. R. at 1-2; *See* Fed. R. App. P. 4(a)(1)(B)(ii). The district court had subject matter jurisdiction over CSP's claim against Highpeak under the citizen suit provision of the CWA. 33 U.S.C. §§ 1365 (a), (g). CSP invoked the district court's jurisdiction to challenge the WTR under the Administrative Procedure Act ("APA"). 5 U.S.C. § 702.

In response to the district court's order, the parties filed motions for leave to file interlocutory appeals. R. at 2. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

I. Did CSP suffer an injury-in-fact that established standing?

II. Did CSP file a timely challenge to the WTR?

III. Did EPA validly promulgate the WTR pursuant to the CWA?

IV. Did the pollutants introduced during the water transfer subject Highpeak's discharge to permitting under the CWA?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this purpose, the

CWA prohibits the "discharge of any pollutant" without a permit. *Id*. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). The statute broadly defines "pollutant" to include solid waste, biological materials, rock, sand, and industrial waste, among other things. *Id*. § 1362(6); *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 170 (2020). The statute also defines "point source" as "any discernible, confined and discrete conveyance," such as a tunnel or channel. 33 U.S.C. § 1362(14). The statutory definitions fall within Chapter V of the CWA. *See id* § 1362. EPA has the authority to prescribe regulations as necessary to carry out the functions of Chapter V. *Id*. § 1361(a). The CWA also establishes the National Pollutant Discharge Elimination System, and EPA's Administrator issues NPDES permits, which allow for the lawful discharge of a pollutant. *Id*. § 1342(a)(1).

Pursuant to the CWA, EPA finalized the NPDES Water Transfers Rule in 2008. 40 C.F.R. § 122.3(i); *NPDES Water Transfers Rule*, 73 Fed. Reg. 33,697, 33,697 (June 13, 2008). Under the WTR, 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). The WTR does not apply when the transfer activity itself introduces pollutants. *Id*. Like the CWA, the WTR broadly defines "pollutant" to include solid waste, chemical wastes, biological material, and industrial, municipal, and agricultural waste discharged into water, among other things. *Id*. § 122.2.

The CWA enables private civil enforcement for "a person or persons" whose interests are adversely affected by a violation of the CWA. 33 U.S.C. §§ 1365(a), (g). Environmental not-for-profit corporations may invoke the CWA's citizen suit provision. *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2nd Cir. 1984). Before initiating a citizen suit, a party must provide

at least 60 days notice of its intent to sue ("NOIS") to EPA, the appropriate state agency, and the alleged violator. 33 U.S.C. § 1365(b)(1)(A).

II. FACTUAL BACKGROUND

A. Highpeak And Its Tunnel

For thirty-two years, Highpeak has operated a recreational tubing business in Rexville, New Union. R. at 4. Highpeak owns a forty-two-acre parcel. *Id*. On the parcel's northern border sits Cloudy Lake. *Id*. Cloudy Lake is a 247-acre lake in the Awandack mountain range. *Id*. On the parcel's southern border is Crystal Stream, where Highpeak operates its tubing business.[1] *Id*. The Stream and Highpeak's tubing operation are located next to Crystal Stream Park ("the Park"). *Id*. at 14, 16. The Park has a two-mile-long walking trail along the Stream. *Id*. at 16.

In 1992, the State of New Union ("State") allowed Highpeak to construct a tunnel connecting Cloudy Lake and Crystal Stream. *Id*. at 4. The tunnel was constructed with an iron pipe and was partially carved through rock. *Id*. Each side of the tunnel has valves, which allow Highpeak to control the volume and velocity of the water entering the Stream to enhance its tubing operation. *Id*. The State restricts Highpeak's use of the tunnel to times when Cloudy Lake's water levels are high enough to allow for the release of water. *Id*. Highpeak generally releases water in the spring to late summer because of this restriction. *Id*. Highpeak has not obtained a NPDES permit from EPA authorizing the release of water from Cloudy Lake to the Stream. *Id*. EPA has not delegated NPDES permitting authority to the State. *Id*. No party has challenged Highpeak's use of the tunnel until now. *Id*.

[1] All parties stipulate that Cloudy Lake and Crystal Stream are "waters of the United States" within the meaning of the CWA. R. at 4-5.

B. Water Samples From Cloudy Lake And Crystal Stream

Water samples from Cloudy Lake showed a naturally occurring elevated concentration of iron, manganese, and total suspended solids ("TSS"). *Id*. at 5. Cloudy Lake's concentration of these pollutants is higher than that of the Stream. *Id*. Water samples from Cloudy Lake also revealed that additional pollutants are introduced during Highpeak's use of the tunnel:

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

Id. The Stream's concentration of iron, manganese, and TSS is two to three percent higher than that of Cloudy Lake. *Id*.

C. Crystal Stream Preservationists

Crystal Stream Preservationists is a not-for-profit corporation. *Id*. at 4. CSP was founded on December 1, 2023, with a mission "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." *Id*. at 14. CSP believes that "[t]he Stream must be preserved and maintained for all future generations," and invites individuals who are interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons" to join its organization. *Id*. at 4.

Currently, CSP has thirteen members. *Id*. All of its members, except for one, have lived in Rexville for at least fifteen years. *Id*. Jonathan Silver moved to Rexville in 2019. *Id*. In addition, two members have owned land along the Stream since 2008. *Id*. These two members reside approximately one mile south of Highpeak's tube run and five miles south of the tunnel. *Id*.

CSP submitted two declarations in support of its Complaint against Highpeak. *See id.* at 14-17. CSP's first declaration is authored by its Secretary, Cynthia Jones. *Id*. at 14-15. On December 1, 2023, Ms. Jones joined CSP to help stop the discharge of water into the Stream. *Id*. at 14. Her residence is approximately 400 yards from the Park, and Ms. Jones has resided there since 1997. *Id*. Ms. Jones has regularly walked along the Park's trail and has enjoyed the Stream's clear color. *Id*. Recently, she noticed the Stream's water was cloudy. *Id*. The cloudiness of the Stream's water diminished Ms. Jones's ability to enjoy the Stream and prevented her from walking in the Stream's water. *Id*. at 15. She feared contamination from toxins and metals, and claimed she would recreate the Stream more frequently if not for Highpeak's discharge. *Id*. at 14-15.

CSP's second declaration is authored by Jonathan Silver. *Id*. at 16-17. Mr. Silver joined CSP on December 3, 2023, two days after its founding. *Id*. at 16. Like Ms. Jones, Mr. Silver joined CSP to try to stop the discharge of water into the Stream. *Id*. Since 2019, Mr. Silver has resided one half mile from the Park. *Id*. He has regularly walked his dogs and children along the Stream. *Id*. After noticing the Stream's cloudy appearance, Mr. Silver became concerned about the presence of pollutants and hesitated to let his dogs drink from the water. *Id*. If not for Highpeak's discharge, Mr. Silver stated he would recreate the Stream more frequently and allow his dogs to drink from its water. *Id*.

III. PROCEDURAL BACKGROUND

On December 15, 2023, CSP sent EPA, Highpeak, and the New Union Department of Environmental Quality a notice of its intent to sue under the CWA. *Id*. at 4. In the NOIS, CSP alleged that Highpeak's tunnel "regularly discharged and continues to discharge pollutants into the Crystal Stream without a permit" every time Highpeak releases water. *Id*. at 4.

Additionally, CSP attacked EPA's promulgation of the WTR. *Id*. at 5. CSP alternatively argued that if EPA validly promulgated the WTR, Highpeak's tunnel introduced pollutants into the Stream, so its use fell outside the WTR's exception to the NPDES permitting program. *Id*. Highpeak argued that it did not need to obtain a NPDES permit because the tunnel naturally added pollutants during the water transfer process. *Id*. After 60 days, on February 15, 2024, CSP filed a civil action in the United States District Court for the District of New Union. *Id*. at 3, 5. The Complaint restated the allegations contained in the NOIS. *Id*. at 5.

EPA and Highpeak moved to dismiss CSP's action on numerous grounds. *Id*. First, Highpeak stated that CSP's challenge to the WTR lacked standing and its claims were time barred. *Id*. at 5. Similarly, Highpeak argued that CSP lacked standing in its citizen suit. *Id*. Highpeak also argued that CSP failed to state a cause of action because EPA's promulgation of the WTR was valid and as a result, Highpeak needed no permit for its discharges. *Id*. Next, EPA joined Highpeak in challenging CSP's standing and timeliness. *Id*. at 6. EPA also moved to dismiss CSP's challenge to the WTR. *Id*. However, EPA agreed with CSP that Highpeak's discharge fell outside the scope of the WTR and required a NPDES permit. *Id*.

The district court denied Highpeak and EPA's motions to dismiss CSP's claims for lack of standing and timely filing. *Id*. at 2, 8-9. The district court then granted EPA's motion to dismiss CSP's challenge to the WTR. *Id*. at 2, 11. The district court also found that Highpeak's discharge fell outside the scope of the WTR. *Id*. at 2, 12. After the district court's order, all parties sought leave to file interlocutory appeals, and this Court granted that motion. *Id*. at 2.

SUMMARY OF THE ARGUMENT

This Court should find that CSP does not have standing to challenge the WTR or to bring a CWA citizen suit because it did not suffer an injury-in-fact, and neither did its members. CSP

cannot rely on injuries resulting from past discharges to establish standing. CSP cannot allege its members are suffering from a current injury because Highpeak's tunnel is not open. CSP does not demonstrate its members' fear of future harm is reasonable because it does not show there is a substantial and imminent risk Highpeak's tunnel will be opened. Opening the tunnel requires independent authorization from the State with no EPA involvement. Additionally, CSP fails to sufficiently provide information showing how frequently the State authorizes opening the tunnel. CSP cannot rely on its mission to protect the Stream to establish an injury-in-fact.

This Court should find that CSP did not file a timely claim to challenge the WTR because its founding members' claims are time barred. CSP does not represent its own injury, so the not-for-profit corporation's formation does not give rise to a new statute of limitations. Associations adopt the statutes of limitations of their members' injuries. CSP adopted the time barred injuries and statutes of limitations of the members who joined December 1, 2023. CSP's right of action to challenge the WTR "first accrued" under 28 U.S.C. § 2401(a) when it adopted the founding members' claims. Mr. Silver's injury does not affect CSP's statute of limitations because he joined after formation on December 3, 2023, has the same type of injury as the founding CSP members, and is not the plaintiff.

This Court should find that the WTR's promulgation is valid. CSP challenges EPA's promulgation of the WTR under the CWA. When it enacted the CWA, Congress granted EPA the discretionary authority to exclude water transfers from the NPDES permitting program. The Rule's promulgation is not arbitrary, capricious, or contrary to the language of the statute, as evidenced by the CWA's text, purpose, and EPA's consistent interpretation of "addition"

within the CWA's definition of "discharge of a pollutant." Accordingly, the Court should follow the precedent established by the Second and Eleventh Circuits.

This Court should find that Highpeak's discharge is subject to permitting. Highpeak challenges EPA's interpretation of its WTR and contends that the pollutants introduced during the water transfer do not subject it to CWA permitting. As to the interpretation of the WTR, Highpeak argues that the Rule only requires a permit if pollutants are introduced through human activity rather than natural processes, but this interpretation contradicts the plain meaning of the regulation. The regulation simply states that a permit is required if there are "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). Because Highpeak is engaging in a water transfer activity that introduces pollutants into Crystal Stream, it cannot be exempted from permitting requirements. Even if human activity is a requirement, Highpeak is still subject to permitting. Highpeak's employees open and close the valves on the tunnel to regulate the water flow which discharges pollutants into Crystal Stream which is a human activity.

STANDARD OF REVIEW

The district court's decisions on the motions to dismiss are reviewable de novo. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023); *Trustees of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2nd Cir. 2016); *W. Va. Pipe Trades Health & Welfare Fund v. Medtronic, Inc.,* 845 F.3d 384, 389 (8th Cir. 2016); *Central Platte Nat. Res. Dist. v. U.S. Dept. of Agric.*, 643 F.3d 1142, 1148 (8th Cir. 2011).

For motions to dismiss, the court treats all allegations made in the complaint as true. *Tyler*, 598 U.S. at 636. A plaintiff's complaint "must contain sufficient factual [enhancement]…to

'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)).

The APA mandates the judicial review of agency actions and instructs the Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. CSP DID NOT SUFFER AN INJURY-IN-FACT THAT ESTABLISHED STANDING.

CSP does not have standing to challenge the WTR's validity or to challenge Highpeak's discharges under a CWA citizen suit because it did not suffer an "injury-in-fact," and neither did its members.

CSP bears the burden of establishing that its injury-in-fact satisfies statutory standing, which requires its injury fall within the "zones of interests" protected by the CWA and the APA. *Lujan v. Nat'l Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 872 (1990). CSP's aesthetic and recreational injuries are within the "zone of interests" protected by the CWA and APA. R. at 7-8; *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). However, "this does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

Additionally, CSP must establish its injury-in-fact comports with Article III constitutional standing requirements, which are satisfied if (1) its injury-in-fact is concrete, particularized, and actual or imminent; (2) the injury is traceable to EPA and Highpeak's actions; and (3) a

court decision will redress CSP's injury. *Laidlaw*, 528 U.S. at 180-81 (citing *Lujan v. Def. of Wildlife (Lujan II)*, 504 U.S. 555, 560-61 (1992)).

CSP may allege an injury-in-fact on behalf of itself or its members through associational standing. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 393-94 (2024). CSP has associational standing if one of its members has standing, the interests at stake are "germane" to the organization's purpose, and participation of individual members is not required. *Laidlaw*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

A. Injuries Resulting From Highpeak's Tunnel's Past Discharges Do Not Establish Standing.

CSP cannot establish standing based on past discharges from Highpeak's tunnel. *Laidlaw*, 528 U.S. at 175 ("[W]e have held that citizens lack…standing under [the CWA] to sue for violations that have ceased by the time the complaint is filed."). Therefore, the CSP affidavits' references to previous instances of the Stream's water appearing "cloudy" due to Highpeak's discharges are not injuries that establish standing. R. at 16.

B. CSP Members Do Not Have An Actual Ongoing Injury Because Highpeak's Tunnel Is Not Currently Releasing Water.

CSP does not have an injury arising from its members' current avoidance of the Stream due to fears of the Stream's contamination from the tunnel's discharges because it is not presently open. R. at 15; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 419 (2013).

In *Laidlaw*, an environmental organization, whose members were nearby residents, sued a waste incinerator facility for discharging pollutants into a river in excess of their NPDES permit. 528 U.S. at 175-76, 182. The residents' affidavits contained "conditional statements" claiming they would use the river, but the facility's discharges led them to avoid swimming, fishing, and walking in or near the river out of concern for the pollution's harmful effects. *Id.*

at 182-83. The court determined the organization's members had "aesthetic and recreational injuries" because the facility discharges were "ongoing." *Id.* at 169, 184.

In *Clapper*, the plaintiffs argued they were suffering an ongoing injury because they had undertaken "costly and burdensome measures" to avoid government surveillance that could be authorized by FISA courts under 50 U.S.C. § 1881(a). 568 U.S. at 415. The court rejected this argument, explicitly contrasting the facts with those in *Laidlaw*:

> Because the unlawful discharges of pollutants were 'concededly ongoing,' the only issue was whether 'nearby residents'…acted reasonably in refraining from using the polluted area. *Laidlaw* is therefore quite unlike the present case, in which it is not conceded that respondents would be subject to unlawful surveillance but for their decision to take preventive measures.

Id. at 419 (citations omitted). Because the surveillance was not "concededly ongoing," the plaintiffs could not show their preventative measures were reasonable. *Id.*

Here, similar to the plaintiffs in *Clapper*, CSP has not demonstrated Highpeak's tunnel discharges are "ongoing." If authorized, the tunnel releases water during the spring and late summer, and its use is otherwise prohibited. R. at 4. CSP did not file its complaint until February 15, 2024, and the tunnel was turned off at that time. R. at 5. Unlike *Laidlaw*, CSP's members' "conditional statements" that they "would recreate more frequently on the Stream" if not for the discharges do not show they are acting reasonably because there are no current discharges which could lead to injury. R. at 15. Therefore, an injury based on CSP members avoiding the Stream does not establish standing.

C. CSP Members' Fear Of Future Harm Is Unreasonable Because There Is No Imminent And Substantial Risk The State Will Approve Opening Highpeak's Tunnel.

CSP cannot assert injuries based on fear of the Stream's risk of contamination resulting from future tunnel discharges because approval of the tunnel's use is contingent upon the approval of the State, and it is unclear how often the State gives this approval. R. at 4, 16.

1. Opening Highpeak's tunnel is contingent upon the State's independent approval.

An injury based on a risk of future harm must be "certainly impending." *Clapper*, 568 U.S. at 401-02. In *Clapper*, the court reasoned that plaintiffs' injuries were not "certainly impending" because it was "speculative" that a FISA court would approve of the government surveillance that would injure the plaintiffs. 568 U.S. at 413. Generally, courts are hesitant to grant standing for injuries resulting from how "independent decision makers will exercise their judgment" because courts "cannot presume to control or predict" whether the decision makers' determinations will give rise to the injury at all. *Lujan II*, 504 U.S. at 562; *Clapper*, 568 U.S. at 413.

By contrast, in *SCRAP*, the court determined there was an imminent risk of future harm that would arise based on the choices of independent decision makers, but the chain of events leading to the alleged injury would occur *immediately* upon the Federal Government's approval of agency action.[2] *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 684-90 (1973).

Here, unlike *SCRAP*, EPA's actions are not starting the chain of events that would lead to CSP members' injuries. CSP cannot show that an injury would arise immediately upon EPA's

[2] In *SCRAP*, the court held the plaintiffs pled enough facts to survive a motion to dismiss. *Id.* at 698-99.

action because the State is responsible for approving Highpeak's tunnel use. R. at 4. Similar to the FISA courts in *Clapper*, the State is an "independent decision maker," and because any hypothetical discharge is dependent on the State's determination, CSP has not shown the risk of harm is "certainly impending."

2. Highpeak's agreement with the State authorizing tunnel use and CSP's pollutant measurements do not demonstrate there is a substantial risk the tunnel will be opened.

CSP members' fear of future harm from discharges are not reasonable because they have not shown there is a substantial risk that the State will approve the tunnel's use. *Laidlaw*, 528 U.S. at 184 ("The reasonableness of [the] fear is dependent upon the likelihood of recurrence of the allegedly unlawful conduct.") (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)).

In *Monsanto*, the plaintiffs did sufficiently show a substantial risk because they alleged facts which demonstrated agency de-regulation of genetically engineered alfalfa could lead to a "significant risk of gene flow to non-genetically-engineered varieties of alfalfa." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010). The plaintiffs alleged that bees would pollinate the alfalfa and because of the close geographic proximity of non-genetically engineered alfalfa and genetically engineered alfalfa, the bees would frequently cross pollinate and cause gene flow. *Id.* at 153 n.3.

The court in *Clapper* also distinguishes between its facts and those of *Monsanto*: "Unlike the conventional alfalfa farmers in *Monsanto*, however, respondents in the present case present no concrete evidence to substantiate their fears, but instead rest on mere conjecture about possible governmental actions." *Clapper*, 568 U.S. at 420.

Here, similar to *Clapper*, CSP does not provide "concrete evidence" that the risk of harm from discharges is substantial because the existence of the agreement between Highpeak and

the State allowing for discharges under certain conditions does not provide any information regarding how often the agreement is acted on. R. at 4. This differs from *Monsanto*, where the plaintiffs could show that the conditions which would lead to gene flow would happen "frequently."

For example, CSP does not show the State approves of opening Highpeak's tunnel annually. This also demonstrates the risk of opening the tunnel is not "certainly impending" because if the tunnel is not used every year, the discharges would occur at an "indefinite future time," which does not allow for standing. *Lujan II*, 504 U.S. at 564 n.2.

CSP does provide some information showing that the concentration of pollutants is higher in the outfall into the Stream compared to Cloudy Lake. However, this measurement was taken on the "same day," and it is unclear what year the measurement was taken. R. at 5. This evidence does not show discharges occur "frequently."

Because there are not multiple pollutant measurements and CSP provides no information regarding how often the State approves of the tunnel's use, it is impossible to determine the "likelihood" of future discharges. Similar to *Clapper*, CSP merely speculates that the State will approve future tunnel use. The CSP members' fear of harm is unreasonable, and they do not have standing.

D. CSP Cannot Rely On Its "Special Interest" In The Stream To Establish Its Own Injury-In-Fact.

An association cannot assert an injury based on its "special interest" in protecting the environment. *Sierra Club*, 405 U.S. at 739. However, associations are able to establish their own standing based on an injury directly affecting their business activities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In *Havens*, a non-profit corporation, which provided housing, counseling, and referral services, claimed an injury on its own behalf,

asserting that the resources the organization had spent attempting to counteract racially discriminatory housing practices were sufficient to demonstrate an injury-in-fact. *Id.* The court agreed, reasoning that the "drain" on resources demonstrated more than "a setback to the organization's abstract social interests." *Id.*

Here, CSP does not show it engages in any business activities whose injury would establish standing, unlike *Havens*. R. at 7. Like in *Sierra Club*, CSP attempts to establish an injury based on its mission to protect the Stream, but this "abstract social interest" does not give grounds for standing. Therefore, CSP does not establish an injury-in-fact on its own behalf.

In conclusion, the Court should find that CSP fails to establish an injury-in-fact, so it does not have standing.

II. CSP DID NOT FILE A TIMELY CHALLENGE TO THE WTR BECAUSE ITS FOUNDING MEMBERS' CLAIMS ARE TIME BARRED.

To bring an APA claim, CSP must "suffer a legal wrong" resulting from a "final agency action."[3] 5 U.S.C. §§ 702, 704; *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024). CSP must also assert its APA claim within the statute of limitations, which states "every 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) (emphasis added).

The Supreme Court has determined § 2401(a)'s statute of limitations allows a plaintiff to bring an APA claim within six years of its injury, rather than within six years of the regulation's promulgation. *Corner Post*, 144 S. Ct. at 2450. In *Corner Post,* the plaintiff corporation challenged Regulation II, which determined certain transaction fee rates between businesses

[3] The Water Transfers Rule is a "final agency action" under 5 U.S.C. § 704 because it is a "rule" under 5 U.S.C. §§ 551(4), 551(13).

and banks. *Id.* at 2448. Corner Post did not exist at the time the regulation was promulgated, so the corporation argued that its statute of limitations began when it opened for business and suffered an injury, not when the regulation was published. *Id.* The Court agreed, reasoning that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Id.* at 2450.

Here, CSP attempts to rely on *Corner Post*'s "plaintiff specific" statute of limitations to argue that its challenge to the WTR is timely, but the facts of *Corner Post* are distinguishable. CSP represents its members' injuries instead of asserting its own corporate injury. Because CSP represents its members' injuries, it adopts its members' statutes of limitations for their injuries. CSP's claims are time barred because its right of action "first accrued" when it started representing its founding members' time barred injuries. Mr. Silver's injuries do not affect CSP's statute of limitations because he joined after the not-for-profit corporation's right of action "first accrued." For these reasons, CSP's claim is time-barred.

A. CSP's Formation Does Not Create A New Statute Of Limitations Because It Did Not Give Rise To A New Corporate Injury.

CSP's formation does not create a new statute of limitations because the not-for-profit corporation did not suffer its own injury. Here, CSP simply represents its members' injuries.[4]

Forming a not-for-profit corporation does not give rise to a new statute of limitations when the corporation represents its members' claims instead of its own through associational standing. *Sw. Williamson Cnty. Cmty. Ass'n. v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999). In *Southwest*, the plaintiff association sued under the APA challenging a final agency action. *Id.*

[4] This section assumes that the court found CSP has associational standing through its members, so for purposes here, the members have an "injury-in-fact."

at 1035. Although the association was formed in 1997, long after the agency actions were issued in 1989 and 1990, the court found the association's claim was time barred because its members were injured when the agency actions were issued. *Id.* at 1036.

In *Corner Post,* the plaintiff corporation argued its business was injured by having to pay high fees. 144 S. Ct. at 2448. Corner Post did not have business activities before incorporation. Therefore, Corner Post's formation and subsequent business activities led to Corner Post's corporate injury and related right of action.

Here, CSP cannot claim its statute of limitations began when it formed on December 1, 2023, because its formation did not give rise to a new corporate injury. R. at 4, 8. Unlike *Corner Post*, CSP did not suffer its own injury; it represents its members' injuries. Because no new corporate injury arose upon formation, CSP's statute of limitations should be determined by its members like in *Southwest*. Therefore, CSP cannot claim its formation gave rise to a new statute of limitations when it formed on December 1, 2023. R. at 4.

B. CSP's Claims Are Time Barred Because Its Founding Members' Injuries Determine When CSP's Right Of Action "First Accrued."

A plaintiff's statute of limitations starts when the right of action "first accrues." 28 U.S.C. § 2401(a). Assuming there is a final agency action, a right of action accrues on the "date the damage is sustained," initiating the statute of limitations. *Corner Post*, 144 S. Ct. at 2451 (citation omitted). Here, the founding members first sustained damage in 2008 when their aesthetic, recreational, and property interests were injured by the WTR. Since both the "injury" and "final agency action" were present in 2008, the founding members' statutes of limitations began.

In *Herr,* the plaintiffs sued under the APA challenging a Forest Service regulation promulgated in 2007 that restricted the Herrs' use of gas-powered motorboats on the lake next

to their property. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 812 (6th Cir. 2015). The court determined the Herrs' right of action "accrued" when they purchased property in 2010, and not when the challenged regulation was promulgated because "[o]nly at that point could the Herrs meet both requirements to bring this lawsuit under the APA by pleading final agency action and an injury to their rights." *Id.* at 819.

In *Corner Post*, the corporation did not have a right of action until 2018 because that is when it suffered an injury arising from having to pay the interchange fees and could "plead" a final agency action. 144 S. Ct. at 2448.

Here, similar to the plaintiffs in *Herr* and *Corner Post*, CSP's founding members' rights of action "accrued" when they sustained injuries and could challenge a final agency action. Because the founding CSP members were residents of Rexville with property, recreational, and aesthetic interests in the Stream before 2008, their injuries arose in 2008 with the promulgation of the WTR, starting their statutes of limitations. R. at 4, 8. Therefore, the founding members' claims are time barred because more than sixteen years have passed since their rights of action "first accrued," far exceeding the six year limit under 28 U.S.C. § 2401(a). R. at 8.

Associations adopt their members' statutes of limitations, so the founding members' statutes of limitations determine the association's statute of limitations. *Southwest*, 173 F.3d at 1036. Here, the founding members' claims are time barred, so CSP's claims are time barred. *Id.*

C. Mr. Silver's Right Of Action Does Not Make CSP's Claim Timely Because The Corporation's Right Of Action Had Already Accrued.

Corner Post's holding that the statute of limitations is "plaintiff-specific" for APA claims has not been applied to associations that represent their members' claims. Initially, two trade

associations had attempted to challenge Regulation II on behalf of their members, but were dismissed for lack of timeliness. *Corner Post*, 144 S. Ct. at 2471. After the dismissal, Corner Post joined each association and was added as a party to litigation. *Id.* Because Corner Post was a named party to the litigation, the Supreme Court only determined that it had a timely claim. It is unclear whether *Corner Post*'s ruling would allow associations to assert their own timely claims because one of their members has a timely claim, especially when that member is not a party to litigation.

However, other court precedents support the conclusion that members who join associations should not change an association's statute of limitations when there are already members with the same injury. For instance, the court in *Herr* explains that the injury sustained determines the statute of limitations. 803 F.3d at 820. When the injury is a different kind of injury—for example, a property injury differs from a recreational injury—each kind of injury has its own statute of limitations. *Id.* The Forest Service argued that the Herrs' property injury claim was time barred because the Herrs also had time barred recreational injuries from using the lake since the 1970's. *Id.* However, the court distinguished between the injuries, reasoning that the Herrs' property injury claim was not time barred because it was a separate injury that arose from owning property on the lake, not from just using it. *Id.*

Here, unlike in *Herr*, Mr. Silver alleges the same kind of recreational and aesthetic injuries as CSP's founding members, so there are not different kinds of injuries that warrant different statutes of limitations. R. at 14-17.

In addition, under 28 U.S.C. § 2401(a), the statute of limitations arises when the right of action *first accrues*." (emphasis added). "First" is defined as "a thing coming before all others." *First*, CAMBRIDGE DICTIONARY, (2024). CSP's right of action "first accrued" when it started

representing members who had sustained recreational, aesthetic, and property injuries on December 1, 2023. R. at 14; *Southwest* 173 F.3d at 1036. Mr. Silver has those same injuries, and he joined CSP later on December 3, 2023, after CSP's right of action arising from recreational, aesthetic, and property injuries "first accrued." R. at 16. Therefore, Mr. Silver's injury should not change CSP's statute of limitations.

Moreover, unlike the plaintiff corporation in *Corner Post*, Mr. Silver is not a named party in the litigation. R. at 8. *Corner Post*'s holding is "plaintiff-specific," so Mr. Silver's injury should not determine CSP's statute of limitations because he is not the plaintiff.

In conclusion, the Court should rule CSP's claims are time barred.

III. EPA VALIDLY PROMULGATED THE WTR UNDER THE CWA BECAUSE IT IS NOT ARBITRARY AND CAPRICIOUS.

CSP contends that EPA invalidly promulgated the WTR and that its promulgation is inconsistent with the language of the CWA. R. at 5. The CWA prohibits "the discharge of a pollutant" without a permit. 33 U.S.C. § 1311(a). The CWA defines the "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any source." *Id*. § 1362(12) (emphasis added). "Addition" is undefined in the CWA, however, EPA has interpreted that an "addition" occurs when pollutants are introduced to navigable waters from the outside world. *NPDES Water Transfers Rule*, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008). Consistent with this interpretation, EPA promulgated the WTR in 2008. *Id*. The WTR excludes water transfers from the NPDES permitting requirements so long as the water is not subject to intervening uses and the transfer process does not introduce external pollutants to the navigable waters. 40 C.F.R. § 122.3(i). For the following reasons, EPA validly promulgated the WTR.

A. Statutory *Stare Decisis* Requires The Court To Uphold The WTR.

The Court should follow the precedent of prior courts and conclude that the WTR is validly promulgated. The principles of *stare decisis* demand respect for precedent despite a change in interpretive methodology. *CBOS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). A prior court's reliance on the deferential standard set out in *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) does not constitute "a special justification" to overrule statutory precedent. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Since its promulgation, the Second and Eleventh Circuits upheld the validity of the WTR. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) (*Friends I*) ("Because the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is arbitrary, capricious, or manifestly contrary to the statute."); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 533 (2nd Cir. 2017) (*Catskill III*). Although these cases relied on *Chevron*, this alone is not enough to invalidate the WTR.

Further, CSP and Highpeak failed to present a special justification that commands the Court to overrule the precedent established by *Catskill III* and *Friends I.* Special justification requires more than "just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 433 (2000)). Rather, special justification arises in several situations, such as intervening developments in the law at issue or when a reviewing court must fix inherent inconsistency. *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 875-76

(D.C. Cir. 1992).[5] No such situation arises here. First, Congress has not taken further action regarding the meaning of "addition" within the CWA. *See id.* at 876 (stating that an intervening development of law includes subsequent actions taken by Congress). Next, if the Court were to invalidate the WTR, it would impose inherent inconsistency in the applicability of the Rule, not remedy it. Invalidating the WTR in the Twelfth Circuit would create precedent inconsistent with the Second and Eleventh Circuits. EPA would then be required to issue NPDES permits for water transfers based on the transfer's location rather than whether the transfer introduces pollutants to navigable waters. Because no special justification exists to overrule the WTR's validity, the Court should decline to disturb the precedent upholding the WTR in other circuits.

B. Congress Granted EPA The Discretionary Authority To Exclude Water Transfers From The NPDES Permitting Program.

Congress granted EPA the discretionary authority to exclude water transfers from the NPDES permitting requirements. When Congress has granted an agency the authority to "fill up the details" of a statutory scheme, "the role of the reviewing court under the APA is… to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 144 S. Ct. at 2263.

Congress granted EPA the discretionary authority to exclude water transfers from the NPDES permitting requirements for two reasons. First, Congress authorized the Administrator of the EPA "to prescribe such regulations as are necessary to carry out his functions under

[5] The Supreme Court departed from *stare decisis* in overruling *Chevron* citing the courts' constant need to identify ambiguity. *Loper Bright*, 144 S. Ct. at 2270. Because of the subjective nature of ambiguity, the *Chevron* doctrine was "unworkable," and its application led to varying results among judges, even those within the same circuit. *Id.* In contrast, upholding the WTR would not create the same problem. It would concretely define "addition" and create consistency of the Rule's application in the Twelfth Circuit.

[Chapter V].” 33 U.S.C. § 1361(a). Because Chapter V defines the “discharge of a pollutant,” *see id.* at § 1362(12), Congress granted EPA the authority to exclude water transfers from the discharges requiring a permit. Second, EPA has the authority to define “pollutant” and “point source.” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Considering this authority, EPA has similar authority to interpret when an “addition” amounts to a “discharge of a pollutant” requiring a permit. *Id*. Given EPA’s authority to exclude water transfers, the Court should effectuate the will of Congress and uphold the validity of the WTR in its independent review of the CWA.[6]

C. Water Transfers Are Not “Additions” Under The Best Reading Of The CWA.

1. EPA’s promulgation of the WTR is consistent with the CWA’s text.

Under the best reading of the CWA, water transfers do not constitute an “addition” of a pollutant. When independently interpreting the language of the CWA, the Court must discern “the best reading of the statute” using the traditional tools of statutory interpretation. *Loper Bright*, 144 S. Ct. at 2263. Congress left “addition” undefined within the CWA. *See* 33 U.S.C. § 1362. Since “addition” is neither defined nor a term of art, the Court should construe it “in accordance with its ordinary or natural meaning.” *S.D. Warren Co. v. Me. Bd. of Env’t Prot.*, 547 U.S. 370, 376 (2006). The ordinary meaning of statutory language may be determined by the term’s dictionary definition. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 (1997).

[6] The text of *Loper Bright* also recognizes EPA’s broad authority to implement effluent limitations under the NPDES permitting program. 144 S. Ct. at 2311 n.6.

The dictionary defines "addition" as "something that has been added to something else." *Addition*, CAMBRIDGE DICTIONARY, (2024).[7] To illustrate the term's plain meaning, courts have employed a metaphor: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 110 (2004); *Friends I*, 570 F.3d at 1217. Likewise, water transfers do not add pollutants because if one removes the water and places it in another body of water, no pollutants are added above those already present. In line with the plain meaning of "addition," the WTR excludes water transfers that introduce external pollutants not already present in navigable water. 40 C.F.R. § 122.3(i); 73 Fed. Reg. at 33,699. When the water transfer is compliant with the WTR's requirements, no additional pollutants are added in the transfer process. Accordingly, excluding water transfers from the permitting requirements is consistent with the plain meaning of the text.

2. The WTR is consistent with the CWA's purpose.

The CWA's legislative history is silent on Congress's intent to exclude water transfers from the NPDES permitting requirements, but EPA's promulgation of the WTR is consistent with the CWA's purpose. To discern the meaning of a statute's provisions, the Court "may read statutory terms in light of the purpose of the statute." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060-61 (9th Cir. 2003). The stated purpose of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Pursuant to this purpose, Congress sought to eliminate the discharge of pollutants into navigable waters. *Id*. § 1251(a)(1).

[7] The Court in *Friends I*, adopted an alternative dictionary definition: "'to join, annex, or unite' so as to increase the overall number or amount of something." 570 F.3d at 1217.

As one of the most complex federal statutes, the CWA must "balance[] a welter of consistent and inconsistent goals." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2nd Cir. 2001) (*Catskill I*). And the narrow question of what constitutes an addition "may not be resolved merely by simple reference to [the CWA's] admirable goal." *United States v. Plaza Health Lab'ys*, 3 F.3d 643, 647 (2nd Cir. 1993); *see Gorsuch*, 693 F.2d at 178 ("[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal."). Water transfers are integral to water resource management and the allocation of water rights. 73 Fed. Reg. at 33,703. The WTR does not blanket authorize all water transfers. 40 C.F.R. § 122.3(i). For instance, when water is extracted for irrigation, it may not be deposited back into navigable water without a NPDES permit. 73 Fed. Reg. at 33,704. The WTR strikes the balance of upholding the broad purpose of the CWA, while satisfying the need to manage water resources. Accordingly, EPA's promulgation of the WTR is in line with the purpose of the CWA.

3. EPA has consistently excluded water transfers from the NPDES permitting program.

Over time, EPA has declined to impose the NPDES permitting requirements to water transfers. To determine a statute's meaning, the Court may seek guidance from the interpretations of the agencies responsible for implementing the statute. *Loper Bright*, 144 S. Ct. at 2262. An agency's interpretation "constitute[s] a body of experience and informed judgment to which courts… may properly resort for guidance." *Id*. (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994)). Consistent interpretations of the statute are especially useful to determine the statute's meaning. *Id*.

Here, water transfers are "the kind of question to which [] EPA would apply its technical expertise." *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1298 (1st Cir. 1996). EPA first

asserted that water transfers do not amount to a discharge of a pollutant in an informal policy statement. *Catskill I*, 273 F.3d at 493. EPA continued to maintain that position when it issued an interpretive memorandum in 2005. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 86 (2nd Cir. 2006) (*Catskill II*). In addition to its informal policy and interpretive memorandum, EPA promulgated the WTR, again maintaining the same interpretation. 73 Fed. Reg. at 33,698-99. Simply put, EPA has historically interpreted that the NPDES permitting program excludes water transfers. *Catskill III*, 846 F.3d at 500. Thus, the Court should interpret the CWA in line with EPA's interpretation.

D. EPA's Promulgation Of The WTR Is Not Arbitrary And Capricious Because It Is Within Its Delegated Authority.

Considering the text, purpose, and EPA's consistent interpretation of the CWA, the WTR is not arbitrary and capricious.[8] Agency action is not arbitrary and capricious when it is rational, based on the consideration of relevant factors, and within the scope of the agency's delegated authority. *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983); *see also* 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard's scope of review is "narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Here, EPA acted within the scope of its delegated authority when promulgated the WTR. EPA also acted rationally when it interpreted the CWA to exclude water transfers, as evidenced by the best reading of the statute. Therefore, the Court should uphold the WTR as a validly promulgated rule.

---

[8] In some instances, there are "extraordinary cases" where the question is of such political or economic significance that Congress must expressly delegate the agency the authority to act. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). EPA's promulgation of the WTR is not a case involving a major question that requires Congress's expressed delegation. *See West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (finding a major question existed when EPA's interpretation "substantially restructure[d] the American energy market").

IV. POLLUTANTS INTRODUCED DURING THE WATER TRANSFER TOOK THE DISCHARGE OUT OF THE SCOPE OF THE WTR, SUBJECTING HIGHPEAK'S DISCHARGE TO PERMITTING UNDER THE CWA.

Highpeak contends that its water transfer is exempt from permitting requirements. The NPDES Water Transfers Rule excludes "discharges from a water transfer" from permitting requirements. 40 C.F.R. § 122.3(i). However, "the exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.* Because of this, Highpeak's discharge, which introduces iron, manganese, and TSS to Crystal Stream in the course of the water transfer, does not fall under the permitting exception and is instead subject to permitting under the CWA.

A. EPA's Interpretation Of The WTR Is Controlling Since It Is Not "Plainly Erroneous Or Inconsistent With The Regulation."

The United States Supreme Court holds that an agency's interpretation of its own regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945). The agency's reasonable interpretation should be upheld as long as the interpretation is consistent with the language and purpose of the Rule. *Id.*

1. Under the plain language of the WTR, Highpeak is required to obtain a permit.

To see if EPA's interpretation of the Rule is reasonable, the Court should look at the plain language. *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1270 (10th Cir. 1994). The plain language states that the "exclusion does not apply to pollutants introduced by the water transfer activity." 40 C.F.R. § 122.3(i). To determine what this plain language means, "pollutant," "introduce," and "water transfer activity" must be defined.

As in the CWA, the WTR also defines "pollutant" as "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 40 C.F.R. § 401.11(f); 40 C.F.R. § 122.2. "Pollutant" is intended to be defined broadly. *Cnty. of Maui v. Haw. Wildlife Fund,* 590 U.S. 165, 170 (2020). The materials at issue here (iron, manganese, TSS) are pollutants under this definition.

"Introduce" is not defined in the Rule. Britannica Dictionary defines "introduce" as "to put or insert something into something else." *Introduce,* THE BRITANNICA DICTIONARY, (2024). Here, pollutants are introduced to Crystal Stream due to the water transfer which causes the water to have a higher concentration of iron, manganese, and TSS than it would without the water transfer.

The Rule states that a "water transfer activity" 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). Here, Highpeak's iron pipe tunnel connects Cloudy Lake to Crystal Stream, which are waters of the United States. R. at 4-5. The transferred water is used for recreational purposes and is not subject to industrial or commercial purposes. Therefore, Highpeak is engaging in a water transfer activity under the plain language of the Rule.

Because Highpeak is engaging in a water transfer activity that introduces pollutants into Crystal Stream, it cannot be exempted from permitting requirements. This is supported by the plain language of the WTR. EPA's interpretation of the regulation should be upheld since it is

not "plainly erroneous or inconsistent with the regulation," and it is supported by the plain language of the WTR. *Seminole Rock & Sand Co*., 325 U.S. at 414.

2. EPA's interpretation is consistent with the Rule's purpose.

In addition to the plain language, the purpose of the Rule supports EPA's interpretation. The WTR is intended to strike a balance between permitting requirements not being overly burdensome for water quality management activities and protecting the waters of the United States from pollution. *NPDES Water Transfers Rule*, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). EPA's position, that a water transfer permitting exclusion applies unless a pollutant is being introduced in the course of the water transfer, strikes this balance.

B. If The Court Finds That The WTR Is Ambiguous, EPA's Interpretation Has Controlling Weight Under *Auer* And *Kisor.*

In *Auer v. Robbins,* the U.S. Supreme Court held that a court should defer to an agency's construction of its own regulation. 519 U.S. 452 (1997). The Court explained there is a presumption that Congress intended agencies to play the primary role in resolving regulatory ambiguities, and the agency that promulgated the rule is in the better position to reconstruct its original meaning. *Id. Auer* is a highly deferential standard. *Id.*

To know if *Auer* deference has bearing in this case, the court must apply the test laid out in *Kisor v. Wilkie.* 588 U.S. 558 (2019). First, the regulation must be "genuinely ambiguous" after a court "exhausts all traditional tools of construction." *Id* at 559. If the court finds that the rule is ambiguous then, second, the agency's interpretation of the regulation must be reasonable. *Id*. EPA's interpretation of the WTR is a reasonable interpretation of the plain language of the Rule, as discussed in subsection A. EPA's interpretation of the WTR is also supported by the purpose of the CWA which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish the

CWA's purpose, EPA needs to be able to regulate pollutants that are introduced by water transfer activities. Therefore, under the purpose of the CWA, EPA's interpretation of the Rule is reasonable.

Third, *Kisor* dictates the regulatory interpretation in question must be "the agency's authoritative or official position" as opposed to a "mere ad hoc statement." *Kisor,* 588 U.S. at 559. EPA's official position, that the WTR does not apply when pollutants are introduced, is not merely situational to the facts here. This Rule was promulgated through notice and comment procedures and is published in the Federal Register. 40 C.F.R. § 122.3.

Next, the regulatory interpretation must implicate the agency's substantive expertise. *Kisor*, 588 U.S. at 559. EPA is the administrator of the CWA and is responsible for implementing the CWA's pollution control programs, including permitting. 33 U.S.C. § 1361. EPA is best situated to determine who is and who is not required to get a discharge permit.

The last step in the *Kisor* test is whether the regulatory interpretation reflects the agency's "fair and considered judgment," meaning that it is not merely a "convenient litigating position" or "post hoc rationalization advanced" to "defend past agency action against attack" and does not "create unfair surprise to regulated parties" or "disrupt expectations." *Kisor*, 588 U.S. at 559. EPA's interpretation that the Rule's permitting exclusion does not apply to pollutants introduced by the transfer activity is a consistent and equitable interpretation. The WTR has been in use since 2008 when the Rule was promulgated. 40 C.F.R. § 122.3. EPA has been consistent in its application of the WTR across four subsequent administrations. R. at 10.

Under *Kisor*, the Court should find that EPA's interpretation of the WTR is reasonable because it is "within the zone of ambiguity the court has identified" which entitles the interpretation to controlling weight. 588 U.S. at 573.

C. *Loper Bright* Does Not Apply When Interpreting Agency Rules.

Highpeak argues that the appropriate standard for interpreting the WTR comes from *Loper Bright*. R at 11. EPA rejects this argument. The Court in *Loper Bright* held that interpreting statutes is the judiciary's task. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). Congressionally-made-statutes and agency-made-regulations are significantly different. *Loper Bright* is the controlling case for agency interpretation of statutes but not for an agency's interpretation of its own rule. 144 S. Ct. 2244. To interpret an agency's own regulation, the Court should employ the standards from *Seminole Rock*, *Auer*, and *Kisor* which specifically apply to agency rules. *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461; *Kisor*, 588 U.S. at 573. Although *Loper Bright* overturned *Chevron* and how agency interpretations of statutes are reviewed, it did not change the interpretive methodology for reviewing an agency's interpretation of its own regulation. *Loper Bright* 144 S. Ct. 2244; *Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984). Accordingly, the controlling case law is *Seminole Rock, Auer,* and *Kisor*. *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461; *Kisor*, 588 U.S. at 573. EPA's interpretation of the WTR is supported by the standards established in these cases and should be upheld.

D. If The Court Finds That The WTR Requires Pollutants To Be Introduced By Human Activity, Highpeak's Actions Qualify As Human Activity, Necessitating A Permit.

The Court should reject Highpeak's interpretation of the WTR because it is inconsistent with the plain language. The WTR excludes certain discharges from permitting requirements but "does not apply to pollutants introduced by the water transfer activity." 40 C.F.R. § 122.3(i). Highpeak interprets the Rule to require a permit only when pollutants are introduced through human activity, not natural processes. R. at 11. This interpretation contradicts the

ordinary meaning of the regulation which plainly states "pollutants introduced by the water transfer activity." 40 C.F.R. § 122.3(i). As discussed above, the plain meaning of introduction is to put something into something else. *Introduce,* THE BRITANNICA DICTIONARY, (2024). No human action is required. Here, iron, manganese, and TSS are being put into Crystal Stream because of the water transfer activity. R. at 5.

Even if Highpeak's interpretation is followed, Highpeak's discharge is a human activity and requires a NPDES permit. In 1992, Highpeak constructed the 100 yard tunnel out of rock and iron pipe. R. at 4. The tunnel is equipped with valves at the northern and southern ends which Highpeak's employees open and close to regulate the flow of water from Cloudy Lake into Crystal Stream. *Id.* Every time Highpeak opens the valves, it is discharging pollutants into the Stream in violation of the CWA. R. at 5. This qualifies as human activity because it necessitates human action. Additionally, the poor construction and maintenance of the water transfer tunnel qualifies as human activity since the pollutants are being introduced as a result of insufficient construction and not natural processes. R. at 12.

Furthermore, Highpeak should not be rewarded for poor construction and maintenance of the water transfer tunnel which has led to increased pollution. Highpeak chose to carve the tunnel through rock and soil, and chose to only partially use a metal conduit. *Id*. Due to poor construction and maintenance of the tunnel, Highpeak allowed a two to three percent increase in concentrations of iron, manganese, and TSS in Crystal Stream. *Id.* EPA has stated that water transfers should be operated in a manner that ensures that it does not add pollutants to the water being transferred. *NPDES Water Transfers Rule*, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). When water transfers introduce pollutants, a NPDES permit is required. *Id.* For EPA to further the purpose and goals of the CWA, which are to restore and maintain the integrity of the

Nation's waters, Highpeak's water transfer activity cannot be exempted from permitting since pollutants are introduced in the course of the transfer. 33 U.S.C. § 1251(a).

In conclusion, Highpeak's water transfer is subject to permitting under the CWA.

CONCLUSION

For the foregoing reasons, the Court should determine that CSP does not have standing to challenge the WTR or bring a CWA suit, and that CSP did not file a timely claim. Additionally, the Court should hold the WTR was validly promulgated under the APA, and that Highpeak must obtain a permit under the CWA.