Team 20

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendants-Appellees-Cross-Appellants

-and-

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

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

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

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STATEMENT OF JURISDICTION

Section 505 of the Clean Water Act ("CWA" or the "Act") allows any citizen to bring suit to enforce the Act provided that the citizen complies with notice of suit standards in the Act. 33 U.S.C. § 1365(a)-(b). Citizens may sue any person who violates an effluent standard to force them to comply with the Act. *Id.* § 1365(a)(1). Likewise, the citizen can sue an agency for failure to perform its duties under the Act. *Id.* § 1365(a)(2). The district courts have jurisdiction, regardless of the amount in controversy or the citizenship of the parties, to resolve CWA citizen suits. *Id.* § 1365(a). Here, Crystal Stream Preservationists, Incorporated ("CSP") properly complied with the CWA notice provisions before filing suit. *See* Decision and Order of the United States Court for the District of New Union ("Order") at 4-5. Further, Section 702 of the Administrative Procedures Act ("APA") allows a person to seek judicial review in the district courts if an agency action adversely affects them. 5 U.S.C. § 702.

The Circuit Court of Appeals for the Twelfth has jurisdiction to hear appeals from the District Court for the District of New Union. *See* 28 U.S.C. § 41. The Circuit Court may, under certain circumstances, permit interlocutory appeals of non-final orders. *Id.* § 1292(b). The district judge must state in the order that the case "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* All three parties to this case filed motions seeking leave to appeal the district court's Decision and Order on Highpeak Tubes, Incorporated's ("Highpeak") and the United States Environmental Protection Agency's ("EPA") motions to dismiss. Order at 2. This Court granted leave to appeal. *Id.*

STATEMENT OF THE ISSUES

I. Did the district court correctly hold that Crystal Stream Preservationists, Incorporated ("CSP") has standing to challenge Highpeak's discharge and the Water Transfer Rule ("WTR" or the "Rule")?

II. Did the district court properly determine that CSP timely filed the challenge to the WTR?

III. Did the district court incorrectly hold that the WTR is a valid regulation under the clear language of the CWA?

IV. Did the district court correctly determine that the company's discharge requires a National Pollutant Discharge Elimination System ("NPDES") permit?

STATEMENT OF THE CASE

On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("NOIS") to the company, the New Union Department of Environmental Quality, and the EPA. Order at 4. The NOIS alleged that Highpeak is violating the CWA because it discharges pollutants into waters of the United States without a required permit. *Id.* at 3. Further, the NOIS alleged that the EPA did not validly promulgate the WTR. *Id.* at 5. Alternatively, CSP alleged that the nature of Highpeak's discharge does not fall within the limited scope of the WTR exception. *Id.* CSP filed its Complaint in the district court after it received Highpeak's reply letter and waited the required sixty days. *Id.* Both Highpeak and the EPA filed motions to dismiss on multiple grounds. *Id.* Highpeak argued that CSP lacks standing, the challenge to the WTR is untimely, and the discharge does not require a NPDES permit. *Id.* The EPA joined Highpeak regarding standing, timeliness, and the validity of the WTR. *Id.* at 6. However, the EPA argued that Highpeak's discharge requires a NPDES permit. *Id.* The district court refrained from ruling on the motions pending the resolution of two cases before the Supreme Court: *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and *Corner Post, Inc. v. Bd. of Governors of Fed.l Rsrv. Sys.*, 144 S. Ct. 2440 (2024). Order at 6. After the Supreme Court issued its decisions

in those cases, the district court granted the motions in part and denied in part. *Id.* Namely, the district court granted the motion to dismiss the APA challenge to the WTR but denied the motions to dismiss CSP's citizen suit. *Id.* Each party filed motions for leave to file interlocutory appeals. *Id.* at 2. This Court granted leave to appeal. *Id.*

STATEMENT OF FACTS

CSP is a not-for-profit corporation that consists of individuals who seek to preserve the "Crystal Stream in its natural state for environmental and aesthetic reasons." *Id.* at 4. The organization was formed in December 2023. *Id.* Its mission is to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." Exhibit A ¶ 4. CSP aims to preserve and maintain the Crystal Stream for all future generations. *Id.*
CSP membership includes thirteen local residents and landowners who are concerned with the Crystal Stream's water quality. *See* Order at 4. Two of the members own land along the Stream and all live in Rexville, New Union. *Id.* Many of the members have lived in the area for over fifteen years. *Id.* The landowners moved to their respective homes prior to 2008. *Id.* Cynthia Jones, CSP's Secretary, lives in a home next to Crystal Stream Park that she moved to in 1997. Exhibit A ¶ 5. Another member, Jonathan Silver, moved to Rexville in 2019. Order at 4. Mr. Silver lives a half of a mile from Crystal Stream Park. Exhibit B ¶ 4.

The Crystal Stream Park is a public park that is located on the section of the Stream where Highpeak operates its tubing business. *Id.* The Crystal Stream Park features a two-mile walking trail that runs along the banks of the Stream. *Id.* Both Ms. Jones and Mr. Silver regularly recreate along the trail. Exhibit A ¶ 7; Exhibit B ¶ 5. Mr. Silver enjoys walking on the trail with his dogs and children. Exhibit B ¶ 5. However, the Crystal Stream sometimes appears cloudy despite its namesake clarity. Exhibit A ¶ 7; Exhibit B ¶ 6. Upon learning that the diminished

clarity is due to Highpeak's pollutant-filled discharges, Mr. Jones does not let his dogs drink from the Stream. Exhibit B ¶ 7. Similarly, Ms. Jones is reluctant to wade in the Stream despite her desire to do so. Exhibit A ¶ 12. Both CSP members state that Highpeak's discharge harms their ability to enjoy the Crystal Stream. Exhibit A ¶ 10; Exhibit B ¶ 7. If not for Highpeak's illegal discharges, CSP members would recreate on the Crystal Stream more often. Exhibit A ¶ 12; Exhibit B ¶ 9.

Highpeak is a recreational water tubing company located in Rexville, New Union. Order at 4. For the past 32 years, Highpeak has launched customers in rented inner tubes from its forty-two-acre property along the Crystal Stream. *Id.* The Highpeak property is located south of Cloudy Lake, a 274-acre lake in the Awandack mountain range. *Id.*

In 1992, Highpeak obtained permission from the State of New Union to construct a tunnel from Cloudy Lake to the Crystal Stream. *Id.* The singular purpose of the tunnel was to artificially enhance the flow of the Crystal Stream to increase tubing recreation. *Id.* The tunnel is four feet in diameter and over three hundred feet long. *Id.* Highpeak partially carved the tunnel through rock and constructed the rest using iron pipe. Order at 4. Tubing employees can regulate the flow of water from Cloudy Lake to the Crystal Stream by opening and closing valves located at the northern and southern ends of the tunnel. *Id.* However, under an agreement with the State of New Union, Highpeak cannot use the tunnel until the State determines that there is enough water in Cloudy Lake to supply the water discharge. *Id.* This generally occurs from the spring to late summer when seasonal rains increase water levels in the Lake. *Id.*

Cloudy Lake, as its name suggests, contains high levels of iron, manganese, and total suspended solids ("TSS"). *Id.* at 5. Conversely, the Crystal Stream, as its name demonstrates, is naturally clear because clean groundwater springs feed its waters. *Id.* Therefore, in its natural

state, the Crystal Stream is not burdened like the waters of Cloudy Lake. *Id.* Accordingly, every time that Highpeak opens the valves and discharges Cloudy Lake water into the Stream, it discharges significantly higher concentrations of toxic metals and TSS. *Id.* More, the water from Cloudy Lake accumulates even more pollutants as it travels through Highpeak's tunnel. *Id.* In just one hundred yards, the concentration of pollutants in the Cloudy Lake water increases three percent. *Id.* Despite Highpeak's man-made alteration of Crystal Stream waters, it has never sought a required NPDES individual permit. *Id.* at 4. Therefore, Highpeak is conveying pollutants into the Crystal Stream without requisite oversight from the EPA. *See id.*

SUMMARY OF THE ARGUMENT

CSP respectfully requests the Court affirm the district court's holding that CSP has standing to challenge Highpeak's discharge and the Water Transfers Rule, that CSP timely filed the challenge to the WTR, and that Highpeak's discharge was subject to permitting under the CWA, and reverse the district court's holding that the WTR was a valid regulation promulgated pursuant to the CWA.

The APA permits judicial review over agency action when a person has suffered legal wrong because of an agency action or is adversely affected by an agency action. 5 U.S.C. § 702. However, the APA limits this judicial review to only agency action that has no alternative remedy, or is considered "final agency action," unless a statute otherwise makes the agency's action reviewable. 5 U.S.C. § 704. An agency action is final for purposes of agency review when the action is no longer tentative or interlocutory and it is an action within which obligations have been determined that have legal consequences. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020).

The CWA authorizes citizen suits against individuals who are not complying with the CWA or against the Administrator who is not enforcing provisions of the CWA. 33 U.S.C. §

1365. This provision grants jurisdiction to the district courts over these citizen suits to enforce the CWA, to order the Administrator to perform their duties, and to apply appropriate civil or criminal penalties under 33 U.S.C. § 1319(b) and 33 U.S.C. § 1319(c). *Id.*

CSP brings this citizen suit against Highpeak for violation of the CWA and challenge to the WTR under 33 U.S.C. § 1251 *et seq*. CSP seeks to enforce the CWA against Highpeak and to protect the Crystal Stream. Order at 3.

First, CSP has standing because the APA has a presumption in favor of judicial review over agency action when a party has suffered a legal harm and because they meet both the Article III requirements and the APA requirements for judicial review. As an association, CSP has standing because (1) their members have recreational and aesthetic injuries due to Highpeak's pollution of the Stream that the CSP members live on or near and this harm is within the plain language of what the CWA intends to protect; (2) the interests at stake, the pollution of the Stream, are akin to CSP's mission to protect the Stream from contamination; and (3) CSP is seeking administrative review which does not require the individual participation of each of its members beyond submitting declarations.

Second, CSP timely filed this challenge within the six-year statute of limitations because the cause of action accrued in 2023. The six-year statute of limitations to sue under the APA starts when the right of action first accrues. According to *Corner Post*, the right of action first accrues when the plaintiff has been injured and when the plaintiff is capable of filing the challenge and obtaining relief. Since CSP could not have filed suit and obtained relief prior to its formation in 2023, like the entity in *Corner Post*, the cause of action first accrued in 2023 when CSP was injured. CSP timely filed the citizen suit and challenge one year later, within the six-year statute of limitations.

Third, the WTR is invalid because the EPA's interpretation of the CWA warrants no deference under *Loper Bright* and *Skidmore v. Swift and Company*, 323 U.S. 134 (1944). With the CWA, Congress intended the EPA to regulate all discharges and the EPA, therefore, lacks the authority except certain discharges from regulation. Further, past cases upholding the WTR are not subject to stare decisis because the WTR frustrates an important national policy goal.

Fourth, even if the WTR is valid, this Court must defer to the EPA's interpretation of its own regulation, as it is subject to *Auer* deference. The portion of the WTR at issue is genuinely ambiguous, and the EPA's interpretation is reasonable.

ARGUMENT

I. THE APPELLATE STANDARD OF REVIEW IS DE NOVO.

When a court considers issues on a section 1292(b) interlocutory appeal, it "employ[s] the usual appellate standard governing motions to dismiss." *Dyer v. Smith*, 56 F.4th 271, 276 (4th Cir. 2022) (quoting *Curtis v. Propel Prop. Tax Funding*, LLC, 915 F.3d 234, 242 (4th Cir. 2019)). For a motion to dismiss, the reviewing court must consider questions of law de novo. *Okoh v. Sullivan*, 441 F. App'x 813, 813 (2d Cir. 2011). The scope of review extends to any issues that are material to the order that the parties appealed. *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990) (citing *Ducre v. Exec. Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n. 16 (5th Cir. 1985)). The appellate court can review questions of law beyond those that the lower court found controlling. *Id.* Further, for a motion to dismiss, the court must accept all facts as true and view them in the light most favorable to the nonmoving party. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

II. CSP HAS STANDING BECAUSE THEIR MEMBERS HAVE A RECREATIONAL INJURY THAT IS FAIRLY TRACEABLE TO HIGHPEAK'S CONDUCT OF CONTAMINATING THE STREAM; CSP'S MISSION IS TO PROTECT THE STREAM; AND CSP IS SEEKING ADMINISTRATIVE REVIEW OF THE ACT WHICH DOES NOT REQUIRE THE INDIVIDUAL PARTICIPATION OF EACH MEMBER.

Article III of the Constitution limits judicial power and grants federal courts jurisdiction only over "Cases" and "Controversies" to maintain separation of the judicial branch and the legislative or executive branch. U.S. Const. art III § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992). For there to be a "Case" or "Controversy" for the court to adjudicate, the plaintiff must have standing, or a personal stake, in the suit or challenge. *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662 (2019); *Duke Power Co. v. Carolina Envt'l Study Grp.*, 438 U.S. 59, 72 (1978). Beyond the Article III elements for standing, the APA also requires that the plaintiff's interest fall within the range of interests that the Act is designed to protect or regulate, or the 'zone of interests.' *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987).

An environmental organization has standing to bring a lawsuit when: (A) the members would have their own standing to sue; (B) the interests at stake are germane to the organization's purpose; and (C) the members of the organization are not required to participate in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). CSP has standing as an organization because (A) Ms. Jones and Mr. Silver have suffered an injury in fact that is fairly traceable to Highpeak's conduct and the lack of regulation from the WTR; (B) the interests at stake, the pollution of the Stream, are germane to CSP's mission to protect the Stream from contamination, and (C) neither the claims nor the relief require the members of the CSP to participate in the lawsuit. *Id.*

A. CSP's members have a recreational injury in fact that is fairly traceable to Highpeak's contamination of the Stream and the WTR permitting the pollution.

A plaintiff has Article III standing if: (i) they have suffered an injury-in-fact; (ii) the defendant's conduct caused the injury; and (iii) it is likely to be remedied by a favorable decision. *Lujan*, 504 U.S. at 560; *Friends of the Earth*, 528 U.S. at 180; *Allen v. Wright*, 468 U.S. 737, 738 (1984); *Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 400 (2013). To challenge an Administrative Act, the plaintiff needs both Article III standing and and the interests they seek to protect must be within the 'zone of interests' that the Act is meant to regulate. *Clarke*, 479 U.S. at 396.

The district court concluded that there was sufficient evidence to prove CSP had standing. Order at 8. Specifically, the district court found that the injuries alleged by the members of CSP have been considered sufficient for environmental standing based on *Friends of the Earth*, 528 U.S. at 184. Order at 7.

i. CSP's members have suffered an injury in fact because the pollution deters the members from their recreational activities on the Stream.

A plaintiff has standing when they have suffered an injury in fact of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 561. A legally protected interest is concrete and particularized and actual or imminent, not conjectural or hypothetical, when the injury actually exists, and the challenged activity currently and directly impacts the plaintiff's personal recreational, aesthetic, and economic interests. *Lujan*, 504 U.S. at 555; *Friends of the Earth*, 528 U.S. at 704; *Victims Rts. L. Ctr. v. Cardona*, 552 F. Supp. 3d 104, 123 (D. Mass. 2021).

In *Lujan*, the plaintiffs argued that they were harmed by an international aid program because it might result in the extinction of endangered animals abroad. 504 U.S. at 558.

Specifically, the plaintiffs stated that they aspire to travel abroad to visit endangered animals in the future, but do not currently have plans to do so. *Id.* at 563. They allege that the injury in fact is the potential extinction of the animals, since this will prevent future visits. *Id.* The Supreme Court concluded that the plaintiffs in Lujan do not prove injury in fact because, "[s]uch 'some day' intentions - without any description of concrete plans, or indeed even any specifications of when some day will be - do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564. Because these injuries do not directly and currently impact the plaintiffs in Lujan, and the "'some day' intentions" to visit are not imminent, the court concluded that the plaintiffs did not prove injury in fact. *Id.*

In *Friends of the Earth*, the plaintiffs sued Laidlaw Environmental Services for discharging excessive pollutants into the nearby river. 528 U.S. at 176. Kenneth Lee Curtis, a member of Friends of the Earth, lives half a mile from Laidlaw's facility. *Id.* at 181. Mr. Curtis would like to fish, camp, and picnic near the river, but cannot engage in these recreational activities because it looks and smells polluted. *Id.* Angela Patterson, another member of an environmental organization represented by Friends of the Earth, lives two miles from Laidlaw's facility. *Id.* at 182. She used to picnic, bird watch, and wade in and along the river but no longer engages in these activities near or in the river because she is concerned about the harmful effects from discharged pollutants. *Id.* The court determined that Friends of the Earth proved injury in fact because, "environmental plaintiffs adequately allege injury in fact when they use the affected area and are persons 'for whom the aesthetic and recreational value of the area will be lessened' by the challenged activity." *Id.* Mr. Curtis' and Ms. Patterson's pollution concerns and recreational discouragement currently and directly impact their interests and therefore, Friends of the Earth has an injury in fact. *Id.*

CSP has an injury in fact to challenge the WTR and file the civil suit because Highpeak's pollution of the water currently and directly impacts their member's recreational and aesthetic enjoyment of the Stream. Ms. Jones, a member of CSP, lives on the Stream. Exhibit A ¶ 5. Ms. Jones frequently walks along the river to enjoy its crystal-clear beauty, and would like to wade in the river, but recently the suspended solids and metals that Highpeak is contaminating the Stream with have been impacting the enjoyment of where she lives, walks, and spends her time, and has been discouraging her recreational use of the Stream. Exhibit A ¶ ¶ 7-9. Mr. Silver, another member of CSP, habitually walks his dog along the Stream. Exhibit B ¶ 5. Mr. Silver would like to recreate more frequently on the Stream and allow his dog to drink from the Stream, but due to the cloudy, polluted look that Highpeak's contamination has resulted in, Mr. Silver's recreational and aesthetic enjoyment has been diminished and deterred out of fear for his dog's health. Exhibit B ¶ ¶ 5, 7. CSP's concerns, unlike in *Lujan*, are not "some day intentions" to travel abroad to see endangered animals that may or may not appear. Instead, like the plaintiffs in *Friends of the Earth*, the members of CSPs' enjoyment of their home and recreational habits has been discouraged because of Highpeak's contamination of the previously clean, beautiful Stream that CSP members live on or near. Like in *Friends of the Earth*, CSP's discouragement of recreational use of the Stream, and the reduction of aesthetic value to the Stream that the members live on or near, directly, currently, and frequently impacts CSP's members and therefore, CSP has an injury in fact.

ii. The recreational injury is fairly traceable to Highpeak's discharge of Cloudy Lake's contaminants into the Stream and the WTR permitting the contamination.

To prove that the defendant's conduct caused the injury, the plaintiff needs to demonstrate that the injury is fairly traceable to the defendant's action. *See Clapper,* 568 U.S. at

400; *Allen*, 468 U.S. at 738; *Duke Power Co.*, 438 U.S. at 72. An injury is fairly traceable to the defendant's action when it is not too attenuated or caused by a third party. *See Allen*, 468 U.S. at 738; *Duke Power Co.*, 438 U.S. at 72.

In *Allen*, parents of black children, who are currently attending desegregating public schools, allege that the IRS granting tax breaks to segregated private schools is harming their children's ability to attend a desegregated school. 468 U.S. at 752. The court reasoned that the injury is highly indirect because it is undetermined how many discriminatory private schools are receiving these tax exemptions and it is up to a third party, the school, to change their discriminatory policies. *Id.* at 758. The parents have not proven that if the IRS stopped granting tax exemptions, the schools would stop their racially discriminatory policies. *Id.* Therefore, the court concluded that the injury is not fairly traceable to the IRS tax exemptions and instead is highly indirect and attenuated because it occurs due to the actions of a third party not party to this suit. *Id.* at 757.

In *Duke Power Co.*, the plaintiffs challenge an act limiting the liability of nuclear power plants. 438 U.S. at 67. The alleged injuries are due to the proximity of the new nuclear plants being built near their homes. *Id.* at 73. Specifically, the plaintiffs allege that the nuclear plants will cause an increase in radiation in the air and water which could result in a reduction of property values, inability to use the river water, and fear of the risks of increased radiation exposure and the potential threat of an accident. *Id.* The court found that this injury is fairly traceable to the Act because there is a substantial likelihood that the construction and operation of the nuclear plants would not proceed if not for the protection from the Act. *Id.* at 74, 75.

The recreational and aesthetic injury is fairly traceable to Highpeak's discharging of the water into the Stream and is not too attenuated or due to a third party because if Highpeak was

not discharging water into the Stream, there would be no contamination, suspended solids or materials, or pollution to the Stream that is causing Mr. Silver's, Ms. Jones', and the rest of the CSP member's injuries. This case is distinguishable from *Allen* because the injury is not indirect, or highly attenuated, from the conduct of the defendant since the injury is directly traceable to the discharge of Cloudy Lake into the Stream that Highpeak regularly conducts in their business operations and there is no third party involved that is at fault.

Further, the injury is fairly traceable to the WTR exception because without the exception permitting Highpeak to discharge the polluted water into the Stream without a permit, no one would be polluting the Stream. The EPA has the power to enforce the CWA without exceptions, and prevent companies like Highpeak from taking advantage of the exceptions. Like in *Duke Power Co.*, there is a substantial likelihood that if the EPA used its power to regulate and prevent the pollution of water, Highpeak would stop their discharge of Cloudy Lake into the Stream and effectively stop the pollution.

iii. A favorable decision will redress CSP's injury because the challenge to the WTR and the civil suit will deter Highpeak from future pollution.

For the injury to be redressable, a favorable decision must be likely, as opposed to merely speculative, to remedy the harm. *Lujan*, 504 U.S. at 561. "Redressability ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction." *Lujan*, 504 U.S. at 562. For a continual injury or threat of future injury, a remedy that deters future harm and prevents its recurrence provides a form of redress that satisfies this element of standing. *Friends of the Earth*, 528 U.S. at 185, 186. "All civil penalties have a deterrent effect." *Friends of the Earth*, 528 U.S. at 185 (citing *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

In *Lujan*, the plaintiffs challenged the Secretary's interpretation of the international aid program because of the potential extinction of endangered animals that the interpretation may

cause. 504 U.S. at 559. Since the plaintiffs are suing the Secretary, not the agencies providing the funding, the district court could only accord relief against the Secretary. *Id.* at The court determined that this would not remedy the plaintiff's alleged injury because the funding agencies are not bound by the Secretary, and the court's order would not be binding on the agencies. *Id.* at 571. Because a favorable decision would not be binding on the third party, the agencies, that caused the harm, the plaintiffs in *Lujan* did not prove that a favorable decision is likely to remedy the harm. *Id.*

In *Friends of the Earth*, the plaintiffs initiated a civil suit seeking penalties against Laidlaw Environmental for polluting the river. 528 U.S. at 176. The court concluded that the civil suit was sufficient for redressability because, "[t]o the extent that they encourage defendants to discontinue from current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." *Id.* at 707.

A favorable decision to CSP's civil suit against Highpeak will likely remedy the harm because the civil penalties against Highpeak will deter future contamination and recurrence. A favorable decision would remedy the harm that Highpeak caused because Highpeak is bound by the decision of this court, unlike the agencies in *Lujan*. Like in *Friends of the Earth*, CSP initiated this lawsuit seeking civil penalties against Highpeak for polluting the Stream. Because, "civil penalties have a deterrent effect," a favorable decision in this suit will likely encourage Highpeak to discontinue the contamination and pollution to the Stream and deter future destruction of the crystal clear Stream. Since the court's order will be binding on Highpeak, and civil suits are known to have a deterrent effect, a favorable decision in this case is likely to redress the harm.

Further, a favorable decision to CSP's challenge to the WTR is likely to remedy the harm because removing the exception allowing Highpeak to discharge the toxic water from Cloudy Lake into the Stream without a permit will require Highpeak to stop the contamination. Since redressability hinges on the response of the regulated third party to the government action, CSP's harm is redressable since Highpeak would respond to the EPA prohibiting the discharge of polluted water into the Stream. This case is distinguishable from *Lujan*, because the EPA actually has the power to regulate and prevent the pollution of water and effectively eliminate Highpeak's polluting habits and prevent future businesses from destroying the beauty and cleanliness of the Stream.

iv. CSP's mission statement is an interest the CWA is designed to protect.

To have standing, the APA requires that the plaintiff have both Article III standing and that the plaintiff's injury falls within the 'zone of interests' that the Act is designed to protect. *Clarke*, 479 U.S. at 396. "The essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Clarke*, 479 U.S. at 396 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984)). The zone of interests test does not grant judicial review to a plaintiff whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit" and "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 396. In *Clarke*, a U.S. employee approved a national bank's application to establish a discount-brokerage affiliate. *Id.* at 391. The plaintiff sued, arguing that approval violated the McFadden Act. *Id.* at 392. The McFadden Act states that a national bank's business can only be within the headquarters and branches and that the branches must be in the

bank's home state. *Id.* at 391. The court concluded that the plaintiff's interest in preventing affiliates from opening is plausibly related to the policies underlying the McFadden Act and is related to Congress' desire to prevent national banks from gaining a monopoly through unlimited branching. *Id.* at 416, 417.

CSP's interests, to protect the Stream from contamination, are within the 'zone of interests' that the CWA is designed to protect. The CWA intends to restore and maintain the Nation's waters. 33 U.S.C. § 1251. Like in *Clarke*, CSP's interests are plausibly related to the policies underlying the CWA and Congress' intent to restore and maintain the Nation's waters. CSP's interests are not only not "so marginally related to or inconsistent with the purposes implicit in the statute," instead, CSP's interests in protecting the Stream are exactly what the CWA's purpose is: to protect the waters of the United States. Based on the plain language of the CWA, CSP's injury falls within the 'zone of interests' that the Act is designed to protect.

B. The pollution of the Stream is germane to CSP's mission of protecting the Stream.

For an association to have standing, the interests at stake must be germane to the organization's purpose. *Friends of the Earth*, 528 U.S. at 181. "[T]he organization must demonstrate an impairment to its mission caused by the Final Rule." *Victims Rts. L. Ctr.*, 552 F. Supp. 3d at 125. "Numerous jurisdictions have emphasized 'that germaneness requirement is undemanding.'" *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 217 (2020). In *Victims Rts. L. Ctr.*, the advocacy organization's focus is on assisting victims through the regulations process. 552 F. Supp. 3d at 125. The advocacy organization demonstrated that because of the challenged rule, there has been a reduction of requests for its services. *Id.* at 126. The court concluded that the interests at stake, the advocacy of victims, were

pertinent to the advocacy organization's purpose of assisting victims since the new rule directly frustrates their purpose. *Id.*

Highpeak's pollution of the Stream frustrates CSP's mission of protecting the Stream from contamination and preserving and maintaining the Stream for future generations. CSP's mission statement 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." Order at 6. Like in *Victims Rts. L. Ctr.*, CSP has demonstrated the pollution of the Stream and the environmental organization's purpose has been directly frustrated by Highpeak's pollution of the Stream.

C. The presence of each CSP member is not required to maintain the lawsuit.

The organization cannot have standing if the individual members are required to participate to maintain the lawsuit. *Friends of the Earth*, 528 U.S. at 181. "[E]vidence supporting recovery for the plaintiff 'might be supplied by the evidentiary submissions of some of the members,' but the presence of each individual member as a party would not be required, and thus there was no bar to associational standing." *Winnebago Cnty. Citizens for Controlled Growth v. Cnty. of Winnebago*, 383 Ill. App. 3d 735, 742 (2008). In *Pres. Soc'y of Charleston*, the court concluded that, although individual members submitted affidavits in support of judicial review, the claim asserted nor the relief requested required the participation of the individual members because the plaintiffs did not seek monetary damages on behalf of their members for specific instances of environmental harm, rather, the plaintiffs seek administrative review. 430 S. Ct. at 217. The court determined that administrative review does not require participation from the individuals. *Id.*

CSP claims that Highpeak is polluting the water and CSP requests the EPA to enforce the CWA against Highpeak and civil penalties against Highpeak for relief. Like in *Pres. Soc'y of Charleston*, the individual members of CSP submitted declarations as evidence to the injury. However, participation of each individual member is not required, and CSP does not seek monetary damages for specific instances of environmental harm but instead is seeking judicial review over an administrative act. Therefore, neither the claim asserted nor the relief requested require the participation of CSP's individual members.

III. CSP TIMELY FILED THE CHALLENGE TO THE WTR BECAUSE THE ORGANIZATION RIGHT OF FIRST ACTION ACCRUED IN 2023, WHEN THE ORGANIZATION WAS FORMED.

Under APA section 702, a person is entitled to judicial review when they have been injured in fact by an agency action. 5 U.S.C. § 702. The APA has a presumption in favor of judicial review over any agency action that has caused harm when there is not a statute that states otherwise. *Corner Post*, 144 S. Ct. at 2449. APA section 704 limits agency actions subject to review those that are considered "final agency action," unless a statute otherwise makes the agency's action reviewable. 5 U.S.C. § 704.

The six-year statute of limitations starts after the right of action first accrues. 28 U.S.C. § 2401(a). A right of action first accrues when the plaintiff has a complete and present cause of action. *Corner Post*, 144 S. Ct. at 2448; *Wallace v. Kato*, 549 U.S. 384 (2007). The plaintiff has a complete and present cause of action when they are capable of filing the challenge and obtaining relief. *Corner Post*, 144 S. Ct. at 2448; *Wallace*, 549 U.S. at 384; *Green v. Brennan*, 578 U.S. 547, 554 (2016). The Court has "rejected the possibility that a limitations period commences at a time when the plaintiff could not yet file suit as inconsistent with basic

limitations principles." *Corner Post*, 144 S. Ct. at 2443 (quoting *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 200 (1997)).

A. CSP's right of first action accrued when CSP was formed because prior to this, CSP was not capable of filing suit and obtaining relief.

The right of action first accrues when the plaintiff has a complete and present cause of action. *Corner Post*, 144 S. Ct. at 2448; *Wallace*, 549 U.S. at 388. Since § 702 requires an injury in fact before filing a suit, the plaintiff cannot have a complete and present cause of action until they have been injured by the agency action. 5 U.S.C. § 702; *Corner Post*, 144 S. Ct. at 2460. In *Corner Post*, the business challenged a regulation enacted by the Federal Reserve Board involving interchange fees on credit card purchases that was established in 2011. *Corner Post*, 144 S. Ct. at 2448. Because of the interchange fees, Corner Post spent hundreds of thousands of dollars and had to raise their prices. *Id.* Due to this injury, Corner Post challenged the regulation in 2021. *Id.* The lower court determined that the six-year statute of limitations had run its course in 2017, before Corner Post opened. *Id.* at 2449. The court disagreed with the lower court's determination and concluded that Corner Post was within the statute of limitations. *Id.* at 2450. Since Corner Post did not have a complete and present cause of action until they suffered the injury by the regulation, which could not have happened until they opened, the statute of limitations started when Corner Post opened and was injured by the regulation. *Id.* at 2453. Corner Post timely filed the challenge because the cause of action accrued when it was injured in 2018 and they filed the challenge in 2021, less than six years later. *Id.* at 2453.

CSP timely filed their challenge to the WTR because their cause of action accrued when they were formed in 2023, less than six years before they filed suit in 2024. CSP is challenging the WTR for the discharge exception that permits Highpeak to discharge the polluted lake water into the stream because it harms the organization's determination to, "protect the Stream from

contamination resulting from industrial uses and illegal transfers of polluted waters," and because the WTR allows Highpeak to pollute the Stream that CSP's members live on. First, like in *Corner Post,* CSP could not have been injured before the entity was formed in 2023. Therefore, prior to the harm to CSP's purpose, the cause of action was not complete and present and CSP was not capable of filing the challenge and obtaining relief. Since the Court has "rejected the possibility that a limitations period commences at a time when the plaintiff could not yet file suit," the statute of limitations began running for CSP in 2023, when they were formed and had a complete and present cause of action that was capable of filing suit and obtaining relief. Second, as described above, CSP did not have standing to bring the suit until 2023 when they came into existence.

B. Under the APA's statute of limitations, a non-profit should be treated similarly to for-profits because it would otherwise adversely impact a non-profit's ability to challenge for judicial review over an agency's act.

The district court found that the formation of an environmental group is analogous to the entity in *Corner Post,* and therefore the first right of action accrued after formation, because there is no precedent or reason to understand and treat a non-profit entity so differently from a for-profit entity. Order at 4. Further, the district court stated that any founding member of the for-profit entity could have had a cause of action or injury due to this regulation prior to the formation of the business, but the fact that the business entity challenged the regulation on behalf of its members did not change the outcome. Order at 8. Finally, the court stated that, "[a]ny doubts the Court has are resolved by the fact that Mr. Silver could not have been injured until he moved to the area." Order at 8. Since Mr. Silver was injured in 2019, his cause of action accrues within the statute of limitations to file suit. Order at 8. The court concluded that CSP timely filed the challenge because the non-profit could not have filed suit and obtained relief prior to their

formation, so the statute of limitations started in 2023, one year prior to challenging the suit. Order at 7.

The APA has a presumption in favor of judicial review over any agency action that has harmed a party. *Corner Post*, 144 S. Ct. at 2449. The court has frequently regarded nonprofits and for profits similarly, such as in cases involving First Amendment rights, the business judgment rule, the piercing of the corporate veil, or the applicability of federal laws regulating commerce and competition. *See generally Michel v. Bare*, 230 F. Supp. 2d 1147 (D. Nev. 2002); *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003); *Medlock v. Medlock*, 263 Neb. 666 (2002); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997). Under the APA statute of limitations, non-profit organizations should be treated the same as for-profit organizations. If non-profit entities were regarded differently than for-profit entities under 28 U.S.C. § 2401(a), it would be significantly harder for a non-profit to file a challenge to an agency action that caused the harm or is causing them harm. For example, first, for any non-profit or for-profit organization filing a challenge, none of the plaintiffs are named in the lawsuit. Therefore, the statute of limitations should not apply to them, only to the actual entity that is named in the lawsuit. Second, distinguishing a non-profit in this way would mean that the entire entity would not be capable of filing suit for an injury if even one member had been injured by the act or regulation outside of the statute of limitations. Large non-profits, with many members, would almost never be able to file suit within the statute of limitations because of the likelihood that one of their members was injured outside of the statute of limitations. This understanding would impose an additional obligation on non-profit organizations, to ensure that none of their members had been injured outside of the statute of limitations, that for-profits do not have to do. Finally, in *Corner Post*, the court did not take into consideration whether any of the individual

members of the entity had been injured by this regulation prior to the formation of the entity, so that should not be a consideration here. To understand the statute of limitations as applying to each individual member of a non-profit entity, and not to each individual member of a for-profit entity, would add additional burden to non-profit organizations and would not further the APA's goal of judicial review over harmful agency action. Therefore, non-profits and for-profit entities should not be differentiated and CSP should be treated the same as the entity in *Corner Post*, where the court concluded that the cause of action could not have accrued before the association was formed.

IV. THE WTR IS INVALID BECAUSE THE EPA IMPROPERLY DETERMINED THAT WATER TRANSFERS ARE OUTSIDE THE SCOPE OF THE CWA.

A. The EPA's interpretation of the CWA warrants no deference under *Loper Bright.*

Congress enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Loper Bright*, 144 S. Ct. at 2261 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)). Therefore, the APA commands a court to set aside agency action that "is not in accordance with law" or "in excess of statutory authority." 5 U.S.C. § 702(2)(a), (c). When a court reviews such agency action, it "must exercise [ ] independent judgment in deciding whether an agency has acted within its statutory authority" and must "set aside any such action inconsistent with the law as [the court] interprets it." *Loper Bright*, 144 S. Ct. at 2261. Courts no longer defer to reasonable agency interpretations of ambiguous statutes. *Id.* at 2261-63 (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Now, courts decide for themselves "whether the law means what the agency says." *Id.* at 2261 (quoting *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 109 (2015)).

When deciding what the law means, all courts begin with the text of the statute. *Ross v. Blake*, 578 U.S. 632, 638 (2016). Statutes "no matter how impenetrable, do—in fact, must—have a single, best meaning." *Loper Bright*, 144 S. Ct. at 2266. It is a fundamental canon of statutory construction that the words "should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (quoting *Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 283 (2018)). More, the court must examine the overall language and design of a statute to determine the clearly expressed intent of Congress. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The court's interpretation of a statute "must give effect to" the intent of Congress. *Id.* Likewise, an agency interpretation must also "give effect" to the intent of Congress. *Id.* Accordingly, an agency interpretation of a statute cannot alter the intent of Congress at the time of enactment. *See id.*

The relevant portion of the CWA prohibits any discharge of any pollutant to waters of the United States unless the discharge complies with the Act. *See* 33 U.S.C. § 1131. Namely, companies must obtain a NPDES permit for any discharge. *See id.* A discharge is "any addition of any pollutant" to waters of the United States "from any point source." *Id.* § 1362(12). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure. . . from which pollutants are or may be discharged." *Id.* § 1362(14).

In *Dubois v. U.S. Dept. of Agriculture*, the First Circuit held that water transfers from a ski area's snowmaking holding pond to a protected river resulted in an "addition" of pollutants under the Act. 102 F.3d 1273, 1298 (1st Cir. 1996). Accordingly, the court held that the ski area operator needed to obtain a NPDES permit to continue its water transfer. *See id.* The court noted that no provision of the CWA exempts de minimis additions from the NPDES permitting

program. *Id.* Rather, the Act requires that the EPA regulate any discharge, no matter how insignificant the discharge may be. *See id.* Further, the court held that exempting water transfers from the NPDES permitting system would defeat the purpose of the Act. *Id.* (holding that the operator would need a permit even if the two bodies had similar water qualities). *Id.* Therefore, it is inconsistent with the CWA to exclude water transfers between two distinct bodies of water from the NPDES permitting program. *Id.*; *see also Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) ("*Catskill I"*); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) ("*Catskill II"*); *Miccosukee Tribe of Indians* v. *S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002).

Here, the law does not mean what the EPA says. First, the district court did not use its independent judgment to determine whether the EPA can exempt entire categories of discharges from the express requirements of the Act. Rather, it deferred to the EPA's recent interpretation of the CWA based on an incorrect application of *Loper Bright*. As discussed below, recent precedent and the EPA's interpretation deserve no judicial deference. Accordingly, the lower court erred when it did not decide for itself what the law means.

Second, the best reading of the Act demonstrates Congress's intent to regulate all discharges. The plain language of the statute mandates that the EPA regulate any addition of any pollutant from any point source. The Act does not base its requirements on the type of discharge. It requires that the EPA address all discharges. No matter how small.

This is the conclusion that multiple circuit courts came to before the EPA abused *Chevron* deference to circumvent the CWA with the WTR. Those courts exercised their independent judgment and held that the EPA could not exempt water transfers from the NPDES

permitting program. Accordingly, the best, single meaning of the CWA is that Congress intended the Act to cover water transfers.

Third, the overall design of the CWA supports the plain language of the Act. As the *Dubois* court properly noted, the CWA does not provide for any exemptions to the NPDES permitting system, even for de minimis discharges. Therefore, the EPA cannot interpret the Act to provide exemptions for the discharge of any pollutants between distinct bodies of water. The *Dubois* court noted that the overall design of CWA requires the EPA to regulate water transfers even if the bodies are of like quality. Accordingly, at the time of enactment, Congress intended the EPA to regulate water quality without exception. Thus, the EPA's interpretation of the CWA aims to alter Congress's intent.

Finally, the nature of Highpeak's transfer demonstrates how the WTR frustrates the CWA. Highpeak is transferring water between two vastly different bodies of water. It moves large quantities of heavily polluted water into a clean stream simply to support recreational tubing. It does not operate the water transfer to increase drinking water supply or some other public benefit. More, the transfer tunnel itself adds copious amounts of heavy metals and suspended solids to the Cloudy Lake water in just a football field. Despite this addition of pollutants from a point source, Highpeak's tunnel is free from regulation simply because it is a water transfer. The EPA argues that the WTR fits within the purpose of the CWA and protects the waters of the United States. However, the pollution spewing, unchecked and untouched by federal water law, from Highpeak's tunnel proves that the WTR is antithetical to the CWA.

B. The EPA's interpretation lacks the "power to persuade" under *Skidmore*.

In *Loper Bright*, the Supreme Court acknowledged that courts could look to an agency for some guidance on questions of law. *Loper Bright*, 144 S. Ct. at 2259. However, an agency's

guidance depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. An agency interpretation only has persuasive power when the modern interpretation is consistent with the agency's interpretation immediately after Congress enacted the statute. *See Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). Such an interpretation represents the "contemporaneous construction of a statute by the [people] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). Therefore, the agency must show that its current interpretation is consistent with that of the administrators who oversaw a statute's nascent years. *See id.* Only then will a court consider granting the agency limited deference. *See id.* Further, an agency interpretation, no matter how long held, cannot supersede a court's statutory interpretation. *See Loper Bright*, 144 S. Ct. at 2261.

The district court improperly applied the *Skidmore* standard when it dismissed the argument in a footnote. The district court analyzed the EPA's promulgation of the WTR under the *Skidmore* factors and held that the EPA had been consistent and thorough in its reasoning. *See* Order at 10, n. 2. Namely, the lower court stated that the EPA had been consistent in its defense of the WTR since the agency promulgated the rule in 2008. *Id.* However, the EPA's defense of the WTR is wholly inconsistent with administrators' initial understanding of the CWA.

As discussed above, multiple circuit courts properly determined that water transfers, like the one at issue in the present case, were not exempt from the NPDES permitting system. As the lower court acknowledged, those preceding courts determined that a water transfer between

distinct waters of the United States was a discharge of pollutants under the Act. As was true then, and is true now, the court's determination that Congress intended the CWA to cover water transfers supersedes any determination that the EPA made. More, for the first thirty years of the CWA, the EPA did not expressly exempt water transfers from the CWA. Therefore, the EPA's interpretation, in 2008, is not a contemporaneous interpretation of a statute by the people whom Congress tasked with starting the NPDES program. Accordingly, the EPA's subsequent defense of a flawed regulation is not the consistency that *Skidmore* deference requires.

C. Decisions upholding the WTR under *Chevron* are not subject to stare decisis.

When it overturned *Chevron*, the Supreme Court acknowledged that stare decisis is not an "inexorable command" that courts must blindly adhere to. *Loper Bright*, 144 S. Ct. at 2270 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Rather, a court must weigh factors and overturn past cases when justice favors letting go of precedent, even long-held precedent. *See id.* (citing *Knick v. Twp. of Scott*, 588 U.S. 180, 203 (2019)). However, the Supreme Court did not go as far as to overturn all cases that relied on the *Chevron* test. *Id.* at 2273. The Court noted that the mere reliance on *Chevron* is not a special justification for overruling past cases that deferred to agency interpretations. *Id.* However, agency interpretations that courts upheld under *Chevron* are not subject to stare decisis when there is an independent, special justification to do so. *See id.*

A rule that frustrates an important national policy goal is exactly the type of decision that is not subject to stare decisis. *Boys Mkts, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 241 (1970). Further, a special justification is when adherence to stare decisis "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). Despite the important

policy considerations underlying stare decisis, a court is not barred from revisiting a case when there is good reason to do so. *See id.*

The district court improperly read *Loper Bright* to apply only to regulations that courts had not previously upheld using the *Chevron* deference test. *See* Order at 10. The Supreme Court simply acknowledged that mere reliance on *Chevron* deference was not sufficient ground alone to overturn prior decisions. Nothing in that statement suggests that a court cannot address regulations that were previously challenged and upheld under *Chevron* when there is an independent reason to do so.

Here, there is an independent reason to revisit the WTR. As *Dubois* and the *Catskill* cases show, exempting water transfers from the NPDES permitting program frustrates the national policy of the CWA. Further, overturning the WTR does not abandon long-held precedent but rather reverts back to a prior interpretation that better embraces the scope of the CWA.

Therefore, the district court erred when it dismissed CSP's challenge to the WTR under *Loper Bright* and stare decisis.

IV. THE DISTRICT COURT DID NOT ERR IN ITS DETERMINATION THAT HIGHPEAK'S DISCHARGE REQUIRES AN NPDES PERMIT.

A. If the WTR is valid, the Court must defer to the EPA's interpretation of the WTR.

The District Court did not err in its determination that Highpeak's discharge is outside of the scope of the WTR and that Highpeak must seek a NPDES permit from the EPA. Order at 12. The WTR exempts those that operate water transfers from obtaining NPDES permits, "provided the transferred water is not subjected to intervening industrial, municipal, or commercial use." 73 Fed Reg. 33,697, 33,697 (June 13, 2008). However, this exemption does not apply when the water transfer itself introduces pollutants. *Id.* at 33,700. Therefore, when a company's water

transfer introduces pollutants during the water transfer, they must comply with the permitting requirements of the CWA. 40 C.F.R. § 122.3(i). The Rule also states that,

> [w]ater transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required.

73 Fed Reg. 33,697, 33,705 (June 13, 2008).

The *Auer* deference test states that courts should defer to an agency's interpretation of its own ambiguous regulation. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). First, *Chevron* and its progeny deal with agency interpretations of ambiguous language in congressional statutes, not regulations. *See,* e.g., *Loper Bright*, 144 S. Ct. at 2254-55. Because the WTR is an EPA regulation, the Court does not need to exercise the same independent judgment that *Loper Bright* requires for statute. *See id.* at 2257; *Kisor*, 588 U.S at 589. Second, Loper Bright did not overrule *Seminole Rock, Auer* deference, or *Kisor*. *See generally Loper Bright*, 143 S. Ct. 2244. Therefore, courts may still defer to agency interpretations of their own regulations. *See id.* Further, the current Supreme Court merely limited *Auer* deference in *Kisor*. *Id.* Instead, the Court laid out the conditions that determine when a reviewing court should defer to an agency's interpretation of its own regulations. *Id*. at 573-79. Those conditions are: (1) the regulation must be genuinely ambiguous; (2) The agency's interpretation must be reasonable; (3) the interpretation must be the agency's authoritative or official position; (4) the interpretation must implicate the agency's substantive expertise; and (5) the interpretation must reflect the agency's "fair and considered judgment." *Id.*

While we do not believe the WTR is valid, if this court determines otherwise, the court must defer to the EPA's interpretation of its own regulation under *Auer* deference. Further, the

district court correctly determined that *Loper Bright* does not inhibit a court's ability to defer to an agency's interpretation of its own regulation.

i. The WTR is genuinely ambiguous based on the language of the WTR.

Before concluding that a regulation is genuinely ambiguous, a court must exhaust all traditional tools of construction, including analysis of the regulation's text, structure, history, and purpose. *Kisor*, 588 U.S. at 575. If a regulation is susceptible to more than one reasonable interpretation, then the regulation is ambiguous. *See e.g., Smith v. Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006). Likewise, silence can also be an indicator of ambiguity if that silence makes the regulation susceptible to more than one reasonable interpretation. *Id.* at 574-75; *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("[i]f, however, the statute 'is silent or ambiguous with respect to the specific issue, "we must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act.") The statutory language of the CWA does not explicitly address whether NPDES permits are required for water transfers. *See* 33 U.S.C. §1131. In addition, the legislative history of the CWA does not provide clear interpretive guidance on this issue. *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA ("Catskill III")*, 846 F.3d 492, 515 (2d. Cir. 2017). Therefore, the EPA promulgated a rule to address water transfers. *See generally* 73 Fed Reg. 33,697. However, the WTR does not exempt water transfer from the NPDES permitting program when the transfer "introduce[s] pollutants to water passing through the structure into the receiving water." *Id.* at 33,705.

The language of the WTR leads to differing interpretations. Namely, the initial statement of the rule indicates that water transfers should not "introduce pollutants" to the water passing through a transfer structure. This suggests that the transfer method only complies with the regulation if it remains pollutant-free. However, the regulation is silent as to whether an

"introduction" must be man-made. This creates the issue here, where Highpeak can somewhat reasonably argue that introduction does not apply to natural causes, like erosion. Therefore, the regulation is genuinely ambiguous.

ii. The EPA's interpretation of the WTR is reasonable.

As discussed above, "[w]ater transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred." 73 Fed Reg. 33,697, 33,705 (June 13, 2008). "However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." *Id.* In *NA KIA'I KAI v. Nakatani,* the owner and operator of a drainage ditch system that was releasing millions of gallons of contaminated water into the Pacific Ocean. 401 F. Supp. 3d 1097, 1100 (D. Haw. 2019). This massive drainage system included forty miles of unlined ditches. *Id.* Notably, the ditch company had been operating without an NPDES permit because the company incorrectly determined that its ditch was exempt from the NPDES program under the WTR. *Id.* However, the court correctly concluded that the WTR would not exempt the drainage system from needing an NPDES permit because "pollutants are added to the water as it flows through the unlined ditches." *Id.* at 1110.

Here, Highpeak's tunnel regularly discharges and continues to discharge pollutants into the Crystal Stream. Highpeak's decision to forgo the construction of a pipe throughout the entirety of the tunnel has drastic results. The unlined tunnel leads to significant pollutant influx during the transfer process, causing an increase of two to three percent in the concentrations of all three contaminants of concern. Considering Highpeak's tunnel is only one hundred yards, a two to three percent increase is significant. Accordingly, under the ordinary meaning of the

WTR, Highpeak's transfer is introducing pollutants to water passing through the tunnel. Therefore, it is completely reasonable for the EPA to require a permit in this case.

Highpeak's argument focuses heavily on the second factor, that a point source must add pollutants to a water body. Highpeak contends "the only reasonable interpretation of the rule is that the 'introduction' of pollutants must result from human activity and not natural processes like erosion" Order at 11. Highpeak also argues that "any contrary interpretation of the WTR would eviscerate the entire rule, as water will always pick up some trace pollutants during transfer." *Id.* However, in *NA KIA'I KAI*, the court held that the unlined ditches contributed pollution to the water. Much of that pollution likely came from erosion of the unlined ditches. Further, Highpeak's discharge does not constitute a natural addition of pollutants. Rather, the pollutants were "introduced" due to human activity, namely Highpeak's poor construction and maintenance of the tunnel, during its water transfer activity. This brings Highpeak's discharge outside the scope of the WTR. Lastly, even if Highpeak argues that the tunnel wasn't poorly constructed, the tunnel is still increasing the concentration of pollutants, and they would still need a permit to operate the tunnel per EPA's reasonable interpretation discussed above.

iii. The EPA's interpretation of the WTR is their official position, implicates their substantive expertise; and reflects their fair and considered judgment.

The EPA's interpretation of the WTR satisfies the remaining *Kisor* conditions. The interpretation must be the agency's authoritative or official position, must implicate the agency's substantive expertise; and must reflect the agency's "fair and considered judgment." *Kisor,* 588 U.S. at 577-79. To be an agency's official position, "the interpretation must at the least emanate from [official agency actions] . . . understood to make authoritative policy in the relevant context." *Id.* at 577. A judgment is fair and considerate when the decision was not made for purposes of a "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend

past agency action against attack." *Id.* at 579 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

First, the EPA's interpretation of the WTR is their authoritative and official position because this is a correctly promulgated legislative rule. Second, the CWA is a national environmental law that Congress specifically tasked the EPA with administering. Third, the WTR reflects the EPA's fair and considered judgment because it is based on a sixteen-year-old rule and is not just for this litigation. Accordingly, the WTR and the EPA's interpretation of it satisfies the *Auer* elements and is subject to deference. Therefore, the district court properly ruled that Highpeak must seek a NPDES permit to continue its tubing augmentation scheme.

CONCLUSION

CSP has standing to bring a citizen suit under the CWA because the EPA's failure to regulate Highpeak's discharge is harming CSP's members. Likewise, CSP's challenge to the WTR is timely because the statute of limitations began to run when concerned citizens formed CSP. Further, EPA exceeded its authority when it promulgated the WTR and exempted water transfers from the NPDES permitting program, despite Congress' clear intent. Notwithstanding the invalidity of the WTR, Highpeak needs a NPDES permit because it introduces pollutants during the transfer. For these reasons, we respectfully request that this Court affirm the lower court's decision regarding standing, timeliness, and the permit requirement. We also respectfully request that this Court reverse the lower court's determination that the WTR is a valid regulation.

We hereby certify that the brief for _____ Law School is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

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Team Member

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Team Member

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Team Member

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