Non-Measuring Brief
Team 24

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CRYSTAL STREAM PRESERVATIONISTS, INC
Petitioner-Appellant-Cross-Appellee

versus

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

and

HIGHPEAK TUBES, INC
Defendant-Appellee-Cross-Appellant

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEAL CASES

UNITED STATES CODE

WATER TRANSFER RULE

OTHER CITES

STATEMENT OF JURISDICTION

On August 1, 2024, The United States District Court for the District of New Union ("the district court") entered judgment in Case No. 24-CV-5678 denying Highpeak Tubes, Inc.'s ("Highpeak") motion to dismiss the citizen suit brought by Crystal Stream Preservationists ("CSP") pursuant to the Clean Water Act ("CWA") and granting Highpeak's and the United States Environmental Protection Agency's ("EPA") motions to dismiss CSP's challenge to the Water Transfers Rule ("WTR"). R. at 2.[1] The district court had subject matter jurisdiction of the federal questions regarding administrative actions pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702 and of the citizen suit pursuant to 33 U.S.C. § 1365. Upon the certification required from the district court, all parties filed motions with this Court for leave to file interlocutory appeals. Agreeing that controlling questions of law existed regarding the WTR's validity and its interpretation, this Court granted the parties leave to appeal pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(1).

STATEMENT OF ISSUES PRESENTED

I. Did the district court err in holding that CSP had standing to challenge Highpeak's discharge and the WTR?

II. Did the district court err in holding that CSP timely filed the challenge to the WTR?

III. Did the district court err in holding that the WTR was a valid regulation promulgated pursuant to the CWA?

IV. Did the district court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR, thus making High peak's discharge subject to permitting under the CWA?

[1] For clarity, the cite "R. at #" will refer to the underlying record in this case. This record includes the district court's order in Case No. 24-CV-5678, along with Exhibits A and B, Declarations of CSP members.

STATEMENT OF THE CASE

I. SUBSTANTIVE HISTORY

A. POLLUTION OF THE CRYSTAL STREAM

Highpeak is a recreational tubing business that operates on the Crystal Stream ("the Stream") in the State New Union ("the State"). R. at 4. When starting its business in 1992, Highpeak obtained permission from the State to construct a tunnel connecting nearby Cloudy Lake to Crystal Stream to support its tubing business. *Id.* The tunnel, measuring four feet wide and one hundred yards long, was partially lined with iron piping and can be opened and closed by valves on each end. *Id*. For reasons unknown, Highpeak opted not to continue the pipe through the entirety of the tunnel or install any other sort of impermeable conduit. *Id.* at 4, 12. This partial construction left portions of the tunnel exposed to the earth and exposes the water being transferred to additional pollutants before being dumped into the Crystal Stream. *Id.* Beyond pollution from the poor construction of the tunnel, testing reveals that Cloudy Lake has "significantly higher levels" of iron and manganese and a "much higher concentration" of total suspended solids ("TSS"). *Id*. at 5. Highpeak's permit to operate this tunnel allows them to contaminate the pure, spring-fed water of the Stream seasonally. *Id*. at 4-5 (stating valves are opened from spring to later summer).

Highpeak has never obtained, nor sought to obtain, a National Pollution Discharge Elimination System ("NPDES") permit as required by the CWA to discharge pollutants. *Id*. at 4. To circumvent this permitting requirement, Highpeak unilaterally relied upon the WTR. Up to this point, Highpeak has not faced a CWA challenge regarding the applicability of the WTR or its business practices generally. *Id.*

B. THE CRYSTAL STREAM AND THE FORMATION OF CSP

The Crystal Stream is an integral landmark of Rexville, New Union. The Crystal Stream Park ("the Park") is a public access that allows all individuals to enjoy the natural beauty of the Stream and recreate along its banks. *See* Exhibit A at Para. 7-9. The Park is not centered around the enjoyment of the Crystal Stream in name alone, but also by the two miles of its walking trail that run directly along the Stream. *Id.* Rexville locals, like Jonathan Silver, a resident since 2019, have historically enjoyed the park with their children and with family pets that often drink from the Stream. *Id*. Others locals, like Cynthia Jones, a resident since 1997, own property along the Stream and enjoy their direct access as well as the Park's amenities. *See* Exhibit B at Para. 5-9.

Recently, locals like Silver and Jones have lost their ability to fully enjoy the Stream and its beauty. Years of unregulated discharges by Highpeak are causing the once crystal-clear waters to become cloudy due to higher levels of TSS. R. at 5. When locals began to question this noticeable diminish of the Stream's beauty, they discovered the true nature of Highpeak's water transfers. *See* Exhibit A at Para. 10 (stating Jones first learned of the pollutants discharged by Highpeak in 2020); *See* Exhibit B at Para. 6 (stating Silver first learned the cloudiness of the Stream was a result of Highpeak's discharge in "the days leading up to [the underlying] Complaint being filed"). This knowledge of increased levels of toxins, metals, and TSS only diminished locals' enjoyment of the Stream even more. *See* Exhibit A at Para. 10, 12 (stating discharges reduced Jones's ability and readiness to walk in and along the Stream); *See* Exhibit B at Para. 7, 9 (stating discharges made Silver hesitant to recreate on the Stream and allow pets to drink from the Stream).

In an effort to protect and preserve the Crystal Stream, thirteen Rexville locals joined together and formed CSP, a nonprofit environmental group, on December 1, 2023. R. at 4. CSP's mission statement emphasizes the group's intention to protect the Stream from contamination and

illegal transfers of polluted waters. *Id*. at 6. CSP also welcomes all people interested in maintaining the Stream "in its natural state for environmental and aesthetic reasons." *Id*. at 4. While addressing Highpeak's unregulated discharge is a priority for the organization, it is not the sole purpose of the organization. For instance, Silver joined CSP in December 2023 to prevent further contamination of the Stream, whatever the source, and it was not until "days before" the February 2024 Complaint that he learned the source of that contamination was Highpeak. *See* Exhibit B at Para. 6.

C. SHIFTING JUDICIAL LANDSCAPE

Notably, this matter comes before this Court amidst a shift in long-standing judicial precedents that affects the claims at issue. *See generally Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *see also Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 144 S. Ct. 2440 (2024). Indeed, after the motions in this case were fully briefed in April 2024, the district court refrained from ruling on the motions given both *Loper Bright* and *Corner Post* were still pending before the Supreme Court at that time. R. at 6.

As anticipated, *Loper Bright* overruled the principle of *Chevron* deference and changed the judicial framework for when deference should be granted to agency interpretations of statutes. *See generally Loper Bright*, 144 S. Ct. at 2244. As a result, courts have more authority to resolve statutory ambiguity and agency interpretations no longer hold binding authority. *Id*. CSP maintains this new judicial landscape allows this Court to invalidate the WTR as inconsistent with the CWA.

In another recent shift, *Corner Post* clarified that a cause of action subject to the Administrative Procedures Act's ("APA") six-year statute of limitation does not accrue until the *plaintiff* is injured. 144 S. Ct. at 2440 (emphasis added). This shift allows plaintiffs, like CSP, to challenge the WTR beyond the six years immediately following promulgation.

II. PROCEDURAL HISTORY

On December 15, 2023, CSP sent Highpeak a notice of intent to sue ("the NOIS") asserting that Highpeak was regularly and unlawfully discharging pollutants into the Stream without a permit in violation of the CWA. R. at 4. CSP supported this claim with sampling data that showed Cloudy Lake has higher levels of iron and manganese and a higher concentration of TSS. *Id.* at 5. Expecting Highpeak to rely on the WTR, the NOIS contended that the WTR was not validly promulgated, and, in the alternative, was not applicable to Highpeak's activity since new pollutants were being introduced during the transfers. *Id.* The water sampling data showed discharge into the Stream contained 2-3% higher concentrations of the mentioned pollutants than samples taken from intake at Cloudy Lake. *Id.* Highpeak sent its reply letter to CSP on December 27, 2023 claiming, as expected, that the WTR exempted Highpeak's discharges from permitting. *Id*. Highpeak claimed that the pollutants were being added to the Stream naturally and, therefore, within the scope of the WTR exemption. *Id*.

On February 15, 2024, CSP filed its Complaint, which included a citizen suit against Highpeak and an APA claim against EPA. *Id.* The latter emphasized that the WTR is inconsistent with the plain language of the CWA and its purpose to forbid discharges of pollutants without a permit. *Id.* at 9. Alternatively, the Complaint reiterated the NOIS insofar as if the WTR was validly promulgated, Highpeak's transfers were beyond the scope of the exemption. *Id*. at 5.

Highpeak moved to dismiss both the citizen suit and the WTR challenge for lack of standing. *Id*. Highpeak argued CSP did not suffer any actual injury, but was formed only to manufacture a claim against Highpeak and the WTR. *Id*. Highpeak also moved to dismiss CSP's challenge to the WTR as time-barred, asserting any injury suffered by CSP was, hypothetically, suffered by its members more than six years ago. *Id*. EPA joined Highpeak in moving to dismiss

the WTR challenge for lack of standing and timeliness. *Id*. at 6. EPA disagreed, however, with Highpeak on the applicability of the WTR. *Id*. The agency agreed with CSP that, since Highpeak's transfers introduce pollutants, the activity requires a permit regardless of the WTR's validity. *Id*.

On August 1, 2024, the district court granted the motions to dismiss CSP's WTR challenge and denied the motion to dismiss CSP's CWA citizen suit. *Id*. at 12. In issuing that order, the district court held (1) CSP had standing to challenge the WTR and bring the citizen suit against Highpeak; (2) CSP's WTR challenge was timely filed; (3) the WTR was validly promulgated; and (4) Highpeak's discharges introduced pollutants to the Stream and required a permit. *Id*. at 2.

Each party filed motions with this Court for leave to file interlocutory appeals. *Id*. This Court granted that leave. *Id*. Highpeak appeals from the holdings regarding standing, timeliness, and the applicability of the WTR. *Id.* EPA also appeals from the holdings regarding standing and timeliness. Finally, CSP appeals from the holding regarding validity of the WTR. *Id.*

SUMMARY OF THE ARGUMENT

As to issue one, the district court properly held CSP has standing to challenge the WTR and bring a citizen suit against Highpeak since it meets the elements of associational standing. Associational standing requires: (1) each member to have standing to sue in their own right; (2) the interests the organization seeks to protect to be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested to require participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Each CSP member has Article III standing under the *Lujan* test since they have suffered an injury in fact caused by Highpeak that is redressable under this petition. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Second, the interests CSP is seeking to protect—the preservation of the Crystal Stream for aesthetic, environmental, and recreational purposes—are germane to CSP's

purpose to preserve the Stream for generations to come. R. at 4, 6. Third, neither the claims asserted, nor the relief requested, requires participation of any individual CSP member to participate since the injury—the damage to the above interests—is not peculiar to an individual member. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). Accordingly, CSP has standing, and the district court's ruling should be affirmed.

As to issue two, the district court properly held that CSP's challenge to the WTR is timely since the claim did not accrue until CSP, as an organization, was injured in 2023. APA claims do not accrue—triggering APA's statute of limitation—until the plaintiff filing suit is injured. *Corner Post*, 144 S. Ct. at 2460. CSP was not formed—meaning it could not be injured—until 2023. R. at 4. Alternatively, when an injury is caused by a continuous violation or repeating occurrence, courts have found seemingly time-barred challenges can be timely. *See generally Wyo-Ben Inc. v. Haaland*, 63 F.4th 857 (10th Cir. 2023). Highpeak has been continuously relying on the WTR to discharge pollutants without a permit since 1992. R. at 4. Highpeak has also been repeatedly opening and closing the valves seasonally, resulting in thirty-two years' worth of individual transfers. *Id*. Under either the continuous or repeated violations doctrine, even CSP members' individual claims would be timely, and this Court should affirm the district court.

As to issue three, the district court improperly found the WTR was validly promulgated since the rule is arbitrary and capricious, contrary to the CWA, and unpersuasive under *Skidmore*. In light of *Loper Bright*, courts have authority to revisit *Chevron*-based decisions where a special justification exists. *Loper Bright*, 144 S. Ct. at 2273 (2024). Further, general principles of *stare decisis* are not violated when a court is not bound by its own authority or that of a superior court. *Colby v. J.C. Penny Co.*, 811 F.2d 1119, 1123-24 (7th Cir. 1987). Here, the special justification to revisit the validity of the WTR is the procedural history of the rule's validity. The district court

recognized this fact, stating that, "once the WTR was promulgated as a regulation," circuit courts that had previously held the WTR was "inconsistent with the [CWA]" only shifted to validating the rule "rely[ing] expressly on the deference formerly applicable under *Chevron*." R. at 9. This Court's own consideration of that same question will not violate principles of *stare decisis* since none of the circuit courts which eventually upheld the WTR have binding authority on this court.

To determine validity of an agency rule, courts consider: (1) whether the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;" and (2) whether the agency's underlying interpretation that facilitates the promulgation of the rule is owed any deference. 5 U.S.C. § 706(2)(A); *see generally Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The arbitrary and capricious standard requires courts to consider whether an agency action is "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 (1983). Likewise, *Skidmore* requires courts to consider the agency's (1) thoroughness of consideration, (2) validity of reasoning, and (3) consistency with prior interpretations. *Skidmore*, 323 U.S. at 140. Under either standard, EPA did not reasonably consider the results of exempting an entire category of discharges from permitting. Such results include transferors, like Highpeak, having the ability to unilaterally decide the WTR applies and leaving others, like CSP, to clean up the results. Other results include transferring more polluted water, like Cloudy Lake, into purer waters, like the Stream. Therefore, under the arbitrary and capricious and *Skidmore* standards, EPA fails to establish it reasonably considered the impacts of the WTR, and this Court should reverse the district court to find the WTR invalid.

As to issue four, the district court properly held that Highpeak's discharge is subject to permitting because the transfers introduce pollutants and are, thereby, not exempt under the WTR. The final sentence of the WTR expressly states that "[t]his exclusion does not apply to pollutants

introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i). EPA asserts pollutants are "introduced by water transfer activity" when the activity "adds pollutants to the water being transferred" or "introduces pollutants to water passing through the structure into the receiving water." R. at 12. EPA's interpretation of when the WTR exemption does not apply is owed deference if it satisfies the five-factor *Kisor* test. *Kisor v. Wilke*, 588 U.S. 558, 573 (2019). Under this test, the interpretation must: (1) be an interpretation of a provision that is genuinely ambiguous; (2) be reasonable; (3) be the agency's authoritative or official position; (4) implicate the agency's substantive expertise; and (5) reflect fair and considered judgment. *Id*.

The ordinary meaning of the WTR is clear and this Court need not go further than that factor. Notwithstanding, EPA's interpretation also satisfies the remaining four factors. The interpretation is reasonable since it answers the alleged ambiguity of the statute in a way a reasonable person could as well. *U.S. v. Phillips*, 54 F.4th 374, 385 (6th Cir. 2022). The interpretation reflects the agency's authoritative position since the interpretation was officially issued contemporaneously with the final rule. *See* NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). The interpretation implicates the agency's substantive expertise since EPA is the administrator of the CWA and the WTR. *Id.* The interpretation reflects the agency's fair and considered judgment since EPA offered that interpretation contemporaneously with the final rule. *Id*. For those reasons, EPA's interpretation satisfies the *Kisor* test and is entitled to deference. Under that interpretation, Highpeak's discharges are not exempt by the WTR and require a permit. Accordingly, this Court should affirm the district court.

STANDARD OF REVIEW

As to the first and second issues, whether a party has Article III standing is a question of law reviewed *de novo*. *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). Likewise, the

district court's determination that CSP's challenge to the WTR was not timely is also a question of law reviewed *de novo*. *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997).

As to the third issue, EPA's interpretation that the CWA allows for the WTR is also a question of law which is now, under *Loper Bright*, reviewed *de novo*. *Loper Bright*, 144 S. Ct. at 2244. In such review, the Court may give "respectful consideration" to an agency's interpretation, but that interpretation "cannot bind a court." *Id*. at 2267. The weight of that interpretation must be limited by its "power to persuade" under *Skidmore* deference. *Id*.; *Skidmore*, 323 U.S. at 143.

Finally, as to the fourth issue, whether Highpeak's discharge is outside the scope of the WTR implicates whether EPA properly interpreted the CWA. In resolving this issue, this Court must first apply a *de novo* standard to determine whether the rule is "genuinely ambiguous." *Kisor*, 588 U.S. at 573. If the Court determines that the CWA is "genuinely ambiguous," it may defer to the agency's interpretation so long as such interpretation satisfies the *Kisor* test. *Id*. at 575-76.

ARGUMENT

I. CSP HAS ASSOCIATIONAL STANDING TO CHALLENGE THE WTR AND HIGHPEAK'S DISCHARGES UNDER THE SUPREME COURT'S *HUNT* TEST.

CSP has appropriate standing to challenge the WTR since it meets the elements established by the Supreme Court. To establish general standing, the Supreme Court has articulated a three-part test. *See generally Lujan*, 504 U.S. at 555. This test requires a plaintiff to prove injury in fact, causation, and redressability. *Id*. at 560-61. When the plaintiff is an organization—rather than an individual—it must also establish so-called "associational standing" to bring suit on behalf of its members. *Hunt*, 432 U.S. at 343. This standing is satisfied by an additional three-pronged test that has been the standard for nearly fifty years. *Circuit Approaches to Mootness in the Associational-Standing Context*, 136 Harv. L. Rev. 1434, 1435 (2023). Associational standing is established when: (1) each member has standing to sue; (2) the interests the organization seeks to protect are

germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt,* 432 U.S. at 343.

In this case, CSP is an environmental organization filing suit on behalf of its members and can satisfy *Hunt*. First, each CPS member has standing under the *Lujan* test—that is, they suffered an injury in fact caused by Highpeak and redressable under this petition. Second, the interests CSP is seeking to protect—the preservation of the Crystal Stream for aesthetic, environmental, and recreational purposes—are germane to CSP's purpose to preserve the Stream for generations to come. Lastly, neither the claims asserted nor the relief requested requires any individual CSP member's participation. Thus, CSP has standing and, this Court should affirm the district court.

A. CSP members could sue Highpeak individually since each member's interest in the Stream was damaged by Highpeak and could be redressed by this Court.

Looking to the first element of associational standing, CSP satisfies this prong since each CSP member could satisfy the *Lujan* test in their own right. An individual plaintiff has standing to sue when they demonstrate an injury in fact, a causal connection between the defendant's conduct and their injury, and how the injury will be redressed by the lawsuit. *Lujan*, 504 U.S. at 560-61. Courts have found individual standing to exist for an organization's members where the members' environmental and recreational interests were negatively impacted by the defendant's introduction of pollutants into a river. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

In *Laidlaw*, an environmental group had associational standing to sue the owner of a wastewater treatment plant after the owner began discharging pollutants into a river in excess of the limits established by its NPDES permit. *Id.* at 176. The Court found the plaintiff organization satisfied the first element of associational standing since the organization's members could satisfy each element of the *Lujan* Test. *Id*. at 168.

Like the individual members of the plaintiff organization in *Laidlaw*, CSP's members individually satisfy the *Lujan* test and have standing to sue Highpeak and challenge the WTR due to the negative impacts on their recreational and environmental interests. Since the members can satisfy *Lujan*, the first element of the *Hunt* test is satisfied.

1. Highpeak's WTR-reliant discharges injured CSP members by diminishing the members' aesthetic, environmental, and recreational enjoyment of the Stream.

CSP members satisfy the first prong of the *Lujan* test since each member can establish injury in fact. Injury in fact must be a "concrete" injury that is actual or imminent rather than speculative. *Id.* at 180. These injuries can take many forms, such as a physical injury, monetary injury, injury to property, or injury to a constitutional right. *FDA. v. All. for Hipp. Medicine*, 602 U.S. 367, 381 (2024). In environmental cases, the pertinent injury is the injury to the plaintiff, not just the environment. *Laidlaw*, 528 U.S. at 181. In other words, plaintiffs can establish injury in fact based on their personal injury even if the environment was not significantly harmed. *Id.*

In *Laidlaw*, an environmental group's members had individual injury where the defendant's discharge of pollutants into a nearby river negatively impacted their environmental purpose and recreational interests. *Id.* at 176. Several members of the plaintiff group confirmed in affidavits and depositions their desire to use the river more but hesitation to do so because of the defendant's pollution. *Id.* at 182-83. Members reported how concerns about the levels of pollution curtailed their river activity and deterred them from buying property near the river. *Id.* at 182. Members refrained from fishing, swimming, picnicking, boating, canoeing, and other recreational activities in and around the river because of concerns about pollution. *Id.* On appeal, the Supreme Court determined the plaintiffs sufficiently proved injury in fact to overcome a motion to dismiss. *Id.* at 185. The Court reasoned reduced "aesthetic and recreational values" of the river area demonstrated reasonable, actual injury necessary for standing. *Id.* at 183.

The instant case is directly on point with *Laidlaw*. CSP members have individual injuries based on Highpeak's discharges made in reliance on the WTR. The repeated, unpermitted discharges of iron, manganese, and TSS into the Crystal Stream negatively impact the members' aesthetic, environmental, and recreational interests. Like in *Laidlaw*, CSP members Jones and Silver provided sworn declarations confirming their hesitation and inability to enjoy the Stream due to Highpeak's discharge of the pollutants. *See generally* Exhibit A; Exhibit B. The very ability to enjoy the name-sake, crystal waters has been impacted since the water now appears cloudy due to the discharges' introduction of higher concentrations of TSS. *Id*. Jones used to enjoy walking along the Stream and admiring its clarity and purity, but is now upset by the cloudy water and does not enjoy the Stream as much as she used to in fear of the contamination. *See* Exhibit A at Para. 8-10. Silver used to walk his dogs and children along the stream, but he is also now concerned about the pollution and limits his Stream recreation because of it. *See* Exhibit B at Para. 5-9.

While only Jones and Silver have provided declarations, each member of CSP joined based on this same premise of diminished enjoyment of the Crystal Stream since both seeing and learning of the damage caused by Highpeak's discharges. *See* R. at 4, 6 (citing CSP's goals and mission statement). Thus, just as in *Laidlaw*, CSP's individual members have been forced to restrict their recreational use of the Stream due to Highpeak's pollution and the broad exceptions allowed by the WTR. This Court should follow the Supreme Court's reasoning in *Laidlaw* and find these facts sufficiently prove the injury in fact, thereby satisfying the first element of the *Lujan* Test.

2. CSP's members can prove causation since Highpeak relied on the WTR to transfer water and introduce pollutants that resulted in CSP members' injuries.

The causal connection between Highpeak's transfers and each CPS member's injury is as clear as the Crystal Stream used to be. To prove causation, the plaintiff must show that the injury was caused by the defendant's conduct. *FDA*, 602 U.S. at 382. This requires the plaintiff to

demonstrate a predictable chain of events leading from the action to the injury. *Id.* at 383. When a plaintiff shows they suffered their injury at the hands of the defendant, they meet the causation element. *Id*.

In water pollution cases, environmental group members establish causation by showing their injuries stemmed from the defendant's conduct of water transfers. *See generally Laidlaw*, 528 U.S. 167. In *Laidlaw*, there was a short chain of events: (1) defendant discharged pollutants into the river exceeding the limits of its permit, (2) pollutant levels were increased, and (3) the plaintiff group members described how this pollution impeded their ability to use the river recreationally and enjoy its beauty. *Id.* at 176, 182.

Again, *Laidlaw* provides a particularly on-point comparison. Similar to the defendant's discharges in *Laidlaw*, Highpeak's transfers are resulting in measurable increases of certain pollutants. R. at 4. Data shows these transfers have introduced iron, manganese, and TSS into the Stream. *Id*. at 5. Since witnessing the results of this transfer—the cloudy water—and learning of its source—Highpeak's discharges—CSP's members have no longer been able to use the river recreationally or enjoy its beauty. That same short chain of events as in *Laidlaw* exists here. Further, since Highpeak's unpermitted discharges relied on the exception provided by the WTR, the causation chain also extends to WTR itself. This Court should find CSP's individual members have proven causation necessary to challenge the Highpeak's discharges and the WTR, thereby satisfying the second element of the *Lujan* test.

3. CSP members' injuries are redressable since this Court has authority to invalidate the WTR and to require permitting under the CWA.

Here, each member's injury is redressable since the Court has authority to regulate Highpeak's transfer under the CWA. Redressability refers to how a favorable decision can remediate the injury. *Laidlaw*, 528 U.S. at 181. Any sanction that abates the defendant's wrongful

conduct and prevents future violation is considered a form of redress. *Id.* at 186. If the relief sought would deter the defendant from continuing its ongoing unlawful actions, it effectively redresses the plaintiff's injury. *Id.*

The injury in *Laidlaw* was redressable because the plaintiff sought civil penalties which would stop the defendant's current pollution of the river and deter the defendant from polluting the river in the future. *Id.* at 170. The Court found the civil penalties' deterrent effect was sufficient to support redressability. *Id.* The Court reasoned the relief sought was likely, as opposed to merely speculative, to redress the plaintiff members' injuries of decreased use of the river because it would prevent further pollution. *Id.*

In the instant case, CSP members' individual injuries at the hand of Highpeak's discharges and the WTR can be redressed by this Court. First, this Court could invalidate the WTR as arbitrary, capricious, and contrary to law for the reasons discussed herein. Alternatively, EPA and CSP agree that, since Highpeak's water transfers introduce new pollutants to the Stream, they are not exempt under the WTR and require a permit under the CWA. This permit would regulate Highpeak's activity and establish limits on the rate of pollution in future discharges. R. at 12. Because a permit would stop Highpeak's current violations and regulate future discharges, CSP members' injuries are redressable under this appeal, and the third element of *Lujan* is satisfied.

Since CSP's members satisfy the *Lujan* test, thereby having standing to sue in their own right, this Court should find CSP meets the first requirement of *Hunt's* associational standing test.

B. CSP is seeking to protect interests germane to its purpose as an organization since the interests sought are those express in CSP's goals and mission statement.

The goal of CSP's citizen suit, and challenge to the WTR, is to achieve the goals and protect the interests expressly stated in CSP's mission statement. To determine germaneness, courts often look to an organization's goals or the members' reasons for joining the organization. *Auto. Workers*

v. Brock, 477 U.S. 274, 286 (1986); If an association's success in the lawsuit furthers the general or specific interests that members joined to protect or advance, this element is met. *Bldg and Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 149 (2d Cir. 2006).

In *Downtown Dev.*, a labor organization sued several defendants for alleged Resource Conservation and Recovery Act and CWA violations. *Id.* at 142. The plaintiff stated in its complaint that its purpose was to improve the working conditions and the occupational safety and health of its members. *Id.* at 149. The defendants' violations consisted of contamination of worksites frequented by plaintiff members and a lake used and enjoyed by many plaintiff members. *Id.* at 143. The Second Circuit held the plaintiff was seeking to protect interests germane to its purpose. *Id.* at 150. The court reasoned that success in litigation would impose an injunction or civil penalties on the defendant to clean up the worksite or remedy the lake pollution—which would advance the organization's purpose of improving member health and safety. *Id.* at 150-51.

Similarly to *Downtown Dev.'s* plaintiff organization, CSP is seeking to further the specific interests its members joined the organization to protect and advance. CSP's mission statement denotes CSP's interest in preserving the Stream in its natural form by preventing pollution and maintaining it for future generations. R. at 6. Further, CSP's mission statement also expressly includes protecting the stream from illegal transfers of polluted waters. *Id*. Highpeak's discharges endanger that very goal. With each opening of the tunnel, Highpeak is directly impacting the Stream's clarity and purity and CSP members' use and enjoyment of the Stream. R. at 7. If CSP is successful in this suit, Highpeak would be subject to CWA permitting and any other remediation and determent measures this Court may enforce under the CWA. Like the civil penalties in *Downtown Dev.*, regulating Highpeak's pollution would advance CSP's express purpose of preserving the Stream and protecting it from illegal transfers. Just as the court in *Downtown Dev.*

found the plaintiff met the germaneness requirement, this Court should similarly find CSP has proven the second *Hunt* element for associational standing.

C. CSP's claim and relief requested do not require the participation of any individual member since the damage to the Crystal Stream is not peculiar any one person.

CSP's success in this suit does not depend on any individual member of the organization. The third requirement for associational standing is that the claim and relief cannot require individualized proof from a certain person. *Hunt*, 432 U.S. at 343. This element is difficult to prove when the injury is peculiar to an individual member or when the relief sought is monetary damages for those injured. *Bano*, 361 F.3d at 714. In contrast, organizations seeking equitable relief or a purely legal ruling that does not require the participation of individual members are likely to satisfy this prong of the *Hunt* test. *Id.*

The *Brock* case demonstrates how an organization can file suit on behalf of its members' injuries without needing individualized proof from those members. 477 U.S. at 288. In *Brock*, a union challenged a federal policy that denied many of the union members certain benefits. *Id.* at 281. Although the suit involved the members' injuries of denied benefits, the union was not directly seeking recovery of those benefits. *Id.* at 284. Rather, the union had standing because it raised a pure question of law—whether the Trade Act was interpreted correctly. *Id.* at 287. The claim itself could be litigated without individual members, and the relief sought would benefit the members without requiring their participation. *Id.* at 288.

The instant case presents a similar situation to *Brock*. Just as the plaintiff in *Brock* brought a suit on behalf of its injured members, CSP is bringing this suit on behalf of its members injured by Highpeak's transfers and the WTR. R. at 8. CSP's challenge to the rule and its applicability does not seek damages for its members or require individual members to litigate. Just as the *Brock* plaintiff raised a question of law, CSP raises a pure question of law—whether the WTR is valid

and applies to Highpeak's transfers. The relief sought—permitting under the CWA—would benefit the members and is a purely legal ruling that would provide equitable relief to all CSP members. This claim does not rely on Jones's or Silver's descriptions of their injuries or the fact that Silver could not have been injured until he moved to the area in 2019. The existence of the Park demonstrates that any member of the public who frequents the area and enjoys the Stream's beauty and recreational opportunities has been impacted by Highpeak's pollution. R. at 16. Other members of the public own land along the Stream and have likely been impacted by the pollution. *Id*. at 4. Thus, CSP's claim against Highpeak and the WTR does not require a CSP member to litigate. Because the claim is a legal question and the relief sought is not individualized damages, CSP can litigate this claim without the participation of individual members. Accordingly, CSP meets the third element of associational standing.

CSP meets all three elements of associational standing since its members have individual standing; the suit is seeking to protect interests germane to CSP's purpose; and the claim and relief do not require any individual members' participation. For these reasons, this Court should affirm the district court's ruling that CSP had standing to challenge Highpeak's discharge and the WTR.

II. CSP'S CHALLENGE TO THE WTR WAS TIMELY SINCE BOTH THE ORGANIZATION'S AND ITS MEMBERS' INJURIES ARE NOT TIME-BARRED BY THE STATUTE OF LIMITATION.

The *Corner Post* ruling and the nature of CSP's injuries establishes CSP's timeliness in its challenge to the WTR. In *Corner Post*, the Supreme Court held that APA claims do not accrue, triggering the six-year statute of limitation to begin, until the ***plaintiff filing the suit*** is injured. *Corner Post*, 144 S. Ct. at 2460 (emphasis added). Even if the regulation was promulgated many years before, *Corner Post* shifted the date of accrual to the date the *named* plaintiff is injured by the regulation. *Id.* at 2453 (emphasis added).

When an injury is continuous, courts have found a challenge to address that injury to be timely, even when it appears time-barred, under the continuing violation doctrine. *Wyo-Ben,* 63 F.4th 857, 862 (10th Cir. 2023). *Similarly,* when there are repeated injurious actions, courts have applied to repeating violations doctrine to find the same. *Id*.

CSP is the named plaintiff in this case and, under *Corner Post,* the relevant entity whose injury under the WTR is required to prompt the start of the statute of limitation period. CSP did not exist and could not have been injured by the WTR, as an organization, until its formation in 2023. R. at 4. Notwithstanding, even if the Court looks to the limitation of CSP members' individual abilities to challenge the WTR, those challenges would not be time-barred. Highpeak's discharges involved both continuous and repeated actions that, separately and together, injured all CSP members. Since (1) CSP could not be injured by the WTR until its formation, and (2) CSP members are continuously and repeatedly injured by Highpeak's ability to escape the permitting process, CSP's challenge to the WTR is timely.

A. The statute of limitation did not begin to run until CSP, the organization, was subject to and injured by the WTR.

CSP had to exist as an organization before it could be injured by the WTR's improper exemption of Highpeak's transfers from the CWA. With *Corner Post* the Supreme Court made clear that the APA's statute of limitation does not begin to run when just anyone's right of action first accrues. 144 S. Ct. at 2455. Rather, the Court emphasized, it is the injured ***plaintiff filing the complaint*** that starts the clock. *Id.* (emphasis added).

In *Corner Post*, the plaintiff convenience store's 2021 challenge of a 2011 regulation was timely because the store did not exist and could not have been injured until 2018. *Id.* at 2460. There, the 2011 regulation could not frustrate the plaintiff until he opened for business in 2018. *Id.* at 2448. In 2021, the plaintiff filed its challenge to that regulation for imposing higher transaction

fees than statutorily permitted. *Id.* The Federal Reserve Board sought to dismiss the challenge pursuant to the APA's six-year statute of limitation since the challenge was filed ten years after the regulation was promulgated. *Id.* The Supreme Court took up the matter and resolved this known circuit split, holding an APA plaintiff has a cause of action, and triggers the statute of limitation period, once the plaintiff is injured. *Id.* at 2450. The Court reasoned that the plaintiff business in *Corner Post* was not open to be injured by the regulation until 2018, when the business was formed. *Id.* at 2460. Since the plaintiff's challenge was filed three years later, within the six-year period, the Court found the suit was not barred by the APA's statute of limitation. *Id.*

As applied to the instant case, *Corner Post* dictates that the APA's six-year statute of limitation did not begin until CSP—the organization—was injured by the WTR's ability to exempt an entire category of discharges from the CWA permitting process. Much like *Corner Post*, where the relevant regulation was promulgated in 2011 but the plaintiff was not formed until 2018, the WTR was promulgated in 2008 but the plaintiff here was not formed until 2023. R. at 8. Just as the *Corner Post* plaintiff could not be injured by higher transaction fees until it existed as an entity, CSP could not be injured by the WTR's exemption of transfers until it organized in 2023.

Highpeak argues that any of CSP's members could have brought this exact challenge to the WTR since they would have individual claims that may have tolled. But the injury here is not just the individual injuries experienced by CSP's members as a result of the WTR exemption. It is the larger injury of how the WTR facilitates Highpeak's unpermitted discharges and prevents CSP from fulfilling its purpose as an organization. CSP was formed to preserve the Stream in its natural state so that it can be aesthetically and recreationally enjoyed for generations to come. *Id*. at 4. This purpose cannot be realized when Highpeak's discharges are polluting the Stream. That injury, and, thereby, that right of action, could not and did not accrue until there was an organization to

be injured. *Corner Post* makes clear the requirement that the named plaintiff of the suit at bar must be injured for the right of action to accrue. Because CSP is the named plaintiff, CSP had to exist and be injured as an organization for the statute of limitation to begin. So, the only question for this Court under the *Corner Post* standard is when CSP's injury actually occurred and whether the statute of limitation has since tolled.

The injury underlying CSP's challenge to the WTR is the regulation's facilitation of Highpeak's unpermitted discharges that damaged CSP's environmental, recreational, and aesthetic interests in the Crystal Stream. The continuous damage the WTR is allowing to those interests accrued simultaneously with CSP's formation on December 1, 2023. On that date, the statute of limitation began ticking. CSP brought its challenge on February 15, 2024, well within the six-year period. The fact that CSP members could have individually challenged the regulation based on similar damaged interests does not, and should not, undermine the distinct injuries to the valid interests of CSP as an organization. Since CSP—as the named plaintiff—filed its challenge well within six years of CSP's formation and injury, it was a timely challenge.

B. Highpeak's discharges involve both continuous and repeated actions that prevent CSP members' individual claims from being time barred.

Even if this Court was persuaded by Highpeak's arguments to look to the individual members' injuries, CSP members' individual WTR are also not time-barred. The continuing violations and repeated violations doctrines are similar but distinct doctrines that operate to allow a plaintiff to bring a claim into the APA's statute of limitation period. *Wyo-Ben*, 63 F.4th at 862-63. Under the continuing violations doctrine, a violation *continues* when "the conduct as a whole can be considered as a single course of conduct." *Hamer v. City of Trinidad*, 924 F.3d 1093, 1098 (10th Cir. 2019) (internal citations omitted). By comparison, under the repeated violations doctrine, a violation that might appear as a single, time-barred claim is *divided* into separate claims

and, as long as one accrues within the limitation period, is considered timely. *Id*. These doctrines are often seen asserted together as alternative arguments. *See e.g., Wyo-Ben*, 63 F.4th at 863; *Hamer*, 924 F.3d at 1101.

In *Wyo-Ben*, Congress enacted a moratorium in 1994 on federal agencies' approval of mineral applications but provided an exemption to that moratorium that required the Secretary of the Department of the Interior ("the Secretary") to process some pending applications. *Wyo-Ben*, 63 F.4th at 861-62. The Bureau of Land Management, not the Secretary, determined the plaintiff's 1993 application did not qualify for the exemption and it was denied. *Id.* at 862. Congress reenacted the moratorium and exemption each year through 2019, but the Secretary never reviewed the plaintiff's application. *Id*. In 2019, the plaintiff filed an APA challenge alleging the Secretary "unlawfully withheld" and "unreasonably delayed" agency action by failing to review the application. *Id*. The Secretary argued that the plaintiff's complaint was time-barred by the APA's six-year statute of limitation. *Id.* In response, the plaintiff asserted both the continuing violation and repeated violations doctrines. *Id.* at 863. Ultimately, the court found the continuing violation doctrine did not apply only because the plaintiff conceded it did not apply in arguments. *Id.* at 871. But, the court found the repeated violations doctrine did apply, reasoning failure to consider the application's exemption from the moratorium each year was a repeated violation. *Id.* at 878.

Here, CSP does not concede the continuing violations doctrine as the plaintiff in *Wyo-Ben* did. Highpeak gained permission from the State to operate their point source, a tunnel that transfers water from Cloudy Lake to Crystal Stream, in 1992. R. at 4. Highpeak did not, however, seek approval under the CWA, instead relying on the WTR. *Id.* at 4-5. Thus, the WTR began facilitating Highpeak's unpermitted discharge into the Crystal Stream in violation of the CWA in 1992 and continues to allow Highpeak to do so now. Thus, the injuries to CSP members have been a

continuing violation of the CWA that is not time-barred. Alternatively, this Court could find similarly to *Wyo-Ben* insofar as each discharge was a repeated violation of the CWA. It is undisputed that Highpeak opens and closes the transfer valve seasonally. *Id*. Thus, just as the Secretary in *Wyo-Ben* committed a new and discrete violation each year, the WTR allows Highpeak to commit a new and discrete violation of the CWA seasonally. Under either analysis, the six-year statute of limitation would not exclude CSP members' individual challenges.

According to *Corner Post*, CSP's right to challenge the WTR could not accrue, and its statute of limitation period could not begin, until CSP itself suffered injury under the regulation. Since CSP could not have suffered injury until it was formed as an organization in 2023, its challenge filed in 2024 was clearly timely under *Corner Post*. Alternatively, if this Court finds *Corner Post* does not apply and looks to CSP members' individual rights to challenge the regulation, the claim was still timely under either the continuing or repeating violations doctrines. Therefore, this Court should affirm the district court's ruling that CSP's WTR challenge is timely.

III. *LOPER BRIGHT* HAS GIVEN THIS COURT AUTHORITY TO REVISIT THE VALIDITY OF THE WTR, WITHOUT VIOLATING PRINCIPLES OF *STARE DECISIS*, AND FIND IT WAS NOT BASED ON THOROUGH CONSIDERATION

The WTR is invalid since EPA's interpretation of the CWA to allow for such exemptions is arbitrary and capricious, contrary to the CWA, and unpersuasive under *Skidmore*. In light of *Loper Bright*, courts have authority to revisit *Chevron*-decided cases where a special justification exists. *Loper Bright*, 144 S. Ct. at 2273. If a court finds that justification, the court may move on to the issue of valid promulgation. *See generally Id*. When considering the validity of a regulation under an APA challenge, courts are governed by "two distinct but potentially overlapping standards." *Fox v. Clinton*, 684 F.3d 67, 74-75 (D.C. Cir. 2012). First, the court must determine if the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with the law." 5 U.S.C. § 706(2)(A). Second, courts must consider the deference owed to the agency's interpretation. *Fox*, 684 F.3d at 74-75. *Loper Bright* established the answer to that second question is *Skidmore* deference. *Loper Bright*, 144 S. Ct. at 2263.

Here, this Court must first determine whether there is a special justification to revisit the validity of the WTR in light of the Supreme Court's departure from *Chevron*. If there is, the Court must then consider the WTR's validity under the APA and *Skidmore*. As to the first question, the procedural history of challenges to the WTR establishes a special justification for revisiting the validity of the WTR. As the district court in this matter aptly noted, once the WTR was promulgated as an official rule, and *Chevron* became applicable, the circuit courts that previously rejected the rule as inconsistent with the CWA suddenly upheld the WTR as a valid interpretation. R. at 9. As to the second question, the pre-promulgation challenges to the WTR provide abundant precedent that, under the APA and *Skidmore*, the WTR is arbitrary, capricious, and contrary to the CWA on its face. *Id.* Accordingly, this Court should find the WTR is invalid.

A. The procedural history of challenges to the WTR provide the special justification to revisit the rule's validity in light of *Loper Bright* without violating *stare decisis*.

This Court has a special justification for revisiting the WTR's validity since courts had determined validity under both *Skidmore* and *Chevron* and held the WTR's validity lacking under the former precedent. Further, that special justification does not violate the principles of *stare decisis* since neither this Court, nor the Supreme Court, have ruled on the WTR's validity.

When the Supreme Court or the Court of Appeals examines its own prior decisions, the use of the term "*stare decisis*" refers to the extent to which earlier judicial decisions bind such court. *Ramos v. La.*, 590 U.S. 83, 124 (2020) (Kavanaugh, J., concurring). Horizontal *stare decisis* is the duty of courts to follow its *own* prior decisions unless a fair argument exists to overrule such decisions. *Colby*, 811 F.2d at 1123. By contrast, vertical *stare decisis* is the duty of inferior courts

to abide by decisions of superior courts. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 520 (6th Cir. 2017). Vertical *stare decisis*, like binding authority, is absolute, as it must be in a hierarchical system with "one Supreme Court." *Ramos*, 590 U.S. at 124 (citing U.S. Const., Art III, § 1).

Before the WTR's formal promulgation, circuit courts concluded that a water transfer between distinct waters of the United States ***does*** constitute a discharge under the CWA. *See generally Dubois v. U.S. Dept. of Agric., et al.*, 102 F.3d 1273 (1d Cir. 1996)*; Catskill Mnts. Chapter of Trout Unl., Inc. v. N.Y.C.*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*); *Catskill Mnts. Chapter of Trout Unl., Inc. v. N.Y.C.*, 451 F.3d 77 (2d Cir. 2006) (*Catskill II*); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *vacated by S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, et al*., 541 U.S. 95 (2004). In those cases, EPA's interpretation that those transfers did not require a permit was expressly rejected as arbitrary and capricious. Once the WTR was promulgated as a formal regulation in 2008, *Chevron* deference applied. Only then did the Second and Eleventh Circuits uphold the WTR as a valid interpretation of the CWA. *Catskill Mnts. Chapter of Trout Unl., Inc. v. U.S. EPA*, 846 F.3d 492, 524-533 (2d Cir. 2017) (*Catskill III*); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009).

EPA asserts that the WTR requires courts to read words into the CWA and construe "navigable waters" to mean "*all* the navigable waters of the United States considered *collectively*." *Catskill III*, 846 F.3d at 535. The Supreme Court has not explicitly ruled on the validity of the WTR; however, *Miccosukee's* dicta suggests the Court has serious reservations about the so-called "unitary waters" approach in *Catskill III*. *Miccosukee*, 541 U.S. at 107. In *Miccosukee*, the Court also opined that using this approach to exempt the transfer of water from one body of water to another "could conflict with current NPDES regulations." *Id.*

In the case at bar, it is this history that provides special justification to revisit the validity of the WTR. Even the district court emphasized the unique nature of the WTR being challenged under *Skidmore* and *Chevron* and expressly found lacking under the former. R. at 9. Not only is this Court not bound by the circuits that upheld the WTR's validity, the *Loper Bright* decision calls into question any post-promulgation upholding of the WTR. Instead, this Court should follow the reasoning and holdings of the pre-promulgation challenges of the WTR's validity, such as *Catskill I* and *Catskill II*.

Further, this special justification does not present any vertical or horizontal *stare decisis* issues. This Court has not issued a ruling on the WTR's validity. Further, there is no Supreme Court ruling on such. The district court here refused to revisit the validity of the WTR, concluding that the contradictory pronouncements of the courts should not constitute a "special justification" to overturn the Second and Eleventh Circuits' decisions upholding its validity. R. at 10. However, that reasoning ignores the fact that inconsistency with other related decisions can constitute a special justification to overcome prior rulings like *Catskill III*. This Court must embrace this special justification and undertake the validity of the WTR.

B. EPA's WTR interpretation of the CWA is arbitrary and capricious, contrary to law, and not entitled to deference since it unreasonably ignores practical results.

EPA's disregard for an entire category of discharges fails to satisfy the arbitrary and capricious standard or demonstrate why deference is appropriate. An agency rule is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem or offers an explanation that runs counter to the evidence before the agency. *Motor Vehicle Mfrs.*, 463 U.S. at 103. This review aims to ensure agency action is "the product of reasoned decisionmaking." *Id*. Similarly, when the agency action at question is the interpretation of a statute for purposes of rulemaking and potentially entitled to *Skidmore* deference, the court must also consider the

agency's (1) thoroughness of consideration, (2) validity of reasoning, and (3) consistency with prior interpretations. *Skidmore*, 323 U.S. at 140. Thus, both the arbitrary and capricious and *Skidmore* analyses aim to scrutinize the agency's underlying reasoning for its action.

In this case, the agency action in question is EPA's interpretation of the CWA to broadly exempt water transfers from permitting. That interpretation arbitrarily and capriciously failed to consider the practical effects of exempting an entire category of discharges—that transferors, like Highpeak, could unilaterally rely on the exemption without any scrutiny as to the practical results of their transfers. *See* R. at 4 (stating, "Highpeak has neither had nor sought an NPDES permit for the discharge"). Any interpretation that allows for these unilateral, unpermitted discharges is contrary to the CWA's express requirement to permit *all* point-source discharges of pollutants into *any* water of the United States. Further, under *Skidmore*, that interpretation is unpersuasive as it fails to establish that EPA thoroughly considered the practical effects of the WTR or offered any valid reason for such a broad exemption. Thus, this Court should overrule the lower court and find the WTR is arbitrary and capricious, contrary to the CWA, and unpersuasive under *Skidmore*.

1. The WTR is arbitrary, capricious, and contrary to law since it contravenes the purpose and plain language of the CWA.

Courts have determined that where an agency fails to consider the practical effects of refusing to regulate pollution, its decision is arbitrary and capricious. *See generally Mass. v. EPA*, 549 U.S. 497 (2007). In *Mass.*, the state petitioned EPA to address climate change concerns by regulating greenhouse gas emissions under the Clean Air Act's order to regulate "any air pollutant from any class or classes of new motor vehicles." *Id*. at 510; 42 U.S.C. § 7521(a)(1). EPA declined to exercise that authority, asserting, *inter alia*, that the Act was designed to address local air pollutants rather than pollutants consistent throughout the world's atmosphere. *Mass.*, 549 U.S. at 512. The Supreme Court found EPA's decision arbitrary and capricious since EPA's assertion

failed to provide any reasonable explanation for refusing to meaningfully consider the impact of greenhouse gasses on climate change. *Id*. at 534. Further, the Court found that, while EPA has "significant latitude" regarding the details of regulating pollutants under the Act, the agency cannot simply refuse to comply with the clear statutory command to regulate. *Id*. at 533.

Here, like in *Mass.*, EPA is once again refusing to regulate an entire source of pollution in one fell swoop. As in *Mass.*, that refusal is arbitrary, capricious, and contrary to the very statute it is interpreting. Like the broad responsibility under the Clean Air Act, EPA has a broad responsibility under the CWA to regulate "all point-source discharges" into "any water."

EPA has actually gone a step beyond the simple refusal in *Mass.* and promulgated an entire rule effectively regulating away its permitting responsibilities. In doing so, the agency failed to consider the practical effects of not permitting an entire source of potential pollution, just as it did in *Mass.* The WTR provides no safeguards to prevent a transferor, like Highpeak, from relying on the WTR, with no other regulatory process, and introducing undisclosed pollutants into secondary waters. This leaves those with interests in the secondary waters, like CSP's interests in the Crystal Stream, to suffer consequences that could have been avoided if the transfers simply went through NPDES. Similar to EPA's local versus worldwide reasoning regarding the pollutant at issue in *Mass.*, EPA asserts the unitary waters reasoning for its interpretation of the CWA. But, as discussed herein and pointed out by the Supreme Court in *Miccosukee*, this interpretation conflicts with the permitting system. While EPA has the latitude recognized in *Mass.* regarding the nuances of regulating, EPA does not have the authority to regulate away its responsibility to do so. Thus, this Court should find the WTR is arbitrary, capricious, and contrary to the CWA.

2. EPA's CWA interpretation is unpersuasive under *Skidmore* since EPA failed to thoroughly consider the results of allowing unilateral application of the WTR.

Where an agency's interpretation contravenes the clear meaning of a statute, courts should find such reading lacks the "power to persuade" under *Skidmore*. *See Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83; *Catskill III*, 846 F.3d at 542. In *Catskill I*, the court found EPA's interpretation that the CWA allowed for the WTR was not entitled to *Skidmore* deference. 273 F.3d at 491. The court reasoned that "the transfer of water containing pollutants from one body of water to another distinct body of water is ***plainly*** an addition [of pollutants] and thus a 'discharge' that ***demands*** an NPDES permit." *Id*. (emphasis added). The court reasoned an "addition" means "the introduction into navigable water from the 'outside world,'" which the court defined as "any place outside the particular water body to which pollutants are introduced." *Id*. Since the two bodies of water there were utterly unrelated, the pollutants in the transferred water were outside the recipient waters before being added by the transfer. *Id*.

Additionally, the court rejected the "unitary waters" theory, reasoning it "lead[s] to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not be subject to the [permitting]." *Id*. at 493. Since the Court found that the "unitary water" approach was inconsistent with the plain meaning of the CWA's text, EPA's interpretation lacked the necessary power to persuade under *Skidmore* deference.

The facts here are a direct manifestation of the second circuits concerns in *Catskill I*. The transfer of polluted water from Cloudy Lake to the pristine waters of the Crystal Stream would not occur without the construction of Highpeak's tunnel to connect the two bodies of water. R. at 4. Thus, just as the *Catskill I* court feared, the pollutants in Cloudy Lake have been dumped into the Crystal Stream in total violation of the CWA's permitting requirements via Highpeak's reliance on the WTR exemption. Altogether, since the WTR allows for absurd results that plainly contradict

the text of the CWA, EPA's interpretation should not be afforded *Skidmore* deference. As such, this Court should find that the WTR is invalid.

IV. HIGHPEAK'S DISCHARGES ARE NOT PERMIT-EXEMPT UNDER THE WTR SINCE HIGH LEVELS OF IRON, MANGANESE, AND TSS ARE INTRODUCED.

The WTR, if valid, should be interpreted to exclude Highpeak's discharge and require it to be permitted since the transfers introduce pollutants. When an interpretation of an agency's own rule is in question, the agency has long been entitled to deference. *See generally Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). This deference is rooted in the fact that the agency that "wrote the regulation will often have direct insight into what the rule was intended to mean." *Kisor*, 588 U.S. at 570 (internal citations omitted). With *Kisor*, the Supreme Court established a five-factor test to determine when it applies. *Id*. To receive deference, the agency's regulatory interpretation must: (1) be an interpretation of a provision that is genuinely ambiguous; (2) be reasonable; (3) be the agency's authoritative or official position; (4) implicate the agency's substantive expertise; and (5) reflect fair and considered judgment. *Id*.

Here, the WTR expressly states the permit exemption "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i). EPA's long-standing interpretation of this regulation is that a pollutant is introduced when it is "added" into transferred water from the "outside world." 73 Fed. Reg. at 33,701. The levels of iron, manganese, and TSS being discharged into Crystal Stream would not be *introduced* to the Stream but for Highpeak's transfers from the outside world. R. at 5. Thus, the rule is clear on its face, and this Court need not go farther than the first element. But, even if this Court disagrees, EPA's interpretation satisfies those factors since it (1) is not only reasonable, but the bare minimum to prevent pollution; (2) reflects the authoritative position taken in agency publications contemporaneous with promulgation; (3) implicates EPA's substantive expertise; and (4) reflects

EPA's fair and considered judgment. As such, the district court did not err in affording EPA deference and concluding that Highpeak must obtain a permit. This Court should affirm that ruling.

A. This Court need not consider the question of EPA's deference since the WTR's plain meaning is unambiguous.

The WTR's final sentence is not genuinely ambiguous since the disputed regulation can be interpreted through traditional tools of statutory interpretation. In *Kisor*, the Supreme Court noted that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." 588 U.S. at 575. To do so, a court must "carefully consider the text, structure, history, and purposes of a regulation, in all the ways it would if it had no agency to fall back on." *Id*. at 576. One well-recognized method of interpretation is the plain meaning. *Id*. at 575. Under this method, courts read the regulation word for word, giving words their ordinary meaning. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017). If the plain meaning of the words used are not in doubt, the regulation then "just means what it means—and the court must give it effect, as the court would any law." *Id.*

Turning the CWA, the statute expressly prohibits "the discharge of any pollutant by any person" unless done in compliance with some provision of the Act, such as a NPDES permit provision. 33 U.S.C. §§ 1311(a), 1342. Under the NPDES, a party must acquire a permit to discharge unless the discharge qualifies for an exemption. *Id.* at § 1342. Currently, the WTR provides *most* water transfers such an exemption. 40 C.F.R. 122.3(i). But, the WTR expressly directs that exempt transfers are those made "without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id.* Even more plainly, the following sentence states "this exclusion ***does not apply*** to pollutants ***introduced*** by the water transfer activity." *Id*. (emphasis added).

Here, there is no genuine ambiguity of this rule as required by *Kisor* to even entertain Highpeak's competing interpretation. Employing the plain meaning method to interpret the ordinary meaning of "introduce" makes it clear that if a transfer adds—i.e., introduces—pollutants, it does not qualify for the WTR exemption. Not only are Highpeak's transfers adding water with "significantly higher levels" of iron and manganese and "much higher concentration[s]" of TSS, the poorly constructed tunnel is adding an additional 2-3% of these pollutants to the water before dumping it into the Crystal Stream. R. at 5. This activity clearly violates the plain meaning of the WTR to exclude transfers "introducing" pollutants from eligibility for the exemption.

Highpeak disagrees, contending the "introduction" of pollutants must result from human activity, not natural processes like erosion. *Id*. at 11. Nothing in the plain language of the rule supports that interpretation. 2-3%, at the very least, of the pollutant levels being introduced are the result of Highpeak's "human activity" of choosing to only partially use metal conduits in its tunnel and carve the rest through rock and soil. *Id*. at 4, 12. Thus, even under Highpeak's asserted interpretation, and especially under the WTR's plain meaning, pollutants are being introduced by Highpeak's transfers in violation of the WTR. Since there is no genuine ambiguity, the analysis should stop here, and this Court should affirm the district court.

B. EPA's interpretation that transfers that introduce additional pollutants are not exempt is reasonable since EPA has a responsibility to regulate water pollutants.

Even if this Court finds the final sentence of the WTR to be genuinely ambiguous, EPA's interpretation satisfies the second *Kisor* factor since it reasonably defines the alleged ambiguity. To be considered reasonable, the agency's interpretation must come within the zone of ambiguity the court identified after exhausting its interpretive tools. *Kisor*, 588 U.S. at 575. An interpretation is considered outside the zone of ambiguity if "no reasonable person could define the ambiguities at issue the way in which the agency's interpretation does." *Phillips*, 54 F.4th at 385.

As described above, the zone of ambiguity here is what the term "introduced by the water transfer activity" means. As referenced by the district court, EPA's interpretation of this alleged ambiguity is that water transfers not "operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred" do not qualify for the exemption. R. at 12 (*citing* NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33705 (June 13, 2003). Specifically, EPA stated that "where water transfers introduce pollutants to water through the structure into the receiving water, NPDES permits are required. *Id*. This interpretation is reasonable since it prevents contamination of the water being transferred by the structure facilitating the transfer. That explanation is exceedingly reasonable in light of the agency's responsibility to regulate water pollution under the CWA, thus, *Kisor's* second element is satisfied.

C. EPA's interpretation aligns with its official position since that position was published in the Federal Register.

EPA's interpretation satisfies the third *Kisor* factor since it is the official position of the agency. The official position factor of *Kisor* requires interpretations emanate from the agency head or equivalent final policymaking actors. 588 U.S. at 577. To satisfy this factor, *Kisor* states courts may defer to official staff memoranda published in the Federal Register. *Id*. at 577.

Here, EPA's interpretation was released with the final WTR in 2008. Fed. Reg. at 33,701. This release, alone, constitutes the needed authoritative position. But, an official press release from EPA, published mere days before the final WTR, also makes clear "[p]ollutants introduced by the water transfer activity itself to the water being transferred would still require an NPDES permit under [the] rule." EPA Reaffirms Clean Water Permits Not Needed For Water Transfers, 2008 WL 2333165, (June 9, 2008). These contemporaneous positions, distributed by EPA in its official capacity, demonstrate an "authoritative position" needed to satisfy the third *Kisor* element.

D. EPA's interpretation implicates its substantive expertise because it is the everyday administrator of the CWA.

EPA's interpretation satisfies the fourth *Kisor* factor since it involves the agency's substantive expertise. As explained in *Kisor*, agencies typically "have a nuanced understanding of the regulations they administer," such as when a regulation is technical or implicates policy expertise. 588 U.S. at 578. This element is only left unsatisfied "when the subject matter of the dispute is distant from the agency's ordinary duties" or "falls within the scope of another agency's authority.'" *Id*. (quoting *Arlington v. F.C.C.*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring)).

The subject matter of this dispute, whether Highpeak's discharge falls outside the scope of the WTR's exemption and requires a permit under the CWA, is entirely within the scope of EPA's duties and authority. EPA is the agency tasked with enforcing the CWA and promulgating rules to satisfy that duty. Notwithstanding CSP's argument that promulgation of the WTR exceeds that authority, neither CSP or Highpeak could make a good-faith argument that EPA is not the authority on the CWA and, thereby, the WTR. Thus, the fourth *Kisor* element is satisfied.

E. EPA's position that Highpeak's discharges fall outside the scope of the WTR is fair and considered since the interpretation supporting that position was made contemporaneously with the final rule.

Lastly, EPA's interpretation satisfies the fifth *Kisor* factor since the interpretation is a product of its fair and considered judgment. The last element of *Kisor* focuses on the timing of the agency's asserted interpretation. *Kisor*, 588 U.S. at 579. Specifically, the interpretation cannot result from a "post hoc realization" advanced merely as a convenient litigating position. *Id*. That concern arises when an agency substitutes one view of a rule for another. *Id*. These issues are avoided when the interpretation is "contemporaneous" with the rule's promulgation. *Id*.

Here, while CSP does not concede its arguments against the validity of the WTR, CSP does recognize that EPA's interpretation of that rule has been the agency's long-standing position. The

interpretation asserted by EPA was contemporaneous with the rule's promulgations. R. at 12. The press release issued mere days before the announcement of the final rule also confirmed the position the EPA still asserts today, sixteen years later. For these reasons, the fifth *Kisor* factor, and the test as a whole, is satisfied. This Court should affirm the district court and find Highpeak's discharges introduce pollutants in violation of the WTR's exemption and require CWA permitting.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the district court as to CSP's standing and the timeliness of CSP's WTR challenge.

Additionally, this Court should reverse the ruling of the district court as to the WTR's valid promulgation or, alternatively, find the rule does not apply and order Highpeak to seek a permit for its discharges.