Team 27

UNITED STATES COURT OF APPEALS
FOR THE TWELVTH CIRCUIT

C.A. No. 24-001109

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and HIGHPEAK TUBES, INC.,

Defendants-Appellees-Cross-Appellants.

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

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JURISDICTIONAL STATEMENT

In case No. 24-CV-5678, the United States District Court for the District of New Union denied Highpeak Tubes Inc.'s ("Highpeak") motion to dismiss the citizen suit under the Clean Water Act ("CWA" or "Act") but granted Highpeak and the United States Environmental Protection Agency's ("EPA") motion to dismiss the regulatory challenge. The district court had subject-matter jurisdiction over the citizen suit pursuant to 33 U.S.C § 1365(a) and subject-matter jurisdiction over the regulatory challenge under 5 U.S.C. §§ 702, 704. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292(b) as the Court granted Crystal Stream Preservationists, Inc. ("CSP"), Highpeak, and EPA's timely motions for leave to file interlocutory appeals.

ISSUES PRESENTED

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

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

III. Did the district court err when it upheld the Water Transfers Rule as validly promulgated, where the rule contradicted circuit courts' holdings that water transfers constitute a discharge of pollutants?

IV. Did the district court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act?

STATEMENT OF CASE

Clean Water Act

Congress enacted the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . ." 33 U.S.C. § 1251(a). In enacting the CWA, Congress set an ambitious goal to eliminate the discharge of pollutants into bodies of water by 1985. *Id.* § 1251(a)(1). The CWA bans "the discharge of any pollutant" except in compliance with other provisions of the Act. *Id.* § 1311(a).

The CWA defines discharge as "*any* addition of *any* pollutant to navigable waters from *any* point source." *Id.* § 1362(12) (emphasis added). Point sources are "any discernible, confined and discrete conveyance," including, for example, pipes or tunnels. *Id.* § 1362(14). Pollutants are defined broadly, covering materials such as sewage, garbage, and waste, but also heat, rock, and sand. *Id.* § 1362(6). Congress made clear that everyone must obtain a permit before discharging any pollutant into navigable waters. *See id.* §§ 1311(a), 1342(a); *Cty. of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 170 (2020) ("The Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so.") (emphasis in original).

The National Pollution Discharge Elimination System ("NPDES"), the cornerstone of the CWA[1], establishes a permit system managed by either EPA or states that have been delegated authority by EPA. *See* 33 U.S.C. §§ 1342(a)-(c), 1251(d). Each NPDES permit specifies the narrative and numerical limits on regulated pollutants and limits based on technology and water quality. 40 C.F.R. § 122.44. With a permit, an entity may discharge pollutants as long as the

[1] *N.R.D.C. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

discharge complies with the safe-harbor effluent limits. *See* 33 U.S.C. §§ 1311(a), 1314(b); *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992). In sum, an entity needs permission whenever it orchestrates the addition of pollutants from a point source into a body of water.

EPA Promulgates the Water Transfers Rule

Natural gas companies, water utility managers, and others attempted to argue that water transfers, which involve transferring water from one body of water to another, did not fall under the CWA's definition of discharge of pollutants. *See, e.g., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004); *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003). Circuit courts unanimously rejected the idea that water transfers did not constitute a discharge of pollutants. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

However, in 2008 EPA promulgated the NPDES Water Transfers Rule ("WTR" or "Rule"), which removed the entire category of water transfers from the CWA's unequivocal permit requirements. 40 C.F.R. § 122.3. Under the WTR, discharges from a water transfer do not require an NPDES permit. *Id.* § 122.3(i). "Water transfer," as defined by the WTR, means "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id.* However, in promulgating the WTR, EPA noted that the WTR exception does not apply "where water transfers introduce pollutants to water passing through the structure into the receiving water." NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).

Pollution of Crystal Stream

Highpeak runs a tubing company in Rexville, New Union. United States District Court for the District of New Union Order, dated August 1, 2024, at 3 (hereinafter "Order"). In 1992,

Highpeak built a tunnel about 100 yards long, connecting Cloudy Lake ("Lake") to Crystal Stream ("Stream"). *Id.* at 4. Highpeak releases water from Cloudy Lake into Crystal Stream for about half the year, from spring to late summer. *Id.*

The water contents of Cloudy Lake differ greatly from Crystal Stream. *Id.* at 5. The water of Cloudy Lake, as the name may suggest, appears cloudy and contains a significantly higher concentration of total suspended solids ("TSS"), iron, and manganese compared to the Crystal Stream water. *Id.* Crystal Stream, on the other hand, is fed by natural groundwater springs and naturally contains very low ambient concentrations of pollutants. *Id.*

Never, since the tunnel was built until now, has Highpeak applied for or obtained a CWA permit under the NPDES program ("NPDES permit"). *Id.* at 4. However, CSP has presented evidence showing that Highpeak's tunnel is polluting Crystal Stream with water from Cloudy Lake and from minerals accumulated in Highpeak's tunnel. *See id.* at 4-5. Water samples taken at the point where the tunnel discharges into Crystal Stream contained higher TSS, iron, and manganese concentrations than samples from the water intake at Cloudy Lake. *Id.* at 5. This suggests that as water flows through Highpeak's tunnel it picks up additional pollutants that are then discharged into Crystal Stream. *See id.*

Procedural History

Plaintiff CSP challenged Highpeak's discharge from the tunnel under the CWA. *Id.* at 4. CSP is a non-profit organization formed on December 1, 2023 dedicated to protecting Crystal Stream and its surrounding environment for "all future generations." *Id*; Jones Decl. ¶ 4. CSP's mission is to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." Jones Decl. ¶ 4. CSP's members have strong connections to Crystal

Stream by owning land near Highpeak's tunnel on Crystal Stream or regularly using the area for recreational pursuits. *See* Order at 4; Jones Decl.; Silver Decl.

One member, Cynthia Jones, has resided approximately 400 yards from a park that sits next to the Stream since 1997. Jones Decl. ¶¶ 5-6. After learning of Highpeak's discharges, Jones reduced her recreation in the Stream and is afraid to walk in the Stream. *Id*. ¶¶ 10, 12. Another CSP member, Jonathan Silver, moved to his house approximately one half mile away from the Stream and park in 2019. Silver Decl. ¶ 4. Silver regularly walks along the Stream with his children and dogs, but does not recreate in and around the Stream as much as he otherwise would because of Highpeak's discharge. *Id*. ¶¶ 5-6, 9. Silver would also let his dogs drink from the Stream if not for fear of pollution from Highpeak's discharge. *Id.* ¶¶ 7, 9.

CSP issued a CWA notice of intent to sue ("NOIS") on December 15, 2023. Order at 4. CSP alleged that Highpeak discharged pollutants into Crystal Stream without an NPDES permit. *Id.* CSP contended that Highpeak's tunnel constituted a point source under the CWA and by releasing water through the tunnel, Highpeak was discharging water with higher concentrations of TSS, iron, and manganese into Crystal Stream. *Id.* at 5. On December 27, 2023, Highpeak replied to CSP, denying any wrongdoing under the CWA and refusing to respond to the NOIS on the merits. *Id.*

On February 15, 2024, CSP filed a Complaint, which contained a challenge under the Administrative Procedure Act ("APA") and a citizen suit reasserting the claims in the NOIS. *Id.* In its regulatory challenge, CSP contended that EPA invalidly promulgated the WTR. *Id.* CSP argued that the WTR contradicts the plain language of the CWA, which requires permits for all discharges of pollutants. *Id.* Alternatively, CSP contended that even if the WTR was valid, the discharge from Highpeak's tunnel would still require a permit because pollutants are introduced

during the transfer process. *Id.* Thus, the WTR does not exempt Highpeak's discharge, and the company is in violation of the CWA by discharging pollutants into navigable waters without an NPDES permit. *Id.*

Highpeak and EPA moved to dismiss claims in the Complaint. First, Highpeak, joined by EPA, challenged CSP's standing for both the citizen suit and claim under the APA. *Id.* at 5-6. Highpeak and EPA argued that CSP's claim under the APA was brought outside the statute of limitations. *Id.* Highpeak also argued that CSP's citizen suit should be dismissed because first, the WTR was validly promulgated and second, the WTR exempts Highpeak's discharge from permitting requirements. *Id.* at 5. EPA sided with Highpeak in arguing that the WTR was validly promulgated. *Id.* at 6. However, EPA defended CSP's citizen suit, affirming that the WTR does not exempt Highpeak's discharge of pollutants into Crystal Stream. *Id.*

The district court issued its order on August 1, 2024, following two Supreme Court holdings regarding challenges under the APA. *See id.* at 6, 13. First, the Court issued a groundbreaking decision in *Loper Bright Enterprises v. Raimondo*, overturning the framework established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) that required courts to defer to an agency's reasonable statutory interpretation. *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2254, 2273 (2024). Additionally, the Court authored an opinion in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S. Ct. 2440 (2024), which clarified that the statute of limitations for which a party may sue under the APA begins to accrue when the party actually suffered an injury under the challenged agency action, not when the agency action first occurred.

In the order, the district court found that CSP had standing to bring both claims. *Id.* at 6. The court granted the motion to dismiss the regulatory challenge to the WTR. *Id.* In so holding,

the court concluded that the claim was timely filed, but that the WTR was validly promulgated. *Id.* at 8, 11. Finally, the court denied the motion to dismiss the citizen suit, rejecting Highpeak's argument that the "natural" introduction of pollutants is exempt from the permit requirement. *Id.* at 12. This appeal followed.

SUMMARY OF ARGUMENT

Although the district court was correct in its holding that CSP's citizen suit against Highpeak's illegal pollution discharges should proceed, it was incorrect in dismissing its challenge to the WTR. This Court should deny EPA's and Highpeak's motions to dismiss because CSP has standing to bring both claims, has timely filed its challenge to the WTR, and because EPA wrongfully issued the WTR in contravention of the Supreme Court's proper judicial interpretation of the CWA. Even if this Court upholds the WTR, however, the Rule does not exempt Highpeak from NPDES permitting requirements.

CSP has standing to bring its challenge to the WTR and citizen suit against Highpeak because its members have suffered cognizable injuries sufficient to obtain Article III standing. Several CSP members live and own property near Crystal Stream, and would recreate in and around the Stream but for Highpeak's illegal discharges. The Supreme Court has long held that such environmental harms are cognizable injuries conferring Article III standing. CSP has standing to bring a suit on its members' behalf because its members would have standing to sue in their own right, the interests are directly related to CSP's organizational purpose, and there is no requirement for individual participation in the suit. Although CSP was formed recently and has a small membership, these facts do not negate it and its members' real stake in the litigation and the harm they have suffered from Highpeak's illegal discharges.

Next, the Supreme Court was clear in *Corner Post* that the APA's 6-year statute of limitations does not accrue until the plaintiff is injured by final agency action. Because CSP was created less than 6 years ago, it could not have suffered injury when the WTR was finalized more than 6 years ago and is therefore entitled to its day in court and a right to sue under the APA. *Corner Post* did not provide any distinction between a non-profit entity and business association, and doing so would be contrary to the Supreme Court's intention. This court does not have authority to craft such a distinction. Furthermore, CSP member Johnathan Silver moved to his property less than 6 years ago and could not have suffered injury before August 2019. Silver's injury alone shows that CSP has the right to sue Highpeak under the APA on his behalf.

Next, the WTR was invalidly promulgated because it is inconsistent with the CWA. The WTR exempts water transfers from NPDES permitting requirements, even though the CWA clearly requires permits for all discharge of pollutants. Under the CWA's definition of the discharge of pollutants, a water transfer constitutes a discharge of pollutants.

The district court erred in deferring to the holdings issued after the promulgation of the WTR ("post-WTR cases"), instead of the many cases decided before the WTR ("pre-WTR cases") unanimously finding that water transfers are considered a discharge of pollutants. First, the pre-WTR cases based their decisions on the best reading of the CWA, the correct standard for judicial review under *Loper Bright*. The post-WTR cases relied on *Chevron* deference and only decided on a reasonable interpretation of the CWA, which is no longer relevant under *Loper Bright*. Second, a special justification exists for not placing weight in the post-WTR case holdings: the Court should reverse EPA's attempt, by promulgating the WTR, to sidestep the circuit courts' holdings. Third, EPA's interpretation of the definition of "discharge of pollutants"

deserves no judicial respect given the WTR's disregard for the plain meaning of the CWA and prior judicial interpretations.

Finally, EPA's interpretation of its own regulation and finding that Highpeak must obtain an NPDES permit should receive deference under *Auer/Seminole Rock*, a doctrine reflecting longstanding precedent that is codified in and consistent with the APA and that was undisturbed by the Supreme Court in *Loper Bright*. Deference to agency interpretations of their own regulations does not present the same concerns as deference to agency interpretations of statutes because an agency's contemporary interpretation of the regulations it writes best reflects their intended meaning, and because Congressional delegation of rulemaking authority to agencies means that there are fewer separation of powers concerns.

Further, the WTR is a prime example of a rule for which deference to agency interpretation is warranted. The WTR is an ambiguous regulation, and its interpretation calls for EPA's specialized expertise in water quality regulation. Further, EPA's interpretation here was established in the Federal Register notice of the final rule and reflects its consistent understanding of the rule developed contemporaneously to its promulgation.

Under EPA's interpretation of the WTR, Highpeak must obtain an NPDES permit because pollutants are introduced to the water during the process of the transfer. This is demonstrated by the outflow water from Highpeak's pipe containing higher concentrations of pollutants than the inflow from Cloudy Lake. Finally, even under Highpeak's interpretation of the WTR, it must obtain an NPDES permit because its shoddy construction and maintenance of the tunnel causes pollutants to be introduced into the Stream through human activity, not natural processes like erosion.

STANDARD OF REVIEW

A district court's grant or denial of a motion to dismiss is reviewed *de novo*. *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1004 (7th Cir. 2019). The reviewing court must accept the factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Id.* Under the APA, courts may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). *Auer/Seminole Rock* deference applies to review of an agency's interpretation of its own regulation, requiring the reviewing court to defer to the agency's interpretation unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 464 (1997); *see also Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945).

ARGUMENT

I. CSP has standing to bring its challenge against Highpeak's discharge and the Water Transfers Rule.

The district court correctly held that CSP has standing to bring its challenge to the WTR and citizen suit against Highpeak. CSP's members have suffered a cognizable injury from Highpeak's failure to obtain an NPDES permit, and the timing of CSP's formation does not negate this.

A. CSP satisfies Article III's standing requirements.

To meet Article III's standing requirements, plaintiffs must show that (1) they have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The standard of review for standing follows the stage of

the litigation. As discussed above, this Court must accept CSP's factual allegations as true and draw all reasonable inferences in its favor. *See Chaidez,* 937 F.3d at 1004. For standing purposes, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561.

An organization has associational standing, the right to bring a suit on behalf of its members, when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

First, CSP's individual members would have standing to sue in their own right under the test set forth in *Lujan*. In environmental cases, the relevant injury is injury to the plaintiff, not necessarily injury to the environment. *Laidlaw*, 528 U.S. at 181. The Supreme Court has held that plaintiffs in environmental cases suffered injuries sufficient to demonstrate standing when they expressed desire to fish, wade, swim, picnic, walk, and birdwatch in and along specific areas of a river, but have not done so due to alleged pollutant discharges. *Id.* at 181-82. Here, CSP's members have demonstrated that they have suffered an actual injury in fact, fairly traceable to Highpeak's illegal discharges, that can be redressed by a favorable ruling. *See Lujan*, 504 U.S. at 560-61.

First, CSP members' injuries are concrete, which means "'real,' and not 'abstract.'" *See Spokeo Inc. v. Robins*, 578 U.S. 330, 340 (2016). Like the plaintiffs in *Laidlaw* who lived next to the river allegedly being polluted, CSP members live near the Stream and the Highpeak tunnel. Jones Decl. ¶ 5, Silver Decl. ¶ 4; *see Laidlaw*, 528 U.S. at 181-82; *see also Friends of the Earth,*

Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152-53, 156-57 (4th Cir. 2000) (describing a plaintiff who owned land four miles downstream from a facility that was allegedly unlawfully discharging pollution into waters as having suffered "precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act").

Like one *Laidlaw* plaintiff who stopped wading in and picnicking, walking, and birdwatching along the North Tyger River for fear of pollutant exposure, CSP member Cynthia Jones is afraid to walk in the Stream and would recreate more frequently in the Stream if not for Highpeak's discharges. *See* Jones Decl. ¶ 12; *Laidlaw*, 528 U.S. at 182. CSP member Jonathan Silver would also recreate more in the Stream if not for Highpeak's discharges, and has stopped letting his dog drink from the Stream due to his concern about pollution. Silver Decl. ¶¶ 7, 9. Silver's concern for his dog's health constitutes a sufficiently cognizable injury, as the Supreme Court has held that even a "purely esthetic" interest in animal well-being is "undeniably a cognizable interest for purposes of standing." *See Lujan,* 504 U.S. at 562-63. These injuries have occurred and continue to occur as Highpeak maintains its tunnel without a permit, so they are not "conjectural or hypothetical." *See id.* at 560.

Next, the injuries are particularized, which means it injures "a particular right of [the plaintiff's] own, as distinguished from the public's interest in the administration of the law." *See Perkins v. Lukens Steel Co.,* 310 U.S. 113, 125 (1940). Jones's and Silver's injuries are particular to their experiences as property owners living near the Highpeak tunnel. *See* Jones Decl. ¶ 5, Silver Decl. ¶ 4. As property owners who frequently spend time near the Stream and are regularly injured by the tunnel's pollution, they are seeking particularized relief and not "relief that no more directly and tangibly benefits [them] than it does the public at large. . . ." *See Lujan,* 504 U.S. at 573-74; *see also Gaston Copper,* 204 F.3d at 157 (holding that a plaintiff's owning

property and living four miles downstream of the alleged pollution source "unquestionably differentiate[s him] from the general public," and that the alleged discharges affect his concrete and particularized legal rights, "not some ethereal public interest").

Plaintiffs need not show "to a scientific certainty that defendant's effluent. . . caused the precise harms suffered by the plaintiffs" to meet the "fairly traceable" requirement. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992). Instead, plaintiffs must show that the defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.* at 980 (quoting *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc*., 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109, 112 L.Ed.2d 1100 (1991). Since Highpeak discharges cloudy water from the Lake into the Stream, which is the kind of discharge that would cause or contribute to the Stream's water becoming cloudy, CSP's injury is fairly traceable to Highpeak's actions. *See id.*; Silver Decl. ¶ 6.

Finally, the injuries are redressable because requiring Highpeak to obtain a permit establishing limits to the amounts of pollutants it may discharge into Crystal Stream is likely relieve CSP's members' injuries. *See Lujan*, 504 U.S. at 561. Although standing is "'substantially more difficult' to establish" for plaintiffs who are not the regulated party challenging regulatory action or inaction, *id.* at 562, CSP here has met the Constitutional bar for redressability. Unlike the plaintiffs in *Lujan*, who challenged a general agency action without identifying any specific projects that judicial relief would affect, CSP here has identified a specific point source that is causing them harm. *See id.* at 568. Where striking down a rule in *Lujan* would not have redressed any of the plaintiffs' general claims of injury, here, striking down the WTR and requiring Highpeak to obtain a permit would directly relieve the injuries suffered by CSP's members. *See*

id. For the foregoing reasons, at least one CSP member would have standing to sue in their own right, and CSP satisfies the first prong of associational standing.

Next, CSP's interests in this suit are clearly germane to its purpose. *See Laidlaw*, 528 U.S. at 181. CSP's mission statement includes the goal to "protect the Stream from contamination resulting from. . . illegal transfers of polluted waters," which is precisely what CSP seeks to accomplish in this suit. *See* Jones Decl. ¶ 4. Finally, no parties contest that CSP's claims can be "properly resolved in a group context" and do not require individualized proof. *See Hunt*, 432 U.S. at 343. Therefore, CSP satisfies the requirements for associational standing.

B. CSP's age does not negate its standing because its members are suffering actual injury.

Further, CSP is a legitimate environmental nonprofit corporation whose members are suffering actual injury, not a mere litigation tool. Although an organization that "seems to have been formed specifically for the purpose of bringing an action" may be denied standing, *In re S. Afr. Apartheid Litig*., 617 F. Supp. 2d 228, 295 (S.D.N.Y. 2009), "an organization's standing is not simply a function of its age or fame. . . ." *Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985). Critical factors in determining standing for new organizations include if any of its members has a "personal stake" in the outcome of the litigation, as well as whether it conducts any other activities demonstrating its interest in the issue. *See A.L.V.A*., 765 F.2d at 939.

In *A.V.L.A.*, for example, the court held that the organization did not have standing to challenge an environmental impact statement prepared by the Navy because it failed to demonstrate any injury in fact its members would suffer should the Navy undertake its proposed action. *Id*. at 938. If A.L.V.A had shown that the challenged activity "would affect its members' aesthetic or ecological surroundings," the court noted that it may have met standing

requirements. *Id*. Here, CSP members have shown that Highpeak's illegal discharges negatively affect their aesthetic and ecological surroundings by preventing them from recreating in and around Crystal Stream. *See* Jones Decl. ¶ 12, Silver Decl. ¶¶ 7, 9. Further, although CSP's mission includes protecting the Stream from illegal transfers, its purpose goes beyond merely challenging this single tunnel. *See* Jones Decl. ¶ 4. The organization also seeks to protect the Stream from industrial contamination and to preserve and maintain it for all future generations, a mission that represents its legitimacy as an organization and interest in the issue. *See id*.

This Court need not look to the intent of CSP's members in forming the organization, nor does its age or the length of its membership rolls determine its standing. *See A.L.V.A.*, 765 F.2d at 939. Since its members have suffered cognizable injuries as a result of Highpeak's illegal discharges and its interests in this case are directly related to its organizational purpose, CSP has standing to bring this case.

II. CSP has the right to sue as the 6-year statute of limitations has not accrued.

An APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action, so CSP has a right to sue. *Corner Post,* 144 S.Ct. at 2443. The Supreme Court in *Corner Post* considered the timeframe to bring a claim under the APA and concluded that "a cause of action does not become complete and present—it does not *accrue*—until the plaintiff can file suit and obtain relief." *Id*. (emphasis in original). In this case, CSP was not formed until December 1, 2023. Jones Decl. ¶ 14. CSP did not sue Highpeak until February 15, 2024, so the 6-year statute of limitations did not accrue. *See id*.

The Court noted that "there are significant interests supporting the plaintiff-centric accrual rule, including the APA's basic presumption of judicial review, and our deep-rooted historic tradition that everyone should have his own day in court." *Corner Post,* 144 S. Ct. at

2443. CSP was formed in 2023 to protect Crystal Stream, and residents near Crystal Stream joined CSP to try and stop the discharge of pollutants into the stream. Jones Decl. ¶¶ 14-15. As in *Corner Post*, CSP did not exist prior to 2023 and therefore could not have suffered injury from Highpeak's unpermitted discharges until its formation. *See* Jones Decl. ¶ 14. Therefore, its suit in 2023 was timely. Plaintiffs deserve their day in court to litigate their legitimate concerns, and preventing an organization from challenging administrative actions that injure them based on a speculative reading of the APA's statute of limitations infringes on this privilege deeply rooted in American legal tradition. *See Corner Post* 144 S. Ct. at 2443; *id*.

Additionally, a nonprofit organization should not be treated any differently from a business organization for purposes of interpreting the APA and *Corner Post*. *See Corner Post,* 144 S. Ct. at 2443. While discussing the APA's 6-year statute of limitations, the Court noted that a "federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge." *Id.* at 2459. The Court here implied that new organizations should be able to challenge administrative agency actions, such as the WTR, as the organizations form and experience injury. *See id. Corner Post* did not distinguish between types of plaintiffs challenging agency actions, and an assumption that nonprofit organizations differ from business organizations would be inconsistent with the Supreme Court's holding that all plaintiffs deserve their day in court. *See id*. CSP is entitled to its day in court and should be able to challenge Highpeak under the APA. *See id*. This court does not have authority to craft any new distinctions between nonprofits and business associations when the Supreme Court declined to do so. *See id* at 2451. The Court cited several dictionaries while interpreting the APA's statute of limitations and was careful to define all ambiguous terms. *Id*. The Court's precision shows it intentionally chose not to distinguish between business and non-profit plaintiff organizations. *See id*.

Furthermore, even without *Corner Post*, CSP's action is still within the APA's 6-year statute of limitations because the statute of limitations would not accrue until a plaintiff moved to their property and suffered injury. *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015); *see also Southwest Williamson County Community Ass'n v. Slater,* 173 F.3d 1033 (6th Cir. 1999). In *Herr*, the court ruled that the APA's 6-year statute of limitations did not begin to run until the Herrs bought property, suffered injury, and subsequently sued under the APA. The court held that the statute of limitations for a plaintiff's association seeking relief on behalf of its members does not accrue [. . .] when "any member first became aggrieved." *Herr* 803 F.3d at 820. In this case, CSP member Johnathan Silver did not move to his home near Crystal Stream until August 2019. Silver Decl. ¶ 16. Therefore, CSP representing Silver could not have suffered injury until August 2019 at a minimum, which is within 6 years from when the suit was filed. *See id*. This means that even if the Supreme Court never decided *Corner Post*, CSP would still have a right to sue Highpeak under the APA on behalf of Silver alone. *See id*. Therefore, beyond *Corner Post* CSP is not barred by the statute of limitations as it represents a plaintiff who could not have been injured until 2019 at the earliest. *See id*.

III. EPA invalidly promulgated the Water Transfers Rule.

EPA invalidly promulgated the WTR because water transfers constitute a discharge of pollutants under the CWA. 33 U.S.C. § 1311(a). By exempting water transfers from permit requirements, the WTR blatantly contradicts the plain language in the CWA that requires permits for *all* discharges of pollutants without exception. *See id.* §§ 1311(a), 1342(a). Thus, EPA may not issue regulations that so clearly violate federal law and, consequently, imperil water quality across the country. *See* Jon Harris Maurer, *Exempting Water Transfers: Watering Down Clear*

Statutory Protections, 27 J. Land Use & Envtl. L. 383, 384 (2012) (noting that water transfers commonly involve funneling polluted water from one body of water to another).

Throughout the saga of water transfer cases, circuit courts had already decided that water transfers constitute a discharge of pollutants before the EPA promulgated the WTR. *Friends of Everglades*, 570 F.3d at 1217. In response to the CWA's clear environmental protections, natural gas companies, water utility managers, and others concocted the unitary waters theory to justify pollution caused by water transfers. *See, e.g., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004); *N. Plains*, 325 F.3d at 1163. According to the unitary waters theory, all navigable waters of the United States constitute one large body of water. *Miccosukee*, 541 U.S. at 106. Thus, transferring water from one navigable water into another would not be an "addition" under the discharge of pollutants definition in § 1362(12). *Id.*

Before the promulgation of the WTR, every single circuit court ruling on the unitary waters theory rejected this far-fetched interpretation. *Friends of Everglades*, 570 F.3d at 1217. Even the Supreme Court expressed skepticism over the unitary waters theory, noting that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Miccosukee*, 541 U.S. at 107. In rejecting the unitary waters theory, courts held that a water transfer constitutes a discharge of pollutants and thus requires an NPDES permit. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 80-82 (2d Cir. 2006) (*Catskill II*).

EPA–disregarding the courts' unanimous conclusions that water transfers require permits–brazenly promulgated the WTR, exempting water transfers from the permitting scheme. 40 C.F.R. § 122.3. In doing so, EPA effectively overturned the pre-WTR circuit court conclusions. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846

F.3d 492, 511, 533 (2d Cir. 2017) (*Catskill III*); *Friends of Everglades*, 570 F.3d at 1217-1218, 1228. After the WTR, courts were forced to reluctantly defer under *Chevron* to EPA's interpretation of water transfers. *See, e.g., Friends of Everglades*, 570 F.3d at 1227-28. *Chevron* required reviewing courts to defer to an agency's reasonable interpretation of a statute, "even if not the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Loper Bright*, 144 S. Ct. at 2264 (internal citations omitted).

In light of *Loper Bright* overturning *Chevron*, this Court should follow the pre-WTR cases and reject the decisions in the post-WTR cases which relied on *Chevron* deference. *See id.* at 2273. First, the Court should adhere to the pre-WTR cases, which delivered the most thorough judicial interpretation of the CWA, instead of the post-WTR cases hinging on *Chevron*'s now defunct reasonable interpretation standard. Second, restoring the status quo–before EPA essentially hijacked the courts' interpretation of the CWA–qualifies as a special justification to not abide by post-WTR holdings. Finally, EPA's interpretation of the CWA deserves no judicial respect under the framework laid out in *Loper Bright*. As such, the Court should follow the pre-WTR cases and find that water transfers constitute a discharge of pollutants.

A. The *Loper Bright* decision dictates that this Court should follow the pre-Water Transfers Rule cases which determined the best interpretation of the CWA, rather than post-Water Transfers Rule cases rubber-stamping a mere reasonable interpretation.

In compliance with *Loper Bright*, this Court should give weight to the pre-WTR cases instead of the post-WTR cases because only the pre-WTR cases discerned the best interpretation of the CWA. *Loper Bright* turns on the idea that courts must determine the best meaning of statutory text. 144 S. Ct. at 2266. The Court noted that "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Id*. Thus, this Court must follow the pre-

WTR cases which held that the best interpretation of the CWA requires finding that water transfers constitute a discharge of pollutants under the CWA. *See id*.

Every pre-WTR case correctly held that the best reading of the CWA, as found in the Act's plain meaning, necessitates finding that water transfers are considered a discharge of pollutants. *See Friends of Everglades*, 570 F.3d at 1217; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83; *N. Plains*, 325 F.3d at 1163; *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir.1996); *Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2d Cir.1991). Courts must abide by the plain meaning of a statute if "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)) (internal quotations omitted). The CWA defines a discharge of pollutants as "*any* addition of *any* pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Webster's Dictionary defined "addition" as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Thus, transferring water from one source to another squarely fits within the plain meaning of "addition." *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) (*Catskill I*); *see also Dubois*, 102 F.3d at 1297-99.

Further, viewing water transfers as a discharge of pollutants is completely consistent with CWA's goal of restoring and protecting American waters. *See* 33 U.S.C. § 1251(a); *Catskill II*, 451 F.3d at 87. Conversely, the WTR could lead to the "absurd result" that transferring water from a polluted, toxic lake to a pristine lake would not qualify as an addition of pollutants. *See Catskill II*, 451 F.3d at 81. Thus, the best reading of the CWA turns on the plain meaning of the

"discharge of pollutants" definition, which pre-WTR cases determined to include water transfers. *See Friends of Everglades*, 570 F.3d at 1217-18.

On the other hand, the courts that ruled on the question of water transfers after the WTR's promulgation all based their holdings on merely "reasonable" interpretations as mandated by *Chevron*. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 501 (2d Cir. 2017) (*Catskill III*) ("While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, *Chevron* tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant."); *Friends of Everglades*, 570 F.3d at 1227-1228 (recognizing that the reasonable interpretation is not necessarily the court's preferred interpretation). *Loper Bright* snuffed out the era of extreme deference to an agency's misguided interpretation, rather than ruling on the best interpretation. 144 S. Ct. at 2266. In deciding which set of cases to give weight, this Court should follow the pre-WTR cases, which found that the best interpretation of the CWA requires permits for water transfers.

B. A special justification–respecting the pre-WTR's holdings–exists for not giving weight to the post-WTR cases.

While *Loper Bright* cautioned against lower courts reconsidering cases that previously relied on *Chevron*, this Court need not abide by the holdings of post-WTR cases. The *Loper Bright* Court noted that holdings from prior cases that relied on *Chevron* remain lawful unless parties can show a "special justification" to overrule such holdings. 144 S. Ct. at 2273. While this reiteration of *stare decisis* was only non-binding dicta, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996), the Supreme Court has also recognized that *stare decisis* is not an "inexorable command" but a "principle of policy," allowing the Court leeway to correct "unworkable" or "badly reasoned" precedent. *Id.* at 63.

There is a special justification for not giving weight to post-WTR cases: restoring the status quo to before EPA forced courts to overturn the pre-WTR decisions. One of the bizarre consequences of *Chevron* was the outcome in *Brand X*, where the Court declared that an agency's reasonable statutory interpretation can trump a previous court's holding, as long as the prior court did not find the statute unambiguous. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*). *Brand X* drew criticism from many jurists and commentators, including from Justice Thomas who originally authored the opinion. *See Baldwin v. United States*, 140 S. Ct. 690, 690-91 (2020) (Thomas, J., dissenting from denial of certiorari); James Dawson, Note, *Retroactivity Analysis After* Brand X, 31 Yale J. on Reg. 219, 220 (2014) ("*Brand X* . . . has created a legal quagmire scarcely rivaled by any Supreme Court case from recent memory."). The *Loper Bright* Court remarked that *Brand X*'s holding "is the antithesis of the time-honored approach the APA prescribes" and "turns the statutory scheme for judicial review of agency action upside down." 144 S. Ct. at 2265. The *Brand X* decision allowed EPA's interpretation in the WTR to overrule the many courts that construed the CWA to require permits for water transfers.

Restoring the pre-WTR cases' holdings qualifies as a special justification to set aside the post-WTR holdings. Allowing EPA's interpretation of the CWA, as manifested in the WTR, to override the prior courts' holdings was poorly reasoned because EPA ignored judicial interpretation of the CWA's best meaning. *See* John Peckler, *Chevron to the Rescue: Should Chevron's Step Two Have Saved the Drowning Water Transfers Rule or Let It Sink?*, 21 Lewis & Clark L. Rev. 1201, 1242 (2017) ("Using *Chevron* deference, EPA was able to revive an interpretation from the grave. . . [*Chevron* deference] was not. . . intended to be a sword for agencies to use to push unsupported policy determinations at the expense of judicial review.")

Especially given the *Loper Bright* emphasis on the best reading of a statute, it makes little sense to allow EPA's outlandish workaround of judicial review to persist. *See* 144 S. Ct. at 2266. Just as in *Loper Bright* where the Court admonished the *Chevron* decision for failing to address the APA, the post-WTR cases failed to address the best meaning of the CWA. *See id.* at 2270. Consequently, this Court need not adhere to the incomplete holdings of post-WTR cases.

C. EPA's interpretation of the CWA deserves no deference under the *Loper Bright* framework.

After the fall of *Chevron*, EPA's faulty interpretation of the CWA warrants no more *Chevron* deference. *See Loper Bright*, 144 S. Ct. at 2273. Neither does EPA's interpretation deserve any significant judicial respect under the *Loper Bright* guidelines, which outlined two ways that agency interpretations may be entitled to respect. *Id.* at 2263, 2259. First, Congress may expressly delegate the power to interpret a statute to an agency. *Id.* at 2263. Second, the Court embraced the *Skidmore* schema, which held that an agency's interpretation is entitled to respect only as much as the interpretation's "power to persuade." *Id.* at 2259 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also* Cass R. Sunstein, *The Consequences of Loper Bright* 4 (July 8, 2024), https://papers.ssrn.com/abstract=4881501 (affirming *Skidmore* as the framework established in *Loper Bright*).

Here, Congress did not explicitly delegate EPA any interpretive powers over the CWA. A statute may "'expressly delegate' to an agency the authority to give meaning to a particular statutory term," direct agencies to "fill up the details," or use language that "leaves agencies with flexibility." *Loper Bright*, 144 S. Ct. at 2263. Nowhere in the CWA does Congress explicitly grant EPA the authority to choose which discharges are exempt from the permitting scheme. *See generally* 33 U.S.C. § 1362(12).

Next, EPA's interpretation of the CWA deserves no *Skidmore* respect. *Skidmore* instructs courts evaluating an agency's interpretation to consider "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.

The *Skidmore* factors all weigh in favor of affording no respect to EPA's interpretation of the CWA. In promulgating the WTR, EPA exhibited neither thoroughness nor valid reasoning, steamrolling the many judicial interpretations of the CWA finding water transfers constituted a discharge of pollutants. *See supra* Part III.A. While EPA may have demonstrated consistency in its interpretation of discharge of pollutants, *Catskill I*, 273 F.3d at 489-91, this factor does not justify affording judicial respect to the WTR, especially in light of the plain meaning of the discharge of pollutants definition. Even if the Court finds that the *Skidmore* factors warrant granting some respect to EPA's interpretation, an agency's interpretation does not have controlling power under *Skidmore*, 323 U.S. at 140. Therefore, the best interpretation of the CWA–as determined in the pre-WTR cases–must control here, not the incomplete reasoning of the post-WTR cases.

IV. Highpeak introduces pollutants during the water transfer and is outside the scope of the Water Transfers Rule, so it must obtain a permit under the Clean Water Act.

The district court correctly held that Highpeak must obtain an NPDES permit. Because *Auer/Seminole Rock* deference is still good law and the WTR is an instance where courts should defer to agency interpretations of their own regulations, EPA's interpretation of the Rule should control. Moreover, under either EPA's or Highpeak's interpretation of the WTR, Highpeak must obtain an NPDES permit.

A. EPA's interpretation of the WTR is entitled to a higher level of respect than Highpeak's.

i. *Auer*/*Seminole Rock* is still good law, even after *Loper Bright*.

An agency's interpretation of its own rules is the "ultimate criterion" in regulatory interpretation and is granted "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 46 (1997). This longstanding legal principle (hereinafter *Auer* deference) was reaffirmed by the Supreme Court in 2019 and was left untouched when the Court overturned *Chevron* deference in *Loper Bright*. *See generally Kisor v. Wilkie,* 588 U.S. 558 (2019); *Loper Bright*, 144 S. Ct. 2244. This Court should defer to EPA's interpretation of the WTR over Highpeak's because *Auer* has not been explicitly overturned; is, unlike *Chevron* deference, codified in and consistent with the APA; and applies in situations exactly like this, when agencies interpret ambiguous rules demanding technical expertise.

First, this Court should not assume that the Supreme Court overturned *Auer sub silentio*. When Supreme Court precedent has "direct application" in a case, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigues de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 484 (1989). This is true even if the applicable precedent "is in tension with 'some other line of decisions.'" *Mallory v. Norfolk Southern Ry.*, 600 U.S. 122, 136 (quoting *Rodrigues de Quijas*, 490 U.S. at 484). *Auer* is directly applicable to the present case, and the Supreme Court affirmed it as consistent with the APA only five years ago. *See Kisor*, 588 U.S. at 563. Since *Loper Bright* did not disturb this precedent, *Auer* (as clarified by *Kisor*) remains the law that must be applied.

Second, *Auer* is still good law because unlike *Chevron* deference, *Auer* deference is consistent with the APA. Section 706 of the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The *Loper Bright* Court held that *Chevron* deference conflicted with the APA's requirement that courts decide questions of law and interpret constitutional and statutory provisions. *Loper Bright*, 144 S. Ct. at 2261. *Auer* deference, however, "go[es] hand in hand" with the third circumstance considered in section 706: "determin[ing] the meaning or applicability of the terms of an agency action." *Kisor*, 588 U.S. at 582 ("[C]ourts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to 'determine the meaning' of a rule precisely by deferring to the agency's reasonable reading."). Since *Chevron* deference and *Auer* deference instruct courts to defer to agencies when answering different kinds of interpretive questions, the *Loper Bright* Court's reasoning for *Chevron* deference being inconsistent with the APA is inapplicable to *Auer* deference.

Further, there is good reason to treat questions of statutory and constitutional interpretation differently from interpretations of agency regulations, and to defer to agencies in the latter cases but not the former. When Congress delegates rulemaking authority to agencies, it "usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue." *Kisor*, 588 U.S. at 570. A component of an agency's regulatory authority, therefore, is "the power authoritatively to interpret its own regulations. . . ." *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991). Deference to agencies' interpretations of their own rules also does not present the "grave separation-of-powers problem" that *Chevron* deference's critics raised, as agencies have been delegated sufficient authority from Congress to

regulate and clarify those regulations. *See* Brief for Petitioners, *Loper Bright Enterprises v. Raimondo*, No. 22-451 42 (S. Ct. July 17, 2023) (hereinafter "*Loper Bright* Brief"). Finally, agencies are best placed to interpret their own regulations, as they "will often have direct insight into what the rule was intended to mean." *See Kisor*, 588 U.S. at 570. This is especially true when interpreting regulations that exist within a "complex and highly technical regulatory program," and when agency interpretations are "contemporaneous" with the regulation's issuance. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Kisor*, 588 U.S. at 570.

Third, *Auer* deference is consistent with the APA because in 1946 when Congress enacted the APA, section 706 was understood to "restate[] the present law as to the scope of judicial review." *Kisor*, 588 U.S. at 582 (quoting Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947)). The Supreme Court has held that the APA did not "significantly alter the common law of judicial review of agency action," which included *Seminole Rock* and its grant of "controlling weight" to agency interpretations of their own regulations. *See Kisor*, 588 U.S. at 582-83 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). Even the *Loper Bright* petitioners understood *Auer*'s historical grounding as distinguishing it from *Chevron* deference, noting that *Auer* deference "pre-dated the APA" whereas *Chevron* deference was "an innovation of the Eighties. . . ." *Loper Bright* Brief at 42. For these reasons, the Supreme Court's overruling of *Chevron* deference does not disrupt *Auer* deference's status as governing precedent.

ii. EPA's interpretation here is still entitled to greater respect under *Kisor*.

In *Kisor*, the Court set forth three considerations in determining whether to grant an agency's interpretation of its own regulations *Auer* deference: (1) the regulation must be "genuinely ambiguous," even after applying all of the "traditional tools" of construction; (2) the

interpretation must be reasonable, not arbitrary and capricious; and (3) courts must make an "independent inquiry" into whether the "character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 588 U.S. at 559. The *Kisor* majority was clear that when a regulation is ambiguous, courts are to presume that Congress intended agencies be delegated the power to interpret their own regulations. 588 U.S. at 569-70 (citing *Martin*, 499 U.S. at 151). Although this presumption is rebuttable, here, EPA's interpretation of the WTR satisfies all three conditions courts look to when determining if deference is appropriate. *See id.*

First, the regulation is "genuinely ambiguous": the WTR exclusion does not apply to "pollutants introduced by the water transfer activity itself," but the regulation is silent as to whether the exclusion covers *any* introduction of pollutants, or only introductions caused by *human activity*. *See* 40 C.F.R. § 122.3(i). The most traditional tool of statutory construction is to look to the plain language of the statute. *Nat. Res. Def. Council, Inc. v. Muszynski,* 268 F.3d 91, 98 (2d Cir. 2001). If the statute's (or, in this case, regulation's) text is open to more than one reasonable meaning, it is ambiguous and courts turn to canons of statutory construction. *Id.* Here, there is more than one reasonable interpretation of what "pollutants introduced by the water transfer activity" means. One traditional canon of construction is that provisions should be interpreted in the context of the statute as a whole. *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000). The WTR is only two sentences long and does not define any of its terms, and the CWA more broadly does not define the scope of water transfer activities, leaving the regulation ambiguous even when viewed within the statutory and regulatory scheme as a whole. *See* 40 C.F.R. § 122.3(i).

Second, EPA's interpretation that any introduction of a pollutant during a transfer results in the exclusion not applying is reasonable. The rule does not describe the cause of the

introduction that makes the WTR's exclusion no longer apply, so EPA's declining to read in words that are not present in the regulatory text is not arbitrary and capricious. *See id*. Further, the CWA's purpose is to eliminate the addition of pollutants to water, 33 U.S.C. § 1251(a), and it is reasonable for EPA to require permits when human infrastructure that transfers water from one water body to another results in the addition of pollutants to the water.

Third, the *Kisor* Court set forth guidelines for determining whether the agency's interpretation is entitled to "controlling weight": the interpretation must be the agency's "authoritative" or "official position," not an ad hoc statement; it must implicate the agency's substantive expertise; and it must reflect "fair and considered judgment," not a "convenient litigating position," "post hoc rationalization," or a new interpretation that creates an "unfair surprise" for regulated parties. *Kisor*, 588 U.S. at 577-79.

These factors all point toward giving EPA deference to its interpretation of the WTR. EPA's interpretation is that an NPDES permit is required "where water transfers introduce pollutants to water passing through the structure into the receiving water." 73 Fed Reg. at 33,705. This interpretation originates from the Federal Register notice of the final rule, which is an "authoritative" statement of the agency's "official position" as to the interpretation of its regulations. *See Kisor*, 588 U.S. at 577 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 n.10 (1980)) (describing deference to agency interpretations published in the Federal Register as appropriate).

Second, the interpretation of what constitutes the introduction of pollutants into water fits squarely within EPA's substantive expertise in administrating highly technical rules protecting environmental quality. *See id.* at 578 ("Generally, agencies have a nuanced understanding of the regulations they administer. That point is most obvious when a rule is technical. . . ." (internal

citations omitted)); *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 395 (4th Cir. 1998) (describing the CWA as "complex and requir[ing] sophisticated evaluation of complicated data" that is within EPA's substantive expertise).

Finally, EPA's position is the longstanding product of its "fair and considered judgment," not one developed post hoc or that disrupts prior interpretations. *See id.* at 579. EPA's interpretation here originated when the rule was finalized in 2008, and therefore its application in this case does not disrupt prior interpretations or create an "unfair surprise" to the regulated (or potentially regulated) community. *See id*; 73 Fed Reg. at 33,705. This Court should defer to the way EPA has consistently interpreted its own regulation because the agency's position here is not merely a "convenient litigation position," but a product of its reasoned rulemaking and a contemporaneous expression of how the WTR's drafters understood the rule. *See Kisor*, 588 U.S. at 579; *Goffney v. Becerra,* 995 F.3d 737, 745 (9th Cir. 2021) (noting that this requirement "protects reliance interests associated with longstanding agency practices and interpretations," that "fair and considered judgment" does not require "an exhaustive interpretive discussion," and that "even an interpretation implicit in an agency's order" could constitute "fair and considered judgment"); (*Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 206 (3d Cir. 2019) (holding that an agency's interpretation of its own regulation reflected "fair and considered judgment" when it had been implemented by staff for more than forty years and was incorporated into a regulation).

Although *Kisor* narrowed the circumstances in which courts are to grant agency interpretations of their own regulations "controlling weight," EPA's interpretation of the WTR here is precisely the kind of regulatory interpretation the Court has described as deserving deference.

B. Highpeak needs an NPDES permit under both EPA and Highpeak's interpretation of the WTR because it introduces pollutants to waters during the course of the transfer activity.

i. Highpeak needs a permit under EPA's interpretation of the WTR.

In promulgating the WTR, EPA stated 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," and that NPDES permits are required when transfers "introduce pollutants to water passing through the structure into the receiving water. . . ." 73 Fed Reg. at 33,705. Further, EPA described the kind of natural introduction of pollutants that the WTR exempts from NPDES permitting as including changes in "chemical and physical factors such as water temperature, pH, BOD, and dissolved oxygen" that occur as water moves through dams or sits in a reservoir. *See id.* These changes occur by nature of water sitting or moving, not by the transfer itself (in this case, Highpeak's pipe). *See id.*

Highpeak has failed to operate its water transfer in a manner that prevents pollutants from being introduced into the receiving water: not only does transferring water from Cloudy Lake introduce pollutants into Crystal Stream, but the outflow into Crystal Stream contains higher concentrations of iron, manganese, and TSS than the intake water. *See* Order at 5. This demonstrates that Highpeak's shoddy construction and maintenance of the tunnel represents a failure to maintain and operate the transfer in a manner that ensures no pollutants will be added by the transfer itself. *See id.* at 12. Under EPA's interpretation of the WTR when promulgating the regulation, Highpeak must obtain an NPDES permit before discharging water into Crystal Stream. *See* 73 Fed. Reg. at 33,705.

ii. Even under Highpeak's interpretation of the WTR, it needs an NPDES permit.

Highpeak interprets the WTR to require an NPDES permit if pollutants are introduced to the water from "human activity," but not if they are added from "natural processes like erosion." Order at 11. Highpeak must obtain a permit even under this interpretation because its poor construction and maintenance of the tunnel is "human activity" that causes pollutants to be introduced into the water. *See id.*

If the water discharged into Crystal Stream from Cloudy Lake was contaminated at the level of Cloudy Lake as a whole, then the water transferred would be introducing pollutants that occur through "natural processes." *See id.* However, the water discharged into the Stream is more contaminated than the intake water, suggesting that the water is picking up pollutants as it travels through the Highpeak tunnel. *See id.* at 5. These pollutants are not the result of natural or "inevitable" processes such as erosion. Instead, they are the result of Highpeak's failure to construct and maintain its tunnel in a manner that ensures the transfer itself does not introduce new pollutants (such as, for example, installing an impermeable barrier or internal pipe through the length of the tunnel). *See* Order at 12, 73 Fed Reg. at 33,705. Under Highpeak's interpretation that the WTR's exemption to NPDES permitting does not apply to pollutants "result[ing] from human activity," Highpeak must still obtain a permit because its failure to do its due diligence in constructing and maintaining the tunnel is human activity that causes pollutants to be introduced to receiving water by the water transfer activity itself. *See* Order at 11, 40 C.F.R. § 122.3(i).

Therefore, although EPA's interpretation of the WTR should control, Highpeak must obtain an NPDES permit under either party's interpretation of the rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's finding that CSP has standing to bring suit, that its challenge was timely filed, and that its challenge against Highpeak may proceed as its introduction of pollutants through the transfer takes Highpeak out of the WTR's scope; and reverse the district court's upholding of the WTR as not arbitrary, capricious, or contrary to law.