Team No. 28

C.A. No. 24-001109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CRYSTAL STREAM PRESERVATIONISTS, INC.,
Plaintiff-Appellant-Cross-Appellee,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and HIGHPEAK TUBES, INC.,
*Defendants-Appellees-Cross-Appellants***.**

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

I. The Clean Water Act 2

II. The NPDES Water Transfers Rule 3

III. Crystal Stream and Highpeak Tubes, Inc. 4

IV. Proceedings Below 7

SUMMARY OF THE ARGUMENT 7

STANDARD OF REVIEW 10

ARGUMENT 10

I. This Court should find that CSP has Article III standing because it is suffering actual environmental injury at the hands of Highpeak's unpermitted discharges that can be stopped by enforcement of the CWA. 10

A. CSP is a legitimate organization suffering a concrete, particularized, and actual injury. 11

1. CSP suffered actual injury because multiple members have had their recreational use and enjoyment of Crystal Stream curtailed. 12

2. CSP is a legitimate not-for-profit corporation because it did not manufacture harm as an avenue for litigation. 13

II. This Court should find that CSP timely filed its challenge to the WTR because its injury occurred within six years "after the right of action first accrue[d]." 15

A. CSP timely filed its challenge to the WTR because the statute of limitations does not accrue until the plaintiff is injured, which could not have been until CSP's formation in December 2023. ... 15

B. Even if CSP could not reset the statute of limitations for an APA challenge, Mr. Silver, a CSP member, could not have been injured until moving to the area in 2019. 17

III. This Court should find the WTR is "not in accordance with law" because the EPA cannot regulate against the express requirements of the CWA.. 18

A. This Court should interpret the CWA in accordance with the pre-WTR precedents which rejected the unitary-waters theory. 19

B. This Court is not bound by *stare decisis* to the interpretation of "addition" upheld in cases after the WTR because "special justification" exists to deviate from precedent and doing so would not cause legal instability. 20

1. This Court should not afford the holdings of *Friends I* and *Catskills III* special *stare decisis* because Congress also did not correct courts' pre-WTR holdings. 21

2. This Court has special justification to deviate from the post-WTR precedents because their holdings create an unworkable legal standard. 23

i. The post-WTR holdings frustrate the purpose of the APA because they remove the Court's power to "decide all relevant questions of law." 24

ii. The post-WTR holdings frustrate the purpose of the CWA because unpermitted, polluted water transfers do not "prevent, control and abate" water pollution. 26

iii. The post-WTR holdings create an unworkable legal standard because they frustrate the purpose of both the APA and the CWA..27

3. This Court would not create legal instability by deviating from precedent because other courts already analyzed the best interpretation of the Act, and this would not signal broad willingness to revisit *Chevron* precedents. 28

C. This Court should invalidate the WTR and reinstate the permitting requirement for water transfers to protect our Nation's waters. ... 30

IV. This Court should find that the district court properly held that Highpeak's discharge requires an NPDES permit. 31

A. The EPA's interpretation of the WTR is entitled to *Auer* deference because the agency is interpreting its own regulation. 32

B. Highpeak's discharge requires an NPDES permit under the CWA because the tunnel conveys pollutants into the Stream during a water transfer. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Anderson v. Evans,

371 F.3d 475 (9th Cir. 2004). 18

Ashcroft v. Iqbal,

556 U.S. 662 (2009). 10

Auer v. Robbins,

519 U.S. 452 (1997). 9, 31, 32

Babbitt v. Farm Workers,

442 U.S. 289 (1979). 12

Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.,

522 U.S. 192 (1997). 16

Bell Atlantic Corp. v. Twombly,

550 U.S. 544 (2007). 10

Bowen v. Mich. Acad. of Fam. Physicians,

476 U.S. 667 (1986). 24

Boys Mkts., Inc. v. Retail Clerks Union, Loc.

770, 398 U.S. 235 (1970). 8, 23

C. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,

511 U.S. 164 (1994). 21

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,

273 F.3d 481 (2nd Cir. 2001). 4, 26, 33

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,

451 F.3d 77 (2d Cir. 2006). 4

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA,

846 F.3d 492 (2d Cir. 2017). 3, 4, 18, 25

CBOCS West, Inc. v. Humphries,

553 U.S. 442 (2008) 20

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,

467 U.S. 837 (1984). 25

Citizens to Pres. Overton Park, Inc. v. Volpe,

401 U.S. 402 (1971). 13

Clapper v. Amnesty Int'l USA,

568 U.S. 398 (2013). 8, 11, 14

Cnty. of Maui, Haw. v. Haw. Wildlife Fund,

590 U.S. 165 (2020). 31

Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.,

144 S. Ct. 2440 (2024). 8, 15

Dague v. City of Burlington,

935 F.2d 1343 (2d Cir. 1991). 34

Dubois v. U.S. Dep't of Agric.,

102 F.3d 1273 (1st Cir. 1996). 4

Food & Drug Admin. v. All. for Hippocratic Med.,

602 U.S. 367 (2024). 12

Friends of Everglades v. S. Fla. Water Mgt. Dist.,

570 F.3d 1210 (11th Cir. 2009). 4, 18, 25, 27, 34

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,

528 U.S. 167 (2000). 12, 13

Green v. Brennan,

578 U.S. 547 (2016). 16

Halliburton Co. v. Erica P. John Fund, Inc.,

573 U.S. 258 (2014). 20

Hertz v. Woodman,

218 U.S. 205 (1910). 20

Hunt v. Wash. State Apple Advert. Comm'n,

432 U.S. 333 (1977). 17

John R. Sand & Gravel Co. v. United States,

552 U.S. 130 (2008). 28, 29

Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wis. Empl. Rel. Comm'n,

427 U.S. 132 (1976). 23

Loper Bright Enters. v. Raimondo,

144 S. Ct. 2244 (2024). 3, 8, 9, 19, 20, 24, 25, 31, 32

Los Angeles v. Lyons,

461 U.S. 95 (1983). 11

Lujan v. Defs. of Wildlife,

504 U.S. 555 (1992). 11, 12

Marbury v. Madison,

1 Cranch 137 (1803). 19

Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgt. Dist.,

280 F.3d 1364 (2002). 4

Mohawk Indus., Inc. v. Carpenter,

558 U.S. 100 (2009). 1

Monsanto Co. v. Geertson Seed Farms,

561 U.S. 139 (2010). 11

Patterson v. McLean Credit Union,

491 U.S. 164 (1989). 8, 21, 23

Payne v. Tennessee,

501 U.S. 808 (1991). 8, 20

Rapanos v. United States,

547 U.S. 715 (2006). 21

S. Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians,

541 U.S. 95 (2004). 34

Sierra Club v. Morton,

405 U.S. 727 (1972). 12

Simon v. E. Ky. Welfare Rts. Org.,

426 U.S. 26 (1976). 13

Skidmore v. Swift & Co.,

323 U.S. 134 (1944). 19

Stoops v. Wells Fargo Bank, N.A.,

197 F. Supp. 3d 782 (W.D. Pa. 2016). 12, 14

TRW Inc. v. Andrews,

534 U.S. 19 (2001). 16

United States v. Morton Salt Co.,

338 U.S. 632 (1950). 24

United States v. Ottati & Goss, Inc.,

630 F. Supp. 1361 (D.N.H. 1985). 34

W. Org. of Res. Councils v. Zinke,

892 F.3d 1234 (D.C. Cir. 2018). 10

Whitmore v. Arkansas,

495 U.S. 149 (1990). 11

Wilderness Soc'y. v. U.S. Fish & Wildlife Serv.,

353 F.3d 1051 (9th Cir. 2003). 18

Statutes

28 U.S.C. § 1292(b) 1

28 U.S.C. § 1331 1

28 U.S.C. § 2344 16

28 U.S.C. § 2401(a) 8, 15

33 U.S.C. § 1251 *et seq.* 1, 2

33 U.S.C. § 1251(a). 2, 26

33 U.S.C. § 1251(a)(7) 2

33 U.S.C. § 1311 .... 20, 28, 29

33 U.S.C. § 1311(a) 2, 3, 4, 27

33 U.S.C. § 1342 .... 2, 3, 20, 28

33 U.S.C. § 1362(12) 2, 4, 20, 27, 28, 29

5 U.S.C. § 551 *et seq.* 1

5 U.S.C. § 702 15

5 U.S.C. § 706 .... 19, 24

5 U.S.C. § 706(2)(A) 8, 18, 30

Regulations

40 C.F.R. § 122.2 .... 2, 31

40 C.F.R. § 122.3(i) 10

National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule,
73 Fed. Reg. 33,697 (June 9, 2008) 3, 31, 33, 34

Constitutional Provisions

U.S. CONST. art. III, § 2 .... 1, 7, 10

Other Authorities

1972 U.S.C.C.A.N. 3668 26

STATEMENT OF JURISDICTION

On August 1, 2024, the United States District Court for the District of New Union, in case 24-CV-5678, dismissed Crystal Stream Preservationists, Inc.'s ("CSP") challenge to the validity of the Water Transfers Rule ("WTR") but denied the EPA's and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss the citizen suit on standing and timeliness grounds, as well as denying Highpeak's motion to dismiss the citizen suit against them based on allegations of Clean Water Act ("CWA" or "the Act") violations. The district court exercised subject matter jurisdiction under 28 U.S.C. § 1331 because the case presented questions of federal law. The controlling laws of the claims are the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*; the CWA, 33 U.S.C. § 1251 *et seq.*; and the U.S. Constitution, U.S. CONST. art. III, § 2. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). A circuit court has jurisdiction over a district court's non-final decision if the district court certifies and the circuit court agrees to an interlocutory appeal involving "a controlling question of law," for which prompt resolution "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 101 (2009). Parties timely appealed.

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing to challenge Highpeak's discharge and the NPDES 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 in holding that the Water Transfers Rule 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 Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the CWA?

STATEMENT OF THE CASE

I. The Clean Water Act

In 1972, Congress passed the CWA, 33 U.S.C. § 1251 *et seq.*, with the primary purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA utilizes two programs to address water pollution—point source and nonpoint source regulation. *Id.* at § 1251(a)(7).

The CWA restricts any discharges of pollutants if not in accordance with other provisions of the Act. *See* 33 U.S.C. § 1311(a). Among the other provisions is the National Pollutant Discharge Elimination System ("NPDES") permit program. *See* 33 U.S.C. § 1342. Under the NPDES program, "any addition of any pollutant or combination of pollutants to waters of the United States from any point source" must be permitted. 40 C.F.R. § 122.2. NPDES outlines a comprehensive strategy to regulate the direct discharge of pollutants from a point source into waterways. *See* 33 U.S.C. § 1342. A discharge is simply "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A direct discharge, defined as "discharge of a pollutant," includes "any addition of any pollutant or combination of pollutants to waters of the United States from any point source." 40 C.F.R. § 122.2 (internal quotes omitted). A point source is any "discernible, confined, discrete conveyance of pollutants into a navigable water," including ditches, conduits, channels, tunnels, and pipes. *Id.*

Thus, the CWA is an essential policy to limit pollutants and further the goals of water restoration and maintenance. NPDES permits are vital to protect water that would otherwise

remain untampered. By requiring permits for *any* addition of pollutants from a point source, polluters are held responsible for the destruction of the integrity of the Nation's waterways.

II. The NPDES Water Transfers Rule

In 2008, the EPA promulgated a regulation known as the NPDES Water Transfers Rule. R. at 8. Water transfers are defined as "engineered activit[ies] that divert[] a water of the U.S. to a second water of the U.S." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,704 (June 9, 2008). The EPA promulgated the final rule outlining an exception to the CWA:

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

Id. at 33,705.

The WTR states that 33 U.S.C. §§ 1311(a) and 1342, which prohibit unpermitted "additions" of pollutants, do not require permits for transfers of polluted waters from one "water of the U.S." to another. *Id.* at 33,699; *Catskill Mountains Chapter of Trout Unlimited, Inc. v EPA*, 846 F.3d 492, 504–05 (2d Cir. 2017) (*Catskills III*). In promulgating the WTR, the EPA reasoned that no "addition" of pollutants pursuant to 33 U.S.C. §§ 1311(a), 1342, and 1362(12) occurred because the pollutants added to the receiving body were already in the waters of the United States and thus transfers did not require an NPDES permit. *Catskills III*, 846 F.3d at 504–05. This approach is referred to as the unitary-waters theory. *Id.*

However, in the wake of the Supreme Court's *Loper Bright* decision, courts no longer have to give deference to an agency's interpretation of ambiguous statutes. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

Before the EPA promulgated the WTR, circuit courts routinely rejected arguments to interpret "additions" of pollutants to comport with the unitary-waters theory, conclusively stating that rejecting that theory was the best reading of the Act's permitting requirements. *See, e.g.*, *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (holding that a permit was required for a ski resort to transfer water from a river to a pond); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) (*Catskills I*) (holding that water transfers were "additions" under 33 U.S.C. §§ 1311(a) and 1362(12) applying *Skidmore* respect); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 83 (2d Cir. 2006) (*Catskills II*) (stating that "in the context of the Clean Water Act, the unitary-waters theory has no place" after applying *Skidmore* respect); *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgt. Dist*., 280 F.3d 1364, 1368–1369 (2002), *vacated sub nom. S. Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

However, in the post-WTR cases, *Friends I* and *Catskills III*, upon finding that the CWA's definition of "addition" of pollutants was ambiguous, the courts were bound by *Chevron* deference to the unitary-waters theory because it was a reasonable interpretation of the term. *See Friends of Everglades v. S. Fla. Water Mgt. Dist*., 570 F.3d 1210, 1223–28 (11th Cir. 2009) (*Friends I*); *Catskills III,* 846 F.3d at 520, 532–33.

Thus, the WTR, which was promulgated in a *Chevron* deference era, provided leniency in CWA water pollutant policies. However, in a post-*Chevron* epoch, there are questions as to if the WTR is a valid interpretation of the CWA.

III. Crystal Stream and Highpeak Tubes, Inc.

Highpeak owns a 42-acre parcel of land in Rexville, New Union where it has owned and operated a recreational tubing operation for the past 32 years. R. at 4. Cloudy Lake, a 247-acre

lake, lies on the northern border of the property and Crystal Stream ("the Stream" or "Crystal Stream") runs along the southern portion. *Id.* Crystal Stream is the waterway upon which Highpeak customers begin their tubing experience. *Id.* The parties have stipulated that both Cloudy Lake and Crystal Stream are waters of the United States. *Id.* at 4–5.

In 1992, the State of New Union granted Highpeak permission to construct a tunnel, four feet in diameter and 100 yards long, to connect Cloudy Lake and Crystal Stream. *Id.* The purpose of the tunnel is to use water from Cloudy Lake to increase the volume and velocity of Crystal Stream to enhance tubing recreation. *Id.* The tunnel was partially carved through rock and partially constructed using iron pipe with valves at the northern and southern ends to allow Highpeak employees to manage water flow from Cloudy Lake into Crystal Stream. *Id.*

New Union permits Highpeak to use the tunnel when the State determines that the water levels in Cloudy Lake are adequate to release water. *Id.* The water levels are normally high enough from spring to late summer due to seasonal rains. *Id.* New Union does not have a delegated CWA permitting program and thus the EPA issues CWA permits under NPDES. *Id.* However, Highpeak has never had or requested an NPDES permit for the discharge of waters from Cloudy Lake into Crystal Stream. *Id.*

Members of the Rexville community have noticed significant changes in Crystal Stream with Highpeak's continuous discharge from Cloudy Lake. *See generally* Jones Decl. & Silver Decl. Cynthia Jones, a Rexville resident whose house is approximately 400 yards from Crystal Stream Park, regularly walks along the trail at the edge of the Stream. Jones Decl. at ¶¶ 5–6. Jones is concerned and upset about Highpeak's discharging as it is making the otherwise clear water cloudy. *Id.* at ¶¶ 8–9. Jonathan Silver, who recently moved to Rexville in 2019, regularly walks his dogs and children along the Stream. Silver Decl. at ¶¶ 4–5. After learning about the

increased concentration of pollutants in the Stream, Silver is reluctant to allow his dogs to drink from the Stream or to recreate in the area. *Id.* at ¶¶ 6–9.

Jones and Silver are both members of Crystal Stream Preservationists, Inc., a not-for-profit corporation with 13 total members who all live in Rexville, New Union. R. at 4. CSP is interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." *Id.* CSP was formed on December 1, 2023. *Id.*

CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak, the New Union Department of Environmental Quality, and the EPA. *Id.* The NOIS alleged that Highpeak's tunnel constitutes a point source under the Act which regularly discharges pollutants into Crystal Stream without a permit. *Id.*

The NOIS was supported by water samples taken from Crystal Stream and Cloudy Lake demonstrating a higher concentration of iron, manganese, and total suspended solids in the water exiting the tunnel at Crystal Stream than in the water entering the tunnel at Cloudy Lake. *Id.* at 5. Compared to water at the intake of the tunnel from Cloudy Lake, the sampled water exiting the tunnel showed a total increased concentration of iron from 0.80 mg/L to 0.82 mg/L; a total increased concentration of manganese from 0.090 mg/L to 0.093 mg/L; and total increased concentration of suspended solids from 50 mg/L to 52 mg/L. *Id.*

After waiting the required sixty days, CSP filed its Complaint on February 15, 2024, including both a citizen suit claim and a claim under the APA, challenging the WTR as invalidly promulgated and not in accordance with the CWA. *Id.* CSP is engaged in ongoing litigation regarding the pollutants in Crystal Stream. *See id.* at 6.

IV. Proceedings Below

CSP filed its Complaint which included both citizen suit claims against Highpeak and a claim under the APA against the EPA. R. at 5.

The citizen suit alleges that Highpeak's tunnel was a point source under the Act, which was regularly discharging and continues to discharge pollutants into Crystal Stream without an NPDES permit. *Id.* at 4. The claim under the APA challenged the WTR as invalidly promulgated and inconsistent with the statutory language of the CWA. *Id.* at 5. CSP also alternatively argued that, even if the WTR were valid, Highpeak would require an NPDES permit due to the pollutants introduced during the water transfer. *Id.*

Highpeak and the EPA moved to dismiss the citizen suit on standing and timely filing grounds and further moved to dismiss CSP's challenge of the WTR under the APA. *Id.* at 5–6. However, the EPA agreed with CSP that Highpeak nonetheless needs a permit for the pollutants introduced to the water during its discharge. *Id.* at 6. The district court granted the motion to dismiss the challenge to the WTR but denied the motions to dismiss the citizen suit against Highpeak. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Highpeak's and the EPA's motions to dismiss for lack of standing and timeliness, as well as the motion to dismiss the citizen suit claim under the WTR. Further, this Court should reverse the district court's finding that the WTR was a valid exercise of the EPA's authority under the CWA.

The district court properly held that CSP has Article III standing. The United States Constitution furnishes federal courts with jurisdiction over "cases" and "controversies" arising out of federal law. U.S. CONST. art. III, § 2. Article III standing is established when an injury is

"concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). CSP members' enjoyment and recreation has been diminished at the hands of Highpeak's unpermitted discharging which is at odds with the CWA; therefore, CSP has grounds for Article III standing.

Additionally, the district court properly held that CSP timely filed its challenge to the WTR because CSP filed a challenge within six years of its formation. A civil action challenging a promulgated regulation must be filed within six years "after the right of action first accrues." 28 U.S.C. § 2401(a). Moreover, the statute of limitations to challenge an agency regulation does not accrue until the challenged regulation injures the plaintiff. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024).

Next, the district court erred in dismissing CSP's challenge of the WTR. A court must invalidate an agency action when the action is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A). In addition, courts can elect to deviate from precedent where there is "special justification." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The fact that a precedent relied on the *Chevron* framework alone does not create such "special justification." *Loper Bright*, 144 S. Ct. at 2273. But a court does have "special justification" to deviate from precedent when the precedent creates an unworkable legal standard. *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989); *Boys Mkts., Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 241 (1970) (holding that a precedent creates an unworkable legal standard when it "frustrates" rather than furthers the realization of an important policy goal of a statute). Courts must also exercise their "independent legal judgment" to determine the *best reading* of a statute; simply relying on an agency's permissible interpretation is now "not permissible." *Loper Bright*, 144 S. Ct. at 2266 (emphasis added).

This Court should invalidate the WTR following the Supreme Court's holding in *Loper Bright* because the WTR is not in accordance with the best reading of the CWA. First, this Court should reinstate the interpretations in the pre-WTR cases that disavowed the unitary-waters theory. Further, *stare decisis* does not protect the WTR and the circuit courts' precedents affirming it because they frustrate the purposes of the APA and the CWA. Finally, this Court's decision to deviate from the precedents and invalidate the WTR would not create uncertainty or signal a broad willingness to revisit cases decided under *Chevron*. This case fits into a narrow category of cases where courts have previously decided the best reading of a statute but then were forced to adhere to a merely permissible reading under the *Chevron* framework. Under the pre-WTR precedents, the WTR would allow unpermitted water transfers that are not in accordance with the CWA and the NPDES provision therein.

Further, the district court properly found that EPA's interpretation of the WTR is entitled to *Auer* deference. Agency interpretations are entitled to deference where the agency interprets its own regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Loper Bright*'s overruling of *Chevron* deference applies only to agency interpretations of legislative action; thus, *Loper Bright* does not impact the validity of *Auer* deference for an agency's interpretation of its own regulation. *See Loper Bright*, 144 S. Ct. at 2273; *Auer*, 519 U.S. at 461. The EPA promulgated the WTR. Therefore, the EPA's interpretation that water transfer activity can convey pollutants regardless of specific human activity or intent is entitled to deference. Thus, the district court properly applied *Auer* deference to require an NPDES permit for Highpeak's water transfer.

Lastly, Highpeak's transfer of water from Cloudy Lake pollutes Crystal Stream by depositing pollutants directly into the transferred water. Under the CWA, NPDES permits are required for any direct discharge of pollutants from a point source into waterways. 40 C.F.R.

§ 122.2. This requirement applies to water transfer activities where the transfer activity itself conveys pollutants into a waterway. 40 C.F.R. § 122.3(i). Highpeak's tunnel deposits iron, manganese, and suspended solids into the water passing through the structure, and therefore, the transfer activity itself pollutes the water.

STANDARD OF REVIEW

Appellate courts review a district court's grant or denial of a motion to dismiss *de novo*. *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1240 (D.C. Cir. 2018). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This requires more than a "sheer possibility" that the party acted unlawfully. *Id.*

ARGUMENT

I. This Court should find that CSP has Article III standing because it is suffering actual environmental injury at the hands of Highpeak's unpermitted discharges that can be stopped by enforcement of the CWA.

The district court properly held that CSP has Article III standing to challenge the WTR and bring the citizen suit against Highpeak because it is a legitimate environmental not-for-profit corporation whose members are suffering actual environmental injury from unpermitted discharges that should be regulated through the CWA.

Federal courts have jurisdiction over "cases" and "controversies" arising out of federal law. U.S. CONST. art. III, § 2.

To bring suit in federal court, a plaintiff must have Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (stating that a "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)).

The district court properly held that CSP has Article III standing because it is a corporation that has members suffering from actual environmental injury due to diminished recreational and aesthetic enjoyment. Further, the test requires fair traceability and redressability. Fair traceability and redressability are not at issue at the time of this appeal, and thus, only actual injury will be addressed. The water samples taken before and after intake in the tunnel provide traceable evidence of Highpeak's discharges being the cause of injury. Additionally, if the Court enforces NPDES permitting requirements, it will mitigate the present and future harm resulting from Highpeak's unpermitted discharges.

A. CSP is a legitimate organization suffering a concrete, particularized, and actual injury.

The district court properly determined that CSP is a legitimate organization suffering a concrete, particularized, and actual injury.

To demonstrate Article III standing, claimants must prove that they have sustained or are in imminent danger of sustaining direct injury that is "real and immediate as a result of the challenged official conduct." *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The Supreme Court has repeatedly stated that "threaten[ed] injury must be *certainly impending* to constitute injury in fact" and that "[a]llegations of *possible* future injury" are not sufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis in original) (internal quotations omitted); *see also Lujan*,

504 U.S. at 566–67; *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.").

Additionally, courts have found no constitutional injury if the corporation was formed for the sole purpose of creating an avenue for litigation. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 796–800 (W.D. Pa. 2016) (finding the plaintiff lacked standing by intentionally buying 35 cell phones to receive calls that violated the statute).

Here, CSP, as a legitimate not-for-profit organization, suffered concrete and particularized actual harm, providing for Article III standing.

1. CSP suffered actual injury because multiple members have had their recreational use and enjoyment of Crystal Stream curtailed.

CSP suffered concrete, particularized, and actual injury because many of its members have had their enjoyment of Crystal Stream diminished due to the increased pollutants.

The injury in question must affect the plaintiff personally and individually. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). In *Alliance for Hippocratic Medicine*, several pro-life doctors and associations sued the FDA to stop the sale and distribution of a new drug to terminate pregnancies. *Id.* at 372–73. The Court held that the plaintiffs did not have standing because none of the doctors or associations prescribed or used the regulated drug and thus did not suffer any direct injury. *Id.* at 392–93; *see also Sierra Club v. Morton*, 405 U.S. 727, 735, 739 (1972) (stating members must be affected aside from their "special interest" in the matter).

Plaintiffs adequately allege injury when an actively used area is affected aesthetically or recreationally and thus has its value lessened. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). In *Friends of the Earth*, a corporation was dumping large

amounts of pollutants into a local waterway which prevented citizens from using the area without fear of health risks. *Id.* at 175–77. The Court held that the plaintiffs had standing as the discharges were directly affecting their recreational, aesthetic, and economic interests, constituting an injury in fact. *Id.* at 183–84.

Here, the court properly determined that CSP suffered concrete, particularized, and actual injury because CSP's members had their enjoyment of Crystal Stream lessened.

CSP adequately alleged injury because Highpeak's unpermitted discharges lessened its members' aesthetic and recreational value of the Stream. Unlike the doctors and associations in *Alliance for Hippocratic Medicine*, and similar to the plaintiffs in *Friends of the Earth*, the members of CSP suffered actual injury. They are residents of Rexville and actively enjoyed Crystal Stream before they observed the effects of Highpeak's unpermitted discharging diminishing the safety and aesthetics of the area, causing concern when near the Stream.

Thus, CSP members' lessened recreational and aesthetic enjoyment of Crystal Stream is a concrete, particularized, and actual injury.

2. <u>CSP is a legitimate not-for-profit corporation because it did not manufacture harm as an avenue for litigation.</u>

CSP was not formed solely as an avenue to sue, as members have experienced demonstrable injuries, and the not-for-profit corporation was formed to protect members from further harm.

Courts acknowledge that an organization formed primarily to mount a legal challenge warrants additional scrutiny when determining standing. *See Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 44–45 (1976). *But cf.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (the Supreme Court was silent on standing as a threshold issue when discussing a citizens' organization that was created to challenge an agency action).

The standing of an entity formed to mount a legal challenge may be questionable if it cannot show how it is concretely affected by the challenged regulation. *Clapper*, 568 U.S. at 410–14. In *Clapper*, attorneys and organizations brought action against parts of the Foreign Intelligence Surveillance Act to declare sections regarding the surveillance of individuals unconstitutional. *Id.* at 401. The Court held that the plaintiffs did not have standing as they failed to demonstrate any concrete injury beyond "mere speculation." *Id.* at 410–14.

Further, an entity cannot manufacture harm to legitimize its standing. *See e.g., Stoops*, 197 F. Supp. 3d at 796–800. In *Stoops*, a prepaid cell phone customer brought action under the Telephone Consumer Protection Act against a bank that initiated numerous automated phone calls to try and reach a previous customer who used to have the cell phone number. *Id.* at 788–89. The court held that the customer did not have standing as they had intentionally purchased dozens of cell phones in the hopes of receiving calls that violated the statute, attempting to manufacture the conditions for their own injury. *Id.* at 796–800.

Here, the district court properly determined that CSP was legitimate as it suffered provable, concrete harm that was not sought out by the organization.

CSP members have felt the significant effects of Highpeak's unpermitted discharging on Crystal Stream. Unlike the plaintiffs in *Clapper*, CSP suffered injuries that were clear and present rather than just mere speculation of a potential injustice. In fact, the apparent and actual increase in pollutants has already caused many CSP members to detrimentally change their recreational habits along the Stream. Ms. Jones is now afraid to walk near the Stream because of the observed pollutants, and Mr. Silver now visits the Stream less frequently due to concerns about the health and safety of his dogs and children.

Further, unlike the consumer in *Stoops*, CSP did not manufacture injury but rather had harm thrust upon it. The corporation was born out of the will of citizens to protect a local, threatened resource for future generations.

Thus, CSP is a legitimate organization with concrete evidence of harm thrust upon its members and, therefore, has Article III standing.

II. This Court should find that CSP timely filed its challenge to the WTR because its injury occurred within six years "after the right of action first accrue[d]."

The court properly held CSP timely filed its challenge to the WTR because CSP filed a challenge within six years of its formation—when CSP could first suffer injury by the regulation.

A civil action challenging a promulgated regulation must be filed within six years "after the right of action first accrues." 28 U.S.C. § 2401(a). The APA allows for the challenge of an agency action when an entity is adversely affected by said action. 5 U.S.C. § 702. The statute of limitations for an APA challenge does not accrue until the plaintiff is injured by the challenged regulation. *Corner Post, Inc.* 144 S. Ct. at 2450.

The district court properly held that CSP was within the statute of limitations proffered by § 2401(a) for an APA challenge, as the corporation could only be harmed by the regulation after it was formed. Alternatively, even if CSP is beyond the statute of limitations for a regulatory challenge, one of its members has been injured by the WTR within the timely filing standard. Thus, there is clear and convincing evidence to justify the district court's holding.

A. CSP timely filed its challenge to the WTR because the statute of limitations does not accrue until the plaintiff is injured, which could not have been until CSP's formation in December 2023.

CSP's challenge to the WTR is timely as the statute of limitations for an APA challenge could not accrue until CSP's formation on December 1, 2023, when injury could first occur.

Regarding limitation periods, a right of challenge "accrues" when the plaintiff has a "complete and present" cause of action. *Green v. Brennan*, 578 U.S. 547, 554 (2016). A cause of action does not qualify as "complete and present" until the plaintiff can file suit and obtain some level of relief. *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment) (agreeing the statute of limitations should not commence until the party has the right to "apply for relief").

There is a clear basis to believe that Congress codified the traditional rule of limitation in § 2401(a), as none of the text diverges from the longstanding understanding of the term "accrues." *Green*, 578 U.S. at 554. Additionally, there is evidence that Congress does depart from the traditional limitation rule to focus on the defendant's actions, rather than the plaintiff's injury, if deemed necessary. *See* 28 U.S.C. § 2344 (permitting petitions for review only "within sixty days after its entry").

Here, applying the traditional definition of "accrues," CSP did not have a complete and present cause of action until it was formed—thus creating an avenue to "apply for relief."

While the EPA promulgated the WTR in 2008, outside of the APA's six-year filing limitation, CSP was formed on December 1, 2023. It is clear that Congress intended the statute of limitations to begin once a corporation harmed by an agency action was injured and could obtain relief. CSP's formation is the earliest that the WTR could have injured the corporation; this brings the challenge filed on February 15, 2024, within the six-year statute of limitations.

Thus, CSP timely filed its challenge to the WTR, as it could not have sustained injury until its formation on December 1, 2023.

B. Even if CSP could not reset the statute of limitations for an APA challenge, Mr. Silver, a CSP member, could not have been injured until moving to the area in 2019.

Alternatively, even if CSP could not reset the statute of limitations, Mr. Silver, a CSP member and recent transplant to Rexville, could not have been injured by Highpeak's unpermitted discharges until he moved to New Union four years before the action was filed.

A corporation has standing to bring suit on behalf of its members as long as it can allege that at least one of its members suffered injury as a result of the challenged action. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–343 (1977). The Court provides for corporate standing on behalf of a member when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343.

Here, CSP has standing to bring suit on Mr. Silver's behalf as he is a member of the corporation and has suffered injury as a result of Highpeak's discharges; this is able to reset the statute of limitations for an APA challenge.

CSP has standing through Mr. Silver as he has suffered immediate injury, thus allowing him to sue in his own right. First, Mr. Silver's injury is germane to the organization's mission of preserving and maintaining Crystal Stream, as he has had his enjoyment of the stream directly impacted and lessened by the unpermitted discharges. Next, Mr. Silver's relief is not individualized. Thus, Mr. Silver moving to Rexville in 2019 and suffering subsequent injury would place his claim within the six-year statute of limitations.

Therefore, CSP has a valid assertion of Article III standing for its challenge either from their date of formation—the first accrual of injury—or through Mr. Silver's personal injury, which have both occurred within the six-year statute of limitations for an APA challenge.

III. This Court should find the WTR is "not in accordance with law" because the EPA cannot regulate against the express requirements of the CWA.

The district court erred in holding that the EPA validly promulgated the WTR because the EPA allowing unpermitted discharges is not in accordance with the CWA.

An agency rule is invalid when it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A).

A regulation is not "in accordance with law" when it permits a party to participate in unlawful activities in reliance on an incorrect interpretation of a statute. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 480 (9th Cir. 2004); *Wilderness Soc'y. v. U.S. Fish & Wildlife Serv*., 353 F.3d 1051, 1067 (9th Cir. 2003) (en banc) (holding that an agency action was not in accordance with law when the action allowed a private party to violate a statute without an exception).

This challenge concerns two cases—the "post-WTR" holdings— in which two circuit courts upheld the WTR under the *Chevron* framework. *See, e.g.*, *Friends I*, 570 F.3d at 1227–28; *Catskills III*, 846 F.3d at 532–33.

The district court erred in holding that the EPA validly promulgated the WTR because courts are tasked with finding the best interpretation of statutes. The best interpretation of the CWA would classify water transfers as "additions" of pollutants. To achieve the desired outcome, this Court should adopt other circuit courts' interpretations of the CWA that held—under the correct level of deference—the best interpretation of the Act required courts to classify water transfers between distinct waters as "additions." Additionally, this Court is not bound by *stare decisis* to the precedents upholding the WTR because special justification exists to deviate

from those holdings and doing so would not create instability. In conclusion, because the best reading of the Act classifies water transfers as "additions," the EPA did not act in accordance with the law when they promulgated the WTR. Thus, the district court erred in holding that the EPA validly promulgated the WTR.

A. This Court should interpret the CWA in accordance with the pre-WTR precedents which rejected the unitary-waters theory.

Because the courts in *Dubois, Catskills I, Catskills II,* and *Miccosukee* found that water transfers were "additions" under the correct level of deference, this Court should adopt that interpretation of the Act.

The courts are tasked with saying what the law is. *See Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Congress stated that this duty extends to courts reviewing agency actions. 5 U.S.C. § 706. Courts must now exercise their "independent judgment" in determining the *best* reading of a statute. *Loper Bright*, 144 S. Ct. at 2273. In exercising judgment, courts should determine the best interpretation of the statute by giving weight to the agency's interpretation to the extent that it has "power to persuade." *Loper Bright*, 144 S. Ct. at 2267 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Here, this Court should find that the best reading of the Act classifies water transfers as "additions" based on the past precedents decided under the correct level of deference.

Other circuit courts have already found that classifying water transfers as "additions" is the best interpretation while applying the correct level of deference. Before the WTR, the courts in *Dubois*, *Catskills I*, *Catskills II*, and *Miccosukee* all interpreted the CWA without the shackles of *Chevron*. This left the courts free to exercise their independent legal judgment and expertise in statutory interpretation. Each court held that water transfers constitute "additions" of pollutants

after analyzing the plain text, purpose, context, and legislative history of 33 U.S.C. §§ 1311, 1342, and 1362(12). The consistency of the courts when allowed to apply their independent legal judgment shows that the best reading of the Act would classify water transfers as "additions" of pollutants and thus prohibit unpermitted transfers.

Thus, courts, when allowed to apply their independent legal judgment, have consistently arrived at the same conclusions. Therefore, this Court should uphold those precedents and hold water transfers constitute an "addition" of pollutants.

B. This Court is not bound by *stare decisis* to the interpretation of "addition" upheld in cases after the WTR because "special justification" exists to deviate from precedent and doing so would not cause legal instability.

This Court is not bound by *stare decisis* to the holdings of *Friends I* and *Catskills III* because "special justification" exists to revisit the question, and it would not create legal instability.

Courts may deviate from precedents decided under the *Chevron* framework when "special justification" exists. *Loper Bright*, 144 S. Ct. at 2273. Despite requiring such "special justification" to deviate from precedent, *stare decisis* is not an "inexorable command." *Payne*, 501 U.S. at 828; *see also Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis* [sic], though one tending to consistency and uniformity of decision, is not inflexible.").

The fact that a precedent relied on a statutory interpretation under *Chevron* deference alone does not constitute a "special justification." *Loper Bright*, 144 S. Ct. at 2273. Also, a mere shift in how courts interpret statutes does not justify overturning precedents. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). The "special justification" also needs to be more than an argument that the court merely decided the precedent incorrectly. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

Here, the Court has "special justification" to reexamine the interpretation of "addition" under the Act. As a threshold matter, the holdings of *Friends I* and *Catskills III* should not be afforded special *stare decisis* because while Congress has not corrected the EPA's interpretation in the WTR, Congress also did not correct courts' interpretations in their pre-WTR holdings. Next, the holdings in *Friends I* and *Catskills III* are now unworkable because the holdings frustrate the purposes of the APA and the CWA. Finally, this Court reverting to the pre-WTR precedents would not create legal instability because it would not signal to others that the courts are willing to rehear all *Chevron* cases, nor would it require a deep reconsideration as much as a reinstatement of the previous principle.

1. <u>This Court should not afford the holdings of *Friends I* and *Catskills III* special *stare decisis* because Congress also did not correct courts' pre-WTR holdings.</u>

Because Congress did not correct either the interpretation of "addition" offered by either the pre- or post-WTR precedents, this Court should not give special *stare decisis*.

Stare decisis may carry "special force" in areas of statutory interpretation when Congress remains free to correct a court's interpretation and does not. *Patterson*, 491 U.S. at 172–173.

However, courts should take "extreme care" in deciding to apply a heightened level of *stare decisis* on an agency's statutory interpretation because Congress had the power to invalidate the interpretation. *See Rapanos v. United States*, 547 U.S. 715, 749–50 (2006). In *Rapanos*, the Court refused to recognize congressional inaction as "deliberate acquiescence" to an agency's interpretation of the CWA. *Id.* at 749–50. The Court reasoned that absent "overwhelming evidence" that Congress wishes to abide by the interpretation, it is impossible to attribute inaction to acquiescence. *Id.* at 750; *see also C. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of

assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation.") (internal quotations omitted).

Here, the holdings of *Friends I* and *Catskills III* are not due special *stare decisis* because there is no "overwhelming evidence" that Congress's silence meant acquiescence.

First, the interpretations of "addition" found in *Friends I* and *Catskills III* are not due a heightened level of *stare decisis* on the basis that Congress was free to correct the interpretation if it believed it to be wrong. Like the statutory interpretation in *Rapanos*, the statutory interpretation here is not due a heightened level of *stare decisis* because many reasons exist as to why Congress did not correct the interpretation.

Further, the argument that the Court should give the post-WTR precedent a heightened level of *stare decisis* would also mean that the pre-WTR precedents would carry the same weight. The First Circuit concluded water transfers were "additions" pursuant to that provision in their *Dubois* decision, the logic of which other circuit courts affirmed. Congress, free to correct that court's interpretation, remained silent on the matter. Thus, since Congress has had the chance to either correct or endorse both interpretations of the CWA, this Court should not see Congress's lack of correction of the WTR as acquiescence to that interpretation requiring an elevated version of *stare decisis*.

Therefore, because Congress was faced with the opposite interpretation and remained silent, Congress's failure to correct the interpretation of addition advanced in the post-WTR cases is not "overwhelming evidence" of acquiescence. Thus, this Court should not give the holdings of *Friends I* and *Catskills III* any form of heightened *stare decisis*.

2. This Court has special justification to deviate from the post-WTR precedents because their holdings create an unworkable legal standard.

Because the holdings of *Friends I and Catskills III* frustrate the purpose of the APA and the CWA, they create an unworkable standard. Thus, this Court has "special justification" to deviate from those holdings.

A court has "special justification" to overrule a prior case when its precedent creates an unworkable rule. *Patterson*, 491 U.S. at 173.

A precedent creates an unworkable rule when the rule poses a direct obstacle to other laws fulfilling their purpose. *Id.* (citing *Boys Markets, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 240–41 (1970)). In *Boys Markets*, the Court overruled a past precedent interpreting a statute. 398 U.S. at 254–55. The Court reasoned that because the past interpretation stood in the way of the statute achieving its goal, *stare decisis* could not protect the precedent. *Id.* at 241; *see also Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wis. Empl. Rel. Comm'n*, 427 U.S. 132, 154 (1976) (overturning a past precedent interpreting a statute on the grounds that the interpretation "[did] not further but rather frustrate[d] realization of an important goal" of the statute's policy).

Here, the holdings in *Friends I and Catskills III* create an unworkable legal standard because they frustrate the purpose of both the APA and the CWA. First, the post-WTR precedents frustrate the purpose of the APA because, by requiring this Court to adopt a mere permissible reading of the CWA, the holdings deprive this Court of the duty to "decide all relevant questions of law" and "interpret . . . statutory provisions." Next, the post-WTR precedents frustrate the purpose of the CWA because the holdings pose an obstacle to the Act's purpose of "prevent[ing], control[ing] and abat[ing] water pollution."

i. The post-WTR holdings frustrate the purpose of the APA because they remove the Court's power to "decide all relevant questions of law."

Because the courts in *Friends I* and *Catskills III* stopped their analysis when they deemed the unitary-waters theory permissible, this Court should not be forced to claim that interpretation as the best interpretation. Doing so would frustrate the purpose of the APA, undermining this Court's duty to "decide all relevant questions of law" and "interpret . . . statutory provisions."

The purpose of the APA is to provide a check on agencies to prevent abuse of delegated powers. *See Loper Bright*, 144 S. Ct. at 2261 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)). This purpose reflects Congress's intent on maintaining a separation of powers. *See id.* at 2261 (citing *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670–671 (1986)). In total, the APA's purpose is to allow agencies to act within their delegated power and to task courts with determining the bounds of that power. *See id.* at 2261–62.

Thus, courts must "decide all relevant questions of law" and "interpret . . . statutory provisions." 5 U.S.C. § 706. In deciding questions of law and interpreting statutes, courts must exercise their "independent legal judgment" to determine the *best reading* of a statute. *Loper Bright*, 144 S. Ct. at 2266 (emphasis added) (overturning *Chevron* on the grounds that binding deference to an agency's permissible interpretation of a statute ran afoul of the 5 U.S.C. § 706). Simply deferring to an agency's permissible interpretation is now "not permissible" under the APA. *Loper Bright*, 144 S. Ct. at 2266 ("So instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.").

Before the Supreme Court's holding in *Loper Bright*, if a court found that the statute was ambiguous, and that the agency's reading of the statute was "permissible," then the framework

required the court to defer to the agency's interpretation. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, Inc., 467 U.S. 837, 842–843 (1984), *overturned by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). Under the *Chevron* framework, courts were bound to an agency's "permissible" interpretation, even when the court would have arrived at a different answer. *Loper Bright*, 144 S. Ct. at 2254.

The post-WTR holdings ended their analysis of the interpretation at permissible. *See, e.g.*, *Friends I*, 570 F.3d at 1227–28; *Catskills III*, 846 F.3d at 532–33.

In *Friends I*, the court used the typical tools of statutory interpretation to determine the statute was ambiguous as to whether water transfers were "additions" of pollutants. 570 F.3d at 1223–27. Bound by any "permissible" EPA reading, the court then briefly concluded that the unitary-waters theory was a permissible interpretation without indicating that it was the best. *Id.* at 1227–28.

Similarly, in *Catskills III*, the court's analysis was bound by the constraints of permissibility under *Chevron*. *Catskills III*, 846 F.3d at 532–33. Upon finding the language to be ambiguous, the court's analysis was constrained to the narrow question of permissibility. *See id.* at 532–33. The court concluded that they were bound to the unitary-waters theory by *Chevron* despite that it may not be the "best" or "most faithful" reading of the Act. *Id.* at 520, 533.

Here, this Court should not be bound by the holdings of *Friends I* and *Catskills III* because deferring to a permissible agency interpretation frustrates the judicial system's APA-prescribed duty to find the best interpretation of the statutes.

Following the post-WTR precedents would remove the court's ability to exercise independent legal judgment. Binding this Court to a merely permissible interpretation would prevent this Court from undertaking the requisite steps to find the best interpretation. In fact,

both the courts in *Friends I* and *Catskills III* expressed that, without the binds of *Chevron*, they may have come to a different conclusion. Further, the court in *Loper Bright* stated that upholding a merely permissible interpretation is now not enough; it is the job of the courts to interpret and restrain an agency to a statute's best reading. Thus, to protect the judiciary's role in agency action, this Court must exercise its own independent judgment to determine the best reading of the CWA and keep the EPA within those statutory bounds.

In conclusion, this Court should not be bound by the holdings of *Friends I* and *Catskills III* because requiring this Court to defer to those decisions would frustrate the purpose of the APA in maintaining the separation of powers.

ii. The post-WTR holdings frustrate the purpose of the CWA because unpermitted, polluted water transfers do not "prevent, control and abate" water pollution.

Because the post-WTR precedents pose a direct obstacle to the purpose of the CWA, the holdings create an unworkable standard. Thus, this Court has "special justification" to deviate from those cases.

The purpose of the CWA, since its inception, has been to "to prevent, control and abate water pollution." 1972 U.S.C.C.A.N. 3668, 3669; *see also* 33 U.S.C. § 1251(a). Exempting water transfers from NPDES would be contrary to that goal. *See Catskills I,* 273 F.3d at 494 ("Artificially transferring water and pollutants between watersheds . . . might well interfere with that integrity . . . . "). The court in *Catskills I* held that the unitary-waters theory was not the best reading of the CWA. *See id.* at 494. The court reasoned that, because the unitary-waters theory would allow the transfer of water from heavily polluted to pristine waters without a permit, the theory was inconsistent with the purpose of the CWA. *See id.* at 493; *see also Friends I*, 570

F.3d at 1226 ("[W]e might agree . . . that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act.").

Here, the holdings of *Friends I* and *Catskills III* create an unworkable legal framework because they pose an obstacle to the Act's purpose of "prevent[ing], control[ing] and abat[ing] water pollution."

The post-WTR precedents frustrate the purpose of the CWA because they allow polluters to transfer pollutants to otherwise untainted waters. Simply because one body of navigable water in the Nation is polluted does not mean that all others should suffer the same fate. The unitary-waters theory would allow transfers from the most polluted bodies of water around this Nation to even the most pristine springs without a permit, so long as the polluter could say that it was merely a transfer. Tainting our cleanest waters does not further the purpose of the Act; it sits directly inapposite. Therefore, the unitary-waters theory is inconsistent with the purpose of the CWA, and this Court should hold that the readings of 33 U.S.C. §§ 1311(a) and 1362(12) most consistent with the statutory purpose of the Act reject the unitary-waters theory.

Thus, the holdings in *Friends I* and *Catskills III* create an unworkable standard because allowing unpermitted water transfers creates a direct obstacle to the Act's goal of preventing water pollution.

iii. The post-WTR holdings create an unworkable legal standard because they frustrate the purpose of both the APA and the CWA.

In conclusion, this Court has special justification to deviate from *Friends I* and *Catskills III* because they create an unworkable legal standard by frustrating the purposes of the APA and the CWA.

First, following those precedents creates an unworkable legal standard because they frustrate the purpose of the APA. Following those cases would prevent the courts from exercising their independent legal judgment and, instead, bind them to a merely permissible interpretation of 33 U.S.C. §§ 1311, 1342, and 1362(12). This would implicate the administrative separation of powers by binding the court to an agency's statutory interpretation, even though statutory interpretation is a judicial function.

Next, following those precedents creates an unworkable legal standard because doing so would frustrate the purpose of the CWA. Because the purpose of the CWA is "to prevent, control and abate water pollution," and the WTR and the precedents upholding it would allow the unpermitted tainting of even our Nation's most pristine waters, this Court has special justification to deviate from the precedents and invalidate the WTR.

3. This Court would not create legal instability by deviating from precedent because other courts already analyzed the best interpretation of the Act, and this would not signal broad willingness to revisit *Chevron* precedents.

Because courts have already analyzed the best interpretation of the CWA, and the decision would not signal a broad willingness to overturn precedents decided under *Chevron*, this Court would not create legal instability by deviating from *Friends I* and *Catskills III*.

The purpose of *stare decisis* is to promote legal stability and avoid disruption, confusion, and uncertainty. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). In *John R. Sand*, the Court stressed that overturning precedent based on an idea that it is no longer "right" would disrupt the stability that *stare decisis* seeks. *Id.*

Overturning precedent may lead to further instability if a court's decision to do so reflects a broad willingness to reconsider others. *See id.* at 139. Further, the Court in *John R. Sand*

reasoned that showing a willingness to overturn cases may be seen as a signal that the court doors are open to reconsider other precedents as well. *Id.*

Here, this Court would not create instability by deviating from those cases relying on the WTR and deciding to follow the cases applying the correct level of deference because that decision will not create uncertainty, nor will it signal a willingness to reconsider other cases.

Not following the interpretation of "addition" in post-WTR precedents will not create instability or uncertainty because courts have already answered the question of whether the WTR incorporates the best meaning of 33 U.S.C. §§ 1311 and 1362(12). While sympathetic to the argument that revisiting precedent decided under *Chevron* will create legal instability, that is not the case here. Both the Second and Eleventh Circuits have held that the unitary-waters theory was not the best reading of the CWA under the appropriate standard of review. Therefore, this case would not require an in-depth and lengthy reconsideration as much as a reinstatement of a principle that stood for over a decade between the Second Circuit's decision in *Dubois* and when the EPA promulgated the WTR in 2008. Thus, courts faced with this question in the future will have a clear, reasoned guide to the best interpretation by applying the holdings of *Dubois*, *Catskills I*, *Catskills II*, and *Miccosukee*.

Additionally, this Court's decision to follow the precedent set by the pre-WTR interpretation would not signal a broad willingness to reconsider *Chevron* precedents because the scope of the decision would be narrow. This case belongs to a narrow subset of cases where courts have found the best reading of a statute under the correct level of deference to subsequently be bound to the opposite interpretation under *Chevron*.

Thus, revisiting the validity of the WTR and deciding to follow the precedents interpreting "addition" under *Skidmore* would not create legal instability, nor would it signal a broad willingness to reconsider other decisions relying on *Chevron*.

C. This Court should invalidate the WTR and reinstate the permitting requirement for water transfers to protect our Nation's waters.

In conclusion, this Court should reinstate the holdings of *Dubois*, *Catskills I*, *Catskills II*, and *Miccosukee* because those cases found that the best reading of the CWA prohibited unpermitted water transfers and rejected the unitary-waters theory under the correct standard of deference. Under those precedents, the WTR is not in accordance with the CWA, and therefore, this Court should invalidate the rule under 5 U.S.C. 706(2)(A). This decision would not show a willingness to reconsider precedents outside of that small subsection of interpretations, avoiding an open season for challenges to *Chevron* precedents.

Further, this Court is not bound by *stare decisis* to the post-WTR precedents because they create an unworkable legal standard under the *Loper Bright* framework. To hold otherwise would undermine this Court's statutory duty to determine the best reading of the CWA and pose a direct obstacle to the goal of the Act.

Finally, invalidating the WTR is the correct decision to protect the purpose of the CWA. Allowing polluters to taint this country's most pristine waters with unpermitted, polluted transfers simply because both bodies of water exist within our borders does not "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Therefore, this Court should invalidate the WTR as it is not in accordance with the best reading of the CWA.

IV. This Court should find that the district court properly held that Highpeak's discharge requires an NPDES permit.

Loper Bright does not impact the validity of *Auer* deference for an agency's interpretation of its own regulation. *Loper Bright*'s overruling of *Chevron* deference applies only to agency interpretations of legislative action. *See Loper Bright*, 144 S. Ct. at 2273; *Auer*, 519 U.S. at 461.

Under the CWA, "*any* addition of any pollutant or combination of pollutants to waters of the United States from any point source" must be approved by an NPDES permit. 40 C.F.R. § 122.2 (emphasis added) (internal quotes omitted); *Cnty. of Maui, Haw. v. Haw. Wildlife Fund*, 590 U.S. 165, 170 (2020).

"[W]here water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." 73 Fed. Reg. at 33,704. Water transfer activities are engineered systems of pumps, tunnels, or other "conveyances constructed to transport water from one water of the U.S. to another water of the U.S." *Id.*

The district court properly held that the EPA's interpretation of the WTR is entitled to *Auer* deference and that Highpeak needs an NPDES permit for its discharges into Crystal Stream. First, the EPA promulgated the WTR, and therefore, the EPA's interpretation is entitled to deference as a regulation. Further, Highpeak's water transfer activity directly pollutes Crystal Stream. Highpeak's tunnel itself introduces pollutants into the Stream during the transfer process by depositing iron, manganese, and suspended solids into the water passing through the structure, so an NPDES permit is required for Highpeak's discharge. Therefore, the district court was correct in denying Highpeak's motion to dismiss the citizen suit under the WTR.

A. The EPA's interpretation of the WTR is entitled to *Auer* deference because the agency is interpreting its own regulation.

The EPA's interpretation that the introduction of pollutants in a water transfer can occur from natural processes, like erosion, should be afforded *Auer* deference because the EPA is interpreting the WTR, its own regulation.

Agency interpretations are entitled to deference where the agency interprets its own regulation. *Auer*, 519 U.S. at 461. In *Auer*, the Court held the Secretary of Labor's interpretation at issue was controlling because the standard was "a creature of the Secretary's own regulations." *Id.* The Court reasoned that where the language of a regulation is ambiguous, courts should defer to the agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (internal quotes omitted).

However, where an agency interprets a statute, courts are not required to defer to the agency. *See Loper Bright*, 144 S. Ct. at 2273. In *Loper Bright*, the Court held that an agency's interpretation of a statute was not entitled to deference, calling statutory interpretation "exclusively a judicial function." *Id.* at 2258. The Court held that where an agency is interpreting a statute enacted by Congress, courts must exercise "independent judgment" in deciding whether an agency has acted within its statutory authority, and courts are not required to defer to the agency's interpretation in deciphering the statute's most accurate meaning. *Id.* at 2273. However, the Court did not decide that the deference afforded to the agency's interpretation of its own regulations should change. *See generally id.*

Here, the EPA's interpretation of the WTR is entitled to *Auer* deference because the EPA is interpreting its own regulation. The EPA drafted and promulgated the WTR. Like the regulation in *Auer*, the WTR is a "creature of the [EPA]'s own regulations;" thus, the EPA's interpretation is entitled to the same deference. This Court should not allow a layman's

interpretation by a corporation to circumvent the expert opinions driving the EPA's policy. The EPA's interpretation that water transfer activity can convey pollutants regardless of specific human activity or intent is entitled to deference.

Therefore, the district court properly applied *Auer* deference in its decision to require an NPDES permit for Highpeak's discharge of pollutants.

B. Highpeak's discharge requires an NPDES permit under the CWA because the tunnel conveys pollutants into the Stream during a water transfer.

Highpeak must obtain an NPDES permit for its discharge into the Stream because the tunnel directly adds pollutants to the water during the water transfer.

While exempting from NPDES requirements "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening . . . use," the WTR states that where a structure directly discharges pollutants into the transferred water during the transfer activity, NPDES permits are required. 40 C.F.R. § 122.3(i); 40 C.F.R. § 122.2.

Under the CWA, NPDES permits are required for any direct discharge of pollutants from a point source into waterways. 40 C.F.R. § 122.2. Direct discharge, defined as "discharge of a pollutant," encompasses "any addition of any pollutant or combination of pollutants to waters of the United States from any point source." *Id.* (internal quotes omitted). A point source is any "discernible, confined, discrete conveyance of pollutants into a navigable water." *Id.* This includes ditches, conduits, channels, tunnels, and pipes. *Id.* Under the CWA, conduits for water transfers "plainly qualif[y]" as point sources. *Catskills I*, 273 F.3d at 493.

The EPA has defined a water transfer as "engineered activity that diverts a water of the U.S. to a second water of the U.S." 73 Fed. Reg. at 33,704. Additionally, an "activity" is "any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances

constructed to transport water from one water of the U.S. to another water of the U.S." *Id.* Further, "[s]uch a system may consist of a single tunnel . . . ." *Id.*

The EPA has 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." *Id.* at 33,705. Merely transferring the water through a clean tunnel or other conduit would not require NPDES permitting, as this practice would not inherently lead to any addition of a pollutant by the point source. *See Friends I*, 570 F.3d at 1228; *S. Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004). In *Friends I*, the court held that a water transfer did not require an NPDES permit where, without adding new pollutants, the activity merely moved pollutants existing in one navigable water to another. *Friends I*, 570 F.3d at 1228. The court analogized their reasoning to the movement of marbles between buckets; if a bucket has four marbles and two are moved to a second bucket, there are still four marbles. *Id.* Similar logic was stated with approval by the Supreme Court. *See Miccosukee*, 541 U.S. at 110 ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.").

Where a point source facilitating a water transfer activity is itself contaminated and introduces new pollutants, an NPDES permit is required. *See United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1377, 1418 (D.N.H. 1985). In *Ottati*, the court held that the unintentional discharge of collected waste materials from a ditch into navigable waters required an NPDES permit. *Id.*; *see also Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (applying the same reasoning), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

Here, Highpeak is required to obtain an NPDES permit, as it is directly discharging pollutants into the stream by way of a point source.

Highpeak's tunnel "plainly qualifies" as a point source for purposes of pollutant discharge under the CWA, as tunnels are expressly listed as point sources in the statute. The tunnel's sloughing of pollutants into the water throughout the transfer activity constitutes direct discharge as an addition of pollutants.

Highpeak is not excluded from NPDES requirements because the water transfer activity itself introduces pollutants into the water through the transfer process. Here, the tunnel, which is engineered to divert water from Cloudy Lake to Crystal Stream, pollutes diverted water by leaking iron and other pollutants into the water during the transfer activity. The tunnel directly emits pollutants into the water during the transfer, as the water discharged into the Stream contained approximately 2–3% higher concentrations of pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day. To borrow the language of *Friends I*, while it is true that moving two marbles from one bucket to another is a simple transfer without an addition, in the present case, it is instead as if someone dropped a third marble into the bucket. Here, the pollutants have been introduced through an unfit tunnel that directly deposits iron, manganese, and suspended solids into the water.

Because Highpeak's tunnel is a point source depositing pollutants into a navigable body of water while performing a water transfer, Highpeak's discharge is not covered by the WTR and must obtain an NPDES permit.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Highpeak's and EPA's motions to dismiss for standing and timely filing; affirm the denial of Highpeak's motion to dismiss the citizen suit under the WTR; and reverse the grant of Highpeak's and EPA's motion to dismiss the challenge to the WTR.