Non-Measuring Brief
Team 29

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

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

-and-

HIGHPEAK TUBES, INC.,
Defendant-Appellee-Cross-Appellant.

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union granted Environmental Protection Agency's ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss Crystal Spring Preservationists, Inc.'s ("CSP") challenge to an EPA regulation promulgated pursuant to the Clean Water Act ("CWA") and denied Highpeak's motion to dismiss a CWA citizen suit. Opinion and Order entered August 1, 2024, by the honorable Judge T. Douglas Bowman in the United States District Court for the District of New Union, No. 66-CV-2019 ("R."). The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question), and 33 U.S.C § 1365 (CWA citizen-suit provision). Highpeak, EPA, and CSP each filed a timely motion for leave to file interlocutory appeals. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292(b), which provides courts of appeals jurisdiction over appeals from district court interlocutory when there is a "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Novel and difficult questions of first impression create a substantial ground for difference of opinion. *ICTSI Oregon, Inc. v. Int'l Longshore and Warehouse Union*, 22 F4th 1125, 1130 (9th Cir. 2022).

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the Clean Water Act and had standing to challenge 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 in holding that the Water Transfers Rule was a valid regulation

promulgated pursuant to the Clean Water Act?

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 THE CASE

I. The Clean Water Act

Congress passed the Federal Water Pollution Control Act Amendments of 1972, known as the Clean Water Act, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to eliminate "the discharge of pollutants into navigable waters." 33 U.S.C. §§ 1251-1387. To achieve this goal, the CWA makes it unlawful to discharge any amount of pollution into a water of the United States without a permit. 33 U.S.C. § 1311. Discharge of a pollutant is defined as "any addition of any pollutant or combination of pollutants to waters of the United States from any point source" and includes "surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2 (2023).

In 2008, EPA issued the Water Transfers Rule ("WTR") clarifying that water transfers between waters of the U.S. do not require National Pollution Discharge Elimination System ("NPDES") permits unless the transferred water is subjected to "intervening industrial, municipal, or commercial use" or pollutants are "introduced by the water transfer activity itself." 40 C.F.R. § 122.3(i) (2023). In justifying the WTR, EPA explained that while "transferred (and receiving) water will always contain intrinsic pollutants . . . the pollutants in transferred water are already in 'the waters of the United States' before, during, and after the water transfer," so there is no "addition" of a pollutant necessitating an NPDES permit. NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,701 (June 13, 2008). The WTR formalized the unitary waters theory, which

suggests that all waters of the U.S. constitute a single entity. Accordingly, under the WTR, if a transfer between two waters of the U.S. conveys pollutants, it does not result in an "addition" of a pollutant for purposes of the CWA. However, EPA made clear that an NPDES permits would still be required if the "conveyance itself introduces pollutants into the water being conveyed." NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,700 (June 13, 2008).

II. Cloudy Lake and Crystal Stream Water Transfer

Highpeak owns and operates a recreational tubing operation in Rexville, New Union. R. at 4. As part of the operation, Highpeak owns a 42-acre parcel of land in Rexville that is bordered on the north by Cloudy Lake and on the south by Crystal Stream. R. at 4. Highpeak launches its customers in rented innertubes on Crystal Stream. R. at 4. In 1992, Highpeak obtained permission from New Union to construct a tunnel across its property connecting Cloudy Lake to Crystal Stream. R. at 4. The tunnel is partially constructed with iron pipe installed by Highpeak in 1992 and partially carved through rock. R. at 4. The tunnel has valves at either end allowing Highpeak to regulate the flow of water from Cloudy Lake into Crystal Stream. R. at 4.

Cloudy Lake and Crystal Stream have different levels of pollutants to begin with, and the tunnel itself introduces additional pollutants. R. at 5. Highpeak's transfers through the tunnel increase the concentration of iron, manganese, and total suspended solids ("TSS") in Crystal Stream by 2 to 3 percent. R. at 5. The purpose of the water releases is to enhance recreational tubing on Crystal Stream. R. at 4. Although it is discharging pollutants into Crystal Stream, Highpeak has never had, nor sought, an NPDES permit. R. at 4.

CSP is a not-for-profit corporation formed on December 1, 2023 with thirteen members that all live in Rexville, New Union. R. at 4. The pollutants introduced by Highpeak have reduced the amount that CSP members recreate along the stream and have contributed to its

otherwise clear water becoming cloudy. R. at 14-17. Cynthia Jones and Jonathan Silver, both CSP members, submitted declarations detailing the harm Highpeak's discharges into Crystal Stream have caused them. R. at 14-17. Jones's enjoyment of Crystal Stream and her ability to appreciate its "crystal clear color and purity" have been lessened by Highpeak's discharges. R. at 14-15. Silver, who moved to Rexville in 2019, regularly recreated along Crystal Stream with his children and dogs upon moving to Rexville. R. at 16. His enjoyment of Crystal Stream has been lessened by Highpeak's discharges, causing him to recreate along the stream less often. R. at 16-17. Silver is less able to enjoy recreating with his dogs due to his concerns that they will be exposed to toxic chemicals from drinking the stream's polluted waters. R. at 16-17.

III. Procedural History

On December 15, 2023, CSP sent a notice of intent to sue ("NOIS") letter to Highpeak informing Highpeak that its tunnel constitutes a point source under the CWA and that its discharges of pollutants into Crystal Stream require an NPDES permit. R. at 4. On December 27, 2023, Highpeak sent CSP a reply letter stating that it did not need to respond to the NOIS on the merits and that Highpeak believes an NPDES permit is not required because the discharges are exempt from permitting requirements under the WTR. R. at 5.

CSP filed its Complaint on February 15, 2024, after waiting the required sixty days to bring a citizen suit. R. at 5. The Complaint challenges EPA's promulgation of the WTR under the Administrative Procedure Act ("APA"). R. at 5. Alternatively, the Complaint argues that even if the WTR is valid, an NPDES permit is still required because the addition of pollutants during the transfers mean that the WTR does not apply. R. at 5.

Highpeak moved to dismiss, arguing that CSP was time-barred from challenging the WTR. R. at 5. Highpeak also moved to dismiss the citizen suit for lack of standing, arguing that

CSP was created for the sole purpose of challenging Highpeak's discharges and therefore suffers no actual injury. R. at 5. Highpeak also argued that the Complaint failed to state a cause of action because the WTR was validly promulgated and as a result an NPDES permit was not required. R. at 5. EPA joined Highpeak's standing and timeliness arguments. However, EPA agreed with CSP that Highpeak's discharges require an NPDES permit. R. at 6.

The District Court held that: (1) CSP has standing to challenge the WTR promulgated by EPA and has standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the CWA; (2) CSP's regulatory challenge to the WTR was timely filed; (3) the WTR is a valid regulation promulgated pursuant to the CWA; and (4) CSP's citizen suit against Highpeak could proceed because Highpeak's discharges introduce additional pollutants into Crystal Stream during the transfer, thus taking the discharge out of the scope of the WTR. R. at 12. CSP agrees with the District Court's rulings on the first, second, and fourth holdings but appeals from the third holding, arguing that the District Court erred in holding that the WTR was a valid regulation promulgated pursuant to the CWA. R. at 2.

SUMMARY OF THE ARGUMENT

The District Court correctly held that CSP has standing to challenge Highpeak's discharges and the WTR. The three requirements of associational standing are met in this case: (1) CSP's members would have standing to sue in their own right; (2) protecting Crystal Stream is germane to CSP's purpose; and (3) the participation of CSP's members is not required in this lawsuit. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

At least two of CSP's members, Cynthia Jones and Jonathan Silver, would have standing to sue in their own right, as evidenced by their declarations. R. at 14-17. The recreational and aesthetic values of Crystal Stream for Jones and Silver are lessened because of Highpeak's

discharges. R. at 14-17. These harms are directly traceable to Highpeak's discharges as allowed by the WTR, and these harms would be redressed if this Court invalidates the WTR or holds that an NPDES permit is required for the transfers. Therefore, Jones and Silver would have standing under *Lujan v. Defenders of Wildlife*. 504 U.S. 555, 560-61 (1992). Their participation in this lawsuit is not required because CSP can adequately represent their interests in protecting Crystal Stream and the nature of the relief sought is not individualized to any of CSP's members.

This lawsuit is germane to CSP's purpose, which is "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." R. at 6. This lawsuit was filed to advance that purpose and therefore meets the requirement for associational standing from *Laidlaw*, 528 U.S. at 181. EPA and Highpeak's allegations that the lawsuit is not germane to CSP's purpose because of CSP's small size and the timing of CSP's formation in relation to the Supreme Court's opinions in *Corner Post* and *Loper Bright* is without merit. Small organizations are not subjected to increased requirements for associational standing, and the Supreme Court has previously granted standing to organizations formed solely for filing lawsuits. *Pennell v. San Jose*, 485 U.S. 1, 7 n. 3 (1988); *U.S. v. Students Challenging Regul. Agency Procedures (SCRAP)*, 412 U.S. 669, 670, 691 (1973).

The District Court correctly held that CSP filed a timely challenge to the WTR because CSP's cause of action accrued on the date it was formed. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court held that the APA's six-year statute of limitations begins to run at the time the individual plaintiff is injured by the regulation, not at the time the regulation is promulgated. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2451 (2024). CSP was formed on December 1, 2023, and therefore could not have been injured by the WTR before that date. R. at 4. As such, CSP is well within the six-

year statute of limitations set by the APA. 28 U.S.C. § 2401(a).

Even if this Court finds that *Corner Post* is inapplicable, CSP would still be well within the six-year statute of limitations because, as an association, CSP's cause of action accrues when its members are injured. *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016). One of CSP's members, Jonathan Silver, did not move to Rexville until 2019, and therefore could not have been injured by the WTR before 2019. R. at 4, 16. Silver's cause of action, imparted to CSP, is still within the APA's six-year statute of limitations.

This Court should not adopt the for-profit versus not-for-profit distinction proposed by Highpeak and EPA when interpreting whether entities have standing under the Supreme Court's decision in *Corner Post*. The Court's opinion in *Corner Post* uses broad language to describe the APA plaintiffs it applies to and makes no mention of limiting the holding to business entities. *Corner Post*, 144 S. Ct. at 2449-50. Further, this distinction would harm the public interest and undermine the APA by allowing agencies to escape challenges to the validity of their regulations when those regulations are favorable to for-profit entities.

The District Court erred in upholding the WTR because it misinterpreted the dicta in *Loper Bright*. The dicta in *Loper Bright* upholds cases that relied on *Chevron*, but those cases "are still subject to stare decisis despite [the] change in methodology." *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). To overturn previously decided *Chevron* cases, special justification is required—something more than an argument that the case was incorrectly decided. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted). Special justification exists to reconsider the WTR for three reasons: (1) the WTR is inconsistent with the overarching purpose of the CWA and specific NPDES provisions within the Act; (2) the overruling of *Chevron* has completely removed the conceptual underpinnings of the

Rule itself; and (3) the WTR ignores Supreme Court precedent that requires an NPDES permit for meaningfully distinct water bodies.

Prior to the passage of the WTR, courts unanimously concluded that a water transfer between distinct waters of the U.S. required an NPDES permit, rejecting EPA's interpretation to the contrary. *See Dubois v. U.S. Dept. of Agric., et al.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) (*Catskill II*). However, both the Eleventh and Second Circuits in upholding the WTR acknowledged that the unitary waters theory adopted in the WTR had a "low batting average" and was inconsistent "with the Clean Water's Act's primary objective." *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009); *Catskill Mountain Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 533 (2d Cir. 2017) (*Catskill III*).

Further, specific provisions in the CWA give states authority to set water quality standards for individual water bodies. This, as the Supreme Court noted in *South Florida Water Management District v. Miccosukee Tribe of Indians*, is "contrary . . . to the unitary waters theory." 541 U.S. 95, 107 (2004). Lastly, Supreme Court precedent requires an NPDES permit for meaningfully distinct water bodies. *Id.* at 112. The WTR is inconsistent with this precedent, which further demonstrates special justification for this court to reconsider the WTR and find it to be an invalid regulation.

The District Court correctly held that Highpeak's discharges require an NPDES permit because the pollutants introduced during the water transfers take Highpeak's discharges out of the scope of the WTR. The WTR "does not apply to pollutants introduced by the water transfer

activity itself to the water being transferred." 40 C.F.R. § 122.3(i). Applying tools of statutory construction, the scope of the WTR is unambiguous and does not encompass Highpeak's discharge because the water transfer activity (i.e., the tunnel) introduces pollutants to the water being transferred. Even if this Court finds the WTR ambiguous, EPA's interpretation of its own regulation is due *Auer* deference, which is unaffected by the holding in *Loper Bright*.

The WTR unambiguously does not allow transfers when pollutants are added during the water transfer activity, regardless of how those pollutants enter the water. Highpeak's argument that an "introduction" must require human activity is without merit. R. at 11. In explaining the WTR, EPA notes that an NPDES permit is required if the "*conveyance itself* introduces pollutants into the water being conveyed." NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,699-33,700 (June 13, 2008) (emphasis added). Passive processes, in addition to human activity, can qualify as an introduction of pollutants. This reading is consistent with other regulations implementing the CWA and ensures that claims of exemption from permitting requirements are narrowly construed consistent with the broad pollution prevention mandate of the CWA. *See* 40 C.F.R. § 122.2 (1981); *North California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

Cases applying the WTR have similarly recognized that the passive introduction of pollutants during a water transfer takes the transfer out of the scope of the WTR. *See Bang v. Lacamas Shores HOA*, 707 F.Supp.3d 1013, 1023 (W.D. Wash. 2023); *Na Kia'i Kai v. Nakatani*, 401 F.Supp.3d 1097, 1109-10 (D. Hawaii 2019). It does not matter *how* the pollutants find themselves in the water being transferred. It merely matters *whether* pollutants that were not present in the original waters of the U.S. (i.e., Cloudy Lake) are discharged into receiving waters of the U.S. (i.e., Crystal Stream). Since that is the case here, the WTR does not apply.

Even if this Court finds the WTR ambiguous, EPA's interpretation is entitled to *Auer* deference because it is reasonable, is an official agency position, implicates substantive expertise, and reflects fair and considered judgment that does not create an unfair surprise. *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Loper Bright* does not impact the level of deference accorded to an agency's interpretation of its own regulations because the decision only addressed an agency's interpretation of a Congressional statute. *Loper Bright*, 144 S. Ct. at 2261. Further, interpreting the application of regulations often involves questions of fact, rather than pure questions of law, which should be left to expert agencies to decide. Here, whether pollutants are "introduced" by a water transfer activity involves assessing facts about the presence of pollutants in the water transfer and when those pollutants entered the water. This is not a question of law that should be left for courts to decide.

STANDARD OF REVIEW

The District Court erred as a matter of law when it granted Highpeak's and EPA's motions to dismiss CSP's challenge to the WTR. Thus, this Court should review the decision *de novo*. *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1354 (Fed. Cir. 2017); *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939, 945 (D.C. Cir. 2013) ("[b]ecause this case comes to us on an appeal from a motion to dismiss, we review the District Court decision *de novo*"). A district court's legal determinations are entitled to little or no deference. *Howard*, 720 F.3d at 945. To survive a motion to dismiss, plaintiffs must plead "enough facts to state a claim that is plausible on its face" and that rises "above the speculative level." *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

ARGUMENT

I. CSP has standing because CSP's members would have standing to sue in their own right, the protection of Crystal Stream is germane to CSP's purpose, and participation of CSP's members is not required in this action.

The District Court correctly held that CSP has standing to challenge Highpeak's discharge and the WTR. As an association, CSP "has standing to bring suit on behalf of its members" because (1) CSP's "members would otherwise have standing to sue in their own right;" (2) "the [interest] at stake" of protecting Crystal Stream from contamination is "germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. CSP's members would have standing to sue in their own right because they have suffered a concrete, particularized, and actual "injury in fact" that is fairly traceable to Highpeak's discharges into Crystal Stream. This injury will be redressed if this Court invalidates the WTR or if an NPDES permit is required. *Lujan*, 504 U.S. at 560-61. The participation of CSP's individual members is not necessary in this lawsuit because CSP can adequately represent its members' interests in the protection of Crystal Stream, and the relief sought is not individualized. *Warth v. Seldin*, 433 U.S. 490, 511 (1975).

A. CSP's members would have standing to sue in their own right based on injuries to their recreational and aesthetic interests in Crystal Stream.

CSP has demonstrated that at least two of its members, Cynthia Jones and Jonathan Silver, would have standing to sue individually. To establish standing, a plaintiff must (1) have suffered an "injury in fact," which is an injury that is actual or imminent, concrete, and particularized; (2) show that the injury is fairly traceable to the defendant's actions; and (3) show that the injury can be redressed by the court. *Lujan*, 504 U.S. at 560-61. Jones and Silver have

both suffered injuries that meet the *Lujan* test for establishing standing. R. at 14-17. This is sufficient for CSP to meet the first requirement of associational standing, which is that at least one member of the association would have standing to sue in their own right. *Sierra Club*, 827 F.3d at 65.

As stated in her declaration, Cynthia Jones has suffered harm to her aesthetic and recreational interests due to pollution in Crystal Stream. R. at 14-15. The suspended solids and metals that Highpeak discharges make the stream's waters cloudy, detracting from Jones's enjoyment of what would otherwise be the stream's "crystal clear color and purity." R. at 14-15. In addition to Jones's injuries, CSP member Jonathan Silver has suffered harm to his recreational interests because of Highpeak's discharges. R. at 16-17. Silver's recreational walks with his dogs along the stream are dampened by his fear of allowing his dogs to drink from a polluted stream. R. at 16-17. Both Jones and Silver would be able to enjoy the stream more often but for Highpeak's pollutant-laden discharges. R. at 14-17.

The injuries experienced by Jones and Silver are similar to those experienced by the plaintiffs in *Laidlaw*. In *Laidlaw*, the plaintiff environmental group alleged that its members suffered injuries to their recreational and aesthetic injuries due to the defendant's discharges of pollutants into the North Tyger River. *Laidlaw*, 528 U.S. at 181-82. These injuries included no longer engaging in river-based recreation due to concerns "about harmful effects from discharged pollutants." *Id.* at 182. The Supreme Court held that the plaintiff association in *Laidlaw* had standing based on these injuries because "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183. Thus, Jones and Silver's injuries are adequate to demonstrate injury in fact.

B. The interest at stake—the protection of Crystal Stream—is germane to CSP's purpose, and this Court can remedy CSP's harms by invalidating the WTR.

CSP's purpose is "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters," and to ensure Crystal Steam is "preserved and maintained for all future generations." R. at 6. This lawsuit was filed to advance that purpose and therefore meets the requirement from *Laidlaw* that the lawsuit be "germane to the organization's purpose." *Laidlaw*, 528 U.S. at 181. The germaneness requirement "mandates 'pertinence between litigation subject and organizational purpose.'" *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015). The purpose of this requirement is to prevent associations from "forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care." *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988). This purpose is met here because CSP is a single-mission association concerned only with protecting Crystal Stream, and its members demonstrably care about protecting the stream and live in Rexville where the stream is located. R. at 4, 6, 14-17.

Highpeak and EPA allege that CSP was formed to "manufacture a claim challenging the WTR and not on the basis of any genuine environmental, recreational or aesthetic concerns." R. at 6. As evidence for this claim, EPA and Highpeak point to three things: (1) the timing of CSP's formation in relation to the *Loper Bright* and *Corner Post* cases; (2) the inclusion of the word "transfers" in CSP's mission statement; and (3) CSP's small size. R. at 6. EPA and Highpeak further contend that, if their allegations are true and CSP was formed solely for the purpose of filing this lawsuit, then CSP would not have standing to sue. R. at 6. This contention is false and ignores Supreme Court precedent. In *Pennell v. San Jose*, the Supreme Court granted

associational standing to the plaintiff, an association of landlords, despite the fact that the association was "organized for the purpose of representing the interests of the owners and lessors of real property in San Jose in this lawsuit." *Pennell*, 485 U.S. at 7 n. 3 (internal quotation marks omitted).

Further, the fact that CSP is a small association with thirteen members does not render it incapable of meeting Article III's standing requirements. In *SCRAP,* the Supreme Court granted associational standing to SCRAP, an "association formed by five law students," where those five students were the association's only members. *SCRAP*, 412 U.S. at 670, 691. In *SCRAP*, the plaintiff association was formed less than two years before the Supreme Court issued its opinion in the case, and only a few months before the final versions of the regulations it challenged were published. *Id.* at 678; *Students Challenging Regul. Agency Procedures v. U.S.*, 346 F.Supp 189, 191 (D.C. Dist. 1972). Here, the timing of the association's formation and CSP's relatively small size should not mean CSP does not have standing to fight against the concrete harms its members are experiencing.

II. CSP filed a timely challenge to the WTR because an association's cause of action for challenging a regulation accrues when the association is formed, not when the regulation is promulgated.

The District Court correctly held that CSP timely filed its challenge to the WTR because, as an association, CSP's cause of action accrued on the date it was formed. CSP is a not-for-profit corporation properly formed under the laws of New Union on December 1, 2023. R. at 4. CSP filed its complaint two months later, on February 15, 2024. R. at 3. The statute of limitations for challenging regulations under the APA is "six years after the right of action first accrues" and "begins to run at the time the plaintiff has the right to apply to the court for relief." 28 U.S.C. § 2401(a); *Corner Post*, 144 S. Ct. at 2451 (internal quotation marks omitted). This is a plaintiff-

focused statute of limitations that begins to run when the plaintiff is first injured by the regulation, rather than when the regulation is first promulgated. *Corner Post*, 144 S. Ct. at 2446. CSP first came into existence on December 1, 2023, so its cause of action accrued on that date. R. at 4. Therefore, CSP's challenge to the WTR is well within the six-year statute of limitations.

A. CSP's cause of action accrued in 2023 when CSP was first injured by the WTR at the time of its creation, or, alternatively, when one of its members moved to Rexville in 2019.

Under *Corner Post*, an APA cause of action accrues "when the plaintiff has a complete and present cause of action—i.e., when she has the right to file suit and obtain relief." *Corner Post*, 144 S. Ct. at 2450. As understood by the Eighth Circuit before *Corner Post* was decided, this meant that no entity formed more than six years after a regulation's promulgation could ever bring a facial challenge to that regulation—the entity would simply have been born too late. *Id.* at 2448-49. As applied to the plaintiff in *Corner Post*, this would mean the plaintiff's cause of action could never have accrued because the plaintiff was formed seven years after the regulation's promulgation. *Id.* at 2448.

In *Corner Post*, the Supreme Court held that the Eighth Circuit's interpretation was wrong and that the APA's statute of limitations was meant by Congress to be plaintiff-focused. *Corner Post*, 144 S. Ct. at 2448-49. This means a plaintiff's cause of action for a facial challenge to a regulation, like CSP's challenge to the WTR, accrues when the plaintiff is first harmed by the regulation. *Id.* at 2448-49. For CSP, like for the plaintiff in *Corner Post*, the cause of action therefore accrued when CSP came into existence.

Even if this Court finds that CSP's cause of action accrued when its members were first injured, instead of when CSP was created, this Court should still hold that CSP filed a timely challenge because one of its members, Jonathan Silver, was not injured until 2019. R. at 16-17.

Unlike with business organizations, who gain standing when the organization itself experiences an injury, associations gain standing when their members experience injuries. *Burwell v. Hobby Lobby Stores, Inc.*,573 U.S. 682, 715 (2014); *Sierra Club*, 827 F.3d at 65. Injury to just one of its members is enough to impart standing on an association. *Sierra Club*, 827 F.3d at 65. Silver did not move to Rexville until 2019, so his injuries could not have occurred prior to 2019. Therefore, even if this Court does not follow *Corner Post* and finds that CSP's cause of action did not accrue when it was formed, this Court should still hold that CSP's cause of action accrued when Silver was first injured.

B. The Supreme Court's holding in *Corner Post* applies to for-profit and not-for-profit entities alike.

Highpeak and EPA allege that the holding in *Corner Post* applies only to for-profit business entities. R. at 8. This allegation is incorrect. According to Justice Barrett's majority opinion in *Corner Post*, "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Corner Post*, 144 S. Ct. at 2450. This broad language places no limits on what entities are or are not entitled to a plaintiff-focused statute of limitations under the APA. Rather, the Court's repeated use of "she" and "he" as stand-ins for the APA's references to plaintiffs as "persons" demonstrates that the Court intended the holding to apply to all entities previously considered "persons" under the APA. *Id.* at 2449-50. There is nothing in the opinion to suggest that only business entities can be the "she" that Justice Barrett refers to.

The Supreme Court's previous APA precedents have treated facial challenges to regulations brought by unregulated business entities and facial challenges brought by unregulated not-for-profit entities alike. For example, the Court granted standing to the plaintiffs

in *303 Creative LLC v. Elenis* and in *Abbott Lab'y v. Gardner* even though neither plaintiff had suffered an actual injury from the regulations they challenged—both were filing pre-enforcement challenges to regulations in anticipation of the harm they would cause. *303 Creative LLC v. Elenis*, 600 U.S. 570, 580-58 (2023); *Abbott Lab'y v. Gardner*, 387 U.S. 136, 153-154 (1967). *Corner Post* takes this one step further, in *Corner Post*, the plaintiffs were held to have a cognizable injury based on "downstream effects of [a regulation] on the unregulated plaintiff." *Corner Post*, 144 S. Ct. at 2460. Similarly, CSP is literally and figuratively alleging downstream effects of a regulation on its members. Like Corner Post, CSP is an unregulated entity challenging a regulation based on its downstream impacts, and both should be treated equally under the law.

The for-profit versus not-for-profit corporation distinction that Highpeak and EPA have invented suggests that CSP should be treated differently simply because it does not suffer injury directly, but through its members. R. at 8. However, this distinction does not comport with the Supreme Court's holding in *Burwell v. Hobby Lobby Stores, Inc.* In *Burwell*, the Supreme Court granted Hobby Lobby, a for-profit corporation, standing to make a challenge to a statute under the Free Exercise Clause. *Burwell*, 573 U.S. at 714-715. This was despite the fact that corporations, as associations of individuals, have no religions of their own—only their individual corporate owners have religious faiths. *Id.* at 682, 713. If under *Burwell* a corporation can raise a religious claim on behalf of its owners, and under well-established caselaw a nonprofit can raise a claim on behalf of its members, then a newly formed not-for-profit entity should be treated the same as a newly formed for-profit entity for the purpose of determining whether those claims are timely.

C. The public interest is best served by applying *Corner Post* to not-for-profit entities because doing so will uphold separation of powers principles and keep the power of administrative agencies in check.

The APA was designed by Congress as a powerful "check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Loper Bright*, 144 S. Ct. at 2261. In the modern administrative state, the APA ensures that administrative agencies do not exceed their authority in the "regime of separate and divided powers." *Id.* The APA accomplishes this by allowing "persons injured by agency action to obtain judicial review by suing the United States or one of its agencies." *Corner Post*, 144 S. Ct. at 2449. An injured party under the APA includes a party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

For environmental statutes, injuries "within the meaning of a relevant statute" include injuries to business entities who are directly harmed by having to comply with overly restrictive regulations, and injures to not-for-profit entities who are harmed by injuries to the environment. *Lujan*, 504 U.S. at 561-64. Under the CWA, this means that a business entity, like Highpeak, would have standing to challenge a regulation when it injures their business interests, and that a nonprofit entity, like CSP, would have standing to challenge a regulation when it injures their environmental interests. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232-35 (5th Cir. 2015). This articulation of standing under the APA ensures balance; businesses can challenge overly-restrictive regulations and not-for-profit entities can challenge overly-permissive regulations. The business versus not-for-profit entity distinction that Highpeak and EPA suggest would violate this balance.

This distinction also violates separation of powers principles by denying courts the opportunity to review an entire category of inappropriate regulations, just because those

regulations harm the public interest instead of harming businesses. Such a distinction prevents the effectuation of important environmental legislation meant to protect human health and the environment by making it more difficult for groups like CSP to challenge regulations like the WTR that fail to adequately implement the CWA, while allowing businesses to block regulations that protect the environment at the expense of corporate profits.

III. The WTR is not a valid regulation as it defeats the ultimate objective of the CWA—to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

The District Court erred in holding that the WTR is a valid regulation. Section 1311 of the CWA prohibits the "discharge of any pollutant" into navigable waters from any point source without first obtaining an NPDES permit. *See* U.S.C. § 1311. The WTR adopts the unitary waters theory, which views all navigable waters of the U.S. as a single entity. *Friends of the Everglades*, 570. F.3d at 1217. Under this theory, all navigable waters are part of one pot—"ladling pollution from one navigable water to another does not add anything" and therefore an NPDES permit is not required. *Id.* The WTR conflicts with prior circuit court decisions that required an NPDES permit for water transfers between distinct bodies of water. *Catskill II,* 451 F.3d at 81.

Prior to the adoption of the WTR, courts held that an NPDES permit is required when a transfer occurs between two distinct water bodies. *Dubois*, 102 F.3d at 1299; *see also Catskill I,* 273 F.3d at 491 ("the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition . . . and demands an NPDES permit"). In *Catskill II*, the court also rejected the unitary waters theory and warned that adopting the theory would lead to the "absurd result" that a transfer of a toxic, heavily polluted water to a pristine water body would not require an NPDES permit. *Catskill II*, 451 F.3d at 82-87 (citation omitted). Such an absurd result has occurred here and should be remedied.

In overruling *Chevron*, the Supreme Court in *Loper Bright* did not shut out the possibility of cases decided under *Chevron* being overruled. *Loper Bright*, 144 S. Ct. at 2273. These cases can be overruled with special justification. *Halliburton*, 573 U.S. at 266. Because the overruling of *Chevron* has severely weakened the reasoning behind upholding the WTR, and because the WTR conflicts with the CWA, there is special justification for this Court to find that the WTR is invalid.

A. Special justification exists to invalidate the WTR because the overruling of *Chevron* has weakened the conceptual underpinnings of the WTR and the WTR is inconsistent with the objectives of the CWA.

Supreme Court precedents are not sacrosanct. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *superseded in part by statute*, Pub. L. No. 102-166, 101, 105 Stat. 1071 (1991). "Precedents should be respected, but . . . occasionally the Court issues an important decision that is egregiously wrong. When that happens, stare decisis is not a straightjacket." *Dobbs v. Jackson Women's Health Org*, 597 U.S. 215, 294 (2022).

The Supreme Court does not mechanically apply stare decisis in cases involving statutory interpretation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 695 (1978). When the Court has previously misinterpreted a statute, the Court may choose to overrule its precedent instead of "plac[ing] on the shoulders of Congress the burden of the Court's own error." *Id.* (quoting *Girouard v. United States*, 436 U.S. 61, 70 (1946)). The reason for such a shift in position can include: (1) changes in law that have eliminated or weakened the "conceptual underpinnings" from the previous decisions, or (2) the precedent being a detriment to the cohesiveness of the law or in direct conflict with achieving objectives of other laws. *Patterson*, 491 U.S. at 173.

1. The overruling of Chevron eliminates the main conceptual underpinning of upholding the WTR.

The WTR has been upheld solely for its reasonableness under the *Chevron* framework. As such, special justification exists to strike down the WTR because the sole reason for its validity has been eviscerated. Although agency interpretations of law "made in pursuance of official duty, based upon more specialized experience" "constitute a body of experience and informed judgment to which court and litigants may properly resort for guidance," they are "not controlling." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). It is for the courts to decide questions of law, including the meaning of ambiguous statutes. *Loper Bright*, 144 S. Ct. at 2261; *see also* 5 U.S.C. § 706.

Despite the Eleventh Circuit conceding the "low batting average" of the unitary waters theory and pointing out that it "has struck out in every court of appeals where it has come up to the plate," the court still upheld the WTR under the coercive mandate of *Chevron*. *Friends of the Everglades*, 570 F.3d at 1217. The Supreme Court has also "called a strike or two" on the theory suggesting that some NDPES provisions are contrary to the unitary waters theory. *Id.* at 1218; *see also Miccosukee*, 541 U.S. at 107. The Second Circuit in *Catskill III* also conceded that the WTR "is not the interpretation that would most effectively further the Clean Water Act's principal focus on water quality." *Catskill III*, 846 F.3d at 533. These concessions demonstrate that the WTR was upheld under *Chevron* despite the fact that the reasonableness of EPA's interpretation was weak.

The Supreme Court's opinion in *Loper Bright* overruled *Chevron*, but that does not automatically overrule prior decisions made under the *Chevron* two-step framework; those decisions are still "subject to statutory stare decisis." *Loper Bright*, 144 S. Ct. at 2273. However,

the overruling of *Chevron* completely removes the conceptual underpinnings of upholding the WTR in *Catskill III* for two reasons. First, there is tension among the circuit courts regarding the validity of the unitary waters theory that is the foundation of the WTR. Second, because the Supreme Court has not reviewed the WTR there is uncertainty in its application.

In the absence of *Chevron*, *Skidmore* respect is available for the courts to use to guide their independent judgment of deciphering the meaning of statutory provisions. *Loper Bright*, 144 S. Ct. at 2262. However, this Court is not bound by EPA's interpretation even if the WTR is entitled to *Skidmore* respect because *Skidmore* respect is not binding and only provides guidance. *Skidmore*, 323 U.S. at 139-40. Further, *Catskill II* held that EPA's interpretation of whether an NPDES permit is required for water transfers between navigable water bodies cannot withstand *Skidmore* respect. *See Catskill II*, 451 F.3d at 82, 83 n. 5.

2. The WTR undermines the cohesiveness of the CWA because it conflicts with NPDES permitting provisions that suggest that water bodies are individually protected.

The WTR is a detriment to the cohesiveness of the CWA because it undermines states' ability to establish and maintain water quality standards for individual water bodies. Where the WTR has been upheld, it has been solely based on the now overruled *Chevron* doctrine. *See Friends of the Everglades*, 570 F.3d at 1217 (explaining that under *Chevron* "all that matters is whether the regulation is a reasonable construction of an ambiguous statute") (citation omitted). However, there are two major inconsistencies between the WTR and the CWA.

First, the unitary waters theory is in direct conflict with the overarching purpose of the CWA—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The *Catskill III* court acknowledged that this is a "powerful argument" but was ultimately not convinced that such an argument was enough to overcome the

extreme deference owed to EPA under *Chevron*. *Catskill III*, 846 F.3d at 531. As Judge Chin noted in his dissent, the exemptions in the WTR create a substantial risk to not only water quality, but also to human health, the environment, and the economy. *Id.* at 540-41 (Chin, J., dissenting).

Second, while the Supreme Court did not rule on the validity of the unitary waters theory in *Miccosukee*, the Court did point out that multiple NPDES provisions could be read as contrary to the theory. *Miccosukee*, 541 U.S. at 107. The fact that the CWA explicitly allows for states to set water quality standards in light of the designated uses of specific navigable water bodies suggests that water bodies are individually protected under the CWA. *Id.*; *see* 33 U.S.C. § 1313(c)(2)(A). Further, NPDES permits are directly impacted by water quality standards states set for individual water bodies. *Miccosukee*, 541 U.S. at 107. If the NPDES permit system fails to maintain the water quality standards for a "given water body," then the pollutant load that the water body can handle must be determined. *Id.*; *see* 33 U.S.C. § 1313(d).

The unitary waters theory, as adopted in the WTR, frustrates the ability of states to set water quality standards for individual water bodies. 33 U.S.C. § 1313. But, if all waters of the U.S. are viewed as a whole, water quality standards for specific water bodies become obsolete. The fact that states can designate water quality standards for individual water bodies demonstrates how the unitary water theories is inconsistent with the CWA.

Here, the WTR's inconsistency with the CWA is directly impacting the community of New Union and the integrity of Crystal Stream. The concerns raised by Judge Chin's dissent in *Catskill III* are exemplified here because people in the community are refusing to recreate in and near Crystal Stream because of Highpeak's discharge. Affidavits from CSP members assert that because of Highpeak's discharges, the water in Crystal Stream has become cloudy, and they

refuse to let their dogs drink the water or kids play in the stream. R. at 14-16. The community does not feel safe to use and enjoy Crystal Stream, demonstrating the impact on human health.

B. The WTR disregards Supreme Court precedent that requires an NPDES permit for meaningfully distinct water bodies.

The Supreme Court rejected a petition for certiorari to rule on the WTR and thus the rule is not Supreme Court precedent. *Catskill III*, *cert. denied*, 138 S. Ct. 1164 (2018). The denial of a petition for certiorari has no precedential effect. *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985). Nor does a denial imply approval of a decision—it is only when the Supreme Court affirms the holding of the lower court that it becomes the law of the Court. *Elgin, J. & E.R. Co. v. Gibson*, 246 F.2d 834 (7th Cir. 1957), *cert. denied*, 355 U.S.897 (1957) (Frankfurter, J., concurring). On the other hand, the requirement of an NPDES permit for transfers of water between meaningfully distinct water bodies is Supreme Court precedent. *Miccosukee*, 541 U.S. at 109; *L.A. Cnty. Flood Control Dist. v. NRDC*, 568 U.S. 78, 82 (2013); *see also ONRC Action v. U.S. Bureau of Reclamation*, 798 U.S. F.3d 933, 937 (9th Cir. 2015).

In *Miccosukee*, the Supreme Court ruled that an NPDES permit is required for water transfers between water bodies that are meaningfully distinct. 541 U.S. at 112. Before the construction of a flood control project, both surface and ground water flowed in a "uniform and unchanneled sheet," but after, the water in the area became divided. *Id.* at 99-100. The construction did not stop the comingling of water because of the porous soil and the flow of water between the surface and groundwater. *Id.* at 110. Nonetheless, the Court made clear that if two water bodies were not meaningfully distinct then an NPDES permit would not be required. *Id.* at 112. In subsequent Supreme Court and circuit court cases, the meaningfully distinct test

has been upheld. *See L.A. Cnty. Flood Control Dist.*, 568 U.S. at 82; *see also ONRC Action*, 798 U.S. F.3d at 937.

There is no discharge when polluted water flows from one portion of a river to another portion on the *same river*. *L.A. Cnty. Flood Control Dist.*, 568 U.S. at 82 (emphasis added). In *L.A. County Flood Control District*, the Supreme Court ruled that stormwater that flowed through concrete channels to lower portions of the same waterway did not constitute a discharge of pollutants because no discharge occurs when such pollutants are merely "flow[ing] from one portion of the water body to another." *Id.* at 83. Relying on *Miccosukee*, the Court reasoned that only if the water transfer were between meaningfully distinct water bodies could a discharge be found. *Id.* Therefore, there is no discharge for water that flows from an "improved portion of a navigable waterway into an unimproved portion" of the exact same waterway. *Id.*

In *ONRC Action v. United States Bureau of Reclamation*, the Ninth Circuit held that an NPDES permit was not required for water flowing into the Klamath River from a manmade channel with a pump station because the two waters are not meaningfully distinct. *ONRC Action*, 798 U.S. F.3d at 938. "Determining whether waters are meaningfully distinct is a factual undertaking." *Id.* at 937 (citation omitted). Looking to the facts of the record, while the manmade channel improved upon a once naturally existing waterway, the court found a substantial portion of the water flowing through the channel originated in the Klamath River. *Id.* at 938. Thus, because it is possible that water could flow between the two waterbodies absent a pumping station, the waters are not meaningfully distinct and an NPDES permit is not required. *Id.*

Water bodies are meaningfully distinct when: (1) there is no hydrological connection; (2) the water bodies are not part of the same waterway and; (3) there is no comingling of their waters between the surface and groundwater. The WTR ignores this requirement. Stare decisis does not

require such inflexibility as to uphold a decision whose conceptual underpinnings have been removed. The overturning of *Chevron* eliminated the rationale behind the validity of the WTR. Additionally, the WTR is inconsistent with the CWA's overarching objective of protecting the integrity of the waters of the U.S. Therefore, special justification exists for this Court to invalidate the WTR.

IV. In the alternative, if the WTR is upheld, Highpeak's discharge nonetheless requires an NPDES permit because the introduction of pollutants during the transfer of water from Cloudy Lake to Crystal Stream takes the discharge out of the scope of the WTR.

Even if the WTR is upheld, Highpeak's discharge into Crystal Stream still requires an NPDES permit. The District Court correctly held that pollutants introduced during Highpeak's water transfer take the discharge out of the scope of the WTR, making it subject to permitting under the CWA.

The scope of the WTR is unambiguous and this Court should apply the plain meaning of the regulation. Accordingly, Highpeak's release is not covered by the WTR because pollutants are introduced during the water transfer activity. Alternatively, even if this Court finds the WTR to be ambiguous, EPA's reasonable interpretation of the regulation must be followed under *Auer* deference, which specifies that deference be given to an agency's interpretation of their own genuinely ambiguous regulation. *Kisor*, 588 U.S. at 573; *Auer*, 519 U.S. at 461.

A. The unambiguous scope of the WTR does not cover transfers if pollutants are added during the water transfer activity, regardless of human activity.

Applying the tools of statutory construction, the WTR is not genuinely ambiguous and so this Court should apply the plain meaning of the regulation. The WTR states that permits are not required when water transferred between waters of the U.S. is not subjected to "intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). However, the rule "does not

apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). The plain meaning of "introduce" is "to bring in especially for the first time." *Introduce*, MERRIAM-WEBSTER DICTIONARY (Eleventh Edition). In using the word "introduce," EPA intended to distinguish between pollutants that first enter during the water transfer activity from those already present in the donor waterbody prior to initiation of the transfer. Here, the water transfer activity (i.e., the tunnel) introduces pollutants and so the rule does not apply.

The phrase "pollutants introduced by the water transfer activity" cannot be read as requiring human activity as Highpeak argues. R. at 5; 40 C.F.R. § 122.3(i). In explaining the scope of the WTR, EPA notes that even when water is moved between two waters of the U.S. an NPDES permit is required if the "*conveyance itself* introduces pollutants into the water being conveyed." NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,699-33,700 (June 13, 2008) (emphasis added). It is clear EPA contemplated scenarios where the conveyance itself, here the tunnel, introduces pollutants to the water being transferred, rather than human activity. This reading is consistent with other regulations implementing the CWA. For example, an NPDES permit is required for surface runoff that enters a point source and is discharged into a waters of the U.S. 40 C.F.R. § 122.2. Passive processes, in addition to human activity, can qualify as an introduction of pollutants.

Highpeak argues that if "introduction" includes pollutants that are "inevitably pick[ed] up" by water flowing through a tunnel, it will "eviscerate the entire rule." R. at 11. While absurd outcomes should be avoided, an outcome is only absurd when "it is quite impossible that [the agency] could have intended the result." *Catskill III*, 846 F.3d at 517. Here, it is quite possible, if not probable, that EPA intended water transfers to require NPDES permits when the transfer

activity itself introduces any quantity of pollutants. The WTR clarified EPA's understanding of "addition" of a pollutant, explaining that "[g]iven the broad definition of 'pollutant,' transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* 'the waters of the United States' before, during, and after the water transfer." NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). EPA acknowledges the potential for "intrinsic pollutants" but only exempts them from NPDES permitting when they are already present in the waters of the U.S. prior to the transfer; not when they are introduced by the transfer activity itself. If EPA wanted a threshold to apply to "pollutants introduced by the water transfer activity itself" they would have done so. Outside of the water transfers context, the requirement for an NPDES permit is not triggered by the level of pollutant present. Instead, an NPDES permit is required for *any* amount of pollutant discharged into the waters of the U.S. from a point source. 40. C.F.R. § 122.2 (2020); 33 U.S.C. § 1311. The unambiguous reading of the WTR is consistent with its enabling statute.

The WTR is meant to, in part, effectuate Congress's intention not to burden a state's ability to move water between waters of the U.S. NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,700 (June 13, 2008). Accordingly, an NPDES permit may not be required to transfer water between waters of the U.S. that have different levels of pollutants. *See South Side Quarry, LLC v. Louisville & Jefferson County Metro. Sewer District*, 28 F.4th 684, 699 (6th Cir. 2022) (does not consider pollutants introduced during the transfer itself but notes "[t]hat the water might contain pollutants or flow between potentially distinct bodies of water makes no difference"). However, this does not abrogate the federal government's ability to prevent *new* pollutants from the "outside world" from being introduced to the waters of the U.S. during a water transfer. *See Nat'l Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927, 940 (6th Cir. 2009)

(citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) ("EPA's longstanding position is that an NPDES pollutant is 'added' when it is introduced into a water of the U.S. from the 'outside world' by a point source"). In general, claims of exemption from the permitting requirements of the CWA should be narrowly construed to ensure the broad pollution prevention mandate of the CWA is still being achieved. *North California River Watch*, 496 F.3d at 1001). Accordingly, the WTR only exempts pollutants that are already present in the waters of the U.S. prior to initiation of the transfer but does not exempt pollutants that are introduced during the water transfer activity itself, however those pollutants may enter the water.

B. Highpeak's release of water from Cloudy Lake to Crystal Stream falls out of the scope of the WTR and so requires an NPDES permit.

Applying the WTR to Highpeak's releases, the water transfer activity (i.e., the tunnel) introduces pollutants to the water being transferred, taking the transfer out of the scope of the Rule. Here, while the tunnel does not subject the transferred water to an intervening industrial, municipal, or commercial use, it does introduce new pollutants that were not present in Cloudy Lake prior to the transfer. Based on water samples comparing the concentration of pollutants at the tunnel intake and the concentration of pollutants in the discharge to Crystal Spring, the tunnel itself increases the concentration of certain pollutants (e.g., iron, manganese, TSS) by 2 to 3 percent. R. at 5. This addition of pollutants to the transferred water brings the discharge out of the scope of the WTR, thus requiring Highpeak to obtain an NPDES permit.

Caselaw confirms that the addition of a pollutant does not need human activity to require an NPDES permit. In *Bang v. Lacamas Shores HOA*, the court held that "whether Defendant is itself actively adding pollutants, or is merely allowing the addition of pollutants . . . is not relevant under CWA." 707 F. Supp.3d at 1023. By choosing to build a tunnel and only encasing

part of it with a pipe, Highpeak is "allowing the addition of pollutants." In *Na Kia'i Kai v. Nakatani*, the court held that where ditches "are integral parts of the water transfer activity" and those ditches are sources of pollutants, an NPDES permit is required. *Na Kia'i Kai,* 401 F. Supp.3d at 1109-10 ("[b]ecause the ditches are logically considered part of the [water transfer activity], and because they add pollutants during the transfer activity, the WTR does not exempt the discharge . . . from NPDES permit requirements"). Here, the tunnel is an "integral part" of the water transfer activity and pollutants are introduced by Highpeak's tunnel in the same way as the ditches in *Na Kia'a Kai*. The pollutants in question were not present "before" the water transfer and instead are added during the water transfer itself, making Highpeak's water release subject to NPDES permitting.

Highpeak has the burden of proving that an exemption applies under the Water Transfer Rule. *U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (holding that a party claiming an exception must prove that they acted within the exception). As noted above, in order to achieve the purpose of the CWA, this Court must narrowly construe claims of exemption from the CWA's broad pollution prevention mandate. *North California River Watch*, 496 F.3d at 1001. The WTR was primarily meant to enable large-scale movement of water in the arid West for critical municipal and agricultural water uses. Here, however, the water release is meant to "enhance recreation," which is an insufficient justification for NPDES permit exemption.

C. EPA's interpretation of the WTR and determination that Highpeak's discharge requires an NPDES permit is due *Auer* deference, which is unaffected by *Loper Bright*.

Even if this Court finds the WTR to be genuinely ambiguous, EPA's interpretation must be followed under *Auer* deference because it (1) is reasonable; 2) is an official agency position; (3) implicates substantive expertise; and (4) reflects fair and considered judgment that does not

create an unfair surprise. *Kisor*, 588 U.S. at 575-79. *Auer* deference provides that, in interpreting what a regulation means, it "is the administrative's interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *Auer*, 519 U.S. at 461. The decision in *Loper Bright*, removing the controlling weight given to an agency's interpretation of a Congressional statute, is inapplicable here.

Highpeak argues that "the only reasonable interpretation of the rule is that the 'introduction' of pollutants must result from human activity and not natural processes like erosion." R. at 11. As outlined above, this is certainly not the only reasonable interpretation of the Rule and instead goes against the plain meaning of the regulation. A reasonable interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Auer*, 519 U.S. at 576. Based on the above analysis, EPA's determination that the scope of WTR does encompass water transfers where "pollutants [are] introduced by the water transfer activity itself to the water being transferred," regardless of the absence of human activity or the amount of pollutants introduced, is within any "zone of ambiguity" this Court may identify. 40 C.F.R. § 122.3(i).

Further, the determination is entitled deference as an official agency position because EPA has authority over NPDES permitting in New Union and the WTR is a final rule that went through notice-and-comment. R. at 4. Determining whether a water transfer falls within the scope of the WTR also implicates substantive expertise because it is a factual determination that involves reviewing technical water quality reports rather than a legal interpretation. Finally, EPA's determination that Highpeak's discharge requires an NPDES permit reflects fair and considered judgment because it is not a post hoc rationalization to defend past actions or simply

a convenient litigating position. *Kisor*, 588 U.S. at 575-79.

Finally, *Loper Bright*, which overruled *Chevron*, does not impact the level of deference accorded to an agency's interpretation of its own regulations. Instead, *Loper Bright* deals strictly with an agency's interpretation of a Congressional statute. *See generally Loper Bright*, 144 S. Ct. at 2261 (holding mentions the "interpretation of ambiguous statutory provisions" but does not directly address ambiguous agency regulations). Highpeak's argument that "interpreting a regulation, like a statute, is a question of law solely for the courts" is incorrect. Interpreting regulations often involves question of fact, rather than pure questions of law. Further, as evidenced by the above analysis, the "controlling weight" provided by *Auer* deference is limited by *Kisor* in important ways, putting guardrails around when an agency interpretation is entitled deference. *Kisor*, 588 U.S. at 575-79 (the interpretation must be reasonable, an official agency position, implicate substantive expertise, and reflect fair and considered judgment that does not create an unfair surprise). These guardrails help ensure that the interpretive question at issue is more factual in nature rather than a pure question of law. *See Loper Bright*, 144 S. Ct. at 2257 ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). This bar is met here. Whether pollutants are "introduced" by a water transfer activity involves assessing facts about the presence of pollutants in the water transfer and when those pollutants entered the water. This is not a question of law that should be left for courts to decide.

Under the WTR, it does not matter *how* the pollutants find themselves in the water being transferred. It merely matters *whether* pollutants that were not present in the original waters of the U.S. (i.e., Cloudy Lake) are discharged into the receiving waters of the U.S. (i.e., Crystal Stream). CSP's complaint plead sufficient facts to state a cause of action and so this Court should uphold the District Court's denial of Higpeak's motion to dismiss.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of Highpeak's motion to dismiss CSP's Clean Water Act citizen suit cause of action and reverse the District Court's grant of EPA's and Highpeak's motions to dismiss CSP's challenge to the WTR.