Team 30

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

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONIST, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES …………………….……………………………………… iv

STATEMENT OF JURISDICTION ……………………………………………………….. 1

STATEMENT OF THE ISSUES PRESENTED ………………………………………... 1

STATEMENT OF THE CASE …………………………………………………………... 2

I. Source and History of Pollution ……………………………………………………… 2

II. Crystal Stream Preservationists, Inc. formation and mission …………………………… 3

III. Procedural History ……………………………………………………………………… 3

SUMMARY OF THE ARGUMENT ……………………………………………………. 4

STANDARD OF REVIEW ……………………………………………………………… 7

ARGUMENT ……………………………………………………………………………… 8

I. CSP HAS STANDING AS IT HAS ALLEGED CONCRETE HARMS THAT ARE FAIRLY TRACEABLE TO HIGHPEAK'S CONDUCT AND REDRESSABLE BY A FAVORABLE DECISION. ……..…………………………………………………….. 8

A. <u>CSP members suffered injury-in-fact because EPA's Water Transfers Rule and Highpeak's discharge in violation of the CWA injured their legally protected interest.</u> ……..………………………………………………………………… 9

B. <u>The district court properly held that CSP alleged a causal connection between the injury and the challenged action, and a favorable decision is likely to redress the injury.</u> ………………………………………………………….… 10

C. <u>CSP's injury-in-fact is within the zone of interest of the CWA because the injury stems from a discharge of polluted waters into waters of the United States.</u> …………………………………………………..……………. 11

II. CSP TIMELY CHALLENGED THE WTR UNDER THE APA AND *CORNER POST* AS ITS INJURY DID NOT OCCUR UNTIL FORMATION IN 2023. ……………….. 12

A. <u>28 U.S.C. § 2401(a)'s six year statute of limitations for challenges brought under the APA does not accrue until an injury has been suffered.</u> …….………. 12

B. <u>Claims that *Corner Post's* holding excludes not-for-profit entities are baseless.</u> ………………..……………………………………………………. 14

C. Alternatively, Jonathan Silver's challenge is well within the statute of limitations because he did not move to Rexville or become injured until 2019. …………………………………………………………………...……. 15

III. THE WTR WAS NOT VALIDLY PROMULGATED UNDER THE CWA. ………….. 16

A. Skidmore deference is the appropriate level for review of the WTR's validity under Loper Bright, despite other Circuits' review of the WTR under Chevron. …………………………………………………………….… 17

B. EPA's reasoning in support of the WTR is not persuasive under Skidmore, therefore the WTR is not in accordance with law. …………………………... 18

1. EPA's unitary waters theory is unpersuasive. ……………..…………..... 19

i. EPA's textual reading in support of the unitary waters theory is merely possible. ………………………………………………………… 20

ii. The Unitary Waters Theory has been repeatedly rejected by Courts. ………………………………………………………………….. 21

2. EPA's reasoning in support of the WTR is unpersuasive. …………..….. 23

i. EPA's reasoning is neither thorough nor valid because it fails to address and explain the WTR's absurd results. ……...………………… 23

ii. EPA's concern that the WTR abridges state water allocation rights is unpersuasive. ……………………………………………..…….. 24

iii. EPA's position on water transfers is not sufficiently consistent to persuade under Skidmore. ……………………………………………… 25

3. CSP's interpretation of the CWA is more persuasive than EPA's because it relies on a less tortured reading of section 402. ….…………… 26

IV. REGARDLESS OF THE WTR'S VALIDITY, HIGHPEAK'S WATER TRANSFER FROM CLOUDY LAKE TO CRYSTAL STREAM LIES OUTSIDE THE SCOPE OF THE WTR AND REQUIRES AN NPDES PERMIT TO OPERATE. …….……. 27

A. The district court properly held that Highpeak must obtain an NPDES permit as its tunnel introduces pollutants in the course of a water transfer outside the scope of the WTR. ………………………………………………………. 27

1. Iron, manganese, and TSS are pollutants. …………..…………………. 28

2. Highpeak's tunnel connecting Cloudy Lake and Crystal Stream is a point source. ……………………………………………….…………. 28

3. Cloudy Lake and Crystal Stream are navigable waters of the United States. ………………………………………………..……. 29

4. EPA correctly determined that Highpeak's water transfer is outside the scope of the WTR and subject to NPDES permitting. ………..……...… 29

i. EPA's determination that Highpeak's transfer is an addition of pollutants requiring an NPDES permit is entitled to deference from this Court. ……………………………………………………….... 30

ii. If not extending deference to EPA, this Court should find EPA's determination persuasive under Skidmore. …………………...……….. 31

CONCLUSION ……………………………………………………………………….. 34

TABLE OF AUTHORITIES

Cases

Corner Post, Inc. v. Board of Governors of Federal Reserve System,

144 S.Ct. 2440 (2024) 3, 5, 12, 13, 14, 15

Association of Data Processing Service Organizations, Inc. v. Camp,

397 U.S. 150 (1970) 4, 9, 11

Auer v. Robbins,

519 U.S. 452 (1997) 7, 29, 30, 31

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

522 U.S. 192 (1997) 12, 14

Bennett v. Spear,

520 U.S. 154 (1997) 11

Bowles v. Seminole Rock & Sand Co.,

325 U.S. 410 (1945) 7, 30

Bureau of Alcohol, Tobacco and Firearms v. FLRA,

464 U.S. 89 (1983) ……..…... 18, 20, 32

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

273 F.3d 481 (2d Cir.2001) 21, 24, 30, 31

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

451 F.3d 77 (2d Cir. 2006) 6, 19, 21, 24, 26, 30

Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency,

846 F.3d 492 (2d Cir. 2017) 22

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,

467 U.S. 837 (1984) 5, 16, 17, 18

Christopher v. SmithKline Beecham Corp.,

567 U.S. 142 (2012). ………………………………………………………….. 30, 31

Clapper v. Amnesty Int'l USA,

568 U.S. 398 (2013) 10

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

590 U.S. 165 (2020) ………..…………… 19

CTS Corp. v. Waldburger,

573 U.S. 1 (2014) 13

Del-Aware Unlimited, Inc. v. Com., Dep't of Envtl. Res.,

508 A.2d 348 (Pa. Cmwlth. Ct. 1986) 26

Director, O.W.C.P., United States Dept. of Labor v. Ball,

826 F.2d 603 (7th Cir. 1987) 7

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

102 F.3d 1273 (1st Cir.1996) 21, 24

Encompass Ins. Co. v. Stone Mansion Rest. Inc.,

902 F.3d 147 (3d Cir. 2018) 23

Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.,

454 U.S. 27 (1981) 19, 24

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

570 F.3d 1210 (11th Cir. 2009)... 20, 21, 22, 24

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,

528 U.S. 167 (2000) 5, 9, 10, 16

Green v. Brennan,

578 U.S. 547 (2016) 12

Harper v. Blockbuster Entm't Corp.,

139 F.3d 1385 (11th Cir. 1998) 8

Herr v. U.S. Forest Serv.,

803 F.3d 809 (6th Cir. 2015) 15

Hishon v. King & Spalding,

467 U.S. 69 (1984) 8

Idaho Conservation League v. Poe,

86 F.4th 1243 (9th Cir. 2023) 32

Johnson v. NCAA,

108 F.4th 163 (3d Cir. 2024) 8

Kisor v. Wilkie,

588 U.S. 558 (2019) 7, 30, 31

Judulang v. Holder,

565 U.S. 42 (2011) 26

Loper Bright Enterprises v. Raimondo,

144 S.Ct. 2244 (2024) 3, 5, 6, 7, 16, 17, 18, 31, 32

Lujan v. Defenders of Wildlife,

504 U.S. 555 (1992) 4, 8, 10

MacNaughton v. Young Living Essential Oils, LC,

67 F.4th 89 (2d Cir. 2023)... 7

Marbury v. Madison,

1 Cranch 137 (1803) 31

Minor v. Dugger,

864 F.2d 124 (11th Cir. 1989) 6, 17, 18

N. Am. Butterfly Ass'n v. Wolf,

450 U.S. App. D.C. 20 (2020) 1

N.M. Health Connections v. United States HHS,

340 F. Supp. 3d 1112 (D.N.M. 2018) 22

N. Plains Res. Council v. Fidelity Exploration and Dev.,

325 F.3d 1155 (9th Cir.2003) …….. 21

National Wildlife Fed'n v. *Consumers Power Co.*,

862 F.2d 580 (6th Cir. 1988) 26, 30, 33

Nat'l Wildlife Fed'n v. Gorsuch,

693 F.2d 156 (D.C. Cir. 1982) 6, 20, 26, 28, 30, 33, 34

Nat'l Wildlife Fed'n v. Gorsuch,

530 F. Supp. 1291 (D.D.C.) 6, 20

Niz-Chavez v. Garland,

593 U.S. 155 (2021) 13

Pereira v. Sessions,

585 U.S 198 (2018) 13

Rapanos v. United States,

547 U.S. 715 (2006) 28

Rotkiske v. Klemm,

589 U.S. 8 (2019) 13

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

541 U.S. 95 (2004) 19, 20, 22, 25, 26

Sackett v. Env't Prot. Agency,

598 U.S. 651 (2023) 20

Sierra Club v. Morton,

405 U.S. 727 (1972) 9, 16

Sigmon Coal Co. v. Apfel,

226 F.3d 291 (4th Cir. 2000) 23

Skidmore v. Swift & Co.,

323 U.S. 134 (1944) 5, 6, 7, 16, 18, 20, 23, 29, 32

Tesco Corp. v. Nat'l Oilwell Varco, L.P.,

804 F.3d 1367 (Fed. Cir. 2015) 17

Tribble v. Gardner,

860 F.2d 321 (9th Cir. 1988) 21

Tyler v. Hennepin Cnty.,

598 U.S. 631 (2023) 7

United States v. Mead Corp.,

533 U.S. 218 (2001) 18

United States v. Students Challenging Regulatory Agency Procedures,

412 U.S. 669 (1973) 15

United States v. *Turkette*,

452 U.S. 576 (1981) 23

W. Virginia Highlands Conservancy, Inc. v. Huffman,

625 F.3d 159 (4th Cir. 2010) 28

Warth v. Seldin,

422 U.S. 490 (1975) 9

Statutes

5 U.S.C. § 702 .... 1, 4, 5, 11, 15

5 U.S.C. § 704 .... 5, 11, 13, 15

5 U.S.C. §706 .... 6, 7, 17

28 U.S.C. § 1291 1

28 U.S.C. § 1292(b) 1

28 U.S.C. § 1331 1

28 U.S.C. § 2401(a) 5, 12, 13, 15

33 U.S.C. § 1251(a) 19, 24

33 U.S.C. § 1311(a) 20, 27, 34

33 U.S.C. § 1313(c)(2) 20, 26

33 U.S.C. § 1313(d)(1)(C) 23

33 U.S.C. § 1342(a)(1) 27, 29, 31, 32

33 U.S.C. § 1342(4) 29

33 U.S.C. § 1362(6) 28

33 U.S.C. § 1362(7) 29

33 U.S.C. § 1362(12) 6, 29, 33

33 U.S.C. § 1362(14) 28

33 U.S.C. § 1365 1

Regulations

40 CFR 122.3(i) 6, 27, 29

Other Authority

1B J. Moore, Federal Practice ¶ 04.02[1] (1980) 17

EPA celebrates 50th Anniversary of the Clean Water Act on the banks of the Cuyahoga River,
EPA (Oct. 18, 2022),https://www.epa.gov/newsreleases/epa-celebrates-50th-anniversary
-clean-water-act-banks-cuyahoga-river 24

Ex. A to Compl. (Decl. of Cynthia Jones) 3, 9, 10, 11

Ex. B to Compl. (Decl. of Jonathan Silver) 3, 9, 10, 11, 16

Fed. R. App. P. 4 1

Fed. R. App. P. 5 1

Fed. R. Civ. P. 12 7

In re Riverside Irrigation Dist.,
1975 WL 23864, at 4 (EPA Gen. Couns. Mem., June 27, 1975) 26

NPDES Water Transfers Rule,
73 Fed. Reg. 33,697 (June 13, 2008) 6, 13, 19, 22, 23, 24, 25, 26, 33, 34

Order 2, 3, 5, 6, 9, 10, 14, 16, 17, 24, 28, 29, 30, 33

Statutory Interpretation in the Federal and State Courts § 6.05 (2024) 22

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union granted United States Environmental Protection Agency's ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motion to dismiss Crystal Stream Preservationists, Inc.'s ("CSP") challenge to the Water Transfers Rule ("WTR") under the Administrative Procedures Act ("APA") and denied Highpeak's motion to dismiss CSP's citizen suit against Highpeak under the Clean Water Act ("CWA") in Case No. 24-CV-5678 on August 1st, 2024. The district court had jurisdiction pursuant to 5 U.S.C. § 702 (appeals of final agency actions), 28 U.S.C. § 1331 (federal question), and 33 U.S.C. § 1365 (CWA citizen suits). EPA, Highpeak, and CSP filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (appeals of district court final decisions), 28 U.S.C. § 1292(b) (interlocutory appeals) and Fed. R. App. P. 5. A grant of a motion to dismiss an action is a final decision if it "represent[s] the final decision in the case." *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1253 (2020) (internal quotation marks omitted). 28 U.S.C. § 1292(b) provides courts of appeal jurisdiction over interlocutory appeals from district court decisions where the district judge determines "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and an immediate appeal from that order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court err in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule?
2. Did the District Court err in holding that CSP timely filed the challenge to the Water Transfers Rule?

3. Did the District Court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the CWA?
4. 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. Source and History of Pollution

Highpeak is a recreational tubing company which has operated on Crystal Stream in Rexville, New Union since 1992. Order at 4. Highpeak relies on a tunnel that augments the natural flow of Crystal Stream with water from Cloudy Lake to enhance customers' tubing experience. *Id.* New Union allows Highpeak to operate the tunnel whenever the State determines that water levels in Cloudy Lake are adequate. *Id.* The tunnel is four feet in diameter and one hundred yards long. *Id.* It has valves that enable Highpeak to regulate the flow of water from Cloudy Lake into Crystal Stream. *Id.*

While Highpeak sought state permission for construction of the tunnel, Highpeak did not seek a National Pollution Discharge Elimination System ("NPDES") permit from the EPA for the permit. *Id.* New Union does not have delegated authority to oversee the state's NPDES program. *Id.* Highpeak contends that a NPDES permit is not required because the tunnel is covered by the WTR. *Id* at 5. Cloudy Lake contains significantly higher concentrations of iron, manganese and total suspended solids ("TSS") compared to Crystal Stream. *Id.* Testing shows that the tunnel contributes additional pollutants to the water as the water travels through the tunnel. *Id.* Water samples taken from the intake at Cloudy Lake contain two to three percent less Iron, Manganese, and TSS compared to samples taken at the outfall into Crystal Stream. *Id.*

II. Crystal Stream Preservationists, Inc. formation and mission

Crystal Stream Preservationists, Inc. incorporated as a not-for-profit under the laws of New Union on December 1, 2023. *Id* at 4. CSP's mission is to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted water. *Id.* at 6. All thirteen members of CSP reside in Rexville, New Union. *Id.* at 4. Two of the members own land along the Stream, and one member, Jonathan Silver, moved to Rexville in 2019. *Id.* Several members regularly recreated along Crystal Stream but have refrained from some of their recreational activities due to Highpeak's pollution of the Stream. Ex. A to Compl. (Decl. of Cynthia Jones) ¶ 7-9; Ex. B to Compl. (Decl. of Jonathan Silver) ¶ 5-9.

III. Procedural History

On December 15, 2023 CSP sent a notice of intent to sue letter to Highpeak and EPA. Order at 4. The notice of intent to sue alleged that Highpeak's tunnel was discharging water into Crystal Stream in a manner contrary to law. *Id.* at 4-5. On December 27, 2023 Highpeak replied to CSP, stating that their discharge was exempted from NPDES permitting requirements due to the WTR. *Id.* at 5. Following the required sixty day waiting period, CSP filed their Complaint on February 15, 2024. *Id*.

CSP's complaint contained both a citizen suit claim against Highpeak and an APA claim against EPA. *Id.* Highpeak moved to dismiss the complaint on grounds that CSP lacked standing and was time barred from challenging the WTR. *Id.* EPA also moved to dismiss CSP's challenge to the WTR on substantive grounds and seconded Highpeak's justiciability arguments. *Id.* at 6. The motions to dismiss were fully briefed in April of 2024. *Id.* The district court waited to rule on this case until *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024) were decided due

to those cases' likelihood of influencing this case. *Id.* Following the Supreme Court's decisions, the district court granted EPA's motion to dismiss the APA challenge to the WTR and denied Highpeak's motion to dismiss the citizen suit. *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly ruled that CSP has organizational standing under *Lujan* and satisfies *Camp*'s 'zone of interest' requirement for APA challenges. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). CSP properly established that it meets the Article III standing requirements from *Lujan*. *Lujan* requires that the defendant's actions caused the plaintiff to suffer injury in fact and that a favorable decision is likely to remedy the injury. Here, Highpeak's actions directly harm the environmental and recreational interests of CSP's members by discharging polluted water into Crystal Stream. Further, the WTR enables this discharge, as without it, Highpeak will need to seek a NPDES permit for their discharge. A favorable decision in this case is likely to redress CSP's injury as Highpeak would be unable to operate their tunnel until they receive a NPDES permit, and the permit itself would limit the pollutants Highpeak can release into Crystal Stream.

CSP also properly established that the challenged conduct is within the zone of interest of the CWA. Here, CSP is challenging Highpeak's discharge of water into a water of the United States and EPA's promulgation of the WTR under the CWA. Both of these are clearly within the scope of the CWA as both directly involve the regulation of pollutants within waters of the United States.

The district court correctly held that CSP timely filed this challenge to the WTR. First, CSP has a right to judicial review because it was injured by an agency action under 5 U.S.C. §

702, and that action was final under 5 U.S.C. § 704. The WTR is a final agency rule published in 2008 after formal notice and comment rulemaking procedure and is causing CSP members to face deteriorating water quality in Crystal Stream. Next, the statute of limitations for claims brought under the APA is "six years after the right of action first accrues," 28 U.S.C. § 2401(a) and does not begin to accrue until after an individual plaintiff is injured. *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440, 2460 (2024). If the plaintiff is an organization, that plaintiff cannot be injured until after it is formed. *Id. Corner Post* provides no distinction between types of plaintiffs, and highlights the importance of plaintiff-centric statutes of limitations. *Id.* at 2452. CSP formed in 2023 so its challenge to the WTR filed on February 15, 2024, is well within section 2401(a)'s six year statute of limitations.

Even if the district court improperly applied *Corner Post* to CSP, a CSP member, Jonathan Silver, has a timely individual claim, as he did not move to Rexville until 2019. Organizations have standing to bring suit on behalf of their members if members have individual standing to sue. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, *Inc*., 528 U.S. 167, 181 (2000). Here, Jonathan Silver was not injured by the WTR until 2019 and CSP's challenge in a representative capacity came within the six years of Silver's injury.

The district court incorrectly decided that the WTR is not contrary to law under APA section 706 and CWA section 402 because it analyzed the WTR under the incorrect standard of deference. The court cited dicta in *Loper Bright* to hold that because other Circuits have analyzed the WTR under *Chevron*, the Twelfth Circuit is bound to analyze the WTR under *Chevron* as well. Order at 9-10. Because other Circuit's decisions do not bind this Circuit, this Court must follow *Loper Bright* and apply *Skidmore* when reviewing agency interpretations of statutes. *See*

Minor v. Dugger, 864 F.2d 124, 126 (11th Cir. 1989); *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

Next, the district court incorrectly concluded in a footnote that the WTR is a persuasive interpretation of the CWA under *Skidmore*. Order at 9-10. Under *Skidmore* a court must accord agency interpretation of law only to the degree it is persuasive. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

Here, EPA's interpretation is far from persuasive because it relies on a "tortured" reading of the statute, frustrates the core goals of the CWA through absurd results and offers little in the way of policy justification for those consequences. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1307 (D.D.C.)); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 81 (2d Cir. 2006)) ("*Catskill II*"). NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). Because CSP's interpretation of the CWA is more persuasive than EPA's, under *Skidmore,* the WTR is "not in accordance with law" and should be struck down. *Skidmore*, 323 U.S. at 140; 5 U.S.C. § 706.

The district court was correct in holding that Highpeak must obtain a NPDES permit to operate under the WTR because its water transfer introduces pollutants falling outside of the protections of the WTR.

The WTR excludes most water transfers from direct discharge NPDES permit requirements, but this "exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 CFR 122.3(i). A discharge is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Although Highpeak and EPA interpret this rule differently from one another, agency interpretations of

agency regulations are entitled to greater deference from courts. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Deference is appropriate when regulations are ambiguous and the agency's interpretation is reasonable within "the zone of ambiguity." *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019). Deference should be awarded here because the WTR and its exception are ambiguous regulations and EPA's interpretation that Highpeak's activities meet the exception are reasonable given that it is the agency in charge of administering NPDES permits and have considerable expertise on water quality.

Loper Bright did not impact this form of deference, but clarified that when it is not granted, agency interpretations can be persuasive to courts under *Skidmore*. *Loper Bright,* 144 S. Ct. at 2267. Interpretations are persuasive under *Skidmore* based on the interpretation's "power to persuade." *Skidmore,* 323 U.S. at 140. Here, EPA's interpretation that Highpeak must obtain a NPDES permit is consistent with past decisions, supported by the WTR, based on agency expertise, and provides a more reasonable result than Highpeak's interpretation. Therefore, CSP argues this Court should at the very least find EPA's interpretation persuasive.

STANDARD OF REVIEW

Violations of 5 U.S.C. § 706 and agencies' statutory interpretation are matters of law and reviewed *de novo*. 5 U.S.C. § 706*; Director, O.W.C.P., United States Dept. of Labor v. Ball*, 826 F.2d 603, 604 (7th Cir. 1987). Grants of dismissal pursuant to Rule 12(b)(6) are also reviewed *de novo*. Fed. R. Civ. P. 12; *MacNaughton v. Young Living Essential Oils, LC*, 67 F.4th 89, 95 (2d Cir. 2023). For purposes of a motion to dismiss, a court will treat all allegations as true. *Tyler v. Hennepin Cnty*., 598 U.S. 631, 636 (2023). Grants of dismissal are appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the

allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). "The standard of review for a motion to dismiss is the same for the appellate court[s] as it [is] for the trial court[s]." *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998).

Courts of appeal review certified questions within interlocutory appeals *de novo* and can consider issues outside of certified questions "necessary to decide the appeal before [the court]." *Johnson v. NCAA*, 108 F.4th 163, 175 n.57 (3d Cir. 2024).

ARGUMENT

I. CSP HAS STANDING BECAUSE IT HAS ALLEGED CONCRETE HARMS THAT ARE FAIRLY TRACEABLE TO HIGHPEAK'S CONDUCT AND REDRESSABLE BY A FAVORABLE DECISION.

CSP has the burden to establish standing for both its CWA citizen suit against Highpeak and its APA claim against EPA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish standing, a plaintiff must establish that: 1) they have suffered an injury-in-fact, 2) the defendant's conduct bears a causal connection to the plaintiff's injury, and 3) the plaintiff's requested relief is likely to redress the injury. *Id.* at 560. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotes omitted). A causal connection requires that "the injury has to be fairly…traceable to the challenged action of the defendant, and not…the result of the independent action of some third party not before the court." *Id.* Redressability requires that it "must be likely, as opposed to merely speculative," that a favorable decision will redress the injury. *Id.* at 561.

To establish its APA claim, CSP must satisfy both the Article III standing requirements listed in *Lujan* and demonstrate that the interest be "arguably within the zone of interests to be

protected or regulated by the [violated] statute." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); 5 USC § 702.

To establish organizational standing, an organization "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

A. CSP members suffered injury-in-fact because EPA's Water Transfers Rule and Highpeak's discharge in violation of the CWA injured their legally protected interest.

Environmental plaintiffs establish injury-in-fact when they can demonstrate "an injury to a cognizable interest" and "that the party seeking review be himself among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

Here, CSP's environmental harms satisfy injury-in-fact requirements. CSP is an organization established to protect Crystal Stream from contamination from industrial uses and illegal transfers of polluted water. Order at 4. CSP's thirteen members regularly visit Crystal Stream. *Id.* CSP members Cynthia Jones and Jonathan Silver submitted declarations that expressed their concerns about suspended solids and metals that are making Crystal Stream cloudy. Ex. A to Compl. (Decl. of Cynthia Jones) ¶ 9-11; Ex. B to Compl. (Decl. of Jonathan Silver) ¶ 6-9. Because Highpeak's discharge relies on the WTR, the alleged environmental harms satisfy the injury-in-fact requirement for both the CWA citizen suit and the APA claim. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-184 (2000) (where plaintiffs properly alleged environmental harms by including affidavits that illustrated members' reasonable concerns about the effects of the challenged conduct on their recreational, aesthetic, and economic interests).

Highpeak and EPA argue that CSP's certificate of incorporation illustrates that CSP was formed solely for the purpose of litigating the WTR, but this is not the case. Order at 5-6. By including the language on protecting Crystal Stream from illegal water transfers, the organization made clear that it understood the most important issue for its members. Further, the mission statement illustrates that the organization understood that illegal water transfers cause the pollution affecting Crystal Stream's clarity. Jones' and Silver's declarations illustrate the concerns CSP's members have about Highpeak's discharges. Ex. A to Compl. (Decl. of Cynthia Jones) ¶ 7-12; Ex. B to Compl. (Decl. of Jonathan Silver) ¶ 6-9.

EPA and Highpeak are asking this Court to speculate on the motivations of private individuals, and bar access to the courts based on that speculation. This level of speculation within the standing analysis is something the Supreme Court has never been willing to do. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (declining to endorse standing theories that rest on speculation about the decisions of independent actors). Further, there is no evidence within the record that illustrates ulterior motives for CSP's litigation other than the notion that the time of CSP's foundation undermines its standing.

B. <u>The district court properly held that CSP alleged a causal connection between the injury and the challenged action, and a favorable decision is likely to redress the injury.</u>

The final two elements of the standing analysis for the CWA citizen suit require a fairly traceable causal connection between the injury and the challenged action, and that a favorable decision will likely redress the injury. *Lujan*, 504 U.S. at 561.

In *Friends of the Earth,* the Supreme Court held that there is "nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." 528 U.S. at 184. Here, Highpeak's

discharges cause residents of Rexville to curtail their recreational use of Crystal Stream. Ex. A to Compl. (Decl. of Cynthia Jones) ¶ 12; Ex. B to Compl. (Decl. of Jonathan Silver) ¶ 9. Further, the WTR allows Highpeak to operate this tunnel without a NPDES permit. Striking down the WTR and enjoining the operation of Highpeak's tunnel will prevent the illegal discharge of pollutants into Crystal Stream, require Highpeak to seek a NPDES permit, and, as a result, alleviate CSP's injury.

C. CSP's injury-in-fact is within the zone of interest of the CWA because the injury stems from a discharge of polluted waters into waters of the United States.

Claims challenging agency actions under the APA require that the challenged conduct be "arguably within the zone of interests to be protected or regulated by the statute" that is alleged to be violated. *Camp,*, 397 U.S. at 153. Here, the challenged conduct is within the zone of interests of the CWA because it directly involves the discharge of pollutants into waters of the United States. As a result, the district court correctly ruled that CSP has standing to sue EPA under the APA as CSP satisfied the *Lujan* factors and established that the challenged conduct is within the scope of interest of the CWA.

II. CSP TIMELY CHALLENGED THE WTR UNDER THE APA AND *CORNER POST* AS ITS INJURY DID NOT OCCUR UNTIL ITS FORMATION IN 2023.

The APA establishes that plaintiffs "suffering legal wrong because of agency action" have the right to judicial review. 5 U.S.C. § 702. Agency actions are reviewable once they are final. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 156 (1997) (finding agency actions are final under the APA when they mark "the consummation of the agency's decision making process" and cause legal consequences). When taken together, plaintiffs may bring claims under the APA after they are injured by a final agency action. Further, civil actions against the United States challenging federal agency rules must be brought "within six years after the right of action

first accrues." 28 U.S.C. § 2401(a). The Supreme Court recently held that regardless of when a regulation was finalized, section 2401(a)'s six year statute of limitations does not begin to accrue "until the *plaintiff* is injured." *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440, 2460 (2024) (emphasis added) (holding that a business was not injured by a regulation until the business formed even though the regulation was over six years old). Plaintiff organizations cannot be injured by agency action until after they legally form. *Id.* at 2450.

CSP formed in 2023 so its challenge to the WTR filed on February 15, 2024 is well within section 2401(a)'s six year statute of limitations. Additionally, one of CSP's members did not move to Rexville until 2019, making his individual injury and CSP's representative claim timely.

A. <u>28 U.S.C. § 2401(a)'s six year statute of limitations for challenges brought under the APA does not accrue until an injury has been suffered.</u>

An organization's statute of limitations accrues under section 2401(a) when it is injured, and organizations cannot be injured until after they have formed. The Supreme Court has long held that rights to challenge agency actions accrue when the plaintiff has a "complete and present cause of action." *Green v. Brennan*, 578 U.S. 547, 554 (2016). Plaintiffs have a "complete and present" cause of action when they can "file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). The Court recently confirmed that section 2401(a)'s six year statute of limitations for claims brought under the APA does not begin to accrue "until *the plaintiff* is injured by final agency action." *Corner Post*, 144 S.Ct. at 2460 (emphasis added). Therefore, regardless of when an agency rule or regulation is published, plaintiffs' six year statute of limitations to bring a claim under the APA starts only after they are injured by said action.

In *Corner Post,* the Supreme Court held that a business could not be injured by an agency action until after it was formed and therefore legally harmed. *Corner Post,* 144 S.Ct. at 2450. The Court rejected arguments that this overly expands when agency rules can be challenged because section 2401(a) sets a statute of limitations not a statute of repose.[1] Even if EPA argues this holding greatly increases the risk of challenges to its actions, "pleas of administrative inconvenience ... never 'justify departing from the statute's clear text.'" *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021) (quoting *Pereira v. Sessions*, 585 U.S 198, 217 (2018)). Additionally, APA section 704's finality requirement limits judicially reviewable challenges to only those against final agency actions, limiting when plaintiffs can challenge action actions. 5 U.S.C. § 704.

Here, EPA published the final WTR in the Federal Register on June 27, 2008 after completing its decision making process. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). CSP, however, did not form until December 1, 2023. Because both finality and injury are required to bring claims under the APA, CSP could not have possibly suffered an injury from the final WTR under APA section 702 until it was formed. Thus section 2401(a)'s six year statute of limitations did not begin to accrue for CSP until December 1, 2023. CSP filed this challenge on February 15, 2024, which is well within the six year statute of limitations.

---

[1]A statute of repose is "an outer limit on the right to bring a civil action" that is measured "from the date of the last culpable act or omission of the defendant," not from when the plaintiff was injured. *Corner Post*, 144 S.Ct. at 2452 (citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014)). Congress may choose to limit judicial review of agency actions via a statute of repose, but it must do so explicitly, as it did with the Hobbs Act. *Id.* at 2453. If Congress does not include a specific review time limit but instead writes when "right of action first accrues" as it did here, it purposely offers a plaintiff-focused statute of limitations. *Id.*; 28 U.S.C. § 2401(a). When "Congress has shown that it knows how to adopt the omitted language or provision," like statute of repose time limits, "it is particularly inappropriate to read language into a statute of limitations." *Corner Post,* 144 S.Ct. at 2453 (internal quotation marks omitted) (quoting *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019)).

B. <u>Claims that *Corner Post's* holding excludes not-for-profit entities are baseless.</u>

EPA and Highpeak argue that while *Corner Post* extends possible statute of limitations under the APA, CSP should be excluded from the holding because an environmental group is distinguishable from a for-profit company forming to conduct business activities, like the plaintiffs in *Corner Post*. 144 S.Ct. at 2448. They argue for this distinction because some CSP members could have brought this suit anytime within the APA's initial six year statute of limitations as the WTR was promulgated in 2008 when most were already living in the area. Order at 8.

However, these arguments have already been rejected by the Supreme Court. Arguments that a statute of limitations period begins when a plaintiff cannot file suit are "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U.S., at 200. In *Corner Post,* the Supreme Court made clear that "[s]ection 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action." 144 S.Ct. at 2452. The opinion gave no criteria or dicta for what organizations the holding applies to and certainly does not bar not-for-profit organizations from the holding. In fact, *Corner Post* unequivocally emphasized the need for plaintiff-specific accrual. It rejected the idea that accrual begins when "theoretically, some other plaintiff was injured and could have sued," *Id.* at 2455, and instead focused on when "the right of action first accrues," for *each* possible plaintiff. *Id.* at 2453. CSP brings this challenge through its representative capacity. Because individual members are not named parties to this case, the possible expiration of their statute of limitations to challenge the WTR is not relevant.

Defendants offer no sensible alternative to *Corner Post*'s clear rule. Are regulations able to evade review if they survive challenges from not-for-profit plaintiffs for six years? No: "[a]

federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge." *Id.* at 2459 (quoting *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015)). And what organizations if not all are afforded fair judicial review under section 2401(a) and *Corner Post*? If only IRS-recognized businesses or for-profit entities, the Court could have specified as such. Instead, environmental not-for-profit organizations, even those formed specifically to challenge agency actions, can have constitutional standing so long as injury is established. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 678-83 (1973).

Following Highpeak and EPA's argument, the business in *Corner Post* would not have been able to bring their challenge against a 2011 rule because another similar truckstop could have challenged the Federal Reserve Board's regulation within six years of publication. *See Corner Post*, 144 S.Ct. at 2448. The Supreme Court held the opposite. Following the Court's reasoning, CSP, like the truckstop in *Corner Post,* was not injured until it was formed and therefore can challenge the WTR within six years of formation.

C. Alternatively, Jonathan Silver's challenge is well within the statute of limitations because he did not move to Rexville or become injured until 2019.

In the alternative that this Court finds CSP time-barred from bringing this claim in a representative capacity, one member of CSP, Jonathan Silver, remains within the statute of limitations to personally assert CSP's claim. Silver did not move to Rexville until August 2019. Exhibit B to Complaint (Decl. of Jonathan Silver) at ¶ 4. As explained above, plaintiffs can bring suits challenging final federal agency actions under the APA within six years after their injury first occurs. 5 U.S.C. § 704; 5 U.S.C. § 702; 28 U.S.C. § 2401(a). CSP timely filed this challenge representing Silver on February 15, 2024, within the APA's statute of limitations.

Highpeak argues that allowing CSP to bring suit now gives its other members who have lived in Rexville since 2008 a second opportunity to challenge the WTR, but an organization should not be prohibited from exercising a member's constitutional right to challenge government actions by the association of other members who could have made the challenge earlier. Order at 8. In fact, it is well established that organizations have "standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth*, 528 U.S. at 181. That is exactly what CSP is doing here. Mr. Silver meets the requirements for standing as an individual and environmental groups have never been excluded from this rule as harm to aesthetic and recreational values in areas where plaintiffs frequently are recognized injuries. *See Id.* at 184*; See also Morton*, 405 U.S. at 735.

Silver was not injured by the WTR until at least 2019 when he moved to Rexville. He became "deeply concerned about the presence of toxic chemicals polluting the water" as he walked his dogs by Crystal Steam. Ex. B to Compl. (Decl. of Jonathan Silver) ¶ 5-9. He could not have brought this challenge within six years of the WTR's promulgation in 2008 because he had not yet moved to Rexville. Therefore, because at least one of its members was not injured by the WTR until 2019, CSP timely brought this suit within six years of Silver's right of action accruing. Under section 2401(a), this is well within the APA's statute of limitations.

III. THE WTR WAS NOT VALIDLY PROMULGATED UNDER THE CWA.

The district court incorrectly applied *Chevron* deference to this challenge based on a misreading of *Loper Bright* and should instead have applied *Skidmore* deference. Order at 9-10; *Loper Bright*, 144 S. Ct. at 2273. Further, the WTR is an impermissible agency action under the CWA because the WTR's reasoning lacks "all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140.

A. *Skidmore* deference is the appropriate level for review of the WTR's validity under *Loper Bright,* despite other Circuits' review of the WTR under *Chevron.*

The APA states that it is the exclusive provenance of the judiciary to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Further, the APA prescribes "no deferential standard for courts to employ in answering those legal questions." *Loper Bright*, 144 S. Ct. at 2261. The *Chevron* Doctrine long held that the judiciary must give great deference to agencies' interpretations of their authorizing statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). However, "*Chevron* is overruled." *Loper Bright.*144 S. Ct. at 2273. Barring "special justification," *Loper Bright* does not allow for the relitigation of previous decisions reliant on *Chevron*. *Id.* However, "it is common knowledge that the decisions of the court of appeals for one circuit are not binding upon the courts of appeals for other circuits." 1B J. Moore, Federal Practice ¶ 04.02[1] (1980); *See Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir. 1989); *See Tesco Corp. v. Nat'l Oilwell Varco, L.P.*, 804 F.3d 1367, 1373 (Fed. Cir. 2015).

In the instant case, the district court held that the Twelfth Circuit must analyze the WTR under *Chevron* because other circuits reviewed the rule under *Chevron* and *Loper Bright* prohibits decisions relying on *Chevron* to be disturbed barring special justification. Order at 9-10. However, this holding misread *Loper Bright* to fundamentally alter the relationship of the federal circuit courts to one another.

The district court read the term "cases" to refer not just to individual cases and controversies, but to all challenges to the WTR or any other "previously challenged and upheld" regulations. Order at 10. Such a reading effectively binds the Twelfth Circuit to every appellate decision that utilized *Chevron* unless litigants can demonstrate special justification to disturb

stare decisis. However, it is axiomatic that circuit court decisions are not binding upon sister circuits and that circuit courts do not disturb *stare decisis* when they interpret the law differently than a sister circuit. *Dugger*, 864 F.2d at 126.

CSP does not seek to disturb cases in any other circuit which have relied on *Chevron*, and the Twelfth Circuit has not yet reviewed the WTR. Accordingly, after *Loper Bright,* the proper standard of deference in this case is *Skidmore* and other circuits' previous reviews of the WTR under *Chevron* are not binding upon this Court, though they may be persuasive.

B. EPA's reasoning in support of the WTR is not persuasive under *Skidmore*, therefore the WTR is not in accordance with law.

EPA's interpretation of the CWA to allow for the WTR is unpersuasive under *Skidmore* because it requires a reading of the statute at the outer limits of possibility, subverts the basic goals and function of the CWA through absurd results and offers little in the way of justification for those consequences.

Under *Skidmore*, an agency's interpretation of its statute is merely "entitled to respect" to the degree that the interpretation is persuasive. 323 U.S. at 140; *See Loper Bright,* 144 S. Ct. at 2273. Courts will look to the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Those other factors can include "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). An agency's interpretation is particularly persuasive "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 (1983). Regardless of the standard of deference granted, however, courts "must reject administrative constructions of the statute … that are inconsistent with the statutory mandate or

that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The "addition" of a "pollutant" from a "point source" into "waters of the United States" without an NPDES permit constitutes a direct discharge in violation of the CWA. 33 U.S.C. §§ 1311(a), 1362(12); *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 170 (2020). The WTR excludes any "activity that conveys or connects waters of the United States" from NPDES permitting requirements unless that transfer activity itself introduces pollutants or subjects the transferred water to "intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i).

In order to not violate the plain language of CWA sections 1311(a) and 1362(12), the WTR relies on the unitary waters theory, "which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from one body of water that is part of the navigable waters to any other could never be an 'addition." *Catskill II,* 451 F.3d at 81; NPDES Water Transfers Rule, 73 Fed. Reg. 33,700 (June 13, 2008). Prior to the promulgation of the WTR, the Supreme Court implicitly rejected the unitary waters theory and held that if jurisdictional water is transferred between "meaningfully distinct water bodies," an addition has taken place. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

1. EPA's unitary waters theory is unpersuasive.

Because the unitary waters theory relies on a strained interpretation of the CWA and has been contravened by the Supreme Court, this Court should find it unpersuasive.

i. EPA's textual reading in support of the unitary waters theory is merely possible.

While courts have found the unitary waters theory to be a possible reading of the CWA, that reading has also been described as "tortured." *Gorsuch,* 693 F.2d at 166 (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1307 (D.D.C.)) Especially without the benefit of *Chevron*, "construing statutory language is not merely an exercise in ascertaining the outer limits of a word's definitional possibilities." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 676 (2023) (internal quote omitted).

EPA claims all jurisdictional waters under the CWA are a single body of water based on the absence of a single "any." Section 402 does not prohibit discharge into *any* navigable waters rather than the article-less and, in their reading, collective navigable waters. *See* 33 U.S.C. § 1311(a). Based on this reading, the Great Salt Lake, the Saint Lawrence Seaway and every stream with a relatively permanent connection to the Mississippi River are a single body of water under the CWA. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009). The Act, however, uses the article-less "navigable waters" elsewhere to refer to singular bodies of water. 33 U.S.C. § 1313(c)(2); *See Miccosukee,* 541 U.S. at 106–7. Stripped of *Chevron* deference, EPA must prove not that its interpretation is *possible*, but rather that it is *persuasive*. *Skidmore,* 323 U.S. at 140. But the unitary waters theory firmly lies in the land of possibility, given its total reliance on the absence of a single article to distinguish two terms which the CWA elsewhere uses interchangeably.

Further, this issue does not present the sort of factual circumstance over which EPA has particular expertise, as the dispute has no grounding in facts of any sort. *See Bureau of Alcohol, Tobacco and Firearms,* 464 U.S. at 98. If EPA were asked to define "meaningfully distinct water bodies" to give breath to the *Miccosukee* decision, such an interpretation would benefit from

additional weight because crafting it requires actual knowledge of not only water but also of how and potentially where the NPDES permitting regime might be affected by that definition. The unitary waters theory is far more elemental. This dispute, as all petitioners' briefs demonstrate, does not rely on factual expertise but rather whether the agency's interpretation of an authorizing statute frustrates the text or purpose of that statute. No special knowledge of water or even the NPDES permitting program is required, and the implications of the dispute to the program are plain to see.

Resting an exception to the "centerpiece" program of the CWA on the absence of an article which, elsewhere in the Act means exactly what EPA says it does not, is not persuasive. *Friends of Everglades,* 570 F.3d at 1225.

ii. The unitary waters theory has been repeatedly rejected by Courts.

When not reviewed under the aegis of *Chevron*, "the unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate." *Friends of Everglades,* 570 F.3d at 1217 (citing *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir.2001) (*Catskill I*); *Catskill II,* 451 F.3d 81; *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir.1996); *N. Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155, 1163 (9th Cir.2003)). Because this Court should not review the unitary waters theory under *Chevron*, it should rule in concordance with the First, Second and Ninth Circuits and preserve the unitary waters theory's losing streak. While *Skidmore* did not explicitly add other circuits' findings to the list of persuasive tools courts can draw on, other Circuits' holdings will always be persuasive, especially when those findings are unequivocal. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988); *Dubois,* 102 F.3d at 1296

(holding that “there is no basis in law or fact for the district court's ‘singular entity’ [unitary waters] theory.”).

In its rulemaking and this proceeding, EPA points to the unitary waters theory’s prior court successes as justification of its persuasiveness, but EPA fails to note that the unitary waters theory’s two victories, *Catskill III* and *Friends of Everglades*, rely exclusively on *Chevron* deference. NPDES Water Transfers Rule, 73 Fed. Reg. 33,700 (June 13, 2008); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 514 (2d Cir. 2017) (*Catskill III*); *Friends of Everglades,* 570 F.3d at 1217. The persuasive weight of such evidence is minimal given the deferential standard involved. Once a court has determined that a statute is ambiguous, agencies prevail “89% of the time.” Statutory Interpretation in the Federal and State Courts § 6.05 (2024). An agency victory under *Chevron*’s second step is not persuasive because agencies almost always prevail under its “toothless” standard. *N.M. Health Connections v. United States HHS*, 340 F. Supp. 3d 1112, 1156 (D.N.M. 2018).

EPA also fails to note that the Supreme Court found that inter-basin water transfers, just marbles rolling around in a bucket in EPA’s view, violate section 402 without an NPDES permit. *Miccosukee*, 541 U.S. at 112. While the unitary waters theory was not explicitly before the Court, its holding is wholly incompatible with the unitary waters theory. *Id.* at 96 (holding that an addition takes place when water is transferred between “meaningfully distinct water bodies”).

No court has condoned the unitary waters theory on its merits and many have rejected it, whether explicitly or implicitly. EPA can point to no circumstances apart from the application of the now-defunct *Chevron* deference that have led to a different outcome. NPDES Water Transfers Rule, 73 Fed. Reg. 33,700 (June 13, 2008). Such reasoning lacks the “power to

persuade" that agency interpretations must provide in order to carry the day in the face of interpretations to the contrary. *Skidmore,* 323 U.S. at 140.

2. EPA's reasoning in support of the WTR is unpersuasive.

The WTR, in addition to its unitary waters issues, is not supported by valid or thorough reasoning. The district court overstated EPA's consistency regarding water transfers.

i. EPA's reasoning is neither thorough nor valid because it fails to address and explain the WTR's absurd results.

EPA cautioned in its final rulemaking for the WTR that "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." NPDES Water Transfers Rule, 73 Fed. Reg. 33,701 (June 13, 2008) (quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981)). The WTR accomplishes neither of these requirements. As noted *supra*, the WTR and its attendant unitary waters theory present unaddressed textual issues. Perhaps more importantly, however, it allows for absurd results clearly against the will of Congress.

Absurd results are "so gross as to shock the general moral or common sense." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000), *aff'd sub nom*. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (internal quotation omitted). They "def[y] rationality or render[] the statute nonsensical and superfluous." *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018).

That standard is met here. EPA contends that the CWA allows for a navigable water which contains any pollutant in any concentration to be added to any other navigable water without any federal oversight aside from lenient Total Maximum Daily Loads ("TMDL") requirements. *See* 33 U.S.C. § 1313(d)(1)(C). It would allow the burning Cuyahoga River, widely credited as the impetus for the creation of both the EPA and CWA amendments, to be

pumped into any National Park's rivers and lakes.[2] Such an outcome would be a moral affront to anyone who observed it, regardless of their familiarity with the intricacies of the CWA. Congress could not possibly have intended this result when it wrote the first sentence of the CWA: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Highpeak's water transfer presents just that outcome, given the high levels of natural pollutants such as TSS the transfer adds to a water body named for its lack of TSS. Order at 5. An interpretation which provides for such outcomes is due no deference at all. *Fed. Election Comm'n.,* 454 U.S. at 32.

EPA's issuance of the final WTR failed to even note this possibility, one of detractors' most enduring and powerful criticisms of the Rule. NPDES Water Transfers Rule, 73 Fed. Reg. 33,703-04 (June 13, 2008). Litigants and courts have raised this issue with EPA repeatedly since the 1980's, yet it received no mention in the Federal Register. *See Dubois,*102 F.3d at 1296; *See Catskill I,* 273 F.3d at 491; *See Catskill II,* 451 F.3d at 81; *See Friends of Everglades,* 570 F.3d at 1217. For reasoning to be thorough, it must engage with the strengths and weaknesses of an argument. EPA has not acknowledged the weaknesses of the WTR nor addressed those weaknesses.

ii. EPA's concern that the WTR abridges state water allocation rights is unpersuasive.

EPA also buttressed its reading by claiming that NPDES permitting authority over water transfers would abridge states' authority to allocate water quantities, in violation of one of the subsidiary stated purposes of the CWA. This reasoning is unpersuasive because NPDES

[2] The Cuyahoga River caught fire in the 1960s which prompted environmental advocacy. The advocacy and alarm from the fires were part of the inspiration behind creating EPA and CWA. *EPA celebrates 50th Anniversary of the Clean Water Act on the banks of the Cuyahoga River,* EPA (Oct. 18, 2022), https://www.epa.gov/newsreleases/epa-celebrates-50th-anniversary-clean-water-act-banks-cuyahoga-river.

permitting does not unduly bridge states' water allocation authority and any such impingement is not "unnecessary Federal interference with State allocations of water rights" when such impingement is necessary to protect water quality. NPDES Water Transfers Rule, 73 Fed. Reg. 33,702 (June 13, 2008).

The presence of a permitting requirement does not preclude state control over water allocation. An NPDES permit requirement for water transfers would only impact states' ability to allocate water in the instances when they sought to introduce polluted water into clean water. While such transfers would also be subject to TMDL restrictions, states are generally most interested in moving clean water as the water is intended for various beneficial uses, and as such would not require NPDES permitting.

States' authority to introduce polluted water into clean receiving water would be somewhat abridged, though this is necessary to effectuate the CWA's primary goal, noted *supra*. The Supreme Court has held as much, stating that such intrusion into state water allocation authority could be necessary to prevent water quality impacts for inter-basin water transfers. *Miccosukee,* 541 U.S. at 108.

iii. EPA's position on water transfers is not sufficiently consistent to persuade under Skidmore.

The WTR was adopted in 2008. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). In support of its consistency argument, EPA noted that, despite numerous judicial orders requiring NPDES permits for specific water transfers, it has never implemented a national requirement for NPDES permits for water transfers. *Id.* at 33,700. However, two decades of failure to enforce a regulatory program does not amount to an adoption of a particular interpretation when EPA never issued even a general policy statement espousing this

interpretation of the CWA. *See Miccosukee,* 541 U.S. at 107. "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011).

Prior to its 30-year silence on the matter, EPA itself stated that irrigation ditches which discharge into navigable waters require NPDES permits even when the ditches are also navigable waters. *In re Riverside Irrigation Dist.,* 1975 WL 23864, at 4 (EPA Gen. Couns. Mem., June 27, 1975). EPA pointed to briefs from the 1980's arguing that dam releases did not require NPDES permits as evidence of its continuously held position regarding water transfers. NPDES Water Transfers Rule, 73 Fed. Reg. 33,701 (June 13, 2008). Those briefs only concern intra-basin transfers, not inter-basin transfers that are the subject of the WTR. *See Gorsuch,* 693 F.2d at 166; *See National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). Through EPA's silence on inter-basin water transfers, Pennsylvania has been requiring and issuing NPDES permits for such water transfers. *Del-Aware Unlimited, Inc. v. Com., Dep't of Envtl. Res.*, 508 A.2d 348 (Pa. Cmwlth. Ct. 1986). At best, EPA has been consistent regarding water transfers only since promulgating the WTR in 2008. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).

3. CSP's interpretation of the CWA is more persuasive than EPA's because it relies on a less tortured reading of section 402.

CSP's interpretation of section 402, that the NPDES program prohibits the introduction of a pollutant to a jurisdictional body of water without a permit, even if that pollutant originates in another jurisdictional body of water, is based on a plain reading of a set of terms which are used interchangeably in the statute and does not create other interpretive tensions within the statute. *See* 33 U.S.C. § 1313(c)(2); *Miccosukee,* 541 U.S. at 106–7. The increased regulatory burden that CSP's interpretation creates is eclipsed by the WTR's absurd results. *Catskill II,* 451 F.3d at 81. While CSP's interpretation has the potential to impact states' authority to allocate

water quantity, such an impact is clearly necessary to prevent the water quality impacts that the WTR would allow.

IV. REGARDLESS OF THE WTR'S VALIDITY, HIGHPEAK'S WATER TRANSFER FROM CLOUDY LAKE TO CRYSTAL STREAM LIES OUTSIDE THE SCOPE OF THE WTR AND REQUIRES AN NPDES PERMIT TO OPERATE.

NPDES permits are required for any (1) discharge of (2) pollutants (3) from a point source (4) into navigable waters under the CWA. 33 U.S.C. § 1342(a)(1). Discharge without a permit violates the CWA. 33 U.S.C. § 1311(a). However, the WTR excludes water transfers between waters of the United States from permitting requirements unless there are "pollutants introduced by the water transfer activity itself to the water being transferred." 40 CFR 122.3(i). Because EPA is tasked with administering NPDES permits and it is within its expertise to do so, its interpretation of when pollutants introduced by water transfer are a discharge under the CWA is entitled to deference by courts. Here, Highpeak must obtain an NPDES permit as it is violating the CWA by operating the tunnel without one.

A. The district court properly held that Highpeak must obtain an NPDES permit as its tunnel introduces pollutants in the course of a water transfer outside the scope of the WTR.

The WTR excludes "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," from NPDES permitting requirements. 40 CFR 122.3(i). However, the WTR "exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.* Because the tunnel Highpeak constructed to transfer water between Cloudy Lake and Crystal Stream, both waters of the United States, introduces pollutants into Crystal Stream, it must obtain an NPDES permit. Parties do not argue on appeal if the pollutants, a point source, and navigable waters elements are met here, but dispute whether an addition has occurred. Because

EPA's determination that this act introduces pollutants into Crystal Stream under the WTR is reasonable, the district court correctly upheld EPA's determination that Highpeak needs an NPDES permit.

1. Iron, manganese, and TSS are pollutants.

The CWA definition of pollutant includes: "biological materials… rock, sand, cellar dirt." 33 U.S.C. § 1362(6). This is a broad definition covering both toxic materials and natural particles that can impact waters of the United States. *Rapanos v. United States*, 547 U.S. 715, 774 (2006). While not explicitly listed, iron and manganese are frequently regulated mining pollutants under the CWA, *see W. Virginia Highlands Conservancy, Inc. v. Huffman,* 625 F.3d 159, 162 (4th Cir. 2010), and TSS is a regulated conventional pollutant, 33 U.S.C. § 1314(a)(4).

Data collected by CSP show a two to three percent increase in iron, manganese, and TSS between water taken from the Cloudy Lake Intake and Crystal Stream outfall. Order at 5. These three substances are pollutants subject to regulation under the CWA and require NPDES permits when discharged.

2. Highpeak's tunnel connecting Cloudy Lake and Crystal Stream is a point source.

A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit." 33 U.S.C. § 1362(14). Pipes and spillways letting water move from one body to another are point sources. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (holding the pipes releasing water from a reservoir through a dam into a river are point sources under the CWA).

Here, Highpeak constructed a one-hundred yard long tunnel with iron pipe and through rock. Order at 4. When its valves are open, water flows from Cloudy Lake to Crystal Stream. This is an undisputed point source that conveys water.

3. Cloudy Lake and Crystal Stream are navigable waters of the United States.

NPDES permits regulate discharges into navigable waters. 33 U.S.C. § 1342(4). Navigable waters are defined as "the waters of the United States." 33 U.S.C. § 1362(7). Because all parties stipulate that both Cloudy Lake and Crystal Stream are waters of the United States, this criterion is met. Order at 4-5.

4. EPA correctly determined that Highpeak's water transfer is outside the scope of the WTR and subject to NPDES permitting.

The final NPDES permit criterion is the "discharge" of a pollutant. 33 U.S.C § 1342(4). A discharge is "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). While the WTR creates an exception for discharge between water transfers, discharge via "pollutants introduced by the water transfer activity itself to the water being transferred" still requires a permit. 40 CFR 122.3(i). Here, the iron, manganese, and TSS[3] introduced by Highpeak's tunnel are an addition under the exception to WTR. Order at 5.

EPA determined that this introduction of three pollutants was an addition subject to NPDES permitting because the tunnel itself, not the transfer of Cloudy Lake's naturally polluted water, added pollutants to Crystal Stream. Order at 11. CSP agrees with EPA's interpretation and argues that this Court should give deference to EPA's decision under *Auer, Auer v. Robbins*, 519 U.S. 452, 461 (1997), or find it sufficiently persuasive under *Skidmore*, *Skidmore,* 323 U.S. at 140.

i. EPA's determination that Highpeak's transfer is an addition of pollutants requiring an NPDES permit is entitled to deference from this Court.

Courts have long given respect to agency interpretations of agency regulations, commonly known as *Auer* deference. When cases involve interpreting administrative regulations,

[3]Specifically, CSP's water sampling data shows that from Cloudy Lake Intake to Crystal Stream Outfall, iron content increased from .80 mg/L to .82 mg/L, manganese increased from .090 mg/L to .093 mg/L, and TSS increased from 50 mg/L to 52 mg/L.

"the ultimate criterion is the administrative 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); *See Auer*, 519 U.S. at 461. *Auer* deference can be granted but only when a "range of conditions" are met. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019). Regulations must be "genuinely ambiguous," and the agency must make a "reasonable interpretation" within "the zone of ambiguity." *Id.* at 574-579; *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Because EPA reasonably interpreted a regulation it promulgated here, *Auer* deference is appropriate.

First, the WTR is an ambiguous regulation. Regulations are "genuinely ambiguous" if they are susceptible to more than one reasonable reading after employing traditional tools of statutory interpretation. *Kisor,* 588 U.S. at 573. As discussed *supra*, circuit splits on application of the WTR provide the necessary evidence of ambiguity. These different holdings show that what constitutes an introduction or addition has different readings. This issue presents a similar ambiguity. CSP and EPA follow the *Catskill I* and *II* reasoning that "pollutants introduced by the water transfer" include *any* increase in any pollutant shown after passing through a transfer conduit, *See Catskill I,* 273 F.3d at 491; *See Catskill II,* 451 F.3d at 81, while Highpeak argues along the lines of *Gorsuch and Consumers Power* that this introduction exception was only designed to include pollutants from outside human activity, not natural processes during transfer, *See Gorsuch,* 693 F.2d at 166; *See Consumers Power Co.* 862 F.2d at 584. Order at 11.

Next, because the WTR is an ambiguous regulation, this Court should find EPA's interpretation reasonable within the "zone of ambiguity." Once a regulation is determined to be "genuinely ambiguous," courts will afford additional deference to an agency's interpretation if that reading comes from the agency making an "authoritative" or "official" interpretation using

its "substantive expertise," and the interpretation reflects its "fair and considered" judgment. *Kisor, 588 U.S.* at 574-579; *See SmithKline Beecham Corp.*, 567 U.S. at 155. Monitoring and safeguarding water quality is among EPA's core functions. 33 U.S.C. § 1342(a)(1). Similarly, determining whether the WTR applies to natural as well as human-caused additions is well within the WTR's "zone of ambiguity". *E.g.,Catskill I,* 273 F.3d at 491. Given the sweeping exceptions to the WTR, Highpeak cannot consider this an unfair surprise. Because *Kisor's* conditions are satisfied, EPA's determination that Highpeak's transfer is an addition subject to direct discharge regulation is entitled to *Auer* deference from this Court.

Highpeak misconstrues *Loper Bright* to hold that regulations are questions of law to be decided solely by courts. *Loper Bright*, 144 S.Ct. at 2257 (citing *Marbury v. Madison*, 1 Cranch 137 (1803)). Plainly, *Loper Bright* did disturb the permissibility of *Auer.* The Court instead stated that agency interpretations of *federal statutes* are to be afforded *Skidmore* deference. *Id.* at 2266. In fact, the dissent highlighted how *Auer* deference had not been overruled and agency interpretations of their regulations should still be respected. *Id.* at 2307-08 (KAGAN, J., dissenting) ("[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law").

ii. If not extending deference to EPA, this Court should find EPA's determination persuasive under Skidmore.

In the alternative that this Court finds *Auer* deference inappropriate, EPA's interpretation that Highpeak's water transfer is a discharge requiring an NPDES permit is sufficiently persuasive under *Skidmore.* When *Auer* deference is not afforded to an agency's interpretation, courts revert to *Skidmore* deference. *SmithKlein,* 567 U.S. at 159; *Loper Bright,* 144 S.Ct. at 2267. *Skidmore* deference allows courts to be persuaded by agency interpretations based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore,* 323 U.S. at 140. An agency's interpretation is particularly persuasive "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 98. Although agency interpretations are not controlling under *Skidmore*, they can be persuasive and inform analysis. *E.g., Loper Bright*, 144 S.Ct. at 2267.

EPA's interpretation of the WTR is a thorough determination supported by thorough and persuasive reasoning. First, EPA has the requisite expertise and authority to interpret water quality data and make this decision. 33 U.S.C. § 1342(a)(1); *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 98. In fact, water quality impacted by discharge is "a concern that lies at the heart of the EPA's expertise." *Idaho Conservation League v. Poe*, 86 F.4th 1243, 1250 (9th Cir. 2023).

Next, EPA's interpretation is consistent with the unitary waters theory, the heart of the WTR. EPA excludes pollutants transferred between waters of the United States from direct discharge regulation under the unitary waters theory, but it cannot also exclude discharge introduced during transfer without allowing an impermissible addition. Even though EPA carved out the WTR exclusion from NPDES permitting, it added the exception because the unitary waters theory does not allow for even *de minimis* additions. EPA highlighted this interpretation in its formal rulemaking for the WTR by noting"[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." NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). Here, Highpeak did not construct or maintain the tunnel in a way to prevent pollutants from being introduced during transfer. Instead of lining the entire tunnel with impermeable conduit, it only used iron pipe in sections and carved the rest through rock. While wholly preventable, CSP data

show these earthen portions of the tunnel discharged pollutants into Crystal Stream. Order at 5. If not required to obtain an NPDES permit, EPA would allow Highpeak to further pollute Crystal Stream with its poorly designed tunnel. This consequence cannot result from a truly persuasive reading. Additionally, holdings from other courts support EPA's interpretation, as an addition of pollutants from the "outside world" categorically requires an NPDES permit, regardless of the pollutant's origins. *Gorsuch*, 693 F.2d at 175; *Consumers Power,* 862 F.2d at 584. In support of its interpretation, Highpeak effectively argues that the rock walls of the tunnel are jurisdictional waters and therefore not the 'outside world' under the unitary waters theory. Order at 11-12.

While EPA's interpretation is reasonable and persuasive, Highpeak offers a theory of addition not yet seen in CWA litigation: that the method of addition determines whether an addition has taken place. Highpeak argues that this exception to the WTR should only apply to additions from human activity because some natural additions from erosion are inevitable from water transfers. Order at 11. Courts have never articulated such a theory and instead make an addition determination based on whether a pollutant was already in jurisdictional waters. *E.g., Consumers Power Co.*, 862 F.2d at 584 (holding that water moving through a hydroelectric facility does not introduce new pollutants into water). Additionally, nothing in the WTR points to a carveout for natural or *de minimis* increases in pollutants introduced during transfer and no part of the NPDES program allows for *de minimis* additions. 33 U.S.C. § 1362(12). The CWA also prohibits the addition of "*any* pollutant by *any* person" into navigable waters. 33 U.S.C. § 1311(a) (emphasis added). The closest support for Highpeak's position comes from comments questioning whether naturally occurring changes to the water would require a permit. "For example, as water moves through dams or sits in reservoirs along the transfer, chemical and physical factors such as water temperature, pH, BOD, and dissolved oxygen may change."

NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008). But these changes come from pollutants *already within the waters in question*. *See Gorsuch,* 693 F.2d at 175. Here, unlike in *Gorsuch,* the so-called natural additions are human caused and come from the outside world. They are also wholly preventable because Highpeak decided to only partially line the tunnel, allowing water to chemically interact with rock and earth. If a water transfer conveyance was lined with uranium, surely the water quality impact would be an addition of a pollutant from the outside world. Therefore, Highpeak has introduced a pollutant from the outside world through its affirmative choices. The unitary waters theory behind the WTR provides no protection for this interpretation. If the pollutants were only from Cloudy Lake's donor water, the WTR would excuse Highpeak from NPDES requirements, but these facts take the transfer outside of the scope of the WTR.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of EPA's and Highpeak's motion to dismiss CSP's challenge to the Water Transfers Rule and affirm the district court's denial of Highpeak's motion to dismiss CSP's citizen suit.