Team 33

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

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

-and-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant Plaintiffs-Appellants-Cross Appellant

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authority

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction over the case docketed as No. 24-CV-5678 under 5 U.S.C. § 702 (judicial review of agency actions), 28 U.S.C. § 1367 (citizen suit provision), and 28 U.S.C. § 1331 (federal question). The district court's federal question jurisdiction was based on a challenge to the Water Transfers Rule ("WTR") promulgated under the Administration Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* and alleged violation of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* Crystal Stream Preservationists, Inc. ("CSP"), the U.S. Environmental Protection Agency ("EPA"), and Highpeak Tubes, Inc. ("Highpeak") all filed timely Notices of Appeal under Fed. R. App. P. 4. The Court of Appeals has jurisdiction over this appeal under 28 U.S.C. § 1291. The final judgment from the district court disposed of all issues in this case and was entered on August 1, 2024.

STATEMENT OF ISSUES PRESENTED

I. Does CSP have organizational standing under *Hunt* to bring this suit?

II. Did CSP timely file its rule challenge under 28 U.S.C. § 2401(a) statute of limitations, where *Corner Post* establishes an injury-based accrual approach?

III. Does the Water Transfers Rule exceed the EPA's discretion under its statutory mandate in §502 of the Clean Water Act?

IV. If upheld, should this court defer to the EPA's expert interpretation of the Water Transfers Rule as inapplicable to Highpeak?

STATEMENT OF THE CASE

I. Procedural History

This is an appeal from the district court's final judgment upholding the WTR as a valid regulation promulgated under the CWA and deferring to the EPA's interpretation of the WTR as inapplicable to Highpeak after CSP's citizen suit. The Plaintiff-Appellant in Case No. 24-CV-5678, CSP, filed its Complaint against Highpeak and the EPA on February 15, 2024. *Crystal*

Stream Preservationists, Inc. v. EPA. and Highpeak Tubes, Inc., No. 24-CV-5678, slip op. at 8 (D. N. U. Aug. 1, 2024).

Defendant-Appellees filed separate motions to dismiss. *Id*. at 3. Highpeak argued that CSP lacked standing for both the citizen suit and regulatory challenge, that the WTR challenge was untimely, and that its discharge is exempt from permitting. *Id*. at 5. The EPA also moved to dismiss, concurring with Highpeak on standing, timeliness, and the validity of the WTR but opposing Highpeak's claim, asserting that pollutants are introduced during Highpeak's water transfer, thus not exempt under the WTR and requiring a permit. *Id*. at 6.

At CSP's request, the district court deferred ruling on the motions, awaiting Supreme Court decisions that CSP argued could support its claims. *Id*. On August 1, 2024, after the Supreme Court issued its decisions in the pending cases, the district court granted the motions to dismiss the WTR challenge. The court denied the motion to dismiss the citizen suit against Highpeak. *Id*. at 12. This appeal followed.

II. Statement of the Facts

Rexville, New Union, is home to Crystal Stream, a waterway traditionally enjoyed for its recreational appeal and natural beauty. *Id*. at 2. The stream flows alongside Crystal Stream Park, which offers a two-mile walking trail tracing the water's edge, allowing residents and visitors to appreciate the stream's natural charm. *Id*. at 14, 16. Highpeak Tubes, Inc. ("Highpeak") is a recreational business that launches customers into Crystal Stream in rented innertubes. *Id.* at 4. In 1992, Highpeak sloppily constructed a 100-yard-long tunnel, four feet in diameter, to connect Crystal Stream with Cloudy Lake, a 274-acre lake situated at the northern edge of Highpeak's property. *Id*. at 4. Under an agreement with the State of New Union, Highpeak may release water when levels are sufficient, typically during the rainy season from spring through late summer. *Id*.

at 4. The tunnel has valves at either end that Highpeak uses to control the flow of water from Cloudy Lake into Crystal Stream. *Id.* Highpeak utilizes the water transfers to "enhance tubing recreation" at the expense of the surrounding ecological systems. *Id*.

Crystal Stream differs notably from Cloudy Lake in water composition. While Crystal Stream is largely fed by natural spring water and contains relatively low levels of total suspended solids ("TSS"), Cloudy Lake has elevated levels of certain minerals and pollutants, including iron at .80 mg/L, manganese at .090 mg/L, and TSS at 50 mg/L. *Id*. at 5. Before the tunnel's construction, Crystal Stream's waters were free from the elevated pollutant levels present in Cloudy Lake. That changed after Highpeak's intervention. Highpeak did not build the necessary pipe through the length of the tunnel and did not install any permeable conduit in the tunnel. *Id.* Therefore, water flow is directed partially through an iron pipe and in sections where the tunnel does not extend, the water moves directly through carved rock, picking up additional contaminants. *Id.* Due to insufficient maintenance, the tunnel is in deteriorating condition. *Id.* at 12. Highpeak's water transfers pollute Crystal Stream.

Highpeak's degradation of Crystal Stream did not go unnoticed by the citizens of Rexville. Two CSP members illustrate the community's experiences witnessing the aesthetic deterioration of Crystal Stream and persisting concerns about the harmful pollutants in the water. Since 1997, Cynthia Jones has lived 400 yards from Crystal Stream Park and has long enjoyed walking along its trail. *Id*. at 14–15. She recalls enjoying Crystal Stream's pristine water, now clouded by Highpeak's pollution. *Id*. at 14. In 2020, Ms. Jones learned that Highpeak's tunnel was the culprit. *Id*. That information was highly upsetting, preventing Ms. Jones from using the trail as frequently as she would like and eliminating the possibility that she might walk in the Stream due to fear and worry. *Id*. at 15. Jonathan Silver moved to Rexville in 2019, about a half-

mile from Crystal Stream. *Id.* at 16. He frequently walks the trail with his children and dogs and has noticed the water turning cloudy. *Id*. Mr. Silver would use the stream more often for recreation and allow his dogs to drink freely from the water if there was no pollution. *Id.* Mr. Jones is deeply concerned about the pollutants in the water and joined CSP to tackle the issue. *Id*. On December 1, 2023, Ms. Jones and other concerned citizens founded Crystal Stream Preservationists, Inc. ("CSP"), a nonprofit organization dedicated to saving and preserving the Crystal Stream. *Id*. at 4. CSP has a President, Vice President, and Secretary with Cynthia Jones serving as Secretary. *Id.* at 14. CSP's mission is to preserve Crystal Stream for future generations and ensure its natural state is safeguarded against pollution. *Id*. at 4, 14.

On December 15, 2023, CSP issued a CWA Notice of Intent to Sue ("Notice") to Highpeak. *Id*. at 4–5. The Notice alleged that Highpeak's tunnel constitutes a point source under the CWA and that Highpeak has been regularly discharging, and continues to discharge, pollutants into Crystal Stream without a National Pollutant Discharge Elimination System ("NPDES") permit. *Id*. CSP sent copies of the Notice to the New Union Department of Environmental Quality and the EPA, as required by 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3 (2023). *Id*. at 4. Because New Union does not have a CWA permitting program, permits in the state are issued by the EPA. *Id*. Highpeak, EPA, and CSP have all stipulated that both Cloudy Lake and Crystal Stream qualify as waters of the United States under the CWA. *Id*. at 4–5.

CSP's Notice further alleged that the discharge from Cloudy Lake into Crystal Stream contains elevated levels of pollutants—specifically iron, manganese, and TSS—due to the natural conditions in Cloudy Lake. *Id*. at 5. Given that Crystal Stream is largely fed by natural groundwater springs with lower pollutant levels, the discharge from Cloudy Lake introduces these pollutants into the stream and violates the CWA. *Id*. Anticipating Highpeak's reliance on

the WTR, CSP argued that the rule was improperly promulgated and thus void. *Id*. In the alternative, CSP argued that, even if the WTR has been properly promulgated, additional pollutants are introduced during the transfer process from Cloudy Lake to Crystal Stream, making the discharge ineligible under the rule. *Id*. To support this argument, CSP provided data samples from December 15, 2023, showing pollutant levels 2-3% higher at the discharge point compared to Cloudy Lake's intake samples. *Id*. The pollutant levels revealed slight differences between the two locations. At the Cloudy Lake Intake, the water contained 0.80 mg/L of iron, 0.090 mg/L of manganese, and 50 mg/L of total suspended solids (TSS). *Id.* In comparison, the discharge into Crystal Stream showed slightly elevated measurements, with 0.82 mg/L of iron, 0.093 mg/L of manganese, and 52 mg/L of TSS. *Id.*

On December 27, 2023, Highpeak sent a reply letter to CSP, stating only that it would not respond to the Notice on the merits, as Highpeak did not need an NPDES permit under the WTR. *Id*. Highpeak also argued that the water transfer from Cloudy Lake to Crystal Stream was natural and the addition of pollutants during the transfer did not bring the discharge outside of the scope of the WTR. *Id*. Sixty days after sending the Notice of Intent, CSP filed its Complaint on February 15, 2024, asserting both citizen suit claims against the Highpoint and a claim under the APA against the EPA challenging the promulgation of the WTR. *Id.* The Complaint challenged the validity of the WTR, arguing that it was invalidly promulgated and inconsistent with the CWA. *Id.* In the alternative, CSP contended that even if the rule were valid, Highpeak would still need an NPDES permit as its introduction of additional pollutants made it ineligible for the exemption.

In response, Highpeak filed a motion to dismiss. *Id*. The EPA also filed a motion to dismiss CSP's APA challenge. *Id*. at 6. The EPA joined Highpeak in questioning CSP's standing

and timeliness under the APA statute of limitations and defended the WTR, asserting that it was a valid promulgation under the CWA. *Id*. However, the EPA agreed with CSP that, even if the Court upholds the rule, Highpeak would still be required to obtain an NPDES permit for the pollutants introduced during the discharge. *Id*.

The district court granted the motions to dismiss CSP's challenge to the WTR but denied the motion to dismiss the citizen suit against Highpeak. *Id.* at 12. CSP timely filed a petition appealing the district court's holding that the rule was a valid regulation under the CWA, seeking recourse to protect the integrity of Crystal Stream. *Id*. at 2.

SUMMARY OF ARGUMENT

The district court correctly held that CSP has standing to bring both claims. CSP is entitled to organizational standing because it meets all elements under *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). CSP members alleged a concrete, particularized injury to their aesthetic and recreational interests that would otherwise entitle them to standing on their own. *Id; see Summers v. Earth Island Inst*., 555 U.S. 488, 495–96 (2009). The goal of this suit is also germane to CSP's purpose – to protect and preserve Crystal Stream from illegal transfers of polluted waters. *Id.* Finally, the participation of individual members is unnecessary to resolve this claim because it hinges on pure questions of law – the validity of the WTR under the CWA and whether this court should defer to the EPA's interpretation of its own rule. *Id.*

This court need not consider whether CSP was formed with intent to litigate. The Supreme Court has repeatedly endorsed litigation-motivated injuries and confers standing if the injury is fairly traceable of the challenged action. *See Federal Election Comm'n v. Cruz*, 596 U.S. 289, 296 (2022). As such, EPA and Highpeak conflate what it means to "manufacture" an injury under *Clapper* and *Hippocratic Medicine*, as those cases involved non-concrete self-

inflicted injuries based on speculative fears that had not occurred. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) and *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 383 (2024). That issue is absent here, as the pollution from Highpeak's discharge *already* injured CSP members. To insert a motive inquiry runs contrary to Congress' intent for relief under the CWA and imposes undue barriers to litigants.

The district court also correctly found that CSP timely filed this action under the 28 U.S.C § 2401(a) six-year limit. The Supreme Court recently held that the clock begins to run once the petitioner suffers the injury, not when the agency takes the final action. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2443 (2024). Where a petitioner is a corporate entity, the injury cannot arise before the entity formed. *Id. Corner Post* did not include a distinction between businesses and non-profits and neither does the APA, defining a "person" for purposes of judicial review as inclusive of both "public or private" organizations. See 5 U.S.C. §§ 551(2), 702. The court should abide by the plain meaning of the text and treat CSP the same because the "APA means what it says." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). Regardless, both the individual members who provide the basis for CSP's standing alleged injuries that fall within the six-year statute of limitations, as Ms. Jones learned of Highpeak's pollution in 2020 and Mr. Silver moved to Rexville in 2019.

Turning to the merits of this case, the district court erroneously upheld the WTR. After the Supreme Court's holding in *Loper*, the court must now apply *Skidmore* to determine whether an agency's interpretation of a rule is the "best reading," a determination exclusive for the court. *Loper Bright*, 144 S. Ct. at 2247. The EPA's reasoning to justify the WTR is unpersuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The EPA fails to analyze relevant definitions in the CWA including "point source" and "pollution," ignores relevant provisions of the Act that

indicate intent to regulate a wide array of polluters, and contradicts prior interpretations of the relevant statutory text. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 510 (2d Cir. 2017) ("*Catskill III*"). Additionally, the EPA's analysis of statutory construction and legislative history is overly narrow, focusing only on CWA provisions that seek to avoid interference with state water management activities while incorrectly implying that *all* water transfers pose that kind of interference. That analysis ignores Congressional intent to preempt state regulation of polluters that meet the definitions under the CWA, which many water transfers do. *See* 33 U.S.C. 1370.

The EPA's WTR is not the best reading of the CWA. The WTR establishes an overbroad exemption contrary to Congressional intent to use the CWA as a "potent weapon" to curb pollution. *Sackett v. EPA*, 598 U.S. 651, 661 (2023). Because of the EPA's seriously deficient reasoning in issuing the WTR, this case provides the "special justification" that the Supreme Court required after *Loper* for straying from *stare decisis* and overruling an agency action that was previously upheld under *Chevron*. *Loper Bright*, 144 S. Ct. at 2273. The court should do so here and find that the WTR is not the "best reading" of the CWA as it attempts to regulate away EPA's statutory duties to regulate qualifying water transfers.

Finally, the district court appropriately deferred to the EPA's interpretation of its ambiguous regulation under *Auer* and *Kisor*, which instructs the court to "ask the author" what a regulation means. *Kisor v. Wilkie*, 588 U.S. 558, 570 (2019). *Loper* does not expressly overrule the *Auer* deference, evidenced by its repeated citation and discussion of *Kisor*, which upholds and clarifies the doctrine. *See Loper Bright*, 144 S. Ct. at 2267. The doctrine remains consistent

with the call of *Loper*, as it does not empower agencies to make binding legal interpretations but rather respects their statutorily authorized expert fact-finding and policymaking. *See id.* at 2267 *and Kisor*, 588 U.S. at 575. If this court upholds the WTR, the statutory interpretation issue is resolved and thus, the EPA is not making any legal judgment. However, it is still unclear which water transfers, based on the EPA's expertise and individual facts, "do not add pollutants," under the rule. Therefore, it is appropriate for this court to defer to the EPA's conclusion that Highpeak is not exempt under the WTR.

STANDARD OF REVIEW

A question of law is reviewed *de novo. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 (2014). In reviewing a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim, the court must accept factual allegations in the complaint as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991); *South River Watershed All., Inc. v. Dekalb Cty*., 69 F.4th 809, 818 (11th Cir. 2023). For agency action review under the CWA, the court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); *see National Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 934 (6th Cir. 2009). The agency must show a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

ARGUMENT

I. CSP has organizational standing to challenge the EPA's Water Transfer Rule and bring its Citizen Suit against Highpeak.

EPA and Highpeak's proposition that the motivation for CSP's formation is relevant in the standing determination is a contrived rule unfounded in precedent. The Supreme Court has

long recognized the right of environmental organizations to sue on behalf of members with shared interests. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). An organization like CSP has standing in a representative capacity where: (1) its members would otherwise have standing in their own right; (2) the interests the suit seeks to protect are relevant to the organization's purpose; and (3) neither the claim nor the relief requested requires the participation of individual members in the lawsuit. *United Food & Commer. Workers Union Local 751 v. Brown Grp*., 517 U.S. 544, 553 (1996) (*quoting Hunt*, 432 U.S. at 343). This court need not consider whether CSP was formed to initiate litigation because the organization meets all *Hunt* elements for standing.

A. The threshold question for standing is whether a justiciable controversy exists, not the motivation of the injured in redressing the harm.

EPA and Highpeak contend that "if the entire purpose of a corporation is to create an avenue for litigation, then the court need not find a constitutional injury." *Crystal Stream Preservationist*s, slip op. at 7. That argument is unfounded and inserts a "motive" inquiry expressly disavowed by the Supreme Court. In *Evers v. Dwyer*, the Supreme Court held that litigation may proceed where a plaintiff purposefully availed himself of an injury for litigation, so long as that injury is justiciable under Article III. *See* 58 U.S. 202, 203 (1958) (allowing challenge to bus segregation statute to proceed, noting that the fact "that appellant may have boarded [the] particular bus for the purpose of instituting [the] litigation [was] not significant"). A petitioner's intent to pursue litigation "does not negate the simple fact of injury within the meaning of the relevant statute." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (conferring standing to "testers" of unlawful discriminatory housing practices who knew they would receive false information from real estate agents but inquired anyway). The injured does not need to be "passive to have standing." [1]

[1] Rachel Bayefsky, *Public-Law Litigation at A Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 NYU L. Rev. Online 128, 148 (2024).

In *Federal Election Comm'n v. Cruz,* the court similarly held that a self-inflicted injury "remains fairly traceable" to the unlawful action, "*even if the injury could be described in some sense as willingly incurred*." 596 U.S. at 296. (emphasis added). In *Cruz*, a candidate had purposefully loaned his campaign an amount exceeding the statutory limit, thereby leaving an amount unpaid that constituted an economic injury traceable to the statute and allowed for a legal challenge. *Id.* at 295. Therefore, the motive of the plaintiff in seeking redress is not relevant.

The EPA and Highpeak also mischaracterize what it means to "manufacture" an injury, erroneously citing case law dealing with a concreteness issue that is absent here. When determining whether an injury is "manufactured," the court considers whether the petitioner *was* or *will in fact be* "perceptibly harmed" by the agency action and not merely that she can "imagine circumstances" in which she *could* be. *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 688–89 (1973). That determination may become challenging when the injury alleged hinges on future effects or the foreseeable actions of third parties as illustrated in *Clapper* and *Hippocratic Medicine*.

When an injury hinges on the actions of a third party – here, the harm caused by EPA's failure to regulate Highpeak – self-inflicted harm based on subjective speculation is insufficient. *Clapper*, 568 U.S. at 416. In *Clapper*, the government passed a statute authorizing surveillance of certain foreign communications. 568 U.S. at 415–16. There, plaintiffs took expensive steps to enhance privacy measures and claimed that this constituted an Article III injury despite their inability to show they would be targeted under the statute. *Id.* That injury was too speculative and thus "manufactured." *Id.* The petitioner must also show that third parties responsible for future harm will "likely react in predictable ways." *Hippocratic Med*., 602 U.S. at 383. Anti-abortion organizations in *Hippocratic Medicine* claimed that they would be injured by the future

effects of eased restrictions on abortion medication, predicting how patients would react and arguing that they would have to divert organizational funds to oppose the policy. *Id.* at 386. The chain of causation between the regulation and those injuries was too attenuated and "mere speculation" about hypothetical effects. *Id.* at 394.

The facts here do not raise that same "manufactured standing" issue for CSP. *Clapper* and *Hippocratic Medicine* also involved organizations seeking to redress the interests of members, but here, the harm is distinguishable because it *already* occurred as in *Cruz*. The chain of causation does not require any speculation. The two declaring members witnessed the reduced quality of the water and already suffered from reduced enjoyment and recreation from Crystal Stream. *Crystal Stream Preservationist*s, slip op. at 14–16. CSP's data showcasing the elevated levels of pollutants corroborates the allegations made by the plaintiffs, and the record does not indicate that any other sources of pollution exist. *Id.* at 5. No CSP member claims to have incurred expenses from precautionary measures *just in case* the Stream becomes polluted, nor that they moved near Crystal Stream to self-inflict their injury and oppose Highpeak in court. Unlike in *Hippocratic Medicine*, it is also reasonably predictable that Highpeak will continue polluting Crystal Stream if it remains unregulated. Since the fears of pollution are not speculative, none of the members' injuries can be categorized as "manufactured."

In addition, at the motion to dismiss stage, this court must presume that the factual allegations in CSP's standing declarations are true and view the facts in its favor. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Neither Highpeak nor the EPA raised any doubts about the two standing declarations or data provided by CSP. If respondents had any basis for asserting that the allegations were untrue, they instead "should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham." *SCRAP*,

412 U.S. at 689 (accepting organization's allegations that a freight rate increase would result in increased pollution in recreational areas as sufficient to survive a motion to dismiss).

B. The court need not scrutinize the purpose of CSP's formation to confer standing.

Scrutiny into the workings of CSP must remain limited if it can establish Article III standing under *Hunt*. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*., 600 U.S. 181, 201 (2023) (declining to scrutinize whether an organization was a "genuine membership organization" because members had standing). Here, the District Court noted that the court can "look beyond the mere existence of corporate formalities to the intent behind that corporation's formation," and suggested that where that intent is to litigate, it may "weaken" the credibility of the injury. *Crystal Stream Preservationist*s, slip op. at 7. Notably, to support that assertion, the district court cited cases dealing with an entirely different standing issue – *Clapper* and *Hippocratic Medicine*. *Id.* Where an organization has "identified members and represents them in good faith" precedent does not "require further scrutiny into how the organization operates." *Students for Fair Admissions,* 600 U.S. at 201.

Although the challenge to organizational composition in *Students for Fair Admissions* was raised on different grounds, the reasoning is relevant here. EPA and Highpeak ask the court to prod into the motivations for the creation of CSP at a heightened level of scrutiny that is unnecessary. However, the court need only look for a justiciable injury to grant standing. That inquiry does not hinge on the *purpose of the formation* of the organization. The record also indicates that CSP is a validly incorporated organization under the laws of New Union. *Crystal Stream Preservationist*s, slip op. at 7.

C. CSP is entitled to organizational standing under *Hunt.*

The threshold question under *Hunt* is whether the organization's members, in an individual capacity, suffered a justiciable injury-in-fact caused by the agency action. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Only a single member with a justiciable injury is necessary. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (citations omitted). A justiciable injury is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical;" (c) "fairly ... trace[able] to the challenged action of the defendant; and (d) "likely," as opposed to merely "speculative," to be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citations omitted). For an APA suit, the court must look at the relevant statutory mandate that the agency action violates. *See SCRAP*, 412 U.S. at 686. Thus, the inquiry here is the same for both the APA challenge and the citizen suit as both are raised under the CWA.

1. Individual CSP members suffered an Article III injury-in-fact.

Harm to aesthetic, recreational, and health interests is cognizable to establish an injury-in-fact where the plaintiff has concrete plans to visit the affected area. *Summers*, 555 U.S. at 495–96. These principles are repeatedly applied by the courts – including the Supreme Court – to grant standing to environmental organizations like CSP. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181–82 (2000); (granting standing to an organization in a CWA citizen suit by citing an affidavit from a member who had stopped recreational activities in a river over concerns of ongoing pollution). For example, organizational petitioners in *Gaston Copper Recycling* had standing based on declarations of a member: a landowner near a lake four miles away from the pollutant release point of a recycling facility in violation of its discharge permit. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000). The owner testified that he and his family reduced their

regular fishing and swimming in the lake because of fear of pollutants in the water. *Id.* The court noted that this constituted "precisely those types of injuries that Congress intended to prevent by enacting the [CWA]" as it explicitly aimed for waters of the U.S. to be "fishable and swimmable." *Id.*

Here, the standing declarations share the qualities that consistently suffice in court. Cynthia Jones provides that she lives 400 yards from Crystal Stream Park, and "regularly" walks along the stream to "enjoy its crystal-clear color and purity," now clouded by Highpeak's transfers. *Crystal Stream Preservationist*s, slip op. at 14. When she "recently" found out about the polluted water entering the stream, she suffered reduced enjoyment as the information was "upsetting" and she is "very concerned" about the toxic pollutants and metals Highpeak is introducing into the Stream. *Id*. Jonathan Silver, who lives half a mile from the stream, declared that he regularly walks with his children and dog along the stream, but has become "deeply concerned" about the quality of the water. *Id.* at 16. Mr. Silver's exacerbated concerns cause him to not allow his dogs to drink from the stream during recreation. *Id.* CSP members provide concrete and particularized harms that suffice to establish Article III standing.

2. The interests of this litigation are germane to CSP's purpose.

Often, the only feasible means by which community members may "vindicate shared interests" is by creating a non-profit organization such as CSP, and this may well be the "primary reason" for joining. *See International Union v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 187 (1951)). "The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests." *Id.* As such, the "only practical judicial policy… is to permit the association or corporation in a single case to vindicate the interests of

all." *Id.* CSP's mission is to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters" and invites all those interested in preserving the stream for "environmental and aesthetic reasons." *Crystal Stream Preservationist*s, slip op. at 4, 6. CSP members banded together to "vindicate" that shared interest. The purpose of this challenge is undoubtedly aligned with that purpose.

3. The individual participation of CSP members is unnecessary to challenge or vacate the WTR.

The final prong under *Hunt* asks whether the claims or relief sought require the court to consider the individual circumstances of any aggrieved CSP member. *Brock*, 477 U.S. at 287. The court may consider whether the injury is "peculiar to the individual member concerned." *Warth v. Seldin*, 422 U.S. 490, 515–16 (1975). CSP members share a pure question of law in both their challenges – whether the WTR is a permissible interpretation of the CWA and whether Highpeak qualifies for the WTR. Neither of those claims require the individual participation of members.

D. The court may not impose prudential requirements where Congress intended the CWA to extend to the full limits of Art. III justiciability.

Denying CSP standing also runs contrary to the zone of interests that Congress created under the CWA. The CWA seeks to attain water quality suited for "recreation in and on the water" wherever attainable. 33 U.S.C. § 1251. The injuries described by the standing declarations of CSP members fall under this purview as their recreational activities are impeded by the muddying and pollution of Crystal Stream. EPA and Highpeak ask the court to unjustifiably create a "motive inquiry" contrary to Congressional intent. *See Havens Realty*, 455 U.S. at 372 (noting that the courts "lack authority to create prudential barriers to standing" where Congress intended relief to extend to the full extent of Article III standing). This court cannot do so. *Id*. Article III standing is concerned with ensuring the plaintiff is entitled to the relief intended

under the specific statute created by Congress. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). This court cannot impose an additional barrier for CSP to have standing.

II. CSP timely initiated this action under 28 U.S.C § 2401.

CSP timely filed its challenge to the WTR as required under 28 U.S.C. § 2401(a). A plaintiff must file a suit against the U.S. government within "six years after the right of action first accrues." *Id.* Interpreting that language in an APA rule challenge, the Supreme Court in *Corner Post* held that the clock begins to run when the plaintiff suffers its injury, not when the agency action occurs. *See Corner Post,* 144 S. Ct. at 2455. That injury-based accrual approach binds this court. There is no indication that a non-profit entity should be treated any differently than the for-profit corporation at issue in *Corner Post*. The court must not infer meaning where there is no clear indication in the statutory text. *See Corner Post, Inc.,* 144 S. Ct. at 2443.

A. CSP is a "person adversely affected" under the APA.

The plain text of the APA makes no distinction between businesses and non-profit entities. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). A question of statutory interpretation begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The APA entitles "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to judicial review. 5 U.S.C. § 702. The act defines a "person" as inclusive of an "individual, partnership, corporation, association, or ***public or private*** organization." 5 U.S.C. § 551(2) (emphasis added); *see also* 5 U.S.C. § 701 (adopting § 551 definitions for judicial review provisions §§ 701–706). The unambiguous wording of the statute contemplates and includes both businesses and public interest organizations. As described

in *Loper Bright*, "the text of the APA means what it says." 144 S. Ct. at 2262; *see also* organization, *Judicial Watch of Fla., Inc. v. United States DOJ*, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (holding that a non-profit is a "person" under § 551 in a FOIA claim). Consequently, courts allow review to both non-profit and private organizations under the same standard, sometimes in the same case. *See, e.g., Petro–Chem Processing, Inc. v. EPA,* 866 F.2d 433, 437 (D.C.Cir.1989) (applying statute of limitations in an APA challenge to deny both a non-profit organization and a business review of a rule).

The surrounding construction of the APA text also supports that conclusion. The Regulatory Flexibility Act (RFA), housed within the APA, requires agencies to make certain impact disclosures to regulated entities in rulemaking. *See* 5 U.S.C. § 602. There, Congress took care to not merely adopt the usual APA definitions in § 551, instead creating new definitions that distinguish a "small business" from a "small organization," the latter including non-profit organizations. 5 U.S.C. § 601. This illustrates Congress' awareness that it may in some instances be appropriate to distinguish the two. In sum, if Congress wanted to treat entities differently for judicial review of agency rules in § 702, it would. *See, e.g., Gun Owners' Action League v. Swift,* 284 F.3d 198, 214 (1st Cir. 2002) (noting that "many federal and state laws treat corporations differently than non-corporations" such as the tax code and medical statutes); *see also Community Blood Bank v. FTC*, 405 F.2d 1011, 1018 (8th Cir. 1969) ("Congress was fully aware of the distinction between business corporations on the one hand and true nonprofit charitable corporations on the other" when drafting Federal Trade Commission Act). The lack of a distinction in 5 U.S.C. § 551(2) shows that Congress could have created a distinction, but "it did not." *Corner Post*, 144 S. Ct. at 2458. This court must find that because CSP was formed on December 1, 2023, its suit is timely under § 2401 because as the truck stop in *Corner Pos*t, its

injury could not have risen before the organization existed. *Crystal Stream Preservationist*s, slip op. at 4.

B. Alternatively, the substantive injuries of individual CSP members substantive fall within the statute of limitations.

Even if the court is unpersuaded, the statute of limitations remains open because the individual injuries that give rise to CSP's standing are well within the time limit. It is unnecessary to summarize the litany of statutory, historical, precedential, and policy arguments that convinced the court in *Corner Post* to adopt the injury-based approach, but the most relevant here is its "substantive-injury" reasoning. 144 S. Ct. at 2450. Administrative "finality" provides that an agency action is reviewable when its result "directly affects the parties" and determines "rights or obligations, or from which legal consequences will follow." *Id.* at 2450 (*quoting Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see also* 5 U.S.C. § 704. For that reason, the relevant date is *when* the injury occurred, as that is when the petitioner was "directly affected." *See Id.* at 2459, n. 8. Otherwise, the court would "effectively deny many parties ultimately affected" access to judicial review. *See Functional Music, Inc. v. FCC*., 274 F.2d 543, 546 (D.C. Cir. 1958) (allowing rule challenge to proceed despite expired sixty-day statute of limitations under the Federal Communications Act nothing that "regulations are capable of continuing application").

For example, in *North Cnty. Cmty. All., Inc. v. Salazar*, the court applied the later-endorsed *Corner Post* approach to allow a claim to proceed ten years past the § 2401 limitations period. 573 F.3d 738, 743 (9th Cir. 2009). There, a non-profit organization consisting of residents and property owners sued only after a casino was constructed near members' homes, alleging that members "could have had no idea" that the ordinance would result in such an effect. *Id*. The

court noted that the review should not be barred "simply because the agency took the action long before anyone discovered the true state of affairs." *Id; cf. Petro–Chem Processing,* 866 F.2d at 437 (denying standing where an environmental group recruited new members after litigation had commenced with newer injuries to cure the limitations issue).

Here, both standing declarations describe injuries well within the time limit of §2401. As in *Salazar*, individual members learned about the elevated chemical levels within 6 years of this suit – Ms. Jones in 2020 and Mr. Silver in 2023. Both joined CSP before this suit commenced. The information that members discovered after joining CSP gave rise to heightened fear and reduced enjoyment of aesthetics and recreation. Still, all that is needed is for one member to have standing for standing. *Summers,* 555 U.S. at 498. It is undisputed that Mr. Silver only moved to Rexville in 2019 and therefore his injuries unquestionably fall within the permitted statute of limitations. *Crystal Stream Preservationist*s, slip op. at 5, 16.

III. The Water Transfers Rule violates the EPA's statutory mandate under the CWA.

In a rule challenge, the question that matters is "does the statute authorize the challenged agency action*?" Loper Bright*, 144 S. Ct. at 2269. The CWA Act does not authorize the WTR and is an impermissible waiver of permitting requirements. *Loper Bright* empowered courts to make the final call, overruling the deferential *Chevron* standard that allowed agencies' interpretations to stand if they were "reasonable." *Id.* at 2273. Congress intended for the CWA to be a "potent weapon" to curb pollution, evidenced by "capacious" definitions, strict applicability, and "severe" penalties for violators. *Sackett,* 598 U.S. at 661. If Congress created "crushing consequences" for even "inadvertent violations," an exemption as broad as the WTR cannot be squared with the goals of the Act. *Id.* (*quoting United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016)). This court must reverse the District Court's finding.

A. Under *Skidmore*, the EPA's reasoning is unpersuasive.

The EPA fails to persuade with the WTR rationale. Reviewing the most recent challenges to the WTR in *Catskill III and Friends of Everglades,* the Second Circuit and Eleventh Circuits grappled with the question of whether a water transfer qualifies as an "addition" of pollutants under the act. See *Catskill III,* 846 F.3d at 512–13, *and Friends of Everglades v. S. Fla. Water Mgmt. Dist*., 570 F.3d 1210 (11th Cir. 2009). Applying *Chevron*, the courts accepted EPA's interpretation and upheld the WTR. However, under *Skidmore*, while the court may look at the "rulings, interpretations, and opinions" of the EPA, the court is the sole final arbiter. *Skidmore,* 323 U.S. at 140. The level of persuasiveness of the agency's interpretation depends on the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.* This court must no longer accept the EPA's erroneous interpretation because, "in the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright,* 144 S.Ct. at 2266. The EPA's interpretation is not the "best."

In the publication of the final 2008 WTR, the EPA based its rationale on three areas of the CWA: (1) its legal framework, (2) statutory language and structure, and (3) legislative history. Each argument is easily discredited. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33698 (Jun. 13, 2008) [hereinafter "WTR"].

1. Although not dispositive, the EPA's Legal Framework Relies on *Chevron.*

EPA begins by citing *Chevron* and cases applying the standard as sufficient justification to ask a reviewing court to accept its rule. WTR at 337000. Because the court in *Loper* instructed that this alone is insufficient to overturn an agency interpretation that has been previously upheld, this argument is not dispositive in analyzing the sufficiency of EPA's reasoning. *See Loper Bright,* 144 S. Ct. at 2273.

2. The EPA's reasoning in its statutory language analysis is incomplete.

EPA begins its analysis by stating that the relevant question is "whether a water transfer as defined in the new regulation constitutes an "addition" within the Act." WTR at 337000. To reach its conclusion, EPA provides the text of only two definitions - "discharge of a pollutant," which the CWA says is "any addition of any pollutant to navigable waters from any point source," and "navigable waters," which means "waters of the United States." WTR at 337000; 33 U.S.C. § 1362(12), (7). The EPA does not bother to include or analyze the text in the definitions of "pollution" and "point sources," merely mentioning that the "pollutant" definition is broad. *Id.* Those definitions, along with multiple other important provisions, are crucial in reaching an accurate interpretation.

EPA omits analyzing the goals of the CWA. Congress tasked the EPA with not merely reducing, but rather "eliminating" the discharge of pollutants into U.S. waters by any "person." 33 U.S.C. §§ 1251(a)(1), 1361(a). To achieve this goal, the EPA must develop water quality standards and implement the "National Pollutant Discharge Elimination System" ("NPDES") program to ensure progress is made toward the elimination goal, as clearly stated in its title. *See* 33 U.S.C. §§ 1342, 1343. Under the NPDES program, any polluter that is a "point source" of pollution must implement appropriate technology to abide by "effluent" concentration limits. *Id.;* § 1311.

The Act defines "pollution" as any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). A "point source" of pollution includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container," releasing pollutants. *Id.* at (14). And finally, a "discharge" is plainly defined as "any addition of

any pollutant to navigable waters from any point source." *Id*. at (16). The dictionary definition of "addition" means "something that has been added to something else."[2] *See Los Angeles Cnty. Flood Control Dist. v. NRDC, Inc*., 568 U.S. 78, 82 (2013) ("add" means "to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate"). That accords with the drafter's intent, as they noted that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 3742 (1972). The EPA conveniently omits this.

Aside from the broad definitions of the act of *polluting* in the CWA, other provisions in the act provide clues into qualifying "additions." A "pollutant" includes a list of things such as dredged spoil, solid and chemical wastes, biological materials, and heat. *See* 33 U.S.C. § 1362(6). In § 304(a), Congress required the EPA to identify and collect information regarding "conventional pollutants," including but not limited to "biological oxygen demanding, suspended solids, fecal coliform, and pH." 33 U.S.C. § 1314(4). The EPA may also "modify" the effluent limitation requirements for "non-conventional pollutants," and for "iron and manganese" in coal operations. 33 U.S.C. § 1311(g), (p). These definitions in tandem with others in the Act support an inference that Congress wanted to include any *alteration* of the "integrity of the water" that may be harmful (emphasis added). This court must not give "limiting language" in the statute "no office." *Jones v. United States,* 529 U.S. 848, 857 (2000).

It also cannot be said that the WTR is consistent with precedent. For one, before the formal issuance of the WTR, the Supreme Court took up the question and reached a "best interpretation" of the "addition," which was not congruent with the EPA's. *See Miccosukee Tribe of Indians,* 541 U.S. at 103. (holding that a point source "need not be the original source of the pollutant," it

[2] *Addition,* Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press (4th Ed., 2021).

need only "convey" pollution to qualify). That "best interpretation" was disregarded despite the court's disagreement merely because the EPA decided to issue a final rule, which at the time, was entitled to *Chevron* deference that is now inapplicable. This court show now reimplement the "best interpretation" by evaluating the WTR rationale under *Skidmore*. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116, 131 ("We judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

Another remaining question in *Miccosukee*, which the court declined to answer, was whether it mattered that the receiving body of water was from one navigable body of water to another and thus within the definition of "discharge." *Miccosukee Tribe of Indians*, 541 U.S. at 105–06. The EPA argued that it does not because "navigable waters" should be read with a "unitary" approach, inherently then not a point source and should instead be regulated as a nonpoint source. *Id*. The court noted that this reading ignored the fact that not all nonpoint sources are exempt, and that often they may also fall within the point source definition. *Id.* at 107. The court remanded to the lower court to determine whether the two bodies of water subject to the transfer were "meaningfully distinct" and thus a discharge of pollutants. *Id*. at 112. *Catskill I* and *Catskill II* also declined to adopt that "unitary-waters" reading of the CWA, though they did not "foreclose" EPA from doing so. *See Catskill III,* 846 F.3d at 510. Applying that "unitary-waters" reasoning, the EPA asserts that "transferred (and received) 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." WTR at 33701. Therefore, the water is "already subsumed and entirely within" the body of water" and thus "nothing is added to those waters from the outside world." *Id.* Evidently, the courts have not found that approach persuasive in the past.

Simultaneously, the rule acknowledges that water transfers "may be of varying complexities and sizes" involving "multiple reservoirs, canals, or pumps," noting that "thousands of water transfers" occur frequently. WTR at 33698. Yet somehow, the WTR excludes all discharges from a "water transfer," that do not subject "the transferred water to intervening industrial, municipal, or commercial use" without requiring any inquiry into the pollutants that the conveyance may still add. 40 C.F.R. § 122.3(i). According to the EPA, then, despite the goals and broad definitions of the CWA to eliminate water pollution, it does not matter that pollution be induced from one pristine body to another because "the pollutants are already in the water."[3] That assumption ignores the realities of water transfers in practice.

Many water transfers qualify as an "addition" of pollutants because by moving waters from one body to another, they cause "man-induced" alterations to the "integrity of the water" as expressly defined in the act, even if the conveyance itself does not generate pollutants (as the Supreme Court reasoned in *Miccosukee*). 33 U.S.C. § 1362(19). Applying the facts in this case helps debunk the weak logic of the WTR. The sole reason for Cloudy Lake and Crystal Stream commingling is Highpeak's sloppy construction of the valve tunnel that allows contaminants to enter Crystal Stream. *Id.* The tunnel undisputably facilitates the "addition" of pollutants that would not occur absent the tunnel.

To further debunk the EPA's interpretive analysis, prior administrative agency adjudications and judicial decisions support a conclusion that the WTR utilizes an overbroad interpretation. For example, an EPA administrative judge rejected an argument that discharges "caused by normal dam operations" were always exempt from NPDES requirements. *Dr. Daniel J. Mcgowan*, 2016 WL 7742871, at *6 (Jul. 25, 2016). In *National Wildlife Fed'n v. Gorsuch*, the

[3] "United States EPA, NPDES Water Transfers Final Rule Fact Sheet" (Dec. 2010).

court noted that Congressional intent under the CWA shows that some dam activity may be point source pollution and that it would be improper to treat all dam transfers as exempt. 224 U.S. App. D.C. 41, n.36 (1982). To support that conclusion, the court also cited *United States v. Earth Sciences, Inc*., 599 F.2d 368, 371–73 (10th Cir.1979), as "accepting EPA view that some mining discharges are regulable under § 402 even though "mining activities" are listed as nonpoint source pollution." *Id.* Despite agreeing that the act did not "conclusively support" the EPA's interpretation, the court deferred to its interpretation upholding a rule exempting dams. *Id.* at 167. The court need not defer here under the new *Loper* standard.

3. The EPA's discussion of statutory construction is overly narrow.

The rule also claims to "look at the statute as a whole," but instead collapses its "addition" of a pollutant conclusion into a states-rights argument, ignoring the actual definitions that preempt such state decisions on this specific matter. WTR at 33701–02. EPA asserts that Congress, in the CWA, "clearly expressed policy not to unnecessarily interfere with water resource allocation." *Id.* While that may be true, that argument rests on another faulty, overbroad assumption – that *all* water transfers interfere with state water allocation systems. A "sweeping presumption of congressional intent" should be avoided where it is not clearly stated. *See Loper Bright*, 144 S. Ct. at 2247.

Regulating water transfers does not unduly interfere with States water resource allocation because the act still allows the EPA to waive or modify permitting requirements on a case-by-case basis. *See* 33 U.S.C. § 1314. The EPA can do so without exempting an entire class of polluters. That approach would not interfere with the states' prerogative to carry out its water management programs or create more stringent rules because again, any regulation would only extend to polluters the Act intends to reach. *See* 33 U.S.C. 1370. A significant number of water

transfers *may* involve such systems, but in its fact sheet, the EPA identifies broad categories of water transfers, including "public water supply, irrigation, power generation, flood control, and environmental restoration."[4] The facts of this case, for example, directly contradict the EPA's assumption as the water transfer at issue here does not interfere with New Union's water management systems in any way.

4. The EPA's Legislative History Analysis is Misleading.

Finally, the EPA's legislative history argument is also weak and incomplete. The EPA again impliedly assumes that Congress acknowledged that water transfers involve "water flow management" activities and inherently qualify as non-point sources. WTR at 33703. As such, it again argues that regulation would interfere with the Act's history of seeking to avoid such interference. *Id*. But additional legislative history of the Act also provides that "it should be the national policy" to take the necessary steps to ensure that water bodies can "change towards [a] pristine state in which the physical, chemical and biological integrity" exists. S. Rep. No. 92-414, at 3742 (1972). The drafter's main goal was to create "a policy for adequate management of all forms of environmental pollution" at a national level. *Id.* at 3742. (emphasis added). Therefore, the legislative history supports an inference, contrary to what EPA commands, that pollution that interferes with those overarching goals – point sources and discharges expressly defined in the act – *is* subject to federal regulation. Although water flow management *may* be a nonpoint source in some instances, Congress did not outright list water flow management as an expressly non-point source or otherwise exempt them from regulation entirely as the EPA attempts to do here.

B. There is sufficient justification to overrule prior holdings.

[4] *Id.*

As such this court is justified to overrule existing WTR rulings. A decision should generally not be overturned merely because it was decided on the wrong grounds, but *stare decisis* is not an "inexorable command." *Loper Bright,* 144 S. Ct. at 2270–73. The Court in *Loper* warned against frivolously overturning upheld rules merely because the holdings relied on *Chevron. Id.* at 2273. The District Court misinterpreted that call, concluding that there was a "clear intent" in *Loper* to limit review only to regulations that have not been previously challenged. *Id.* On the contrary, *Loper* suggests that a rule may overruled when there is a "special justification" to stray from *stare decisis* and that courts must *"*exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright,* 144 S. Ct. at 2273. To do so, the court may look at several factors including the quality of the reasoning, the workability of the rule, consistency with other decisions, and current reliance on the decision. *Knick v. Township of Scott,* 588 U.S. 180, 203 (2019) (*quoting Janus v. AFSCME,* 585 U. S. 878 (2018)).

As already illustrated, the EPA's reasoning is too weak to justify deferring to its interpretation. The WTR is unworkable and if anything, has created a dizzying array of case law struggling to decode whether its exemption is acceptable. *See Crystal Stream Preservationist*s, slip op. at 9. (listing case law from the 1st, 2nd, and 11th Circuits where the courts' rulings changed after EPA issued a formal rule). Those decisions have also not been consistent in their interpretations and only deferred to the EPA because *Chevron* required that result. The EPA acknowledges those inconsistencies throughout the rule, citing various cases where Courts of Appeals did find that NPDES permits were required in vastly different situations such as "the expansion of a ski resort and the supply of drinking water." WTR at 33699. The inconsistent

interpretations stem from the excessive broadness of the WTR. Whether water transfers require an NPDES permit is largely fact-dependent.

The EPA asserts that there are only "a few isolated instances" where entities administering the CWA have issued NPDES permits for water transfers (with only one state where they are "regularly issued"). WTR at 33699. It is reasonable, maybe obvious, to expect that a state regulatory authority with limited resources will avoid additional responsibilities where it can. EPA also argues that imposing permitting requirements will "unnecessarily burden water quality management activities." *Id.* at 33700. That is insufficient justification to keep the WTR as "[p]leas of administrative inconvenience ... never 'justify departing from the statute's clear text." *Corner Post*, 144 S. Ct. at 2458 (citations omitted). This court can overrule the WTR.

IV. The EPA's interpretation is still entitled to *Auer* deference post-*Loper*. Highpeak's water transfer requires a permit.

Even if this Court finds that the EPA properly promulgated the WTR, the exemption does not apply to Highpeak. The EPA agrees. *Crystal Stream Preservationists, Inc.*, No. 24-CV-5678 at 9. As the Supreme Court says: "Want to know what a rule means? Ask its author." *Kisor*, 588 U.S. at 570. This court should apply *Auer* deference to allow the EPA's interpretation to control. Highpeak argues that interpreting this regulation should be a purely legal matter for courts to decide, claiming that the recent Supreme Court decision in *Loper* removes any need to defer to the EPA's interpretation. *Id.* While *Loper* does shift the standard for automatic deference to agency interpretations, it does not expressly overrule the traditional *Auer* deference for an agency's interpretation of its own rules affirmed in *Kisor*. *See Loper Bright*, 144 S. Ct. at 2244. Here, determining what qualifies as introducing a pollutant through a water transfer activity involves complex factual and technical analysis, requiring EPA expertise rather and not legal

judgment. The EPA was tasked with making such determinations under the CWA. *See* 33 U.S.C. §§ 1311-1314.

A. *Loper* strikes a balance, allowing *Kisor* deference to an agency's expertise when the issue involves technical knowledge and factual determinations within its jurisdiction.

A court must defer to an agency's interpretation of an ambiguous rule unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *Loper* did not expressly overrule *Auer,* evidenced by its extensive discussion of *Kisor*, a case that recently clarified when deferring to an agency is appropriate. *See Loper Bright,* 144 S. Ct. at 2267 *and Kisor*, 588 U.S. at 563–64. *Loper* also acknowledges that the agency's views still carry weight, emphasizing that its specialized knowledge, especially in areas involving complex factual determinations and technical expertise, should inform the court's statutory interpretation. *Loper Bright,* 144 S. Ct. at 2267. That reasoning can be reconciled with *Kisor,* allowing deference where an agency's interpretation of a regulation involves choices based on facts and does not involve binding legal interpretation. 588 U.S. at 575.

In *Kisor,* the court reviewed a challenge to a decision of the Board of Veterans Appeals denying petitioner retroactive benefits after a determination that he suffered from PTSD. *Id*. at 564. The decision hinged on the agency's interpretation of a regulation that allowed for such retroactive benefits if the veteran could show "relevant official service records" not originally considered. *Id.* The court acknowledged that *Auer* deference is a "longstanding doctrine" and declined to overrule, instead stipulating its bounds. *Id.* First, the court must confirm that the regulation is actually ambiguous utilizing traditional tools of construction. *Id.* at 559. If ambiguous, the court must determine whether the "character and context" of the agency

interpretation are sufficient. *Id.* For example, the position must be the "authoritative or official agency position" in an area that involves the agency's substantive expertise. *Id.* The court also cautioned that the court must "determine whether the interpretation is of the sort that Congress would want to receive deference." *Id.* at 590. The *Kisor* rule remains consistent with the new holding in *Loper* and can thus still be applied by this court to the WTR.

B. The WTR is an ambiguous regulation and the EPA's interpretation satisfies *Kisor*.

If this court upholds the WTR, the ambiguous statutory interpretation issue is resolved, and the EPA need not make any legal judgment about what the CWA means. However, the rule is still ambiguous because it is still unclear which water transfers EPA considers exempt. The WTR stipulates that water transfers are exempt from permitting requirements *only* when they do not add pollutants to the receiving waters. 40 C.F.R. § 122.3(i) (2023). The rule clarifies that it does not apply to "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i) (2023). Thus, the EPA must still decide, on a case-by-case basis and independent scientific facts, which polluters fit the court's interpretation of "addition" under the WTR. That is what Congress requires the EPA to do.

The issue of whether iron, manganese, and TSS constitute an introduction of pollution during a water transfer activity is inherently technical and fact-specific, falling squarely within the expertise of the EPA. This is precisely the kind of determination that is entitled to deference under *Kisor*. The EPA, with its access to scientific data, research, and expert testimony, is best positioned to interpret what constitutes pollution in this context, not the court. S*ee Michigan v. EPA*, 576 U.S. 743, 771 (2015) ("EPA's experience and expertise in [the] arena — and courts' lack of those attributes — demand that judicial review proceed with caution and care"). The

classification of pollutants requires specialized knowledge in chemistry, hydrology, and water quality impacts—areas where the EPA has longstanding expertise. The agency's judgment, informed by years of environmental monitoring and technical knowledge, is crucial in understanding how these substances interact in water systems and whether their presence violates ecological standards. Given the complexity of water quality issues and the need for a specialized understanding of environmental impacts, the EPA's interpretation warrants deference.

To further illustrate, the EPA's technical interpretation of the WTR differs fundamentally from the legal interpretation in *Loper* deducing that the Magnuson-Stevens Fishery Act ("MSA") allowed requiring fishermen to pay for compliance observers. *Loper Bright,* 144 S. Ct. at 2256. Unlike interpreting what was permissible under the MSA, which constituted a legal interpretation, the EPA's interpretation here focuses solely on the technical application of a regulation it drafted —specifically, what kind of "introduction of pollution" is exempt from the WTR. The EPA here is using its scientific expertise to clarify complex terms within its regulatory framework, a task within its purview under CWA.

The EPA's interpretation of what constitutes the addition of pollutants is also well-supported by precedent. *See, e.g., S. D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 126 S. Ct. 1843, 1853 (2006). The central issue in *Warren* was whether the operation of a company's hydroelectric dams, which diverted water from rivers through turbines and then returned the water into the river, constituted a "discharge" into navigable waters under the CWA. *Id*. at 1847. The Court reasoned that "discharge" must have a broader scope than just the discharge of pollutants; otherwise, it would be redundant. *Id*. 1846. Relying on its ordinary meaning—"a flowing or issuing out"—the Court applied this broader sense, aligning with prior

case law and longstanding interpretations by the EPA, which had both construed "discharge" broadly to encompass releases from hydroelectric dams. *Id.*

C. Based on agency expertise, Highpeak's water transfer activity adds pollutants and is not exempt under the WTR.

Under the EPA's interpretation of the WTR, Highpeak's transfer of water from Cloudy Lake into Crystal Stream inarguably introduces pollutants and, therefore, requires an NPDES permit. Specifically, the EPA provides that a permit is required when water transfers introduce pollutants as they pass through a point source before entering the receiving body of water. WTR at 33705. The rule aims to prevent scenarios where water transfer infrastructure serves as a conduit for pollutants. This interpretation aligns with the fundamental objectives of the CWA—protecting water quality by preventing human activities from exacerbating pollution levels. *See Sackett*, 598 U.S. at 661. Highpeak contends, however, that the exception to the Exemption in 40 C.F.R. § 122.3(i) applies only to pollutants added by human intervention, not to naturally occurring substances like iron, manganese, and TSS.

According to the EPA, Highpeak's tunnel is essentially a point source. As water from Cloudy Lake passes through the iron pipe and rock of Highpeak's tunnel, pollutants are added, resulting in elevated concentrations of iron, manganese, and TSS when the water is discharged into Crystal Stream. *Crystal Stream Preservationists, Inc.*, slip op. at 5. These pollutants meet the CWA's definition under § 502(6), which includes substances such as chemical wastes, rock, and sand, as well as biological and industrial waste discharged into water. 33 U.S.C. § 1362(6) (2024). CSP's sampling data reveals a 2–3% increase in pollutant levels during the water transfer, linking Highpeak's water transfer to the introduction of contaminants. *Crystal Stream Preservationist*s, slip op. at 5.

The elevated concentrations of iron, manganese, and TSS observed in Highpeak's water transfers impose an active addition of pollutants, triggering the need for an NPDES permit. Highpeak's process does not merely move water; it introduces contaminants into the receiving waters of Crystal Stream, which falls outside the scope of the WTR. That addition falls within the scope of the NPDES permit system – to ensure that point-source discharges are properly regulated. See, *S. D. Warren Co.*, 126 S. Ct. at 1846. This court should defer to the EPA and find that Highpeak is not exempt from regulation. A decision to do so will protect and preserve Crystal Stream from environmental degradation, consistent with this nation's ambitious pollution elimination goals under the CWA.

CONCLUSION

For the foregoing reasons, Petitioner CSP respectfully requests that this court:

I. AFFIRM the district court's finding that CSP has standing to challenge WTR and bring its CWA Citizen Suit.

II. AFFIRM the district court holding that CSP timely filed its APA challenge.

III. REVERSE the district court holding that WTR is valid rule under CWA.

IV. Alternatively, AFFIRM the district court holding that Highpeak does not fall within the scope of the exemption established in WTR.