NON MEASURING BRIEF
TEAM 37

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

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

-and-

HIGHPEAK TUBES, INC.,
Defendant-Appellee-Cross-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 Petitioner, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

In 2008, the Environmental Protection Agency ("EPA") established the Water Transfers Rule ("WTR") to resolve a decades-long debate over water management under the Clean Water Act ("CWA"). The WTR clarified that water transfers between waters of the U.S. do not require a National Pollutant Discharge Elimination System ("NPDES") permit when free of pollutants. The rule aligns the implementation of the CWA with Congress's intent to balance federal and state authority in water management while preserving states' power over water allocations. The co-defendant, Highpeak Tubes, Inc. ("Highpeak"), a local family-owned recreational tubing company, has managed water levels between Cloudy Lake and Crystal Stream through its tunnel under New Union state oversight since 1992.

In December 2023, Crystal Stream Preservationists ("CSP"), was founded to raise an eleventh-hour challenge that the EPA unlawfully promulgated the WTR all those years ago. CSP's lawsuit is based on technically deficient declarations from two members who regularly recreate along Crystal Stream. In both declarations, the members explain that other members of CSP informed them the stream was being polluted, and learning about the pollution bothered them. CSP provided measurements of a 0.02 mg/L increase in iron, a 0.03 mg/L increase in manganese, and a 0.2 mg/L increase in total suspended solids ("TSS") between Cloudy Lake's intake and Crystal Stream's outfall. However, CSP has not provided data on the timing or specific figures for turbidity, nor the location of the tunnel relative to where the declarant members recreate. While Highpeak's tunnel likely requires an NPDES permit, CSP and its members are not constitutionally authorized to bring this challenge in federal court.

CSP's challenge to the EPA's promulgation of the WTR holds no water, and the district court erred in granting CSP "environmental standing." First, CSP's claim is time-barred; the CWA sets a strict 120-day limit for challenging the WTR, and CSP's filing was both brought in the improper court and filed years too late. Second, CSP lacks standing to facially challenge the WTR, as it fails to establish concrete, particularized harm stemming from the WTR, relying instead on conclusory assertions about water cloudiness, generalized grievances about pollution, and speculative injuries unrelated to the EPA's rulemaking. Third, CSP lacks standing to bring a CWA citizen suit as they have not shown plausibly in the complaint that the injuries are fairly traceable to the conduct of Highpeak or that a favorable judicial decision will remedy the alleged harm.

Next, the CWA's text empowered EPA's adoption of the WTR despite *Loper Bright* overturning *Chevron* deference. Even if the CWA's language is ambiguous, the EPA's interpretation remains the most faithful reading consistent with Congress's intent to uphold the relationship between federal oversight and state authority. Finally, the EPA's interpretation merits *Auer* deference under *Kisor*, as it reflects a fair, expert judgment aligned with longstanding regulatory principles. This Court should accordingly rule that CSP is time-barred from challenging the WTR, lacks Article III standing, and therefore affirm the lawful promulgation of the WTR, relying on EPA's interpretation of its regulation.

JURISDICTIONAL STATEMENT

On February 15, 2024, CSP filed a citizen suit under 33 U.S.C. § 1251. The district court had jurisdiction over the original action under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a), which authorizes citizen suits under the CWA. The United States Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 33 U.S.C. § 1369(b).

In this case, the plaintiffs challenge the EPA's WTR under the Administrative Procedure Act ("APA"). The district court's jurisdiction was not properly invoked under 33 U.S.C. § 1365(a). The WTR falls within the scope of 33 U.S.C. § 1369(b)(1), because it implicates one of the listed actions, and thus, challenges to the rule must be filed in a federal appeals court. *See infra* Argument Part I section A. The jurisdictional basis for this appeal will be further discussed in the argument section.

STATEMENT OF THE ISSUES PRESENTED

1. Whether CSP's regulatory challenge, which hinges on injuries to its members rather than injuries to the organization, was timely filed.
2. Whether CSP has standing to challenge the Water Transfers Rule when their alleged injury predates the rule itself.
3. Whether CSP has standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the Clean Water Act based on conclusory member declarations.
4. If the facial challenge can proceed, whether the EPA's promulgation of the WTR was a lawful exercise of its regulatory authority under the CWA.
5. If the citizen suit can proceed, whether Highpeak's discharge constitutes an "addition" not within the scope of WTR, despite lack of human activity.

STATEMENT OF THE CASE

In 2008, the EPA promulgated the WTR under the CWA, clarifying that water transfers between waters of the U.S. do not require an NPDES permit if no new pollutants are introduced. 40 C.F.R. § 122.3(i). The WTR confirms that NPDES permits are required when there are "additions" of pollutants introduced from a point source, as stated in the CWA. *Id.*

For thirty-two years, Highpeak, a family-owned recreational tubing company in Rexville, New Union, has operated along Crystal Stream. Record of the Court ("R") at 4. In 1992, with state approval, Highpeak constructed a four-foot, 100-yard tunnel connecting Cloudy Lake to Crystal Stream to manage water levels for optimal tubing conditions. *Id.* This tunnel, carved through rock and partially lined with iron pipe, includes valves at both ends, enabling Highpeak to adjust flow based on lake levels. *Id.*

Highpeak is allowed to operate the tunnel only when New Union confirms that Cloudy Lake's levels can sustain tubing activities and maintain the lake's ecological health, usually during the spring and summer. *Id.* Highpeak has never acquired an NPDES permit for these discharges. *Id.* According to water sampling by the plaintiff CSP, at the outfall, the levels of iron, manganese, and suspended solids are higher than at the intake. *Id.* at 5. At Cloudy Lake's intake, iron levels measured 0.80 mg/L, manganese 0.090 mg/L, and TSS 52 mg/L. *Id.* Meanwhile, at Crystal Stream's outfall, it was 0.82 mg/L, manganese 0.093 mg/L, and TSS 52 mg/L. *Id.*

CSP was founded on December 1, 2023, to "preserve Crystal Stream in its natural state for environmental and aesthetic reasons." *Id.* CSP consists of thirteen members in Rexville, of which two own lands within a mile of Crystal Stream. *Id.* Twelve members have lived in Rexville and recreated at Crystal Stream for over fifteen years, while Jonathan Silver arrived in 2019. *Id.* On December 13, CSP secretary Cynthia Jones declared that she had observed occasional cloudiness in the stream's water. *Id.* at 14. She stated that knowledge of the cause was based on secondhand information from CSP members, who speculated that this cloudiness might be related to a discharge from Cloudy Lake. *Id.* Jones has walked along the stream since 1997 and continues to do so. *Id.* Silver, who made his declaration on December 12, expressed reluctance to let his dogs drink from the stream due to perceived contaminants. *Id.* at 16. Silver

has not stopped walking with his dogs along the stream but stated that if not for Highpeak's discharge, he would recreate it more frequently on the stream and would allow his dogs to drink from it. *Id.* No data on Cloudy Lake's turbidity was collected by CSP to justify Jones's or Silver's declarations, including what time in the year the lake was turbid. Moreover, the declarations do not specify where the tunnel was located relative to Crystal Stream.

On December 15, CSP sent a notice of intent to sue ("NOIS") to Highpeak, the New Union Department of Environmental Quality, and the EPA. *Id.* at 4. The NOIS alleged that Highpeak's tunnel discharged pollutants into Crystal Stream without a required NPDES permit. *Id.* at 14-15. Anticipating Highpeak's potential reliance on the WTR exemption, CSP argued that pollutant increases during transfer made the discharges non-exempt. *Id.* at 15. After the sixty-day waiting period, CSP filed a complaint on February 15, 2024, reiterating the CWA claims against Highpeak and adding a APA challenge against the EPA. *Id.* at 8. In this complaint, CSP contended that the WTR itself was inconsistent with the CWA's statutory language and is therefore invalid, expanding their argument to include both the original CWA citizen suit claims and an APA-based challenge to the WTR's interpretation of "addition" as it applies to water transfers. *Id.*

The district court found that CSP had "environmental standing" and deemed the challenge timely. *Id.* at 6-8. The court upheld the WTR but held that Highpeak's discharge falls outside of the WTR exception and requires an NPDES permit. *Id.* at 9-12. EPA, Highpeak, and CSP each appealed different parts of the district court's order, with interlocutory appeals granted. *Id.* at 2.

SUMMARY OF THE ARGUMENT

CSP's claim is time-barred; the CWA clearly limits challenges to regulations of the NPDES system to 120 days after the publication of the rule. CSP's filing lacked jurisdiction in the district court and was filed years too late. Even if this Court disagrees as to timing, CSP lacks standing to facially challenge the WTR. The complaint fails to name any concrete, particularized harm stemming from the WTR, and general injuries to the association's values cannot support Article III standing. Likewise, all of the injuries claimed by members of CSP could not be caused by the WTR as Highpeak began operating its tunnel years before the adoption of the rule. CSP also lacks standing to bring the citizen suit under the CWA. The organization failed to plausibly show in the complaint that any injuries to its members are fairly traceable to the conduct of Highpeak; neither a geographic nor a temporal nexus has been plead. CSP also failed to explain how a favorable judicial decision might remedy the alleged harm.

Next, the WTR was adopted pursuant to EPA's delegated power in the CWA. EPA's interpretation remains the most faithful reading consistent with Congress's intent to uphold the relationship between federal oversight and state authority and therefore deserves respect from this Court. Finally, the EPA's interpretation of the term "pollutants introduced" in WTR merits *Kisor* deference as it reflects a fair, expert judgment aligned with longstanding regulatory principles. This Court should accordingly reverse the district court's holding as to timing and standing and affirm it's holding as to the adoption of the WTR and that the pollutants introduced by Highpeak's tunnel fall outside the scope of the WTR.

STANDARD OF REVIEW

This Court reviews all the foregoing issues de novo. Appellate courts reviewing district court's determinations on a motion to dismiss is de novo. Well-pleaded facts in the complaint are

accepted by this Court and all reasonable inferences are drawn in favor of the non-movant. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). Jurisdictional issues are questions of law that appellate courts review de novo. *Thompson v. Cty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994). Likewise, this Court reviews standing issues de novo. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). Finally, this Court reviews questions of law, de novo. *Monasky v. Taglieri*, 589 U.S. 68, 83-84 (2020).

ARGUMENT

I. The district court erred in finding CSP's facial challenge was not time-barred.

CSP's challenges lacked subject matter jurisdiction in the district court. The CWA provides an avenue for challenges to regulations that shape the NPDES permitting program like the WTR. 33 U.S.C. § 1369(b)(1). Under this provision, facial challenges to rules like the WTR must be brought in a circuit court of appeals within 120 days of the rule's publication. Even if this Court finds the rule was properly challenged under the APA, the district court misapplied the holding of *Corner Post* to find CSP's challenge was timely filed. This Court should reverse the holding of the district court as to timing.

a. CSP's claim has original jurisdiction in the U.S. Court of Appeals for the Twelfth Circuit under the Clean Water Act, but the claim was timed-barred.

CSP presented its facial challenge to the WTR to the wrong court under the wrong statute. While suits against the government are generally governed by the APA, CSP's facial challenge is properly governed by the statute of limitations specified by the Clean Water Act, as the timing provision in that statute displaces the APA. 33 U.S.C. §1369; *see Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024).

Jurisdictional issues can be raised for the first time on appeal. Fed. R. Civ. P. 12(h)(3); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382-83 (1884). Although the EPA's position is not automatically given deference, courts have deferred to an agency's interpretation of jurisdiction-conferring statutes when the jurisdictional issue involves multiple complex statutory provisions, and the agency is responsible for administering the statute. *See Halogenated Solvents Industry Alliance v. Thomas*, 783 F.2d 1262, 1265 (5th Cir. 1986).

Under the CWA, challenges to an EPA action issuing or denying any permit under 33 U.S.C. § 1342 can only be filed in a circuit court of appeals within 120 days of the rule's publication. 33 U.S.C. § 1369(b)(1)(F). §1342 of the CWA governs the NPDES permitting system. 33 U.S.C. § 1342. The term "under" in the jurisdiction-conferring statute has been construed by the Supreme Court to mean "pursuant to" or "by reason of the authority of" a specified section. *Nat'l Ass'n of Mfrs. v. DOD*, 583 U.S. 109, 110-11 (2018). Courts give this statute a "practical rather than a cramped construction." *Nat'l Res. Def. Council v. U.S. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982). In enacting this cause of action under the CWA, Congress intended to create a "clear and orderly process for judicial review."[1] Judicial decisions with nationwide policy implications are "best served by initial review in a court of appeals." *Nat'l Res. Def. Council*, 673 F.2d at 405 & n.15.

Circuit courts have original jurisdiction to hear challenges to both the actual issuance and denial of permits as well as the regulations governing the NPDES permitting system. *E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (holding that a finding to the contrary "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § [1342] but would have no

[1] *See* H.R. REP. NO. 92-911 at 136 (1972).

power of direct review of the basic regulations governing those individual actions."); *Nat'l Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927, 933 (6th Cir. 2009); *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 763 (9th Circ. 1992); *Nat'l Res. Def. Council v. U.S. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992). *See generally Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005).

The 11th Circuit decided that the WTR could not be challenged under §1369(b)(1)(F), thus misconstruing the meaning of the WTR. *Friends of the Everglades v. U.S. EPA*, 699 F.3d 1280, 1287-88 (11th Cir. 2012). In doing so, that court limited the scope of review, ignoring congressional intent and Supreme Court precedent. In *Crown Simpson Pulp Co. v. Costle*, the Supreme Court refused to read § 1369 "as creating such a seemingly irrational bifurcated system" which would force litigants to first raise their challenge in a district court, frustrating Congress' intent in writing the CWA. 445 U.S. 193, 197 (1980). Despite this clear holding, the court in *Friends of the Everglades* found it did not have jurisdiction to hear a challenge to the WTR under § 1369(b)(1)(F) because it constituted an "exemption" to the permitting system. 699 F.3d at 1288. The court explained that exemptions are fundamentally different from regulations that issue or deny a permit. *Id.* This is directly in conflict with the holding in *E. I. Du Pont* and *Crown Simpson* which demands a broader reading of the statute to include a review of "basic regulations governing those individual actions." *E. I. Du* Pont, 430 U.S. at 136.

The 12th Circuit should decline to apply the 11th Circuit's reasoning in the case because the WTR is a "basic regulation" that clarifies an area where permitting had historically been murky nationwide. When it adopted the rule, EPA explained challenges to the rule should be brought pursuant to §1369(b)(1) in a federal circuit court of appeals. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13,

2008). The WTR was promulgated under statutory authority of § 1342 which governs the NPDES permitting system. *Id.* at 33,698. The WTR clarifies that water transfers that introduce pollutants require an NPDES permit. 40 C.F.R. § 122.3(i). Before the issuance of the rule, many citizen suits arose out of impermissible discharges resulting from water transfers. *See infra* pp. 19-25. No matter what a court decides as to the merits of this case, the implications will make ripples across the nation. From the arid west to New York City, water transfers are all around us, and the court's decision will have national implications. Therefore, it is in line with congressional intent to create a bifurcated system of review and Supreme Court precedent that this challenge could only be raised under § 1369(b)(1)(F) of the CWA. Thus, any challenge to the WTR had to be raised by October 11, 2008, 120 days after the adoption of the WTR, and CSP's challenge is clearly outside of that window.

b. The District Court incorrectly identified an injury to CSP, rather than its members when determining the accrual of the claim in this case.

Even if this Court decides that this claim is properly asserted under the APA, CSP is still time-barred from bringing its challenge because the challenge is based on injuries to its members, rather than injuries to the organization itself. Under the APA, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C.S. § 2401. Recently, the Supreme Court clarified this provision, holding that a "right of action accrues when the plaintiff has a complete and present cause of action, which is when she has the right to file suit and obtain relief." *Corner Post,* 144 S.Ct. at 2444 (internal quotation marks omitted). In other words, the statute of limitations to challenge a regulation under the APA starts running when an injury occurs to a plaintiff.

In *Corner Post,* a business brought an facial challenge to a regulation adopted by the Federal Reserve in 2011 under the APA. *Id.* at 2448. The challenged regulation standardized the percentage of credit card interchange fees that banks could pass onto merchants. *Id*. Corner Post, the plaintiff, did not open its doors until 2021. *Id.* However, as soon as it opened its doors, Corner Post suffered injury from the agency's rule, alleging the regulation placed more of the cost of the interchange fees on merchants than allowed by the statute. *Id.* The Court decided the statute of limitations did not begin to run until 2021 as that was the date Corner Post's injury accrued. *Id.* at 2453.

This case is distinct from *Corner Post*. CSP is suing under the theory of organizational standing, which, among other things, requires one of its members to have standing to sue in their own right. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Unlike the plaintiff in *Corner Post,* the timing of the injury in this case has nothing to do with when CSP was formed. Rather, the relevant question is when did the right of action "accrue" for the members that support CSP's standing to challenge the WTR. Here, the members CSP relies on to assert standing were alive and well when the WTR was adopted by the EPA, and any downstream injuries they may suffer because of the rule began when the rule was adopted. The member's right to challenge the WTR under the Court's logic therefore "accrued" the moment the rule was promulgated in 2008. Therefore, any claim these members had to facially challenge the WTR under the APA was barred by 2014. Therefore, this Court should reverse the district court's holding as to timing.

II. The District Court erred in finding CSP established "environmental standing" to sue under the APA and the CWA.

The district court erroneously held that "the evidence demonstrated in the declarations of CSP's members is sufficient to find environmental standing." R. at 7. The court failed to address any of the constitutionally mandated standing requirements. Additionally, it is a well-established principle that plaintiffs must establish standing for each claim they assert. *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). The District Court lumped both of CSP's claims together, finding CSP generally had shown "environmental standing" sufficient to bring suit in federal court. Neither Congress nor the Supreme Court has created a standard for "environmental standing" that disregards the constitutional minimums of Article III standing, and the district court cannot do so now.

Beyond these major oversights, two main issues preclude CSP from surviving the motion to dismiss for lack of standing. First, CSP does not have standing to challenge the WTR because they have not pleaded a cognizable injury to do so and the WTR could not have caused any injury to the members. Second, CSP does not have standing to bring the citizen suit because the injuries to the members are not fairly traceable to Highpeak's conduct and CSP failed to explain how a favorable decision would likely redress any alleged injuries.

Article III standing is built on separation-of-powers principles, preventing the judicial branch from usurping power constitutionally dedicated to the political branches. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To obtain standing, an organization must show: (1) its members have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. 333 at 343. In this

case, CSP does not have standing to assert a claim under either the APA or the CWA, so this Court should reverse the district court's holding as to standing.

a. CSP does not have standing to bring a claim under the APA.

CSP fails to meet the first prong of the organizational standing test. CSP failed to allege an injury to a legally protected interest of its members that is caused by the WTR and likely to be redressed by a favorable judicial decision. It is especially difficult for a plaintiff who is not the object of a regulation to establish standing on facial challenges to that regulation; Choices made by the regulated third party often affect the traceability of an alleged injury to the challenged regulation and the likelihood of redressability. *Lujan*, 504 U.S. at 562.

i. CSP failed to allege any actual or imminent injury resulting from the WTR.

To establish standing, plaintiffs must show a concrete and particularized invasion of a legally protected interest. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). The injury must be actual or imminent rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. Frustration to an organization's mission alone does not constitute an actual or imminent injury. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Organizations cannot establish standing based on the intensity of their interests or because they oppose an agency's choice of regulation. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 (1982). Simply showing a "setback to the organization's abstract social interests" is insufficient to confer standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

In *FDA v. All. for Hippocratic Med.*, the Food and Drug Administration relaxed use restrictions on an abortion pill, Mifeprex, deeming it safe to use to terminate pregnancies up to ten weeks rather than seven weeks as it originally was approved. 602 U.S. 367, 377 (2024). Pro-life medical associations and individual doctors opposed the regulatory change and sued under

the APA. *Id.* at 373. The medical associations argued the change in regulations "impaired their ability to provide services and achieve their organizational missions." *Id.* at 394 (internal citations omitted). The court held plaintiffs cannot assert standing merely because they disagree with an agency's actions. *Id.*

CSP failed to clearly state any injury to its members as a result of the WTR. The only potential connection to the WTR alleged is the organization's interest in stopping illegal water transfers. Like the general objectives of the medical associations in *All. for Hippocratic Med.*, this mission alone does not afford CSP standing to facially challenge the WTR. Other than this general organizational mission, the only injuries alleged in the complaint are those to the recreational and aesthetic interests of members of CSP, detailed in their declarations. R. at 12-17. These injuries, however, are not downstream effects of the WTR.

ii. The alleged injuries to CSP's members predate the WTR, so it could not have caused them.

All alleged injuries to CSP's members' aesthetic and recreational interests predate the adoption of the rule. To support standing, injuries must be fairly traceable to a challenged regulation, meaning there must be a causal connection between the injury and challenged agency rule. *Allen v. Wright,* 468 U.S. 737, 753 (1984). Injuries that result from the independent action of a third party are not sufficient to confer standing. *California v. Texas*, 593 U.S. 659, 671 (2021). Especially when the plaintiff is not the object of a challenged regulation, they must show how the regulated party's conduct produced causation and permits redressability of the alleged injury. *Lujan*, 504 U.S. at 562. Injuries are not fairly traceable to a regulation if the plaintiff had a similar incentive to engage in countermeasures before the adoption of the rule. *Clapper*, 568 U.S. 398 at 417.

In *Clapper*, plaintiffs challenged the Foreign Intelligence Surveillance Act (FISA), arguing their communications with foreign contacts were likely to be intercepted under the amendments to the act. *Id.* at 401. However, the court found the plaintiffs' fear of surveillance was speculative and not fairly traceable to the challenged rule. *Id.* at 402. The Court reasoned plaintiffs had similar concerns about surveillance before the adoption of the FISA Amendments, indicating the alleged injuries were not caused by the new rules, but by pre-existing circumstances and activities. *Id.* at 417.

As was the case in *Clapper*, the WTR did not cause any injury to CSP's members; the alleged injuries are based on circumstances that predate the adoption of the WTR. Highpeak has been operating its tunnel, and likely impermissibly discharging since 1992. R. at 4. The WTR was not adopted by the EPA until 2008. Therefore, it wouldn't be possible for the WTR to cause any of the alleged injuries to CSP, and the organization has failed to even allege it has.

b. CSP does not have standing to sue under CWA.

The district court erroneously held that "the evidence demonstrated in the declarations of CSP's members is sufficient to find environmental standing." To obtain standing in a federal court, CSP must show a member has suffered an injury to a legally protected right that is "fairly traceable" to the challenged conduct of the defendant and is likely to be redressed by a favorable decision from the court. *Lujan*, 504 U.S. at 560-61. The Supreme Court is clear that plaintiffs at the pleadings stage must clearly allege facts that confer standing. *Spokeo*, 578 U.S. at 338. Thus, accepting the plaintiff's assertions as true, the complaint must be "plausible on its face," not

merely "threadbear" assertions supported by "mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[2]

Most circuits interpret this to mean the plaintiff must show sufficient factual matter that *plausibly* establishes standing if accepted as true. *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1355 (Fed. Cir. 2018); *Kareem v. Haspel*, 451 U.S. App. D.C. 1, 7 (2021); *Roman-Oliveras v. P.R. Elec. Power Auth.*, 655 F.3d 43, 45 n. 3, 49 (1st Cir. 2011); *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011); *Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570, 576-77 (3d Cir. 2024); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). A minority of circuits diverge, insisting that general allegations are sufficient to show standing at the pleadings stage. *See, e.g. Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). However, these courts overlook the Supreme Court's directive that plaintiffs bear the burden of proving elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Therefore, this court should disregard the path taken by the minority of circuits, adhere to the precedent of the Supreme Court, and require a plausible showing of standing to survive the motion to dismiss.

i. CSP failed to show that the discharge was "fairly traceable" to alleged injuries to its members.

The affidavits produced by CSP's members draw conclusory statements without any evidence that the discharge is fairly traceable to the occasional cloudiness members noticed in

[2] While *Ashcroft* dealt with substantive claims rather than standing issues, the Supreme Court previously held that each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

the river.[3] A mere violation of the CWA does not establish causation; a plaintiff must show that the pollutant discharged by the defendant causes or contributes to the injuries alleged. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021) (holding informational injuries alone cannot confer standing). Standing theories built on a "speculative chain of possibilities" are insufficient for Article III purposes. *Clapper*, 568 U.S. at 414. The "line of causation" between the alleged harm to the plaintiff and the defendant's discharge must be "more than 'attenuated.'" *Maya*, 658 F.3d at 1070 (quoting *Allen*, 468 U.S. at 757).

The plaintiff must show a geographic and temporal nexus between the alleged injury and the discharge to meet the "fairly traceable" standing requirement. *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 537 (5th Cir. 2019) (citing *Clapper*, 568 U.S. at 410). To establish a geographic nexus, the plaintiff must show the challenged discharge reaches the area where the plaintiff's alleged interests exist. *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1245 (10th Cir. 2021). To show a temporal nexus, the plaintiff must

[3] CSP's member declarations do not comply with the requirements set out in 28 U.S.C. §1746, and this court should render them invalid. According to the statute, if a declaration is executed within the United States, they can be supported as true if they are signed "under penalty of perjury that the foregoing is true and correct." 28 U.S.C. §1746(2). The affidavits here state the "foregoing is true and correct to the best of my knowledge." R. at 17, 15. Courts across the country have invalidated unsworn declarations for not strictly complying with the language set out in the statute. *See, e.g.*, *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) (holding an unsworn affidavit invalid because it was not stated to be "true and correct" as demanded by the statute); *Cortez v. Lobo (In re World Trade Ctr. Disaster Site Litig.)*, 722 F.3d 483, 488 (2d Cir. 2013) (holding "[t]he substitution of "subject to punishment" for "under penalty of perjury" is a substantial departure from the substance of the declaration provided in § 1746, and thus, does not comply with the statute). The 12th circuit should require strict compliance with the statute because the addition of "to the best of my knowledge" introduces ambiguity as to whether the declarations are true as required by statute. Further, the declarants allege their injuries are a result of information they learned from other members of CSP. Inadmissible hearsay does not rise to the level of plausibility required on a motion to dismiss. *Supra* Part II section B.

show that "discharges are present at a time relevant to" the members' interests. *Ctr. for Biological Diversity*, 937 F.3d at 537.

The line of causation here is attenuated at best. CSP offered no evidence regarding a temporal nexus between the discharge and alleged injuries. New Union typically allows Highpeak to operate the tunnel during the spring and summer. R. at 4. The declarations make no indication when during the year members witnessed any cloudiness in Crystal Stream, forcing this Court to speculate that the turbidity is a result of the discharge, rather than any other potential cause. In fact, Jones does not even claim to have witnessed cloudiness in the river at all. She only claims that members of CSP alerted her to the discharge and told her it could cause cloudiness in the water. *Id.* at 14.

The declarations only provide conclusory statements as to a geographical nexus. The members allege they regularly use a trail that runs along Crystal Stream for two miles, and that the tunnel is located "in the same area" of the stream. R. at 14-16. This general description alone is not sufficient to establish a plausible geographic nexus. The declarations lack any details about how close Highpeak's tunnel is to the trail. Likewise, there is no information about where the occasional cloudiness in the water is compared to the outpour of Highpeak's tunnel. These threadbear assertions force the court to speculate that there is a geographical nexus between the discharge and the claimed injury to the member's interests.

ii. CSP failed to request any redress or show how a favorable decision would remedy the alleged injury.

The standing requirement guards the judicial process from turning into "a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). To establish they are more than a "concerned bystander" and rise to the rigors

of Article III standing requirements, plaintiffs must show a "substantial likelihood" that a favorable decision will remedy the harm. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n. 20 (1978).

CSP failed to request a specific remedy to redress their alleged injuries. In the NOIS and subsequent complaint, CSP indicated it was suing Highpeak for discharging into the stream without a permit. R. at 4. However, no remedy specific was requested. Without a clear request for action from the court, it is less than likely that the court can redress any injury claimed. Likewise, because CSP has failed to show the discharge is fairly traceable to the cloudiness, it is uncertain whether a favorable decision from this court would have any effect on the cloudiness Silver occasionally noticed in the river.

III. The district court correctly held that the EPA had the authority to promulgate the WTR pursuant to the CWA.

The EPA lawfully promulgated the WTR under its delegated authority within the CWA. First, the statutory language of the CWA distinguishes between water quality regulation, under federal oversight, and water quantity allocation, traditionally managed by states. *See* 33 U.S.C. § 1251(g). Second, even if the CWA is found to be ambiguous, the WTR aligns with the single best interpretation of the statute, as evidenced by decades of consistent judicial and administrative application. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009); *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. U.S. EPA*, 846 F.3d 492, 533 (2d Cir. 2017). Finally, the WTR reflects thorough and consistent reasoning, meeting the standards for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), by balancing water quality with practical regulatory boundaries and maintaining federalism principles.

In administrative law cases, a statute's language may indicate that the implementing agency is authorized to exercise a degree of discretion, either by explicitly delegating authority to define statutory terms or by empowering the agency to "fill up the details" of a statutory scheme. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (citing *Wayman v. Southard*, 23 U.S. 1, 10 (1825)). Under the APA, the court's role is to independently interpret the statute, effectuate the will of Congress, fix the boundaries of the delegated authority, and ensure that the agency engages in "reasoned decisionmaking" within those limits. *Loper Bright*, 144 S. Ct. at 2263 (citing *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). The APA does not prescribe a deferential standard for courts when answering legal questions, even those involving ambiguous laws. *Id.* at 2261. While the APA mandates deference for agency factfinding and policymaking, it requires courts to independently interpret statutes and determine their meaning. 5 U.S.C. § 706. Accordingly, the Court should apply de novo review to affirm the district court's finding that the EPA lawfully promulgated the WTR.

a. The CWA's clear statutory language supports the EPA's adoption of WTR.

The EPA lawfully promulgated the WTR under its delegated authority within the CWA. The CWA employs a cooperative federalism model to achieve a dual purpose of protecting the integrity of the waters of the U.S. through federal oversight and respecting traditional state autonomy over water allocations. *See* 33 U.S.C. § 1251(g). The CWA distinguishes between water quality regulation, managed by the EPA, and water quantity allocation, which Congress explicitly reserves for states, reflecting Congress's intent to limit federal interference in state water rights. *Id.*

The CWA's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The NPDES permit program regulates

pollutant discharges from point sources into navigable waters, covering materials like solid waste, sewage, and chemical waste. 33 U.S.C. § 1362(6). The WTR clarifies that transferring water between waters of the U.S. does not constitute a "discharge" if no new pollutants are introduced. 40 C.F.R. § 122.3(i). By excluding standard water transfers from the federal NPDES permitting regime, the WTR implements Congress's intent to allow state control over water resource allocations without undue federal interference. *See* 33 U.S.C. § 1251(g). The CWA was passed with the understanding that the legislation needed to be a partnership between the state and federal government, and that problems vary from state to state.[4]

Requiring federal NPDES permits for water transfers that merely convey water without adding pollutants would disrupt this delicate federal-state balance, encroach on state authority, and impose an unnecessary regulatory burden. Congress addressed pollutants in the CWA by categorizing them and introducing a "best conventional technology" standard for "conventional pollutants" to ensure practical, effective treatment without excessive demands. Sen. Edmund Muskie, *The Meaning of the 1977 Clean Water Act*, EPA J., vol. 4, no. 7, July-Aug. 1978, at 4.

Conflicting circuit rulings inevitably led the EPA to promulgate the WTR to clarify NPDES requirements for water transfers. For instance, in *Nat'l Wildlife v. Gorsuch*, the court held that water passing through dams does not constitute an "addition" of pollutants, as no pollutants were introduced from an external source. 693 F.2d 156, 175 (D.C. Cir. 1982). However, in *Dubois, v. U.S. Dept. of Agric.*, the court held that water transfers between distinct bodies of water can be an "addition" under the CWA, requiring NPDES permits. 102 F.3d 1273, 1298–1300 (1st Cir. 1996). The WTR resolved this court-created confusion by clarifying that

[4] ENVIRONMENTAL POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, VOL. 4, SERIAL NO. 95-14, 1426 (1978).

only water transfers introducing pollutants in transit fall under NPDES requirements, reducing litigation and ensuring consistent regulation, consistent with Congress's intent. 73 Fed. Reg. at 33,702–03.

For decades, the EPA has held steady as a matter of policy that water transfers do not necessitate an NPDES permit unless there is an addition of pollutants.[5] Since issuing the WTR, the EPA has maintained that pollution from transferred waters is better addressed through water resource planning and land use regulations, targeting the problem at its source. 73 Fed. Reg. 33,697 at 33,702. The CWA already provides frameworks supporting this approach, including Section 102(b) on reservoir planning, Section 208(b)(2)(F) on land use planning to reduce agricultural nonpoint sources, Section 319 on nonpoint source management programs, and Section 401 on state certification of federally licensed projects. *Id.* at 33,702-03. Section 510 of the CWA further allows states to manage water quality standards related to transfer impacts. *Id.* at 33,706. The WTR reinforces Congress's expressly mandated cooperative federalism model by clarifying water transfers that introduce pollutants to comply with the NPDES program. *See* 33 U.S.C. § 1251(g). Accordingly, the EPA lawfully promulgated the WTR.

b. The single best meaning of the CWA supports the WTR as evidenced by Chevron-era cases.

Loper Bright overturned deference as described in *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 844 (1984), but it still ensures earlier decisions affirming the WTR's validity using *Chevron* remain binding under statutory stare decisis. 144 S. Ct. at 2273. Second, preserving the WTR is justified under stare decisis because it is well-reasoned, workable, and has

[5] U.S. ENVIRONMENTAL PROTECTION AGENCY, AGENCY INTERPRETATION ON APPLICABILITY OF SECTION 402 OF THE CLEAN WATER ACT TO WATER TRANSFERS (2005).

been consistently relied upon by states and private entities, aligning with the CWA's federalism framework and providing regulatory stability. *Id.* at 2270 (citing *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)). Finally, the EPA's consistent interpretation, thorough consideration, and alignment with the CWA's federalism objectives show the WTR was a lawful exercise of EPA's delegated authority. Thus, the EPA's interpretation of the CWA iterated in the WTR is demands *Skidmore* deference. *Skidmore*, 323 U.S. at 140.

The WTR has been upheld twice by appellate courts applying *Chevron* deference. *See Friends of the Everglades*, 570 F.3d at 1217; *Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d at 533. Thus, for several years, courts have recognized the EPA's interpretation as reasonable. Under *Chevron*, if a statute is ambiguous, the court will defer to an agency interpretation if it is within the bounds of reasonable interpretation. *Michigan v. EPA*, 576 U.S. at 750.

Although *Chevron* deference was overturned in *Loper Bright*, the Supreme Court confirmed that cases previously decided under *Chevron* remain legally binding due to statutory stare decisis. *Loper Bright*, 144 S. Ct. at 2273. This means that a judicial interpretation of a statute remains binding when the Court has definitively construed the statutory language. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 483–85 (2012). Simply arguing that a decision relied on Chevron does not meet the threshold for overturning it. *Loper Bright*, 144 S. Ct. at 2273 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

Earning stare decisis depends on factors such as the quality of a precedent's reasoning, its workability, and reliance interests. *Id.* at 2270 (citing *Knick*, 588 U.S. at 203). Here, the WTR meets each of the stare decisis factors, justifying its preservation. First, the WTR's reasoning not only respects but reinforces the CWA's cooperative federalism framework by exempting

pollutant-free water transfers from NPDES permits, as Congress intended to limit federal oversight over state-managed water allocation decisions. *See* 33 U.S.C. § 1251(g). The rule is workable in practice, having been upheld by courts and relied upon since 2008 in managing water resources. *See Friends of the Everglades*, 570 F.3d 1210 at 1217; *Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d at 533. Finally, the reliance interests supporting the WTR are substantial: states and private entities such as New Union and Highpeak have developed intricate water management frameworks based on the predictable boundaries it sets between federal and state authority. R. at 4.

Furthermore, EPA's interpretation of the CWA through the adoption of the WTR is owed respect from this court. *Skidmore*, 323 U.S. at 140. This deference is especially important given the WTR's nationwide role in ensuring consistent water management, which municipalities, industries, and agricultural regions rely on to meet critical needs. Relevant factors to determine how much weight an agency's interpretation is owed include the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Loper Bright*, 144 S. Ct. at 2259.

In adopting the WTR, the EPA first carefully reviewed scientific data, policy impacts, and extensive public comments, addressing concerns about water quality and regulatory burden. 73 Fed. Reg. at 33,703-04. Second, the WTR's reasoning aligns with the CWA's cooperative federalism model, which grants states control over water quantity management; by clarifying which transfers are subject to NPDES permitting requirements, the rule maintains state authority over non-polluting transfers, upholding the Act's intent and demonstrating a legally sound rationale. *See* 33 U.S.C. § 1251(g). Third, the WTR reflects the EPA's consistent approach to

water transfers, maintaining the agency's long-standing view that such transfers without added pollutants fall outside NPDES requirements.[6] Finally, the WTR's thoroughness, sound reasoning, and consistency lend it strong persuasive authority. Accordingly, the single best meaning of the CWA supports the EPA's adoption of the WTR. Therefore, this Court should affirm the district court's finding that the EPA validly promulgated the WTR.

IV. Highpeak's discharge does not fall within the scope of WTR, and therefore it must apply for an NPDES permit under the CWA.

Highpeak's discharge requires an NPDES permit because the term "pollutants introduced" in the WTR includes discharges that contain higher concentrations of iron, manganese, and sediment that raise the turbidity of a body of water at any point in during the transfer process. 40 C.F.R. § 122.3(i). Under this interpretation of the regulation, Highpeak is required to apply for a permit for their discharge of pollutants into Crystal Stream pursuant to 33 U.S.C. § 1311(a).

Highpeak asks this Court to impermissibly extend the recent Supreme Court ruling in *Loper Bright* to disregard an agency's long-held interpretation of its own regulation. Highpeak's argues that by overruling *Chevron* deference, lower courts should expand the logic to overrule a different long-standing doctrine, *Auer* deference, with no directive from the Supreme Court. By doing so they ask this Court to substitute the agency's interpretation with its own, ignoring well-established precedent to the contrary.

Supreme Court precedent requires federal courts to defer to an agency's interpretation of its own regulations. When evaluating an agency's interpretation of its own regulation, this Court

[6] U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 5.

must defer to the agency interpretation according to *Auer* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer* deference is a three-part test used when evaluating an agency interpretation of a regulation passed by that agency. *Id*. First, the court must determine if the regulation is genuinely ambiguous. *Kisor v. Wilkie*, 588 U.S. 558, 573-74 (2019). Second, an agency's interpretation must reflect fair and considered judgment. *Id*. at 578. Finally, the court must determine if the agency interpretation holds the controlling weight of law and in some way implicates its substantial expertise. *Id*. at 577. Here, the EPA has met every requirement to be awarded *Auer* deference. Therefore, this Court should rule that EPA's interpretation of the WTR should be upheld.

a. The specific provision of the WTR is genuinely ambiguous.

The first consideration a court must make when deciding when to apply *Auer* deference is if the regulation is genuinely ambiguous. *Kisor*, 588 U.S. at 573-74. Before concluding that a regulation is genuinely ambiguous, a court must exhaust all traditional tools of construction. *Id*. at 575. The court adopted the same ambiguity standard and analysis as *Chevron*. *Id*. A court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency interpretation to fall back on. *Id*. First, looking at the text and structure of the regulation, the plain meaning of the words is reviewed, and it is presumed that words carry their ordinary meaning. *United States v. Caraballo*, 88 F.4th 239, 246 (3d Cir. 2023). Courts have routinely relied on legal dictionaries such as *Black's Law Dictionary* as a way of determining the plain meaning of a statute or regulation. *Id*.

The specific provision of the WTR in question reads:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to

> *pollutants introduced* by the water transfer activity itself to the water being transferred. 40 C.F.R. § 122.3(i) (emphasis added).

The source of the ambiguity in the above regulation is the phrase "pollutants introduced." Highpeak never asserted that the text of 40 C.F.R. § 122.3(i) is clear. Instead, they provided their own interpretation of the regulation that reads "pollutants introduced" to mean introduced by human activity. R. at 11. The EPA interprets this text to be more expansive, determining that "pollutants introduced" means the addition of pollutants through human activity and natural processes such as erosion. *Id*. The fact this text results in two different interpretations demonstrates that the regulation's plain meaning is ambiguous and passes step one of the *Auer* deference test.

Black's Law Dictionary defines "pollutant" as "any substance, or form of energy which has the ability to pollute the environment, causing harmful effects and damaging nature in general." *Pollution, Black's Law Dictionary* (2nd Ed. 1995). Notably, *Black's* does not provide specific information as to what substances would be considered a pollutant. This lack of specificity is more evidence of the regulations' ambiguity.

The term "introduced" has many definitions. One definition of "introduced" is "to lead or bring in especially for the first time" and "to bring into play[.]" *Introduced, Merriam-Webster Dictionary* (2024). Another dictionary defines it as "to put something into use, operation, or a place for the first time." *Introduced, Cambridge Dictionary* (2024). The existence of multiple definitions of the word "introduced," shows there are multiple interpretations of the word. As in *Carballo,* where the court found that multiple reasonable readings are evidence of ambiguity, the court here should similarly find the WTR to be ambiguous. 88 F.4th at 247.

Looking to the structure of the regulation provides more evidence that WTR is ambiguous as the regulation fails to define the term "introduced." The absence of a definition

means that the WTR does not provide clear textual guidance further supporting its ambiguity and the EPA's interpretation.

Finally, the courts have a history of finding the language of the WTR ambiguous. To understand the WTR, previous courts have used the federal register to supplement their understanding of the regulation and to determine what the EPA interpreted "addition of pollutants" to mean. *See, e.g. Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d at 504-05. (The court looked at regulatory history and EPA action to interpret the WTR). Because no definitions of "introduced" and "pollutants" are specified in the plain language of the regulation, and there is a history of other courts finding the regulation ambiguous, the Court should find that the regulation is genuinely ambiguous and passes *Auer's* first step.

b. The EPA's interpretation of the WTR shows fair and considered judgment.

An agency's reading of a regulation must reflect "fair and considered judgment" to receive *Auer* deference. *Kisor* 588 U.S. at 579. A court may not defer to a new interpretation, regardless of whether it is introduced for the first time during litigation because it creates "unfair surprise" to regulated parties. *Id*. *Auer* deference is rarely given when the agency's interpretation conflicts with a prior interpretation from the same agency. *Id*. An agency satisfies step two of *Auer* deference if the definition and interpretations provided are reasonable. *Caraballo*, 88 F.4th at 248. Click or tap here to enter text.

The EPA has interpreted "pollutants introduced" more expansively than Highpeak. Nevertheless, the interpretation is supported by fair and considered judgment. EPA has based its interpretation of the WTR on definitions provided and case law.

Looking at the text, "introduced" is not directly defined in the regulation, while the definition of "discharge of a pollutant" is clearly stated and provides the basis for the EPA's

interpretation of the regulation. "Discharge of a pollutant" is defined as "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2. There is no language that supports Highpeak's argument that the introduction of pollutants needs to exclusively be from human activity. The definition of "pollutant" is provided by the EPA: "Pollutant means…solid waste, ... biological materials, … rock, [and] sand." 40 C.F.R. § 122.2. Again, there is no language in this definition that supports Highpeak's interpretation of the regulation that necessitates a link between the pollutants and human activity.

Relevant to the EPA's interpretation of the WTR is the definition of "point source." A point source means "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, [or] tunnel … from which pollutants are or *may* be discharged." 40 C.F.R. § 122.2 (emphasis added). This definition is identical to the definition of point source in the CWA. *Nat'l Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (upholding the definition of "point source" as written in the CWA, which is identical to the definition in the WTR). Highpeak's tunnel undoubtedly qualifies as a point source according to EPA regulations and the CWA.

The structure and text of the WTR support the EPA's interpretation in this case. When the WTR was published in the Federal Register, the EPA used express language stating that NPDES permits would be required for "pollutants introduced by the water transfer activity itself to the water being transported." 73 Fed. Reg. at 33,705. Further, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required. *Id*. Highpeak has not alleged that the measurements presented by CSP's complaint are false. R. at 5. The measurements show an increase in iron, manganese, and TSS that is being

added to Crystal Stream as a direct result of Highpeak's water transfer. This is the exact situation the EPA contemplated in the final rule published in the Federal Register.

The EPA based its interpretation on officially promulgated rules and regulations. Even before the adoption of the WTR, the EPA's policy remained consistent throughout history, evidenced by its interpretive memo published in 2005. The memo's language mirrors the WTR when it was published.[7] The EPA showed that the WTR covers any introduction of pollutants during the water transfer process, whether through human activity or natural processes, using fair and considered judgment as required by step two of *Auer*. EPA constructed this interpretation using definitions contained within 40 C.F.R. Part 122 and used consistent reasoning dating back to the promulgation of the Water Transfer Rule in the Federal Register in 2008. EPA's position in this litigation is consistent with official policy since 2006, and Highpeak cannot contend that there was an "unfair surprise" when the agency rationale has been published for over a decade. Due to all these factors, the EPA has demonstrated fair and considered reasoning and passed *Auer* step two.

c. The character and context of the EPA's interpretation entitle it to controlling weight.

To be considered for *Auer* deference, the court must make an independent inquiry into whether the character and context of the agency interpretation entitle it to controlling weight. *Kisor*, 588 U.S at 576. The court in *Kisor* provided two specific considerations used to determine if the agency's interpretation was entitled to controlling weight. *Id*. First, the interpretation must be one made by the agency and must be the agency's "authoritative" or "official position." *Id*. at 577. Next, the interpretation must implicate the agency's substantive expertise. *Id.*

[7] U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 5.

As discussed, the agency's interpretation is rooted in publications published in the Federal Register since 2006. These publications show that the EPA's interpretation has remained consistent, and the interpretation is the EPA's official position. In an interpretive memo from August 5, 2005, EPA clarified that the WTR was meant to exclude transfers that do not move pollutants.[8] Finally, the EPA's interpretation of the WTR squarely implicates the agency's expertise. Congress when passing the CWA left many areas for the EPA to fill the gaps. The EPA had the proper authority to promulgate the WTR. *See Supra* Argument Part III. Congress has expressly relied on the EPA's expertise in carrying out the NPDES permitting system. 33 U.S.C.S. § 1342(a). § 1342 of the CWA lays out the NPDES system and is one of the statutory bases for the WTR and other regulations of the permitting system. In 2021, the Government Accountability Office issued a report, finding that in 2020, the EPA was overseeing roughly 335,000 active permits.[9] The EPA's history of issuing permits and overseeing the permitting system shows the agency expertise in this area. Therefore, this Court should give controlling weight to the agency's interpretation of the WTR. Therefore, the EPA's interpretation of "pollutants introduced" in the WTR passes the final step of the *Auer* test.

The EPA's interpretation of the WTR passes all steps of the *Auer* test. As such, this Court should affirm the district court ruling that Highpeak's discharge is not covered by the WTR and requires an NPDES permit.

[8] U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 5.
[9] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-290, CLEAN WATER ACT: EPA NEEDS TO BETTER ASSESS AND DISCLOSE QUALITY OF COMPLIANCE AND ENFORCEMENT DATA (2021).

CONCLUSION

For the foregoing reasons, the EPA asks this Court to reverse the district court's ruling in issue I and II, instead finding that CSP was time-barred from bringing their challenge and did not have standing to bring suit under the APA or CWA. We ask this Court to affirm the lower court's finding that the WTR was validly promulgated, and the decision to grant the EPA's motion to dismiss CSP's challenge to the WTR. Lastly, we ask this Court to affirm the EPA's interpretation of the WTR requiring Highpeak to obtain an NPDES permit.