Team 38

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-Appellee-Cross-Appellant

On Appeal from the United States District Court for the District of New Union

Brief of Appellee, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union issued a Decision and Order in case No. 24-CV-5678 on August 1, 2024, by the Honorable Judge T. Douglas Bowman. The district court has subject-matter jurisdiction under 33 U.S.C. § 1365(a), the citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1251, and under 28 U.S.C. § 1331 because the cause of action is provided by federal law. Crystal Stream Preservationists, Inc. ("CSP"), the United States Environmental Protection Agency ("EPA"), and Highpeak Tubes, Inc. ("Highpeak") all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292(b), providing that the court of appeals has jurisdiction over appeals from district courts' interlocutory decisions where such order involves a controlling question of law. The District Court of New Union indicated that there are controlling questions of law regarding the validity of the Water Transfers Rule and its interpretation.

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err when it held that CSP, a not-for-profit corporation comprised of residents of Rexville, New Union, who all have been personally harmed by Highpeak's discharges, had standing to challenge a regulation promulgated by the EPA and had standing to bring a citizen suit for discharges in violation of the Clean Water Act?

II. Did the District Court err when it held that CSP's regulatory challenge was timely filed, given CSP filed within 76 days of their cause of action accruing determined under the Supreme Court's holding in *Corner Post* when there is a six-year statute of limitations?

III. Did the District Court err when it held that the Water Transfers Rule is a valid promulgation pursuant to the Clean Water Act, given that the Water Transfers Rule is contrary to the plain language of the Clean Water Act and its legislative intent?

IV. Did the District Court err in holding that pollutants introduced in the course of the water transfer itself took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to an NPDES permit, given the regulation explicitly stating that if pollutants are introduced through water transfers itself, the pollutants are outside the scope?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Clean Water Act. In 1969, Ohio's Cuyahoga River caught on fire due to the abysmal number of pollutants in the water. *See American Rivers*. The public was devastated by this and demanded Congress enact laws to protect all waters. *Id.* The Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "the Act"), was passed in 1972 to protect the integrity of the United States' waters. *See* 33 U.S.C. §§ 1251-1387. The Act provided a basic structure to ensure quality standards for bodies of water and to "maintain the chemical, physical, and biological integrity" of the water. *Id.* at § 1251(a). More specifically, the Act made the discharge of pollutants from pipes and man-made tunnels into the United States' waters unlawful. 33 U.S.C. 1311(a); *See* U.S. Environmental Protection Agency, Summary of the Clean Water Act (2024). To achieve its goal, the terms of the statute were written broadly. *Id.* A discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* A pollutant is defined broadly as listing various types of materials that would qualify. *Id.*

Although the statute was written broadly, the Clean Water Act is not an absolute. *Id.* The Act provides certain exceptions; one exception is allowing individuals to acquire a permit. *Id.* The Act created the National Pollutant Discharge Elimination System (NPDES). *Id.* When structuring the Act, Congress intended for the states to play an active role in decision-making and enforcement. *Catskill Mts. Chptr. Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 502 (2d Cir. 2017) ("Catskill III"); *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (the CWA "anticipates a partnership between the States and the Federal Government"). Reflecting this, states control the NPDES permitting programs that apply to the waters within their borders, subject to EPA approval. *See* 33 U.S.C. §§ 1314(i)(2), 1342(b)-(c). This method has been quite effective as most states have created state-specific permitting standards. *S. Side Quarry v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022). Of the few who has not, New Union has not created a state-specific permitting system, rather, New Union's own environmental agency issues permit under the NPDES. R. at 4.

The NPDES is a permit system that requires facilities to obtain a permit to discharge pollutants from a "point of source" into the waters of the United States, which gives the EPA the power to issue these permits. *Id.*; 33 U.S.C. § 1342(a)(1). "The permit will contain limits on what [an individual] can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health." *Id.* "With a permit, a person may discharge pollutants so long as he stays within the permit's limits. But without a permit, a discharge is unlawful." *S. Side Quarry v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 28 F.4th 684 (6th Cir. 2022) (citing 33 U.S.C. § 1311(a)).

The Water Transfers Rule. In 2008, the EPA created the Water Transfers Rule, which is an exemption to the Act. *See* 40 C.F.R. 122.3(i) (2023). The Water Transfers Rule exempts nine

types of discharges from having to require a permit, which otherwise would require one. *Id.* Within these, discharges from a water transfer are exempted. A water transfer is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. 122.3(i) (2023). Yet, the Water Transfers Rule does not exempt transfers that introduce pollutants to the water by the transfer activity itself. *Id.*

B. Highpeak's Business Operations

Highpeak is a recreational tubing operation located in the town of Rexville, New Union. R. at 4. Highpeak owns a 42-acre parcel of land that they use for the operations. On this huge parcel of land, there is Cloudy Lake and Crystal Stream. R. at 4. Cloud Lake is a 274-acre lake in the Awandack mountain range, bordering the north edge of the property. R. at 4. Crystal Stream is a stream on the southern portion of the land. R. at 4.

The Water Transfer. For the past 32 years, Highpeak has been using Crystal Stream to launch customers in rented innertubes. R. at 4. Yet, Highpeak does not always have enough water for tubing. R. at 4. Highpeak constructed a tunnel to siphon water from Cloud Lake to fix this problem. R. at 4. This tunnel was carved through a rock and constructed with an iron pipe installed by Highpeak. R. at 4. The tunnel is four feet in diameter and approximately 100 yards long and is equipped with valves at the northern and southern end. R. at 4. Without any limitations, employees at Highpeak use these values when Cloud Lake water levels are adequate to release water into Crystal Stream for the sole purpose of enhancing the tubing experience. R. at 4.

Highpeak's ease of siphoning water from Cloudy Lake does not come without consequences. R. at 5. When they transfer Cloudy Lake water, Highpeak introduces higher levels

of iron, manganese, and total suspended solids into Crystal Stream. R. at 5. These pollutants are changing the quality and clarity of Crystal Stream's water. R. at 5.

C. Community Concern for the Crystal Stream

Crystal Stream is a staple in the community of Rexville, New Union. R. at 4. This town is filled with decades-long residents who regularly use the Crystal Stream for a variety of reasons from walks with their dogs, swimming with their families, and simply enjoying the beautiful crystal-clear water of Crystal Stream. *See* Exhibit B to Complaint (Decl. of Johnathan Silver at Par. 5-9; *See* Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7-9.

Over the years, many residents have become concerned with the deteriorating quality of Crystal Stream. *Id*. Since moving to Rexville in 2019, Johnathan Silver has frequently enjoyed and appreciated Crystal Stream. After noticing the change in the Crystal Stream's water condition, several community members banded together to create Crystal Stream Preservationists, Inc. R. at 5. CSP is a not-for-profit corporation that focuses on "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." R. at 5. CSP's mission centers around protecting Crystal Stream from industrial uses and water pollution for the preservation for the current and future generations to enjoy. R. at 6.

> The Crystal Stream Preservationists' mission is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations.

R. at 6.

CSP has 13 total members. R. at 4. These 13 members have a long commitment to a close-knit community of Rexville—as two members own land along Crystal Stream and all members, but one, have lived in Crystal Stream for more than 15 years. R. at 4. After being a landowner

along the Crystal Stream, Johnathan Silvers joined CSP In protecting Crystal Stream, CSP is trying to stop the harmful pollution. R. at 5.

D. Procedural History

Prior to Suit. On December 15, 2023, Plaintiff CSP sent a CWA notice of intent to sue letter to Highpeak and sent copies to the New Union Department of Environmental Quality and the EPA, complying with the regulation's requirements. R. at 4. The letter alleged that Highpeak's siphoning violates the CWA because the tunnel, which is a point source under the Act, regularly discharges pollutants into Crystal Stream, which is a water of the United States under the Act. R. at 5. The letter included sampling results evidencing that every time a Highpeak employee opens the value, multiple pollutants are contaminating Crystal Stream from the incoming water from Cloudy Lake. R. at 5. Lastly, the letter detailed why the Water Transfers Rule is not validly promulgated by EPA. R. at 5. Highpeak replied two weeks later, simply stating that they do not need to reply to the merits of the arguments because they do not need a National Pollution Discharge Elimination System ("NPDES") permit under the CWA. R. at 5. CPS waited the required 60 days, and nothing changed. R. at 5.

District Court. On February 15, 2024, CSP sued Highpeak and the EPA in the District Court of New Union. CSP alleged that its members cannot fully enjoy Crystal Stream because of its water quality due to Highpeak continually violating the CWA. R. at. 3, 7-8. CSP challenges the validity of the EPA's Water Transfers Rule and that, even if the rule is valid, Highpeak's discharge still requires a permit because pollutants are introduced during the water transfer itself, which falls outside the exemptions' scope. R. at 3. The EPA joined CSP's last motion, arguing that the Water Transfers Rule is valid, but Highpeak is not exempt from the permitting requirements of the CWA. R. at 3. CSP and the EPA argue that Highpeak's business practices are excluded under 40 C.F.R.

122.3(i), which states that "this exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." Highpeak argues that they comply with the Water Transfers Rule under the CWA. R. at 11. Conversely, Highpeak, which EPA later joined, moved to dismiss the action because CSP lacked standing to bring either suit, and CSP's challenge to the WTR was not timely filed. R. at 3. Lastly, Highpeak moved to dismiss the action because they qualify for the exemption under the CWA. R. at 3.

All three parties filed timely motions. R. at 5-6. The District Court of New Union denied every motion. R. at 8-9, 11-12. The district court denied Highpeak and EPA's motion to dismiss on the grounds of standing and timeliness. R. at 8-9. The district court denied CSP's challenge to the validity of the WTR finding that it was a valid exercise of the EPA's authority under the CWA and consistent with the Act. R. at 10-11. The district court denied Highpeak's motion to dismiss the citizen suit claim. R. at 12.

SUMMARY OF THE ARGUMENTS

I. The district court correctly held that CSP has standing to challenge Highpeak's discharge and the Water Transfers Rule. Environmental injury to an individual's enjoyment and recreational use is a long-standing and well-established cognizable injury. After over a dozen citizens of Rexville, New Union, enjoyment and recreational use of Crystal Stream has been harmed by Highpeak's business practices, siphoning pollutants into Crystal Stream, the citizens began an initiative to do something about it. So, CSP was formed. CSP is an environmental conservation organization whose primary goal is to protect Crystal Stream's clarity and integrity, not contrive a lawsuit against Highpeak. CSP is not attempting to configure standing as a member of CSP has constitutional standing to sue Highpeak. Representing the interest of over a dozen Rexville, New

Union citizens, CSP has a personal stake in the lawsuit as Crystal Stream is an integral part of their community and is not a shell organization.

II. The district court correctly held that CSP filed the challenge to the Water Transfers Rule. The United States Supreme Court held that the statute of limitations does not start until the right of action accrues—the cause of action does not accrue until the plaintiff is injured by the regulation. CSP's injury occurred on December 1, 2023, so this is when its cause of action arises. That means that CSP is well within its statute of limitations, suing within the first two months of its six-year limitation. This conclusion is supported by the United States Supreme Court's decision in *Corner Post*, which held that a corporation's cause of action did not accrue until its formation. There is no fundamental distinction between the for-profit corporation in *Corner Post* and CSP operating as a not-for-profit corporation.

III. The district court erred in holding that the Water Transfers Rule was a valid regulation promulgated under the Clean Water Act. The Court must use its independent judgment to interpret the language of the Clean Water Act to determine whether the EPA's interpretation is valid. When exercising independent judgment, this Court will conclude that the EPA's interpretation is inconsistent with the Clean Water Act's plain language and legislative intent. Therefore, under a *Skidmore* analysis, this Court should afford the EPA's interpretation no persuasive power when determining whether the Water Transfers Rule is a valid exercise of their authority. With no persuasiveness power, this Court will find that the Water Transfers Rule is an invalid exercise of the EPA's authority.

CSP can show that there is a special justification for overruling the precedent decided on the *Chevron* framework; it extends far beyond overruling the cases simply because they relied on the *Chevron* framework. The United States Supreme Court has provided factors for a court to use

to determine whether to overturn precedent, which includes the quality of the prior cases' reasonings, workability of the rule it established, consistency with other decisions, and developments since the decision was handed down. All these factors weigh in favor of overturning the previous precedent and invalidating the Water Transfers Rule. The quality of the prior cases is low because, under *Chevron,* the court did not analyze the rule but rather strictly deferred to the EPA. Before the *Chevron* framework, multiple circuit courts rejected the EPA's interpretation, and this decision would be consistent with all the circuit court's reasonings. Given that the cases were decided purely under the *Chevon* framework, the recent development of overturning *Chevon* is a major development for these cases. Invalidating the Water Transfers Rule and making corporations conform to the Clean Water Act is workable because it just requires them to obtain a permit to continue their business.

IV. The district court correctly held that the pollutants introduced during the water transfer took the discharge out of the scope of the Water Transfers Rule, requiring Highpeak to obtain a permit under the Clean Water Act. The plain language of the Water Transfers Act and the regulations clearly include pollutants introduced by humans and natural processes. The Act simply states pollutants introduced without regard to how the pollutants are being introduced to the water. Furthermore, if this Court finds that the Water Transfers Act is ambiguous, the EPA is entitled to Auer deference, which provides that "Congress intended for courts to defer to agencies when they interpret their own ambiguous rules." The EPA's interpretation of the Water Transfers Rule is reasonable and furthers the purpose of the Clean Water Act. This deference is not limited by the Supreme Court's holding in *Loper Bright*, because an agency's deference was limited when interpreting a statute written by the legislature, not a regulation that the agency itself drafted and interpreted.

STANDARD OF REVIEW

Standing is reviewed de novo, because "whether appellants have standing to bring suit constitutes a legal issue." *Jacobs v. The Florida Bar,* 50 F.3d 901, 903 (11th Cir. 1995). "Whether a statute of limitation bars a party's claim" is also reviewed de novo. *Humphrey v. Eureka Gardens Pub. Facility Bd.*, 891 F.3d 1079, 1081 (8th Cir. 2018). A district court's *Skidmore* analysis is reviewed under the clearly erroneous standard. *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995). An agency's factual determinations are reviewed under the arbitrary and capricious standard. *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 103 (2d Cir. 2017). An appellate court reviews a district court's interpretation of a statute as de novo. *In re Gledhill v. State Bank of S. Utah*, 164 F.3d 1338 (10th Cir. 1999).

ARGUMENT

Justice Scalia simplified standing to one question: "What's it to you?" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). CSP has a simple answer: it is a lot. It is the tainting and contamination of a river that is a staple in their community and their home. For a plaintiff to get into the courthouse doors, they must have a "personal stake" in the dispute. *Id.* As each of the CSP's 13 members uses Crystal Stream regularly for recreational activities, from quality time with their family to relaxing walks with their dogs, CSP has a personal stake in Highpeak polluting the stream on behalf of their community and members.

I. CSP HAS STANDING TO CHALLENGE HIGHPEAK'S VIOLATIONS OF THE CLEAN WATER ACT AND THE EPA'S INVALID PROMULATION OF THE WATER TRANSFERS RULE.

To have standing, the plaintiff must show that (1) they "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, (2) the injury can be fairly traced to that conduct, and (3) a favorable decision is likely to redress the injury." *Valley*

Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). An association has standing to sue for its members if its members have standing in their own right, the interests at stake align with the organization's purpose, and the claim nor relief requires individual members' participation. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). This suit does not require CSP member participation. Highpeak's discharge is unlawful under the Clean Water Act. It is not contested that the injury can be fairly traceable to Highpeak's conduct and that a favorable decision for CPS is likely to redress the injury.

A. CSP is a legitimate environmental not-for-profit corporation and has a personal stake in the dispute because of Highpeak's impact on its members.

CSP is a legitimate not-for-profit corporation because it was created to protect Crystal Stream. As the majority highlights, an organization seeking "to initiate a legal challenge does not, by itself, invalidate the alleged injuries for standing purposes." R. at 7. Highpeak argues that CSP was created purely to obtain standing in the Court and that this destroys standing. R. at 7. But CSP was created for a purpose higher than bringing one lawsuit. R. at 6. Members of Rexville did not form CSP for the sole purpose of suing Highpeak and the EPA; rather, these are citizens who created a not-for-profit organization to protect the beauty of Crystal Steam, and one way of accomplishing that is by stopping Highpeak from polluting the stream. As shown through the mountain of testimony by members of the CSP, the pollutants have hindered all 13 members' use of Crystal Stream; all the members have suffered a recognized injury in fact.

The members of CSP are using the Clean Water Act for its intended purpose of trying to protect Crystal Stream from pollutants. Highpeak's reliance on *Stoops* is misplaced because the plaintiff's business fundamentally differs from CSP's mission. In *Stoops*, the plaintiff created a business structure around profiting from suing companies under the Telephone Consumer

Protection Act by purchasing phones to receive calls that would violate the Act. *Stoops v. Wells Fargo Bank, N.A.*, 197 F.Supp.3d 782, 296-800 (W.D. Pa. 2016). At the time of the lawsuit, the plaintiff had filed nine previous lawsuits under the Telephone Consumer Protection Act. *Id.* In *Stoops*, the district court reasoned that the plaintiff's harm was not the type to be protected under the statute. *Id.* Unlike the plaintiff in *Stoops*, the 13 members of CSP are not attempting to benefit from this lawsuit financially—the plaintiff in *Stoops* was making a business out of the Telephone Consumer Protection Act. Similarly, contrasted to the nine suits eagerly filed in Stoops, CSP sent Highpeak a notice to sue and waited 60 days before filing the suit; this is not about trying to maintain a lawsuit against Highpeak. The harm that CSP has suffered is the exact type of harm that the Clean Water Act is intended to protect from.

Highpeak points to CSP's mission statement to show that they are a façade because the wording of the mission statement includes the word "transfer." But this argument is misplaced. While Highpeak the EPA uses CSP's mission statement to cast doubt on standing, this argument is inapposite. CSP's mission statement speaks directly to the second requirement of representational standing, "whether the organization's purpose seeks to protect interests germane to the organization's purpose." See *Hunt*, 432 U.S. at 343. The goal of protecting Crystal Stream from pollutants using the word "transfer" clearly demonstrates how CSP's purpose aligns with CSP's mission.

To provide the Court more comfort that CSP is a legitimate not-for-profit corporation, it is undisputed that Johnathan Silver, a member of CSP, has standing. He moved to Rexville, New Union, four years ago, meaning that is when his cause of action arose, and he still has two years within the statute of limitations. R. at 9. Highpeak has argued that CSP is attempting to take advantage of the United States Supreme Court's decisions in *Loper Bright* and *Corner Post*

because CSP could not bring this case otherwise. R. at 6. Yet, this is simply not the case because Johnathan Silver has standing.

B. CPS suffers an environmental injury that is a well-established and recognized cognizable injury to obtain constitutional standing.

It is established that a landowner with property in the path of a toxic discharge demonstrates injury in fact. *Friends of Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000). In *Friends of Earth*, the landowner's lake was contaminated because of a metal smelting facility's pollution. *Id.* The landowner could not enjoy and appreciate his land—he could not fish on his land or swim in the water. *Id.* The landowner was not the only victim of the smelting facility's pollution. *Id.* Another member of these environmental groups complained that they could also not enjoy the water because the pollutants were clouding the water. *Id.* The Fourth Circuit found that these environmental injuries satisfied the cognizable injury to obtain standing. *Id.*

The landowner's harm suffered in *Friends of Earth* is the exact type of harm that two members of CPS are facing. Both Johnathan Silver and Cynthia Jones, like the landowner, own land along Crystal Stream and complain that they cannot enjoy their land because of the pollutants clouding the water. Like the landowner not being able to swim on his land because of concern about the discharge, Cynthia Jones is scared to walk into the water at Crystal Stream, diminishing her use of her property and the stream. Like the landowner not being able to eat the fish from his land because he was concerned about contaminating the fish, Johnathan Silver is worried about letting his dog get into the stream because the pollutants in the stream could be unsafe for his pet.

Environmental injury to someone's aesthetic or recreational interests is a cognizable injury. *Sierra Club. V. Morton*, 405 U.S. 727, 734 (1982) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society … deserving of legal protection through the judicial process.") All the members of CSP have environmental injury

to their aesthetic because the pollutants that Highpeak is siphoning into Crystal Stream are causing the stream to be cloudy and hindering their enjoyment and use of the stream.

II. THE FORMATION OF CSP GIVES RISE TO A NEW STATUTE OF LIMITATIONS UNDER *CORNER POST* BECAUSE CSP'S CAUSE OF ACTION DID NOT ACCURUE UNTIL DECEMBER 2023.

The United States Supreme Court affirmed the accrual principle and highlighted the long-standing history and purpose of this principle in their decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*. Relying on foundational rules, the United States Supreme Court solidified that "[i]t is 'unquestionably the traditional rule' that 'absent other indication, a statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief.'" *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys*., 144 S. Ct. 2440, 2445 (2024) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001)). These principles support CSP's contention that *Corner Post* gives rise to the new statute of limitation period. The only other option would be, Highpeak argues, that the cause of action accrued over 30 years ago when Highpeak began its business operations. But this would mean that CSP's statute of limitation would have begun to run before CSP had the right to sue, which creates absurd consequences. *Id.*

A cause of action does not accrue until "the plaintiff can file suit and obtain relief." *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys*., 144 S. Ct. 2440, 2445 (2024). The United States Supreme Court held that CornerPost sued the Federal Reserve Board within its statute of limitations because the cause of action did not accrue until the business was injured. *Id.* In reaching their holding, the Court had to interpret "accrual" in terms of determining when the statute of limitations begins to run in a suit under the Administrative Procedure Act. *Id.* at 2444. The Court interpreted accrual to mean that "a cause of action accrues when a suit may be maintained." *Id.* Conversely, "a cause of action does not become complete and present—does not accrue— 'until

the plaintiff can file suit and obtain relief.'" *Id.* (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp*., 522 U.S. 192, 201 (1997) (rejecting the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles")).

Under the Supreme Court's holding in *Corner Post*, CSP's cause of action did not accrue until December 1, 2023, the date of its incorporation, because that is when CSP could file suit and obtain relief. A corporation gains the ability to sue on the date of its incorporation. *See Anglo-Dutch Petroleum Int'l, Inc. v. Case Funding Network, LP*, 441S.W.3d 612, 623 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("the date on which a corporation gains the capacity to sue and be sued is that on which it files its articles of incorporation.") CSP became a legally established not-for-profit corporation on December 1, 2023—meaning that CSP has only had the capacity to sue since the first day of December in 2023. CSP fell well within the Clean Water Act's six-year statute of limitations because CSP accrued the cause of action at the beginning of December 2023 and sued Highpeak on February 15, 2024.

CSP being a not-for-profit corporation does not take it out of the scope of the Supreme Court's holding in *Corner Post*. When looking at when a cause of action accrues for a corporation, there is no distinction based on the type of entity. *See Corner Post* 144 S. Ct. at 2446. In *Corner Post*, the Supreme Court relied heavily on public policy and precedent when construing the word "accrual" and when a corporation accrues a cause of action. *Id.* But, notably, one thing the Court did not focus on was the makeup or type of entity that was claiming injury. *See Id*. As the district court highlighted, there is "no meaningful distinction between the pertinent facts of Corner Post and that of the instant case." R. at 8.

Highpeak argues that the formation of a not-for-profit environmental group does not give rise to a new statute of limitations under *Corner Post*. R. at 8. In making their argument, Highpeak misapplies *Corner Post* by differentiating between CSP being a not-for-profit organization and CornerPost being a for-profit business. Yet, as the District Court of New Union points out, the distinction that Highpeak relies on, determining whether the corporation was making a profit, was not an inquiry that the Court made in determining when the statute of limitations accrues. *See Corner Post* 144 S. Ct. at 2446; R. at 8. In fact, the United States Supreme Court does not refer to anything that would support Highpeak's contention that a not-for-profit corporation would not fit within *Corner Posts*' holding.

III. THE PROMULGATION OF THE WATER TRANSFERS RULE IS INVALID BECAUSE THE EPA EXCEEDED ITS AUTHORITY WHEN IT CREATED A RULE THAT IS INCONSISTENT WITH THE CLEAN WATER ACT.

In overruling the *Chevron* framework, the United States Supreme Court put the responsibility of interpretation back into the courts' hands. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). In determining whether an agency has acted within its authority, courts must exercise their independent judgment. *Id*. The only circumstance that requires a court to defer to an agency's interpretation is when the statute delegates authority consistent with the Constitution. Even when there is a stated delegation of authority within a statute, the court must ensure that the agency is acting within its limits. *Id.* No language in the Clean Water Act would delegate authority to the EPA.

A. When this Court exercises independent judgment, it will find that the Water Transfers Rule undermines the plain language and intent of the Clean Water Act and will be afforded no persuasive power.

Courts must exercise independent judgment to interpret the language of an ambiguous statute. *Loper Bright Enters.*, 144 S. Ct. at 2273. In making this independent judgment, courts look

at the legislative history and intent, the plain language of the statute, an agency's interpretation, and prior case law. *See Mancini v. City of Providence*, 155 A.3d 159, 163 (R.I. 2017). While the Executive Branch can help make this determination, "courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of law simply because a statute is ambiguous." *Loper Bright Enters.*, 144 S. Ct. at 2273. To determine how much deference to provide an agency's interpretation, courts must conduct a *Skidmore* analysis to determine its persuasiveness power. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). Then, the courts use the persuasiveness power to determine how much deference to give to the agency's interpretation in making its independent judgment. *Id.*

i. The plain language of the Clean Water Act makes it clear that the term "any" includes any additional pollutant from one body of water to another making the EPA's interpretation inconsistent with the Act.

Courts follow a principle of statutory interpretation of *expressio unius est exclusion alterius* when interpreting statutes. *Dingley v. Yellow Express, LLC*, 514 B.R. 591, 603 (B.A.P. 9th Cir. 2014). This directs courts to give weight to the precise words used in the statute because the legislature "includes particular language in one section of a statute … it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). When interpreting the Clean Water Act, this Court should give weight to the broad words that the legislature used, such as "any" or "additional," and construe the statute in that manner.

Understanding the context of "additional" is important to give full weight to the legislative intent. In the statute, "discharge of a pollutant means *any* addition of any pollutant from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). "The term "any" has a universally understood construction. The "term any is broadening and inclusive. It is defined as every; all … or one or

more without specification or identification. This expansive reading is the sense of the word given in extensive judicial construction of a broad range of statutory provision, which consistently recognize the term's broad, encompassing import." *State v. Badikyan*, 459 P.3d 967, 973-74 (Utah 2020) (internal quotations omitted). Under the Water Transfers Rule, Highpeak argues a narrow definition of additional that the term addition does not include pollutants transferred between any waters in the United States. But this takes away the effect of the legislature's intent of using the word "any" multiple times.

Courts avoid interpretations that result in an unreasonable, illogical, or absurd outcome. *State v. Hooper*, 363 N.W.2d 175, 177 (Wis. Ct. App. 1985). Illogical and unreasonable results would occur if this Court were to adopt the EPA's reading of the Clean Water Act and promulgate the Water Transfers Rule. *See Catskill II*, 451 F.3d 77, 81 (2d Cir. 2006). The First Circuit highlighted this exact result, finding that the EPA's Water Transfers Rule "would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the [Act]'s NPDES permit requirement." *Id.* Highpeak's business activities that introduce pollutants into a crystal-clear body of water that destroys the chemical, physical, and biological integrity of the water is the *exact type* of harm that the Clean Water Act attempted to prevent. *See* 33 U.S.C. § 1251. CSP has evidence that the water being introduced to Crystal Stream has significantly higher concentrations of iron, manganese, and suspended solids, which would fall into the plain language of the Clean Water Act.

ii. The legislative intent of the Clean Water Act suggests that this Court construes the language of the Act broadly and invalidates the EPA's narrow interpretation.

Going back over forty years, Congress has been enacting legislation to protect the United States' waters from pollution specifically. *See* Water Quality Act of 1987 100 P.L. 4; 101 Stat. 7 ("To amend the Federal Water Pollution Control Act to provide for the renewal of the quality of the Nation's waters."). The legislative history of the Clean Water Act confirms that Congress intended to include any additional pollutants in their regulation. *Id*. "Although some weight should still be given to the agency's interpretation, especially, if the agency's interpretation is longstanding, [courts] will interpret the statute in question by looking to the meaning of the statute's language, its legislative history, and its purpose." *State v. Progressive Cas. Ins. Co*., 165 P.3d 624, 628 (Alaska 2007).

This Court should invalidate the Water Transfers Rule because it disregards the intent of the Clean Water Act. Two of the Act's well-recognized goals are ensuring the nation's waterways are swimmable and maintaining the integrity of the water. *See, e.g., Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 784 (4th Cir. 1998). Neither of which is being achieved because of the Water Transfers Rule. Crystal Stream is not swimmable, and the water that used to be crystal clear is now cloudy. Residents of Rexville, New Union, are fearful of walking into the waters or letting their pets into the waters due to the pollutants changing the quality of the water. Residents are not enjoying or visiting Crystal Stream out of fear of the pollution. Highpeak's business activities created this pollution problem because they were not required to obtain a permit under the Clean Water Act because of the Water Transfers Rule.

iii. Under a *Skidmore* analysis, the EPA's interpretation of the Clean Water Act should get no persuasiveness power.

When the Supreme Court overruled *Chevron*, the Court reinstated the previous standard laid out in *Skidmore v. Swift & Co*. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Under *Skidmore*, a court makes an independent judgment about how much deference to

give an agency's interpretation depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). A court is not required to follow an agency's interpretation of a statute, but a court can decide to do so depending on how much persuasive power the agency's interpretation has. *Id.*

The EPA's thoroughness and validity of its reasoning is not evident with the Clean Water Act because of the inconsistencies with the plain language of the Clean Water Act. Under the Clean Water Act, a "discharge of any pollutant" into navigable waters from any "point source" without an NPDES permit. 33 U.S.C. § 1311(a) (1994). A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (1994). The EPA has interpreted "additional" to exclude certain water transfers under the Waters Transfers Rule through the Unitary Water Theory. *Dubois v. United States Dep't of Agric*., 102 F.3d 1273, 1296 (1st Cir. 1996). The unitary water theory reasons that "all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an addition." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 81 (2d Cir. 2006) ("Catskill II"); *See Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dis*t., 280 F.3d 1264-1267-69 (11th Cir. 2002)., *vacated* by *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, et al.,* 541 U.S. 95, 112 (2004). The unitary water theory in action would mean that all water transfers within the United States would fall within this theory, which is completely contradictory to the Clean Water Act's purpose. *See* Chris Reagen, The Water Transfers Rule: How an EPA Rule

Threatens to Undermine the Clean Water Act, Vol. 83 University of Colorado Law Review 307, 326 (2012) ("The unitary water theory is antithetical to the very purpose of the CWA.")

The lack of consistency between cases decided before *Chevron deference* and cases using *Chevron* deference should urge this Court to give the EPA's interpretation no persuasiveness power. Multiple circuits analyzed the EPA's interpretation under a *Skidmore* analysis and found that the EPA's position was not persuasive. *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001). As the district court highlights, this view only changed when the Court of Appeals began relying on *Chevron* and expressly deferred on the EPA's interpretation of the statute. *See Catskill III*, 846 F.3d 492, 524-33 (2d Cir. 2017). When courts made independent judgments about the Water Transfers Rule, multiple ruled that it did not align with the goals of the Clean Water Act and would result in absurd results. *Id.*

iv. The Supreme Court's statements regarding precedent in *Loper Bright* are mere dicta because the issue of precedent was not essential to the decision.

A dictum is any statement by the court "for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (quoting *Stover v. Stover*, 60 Md. App. 470, 476 (1984)). A statement is a part of the holding if it is based on material facts and necessary for the decision; otherwise, it is dicta. *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1275 (Ohio 2003); *See* Black's Law Dictionary (6th Ed.1990) 454.

In the *Loper Bright* opinion, the United States Supreme Court was tasked with determining whether a court should exercise independent judgment or defer to an agency's interpretation when a statute is ambiguous. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). To decide this issue, the Court had to reevaluate its previous decision in *Chevron, U.S.A., Inc. v. Nat. Res.*

Def. Council, Inc., 467 U.S. 837 (1984). *Id*. The United States Supreme Court overruled the precedent for special justifications. *Id*. But, in the discussion of precedent, the United States Supreme Court was not dealing with the issue in this case: circuit courts reviewing a regulation under both *Skidmore* and *Chevron* and holding the regulation's validity to be lacking under the former precedent. The discussion of *stare decisis* to cases decided under *Chevron* was not essential to determining in *Loper Bright*. That statement is merely dicta.

"Dicta in one case has no binding effect in other cases." *Hicks v. State Farm Mut. Auto. Ins. Co.*, 95 N.E.3d 852, 863 (Ohio Ct. App. 2017). While dicta can be influential for courts making decisions, the statements that are dicta that the Supreme Court made in *Loper Bright* are not binding on this Court. *Id.* This Court should not feel bound by these statements. This Court should not find that the Water Transfers Rule is valid by relying on the Supreme Court's statement in *Loper Bright*.

B. There are special justifications to permit this court to overturn the precedent decided on the chevron framework.

If this Court finds that the United States Supreme Court's discussion regarding stare decisis is more than dicta, this Court should still not find that the regulation is valid because there are special justifications to overturn precedent. The United States Supreme Court in *Loper Bright* was clear that courts should not overturn precedent *just* because the case was based on *Chevron deference*. *Loper Bright*, 144 S. Ct. at 2273. But this does not negate the fact that courts can overturn precedent with other justifiable reasons. *Payne v. Tennessee*, 501 US. 808, 828 (1991) ("*Stare decisis* is not an 'inexorable command.'"); *See Knick v. Township of Scott*, 588 U.S. 180, 203 (2019) (listing stare decisis considerations). The exact reason that the United States Supreme Court overturned *Chevron*—it allowed "the Executive … to dictate the outcomes of cases through erroneous interpretations"—is why this Court must invalidate the Water Transfers Rule; the EPA

was allowed to disregard the plain language of the Clean Water Act and decide that "any additional" is limited and does not mean any additional.

To overturn precedent, there must be special justifications "over and above the belief 'that the precedent was wrongly decided.'" *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 266 (2014). Special justifications include the quality of the prior court's reasoning, consistency with related decisions, developments since the decision was decided, reliance on the decisions, and the workability of the rule established. *Riccio v. Sentry Credit, Inc*. 954 F.3d 582, 590 (3d Cir. 2020). All these factors support this Court overturning precedent that establishes the validity of the Water Transfers Rule.

The EPA's interpretation of the Clean Water Act was repeatedly rejected by multiple United States Court of Appeals. *See Dubois v. U.S. Dept. of Agriculture, et al*., 102 F.3d 1273, 1296-99 (1st Cir. 1996). The EPA argues that "for there to be an 'addition,' a point source must introduce the pollutant into the navigable water from the outside world." *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001). The EPA has continuously argued for an interpretation of "additional" that overly complicates and misdefines the word "additional." *Id.* Under the Water Transfers Rule, all water transferred from distinct bodies of water within the United States would not fall within the Clean Water Act because the bodies of water are the same, regardless of the pollution levels. *Id.* This interpretation essentially strips the Clean Water Act of any effect.

The First Circuit rejected the EPA's interpretation because the concept of all bodies of water being the same is too broad. *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1297 (1st Cir. 1996). In *Dubois*, a ski resort operator pumped water without a permit for its snowmaking equipment from a polluted river into a less-polluted pond. *Id.* at 1274. The ski resort operator argued that, under the Water Transfers Rule, they were not required to obtain a permit. *Id.* The

Court focused on the distinctness of the bodies of water and that "although water naturally flowed from the pond into the river, water would never naturally flow from river to pond. That difference made the pumping an 'addition.'" *Id.* at 1296-97. This conclusion is still valid and should be used to invalidate the promulgation of the Water Transfers Rule. The exact type of distinctness that the First Circuit highlighted is the case at hand: Cloudy Lake would never *naturally* flow into Crystal Stream.

The Second Circuit rejected the EPA's interpretation because of the plain meaning of the EPA's interpretation and the legislative intent. *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001). In *Catskill I*, water was diverted from a reservoir through a tunnel for several miles to be released into a creek, which empties into another reservoir to provide drinking water to New York City. *Id.* An environmental protection group sued the city alleging that it was violating the Clean Water Act by discharging pollutants. *Id.* The EPA argued its unitary water theory. *Id.* When looking at the practicality, the Second Circuit expressly rejected the EPA's interpretation because it found that "under this argument, pollutants would be 'added' *only* when they are introduced into navigable waters for the first time." *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (emphasis added). Furthermore, the Court found that the plain language was explicit. *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001) ("Given that understanding of "additional," the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.")

Since the Water Transfers Rule was held to be a valid promulgation, one major development has occurred: the *Chevron* framework was overruled. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). While this may not be a major development in other cases that relied on *Chevron*, it is a major development for the Water Transfers Rule because

several courts relied strictly on this deference for their decisions. *See Catskill III*, 846 F.3d 492, 502 (2d Cir. 2017). This Court is not facing a situation where a court's independent judgment is aligned with the EPA's interpretation. Instead, as the district court emphasizes, multiple circuit courts repeatedly rejected the EPA's interpretation until they were required to defer to the EPA's interpretation under *Chevron deference*. *See Id.*

If this Court were to find the Water Transfers Rule invalid, the workability of the previous rule is high and would not produce unfair or catastrophic results. Highpeak could still operate their business. After all, it could obtain an NPDES permit to comply with the Clean Water Act. The NPDES permitting system is not an absolute bar; it just requires the business to track and monitor the pollutants they are discharging and stay within a certain limit. *See* U.S. Environmental Protection Agency, *NPDES Permit Basics*, (2022). Furthermore, if New Union does not support the EPA's decisions regarding the Water Transfer Rule, New Union could establish its own requirements and levels as many other states have done, which would further the Act's purpose. *See S. Side Quarry v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022) (The EPA's hands-off approach to water transfers aligns with the CWA's emphasis on 'cooperative federalism.'"

IV. HIGHPEAK'S "INTRODUCTION" OF POLLUTANTS INTO CRYSTAL STEAM DOES NOT FALL WITHIN THE EXEMPTIONS OF THE WATER TRANSFERS RULE AND IS A VIOLATION OF THE CLEAN WATER ACT.

Under the Water Transfers Rule, there is a list of discharges that are excluded from the Clean Water Act, meaning that these discharges do not require NPDES permits. 40 C.R.F. 122.3 (2023). Water transfers are included on this list; water transfers are defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. 122.3(i) (2023). However, when

the EPA drafted this regulation, it did not create an absolute exclusion to water transfers. *Id.* The Water Transfers Rule "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.* Highpeak argues that water transfers inevitably amount to new pollutants, and because of this, under a *Skidmore* analysis, a court would not agree with the EPA's determination that Highpeak falls within this provision. R. at 11. However, this argument is misplaced because a *Skidmore* analysis is not warranted when it is an agency's regulation. *See Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945).

The United States Supreme Court has long held that, when interpreting a regulation, the ultimate criterion "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* This deference was not given lightly. Regulations are drafted by people who specialize and have expertise within the areas in which they are drafting regulations. *See Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (1978). This deference is given because the Courts are allowing the individuals in these agencies who write the regulations to tell the courts what they intended regulations to mean. *Id.* Given the United States Supreme Court's significant impact in overruling *Chevron* deference, it is imperative that this Court clarify that the *Loper Bright* holding does not encumber an agency's interpretation of their validly promulgated regulations.

Highpeak argues that this Court should apply a *Skidmore* analysis to interpret regulations because of the Supreme Court's decision in *Loper Bright*. However, Highpeak's reliance on *Loper Bright* is misplaced because it extends the scope of *Loper Bright* farther than what the Supreme Court intended. In *Loper Bright*, the United States Supreme Court put the power of interpretation of statutes written by lawmakers back into the Courts. *Loper Bright*, 144 S. Ct. 2244 (2024). The Supreme Court did not want an agency determining what the legislature intended in their statute.

But, regarding regulations, the courts encourage agencies to tell the court what they mean in their statutes. *See 1330 Conn. Ave. v. D.C. Zoning Comm'n*, 669 A.2d 708, 714 (D.C. 1996). Highpeak is trying to have their cake and eat it too by asking the Court to rely on *Chevron* and defer to the EPA's interpretation when promulgating the Clean Water Act yet asking this Court to disregard the EPA's interpretation of the Water Transfers Rule—a regulation drafted by the EPA— and conclusion that Highpeak does not qualify for the Water Transfers Rule exemptions.

A. The plain language of the Water Transfers Act explicitly excludes pollutants introduced through water transfers itself, regardless of whether the pollutants are introduced by natural processes or humans.

When drafting the Water Transfers Rule, the EPA deliberately detailed what activities would and would not require an NPDES permit. *Dingley v. Yellow Express, LLC*, 514 B.R. 591, 603 (B.A.P. 9th Cir. 2014) ("it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion."). Of these exceptions, the EPA included water transfers, with this exception being the one that explicitly stated certain activities that would not fall under this exception. Within the exception for water transfers, the EPA defined water transfers, but the EPA finishes the subsection stating that "[t]his 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) (2023). Highpeak's siphoning of water from Cloudy Lake to Crystal Stream falls squarely within this exclusion provision.

The plain language of the regulation is clear in that an NPDES permit is required if pollutants are being introduced to the water transfer activity itself. *See Catskill II*, 451 F.3d 77, 81 (2d Cir. 2006) (finding that the defendants "simply overlook [the CWA's] plain language.") When defining a water transfer, courts have established that water transfers take a variety of forms, such as "water through tunnels, channels, and/or natural streams." *S. Side Quarry v. Louisville &*

Jefferson Cty. Metro. Sewer Dist., 28 F.4th 684, 699 (6th Cir. 2022). Highpeak argues that to be excluded, the introduction of pollutants must result from human activity and not natural processes like erosion. R. at 12. But this interpretation is not based on any language in the regulation or legislative history, but rather on Highpeak's own conclusion that water will always pick up some trace pollutants during transfer. 40 C.F.R. 122.3(i) (2023). The plain language of the regulation does not require that an individual or human activity be involved to be subject to that provision in the regulation. See Nor does the regulation differentiate between human processes versus natural processes when making determinations regarding what constitutes a water transfer. *Id.*

B. Auer deference applies to this case because the Water Transfers Act is genuinely ambiguous, and the EPA's interpretation is reasonable.

When interpreting the Water Transfer Rule, this Court will find that most interpretive tool affirms the EPA's interpretation of what qualifies as pollutants introduced. Auer deference is a presumption that "Congress intended for courts to defer to agencies when they interpret their own ambiguous rules." *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019). For this presumption to be applied, the Water Transfers Act must be genuinely ambiguous, the EPA's interpretation must be reasonable, and the interpretation must be of "the character and context" to be entitled to "controlling weight." *Id.* at 575-76. Both of which are satisfied

A statute is ambiguous if it is capable of being understood in two or more reasonable interpretations. *Allen v. Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002). The Water Transfers Rule is ambiguous because the EPA and Highpeak have both understood the rule differently by interpreting "introduced" to exclude different pollutants. Highpeak argues that the only reasonable interpretation of the rule is that the "introduction" of pollutants must result from human activity and not natural processes like erosion. The EPA and CSP argue that when one body of water contains higher concentrations of pollutants and is siphoned into another body of water,

pollutants are "introduced." If this Court finds that both interpretations are reasonable, then the Water Transfers Act is genuinely ambiguous.

The EPA's interpretation is reasonable because it furthers the purpose of the Clean Water Act. Courts use a canon of interpretation known as the presumption against ineffectiveness when interpreting texts. *Rodriguez v. Branch Banking & Tr. Co.*, 46 F.4th 1247, 1257 (11th Cir. 2022). The presumption against ineffectiveness provides that "a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 59 (2012). The narrow reading of the Water Transfers Rule furthers the Clean Water Act's purpose by following the EPA's passive and hands-off approach to encourage cooperative federalism and states to enact their permitting standards. *See S. Side Quarry v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022). This Court should adopt the EPA's interpretation of pollutants introduced because this narrow definition furthers the EPA and Congress's purpose of the Water Transfers Rule and Clean Water Act.

CONCLUSION

For the foregoing reasons, Appellee CSP respectfully requests that this Court affirm in part and reverse in part. This Court should affirm the district court's finding that CSP has standing, filed timely, and that Highpeak's discharge is outside the Water Transfers Rule and is subject to permitting under the Clean Water Act. This Court should reverse the district court's finding that the Water Transfers Rule was a valid regulation promulgated under the Clean Water Act.