NON-MEASURING BRIEF
TEAM 39

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

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

-and-

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

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union in in Case No. 24-CV-5678 granted the United States Environmental Protection Agency's ("EPA") and Highpeak's motions to dismiss Crystal Stream Preservationists ("CSP") challenge to the Water Transfer Rule ("WTR"), but denied Highpeak's motion to dismiss CSP's Clean Water Act ("CWA") citizen suit cause of action. The district court had federal question jurisdiction of this action under 28 U.S.C. § 1331 as well as subject-matter jurisdiction under 5 U.S.C. § 702. The EPA, Highpeak and CSP each filed timely notices of appeal under Fed. R. App. P. 4. This court has jurisdiction under 28 U.S.C. § 1291, which provides for review of all final decisions of district courts.

STATEMENT OF THE ISSUES PRESENTED

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

II. Did the District Court err in holding that CSP timely filed the challenge to the Water Transfers Rule?

III. Did the District Court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act?

IV. Did the District Court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act?

STATEMENT OF THE CASE

I. Statement of the Facts

For the past 32 years, Highpeak has owned and operated a recreational tubing operation in Rexville, New Union. On the northern border of Highpeak's parcel lies Cloudy Lake, and on

the southern portion of their parcel runs Crystal Stream, where Highpeak launches its customers in rented innertubes. In 1992, Highpeak constructed a tunnel connecting Cloudy Lake to Crystal Stream, and equipped the tunnel with valves at each of its ends. Opening and closing these valves allows Highpeak to discharge water from Cloudy Lake into Crystal Stream. Highpeak uses these discharges to enhance the volume and velocity of Crystal Stream, thereby enhancing the tubing experience for Highpeak's customers.

Unfortunately, this tunnel was constructed with procedural and practical flaws. Though Highpeak obtained permitting through the State of New Union for the construction of its tunnel, it did not ever seek or obtain a National Pollution Discharge Elimination System ("NPDES") permit during the 32 years in which the tunnel has been in operation. Additionally, the tunnel was constructed in such a way that exposes Crystal Stream to increased pollutants. Instead of building the tunnel solely out of an impermeable conduit or pipe, the tunnel is, in part, carved directly through rock and soil. This construction has caused Highpeak's tunnel to discharge a slew of iron, manganese and total suspended solids ("TSS") into Crystal Stream for the last 32 years. Thanks to the tunnel's vulnerable construction, the pollutants are discharged into Crystal Stream at a rate 2-3% higher than those currently present in Cloudy Lake, a body already more polluted than Crystal Stream. Crystal Stream is fed by a groundwater spring and is normally not exposed to the pollutants with which it is being bombarded.

In response to the pollution of Crystal Stream, CSP was formed on December 1, 2023, with the purpose of protecting Crystal Stream for both present use and the use of future generations. Two members of the organization, Cynthia Jones and Jonathan Silver, have submitted declarations describing the harm they have suffered as a result of Highpeak's pollution of Crystal Stream. Cynthia Jones lives only 400 yards from the stream and regularly walked

alongside it. The pollution has caused her to fear walking in the water and has reduced her use and enjoyment of the stream. Jonathan Silver moved half a mile from the stream in 2019 and was unable to fully enjoy the natural beauty of the stream, dissuaded by its polluted form. He is hesitant to walk alongside the lake with his pets and children. These cases exhibit how Highpeak's pollution has harmed the community.

II. Current Litigation

Shortly after its inception, CSP began taking steps to aid Crystal Stream by filing its complaint against Highpeak and the EPA on February 15, 2024. The district court issued its ruling granting the motions to dismiss the challenge to the WTR, but denied the motion to dismiss the citizen suit against Highpeak. CSP now appeals to argue that the district court erred in holding that the WTR was a valid regulation promulgated pursuant to the CWA.

SUMMARY OF THE ARGUMENT

CSP had associative standing under *Hunt* to bring a suit on behalf of its members and can therefore bring both a citizen suit challenging Highpeak's illegal discharges and a suit challenging the EPA's improper promulgation of the WTR. CSP's members have standing to sue in their own right because they have suffered injury caused by Highpeak and the EPA, and the redressability of their injury is likely. CSP members have suffered injury to their use and enjoyment of Crystal Stream, and other aesthetic harms. Cause of this injury is fairly traceable to Highpeak's discharges from Cloudy Lake into Crystal stream, only possible due to the EPA's improper promulgation of the WTR. Redressability is likely because CSP's members' present and future injuries would be greatly reduced by an order subjecting Highpeak to existing NPDES permitting requirements. Redressability is further likely because, under *Loper Bright*, this court need give no special weight to the EPA's interpretation of the CWA.

Because the district court correctly ruled that the complaint was filed in a timely manner, this court should affirm the district court's ruling. The district court correctly looked to *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, which stated that a right of action accrues only after the plaintiff has suffered harm. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S.Ct. 2440, 2450 (2024). The court goes on to claim that the start date of accrual is based on this particular plaintiff, and not based on the first available plaintiff, as a result, the right of action can accrue many years after the original government action. *Id.* at 2455. CSP was formed on December 1, 2023 and therefore the harm it suffered falls well within the timeframe of within six years after suffering an injury. In addition to this, CSP has a member who moved to the area in 2019, showing that both CSP itself and a member within the organization both had the ability to file the complaint in a timely manner. Thus, the trial court correctly ruled the complaint was filed in a timely manner.

The Clean Water Act ("CWA" or "Act") states that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). Despite the Act's explicit definition of what constitutes a violation, EPA asserts that an ambiguity within the text grants the agency the broad authority to exempt from the Act's requirements an entire category of pollutant discharges—water transfers.

The Water Transfers Rule ("WTR") states that "[d]ischarges from a water transfer" are not subject to the Act's central regulatory mechanism, the National Pollutant Discharge Elimination System (NPDES) permitting program. EPA bases the WTR on an interpretation of the word "addition" within the text. Because CWA does not provide a definition of "addition," EPA argues the Act is sufficiently ambiguous to allow the agency to insert an statutory

exemption where Congress had not. EPA's interpretation defies the plain meaning of the text and contravenes Congress' intent.

The CWA created a blanket prohibition, with some exceptions, against the "discharge of pollutants," *Id.* § 1311(a), which the Act defined as "*any* addition of *any* pollutant to navigable waters from *any* point source." *Id.* § 1362(12)(A) (emphasis added). "Addition" can be plainly understood as an increase—introducing one thing into another. Under such an interpretation, a water transfer that introduces pollutants from one water body to another distinct water body is certainly a "discharge of pollutants." The WTR, however, ignores any plain reading of the statute and substitutes it with a theory that all the waters of the United States constitute one collective body of water. Under this theory, a pollutant that enters one water body in one watershed, and then is transferred to and deposited in another watershed cannot constitute a "discharge of pollutants," because the pollutant was already in the receiving water through its connection to the donor water. This theory is an untenable interpretation of the CWA and has been rejected by multiple courts as inconsistent with the Act.

The primary goal of the CWA was the "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters." *Id.* 1251(a). The CWA was a response to a national problem of water pollution that required drastic action. Congress had a bold agenda that needed equally bold actions. By prohibiting unpermitted pollutant discharges, Congress intended "that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* 1251(A)(1). While ultimately unsuccessful in this goal, the Act unequivocally intended sweeping reforms in order to obtain sweeping results. The WTR allows massive amounts of pollutant discharges that occur during a water transfer to escape the scrutiny of the NPDES program. Such an interpretation is clearly contrary to Congress' intent to protect the integrity of the nation's

waters. Any regulation that negates the statute it purports to enforce in such a significant manner should be invalidated.

The official promulgation of the WTR awarded to EPA a legal shield that it did not have in the prior challenges: judicial deference under *Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). After final promulgation in 2008, the WTR, once soundly rejected by multiple courts, became an official agency regulation that was given *Chevron* deference. In essence, EPA took an informal policy that had been challenged in court and labeled as inconsistent with the CWA, put it through EPA's rule-making process, and ended up with that same invalidated policy but with an official name. An agency should not be able to take a bad policy, promulgate it as a final rule, and suddenly have it upheld. Moreover, the Supreme Court has overruled *Chevron*, taking away the deferential shield under which the WTR hid. Because the WTR has been upheld entirely based on *Chevron*, and because the Supreme Court has overruled *Chevron*, the WTR no longer has the higher standard of deference.

The question of whether the WTR is a valid promulgation, however, ultimately has no bearing on Highpeak's tunnel. That's because the WTR contains an exception: WTR's "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). Here, Highpeak's tunnel conveys water from Cloudy Lake to Crystal Stream. The tunnel clearly constitutes a water transfer. As the water is transported through the tunnel, it picks up pollutants that are then discharged into Crystal Stream. Thus, the present case constitutes a situation where "pollutants [are] introduced by the water transfer activity itself to the water being transferred." *Id.* Highpeak's tunnel is outside the scope of the WTR and thus, Highpeak requires a permit. Therefore, no matter whether the Water

Transfer Rule is determined to be a valid promulgation under the Clean Water Act, Highpeak still must obtain a permit for its discharge of pollutants into Crystal Stream.

STANDARD OF REVIEW

An appellate court reviews a district court decision on a motion to dismiss *de novo*, applying the same standard as the district court without deference to the lower court's decision. *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2nd Cir. 1995). § 5.01 Rule 12(b)(6) and Other Dismissals.

ARGUMENT

I. CSP has associative standing under *Hunt* to challenge Highpeak's illegal discharges and the EPA's improper promulgation of the WTR.

CSP has associative standing to bring a citizen suit against Highpeak and to challenge the WTR because CSP's members can show they suffered injury in fact to their use and enjoyment of Crystal Stream, caused by Highpeak's unpermitted discharges into the stream as allowed by the EPA's WTR, whose redressability is likely rather than speculative.

An organization has associative standing to bring a suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests the suit seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); see also *United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 553 (1996). *Friends of the Earth v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996). Members of an organization have standing to sue in their own right where they can demonstrate they suffered cognizable and particularized injury to a legally protected interest which is fairly traceable to the defendants' actions, and whose redressability by the court is likely rather than speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For the purpose of a motion to dismiss, courts treat a plaintiff's

factual allegations as true. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023).

Individual members of CSP have suffered injury to their use and enjoyment of Crystal Stream. This injury is directly attributable to Highpeak's polluting discharges into Crystal Stream, as allowed unpermitted by the EPA's WTR. Protecting Crystal Stream for present and future use is the direct purpose of CSP, and therefore, this suit is germane to the organization's purpose. Redressability is likely rather than speculative because, by ruling that the WTR is either improperly promulgated or inapplicable in this instance, this court can require Highpeak to seek an NPDES permit, thereby limiting the discharges of pollutants into Crystal Stream and reducing CSP's harm.

A. CSP's members have suffered cognizable injury to their legally protected interest in the use and enjoyment of Crystal Stream.

CSP's members suffered a concrete and particularized injury, loss of use and enjoyment of Crystal Stream, and therefore meet the cognizable injury requirement of individual standing.

Individual members of an organization may fulfill the injury in fact requirement of standing where they can demonstrate they suffered cognizable and particularized injury to a legally protected interest. *Lujan*, 504 U.S. at 555. Environmental groups have been shown to have suffered cognizable injury where continuous and illegal discharges of pollutants into a water source cause nearby residents to reduce their recreational use of the waterway and subjected them to other aesthetic harms. *Friends of the Earth, Inc.*, 528 U.S at 173. Discharges of pollutants into water sources of the United States without first obtaining a federal National Discharge Elimination System ("NPDES") permit are illegal under the Clean Water Act ("CWA") absent an applicable exemption. 33 U.S.C. § 1342.

Highpeak's pattern of discharging of pollutants into Crystal Steam is undoubtedly continuous. For the past thirty-two years, Highpeak has seasonally discharged a continuous slew of iron, manganese, and TSS from Cloudy Lake into Crystal Stream through its manmade tunnel. CSP's Notice of Intent to Sue letter ("NOIS") alleges a discharge of multiple pollutants from

Cloudy Lake into Crystal Stream in concentrations approximately 2-3% higher than are presently contained in Cloudy Lake, indicating that additional pollutants are introduced during Highpeak's water transfer process. Crystal Stream, fed by groundwater springs, is not naturally subject to such pollutants. It is clear that Highpeak has discharged pollutants into Crystal Stream that would not otherwise exist, continuously, for the past thirty-two years.

These discharges are clearly illegal as well. Highpeak constructed its tunnel and began discharging pollutants into Crystal Stream without a NPDES permit. Absent an exception, the CWA requires any party seeking to discharge into the navigable waterways of the United States to obtain a NPDES permit. Highpeak has never sought or obtained a NPDES permit. Absent a finding by this court that the WTR was both validly promulgated and properly applied in this instance, it is clear that Highpeak's unpermitted discharges of pollutants into Crystal Stream are contrary to CWA requirement for a NPDES permit, and therefore illegal. 33 U.S.C. § 1342.

Members of CSP have suffered injury in fact to their legally protected interest in Crystal Stream due to Highpeak's discharges, which have caused CSP's members to curtail their use of Crystal Stream and subjected them to additional aesthetic harms. Two members have submitted affadavits detailing their specific injuries.

Cynthia Jones joined CSP when she became concerned about the pollutants Highpeak has been discharging into Crystal Stream. She lives 400 yards from Crystal Stream and regularly walks alongside it. Cynthia is now afraid of walking in the water due to Highpeak's pollution. Highpeak's discharges have significantly curtailed her use and enjoyment of the stream.

Jonathan Silver also joined CSP due to his concern about Highpeak's discharges, beginning when he noticed Crystal Stream had begun to appear cloudy. Jonathan lives half a mile from the stream and regularly walks alongside the stream with his children and pets. Highpeak's discharges have reduced Jonathan's enjoyment of the stream by reducing the frequency of his visits. The pollution plaguing Crystal Stream has detracted from Jonathan's enjoyment of the stream and worried him. Due to the pollution, Jonathan no longer allows his dogs to drink from the stream. Highpeak's continuous and illegal discharges have curtailed at

least two CSP members' use and enjoyment of Crytal Stream and subjected them to the aesthetic harms.

CSP's members have clearly suffered loss of use and enjoyment of Crystal Stream and been subjected to aesthetic harms due to Highpeaks' continuous and illegal discharges into Crystal Stream. CSP's members therefore meets the cognizable injury requirement of individual standing.

B. Cause of the CSP's members' injury is fairly attributable to Highpeak's discharges.

CSP's member's injury was directly caused by Highpeak's illegal and unpermitted discharges from Cloudy Lake to Crystal Stream, as allowed by the EPA's promulgation of the WTR.

To have standing in a citizen suit, an environmental group plaintiff must show their injury is fairly traceable to the defendant's discharges. *Friends of the Earth*, 95 F.3d at 359. In a citizen suit under the CWA, a plaintiff may meet the causation requirement of standing by showing that the defendant has: (1) discharged some pollutant in concentrations greater than allowed by its CWA permit; (2) into the waterway in which plaintiffs have an interest, which is either presently adversely affected or may be adversely affected by the pollutant; and (3) that the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996). *Friends of the Earth*, 95 F.3d at 360-61. Plaintiffs who use waterways far downstream from the source of unlawful pollution may satisfy the "fairly traceable" element by relying on alternative types of evidence. *Friends of the Earth*, 95 F.3d at 362 (quoting *Cedar Point Oil Co.*, 73 F.3d at 558 n.24). For example, plaintiffs may produce water samples showing the presence of a pollutant of the type discharged by the defendant upstream or rely on expert testimony suggesting that pollution upstream contributes to a perceivable effect in the water that the plaintiffs use." *Id.* at 362. Any discharge into United States waterways without either an NPDES permit or an applicable exemption is an illegal discharge under the CWA. 33 U.S.C. § 1342.

Highpeak does not dispute that it discharged waters from Cloudy Lake into Crystal Stream without an NPDES permit. As Highpeak never possessed an NPDES permit, absent a ruling that the WTR was both properly promulgated and properly applied here, any of Highpeak's discharges into Crystal Stream in any amount would qualify as discharges of pollutant in greater concentrations than allowed by the CWA. CSP has shown Highpeak discharged pollutants (iron, manganese, and TSS) into Crystal Stream at concentrations approximately 2-3% higher than samples taken from Cloudy Lake. The type of pollutants discharged are those that make Cloudly Lake itself cloudy, and have thereby made Crystal Stream cloudy as well. Thus, Highpeak has clearly discharged some pollutant into Crystal Stream, and the discharge of these pollutants contribute to the kinds of injuries caused to CSP's members.

Highpeak also does not dispute that CSP's members have an interest in Crystal Stream. Two CSP members have submitted affidavits stating they live close to and regularly use the stream. CSP members have further sworn they suffered loss of use and enjoyment due to the pollution of Crystal Stream and their concern over Highpeak's discharges. Highpeak's discharges of pollutants are thus fairly traceable to the harm inflicted, namely, pollution of the stream and the resulting loss of use and enjoyment by CSP's members.

Because CSP can show Highpeak illegally discharged pollutants into a Crystal Stream, a waterway in which CSP's members have an interest, in greater amounts than are allowable under the CWA, and that the discharge of those pollutants are fairly traceable to the harms suffered by CSP's members, CSP fulfills the causation prong of its standing requirement.

C. Cause of the injury suffered by CSP's members is also fairly traceable to the EPA's improper promulgation of the WTR.

CSP's members have standing to oppose the WTR because they suffered loss of use and enjoyment of Crystal stream as a result of the EPA's promulgation of the WTR.

To challenge a regulation promulgated by a government agency, plaintiffs must demonstrate they suffered actual, concrete injury as a result of the challenged regulation. *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 386-93 (2024). Normally, an organization seeking engage in activity which discharges into the navigable waters of the United States must obtain a National Discharge Elimination System ("NPDES") permit, and thus be subjected to CWA limitations on releases of pollutants, inspection, and other statutory requirements. 33 U.S.C. § 1342. The WTR exempts organizations engaging in "water transfers" from NPDES permits, with "water transfers" referring any connection of United States waters which does not subject the transferred water to intervening industrial, municipal, or commercial use. 40 C.F.R. 122.3(i).

The actual, concrete injuries suffered by CSP's members are directly attributable to the EPA's improper promulgation of the WTR. Without the WTR, Highpeak would have been forced under the CWA to seek a NPDES permit. NPDES permitting in this instance would have subjected Highpeak's discharges to CWA requirements and federal oversight, thereby reducing the amount of pollutants released into Crystal Stream and the resultant harm suffered by CSP members. Absent this permit, Highpeak has been able to discharge pollutants into Crystal Stream annually for the past 32 years without any federal or state oversight whatsoever. It is clear that the actual and concrete injury suffered by CSP's members at the hands of Highpeak is fairly attributable to the EPA's improper promulgation of the WTR. Thus, CSP fulfill the causation prong of their standing requirement to challenge the EPA's WTR.

D. <u>This court may redress CSP's members' injury by requiring Highpeak to seek a permit and by ruling the WTR is either improperly promulgated or inapplicable in this instance.</u>

Redressability of CSP's members' injury in fact is likely rather than speculative because ruling that the WTR is either invalidly promulgated or inapplicable here would force Highpeak to seek an NPDES permit, subjecting Highpeak to government oversight with the overwhelming likelihood of reducing or halting the discharge of pollutants into Crystal Stream.

To have standing, plaintiffs must show the redressability by the court is likely rather than speculative. *Lujan*, 504 U.S. at 555. When determining whether to overrule an agency-promulgated regulation, courts must exercise their independent judgment in determining whether an agency acted within its statutory authority. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). While courts must respect when a particular statute delegates authority to an agency when consistent with constitutional limits, they need not give greater deference to the agency's interpretation of the law. *Id.*

An organization wishing to discharge pollutants into the navigable waters of the United States must obtain an NPDES permit. 33 U.S.C. § 1342. These permits limit the types and concentrations of pollutants a permit holder may discharge; only by complying with these limits is a permit-holder deemed to comply with the CWA. 33 U.S.C. § 1342(k). The CWA further requires permittees to install and maintain equipment to test their discharges, and to report these test results to the EPA. 33 U.S.C. § 1318(a). 40 C.F.R. §§ 122.41(j). 40 C.F.R. § 122.48.

Under *Loper Bright*, this court has final say in determining whether to invalidate the WTR, uphold it, or determine it inapplicable in this instance. No deference need be given to the EPA's interpretation of its statutory grant of power from Congress. The increase of independence *Loper Bright* grants to courts makes redressability likely, as the substantial burden of *Chevron* deference no longer inhibits this court from granting relief to CSP by ruling that the WTR is either invalidly promulgated or inapplicable in this instance. After such a ruling, existing CWA requirements stemming from an NPDES permit, such as frequent testing, discharge limits, and required reports to the EPA would limit Highpeak's ability to inflict further harm to Crystal Stream and CSP. A ruling against Highpeak either invalidating the WTR or finding the WTR inapplicable in this instance would thereby halt CSP's ongoing injuries during the NPDES permit application process and significantly reduce CSP's future injury. Thus, due to the Court's greater flexibility after *Loper Bright* and the existing NPDES permitting rules meant to limit polluting water transfers, redressability of CSP's injury is likely rather than speculative

E. CSP itself has standing because it fulfills the *Hunt* requirements for associative standing.

CSP has associative standing to bring a suit on behalf of its members because its members would have standing to sue in their own right, because protecting Crystal Stream is germane to CSP's main purpose, and because no individual member is required to sue individually in order for CSP to have standing.

An organization has associative standing to bring a suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests the suit seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt*, 432 U.S. at 343. Members' individual participation in a lawsuit is only necessary when the organization is seeking monetary damages on behalf of its members; individual participation is not required when the association seeks only prospective or injunctive relief. *United Food & Commer. Workers*, 517 U.S. at 546.

As shown above, CSP's individual members meet the requirements for individual standing. CSP members have suffered injury in fact due to the frequent discharges of pollutants into Crystal Stream. CSP's members can show that causation for their injury is fairly attributable to both Highpeak's discharges from Cloudy Lake into Crystal Stream and the EPA's promulgation of the WTR, which allows for these transfers to continue without an NPDES permit. Redressability has been shown to be likely due to the deference given this court under *Loper Bright* and the pre-existing CWA requirements for non-exempt NPDES permit holders, which would require limitations on and reporting of pollutants discharged into Crystal Stream.

CSP's interests are germane to the organization's purpose. CSP states that its sole interest is in " the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." This interest cuts to the core of the present litigation, which involves discharges of pollutants which presently pollute Crystal Stream and reduce CSP members' use and enjoyment of Crystal Stream.

Neither the claim asserted nor the relief requested require the participation of individual

members. CSP is not seeking monetary damages in this instance. CSP is only seeking injunctive relief, asking the court to rule as to the validity of the EPA's WTR in general and applicability of the EPA's WTR to Highpeak's discharges in this instance.

As CSP's individual members have standing, the interests of the suit are germane to CSP's purpose, and because this suit does not require the participation of individual CSP members, CSP has associative standing to bring this suit on behalf of its members.

II. The District Court correctly concluded that the complaint filed by CSP was timely because the right of action only accrues after an injury has been suffered.

The district court correctly concluded that the challenge filed by CSP was timely. The Administrative Procedures Act ("APA") allows a person who is wronged by federal agency action to bring a civil suit against that federal agency. 5 U.S.C. § 702. For a challenge under the APA to be timely, the complaint must be filed within six years after the right of action first accrues. 28 U.S.C. § 2401(a). The date in which accrual begins is when the plaintiff has a complete and present cause of action. *Green v. Brennan*, 578 U.S. 547, 554 (2016). In the matter of an APA complaint, the plaintiff does not have a complete and present cause of action until they suffer an injury. *Corner Post, Inc.,* 144 S.Ct. at 2450. This means that the date the injury is suffered by the plaintiff begins the accrual period, as opposed to the date that the agency action promulgated. Therefore, the complaint filed by CSP is timely because it was made within six years of when it first suffered an injury.

CSP was formed on December 1, 2023, and thus could not suffer harm from Highpeak's actions until that date. As Highpeak's harmful action had already been occurring, CSP suffered injury immediately upon its creation. This sets both the date of the injury and the date in which CSP had a complete and present cause of action to December 1, 2023. This began the six year time limit for CSP to bring its complaint, allowing the complaint to be timely as long as it was

filed before December 1, 2029. CSP filed its complaint under the APA on February 15, 2024, well within the six year statute of limitations, making it a timely challenge under the Supreme Court's analysis of 28 U.S.C. 2401(a).

Highpeak's claims that CSP should be held to a different standard than that decided in Corner Post is without merit. There is no backing to support a non-profit entity being treated differently than a for-profit entity with regards to when a right of action first accrues. The APA defines a person as being inclusive of any person, corporation, association or organization as a person able to bring suit if harmed by agency action. 5 U.S.C. § 551(2). This showing that CSP as an incorporation would have the same right to bring suit as any individual harmed by the actions of Highpeak and the EPA, and would be treated in the same way as the for profit corporation who was party to the litigation in Corner Post. Congress has numerous times in the past specified when something should not fall under the standard statute of limitations rules. *Corner Post, Inc.*, 144 S.Ct. at 2453. Having not specified so in this case, showcases they intended for a non-profit entity such as CSP to be treated under the same standard as a for-profit entity, such as the one in Corner Post.

None of CSP's members are party to the litigation and therefore having suffered harm before the creation of CSP does not alter the date of accrual. The majority in Corner Post make it clear that the APA has a plaintiff-centric accrual rule, which is designed to give everyone their day in court. *Id.* at 2459. As such the APA is designed to allow a group such as CSP to have an opportunity to challenge agency action, as opposed to being a shield for the EPA against liability**.** Highpeak claims it is problematic that CSP be allowed to challenge a decades old regulation, but this concern is contrary to congress's very purpose here, to allow those impacted by oversteps in regulation to be allowed judicial review. *Id.* Reading an alternative intent into the

statute that goes beyond both the words of congress and the interpretation of the supreme court, for the means of administrative ease, would be inappropriate. Additionally, the WTR promulgating in 2008 is completely irrelevant to this analysis, as the Supreme Court clearly established that it is the date of injury that matters, not the date of agency action. *Id.* at 2450.

Even if the court decided that CSP itself was unable to bring suit a timely manner, this case should not be dismissed. Any concerns surrounding CSP bringing a challenge in a representative capacity on behalf of members who suffered injury more than six years before the complaint was filed should be assuaged by the membership of Jonathan Silver. Mr. Silver moved to the area in 2019 and only suffered injury after moving into the community. This means that Mr. Silver's right of action only began to accrue in 2019, allowing him to file a timely challenge as long as he did so before 2025. This shows that even without the existence of CSP, Mr. Silver would have been able to file a timely complaint on his own against Highpeak, further showcasing the merit and validity behind CSP's challenge.

This court should uphold the district court's holding that the complaint was filed in a timely manner.

III. The Water Transfer Rule is an invalid promulgation by EPA that is inconsistent with the plain language and purpose of the Clean Water Act and is based on the now overruled Chevron Doctrine.

This Court should reverse the district court's holding that the Water Transfer Rule ("WTR") is a valid regulation promulgated by EPA. The regulation should be declared invalid for the following reasons: (1) the plain language and structure of the Act unambiguously establishes that transfers of polluted water between distinct water bodies without a permit constitutes an "addition" of pollutants under the Act; (2) the WTR is inconsistent with Congress' intent and frustrates the very purpose of the Act; and (3) even if the Act is determined to be

ambiguous, the district court's ruling that the WTR is a valid promulgation is based entirely on the *Chevron* Doctrine, which has since been overruled by the Supreme Court in *Loper Bright*. *Loper Bright Enterprises*, 144 S.Ct. at 2244.

A. The plain language and structure of the Clean Water Act unambiguously establish that transfers of polluted water between distinct bodies of water without a permit constitutes an "addition" of pollutants under the Act.

The Clean Water Act states that "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id* § 1362(12)(A). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). While the Act does not provide a definition for "addition," reading the plain language of the text unambiguously establishes that transfers of polluted waters between distinct water bodies constitute an "addition" of pollutants.

When interpreting a statute, courts will begin with an analysis of the plain text. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (stating the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning"). "Addition" is plainly understood as an increase or augmentation, which can easily be divined by considering its common meaning. *See generally S.D. Warren Co. v. Me. Bd. Of Envtl. Prot.*, 547 U.S. 370, 376 (2006) (noting that where a word is "neither defined in the statute nor a term of art, we are left to construe it in accordance with its ordinary or natural meaning") (internal quotation marks omitted); *see also Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (*Friends I*) (stating the "dictionary definition of 'addition' is

'to join, annex, or unite' so as to increase the overall number or amount of something"). As such, "addition" is readily understood as an increase—one thing joining another.

Applying an ordinary understanding of the word clearly requires that a water transfer that discharges pollutants clearly constitutes an "addition." *See Dubois v. U.S. Dep't of Agriculture, et al.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (holding that when dealing with "two distinct waters of the United States…[a] proposed transfer of water from one to the other constitutes an 'addition'" and where "the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required"). Where water is conveyed through a tunnel, as in the present case, from a body of water that contains a high concentration of pollutants to a distinct body of water that is free from those pollutants, an "addition" of pollutants has undoubtedly occurred and a permit is required. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001) (*Catskill I*) ("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").

EPA abandoned any attempt at a plain language interpretation of the Act. Instead, EPA argues that a transfer of contaminated water from a polluted waterway to a distinct pollutant-free waterway does not constitute an "addition" of pollutants because all the waters of the United States constitute one collective entity. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 505 (2nd Cir. 2017) (*Catskill III*) ("the EPA characterizes this interpretation of Section 402 of the Clean Water Act as embracing what is often referred to as the 'unitary-waters' reading of the statutory language"). A "unitary waters" reading of the CWA is far from a plain reading of the Act.

EPA ignores the plain meaning of the word "addition" by asserting that not only must an "addition" come from the "outside world," but also from "outside the waters being transferred." National Pollution Discharge Elimination System (NPDES) Water Transfers Rule ("WTR Final Rule"), 73 Fed. Reg. 33697, 33701 (June 13, 2008) (codified at 40 C.F.R. 122.3(i)). A water transfer that discharges pollutants from one distinct water body to another cannot be considered an "addition" of pollutants because, as a unitary body of water, the pollutants were already in that water to begin with. *See Catskill III,* 846 F.3d at 505. This "unitary waters" theory formed the basis of EPA's informal policy regarding transfers that would become the WTR. EPA's approach was addressed and rejected in several cases prior to the final promulgation of the WTR in 2008. *See Dubois,* 102 F.3d at 1296 (rejecting district court's conclusion that two distinct bodies of water constituted a "singular entity," stating "[t]here is no basis in law or fact for the district court's 'singular entity' theory"); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 451 F.3d 77, 81 (2nd Cir. 2006) (*Catskill II*) (reaffirming the *Catskill I* court's rejection of the "unitary water theory as inconsistent with the ordinary meaning of the word 'addition'").

The unitary waters theory was also addressed with skepticism by the Supreme Court. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95, 107-08 (2004) ("The 'unitary waters' approach could also conflict with current NPDES regulations. The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times"). While the Court did not ultimate rule on whether the unitary waters approach was valid, the Court's discussion cast significant doubt on EPA's argument.

Wherever possible, courts should adhere to the plain language of a statute. The plain language of the Clean Water Act clearly shows that a transfer of pollutants from one body of

water into a distinct body of water constitutes a discharge of pollutants. Further, EPA's unitary waters theory, which the WTR is premised on, is inconsistent with the plain language of the Act showing Congress clearly considered the statute to apply to the nation's many, distinct bodies of water. Thus, the Water Transfer Rule should be designated an invalid promulgation.

B. The WTR is inconsistent with Congress' intent and frustrates the purpose of the Act.

The Clean Water Act provided a blanket prohibition on the discharge of pollutants into navigable waters without a permit. The WTR exempts an entire category of water pollution from this blanket prohibition by asserting that water transfers are not subject to NPDES requirements. The NPDES is the critical mechanism through which the Act operates. By exempting transfers from the Act's regulatory mechanism, the WTR contravenes the policy underlying the Act.
The Clean Water Act was a landmark piece of legislation in response to alarming and harmful pollution in the nation's waters. While public outcry following events such as the Cuyahoga River fire are often cited as the impetus of the Act, the need for a sweeping approach had been decades in the making. Congress responded to this massive problem with similarly massive actions. The purpose of the Act was the "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters." 33 U.S.C. § 1251(a). Congress had a clear and bold agenda, as evidenced by the objective "that the discharge of pollutants into the navigable waters be eliminated by 1985." § 1251(A)(1). While the 1985 goal proved unsuccessful, its inclusion among the Act's declaration of goals and policy clearly shows Congress' intent to address the widespread problem of water pollution as strongly as possible.

Central to the Act is the National Pollution Discharge Elimination System permitting program—"the centerpiece" of the Clean Water Act. *Am. Iron & Steel Inst. v. E.P.A.*, 115 F.3d 979, 990 (D.C. Cir. 1997). The Act established the permitting program to strictly regulate point

source pollution. The WTR allows massive amounts of water to escape the scrutiny of the NPDES program and the Act's blanket prohibition on discharges of pollutants into water bodies without permits. Such an interpretation flies in the face of the central purpose of the Act as it authorizes EPA to regulate away an entire category of water pollution from the clear permitting requirements of the Act just because the pollution occurred in a water transfer.

Moreover, the WTR can lead to absurd results that further undermine the purpose of the Act. The WTR essentially gives a free pass to the discharge of potentially unlimited types and amounts of pollutants, so long as the discharge occurs during a water transfer. One example of major significance is the introduction of invasive species. As climate change increases the vulnerability of many ecosystems to changes in physical, chemical, and biological conditions, the introduction of an invasive species can collapse entire ecosystems. So long as an invasive species is introduced through a water transfer, the WTR will allow such ecosystem collapses to occur. When an interpretation of a statute leads to the opportunity for absurd results, that interpretation must be rejected. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, (2nd Cir. 2001) (when interpreting a statute, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with") (internal quotation marks and citation omitted); *see also U.S. v. Dauray*, 215 F.3d 257, 264 (2nd Cir. 2000) ("[a] statute should be interpreted in a way that avoids absurd results").

EPA argues that the WTR is necessary because it would be practically impossible and economically infeasible if water transfers were subject to NPDES permitting requirements due to the sheer volume of water transfers in the country. *See* WTR Final Rule at 33702 ("Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights…it is reasonable to read the statute as not requiring

NPDES permits for water transfers"). While it is true that water transfers constitute massive volumes of water that are typically allocated by the states, this negates rather than supports the WTR. First, that means that all that water goes unregulated, free to dump pollutants into any navigable waterway. Second, the burdens of subjecting water transfers to the NPDES permitting requirements are overstated. EPA already has the means and ability to issue general permits. *See S. Fla. Water Mgmt. Dist. V. Miccosukee Tribe of Indians*, 541 U.S. 95, 108-09 (2004) (acknowledging potential burdens of permitting, but stating that "it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs"); *see also* 40 C.F.R. § 125.3(b) (point source operators can seek a variance from limits); *see also Nw. Envtl.*, 537 F.3d at 1010 ("Obtaining a permit under the CWA need not be an onerous process"); *see also Catskill II*, 451 F.3d at 84 ("The power of the states to allocate *quantities* of water within their borders is not inconsistent with federal regulation of water *quality*") (emphasis in original). Thus, one of EPA's central arguments concerning federal interference on the states lacks merit.

Furthermore, Congress directly considered the issue of water transfers as evidenced by the fact that subsequent amendments to the Act contained exemptions for specific categories of transfers. The CWA provides specific exemptions to the NPDES permitting requirements, such as an exemption for stormwater runoff, 33 U.S.C. § 1342(l)(2), and for discharging dredged or fill material into navigable waters, 33 U.S.C. § 1344(a). The inclusion of explicit exemptions clearly demonstrates that Congress was aware of the issue of pollutant discharges associated with water transfers. Given the opportunity, Congress chose to omit any blanket exceptions for all water transfers and instead carved out several narrow categories of discharges. *See N. Plains Res.*

Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155, 1164 (9th Cir. 2003) ("Only Congress may amend the CWA to create exemptions from regulation"); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1021-22 (9th Cir. 2008) (noting that EPA may not "exempt certain categories of discharges from the permitting requirement" and concluding that "Congress expressed 'a plain…intent to require permits in any situation of pollution from point sources'") (citation omitted); *see Hillman v. Maretta*, 569 U.S. 483 (2013) ("We have explained that '[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). Clearly, Congress never intended for water transfers as an entire category to be free from the Act's permitting requirements and EPA cannot create its own broad, much more sweeping exemption.

The Act was a landmark piece of legislation. The statute's admirable goals and sweeping requirements reflected the bold and necessary motivations of eliminating pollution. The WTR provides an exemption from the Act's explicit permitting requirements where Congress did not. A regulation that negates the express purpose and underlying policy of a statute should be invalidated.

C. Even if the Act is determined to be ambiguous, the district court's ruling that the WTR is a valid promulgation is based entirely on the Chevron Doctrine, which has since been overruled by the Supreme Court.

The district court's ruling relied on the cases decided after the WTR was promulgated and that upheld the regulation. These cases upheld the WTR as a permissible interpretation of the CWA based entirely on *Chevron*. Chevron instructs courts to defer to agency interpretations of ambiguous statutes. As discussed in detail above, the plain meaning of the statute's text and the clear congressional intent are unambiguous when it comes to the Act's blanket prohibitions and

the issue of water transfers. However, even if this Court determines that the Act is ambiguous, the WTR is still invalid because those decisions upholding it did so on grounds that have since been overruled. This Court should adhere to the Supreme Court's holding in Loper Bright that courts must no longer afford the level of deference awarded under Chevron.

While Loper Bright is now governing law, the Supreme Court stated in its opinion that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful…are still subject to statutory *stare decisis* despite our change in interpretive methodology." [Cite]. This statement, however, is dicta. Despite the district court's acknowledgment that this line is purely dicta, the court relied on it to decline to examine the WTR's validity. This Court should follow the Supreme Court's example and invalidate the WTR's use of the now overruled *Chevron* as a judicial shield. Moreover, "[*s*]*tare decisis* is not an 'inexorable command.'" *Loper Bright,* 144 S.Ct. 2244, 2270 (2024) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). In *Loper Bright*, the Court concluded that the stare decisis decisions most relevant were "the quality of [the precedent's] reasoning, the workability of the rule it established…and reliance on the decision." *Id.* (internal quotation marks and citations omitted). The Court concluded these factors weighed in favor of "letting *Chevron* go." In the present case, these same considerations also weigh in favor of letting the Water Transfer Rule go.

While the district court's avoidance of the WTR issue at hand was based on the Supreme Court's statement that "[m]ere reliance on *Chevron* cannot constitute a '"special justification"' for overruling such a holding," [Cite], the court incorrectly assumed that the present case is an issue of "mere reliance on *Chevron*." The question of WTR's validity is an issue of more than "mere reliance," but of absolute plausibility. The WTR was promulgated to use Chevron as a shield, as

shown in the rule's final promulgation. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01 ("Courts are required to accept an agency's reasonable interpretation of a statute, even if this interpretation differs from what the court believes is the "best" statutory interpretation") (citing *National Cable and Telecommunications Ass'n, et. al. v. Brand X, et al.*, 545 U.S. 967, 980 (2005)). The WTR doesn't merely rely on *Chevron*—it owes its entire existence, from its birth to its upholding in *Catskill III*, on *Chevron*. A regulation that is as consequential as the WTR and that lacks any legal grounds at all upon which to stand is as special justification as any to revisiting its prior rulings.

The WTR is the exact sort of overreach that the Supreme Court meant to eliminate with *Loper Bright*. Considering the Court's concern with executive agencies overstepping their constitutional authority, and considering the WTR is a regulation that provides a massive exemption to a statute's requirements where Congress had not, the WTR at the very least should be reassessed under a standard of deference other than *Chevron*. *See Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (2024) ("courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous").

While EPA argues the WTR ensures judicial consistency, the opposite has always been the case. *See* WTR Final Rule at 33,704 ("EPA believes that this action will add clarity to an area in which judicial decisions have created uncertainty"). EPA promulgated the WTR despite the fact that the courts in *Catskill I*, *Catskill II*, and *DuBois* had already invalidated the arguments on which the WTR is based. Further, while not ultimately ruling on the validity of the unitary waters theory, which formed the original basis for the WTR, the Supreme Court cast significant doubt on EPA's arguments. In fact, it wasn't until 2017 that the WTR was validated by the court in *Catskill III*, and that was done because of *Chevron*. Thus, EPA's argument that the WTR "add[s]

clarity to an area in which judicial decisions have created uncertainty" is nonsensical—EPA went completely against the clear judicial decisions that had been made against the WTR.

"[*Chevron*] requires a court to *ignore*, not follow, 'the reading the court would have reached' had it exercised its independent judgment as required by the APA." *Loper Bright* (quoting *Chevron*). This, the Court declared, was one of the fundamental flaws in Chevron that made it inconsistent with the APA, calling it "the antithesis of the time-honored approach the APA prescribes." *Loper Bright*. This is also exactly what the district court did in its decision—ignored its independent judgment as required by the APA.

Even if the Court concludes that the WTR is a permissible interpretation of the Clean Water Act, the EPA's promulgation of the WTR is still contrary to the Act because it is not the best interpretation. While Chevron allowed for judicial deference to any agency interpretation that was permissible, Loper Bright expressly held that if a federal agency's interpretation of a federal statute is not the best, it is not permissible. *See Catskill I*, 273 F.3d at [pincite] ("Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive…we do not find the EPA's position to be persuasive") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See Catskill II*, 451 F.3d at [pincite] (declaring the deference described in *Skidmore* and *Mead* applicable: "We thus defer to the agency interpretation according to its 'power to persuade'") (citing *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("the rulings, interpretations and opinions" of an agency may constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). *Id.* (Agency's interpretation of a statute under the *Skidmore* standard depends on the interpretation's "power to persuade," which in turn depends on "the

thoroughness evidence in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements"). As evidenced by the courts in *Catskill I* and *Catskill II*, EPA has utterly failed to persuade that the WTR is the best interpretation of the CWA.

Before the WTR was an official regulation promulgated by the EPA, it was an informal policy that had been challenged multiple times in the courts and found to be inconsistent with the Act. EPA took that same invalidated policy and promulgated it to take advantage of Chevron. The simple act of attaching a name to a policy that has been invalidated does not transform that act from an overreach of agency authority to an appropriate regulation. The WTR was invalid before it was an official regulation and should be declared invalid after, as well. Moreover, although courts have upheld the WTR after its official promulgation, they have done so on the explicit grounds that the Chevron doctrine enabled them to show deference to agency discretion. Those cases shared the sole basis of Chevron deference. The Supreme Court has now overruled Chevron deference, thereby eroding all legal grounds that had upheld the WTR.

The WTR defies the plain language of the Act by imposing an unreasonable definition of the word "addition" so as to allow water transfers that discharge pollutants into distinct water bodies to escape the Act's permitting requirements. The WTR is based on a legal theory that has been invalidated by multiple courts as inconsistent with the Act. The WTR allows for the possibility of massive amounts of unpermitted pollution, an absurd result that surely contravenes the Act's guiding policy of protecting, enhancing, and maintaining the nation's waters. Furthermore, the WTR was only upheld after taking advantage of Chevron, which has been overruled. As such, this Court should overruled the district court's holding that the WTR is a valid promulgation under the Clean Water Act.

IV. Even if the Water Transfer Rule is determined to be a valid promulgation, Highpeak must still obtain a permit under the Clean Water Act.

No matter this Court's determination on the validity of the Water Transfer Rule, this Court should uphold the district court's ruling that Highpeak must still receive a permit for its discharges into Crystal Stream. The Water Transfer Rule exempts from the NPDES permitting system discharges from a water transfer, meaning "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). The WTR goes on to state that the "exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.* In this regard, the regulation is unambiguous, and the plain language clearly establishes that Highpeak's tunnel, which conveys contaminated water from Cloudy Lake to Crystal Stream, introducing pollutants in the process, requires a permit for its pollutant discharge.

A. The Water Transfer Rule expressly removes from its exemption any transfers that introduce pollutants, which Highpeak's tunnel does.

The WTR clearly states 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). It is not disputed that Highpeak's tunnel constitutes a water transfer. Highpeak's conveyance of water from Cloudy Lake to Crystal Stream therefore constitutes a water transfer activity. This water transfer activity, which has continued uninterrupted for the past thirty-two years without a permit, discharges multiple pollutants into Crystal Stream. Cloudy Lake contains significantly higher levels of certain minerals, such as iron and manganese, and has a much higher concentration of total suspended solids ("TSS") than Crystal Stream.

See WTR Final Rule at 33,705 ("Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being

transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required") (internal citations omitted). Where a "regulation is genuinely ambiguous," *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019), respect for an agency's interpretation of its own regulation is due. In the present case, however, the WTR is not genuinely ambiguous. Thus, any analysis of the EPA's interpretation, whether under *Skidmore* or *Seminole Rock*, is unnecessary and the rule should not be subject to conflicting interpretations. The WTR plainly states that discharges from a water transfer do not require a permit unless the discharge involves "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). This statement clearly establishes that a transfer that allows water to be exposed to contaminants in the transfer is still subject to the NPDES permitting system. As such, this Court need not apply any judicial standard of review, as the regulation is not "genuinely ambiguous." *See Kisor v. Wilkie*, 588 U.S. 558, 574-75 (2019) ("If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law….But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading").

While Highpeak argues that it does not require a permit because the pollutants are contained in the water due to natural conditions, these natural pollutants only make it to Crystal Stream because of Highpeak's activities. The minerals and TSS may be natural, but their introduction into Crystal Stream is entirely human-caused. Crystal Stream is fed largely by natural groundwater springs, making it naturally lower in iron, manganese, and TSS concentrations than Cloudy Lake. The higher concentration of minerals and TSS would not naturally make its way into Cloudy Lake absent human intervention. That human intervention

occurs every time Highpeak opens the valves and allows the pollutants to enter the largely pollutant free Crystal Stream. No matter how natural the contaminants are when present in Cloudy Lake, they are unequivocally introduced by Highpeak's water transfer. Thus, Highpeak's argument that the only reasonable interpretation of the WTR is that the introduction of pollutants must result from human activity has no bearing on the analysis—the introduction of pollutants into Crystal Stream is a result of human activity—Highpeak's activity.

Moreover, Highpeak likely could have avoided the contamination of Crystal Stream by building its tunnel using metal conduits. The introduction of the pollutants has occurred because instead of doing so, Highpeak chose to carve the tunnel through rock and soil with only part of the tunnel being made up of an impermeable conduit. This decision by Highpeak, another example of why the introduction of pollutants into Crystal Stream is the result of a human activity and not "natural processes," as Highpeak argues, allowed the water transferred from Cloudy Lake to pick up the contaminants and introduce them to Crystal Stream.

Additionally, the WTR makes no mention of nor exception for pollutants introduced as a result of natural processes. EPA's intent in narrowing the scope of the WTR to exclude transfer that introduce pollutants is clear, as seen in the agency's final promulgation of the rule: "where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." WTR Final Rule at 33,705. The agency had every opportunity to provide an exception for naturally occurring pollutants and did not. Notably, the EPA did make an exception for "naturally occurring changes to the water" in regard to utilities and water districts. *Id.* The EPA explicitly tailored this exception to water that "moves through dams or sits in reservoirs along the transfer" and concluded that such water transfers were not subject to the permitting requirements. *Id.* EPA's inclusion of this exception to water transfers in

the context of utilities and water districts demonstrably shows the agency considered the issue at hand—whether naturally occurring changes to water in the course of a water transfer constitute an addition of pollutants that require a permit—and decided only one category of water transfers should receive such an exception: water transfers conducted in the course of operation by utilities and water districts. Highpeak is neither a utility or water district and clearly does not fall within this category.

Interpreting the WTR in a way that disallows the final sentence from applying to anything but pollutants introduced from human activity would result in absurd outcomes in which heavily contaminated water would be free to pollute waterways so long as the pollution was "natural." While Highpeak argues that anything contrary to its natural pollution interpretation would eviscerate the entire rule, the WTR still allows for an entire category of water transfers to escape the permitting requirements of the CWA. Moreover, were this Court to accept Highpeak's argument that the WTR only applies to pollutants introduced from human activity and not to natural processes like erosion, then the WTR would allow for absurd outcomes where shoddy conveyances that exposed transferred water to dangerous but natural pollutants would not require permits. An actor planning a water transfer through ground containing natural gas or oil deposits could be left with the choice of building a more expensive conveyance that could bring the water around the pollutants, or allow the transfer to go through the deposits, becoming toxic along the way. Assuming the latter is the cheaper option, Highpeak's interpretation would allow such a scenario to occur without necessitating a permit. Such an unregulated and dangerous scenario is plainly contrary to EPA's intention in promulgating the WTR. Thus, this Court should reject Highpeak's interpretation.

B. EPA's interpretation of the WTR in the present case, requiring Highpeak to obtain a permit for its tunnel, is a reasonable interpretation that stands up against every relevant standard of review.

Even if the WTR is deemed ambiguous, EPA states that Highpeak's tunnel is a water transfer that requires a permit, which is a reasonable interpretation of EPA's own regulation. This pronouncement is based on EPA's own regulation and is entitled to a high level of deference. *See Auer v. Robbins*, 519 U.S. 452 (1997): An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. Unlike EPA's interpretation of the CWA, which as a case of an agency interpreting a statute is due less deference than what was given by the district court, the present case is an instance of an agency interpreting its own regulation. When an agency's regulation is scrutinized to arrive at the appropriate interpretation, the "ultimate criterion" in the analysis is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer*, 519 U.S. at 461. EPA's determination that Highpeak requires a permit under the CWA for its discharge of pollutants into Crystal Stream is neither plainly erroneous nor inconsistent with the Water Transfer Rule. *See Kisor v. Wilkie*, 588 U.S. 558, 576 (2019) ("Some courts have thought (perhaps because of *Seminole Rock*'s 'plainly erroneous' formulation') that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes…But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation'") (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). *Id.* at 576-77 ("The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate. To begin with, the regulatory interpretation must be one actually made by

the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views….Next, the agency's interpretation must in some way implicate its substantive expertise….Finally, an agency's reading of a rule must reflect 'fair and considered' judgment' to receive *Auer* deference") (citing *Christopher*, 567 U.S. at 155) (quoting *Auer*, 519 U.S. at 462).

While Highpeak argues that Loper Bright requires at most a Skidmore analysis of EPA's interpretation, in overruling Chevron, Loper Bright applied only to the issue of an agency interpreting a statute, not its own regulation. Thus, the agency's interpretation is given more weight because the agency drafted the regulation itself and a standard of review more than Skidmore is appropriate. Whereas the Supreme Court expressly overruled the Chevron Doctrine, and thus removed the deference given to agencies in interpreting statutes, the Court has not overruled or even altered Seminole Rock or Auer. As such, this Court need only find that EPA's interpretation of the WTR be reasonable and consistent with the rule's language. [Cite]. Given that EPA has provided an interpretation of the WTR that Highpeak's tunnel is not exempt from the regulation, this Court should uphold the district court's ruling that Highpeak must obtain a permit for its discharge of pollutants into Crystal Stream.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holdings that CSP had standing to challenge, that CSP timely filed the challenge, and that Highpeak's discharge is subject to permitting under the Clean Water Act. This Court should reverse the district court's ruling that the Water Transfers Rule was a valid regulation promulgated by EPA pursuant to the Clean Water Act.

We hereby certify that the brief for University of Oregon School of Law is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

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