Non-Measuring Brief
Team 40

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 Petition for Review of an Order of the United States District Court for the District of New Union in Docket No. 24-CV-5678

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

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STATEMENT OF JURISDICTION

The Court of Appeals for the Twelfth Circuit has subject matter jurisdiction over this matter under the statutory grant of jurisdiction of the Clean Water Act ("CWA" or "the Act"). The Act grants jurisdiction over any challenge for enforcement of a standard or limitation under the Act, or to enjoin the Administrator to perform his or her duties. 33 U.S.C. § 1365. The Administrative Procedure Act ("APA") permits judicial review of final agency actions for which there is no other remedy. 5 U.S.C. § 704. The final rule issued by the Environmental Protection Agency ("Agency") on June 13th, 2008, is a final agency action–thus reviewable by this court because it marks a consummation of the agency's decision-making process and includes determinations of obligations from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP has 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 correctly hold that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act?

IV. Did the District Court correctly hold that pollutants introduced in the course of the water transfer took 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. Highpeak Tubes Has Transferred Water Between Cloudy Lake and Crystal Stream Uncontested for Thirty Years.

Defendant-Appellee-Cross Appellant Highpeak Tubing Inc. ("Highpeak") is a recreational inner tubing company that has operated in Rexville, New Union, for more than thirty years. Record at 4. In 1992, Highpeak sought and obtained permission from the state to construct a tunnel connecting two bodies of water on its property: Cloudy Lake ("The Lake") and Crystal Stream ("the Stream"). *Id.* In coordination and agreement with the State of New Union, Highpeak used the tunnel to increase the water flow to the Stream by supplementing its volume with water from the Lake. *Id.* Highpeak only utilized the tunnel during the spring and late summer, when seasonal rain increased the water level of the lake such that release of its volume would not be detrimental to the Lake. *Id.* The tunnel itself is partially constructed with iron pipe and partially carved through existing rock between the Lake and Stream, and until this complaint, nobody has challenged the discharge. *Id.*

II. The Water Transfers Rule ("WTR") and the Clean Water Act ("the Act")

In 2008, following a notice published in the Federal Register as required by the APA §553 notice-and-comment process, the Agency promulgated the final WTR amendment, which excluded "discharges from a water transfer" from the NPDES permitting requirement for discharges of pollutants into "waters of the United States". National Pollutant Discharge Elimination System (NPDES) WTR, 73 Fed. Reg. 33697 (June 13, 2008). The full text of the WTR is as follows:

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

NPDES WTR, 73 Fed. Reg. 33,697 (June 13, 2008).

The parties have already stipulated that both Crystal Stream and Cloudy Lake are "waters of the United States" Record at 4-5.

The Clean Water Act was originally passed in 1972 with "[t]he objective [...] to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Act creates the office of the Administrator of the Agency, and provides in relevant part that "[t]he Administrator shall prescribe conditions for [NPDES] permits…", "...is authorized to prescribe such regulations as are necessary…" and "...shall ... identify[] conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH...". 33 U.S.C. §§ 1342(a)(2); 1361(a); 1314(a)(4).

III. Crystal Stream Preservationists Filed a Complaint Shortly After the Organization's Formation.

Crystal Stream Preservationists, Inc. ("CSP") was formed on December 1, 2023, as a not-for-profit organization. Record at 4. They aim to attract members interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." *Id.* Its mission statement is as follows: "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. *Id.* at 14.

CSP is composed of thirteen members, including three officers, who all live in Rexville. *Id.* However, only two of its members own property along the Stream, about five miles south of Highpeak's tunnel. *Id.* at 4. Both bought their homes there prior to 2008. *Id.* Most members of

CSP have lived in Rexville around fifteen years. Record at 4. The only exception is Jonathan Silver, who moved to Rexville in 2019 but does not live along the stream. *Id.* at 16.

CSP alleges that Highpeak's discharge makes the usually clear water cloudy. *Id.* at 14. Members state that their ability to enjoy the Stream has significantly diminished because of the discharge; they are afraid to walk in or let their dogs drink from the Stream. *Id.* at 12, 15-16.

Just two weeks after its formation, CSP sent a notice of intent ("NOIS") to Highpeak to sue under the Clean Water Act. *Id.* at 4. The NOIS alleged Highpeak's tunnel qualified as a point source according to the Act and was discharging pollutants into the stream without the required permit. *Id.* CSP submitted a study showing that the water discharged into the Stream contained elevated levels of iron, manganese, and total suspended solids (TSS) than the water in the Lake; CSP claimed that this brought the discharge outside the scope of the NPDES permit exemption for water transfers. *Id.* at 5.

The NOIS also attacked the NPDES permit exemption on administrative grounds; according to CSP, the WTR was promulgated outside of the Agency's authority under the Act. *Id.* Highpeak sent a reply letter on December 27, 2023, stating that it need not respond to the NOIS on its merits, that it did not need a NPDES permit under the WTR, and that the addition of pollutants from the tunnel did not bring its action outside the scope of the rule. *Id.*

On February 15, 2024, after waiting the minimum sixty days from the NOIS, CSP filed its initial Complaint repeating the allegations from the notice. *Id.* CSP filed citizen suit claims against Highpeak for its activity in connection with the tunnel and permitting requirements and against the Agency challenging the WTR as invalidly promulgated and inconsistent with the statutory language of the CWA. *Id.*

IV. The District Court for the District of New Union Initially Dismissed CSP's Claims Against the Agency but Allowed Their Claims Against Highpeak to Proceed.

Following the filing of CSP's complaint, Highpeak filed a motion to dismiss for lack of standing and exhaustion of the statute of limitations for the claim against the Agency. Record at 5. Furthermore, Highpeak argued that CSP was created solely for the purpose of bringing this suit and had no actual injury as a result of the discharge, and so lacked standing in the citizen suit. *Id.* Highpeak also asserts CSP has no cause of action to challenge the lack of permit, because the WTR was validly promulgated and their activities were covered by the exemption, so no permit was required. *Id.*

The District Court of the District of New Union held that CSP had standing to challenge the WTR and to bring a citizen suit against Highpeak for alleged violations to the Act arising from their comingling of Cloudy Lake and Crystal Stream. *Id.* at 6-8. The District Court further found that CSP's challenge was timely filed but held that the WTR was valid under the Act. *Id.* at 8-11. Finally, the District Court held that Highpeak's discharges introduced additional pollutants and brought it outside the scope of the WTR, allowing CSP's citizen suit to proceed. *Id.* at 11-12.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that CSP had standing to challenge Highpeak's discharge. First, there was no injury to CSP. CSP fails to satisfy its burden in demonstrating that any members experiencing a genuine economic, recreational, or aesthetic harm. Furthermore, it was formed primarily for the purpose of developing standing to sue. The alleged harms specified by CSP with respect to the WTR and Highpeak's discharge, including members' diminished ability to enjoy the Stream's clear, pure water, are not concrete and particularized, nor are they actual or imminent. Second, CSP cannot meet its burden of showing a causal link between an

injury in fact and Highpeak and the Agency's conduct. CSP cannot show that its alleged harms are fairly traceable to Highpeak's discharge and the Agency's rule.

The District Court erred in holding that CSP's challenge to the WTR was timely filed first because CSP's members knew or should have known about their potential claim no later than 2008, when the WTR was promulgated. Second, CSP's formation does not automatically reset the long-expired statute of limitations because it is acting on behalf of its members, who were not harmed after the WTR's publication.

The District Court did not err in holding that the WTR was validly promulgated under the Act. This Court has declined to overturn precedent absent special justification, and no such justification exists here. Furthermore, *Chevron* precedent carries additional explicit protection under the recent decision in *Loper Bright.* Since the WTR has been validated in numerous standing decisions, the Court need not re-visit the validity of the rule pursuant to the Act.

However, should the Court elect to revisit the WTR, established tools of judicial review support the validity of the rule. *Loper Bright* calls for the Court to employ all tools at its disposal when considering *de novo* agency interpretations of their enabling statutes; foundational textual analysis of the Act permits the Administrator to exempt water transfers from NPDES permitting requirements, because establishing "conditions" includes not just conditions required to obtain a permit, but conditions under which a permit is not required.

The District Court did not err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR. Highpeak must obtain a permit for its discharges into Crystal Stream.

The plain text, history, and purpose of the WTR each unambiguously indicate that "introduce" in the meaning of the rule applies to any water transfer activity that causes an

addition of pollutants. This Court should apply the WTR as written and require Highpeak to obtain an NPDES permit.

However, should this Court find the definition of "introduce" to be genuinely ambiguous, the Agency's interpretation is entitled to deference under the *Auer-Kisor* standard. Each of the five *Kisor* factors is satisfied: the Agency's interpretation is reasonable, represents the Agency's official position, implicates the Agency's substantive expertise, and reflects its fair and considered judgment.

STANDARD OF REVIEW

Federal appellate courts review *de novo* a district court's order granting a motion to dismiss for lack of standing. *See Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021); *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 416 (9th Cir. 2020). For an organization to satisfy standing requirements, its members must have individual standing, the relief sought must be "germane to the organization's purpose," and neither the claim asserted nor relief sought may require the participation of an individual member. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

Federal appellate courts also review *de novo* a district court's interpretation of a federal regulation. *See Golub v. Gigamon Inc.*, 994 F.3d 1102, 1105 (9th Cir. 2021); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053, 1057 (9th Cir. 2016). If the regulation is unambiguous, the court must apply the regulation as written. *Kisor v. Wilkie*, 588 U.S. 558, 574-75 (2019). If the regulation is genuinely ambiguous, courts must defer to a "reasonable" agency interpretation of its own regulation, so long as the interpretation's "character and context … entitle[] it to controlling weight." *Kisor*, 588 U.S. at 576.

ARGUMENT

I. The District Court Erred in Holding That CSP Had Standing to Challenge Highpeak's Discharge and the WTR Because There Was No Injury In Fact to CSP And There Is No Causal Link Between Highpeak's Conduct and CSP's Alleged Harm.

To bring an action in federal court, as a citizen suit or challenge to a federal regulation, a plaintiff must have constitutional, or Article III, standing. *Lujan v. Def. of Wildlife,* 504 U.S. 555, 560 (1992). For a plaintiff to have standing as an association, one of the organization's members must satisfy individual standing, the issues of the suit must be germane to the organization's purpose, and litigation must not be adversely affected by the absence of any individual plaintiff. *Id.* at 563. To satisfy individual constitutional standing, the plaintiff CSP bears the burden of demonstrating at a minimum (1) an injury in fact, (2) a causal connection between this injury and the conduct complained of, and (3) likelihood that this harm will be redressed by a favorable decision. *Id.* at 560. The issues here are whether CSP was injured in fact and whether there was a causal link between the alleged injury and Highpeak's conduct. Redressability is considered "flip sides of the same coin" with causation, and therefore the Agency is not addressing it separately. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024).

The Court has described an injury in fact as an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. In determining whether an associational plaintiff has properly alleged an injury in fact, the Court must also evaluate the purpose of its formation and its business practices. *See Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410-414 (2013). The District Court acknowledged that "an organization formed primarily to mount a legal challenge warrants additional scrutiny in determining standing" and that "the Court must carefully review the legitimacy of the alleged injury." Record at 7. Applying this standard of review to the current case, this court should reverse the District Court's ruling that CSP has constitutional standing

because it fails to prove a cognizable injury as an organization formed solely, or at least primarily, for the purpose of mounting a legal action.

If an injury in fact exists, the plaintiff also must show causation between this injury and the conduct complained of. *Lujan,* 504 U.S. at 560. The Court has explained that to satisfy causation, a federal court must determine whether the injury is "fairly traceable to the challenged action of the defendant." *Id*., quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Causation is substantially more difficult to establish when the plaintiff is challenging the government's unlawful regulation of a third party. *Lujan,* 504 U.S. at 560-561. Even if an injury in fact is found, this court should reverse the District Court's ruling that CSP has constitutional standing because CSP fails to show that the minerals and suspended solids found in higher concentrations at the discharge point on Highpeak's property have a "fairly traceable" pollutant effect five miles south, where the only two members of CSP that own land along the Stream live. Thus, the lower court erred in holding that CSP had standing and this Court should reverse and dismiss for lack of standing.

A. CSP cannot meet its burden of demonstrating an injury in fact because it cannot demonstrate that any members experienced a genuine economic, recreational, or aesthetic harm and was formed primarily for the purpose of developing standing to sue.

1. The alleged harms specified by CSP with respect to the WTR and Highpeak's discharge, including members' diminished ability to enjoy the Stream's clear, pure water, are not concrete and particularized.

The strict limitations imposed by doctrine of constitutional standing reflect the federal courts' mission in devoting time and resources only to claimants with genuine, cognizable injuries. *Stoops v. Wells Fargo Bank,* 197 F.Supp.3d 782, 806 (W.D. Pa, 2016). Accordingly, the alleged harm must be "concrete," which means "real" and "not abstract." *Id.* at 796. An injury in fact must also be "particularized," or "[affecting the plaintiff] in a personal and individualized

way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). The Court recognizes such injuries when the defendant's "continuous and pervasive" conduct would cause residents to curtail their recreational use of the waterway and subjects them to "other economic and aesthetic harms." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 184 (2000).

In *Friends of the Earth,* the defendant waste management company regularly discharged unlawful amounts of mercury, an "extremely toxic" pollutant, into a nearby waterway. *Id.* at 176. Members of the plaintiff organization used the waterway for an extensive array of activities, including hiking, swimming, fishing, camping, picnicking, birdwatching and boating. *Id.* at 182. The Court held that members of the plaintiff organization suffered an injury in fact when they had to cease these activities due to their "concerns" about the water's toxicity, noting that they would resume these activities were it not for the pollution. *Id*. Justice Ginsburg explains that the conditional nature of the plaintiff's complaints does not preclude finding an injury in fact but must be reasonable rather than speculative. *Id.* at 184.

CSP did not suffer a concrete or particularized injury. Firstly, CSP members' use of the waterway was not sufficiently curtailed by Highpeak's conduct. In *Friends of the Earth,* prior to the defendant's operation of the sewage plant, members of the plaintiff organization had regularly participated in recreational activities from birdwatching to boating, all involving significant interactions with the water and its surroundings. *Friends of the Earth*, 528 U.S. at 182. In this case, however, CSP members' previous activities were limited to "walking along the stream" and "enjoying its crystal-clear color and purity." Record at 14, 16. In *Friends of the Earth*, affected members were forced to abandon well-established pleasures and plans due to a highly toxic pollutant being "continuously and pervasively" discharged into the waterway. *Friends of the Earth*, 528 U.S. at 182. In this case, Highpeak only utilizes the tunnel from spring

through late summer, with the express permission of the state. Record at 4. Furthermore, CSP members have observed that the water only "occasionally appears cloudy." *Id.* at 16. Members are recreating along the stream less frequently but have not stopped altogether. *Id.* at 15-16. Therefore, CSP fails to show a concrete, particularized harm.

2. The alleged aesthetic harms identified by CSP with respect to the WTR and Highpeak's discharge, including diminished ability to enjoy the Stream's clear and pure water, are not actual or imminent.

While the Court has found conditional statements of concern to be adequate to demonstrate a concrete and particularized harm, an injury in fact must still be actual or imminent. *Lujan,* 504 U.S. at 564. In *Lujan*, the plaintiffs stated that they merely "intended" to return to an area affected by the allegedly injurious development projects to observe endangered species. *Id.* Justice Scalia emphasizes that statements of "someday" intentions are "simply not enough" to show an actual, imminent harm. *Id.* These statements must be supported by a description of concrete plans. *Id.* Furthermore, the alleged harm must be "certainly impending." *Clapper,* 568 U.S. at 410 (holding in part that the plaintiff's speculative chain of possibilities, based on no actual knowledge of the defendant's practices, does not establish an injury that is certainly impending, even when plaintiffs took extensive measures to avoid the harm). It is not sufficient to allege harm based on mere conjecture of a possible future effect. *Id*.

The harms alleged by CSP are not actual or imminent. First, CSP members' characterization of their aesthetic harm–potential future enjoyment of the stream–is of the "someday" type that Justice Scalia specifically warned against. *Lujan,* 504 U.S. at 564. CSP's members continue to use the Stream, although less frequently than before. Record at 14, 15, 16. One member, who finds the discharge "upsetting" and is "very concerned" about contamination, asserts that were it not for the discharge, she would recreate even more frequently on the Stream. Record at 14-15. These concerns, while appearing to be the conditional type permitted by

Friends of the Earth, do not meet the standard of imminence set forth in *Lujan,* where the plaintiffs failed to articulate with specificity how and when they would be affected by the defendant's conduct. *Lujan*, 504 U.S. at 564. Apart from one member's assertion that he would allow his dogs to drink from the stream were it not for the pollution, the members do not allege plans to use the waterway beyond mere conjecture. Record at 16. Additionally, as in *Clapper,* where the plaintiffs undertook preventative measures out of concern for a speculative harm, CSP members' avoidance of water that is only "sometimes cloudy" does not signify a certainly impending harm. Therefore, the harms alleged are not actual or imminent.

3. CSP cannot show an injury in fact because it is an associational plaintiff formed solely, or at least primarily, for the purpose of manufacturing standing to sue in federal court.

Federal courts are not "open forums" for citizens to bring general complaints on how the government does its business. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024). To prevent an "enterprising plaintiff" from having their day in court through purposeful manipulation of constitutional standing, the Court imposes a higher level of scrutiny on organizations formed for the purpose of mounting a legal action, including challenging a regulation. *See Clapper*, 568 U.S. at 410-414 (holding in part that plaintiffs challenging a government surveillance regulation did not have standing because they manufactured harm by taking measures to avoid a speculative future harm). Plaintiff actions taken that may preclude standing include forming an organization to create an avenue for litigation. *See Stoops*, 197 F.Supp.3d at 796-800. In *Stoops,* a federal court held that a plaintiff who formed a business solely for the purpose of filing suits to receive statutory compensation under the Telephone Consumer Protection Act (TCPA), having purchased a large quantity of cell phones to receive prohibited calls, did not have standing. *Id.* In assessing an organization's motivations, courts should ensure that it "maintains a genuine and demonstrable commitment to [its] mission

independent of the lawsuit." *Nielsen v. Thornell,* 101 F.4th 1164, 1170 (9th Cir. 2024). This requires the Court to "vigorously examine" the breadth of the group's mission as well as their legitimate (or lack of legitimate) business practices. *Id.* If a plaintiff has manufactured standing, there is no injury in fact. *See Clapper*, 568 U.S. at 410-414.

CSP has the burden of establishing standing with the heightened standard of review set forth by the courts when assessing manufactured standing. From this, it is clear that CSP was formed in order to challenge the WTR and Highpeak's actions. First, although CSP's members do not allege the type of actions purposefully inflicted in anticipation of a future harm unlike the plaintiffs in *Clapper*, they nevertheless "took action" in going through the trouble of forming a nonprofit when the opportunity was ripe to re-establish timeliness. Record at 4. This is similar to the plaintiff in *Stoops*, who admitted to creating a business solely for the purpose of bringing lawsuits. *Stoops,* 197 F.Supp.3d at 796-800. While the members of CSP offer no such admission, a similar motive can be inferred through the questionable timing. In the thirty years Highpeak has operated the tunnel, their conduct has never been challenged. Record at 4. All but one of CSP's members have lived in Rexville for more than fifteen years. *Id.* The two members owning land along the stream have lived there since 2008, the same year the WTR was promulgated. Logically, the operation of the discharge tunnel in 2008 would have similar effects on the stream that it does today. Therefore, the members of CSP had fifteen years to challenge both the WTR and Highpeak's conduct. CSP was not formed until the Court took up cases which could potentially make it easier to challenge the WTR and reset the statute of limitations for doing so. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.,* 144 S. Ct. 2440 (2024). Just two weeks after forming, CSP sent notice of their intent to sue. Record at 4.

Second, CSP fails to point to any meaningful business practices independent of the suddenly speedy litigation. Neither member who submitted declarations, including the organization's secretary, described the means through which CSP achieves its goal of "protecting the stream." Record at 14. The only other tool available for assessing the organization's motives is the mission statement itself. CSP's mission statement makes a direct reference to illegal transfers, followed by an overly broad assertion that "the Stream must be preserved and maintained for all future generations." *Id.* With no references to other means of protecting the stream from illegal transfers, it can be inferred that the mission statement was designed with this specific litigation in mind; CSP was formed at least primarily for the purpose of challenging the WTR and Highpeak.

B. CSP cannot meet its burden of showing a causal link between an injury in fact and Highpeak's conduct and the WTR because the alleged harm is not fairly traceable to the conduct.

Even if this Court finds that CSP sufficiently alleged an injury in fact, it should determine that there is insufficient causation between the injury and the defendant's conduct. To demonstrate standing, the plaintiff must establish that their injury was caused or likely will be caused by the defendant's conduct. *All. for Hippocratic Med.,* 602 U.S. at 382. Additionally, a plaintiff claiming an environmental injury must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. *Lujan,* 504 U.S. at 566. Justice Scalia argues that this would otherwise open rights of action to persons who use portions of an ecosystem not affected by the unlawful action. *Id.*

There is no sufficient causal link between Crystal Stream's cloudy appearance and alleged contamination where it is enjoyed by CSP members and Highpeak's discharge. This case is similar to *Lujan*, where an unregulated plaintiff challenged the actions of a third party, making it difficult to show that their alleged injury is linked to the government's regulation of someone

else. *Lujan,* 504 U.S. at 560-561. CSP alleges that the concentration of metals and suspended solids is higher at Highpeak's discharge point than the rest of the Stream. Record at 5. However, CSP does not specifically allege harm within this area. *Id.* at 14-15. The two members owning land along the Stream live five miles south of the discharge point, which is only in the vicinity of the directly affected area. *Id.* at 4. CSP fails to specify whether this area, as well as the area near the park, where the harms are alleged, experiences the same level of mineral contamination. *Id.* Because of these intervening factors, CSP cannot demonstrate a causal link between its alleged injury and Highpeak's conduct.

II. The District Court Erred In Holding That CSP's Challenge to the WTR Was Timely Filed Because CSP's Members Knew or Should Have Known About Their Claim No Later Than 2008, and the Organization's Formation Does Not Reset the Statute of Limitations.

A plaintiff cannot challenge a federal regulation under the Administrative Procedure Act (APA) unless or until they suffer an injury caused by agency action. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2449 (2024). As soon as an injury occurs, the plaintiff's right of action accrues, and they must file suit within six years or else be time barred. *Id.* at 2450. Therefore, to determine whether a plaintiff filed a timely challenge, the court must identify when the alleged injury giving rise to the claim actually occurred. An appellate court reviews *de novo* the district court's application of the statute of limitations. *Desuze v. Ammon*, 990 F.3d 264, 268 (2nd Cir. 2021).

The issue here is whether the formation of CSP as a nonprofit organization on December 1, 2023, restarts the clock on the statute of limitations previously applied to its individual members. CSP argues in the affirmative, contending that as an organization, it could not have suffered an injury before it existed. Although *Corner Post* was decided recently, the previous circuit split over this issue provides similar cases with guidance in identifying how and when an

injury occurs with respect to the APA. *Corner Post*, 144 S. Ct. at 2454, 2458, 2459. First, the court should determine the date "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Izaak Walton League of Am. Inc. v. Kimbell,* 558 F.3d 751, 759 (8th Cir. 2009) (quoting *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988)). Next, the court should identify any intervening events that could toll or restart the statute of limitations. *See Herr v. United States Forest Serv.,* 803 F.3d. 809, 819-820 (6th Cir. 2015). This Court should find that CSP is time barred because its members, who have lived in Rexville for more than fifteen years and frequently use the Stream, should have known that they had a claim long before the eventual filing. Additionally, the formation of an organization in 2023 after the Agency's final actions in 2008 should not restart the statute of limitations.

A. CSP's members knew or should have known about their potential claim before the organization was formed because the discharge has been ongoing for thirty years, most members have lived in Rexville for fifteen years and frequent the Stream, and all identify as people interested in environmental issues

In *Corner Post*, Justice Barrett repeatedly emphasizes the plaintiff-centered nature of the decision. *Corner Post*, 144 S. Ct. at 2454, 2458, 2459. Therefore, it is appropriate to take a close look at a plaintiff's behavior and practices when assessing the extent of their alleged injury, which are important factors in determining when the facts are present for them to institute an action. *Izaak Walton,* 538 F.3d at 751. In *Izaak Walton*, the court held that the plaintiff environmental groups alleging that a United States agency violated the Boundary Waters Canoe Area Wilderness Act ("BWCAWA") were time barred because the plaintiffs waited twenty-six years to file an action after the claim accrued. *Id.* at 763. The accrual was marked by the time the plaintiffs were on "notice" of the defendant's actions, how they were affected, and what they could do as redress. *Id.* at 759. In other words, the right of action accrued because the plaintiffs knew, or with due diligence should have known that they had a claim. *Id.*

The members of CSP (apart from Jonathan Silver), with due diligence, knew or should have known about their potential challenge to the WTR in 2008 at the latest. Most members have lived in Rexville for more than fifteen years, and Highpeak had been operating the tunnel for fifteen years before that. Record at 4. Two members own land along the Stream. *Id.* Members allege that they "regularly walk along the stream." *Id.* at 14-16. Furthermore, they cared enough about the Stream to go through the trouble of forming a voluntary membership organization to address its challenges specifically relating to water transfers, the subject of the rule. *Id* at 4. It is unlikely that most members were unaware of the visually obvious contamination in such a heavily used area. Although two members admit that they only recently learned the alleged cause of the contamination, they should have known with due diligence how to address the conditions they were "very concerned" about. *Id.* at 9.

The importance of evaluating the extent to which a plaintiff should have been "on notice" is why the court must distinguish for-profit businesses from nonprofit environmental groups. Entities do not exist in a vacuum; they are composed of people whose grievances are the foundation of the entity's ability to sue. *See Lujan v. Def. of Wildlife,* 504 U.S. 555, 560 (1992). Business owners must engage in heavily regulated activities for a living, whereas environmental activists choose to inject themselves into the legal realm. It is much more likely such activists would be on notice of a complaint, even before officially joining an organization. The owners of Corner Post had no reason to educate themselves on endless regulations before being injured. The members of CSP, who joined specifically to "stop the discharge," had every reason to. Record at 15. There are no facts that point to any reason why the individuals who would later join CSP could not bring a suit when their right of action accrued.

B. CSP's formation does not automatically reset the statute of limitations because it is acting on behalf of its members who were not harmed after the WTR's publication

Although Justice Barrett does not formally address whether organizations formed after the promulgation of a rule are automatically precluded from injury, she suggests that "it … may be that some injuries can only be suffered by entities that existed at the time of the challenged action." *Corner Post*, 144 S. Ct. at 2459 n.8. On the other hand, it is well established that entities formed after the final agency action cannot automatically reset the statute of limitations. *Herr,* 803 F.3d at 820 (holding that a newcomer plaintiff can only mount a timely challenge when their injury accrued after the rule's promulgation). Corner Post was such a "rare plaintiff." Brief for National Federation of Independent Business Small Business Legal Center, Inc. et. al. as Amici Curiae Supporting Petitioners, *Corner Post Inc., v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024) (No. 22-1008) at 22. This rule excludes plaintiffs whose injuries accrue congruently with the agency's final action. *Herr,* 803 F.3d at 820.

CSP cannot automatically reset the statute of limitations on the basis of their recent formation. Both Corner Post and CSP were formed after the final agency action. *Corner Post,* 144 S. Ct. at 2448; Record at 8. However, Corner Post's injuries were subsequent to the promulgation of the rule (and in fact the business's formation). *Corner Post,* 144 S. Ct. at 2448. Logically, CSP's members could not have been injured by a rule that did not exist, so the earliest their claim could have accrued is when the rule was published in 2008. Record at 8. Highpeak had already been discharging the tunnel at this point, and at least one member of CSP lived along the Stream. Record at 4. There are no gaps between the alleged contamination, the rule being promulgated, and the accrual of CSP's injuries. Therefore, CSP's injuries occurred contemporaneously with the agency's final action, exempting the organization from bringing a claim as a newcomer.

III. The District Court Did Not Err In Holding That The WTR Was Validly Promulgated Pursuant To The Clean Water Act.

The Court in *Loper Bright* declared that that decision would not overturn long-standing precedents. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). A prior determination presumptively stands under stare decisis absent some special justification for departure from precedent. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Reliance on an overturned judicial standard does not independently constitute special justification. *Loper Bright* at 2273.

In overturning the *Chevron* standard established in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), the Court in *Loper Bright* ushered in a new era for the scope of judicial review of agency actions. *Id.* Whether an agency's action is proper pursuant to its enabling statute must rely on the single best reading of the statute. *Id.* at 2263. If the statute is unambiguous, the unambiguous reading must govern; however, if a statute is ambiguous, the single best reading should be determined independently by the court, unless a prior determination stands under stare decisis. *Id.* In making their independent determination, the court should "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity". *Loper Bright*, 144 S. Ct. at 2266. These tools include traditional canons of construction, such as the principle of *expressio unius est exclusio alterius*, which when applied to a list of terms, indicates statutory inclusion of certain terms excludes unlisted terms. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

The best reading of the statute is that which captures congressional intent and has traditionally been guided by various evidence such as the ordinary meaning and statutory context. *Loper Bright*, 144 S. Ct. at 2266. When a particular term is at issue and is neither defined in the statute nor as a term of art, the ordinary meaning applies. *S. D. Warren Co. v. Me.*

Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006). The ordinary meaning is drawn from the dictionary and construed in light of the court and agency's prior understanding of the term. *S. D. Warren Co.*, 547 U.S. at 376. Statutory context may be used to consider whether the statute intended a narrowing of understanding beyond an ordinary meaning by examining how the term is used elsewhere in the statute. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 332 (2014).

The WTR has been declared valid multiple times, and there is no special justification for overturning those decisions. Furthermore, even under a *de novo* review of the rule, the agency's action is permitted under its enabling statute.

A. The WTR was already declared valid and need not be revisited.

The WTR was validly promulgated under stare decisis, and that precedent is still valid in light of *Loper Bright*. *Loper Bright* overturned the *Chevron* standard of judicial review, but explicitly disavows re-litigation of cases decided under *Chevron*. *Loper Bright*, 144 S. Ct. at 2273. Traditionally, "the Court has always required a departure from precedent to be supported by some special justification". *Dickerson*, 530 U.S. at 443. The *Loper* Court maintains "[m]ere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding". *Loper Bright*, 144 S. Ct. at 2273. Here, there is no such special justification that requires overturning the WTR.

Explicit protection of prior *Chevron* decisions aside, special justification for disregarding precedent only exists where the previous decision is "manifestly absurd or unjust". *Ramos v. Louisiana*, 590 U.S. 83, 123 (2020) (quoting 1 Blackstone, Commentaries on the Laws of England, at 70). A previous decision is only manifestly absurd or unjust when "the prior decision not just wrong, but grievously or egregiously wrong," "the prior decision caused significant negative jurisprudential or real-world consequences," and significant reliance interests are

unduly upset. *See Ramos*, 590 U.S. at 122, (challenging a practice of allowing criminal convictions without a unanimous jury verdict; finding this precedent was egregious enough to merit overturning precedent).

The validity of the WTR has been settled. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III*), the Court relies on *Chevron* deference in holding the Clean Water Act does not explicitly address whether NPDES permits are required for water transfers, and that the Agency had offered a reasonable interpretation of the Act. *Catskill III*, 846 F.3d 492, 533 (2017). Since the Court itself upheld the WTR in 2017, the *Loper Bright* assumption of protection of the prior decision indicates continued validity of the WTR. Valid promulgation of the WTR is further supported by other *Chevron*-era decisions. *See e.g., Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (2009) (upholding the WTR's validity under the Act when challenged based on the transfer of existing contaminated water *between* bodies of water) (emphasis added); *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (upholding the WTR when challenged based on the discharge of pollutants from a canal). Although the WTR has been invalidated in *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 940 (2009), that dispute arose from the transfer of water contaminated with pesticides residuals and revolved around the term "addition"; that errant attack on the rule itself was unnecessary since the contaminants at issue fell outside the scope of the rule.

CSP fails to show how the Court's previous approval of the WTR is manifestly absurd or unjust. CSP relies primarily on ignoring *stare decisis* and provides no special justification for overturning *Catskill III* and multiple other decisions upholding the WTR. CSP provides no evidence that the validity of the WTR is egregiously wrong, that it has negative judicial or real-world consequences, or that significant reliance interests are unduly upset.

B. The Clean Water Act gives the agency the authority to exempt water transfers from NPDES permitting requirements because water is not a pollutant, and its exemption is covered under the Administrator's permitting authority.

The exemption for water transfers is a condition for NPDES permitting. Section 1342(a)(2) of the Clean Water Act states the Administrator "shall prescribe *conditions* for such permits" 33 U.S.C. § 1342(a)(2) (emphasis added). Since "conditions" is not defined elsewhere in the statute, no narrowing of definition applies and the ordinary meaning is instructive. The Oxford dictionary says conditions mean "a state of affairs that must exist or be brought about before something else is possible or permitted." Conditions, *The Oxford English Dictionary* (3d ed. 2010). The Agency can prescribe the state of affairs that must exist in order for an applicant to receive a permit, but also that state of affairs which necessitates one in the first place. Prescribing that a permit is not required under certain conditions falls under the Agency's NPDES permitting authority.

CSP argues the EPA may not regulate away a whole category of "pollutants." Record at 9. The ordinary meaning of "pollutant" is "a substance that pollutes something, especially water or the atmosphere." Pollutant, *The Oxford English Dictionary* (3d ed. 2010). However, the Clean Water Act provides a specialized definition to "mean[] dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 USCS § 1362(6). Not only is water not included in that list, the use of the word "mean" instead of "include" suggests that list is exhaustive. Under the canon of *expressio unius est exclusio alterius*, water is excluded from pollutants covered under the CWA. Water is simply not a material Congress intended to subject to NPDES permitting.

IV. The District Court Correctly Held That Pollutants Introduced In The Course Of The Water Transfer Took The Discharge Out Of The Scope Of The WTR

Highpeak must obtain a permit for its discharges into Crystal Stream. The WTR 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) (2023) (emphasis added). *Id.* If a water transfer activity does "introduce pollutants to water passing through the structure into the receiving water," then the facility must obtain an NPDES permit for those pollutants. 73 Fed Reg. 33,697 33,705 (June 13, 2008).

At issue in this case is the definition of "introduce" under the WTR. Because the water discharged from Highpeak's tunnel into Crystal Stream contains elevated levels of iron, manganese, and TSS, its water transfer, by definition, "introduces" pollutants. Record at 5. Nevertheless, Highpeak claims that requiring it to obtain an NPDES permit would "eviscerate the entire [WTR]," arguing that a permit is only needed if human activity introduces the pollutants. *Id.* at 11. Requiring Highpeak to obtain a permit would not eviscerate the WTR.

A. Agency interpretations of their own regulations are entitled to *Auer-Kisor* Deference.

Deference to agency interpretations of regulations is a foundational cornerstone of administrative law dating back to before the Administrative Procedure Act ("APA"). *Kisor*, 588 U.S. at 582-83. Where an agency's interpretation of its own regulation is called into question, "a long line of precedents" have affirmed that the agency's interpretation is entitled to deference. *Id.* at 587.

The Court articulated this principle in *Bowles v. Seminole Rock & Sand Co.*, a year before the APA was even enacted. 325 U.S. 410, 414 (1945). In *Seminole Rock*, the Court upheld an agency's own interpretation, because that interpretation deserved "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414.

Like in *Seminole Rock*, before the APA, courts used "flexible, common law methods to review administrative action." *Kisor*, 588 U.S. at 583. When enacted, the courts understood the APA as "restat[ing] the present law as to the scope of judicial review." *Kisor*, 588 U.S. at 582-83. The Court interpreted the APA not to have "significantly alter[ed] the common law of judicial review of agency action." *Id.* at 582. Thus, judicial review of an agency interpretation of its own regulation under APA § 706 draws upon the highly deferential standard elicited in *Seminole Rock*.

Thousands of cases since *Seminole Rock* have applied its highly deferential standard, and the Court largely reaffirmed the standard in *Auer v. Robbins*–the seminal case that gave rise to the modern title of "*Auer* deference." 519 U.S. 452 (1997). The Department of Labor's interpretation of its own regulation "easily" met the deferential standard of "plainly erroneous or inconsistent with the regulation." *Id.* at 461. The Court was unconvinced that giving deference to the agency's interpretation was a mere "*post hoc* rationalizatio[n]" of past action or represented anything other than the agency's "fair and considered judgment on the matter in question." *Id.* at 462. The agency interpretation in question clearly fit within the phrase's plain meaning, so the Court swiftly concluded that the agency interpretation controlled. *Id.* at 461.

In the years since *Auer*, the Court followed and applied its deferential standard to agency interpretations of their own regulations many times. *See, e.g., Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 387-88 (2003); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 275-75 (2009); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208-210 (2011).

B. Despite concerns from some members of the Court, the deferential standard provided to agency interpretations of their own regulations was affirmed in *Kisor*.

Led by Justice Scalia, members of the Court began to doubt the validity of *Auer* deference. *See, e.g., Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring); *Decker*, 568 U.S. at 617-19. After questioning the practice in *Talk America*, Justice Scalia argued in a dissent in *Decker* that *Auer* should be reconsidered on the basis that granting agencies power to resolve ambiguities in their own regulations may violate separation of powers. *Id.* at 617-19 (Scalia, J., dissenting). Chief Justice Roberts concurred separately in *Decker*, noting that Justice Scalia's dissent "raises serious questions about" *Seminole Rock* and *Auer*, but declined to join the dissent. *Id.* at 615 (Roberts, C.J., concurring). Two years later, Justice Scalia in a concurrence argued that the Court should "abandon" *Auer* entirely. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 112 (2015) (Scalia, J., concurring). Justice Thomas, also concurring in *Perez*, brought up similar separation of powers concerns about whether Congress may grant agencies the power to issue judicially binding interpretations of regulations. *Id.* at 132 (Thomas, J., concurring).

Against this backdrop of conservative judges' skepticism towards *Auer*, the Court granted certiorari in *Kisor* to consider overruling *Auer* and *Seminole Rock*. *Kisor*, 588 U.S. at 563. Instead, the Court once again affirmed the principle of *Auer* deference, refining the analysis. In *Kisor*, Justice Kagan turned to the Court's 75+ years of deference since *Seminole Rock* to justify preserving *Auer*. *Id.* at 587. She pointed out that Congress could have legislated at any time to curb the practice and require *de novo* review of regulatory interpretations, but it has continued to allow *Auer* deference even after some Members of the Court began questioning it. *Id.* at 587-88. "Given that history," Justice Kagan wrote, "we would need a particularly 'special justification' to now reverse *Auer*." *Id.* at 588.

Synthesizing the Court's history of applying *Seminole Rock* and *Auer*, Justice Kagan set forth a five-step inquiry in *Kisor* for determining whether to defer to an agency's interpretation of its own regulation that remains controlling today.

(1) The court must conclude that the regulation is "genuinely ambiguous." *Kisor*, 588 U.S. at 573.

(2) Where genuine ambiguity exists, the agency's interpretation must be reasonable, "within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id* at 575-76.

(3) The agency interpretation must be the agency's "authoritative" or "official position," not an ad hoc statement that does not reflect the agency's views. *Id.* at 577.

(4) The agency interpretation "must in some way implicate" the agency's substantive expertise. *Id.*

(5) The agency interpretation "must reflect 'fair and considered judgment.'" *Id.* at 579.

Highpeak argues that the *Kisor* test has been supplanted by the Court's decision in *Loper Bright*. Record at 11. This contention disregards the clear distinction between interpreting a statute drafted by Congress and a regulation drafted by an agency. In *Kisor*, Justice Kagan discussed the Court's presumption that Congress intended *Auer* deference because "resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.'" *Id.* at 570-71. Justice Kagan highlighted several reasons why agencies are better suited than courts to make policy judgments regarding regulations in their subject areas. *Id.* at 571-72. Agencies have "unique," specialized expertise in their fields, can conduct factual investigations, and have greater political accountability than courts. *Id.* at 571-72. These features are why Congress delegates rulemaking authority to agencies to fill in statutory gaps; they are

why the Court believes that Congress intends for those agencies to respond to new issues. *Kisor*, 588 U.S. at 572. Although *Loper Bright* ended the practice of deference to agency interpretations of statutes, agencies remain uniquely positioned as the best authority for interpreting their own regulations.

As Justice Gorsuch wrote in his *Kisor* concurrence, "[i]t should have been easy for the Court to say goodbye to *Auer*" after several Justices expressed their doubts, but the Court still declined to do so. *Id.* at 592 (Gorsuch, J., concurring). The Court then had every opportunity to address regulatory interpretations in *Loper Bright* but also declined to do so there. Instead, the *Loper Bright* majority cited *Kisor* four times, indicating the case law remains unabridged. *Auer* and *Kisor* remain good law that must again be applied today by this Circuit.

C. The definition of "introduce" is unambiguous, or, alternatively, the Agency is entitled to deference under the *Auer-Kisor* standard.

The WTR's plain text, history, and purpose each unambiguously indicate that "introduce" in the meaning of the rule applies to any water transfer activity that causes an "addition" of pollutants. This Court should apply the WTR as written and require Highpeak to obtain an NPDES permit.

However, should this Court find the definition of "introduce" to be genuinely ambiguous, the Agency's interpretation is entitled to deference. Because the Court has notably failed to articulate a new standard, despite multiple opportunities, *Auer-Kisor* remains the standard to be applied today. Without clear indication from the Court that *Auer* deference no longer applies, *Kisor*'s framework remains good law and controls here. Satisfying the *Kisor* framework, the Agency's interpretation of its own WTR continues to be entitled to deference and should therefore be upheld.

1. The definition of "introduce" under the WTR is unambiguous.

The regulation must be "genuinely ambiguous" after a court has applied "all the standard tools of interpretation." *Kisor*, 588 U.S. at 575. The reviewing court must "carefully consider" the regulation's text, structure, history, and purpose. *Id.* If the regulation is not ambiguous, then the court must apply the regulation as written. *Id.*

Nothing in the regulation's text suggests that the Agency intended the exclusion to apply only to human-introduced pollutants, as Highpeak's argument advances. Record at 11. The regulation simply states that the WTR's exclusion from permitting requirements "does not apply to pollutants introduced by the water transfer activity itself …" 40 C.F.R. § 122.3(i).

The history and purpose of the WTR also indicate a clear, plain meaning. The Agency introduced the WTR as a 2009 amendment to its NPDES regulations to clarify that an NPDES permit is not required to simply transfer water from one distinct water body. Whether a permit is needed in such a situation was first raised in *Catskill Mountains Chapter of Trout Unlimited v. City of New York (Catskill I)*, where the Second Circuit Court of Appeals held that a transfer of polluted water from one water body to another does constitute a discharge requiring a permit. (273 F.3d 481 (2d Cir. 2001). The Court took up the issue two years later. *Miccosuke Tribe of Indians*, 541 U.S. at 95. In *Miccosuke*, the Court held that a CWA permit is not required for a water transfer between two water bodies that are not "meaningfully distinct." *Id.* at 109-112. Shortly after *Miccosuke*, the Agency issued an interpretive memorandum in 2005 to address the issue of whether NPDES permits are required for water transfer, concluding that Congress intended water transfers *not* to fall within the purview of the NPDES permitting program. 73 Fed. Reg. 33,697, 33,699 (June 13, 2008). The Agency's 2006 proposed WTR and the final WTR promulgated in 2008 align with that interpretation. *Id.*

However, the Agency never intended to exclude pollutants, themselves, from permitting requirements simply by being associated with a water transfer. In promulgating its final rule, the Agency wrote: "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. 73 Fed Reg. 33,697 33,705 (June 13, 2008). However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." *Id.* The required permit would only apply to pollutants added during the transfer, not pollutants present in the donor waterbody. *Id.* The Agency addressed that any pollutants "incidental to water transfers" do not constitute an addition of a pollutant, but these "incidental" changes are better described as changes to the water *quality*–such as the water's temperature, pH, BOD, and dissolved oxygen. *Id.*

At no point has the Agency stated that pollutants may only be "introduced" by human activity. In fact, the Agency specifically wrote that the rule's purview is *not* limited to human-directed or controlled events. The Agency responded to public comments to clarify that a water transfer "activity" means "any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances constructed to transport water from one water of the U.S. to another water of the U.S." 73 Fed Reg. 33,697 33,704 (June 13, 2008).

The WTR's text, structure, history, and purpose unambiguously indicate that the rule was intended to resolve the issue of whether a water transfer requires a permit, without indemnifying any transfers that "introduce" pollutants into the water. Because the meaning of "introduce" in the regulation is unambiguous, the court should apply the WTR as written and require Highpeak to obtain a permit.

If the court does find the meaning of "introduce" in the regulation to be genuinely ambiguous, the Agency's interpretation is entitled to *Auer-Kisor* deference.

2. The Agency's interpretation of "introduce" to include any addition of pollutants is reasonable and falls within the zone of ambiguity.

Where genuine ambiguity exists, the agency interpretation must be "reasonable," falling within the "zone of ambiguity" identified by the court to receive deference. *Kisor*, 588 U.S. at 576.

Certainly, if genuine ambiguity exists, the Agency's interpretation that "introduce" applies to any addition of pollutants, not only pollutants added to the water by human intervention, is reasonable and within the relevant zone of ambiguity. Nothing in the WTR itself or any comments accompanying the final rule explicitly limited "introduce" to human activity. 40 C.F.R. 122.3(i) (2023); 73 Fed Reg. 33,697 (June 13, 2008). The Agency relied on precedent from *Miccosuke* and earlier cases involving dams in drafting the WTR. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Fed'n v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988). As the D.C. Circuit held in *Gorsuch*, an "addition" of pollutants is reasonably limited to situations in which ''the point source itself physically introduces a pollutant into a water from the outside world.'' *Gorsuch*, 693 F.2d at 175. Further, *Miccosuke* established that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Miccosuke*, 541 U.S. at 104.

In promulgating the final WTR, the Agency wrote that the new rule would not change its longstanding position that hydroelectric dams are exempted from permitting requirements, "unless [...] the hydroelectric facility itself introduces a pollutant such as grease into the water passing through the dam." 73 Fed Reg. 33,697 33,704 (June 13, 2008). No human intervention would be necessary to trigger NPDES permitting requirements for pollutants introduced by the

hydroelectric dam. This parallels with the case at hand, where Highpeak's tunnel introduces pollutants to the water being transferred, thus triggering NPDES permitting requirements for Highpeak.

3. The Agency's interpretation of the WTR satisfies the final three factors from *Kisor*.

If the agency interpretation is reasonable, then courts consider whether its "character and context entitle it to controlling weight," as determined by the following three factors. *Kisor*, 588 U.S. at 575-79.

First, the agency interpretation must be the agency's "authoritative" or "official position," not an ad hoc statement that does not reflect the agency's views. *Id.* at 577. This element serves to exclude informal communications and documents such as regulatory guides that the agency does not consider authoritative. *Id.* In arguing that Highpeak is subject to NPDES permitting requirements for pollutants introduced by its water transfer, the Agency relies upon the regulatory text of 40 C.F.R. § 122.3(i) and comments accompanying that final promulgated rule.

Second, the agency interpretation "must in some way implicate" the agency's substantive expertise. *Kisor*, 588 U.S. at 577. Agencies' specialized expertise "largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.'" *Id.* at 577-78 (citing *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. 144, 153 (1991)). The interpretation at hand implicates the Agency's unique substantive expertise in environmental law. In 33 U.S.C. § 1251(d), Congress delegated authority to the Agency to administer the CWA, and the WTR was promulgated subject to that authority. 40 C.F.R. § 122.3(i).

Third, the agency interpretation "must reflect 'fair and considered judgment.'" *Kisor*, 588 U.S. at 579 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Courts may not defer to a mere "convenient litigating position" or "*post hoc* rationalizatio[n] advanced"

to "defend past agency action against attack." *Id.* Courts also may not defer to a new interpretation that creates "unfair surprise" to regulated parties. *Kisor*, 588 U.S. at 579 (citing *Long Island Care at Home, Ltd v. Coke*, 551 U.S. 158, 170 (2007). The Agency's interpretation of "introduce" in the context of the WTR has remained consistent since its original promulgation. 40 C.F.R. § 122.3 has been amended only once since the WTR amendment in 2008, and that amendment did not impact the WTR. *See* 78 Fed. Reg. 38594 (June 27, 2013).

This Court should uphold the District Court on this issue. The definition of "introduce" is unambiguous. Should this Court find it ambiguous, the Agency's interpretation of "introduce" is entitled to the highly deferential *Auer-Kisor* standard. Water discharged from Highpeak's tunnel contained higher concentrations of iron, manganese, and TSS than in Cloudy Lake, meaning that Highpeak's tunnel introduced these pollutants during the transfer activity. Thus, Highpeak is not excluded from NPDES permitting requirements by the WTR.

CONCLUSION

For the foregoing reasons, this Court should grant the Agency's motion to dismiss for lack of standing and CSP's untimely challenge. Alternatively, the Court should grant the Agency's motion for failure to state a claim as to the invalidity of the WTR under the Act. Finally, this Court should affirm the denial of Highpeak's motion to dismiss CSP's citizen suit.