Non Measuring Brief
Team 41

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,
Defendants-Appellees-Cross-Appellants,

-and-

HIGHPEAK TUBES, INC.,
Defendants-Appellees-Cross-Appellants.

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

Brief of Appellee, CRYSTAL STREAM PRESERVATIONISTS, INC.

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EPA, *About the Safe and Sustainable Water Resources Research Program* (Apr. 16, 2024), https://www.epa.gov/aboutepa/about-safe-and-sustainable-water-resources-research-program 33

EPA, *Our Mission and What We Do* (May 1, 2024), https://www.epa.gov/aboutepa/our-mission-and-what-we-do 33

National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule 73 Fed. Reg. 33697 (June 13, 2008) .... passim

Hudson River Watershed Alliance, *2023 Annual Report* (2023), https://hudsonwatershed.org/wp-content/uploads/HRWA-2023-annual-report.pdf 14

Stephanie Rich, *Troubled Water: An Examination of the NPDES Permit Shield*, 33 Pace Env't L. Rev. 250 (2016) 20

USA State Filing Services, *Apply Online For Your LLC*, https://usa-llc-filing.com/ 19

STATEMENT OF JURISDICTION

In case No. 24-001109, the United States District Court for the District of New Union granted Highpeak Tubes, Inc.'s ("Highpeak") and the United States Environmental Protection Agency's ("EPA") motions to dismiss Crystal Stream Preservationists, Inc.'s ("CSP") challenge to the Water Transfers Rule. This court also denied Highpeak's motion to dismiss CSP's Clean Water Act citizen suit cause of action. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (right of review of agency action), 28 U.S.C. § 1331 (federal question), and 33 U.S.C. § 1365 (citizen suits). The United States Court of Appeals for the Twelfth Circuit has jurisdiction in accordance with 28 U.S.C. § 1291, which provides federal appellate courts with jurisdiction over final judgments from the U.S. District Courts. Decisions on motions to dismiss are appealable because they are a final disposition of a claimed right. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). CSP, Highpeak, and EPA appealed on August 1, 2024, pursuant to Fed. R. App. P. 4.

STATEMENT OF ISSUES PRESENTED

1. Did the district court err in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule, *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)?
2. Did the District Court err in holding that CSP timely filed the challenge to the Water Transfers Rule, *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024)?
3. Did the District court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act, *Catskill Mountains Chapter. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001)?

4. Did the District Court err in holding that pollutants introduced during 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, *Kisor v. Wilkie*, 588 U.S. 558 (2019)?

STATEMENT OF THE CASE

I. Formation of Crystal Stream Preservationists

Crystal Stream Preservationists, Inc. ("CSP") is an environmental not-for-profit group based in the Town of Rexville, New Union. CSP is dedicated to saving and preserving a distinctive waterbody known as Crystal Stream. As its name suggests, Crystal Stream flows with exceptionally crystal-clear waters. Along the shore of Crystal Stream, a park with a two-mile walking trail offers CSP members and other members of the public convenient access to Crystal Stream's pristine waters. CSP members frequent this walking trail, named Crystal Stream Park ("the Park"), to enjoy Crystal Stream's environmental, aesthetic, and recreational values.

CSP legally formed on December 1, 2023, with the express purpose of protecting Crystal Stream. CSP utilizes a membership model, and invites individuals interested in the "preservation of Crystal Stream in its natural state for environmental and aesthetic reasons" to join as members. At the time of its complaint, CSP had thirteen members. All CSP members are residents of Rexville. This includes Cynthia Jones and Jonathan Silver, who both own property near Crystal Stream.

II. Highpeak's Contamination of Crystal Stream

Highpeak Tubes ("Highpeak") is a recreational tubing business based in Rexville, New Union, which operates from a parcel of land positioned between Crystal Stream and Cloudy Lake, near Crystal Stream Park. As part of its business, Highpeak launches patrons in rented innertubes into Crystal Stream. In 1992, Highpeak sought to enhance its business by constructing

a tunnel connecting Crystal Stream to Cloudy Lake. This poorly constructed and maintained tunnel, which is partly iron pipe installed by Highpeak and partly carved through rock, lets Highpeak employees use a valve to control the flow of water from Cloudy Lake to Crystal stream. The State of New Union gave Highpeak permission to construct the tunnel.

Unfortunately, Highpeak's tunnel causes the discharge of multiple contaminants from Cloudy Lake into Crystal Stream. Due to natural conditions, Cloudy Lake contains higher levels of minerals, like iron and manganese, as well as a higher concentration of total suspended solids ("TSS") than Crystal Stream. Thus, when Highpeak opens the tunnel valve, Highpeak introduces contaminated Cloudy Lake waters directly into Crystal Stream's pristine waters. Additionally, a portion of the contamination originates from the tunnel itself. Both sources of contamination cause Crystal Stream to not only be more toxic but also causes the otherwise crystal-clear waters to become cloudy.

Highpeak has never had and has never sought a National Pollution Discharge Elimination permit ("NPDES permit"), which is generally required for discharges of pollutants into waters of the United States such as Crystal Stream.

III. The Clean Water Act and Water Transfers Rule

Both Cloudy Lake and Crystal Stream are waters of the United States and thus fall under the protections of the Clean Water Act ("CWA"). Established in 1972, the CWA provides a longstanding and extensive framework for regulating the discharge of pollutants into federal waters. 33 U.S.C. §§ 1251–1389. The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To accomplish its purpose, the CWA established NPDES permitting program and generally forbids the discharge of pollutants into waters of the United States without a NPDES permit. 33 U.S. Code § 1342; 33 U.S.C. § 1311. Specifically, the CWA states that ". . . the discharge of *any* pollutant by *any*

person shall be unlawful." 33 U.S.C. § 1342 (emphasis added). The responsibility to enforce the permitting requirements for federal waters in the State of New Union falls on the Environmental Protection Agency ("EPA"), as the State of New Union does not have a delegated CWA permitting program.

Despite the CWA's express purpose and plain language, EPA has regulated away an entire category of discharges: water transfers. In 2008, the EPA codified the Water Transfers Rule ("WTR") as an exception to CWA's rules. 40 C.F.R. § 122.3(i). Under WTR, discharges from water transfers are excluded from NPDES permitting requirements. *Id.* Water transfers refer to "an activity that conveys or connects water of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id.* However, the WTR permitting exclusion does not extend to "pollutants introduced by the water *transfer activity itself* to the water being transferred." *Id.* (emphasis added). The Administrative Procedure Act ("APA") allows a plaintiff to challenge regulations like WTR. 28 U.S.C. § 2401(a).

Unsurprisingly, CWA's applicability to water transfers has been challenged multiple times–both before and after EPA officially promulgated WTR as a regulation in 2008. Courts varied in their holding depending on the method of judicial review. Before EPA established WTR as a regulation, courts applied a *Skidmore* analysis. *See Christensen v. Harris County*, 529 U.S. 576 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, courts rejected EPA's interpretation and found water transfers were not exempt from NPDES permitting requirements. *See, e.g.*, *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill Mountains I*").

After EPA promulgated WTR, the rule faced challenges in the Second and Eleventh Circuits. Both circuits upheld WTR as valid. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't. Protection Agency*, 846 F.3d 492, 524–33 (2d Cir. 2017) ("*Catskill III*"); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (11th Cir. 2009) ("*Friends I*"). However, both circuits relied on the principle of *Chevron* deference, which *Loper Bright* recently overturned. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) ("*Loper Bright*"). Post-*Loper Bright*, courts now rely again on the *Skidmore* analysis. *Id.*

IV. CSP's Complaint Against Highpeak and EPA

On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak. CSP also sent the NOIS to EPA and to the New Union Department of Environmental Quality, as required. 33 U.S.C. § 1365(b)(1)(A); *see also* 40 C.F.R. § 135.3 (2023).

The NOIS stated that (1) Highpeak's tunnel is a point source under the CWA, (2) the tunnel regularly discharged and continues to discharge contaminants into Crystal Stream without a WPDES permit, (3) EPA invalidly promulgated WTR, and (4) even if WTR is valid, Highpeak's discharge is not covered by WTR exemption. To support its claim, CSP included the following data showing a 2–3% increase of contaminants after the water had passed through Highpeak's tunnel:

Sample Location	Iron	Manganese	TSS
Cloudy Lake at Intake	.80 mg/L	.090 mg/L	50 mg/L
Outfall into Crystal Stream	.82 mg/L	.093 mg/L	52 mg/L

On December 27, 2023, Highpeak sent CSP a reply letter claiming the tunnel did not require a NPDES permit and did not need to respond on the merits of CSP's NOIS.

On February 15, 2024, CSP filed its Complaint. The Complaint included the citizen suit against Highpeak, as well as a claim under the APA against EPA. CSP's Complaint reiterated all the assertions from its NOIS regarding the Highpeak tunnel. CSP again challenged the WTR as invalid and argued that even if WTR is valid, then the tunnel needed a NPDES permit due to the contaminants introduced by the tunnel itself.

In its Complaint, CSP included two affidavits. The first is from Cynthia Jones, a member and Secretary of CSP, who lives 400 yards from the Park. Ms. Jones frequently utilizes the walking trails in the Park to enjoy Crystal Stream's pristine water, and learning about the pollutants from Highpeak's discharge in 2020 has significantly impacted her enjoyment of Crystal Stream. TSS and metals discharged into Crystal Stream upsets Ms. Jones because they make the otherwise clear water cloudy, and she is concerned about the contamination from TSS and metals. Additionally, if not for Highpeak's discharge, Ms. Jones would recreate more frequently in Crystal Stream's water. She is "afraid to walk in the Stream due to the pollution."

The second affidavit, from CSP member Jonathan Silver, expressed similar concerns to Ms. Jones. Since moving to Rexville in 2019–only four years before the time of CSP's complaint–Mr. Silver has regularly walked with his children and dogs in the Park alongside Crystal Stream. Mr. Silver joined CSP to try to stop Highpeak's discharge, as he is "deeply concerned" about pollution entering Crystal Stream and causing the water to be contaminated and cloudy. He is particularly worried about allowing his dogs to drink from the contaminated water. Like Ms. Jones, Mr. Silver would recreate more frequently in Crystal Stream's water if not for Highpeak's contaminated discharge. He would also allow his dogs to drink from Crystal Stream if it were not polluted by Highpeak.

V. Current Proceedings

In response to the Complaint, Highpeak moved to dismiss both the citizen suit and the challenge to WTR. Highpeak also argued that WTR is valid, and that Highpeak's discharge of contaminants into Crystal Stream does not require a NPDES permit. EPA joined Highpeak's motion to dismiss the challenge to WTR and likewise argued WTR was validly promulgated under CWA. However, EPA agreed with CSP that Highpeak's discharge of contaminants into Crystal Stream requires a NPDES permit.

On August 1, 2024, the district court granted Highpeak and EPA's motions to dismiss CPS's challenge to WTR but denied the motion to dismiss the citizen suit. Specifically, the court held that (1) CSP has standing to bring a citizen suit against Highpeak for its alleged violation of CWA, (2) CSP filed a timely challenge to WTR, (3) EPA validly promulgated WTR, and (4) CSP's citizen suit can proceed because Highpeak's tunnel is a point source that requires a permit under CWA.

On the first issue, the district court properly recognized that CSP members had suffered legitimate environmental harm sufficient for standing. On the issue of timing, the district court correctly found no meaningful distinction between the facts of *Corner Post* and the facts of the instant case. Even if it did, the court reasoned that CSP member Mr. Silver could not have been injured until he moved to Rexville in 2019. Accordingly, CSP could not have filed its Complaint until at least four years ago–well within the APA's limitations.

The district court then turned to the two WTR matters. To reach its conclusion that EPA validly promulgated WTR, the district court erroneously construed *Loper Bright* as still requiring the court to hold WTR valid under the *Chevron* framework. It noted the Supreme Court's apparent intent for *Loper Bright* to not overturn settled regulations, ignoring that WTR is an arbitrary and capricious promulgation that conflicts with the congressional intent of CWA.

Finally, the district court correctly deferred to EPA's judgement, and ruled that Highpeak's tunnel itself is a point source and thus requires a NPDES permit under CWA for its contaminating discharge into Crystal Stream. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court properly held that CSP is a valid not-for-profit entity with standing to challenge Highpeak's discharge and EPA's promulgation of WTR. The court also properly held that CSP timely filed its challenge to WTR within the APA's 6-year limit. However, the district court erred in holding that EPA validly promulgated WTR pursuant to CWA. Despite this error, the district court correctly decided that Highpeak's discharges into Crystal Stream are subject to permitting under CWA because the tunnel itself introduces pollutants.

The district court correctly held CSP has standing. CSP is a legitimate nonprofit organization which suffered a cognizable environmental injury caused by Highpeak's actions, which a court can redress. The standing doctrine, established by Section II of Article II of the United States Constitution, involves three necessary elements: (1) the plaintiff suffered a concrete and particularized injury that is actual and immanent, (2) there is a causal link between the challenged conduct and the injury, and (3) the injury must be likely to be redressed by a favorable decision by the court. *See Friends of the Earth, Inc.*, 528 U.S. 167. CSP meets each element. Highpeak's discharge substantially impacts CSP members' ability to enjoy and use Crystal Stream, and requiring greater regulation of the discharge under CWA will mitigate the contamination harming CSP members.

Further, CSP is a good-faith actor that formed properly under the laws of New Union. R. 7. The latter point is undisputed. *Id.* Likewise, the fact that Highpeak's operations are increasing the cloudiness, TSS, and metals in Crystal Stream water is also undisputed. R. 11. Community

members forming an environmental organization to address such pollution in a unique waterbody like Crystal Stream is not unusual, and the degree of suspicion required to overcome standing is high. In light of the environmental injury already described and the lack of any evidence of bad faith on the part of CSP, the circumstantial evidence articulated by Highpeak is too fragile to destroy CSP's due process rights. Therefore, CSP has standing, and the court properly denied the motion to dismiss on these grounds.

Second, CSP's challenged WTR well within the APA's statute of limitations. *Corner Post* clarified what it means for a right of action to accrue, holding that an entity cannot be harmed until it existed. *Corner Post,* 144 S. Ct. Based on *Corner Post'*s reasoning, WTR and Highpeak's transfers could not have harmed CSP until the date CSP formed. This is well within the APA's 6-year limit. 28 U.S.C. § 2401(a); *Corner Post, Inc.*, 144 S. Ct. 2440. The fact that the plaintiff in *Corner Post* was a business was irrelevant to the court's reasoning. Looking beyond Corner Post, the APA and CWA provide no basis to treat a non-profit differently than a for-profit entity. In fact, the CWA citizen suit provision specifically looks to people and entities with social rather than private goals. Thus, CSP's status as a non-profit should not be grounds to deny it standing. Accordingly, CSP filed a timely challenge, and the district court properly denied the motion to dismiss on this issue.

Turning to WTR, the district court erred in finding that EPA validly promulgated WTR. Historically, if a statute was ambiguous and Congress had not "directly spoken to the precise question at issue," a reviewing court had to defer to the responsible agency's interpretation, unless it was determined to be an impermissible construction. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984), *overruled* by *Loper Bright*, 144 S. Ct. The Supreme Court stated that prior cases relying on *Chevron* deference would still be afforded *stare decisis unless* there

was a "special justification" for establishing a new precedent. *Id.* at 2272. CSP is arguing that there is "special justification" to overturn prior precedent that upheld the Water Transfers Rule under *Chevron* deference. *Id*. CSP challenges that WTR ignored the intent of the Clean Water Act when it promulgated WTR and directly contradicted the plain meaning of "addition" understood by the courts and therefore constitutes "special justification."

Finally, even if WTR is valid, Highpeak's discharge requires a permit under CWA because Highpeak's tunnel itself introduced pollutants during the water transfer. WTR provides that the water transfer exclusion does not "apply to pollutants introduced by the water transfer activity *itself* to the water being transferred." 40 C.F.R. § 122.3(i) (emphasis added). Highpeak's tunnel, partially because of its poor construction and maintenance, introduces additional contaminants to the water it transfers. Thus, Highpeak's transfers fall outside the scope of WTR and requires a NPDES permit. EPA agrees that Highpeak's actions constitute an introduction of pollutants requiring a NPDES permit. This court should rely on EPA's interpretation under *Auer* deference if it finds WTR a reasonable promulgation. EPA's reasonable interpretation of its own rule should be given a higher level of deference than Highpeak's interpretation. Doing so is substantially different than a court deferring to an agency's interpretation of Congressional intent behind an organic statute and enhances, rather than impedes, judicial review.

STANDARD OF REVIEW

A party's standing must be reviewed *de novo* if the Defendant's arguments rest entirely on the claims made within the complaint and its attached exhibits. *Sonterra Capital Master Fund, Ltd. v. UBS AG*, 954 F.3d 529, 533 (2d Cir. 2020). Whether a party made a timely filing is reviewed *de novo*, since it is a jurisdictional requirement. *Wall Guy, Inc. v. FDIC*, 95 F.4th 862, 868 (4th Cir. 2024). When tasked with reviewing an agency's interpretation of the statutes it

administers, courts review the statute independently and afford the agency's interpretation Skidmore deference. *Loper Bright*, 144 S. Ct. at 2262–63. Under *Skidmore* deference, an agency's analysis "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Finally, when reviewing questions of law, the appellate court will review the issue *de novo*. *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020).

ARGUMENT

I. CSP HAS STANDING TO CHALLENGE WTR AND TO FILE A CWA CITIZEN SUIT AGAINST HIGHPEAK.

The District Court correctly held CSP has standing to challenge WTR and Highpeak's unpermitted discharges into Crystal Stream. CSP suffered a cognizable environmental injury from Highpeak's unpermitted discharges into Crystal Stream and is a legitimate nonprofit organization formed for the purposes of genuine environmental, recreational, and aesthetic concerns related to Crystal Stream.

A. CSP meets all elements required for standing.

The Supreme Court has determined that standing involves three necessary elements: (1) the plaintiff suffered a concrete and particularized injury that is actual and immanent, (2) there is a causal link between the challenged conduct and the injury, and (3) the injury must be likely to be redressed by a favorable decision by the court. *Friends of the Earth*, 528 U.S. at 167. Additionally, when a plaintiff is an organization, it must demonstrate that at least one of its members would have standing. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). If a plaintiff meets these requirements, then the plaintiff generally has standing.

1. Highpeak's unpermitted discharge into Crystal Stream caused CSP to suffer a concrete and particularized environmental injury.

CSP meets the first and second element for standing because several of the organization's members cannot fully enjoy Crystal Stream due to Highpeak's unpermitted discharges of metals and TSS into Crystal Stream.

A particularized and concrete injury can be intangible. *Friends of the Earth*, 528 U.S. at 180. In *Friends of the Earth*, the court held that an environmental organization suffered an injury sufficient for standing because some of its members could not use a river in desired ways. *Id*. at 180–83. The organization asserted that discharges into a river caused aesthetic harms, in addition to preventing them from using the river for recreation. *Id*. at 184–85. Thus, the court reasoned these injuries, though intangible, are particularized and concrete because the organization's members had recreational and aesthetics *interests* that the defendant harmed. *Id*. at 189.

To meet the causal element of standing, plaintiffs must "show that their injury 'fairly can be traced to the challenged action of the defendant.'" *Simon v. E. Ky. Welfare Rts. Org*., 426 U.S. 26, 41 (1976). In *Friends of the Earth*, the court relied on affidavits from the plaintiff organization's members in finding that the defendant's discharge of pollutants caused the organization harm. *Friends of the Earth*, 528 U.S. at 183–85. The defendant discharged a variety of pollutants into waterways and exceeded discharge limits set by permits. *Id*. at 178. The plaintiff's affidavits explicitly stated that these specific discharges caused the inability to utilize and enjoy the contaminated area. *Id*.

Here, the Court should hold that Highpeak caused CSP to suffer a particular and concrete injury. At minimum, CSP has two members, Ms. Jones and Mr. Silver, who demonstrate injuries similar to the aesthetic and recreational harms described in *Friends of the Earth*. Both members used the stream for recreational and aesthetic purposes, but the actions of Highpeak have

prevented both members from utilizing the stream more regularly. R. 14–17. For example, Ms. Jones stated that she does not enter Crystal Stream because of Highpeak's discharges, and Mr. Silver stated he would allow his dogs to drink from Crystal Stream if not for Highpeak's discharges. *Id.* The affidavits attributed these injuries directly to the water transfer done by Highpeak. *Id.* Specifically, Ms. Jones said that her "ability to enjoy the Stream has significantly diminished since learning about the pollutants introduced by Highpeak's discharge." R. 14. Similarly, Mr. Silver's affidavit stated "[i]f not for Highpeak's discharge, I would recreate more frequently on the Stream. I would also allow my dogs to drink from the Stream." R. 16.

2. *The injury can be redressed by a favorable ruling from the court.*

Redressability is available in this case because this Court's refusal to grant the motions to dismiss will allow CSP's complaint to survive. If CSP's complaint survives, then a favorable ruling could bring the transfers under CWA regulations, could result in an injunction against Highpeak's unpermitted water transfers, or impose deterring civil penalties. For example, CWA regulations would require Highpeak to obtain NPDES permits, which often impose discharge limits and monitoring requirements. 40 C.F.R. § 122.21. Such regulation would likely decrease the prevalence of metals and TSS responsible for CSP's environmental injury.

B. <u>CSP is a good-faith, legally formed organization with a legitimate purpose to preserve Crystal Stream.</u>

CSP is a legitimate non-profit organization formed in good faith to protect and preserve Crystal Stream. This litigation is one means to that end. Adequately protecting and preserving Crystal Stream *necessarily* involves challenging Highpeak's unpermitted transfers because these transfers are a major polluter of Crystal Stream. Accordingly, the fact that CSP filed a complaint regarding those transfers should not detract from CSP's legitimacy or excuse Highpeak from accountability for the real environmental harm it caused CSP.

As the district court noted in its decision, the "mere fact an organization . . . seeks to initiate a legal challenge does not, by itself, invalidate the alleged injuries for standing purposes." R. 7. If an organization is formed primarily for the purposes of litigation, this only requires greater scrutiny of the legitimacy of those injuries. *Id.* In some extreme cases, the court may not recognize any injury if the circumstances are sufficiently suspicious. For example, in *Stoops v. Wells Fargo Bank*, the court held that a plaintiff who bought at least 35 cellphones for the purposes of filing a lawsuit did not have standing. *Stoops*, 197 F. Supp. 3d at 796. This plaintiff, who resided in Pennsylvania, also programmed the phones to have Florida zip codes with the intent of increasing the frequency and likelihood of statutory "injury" from phone calls. *Id.* at 796–800.

In contrast, CSP suffered a legitimate injury and is nothing like the bad-faith plaintiff in *Stroop*. First, unlike purchasing 35 cellphones and using an out-of-state area code, forming an environmental not-for-profit to protect a waterbody is a common and reasonable action for individuals seeking to conserve that waterbody from pollution or other harms. *See, e.g.*, Hudson River Watershed Alliance, *2023 Annual Report* (2023), https://hudsonwatershed.org/wp-content/uploads/HRWA-2023-annual-report.pdf. Additionally, all of CSP's members live in Rexville, where Crystal Stream is located. R. 4. Notably, two of its members live especially close to Crystal Stream–Ms. Jones, for example, lives only 400 yards away from the Park and Mr. Silver moved within a half-mile of the Park in 2019. R. 14–17. Two other members own property directly on Crystal Stream. *Id.* at 4. Thus, unlike the plaintiff in *Stoops*, all CSP members are directly connected to the locality where the pollution occurs, and need not do something unusual to be impacted by the pollution.

Finally, Highpeak's tunnel and water transfers from Cloudy Lake currently pose a significant threat of contamination to Crystal Stream. Increased cloudiness, metals, and TSS are a particularly salient environmental injury to CSP members like Ms. Jones and Mr. Silver who live so near the Crystal Stream and enjoy walking along Crystal Stream's pristine waters. R. 7; R. 14–17. Consequently, the use of "transfers" in CSP's mission statement is unsurprising. It is also reasonable that an initial, significant focus of CSP's would be to attempt to prevent or mitigate Highpeak's transfers: CSP's challenge of WTR and Highpeak's unpermitted discharge is necessary to address CSPs legitimate environmental and aesthetic concerns related to Crystal Stream.

Thus, in light of the environmental injury suffered by CSP members and the purpose of CSP good-faith effort to protect Crystal Stream from pollution, the district court correctly held that CSP's has standing.

II. CSP TIMELY CHALLENGED WTR WITHIN APA'S 6-YEAR LIMIT.

The district court correctly held that CSP filed its challenge to WTR within the APA's statute of limitations. Based on the Supreme Court's ruling in *Corner Post*, CSP could not have been harmed by WTR until the date CSP formed–December 1, 2023–and thus CSP's complaint is well within the APA's 6-year limit. Even in the absence of *Corner Post*, at least one CSP member, Mr. Silver, could not have been harmed by WTR until he moved to Rexville in 2019. Accordingly, CSPs challenge to WTR is timely in either case.

The APA establishes the right to judicial review. *See* 5 U.S.C. §§ 701–06. Under the APA, a person or organization is entitled to judicial review if an agency action causes that person or organization to suffer a legal wrong or to be otherwise aggrieved within the context of the relevant statute. 5 USC §702; 5 U.S.C. § 551(2). Any civil action against an agency must be within six years of when the right of action first accrues. 28 U.S.C. § 2401(a). In *Corner Post,*

the Supreme Court held that the right of action does not accrue until a final agency action actually injures the plaintiff. *Corner Post,* 144 S. Ct. at 2440–43. Thus, the statute of limitations does *not* automatically begin to run when an agency promulgates an official rule. *Id.*

A. There should not be an exception to *Corner Post* for non-profits because an exception has no legal or policy basis.

A non-profit organization like CSP should not be treated less favorably than a for-profit entity simply because their aim is social rather than financial. Such an exception to *Corner Post* has no legal or policy basis.

The only relevant fact about the plaintiff in *Corner Post* is the date of the plaintiff's creation in relation to the APA's statute of limitation. Specifically, the plaintiff in *Corner Post* could not have brought a complaint under the APA until the date it existed, even though the agency promulgated the challenged regulation more than six years before the complaint. Likewise, CSP could not have brought a complaint under the APA until the date it existed, even though EPA promulgated WTR in 2008. Subsequently, there is no meaningful difference between the plaintiff in *Corner Post* and CSP.

Thus, the primary difference between CSP and the plaintiff in *Corner Post* is merely their goal. Organizations like CSP should not be treated as second-class and stripped away of their statutory rights simply because they do not make a profit. Social ends, such as preservation of a waterbody for environmental and aesthetic values, are as equally valid as financial ends– especially in the context of CWA.

1. The language of APA, CWA, and Corner Post demonstrate that nonprofits should not be excluded from the Corner Post principle.

No language in the APA, CWA, or in *Corner Post* suggest that a not-for-profit environmental group like CSP should be treated differently than a for-profit business.

First, the APA grants the right to judicial review to a person harmed by an agency action and defines "person" as including any "public or private organization other than an agency." 5 U.S.C. §702; 5 U.S.C. § 551(2). This does not specify that the organization must be for-profit; the only qualification is that it cannot be an agency. Likewise, the APA statute of limitation language broad. This limitation applies to "*every* civil action," and provides no qualifications. 28 U.S.C. § 2401(a) (emphasis added).

Like the APA, the language of CWA is expansive. The citizen suit provision of the CWA grants the power to "*any* citizen" to bring a challenge against an agency. 33 U.S.C. § 1365 (emphasis added). Notably, environmental groups like CWA have frequently brought citizen-suit challenges. *See, e.g.*, *Cnty. of Maui, Haw. v. Haw. Wildlife Fund*, 590 U.S. 165 (2020); *Friends of the Earth,* 528 U.S. 167; *Pa. Env't Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431 (M.D. Pa. 1989). This is because the purpose of the CWA citizen suit is to "protect and advance the public's interest in pollution-free waterways, rather than to promote private interests." *Pa. Env't Def. Found.*, 718 F. Supp at 434. Thus, the purpose of the citizen suit is inherently social, not financial. Given the purpose of the citizen suit is inherently social, it would be unusual and illogical to create an exception under *Corner Post* for organizations aimed at those very goals.

Turning to *Corner Post,* no part of the court's reasoning suggested that the plaintiff's ability to make a profit had a role in the court's decision. The Supreme Court did not linger on the for-profit status of the plaintiff and only described the entity when laying down the basic facts of the case for context of the injury. *Corner Post*, 144 S. Ct. at 2448. Instead, the opinion focused almost entirely on the meaning of "accrue." *Id.* at 2451–2458. The Supreme Court began by identifying the tolling provision, then moved to examining the well-established understanding of "accrue" as the "date that damage is sustained," and finally disregarded contrary textual

arguments. *Id.* At no point did the for-profit status of the plaintiff in *Corner Post* become a factor in the tolling principle described by the Supreme Court. Thus, whether an entity is for-profit or not-for-profit is irrelevant to whether the tolling principle in *Corner Post* applies.

2. *A Corner-Post exception for non-profits is not supported by policy concerns.*

Highpeak and EPA may raise concerns regarding burdens on agencies due to the supposedly low barrier of entry for creating a not-for-profit as opposed to a business. These concerns are unfounded.

First, if this Court chooses not to carve out an exception to *Corner Post* for non-profits, there may well be more challenges to agency actions by non-profit which could place more burdens on agencies; however, mere administrative inconvenience should not destroy a right expressly granted by the APA. *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021) (quoting *Pereira v. Sessions*, 585 U.S. 198, 217 (2018). Further, challenges to agency actions also are not inherently bad. Agencies can promulgate invalid rules which ought to be challenged–like the WTR. In any case, the impact is still far too uncertain even if there are more challenges. A challenge under the APA is not any guarantee that an agency rule will be found unconstitutional, or that a court would fail to grant a motion to dismiss when the facts of the case are similar to that of the bad-faith plaintiff in *Stroop*.

Second, creating a real non-profit organization in accordance with state law, like CSP has done here, does not have any lower barrier to entry than a business. Perhaps, if CSP consisted of only one person, Highpeak and EPA would be correct to raise concerns about the legitimacy of CSP's challenge and nonprofits like it. However, CSP has thirteen members–a respectable amount for concerns related to localized impacts on a waterbody like Crystal Stream. R. 4, 15. Additionally, CSP is organized enough to have a President, Vice President and Secretary; they

also recruit new members and are sophisticated enough to perform water sampling for TSS and metals. *Id.* at 4; R. 14–16. This level of organization around a social cause may, in fact, be more difficult than starting a business. For comparison, registering an LLC can take only a few minutes, and can require as little as a business name, address, and a filing fee. *See* USA State Filing Services, *Apply Online For Your LLC*, https://usa-llc-filing.com/.

Thus, there is no basis to treat CSP differently than a for-profit entity and the *Corner Post* principle should apply here. Accordingly, CSP's complaint is not time-barred.

B. Even if there is a non-profit exception to *Corner Post*, the complaint is nonetheless timely because not all CSP members could have made the challenge sooner.

The district court correctly disregarded Highpeak and EPA's argument that this challenge should be time-barred because CSP members could have brought the challenge within six years of EPA promulgating WTR. Not all CSP members could have individually brought a challenge to WTR within that time frame.

In the most obvious instance, CSP member Mr. Silver did not move to Rexville until 2019. Thus, Mr. Silver could not have brought a challenge to WTR until 2019 at the earliest– well within the APA's six-year limitation. Highpeak and EPA have also failed to establish that every CSP member who has lived in Rexville for longer than Mr. Silver could have brought the challenge sooner. Residing in Rexville is not identical to enjoying Crystal Stream and becoming harmed by agency action. For example, some members could have only recently begun visiting the Park and enjoying the aesthetics of Crystal Stream. Subsequently, the harm from WTR to these members could not have accrued until then. The record states only three out of CSP's thirteen members could have brought the challenge sooner: Ms. Jones lives within 400 yards of the Park, and the two other members of CSP own property adjacent to Crystal Stream. R. 4; *id.* at

14–16. Thus, arguments that this challenge is time-barred because CSP members could have brought the challenge individually sooner falls flat.

III. THE WTR IS AN INVALID PROMULGATION BECAUSE IT CONTRADICTS THE INTENT OF THE CLEAN WATER ACT AND REFUTES THE PLAIN MEANING OF "ADDITION."

WTR is an invalid promulgation pursuant to the CWA because it contradicts CWA's intent and refutes the plain meaning of "addition." The EPA's erroneous interpretation of the CWA constitutes a "special justification" to overturn precedents upholding the WTR under *Chevron* deference. Without *Chevron* deference, the WTR would still be owed *Skidmore* deference; however, it would also fall under this standard because it endorses logical impossibilities and ignores the unique composition of each waterbody.

After the Cuyahoga River—a waterbody teeming with industrial waste—set on fire in 1969, Congress amended the Federal Water Pollution Control Act, which became known as the Clean Water Act. S*olid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting). Amongst CWA's amendments was the National Pollution Discharge Elimination System ("NPDES"). Stephanie Rich, *Troubled Water: An Examination of the NPDES Permit Shield*, 33 Pace Env't L. Rev. 250 (2016). NPDES requires permits from the EPA, or appropriate state authority, for "the discharge of any pollutant" into "waters of the United States." 33 U.S.C. § 1311(a); 40 C.F.R. § 122.3(i) (2023); Rich, *supra* at 251–52. Congress specifically defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C § 1362(12). However, "addition" was ambiguous.

To resolve this ambiguity and exclude economically important water transfers from the permitting system, EPA interpreted "addition" to mean "the point source must introduce the pollutant into navigable water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693

F.2d 156, 165 (1982); *see also* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33699 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122). However, several courts refused to uphold the EPA's permit exemption because it lacked "sufficient[] formal[ity] to warrant Chevron deference." *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, (2d Cir. 2017) ("*Catskill Mountains III*"); *see Catskill Mountains I*; *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

To require courts to uphold their interpretation, EPA officially codified the rule as the "National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule" ("Water Transfers Rule" or "WTR") in 2008. *Catskill Mountains III*, 846 F.3d at 504. In its proposed rule, EPA expressly adopted the Unitary Waters Theory, which views all waters of the United States as a single, interconnected body of water. *S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105–06 (2004) ("Miccosukee"). Since all waterbodies are connected, water transfers do not need an NPDES permit because they "do not result in the 'addition' of a pollutant." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33699 (June 13, 2008) (to be codified at 40 C.F.R. 122).

Once the WTR qualified for *Chevron* deference, courts had to determine if Congress had "directly spoken to the precise question" of whether water transfers require NPDES permits. *Catskill Mountains III*, 846 F.3d at 507; *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984), *overruled* by *Loper Bright*, 144 S. Ct. Since Congress had not, courts determined whether EPA's interpretation is "based on a permissible construction of the statute." *Catskill Mountains III*, 846 F.3d at 507; *Chevron*, 467 U.S. at 843. The *Catskill III* court refused to analyze the WTR's permissibility under *State Farm*'s arbitrary and capricious standard, holding that the standard was only "used to evaluate whether a rule is procedurally defective as a result

of flaws in the agency's decision-making process." *Catskill Mountains III*, 846 F.3d at 521. After erroneously finding WTR to be free from procedural flaws, the court held that EPA's interpretation was "permissible." *Catskill Mountains III*, 846 F.3d at 521; *Chevron*, 467 U.S. at 843.

In June 2024, the United States Supreme Court overruled *Chevron* deference in *Loper Bright*. 144 S. Ct. at 2273. In his opinion, Chief Justice Roberts reasoned that statutory interpretation is the court's responsibility, not an agency's, and *Chevron* deference "was a judicial invention that required judges to disregard their statutory duties." *Id.* at 2272. To ease the transition, the court clarified that prior cases relying on *Chevron* deference would still be afforded *stare decisis unless* there was a "special justification" for establishing a new precedent. *Id.* (emphasis added).

Despite the EPA's codification of WTR, the rule was based on an erroneous interpretation of CWA that fails to consider the intent of the CWA and significantly harms the environment. Such impacts serve as a "special justification" to establish new precedent and save Clear Stream before it is inflicted with irreversible harm. *See Loper Bright,* 144 S. Ct. at 2272.

A. WTR is arbitrary, capricious, or against the law.

The WTR is arbitrary, capricious, or contrary to law because its Unitary Waters Theory directly contradicts the intent of CWA and the plain meaning of "addition." The EPA's failure "to consider an important aspect of the problem," and instead "offer[] an explanation for its decision that runs counter to the evidence" constitutes a "special justification" to overturn precedents that upheld the Rule under *Chevron* deference.

Under the APA, an agency's action must "ha[ve] reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414,

423 (2021). Reviewing courts should defer to the agency's actions, but may vacate if it is deemed arbitrary, capricious, or contrary to law. 5 U.S.C § 706(2)(a). An agency's action may be arbitrary or capricious if it:

> [R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence…or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (*"State Farm"*).

WTR ignored the intent of CWA when it promulgated WTR and directly contradicted the plain meaning of "addition" understood by the courts. These reasons provide a "special justification" to overturn prior precedent that upheld the Rule under *Chevron* deference. *Loper Bright*, 144 S. Ct. at 2272.

1. *The Unitary Waters Theory Adopted Under WTR Directly Contradicts the Purpose of CWA.*

WTR is arbitrary, capricious, or contrary to law because it adopts the Unitary Waters Theory, which directly contradicts the purpose of CWA. Under WTR, any "activity that conveys or connects *waters of the United States* without subjecting the transferred water to intervening industrial, municipal, or commercial use" is exempt from NPDES permitting. 40 C.F.R. § 122.3(i) (2023) (emphasis added). The EPA clarified that "Waters of the United States" comprises those "in interstate or foreign commerce . . . [t]he territorial seas; or [i]nterstate waters," as well as certain impoundments, adjacent wetlands, plus relatively permanent tributaries, intrastate lakes, and ponds. 40 C.F.R. § 120.2(a)(1)–(5). With such an expansive and interconnected view of the United States' waterways, WTR contradicts the intent of CWA.

The first section of CWA explicitly states Congress' intent to improve the "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters." 33 U.S.C. § 1251(a). However, the Unitary Waters Theory precludes Congress from achieving this goal because many bodies of water, like Cloudy Lake, can transfer pollutants to other bodies of water, like Crystal Stream, without an NPDES permit, since the pollutant already "existed" in the receiving waterway. R. 5; *See Catskill I*, 273 F.3d at 491 (analogizing that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot."). Such a view of "waters of the United States" exempts a large portion of water transfers from NPDES regulations, allowing pollutants to travel where they were absent or present in smaller amounts.

WTR also ignores a provision within CWA that indicates Congress's rejection of the Unitary Waters Theory. *Miccosukee*, 541 U.S. at 107. Under the NPDES section of CWA, Congress specifies that any new and revised "water quality standard[s] shall consist of the designated uses of the *navigable waters involved*." *Id.*; 33 U.S.C § 1313(c)(2)(A) (emphasis added). The express use "involved" indicates that some—if not many—waters of the United States are excluded from the new and revised water quality standards. Such a holding would not be possible under the Unitary Waters Theory since all waterways are seen as one big waterway; therefore, all would be included.

By ignoring Congress' intent and the unique composition of *each* body of water, the Water Transfers Rule's adoption of the Unitary Waters Theory directly contradicts the Clean Water Act's goal of "restor[ing] and mainta[ining]" our Nation's water. 33 U.S.C. § 1251(a). In failing "to consider an important aspect of the problem," WTR must be set aside for being arbitrary, capricious, or contrary to law. *State Farm*, 463 U.S. at 43.

2. *The Unitary Waters Theory Also Negates the Plain Meaning of "Addition."*

WTR's adoption of the Unitary Waters Theory also negates the plain meaning of "addition." Under CWA, Congress defined the "discharge of a pollutant" as "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C § 1362(12) (emphasis added). However, they did not clarify what constitutes an "addition." *Id.*; *see also Gorsuch*, 693 F.2d at 165. This ambiguity caused much debate amongst courts, which prompted EPA to adopt the Unitary Waters Theory when promulgating the final Rule. *Gorsuch*, 530 F. Supp. at 1306; National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 109 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122) (stating Congress "did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States.")

Under EPA's definition, a "point source must *introduce* the pollutant into navigable water from the outside world," to constitute an "addition." *Gorsuch*, 693 F.2d at 165. However, this definition directly contradicts the plain meaning of "addition." Courts have routinely understood "addition" to mean the introduction of a pollutant from a source that is physically, chemically, and/or biologically different from the source giving water. *Catskill I*, 273 F.3d at 492 (noting how the water at issue was "artificially diverted" and "utterly unrelated in any relevant sense"); *Dague v. Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991) (rev'd on other grounds); *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-97 (1996) (stating "there is no basis in law or fact for the [] 'singular entity' theory" and the transfer at issue "would not occur naturally.").

By ignoring the plain meaning of "addition," EPA's Unitary Waters Theory allows polluted waterways—like Cloudy Lake—to transfer pollutants into cleaner waterways—like

Crystal Stream—without needing an NPDES permit, since the pollutant already existed within their "unified" framework. R. 5. This definition of "addition" not only threatens the health of each waterway by disregarding its unique chemical, physical, and biological composition, but counteracts the term's plain meaning.

EPA's decision to negate the plain meaning of "addition"—which was routinely emphasized by the courts—in adopting the Unitary Waters Theory, WTR must be set aside for being arbitrary, capricious, or contrary to law. As a result, prior precedents upholding the WTR under *Chevron* deference are no longer owed stare decisis; rather, WTR must only be given our new standard of agency deference—*Skidmore* deference. *Loper Bright*, 144 S. Ct. at 2262–63, 2272.

B. WTR also fails under Skidmore deference—the current standard of agency deference—because it endorses logical impossibilities and ignores the unique composition of each waterbody.

Under *Skidmore* deference—the agency deference standard now required by the Supreme Court—WTR still fails for its endorsement of logical impossibilities and disregard for the unique composition of each waterway. For almost 40 years, courts adhered to *Chevron* deference. *Chevron*, 467 U.S. at 837; *Loper Bright*, 144 S. Ct. at 2244. However, while *Chevron* was the appropriate standard for agency deference, courts grappled with how formal an agency's interpretation had to be to warrant this high level of deference. *See Christinsen v. Harris Cnty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (stating that *Chevron* deference does not apply "where one has doubt that Congress actually intended to delegate interpretive authority to the agency"). Over time, courts held that a formal administrative procedure was a good indication that an interpretation should be afforded *Chevron* deference, since it requires an interpretation to be thoroughly discussed. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

If an agency's interpretation had not undergone a formal administrative procedure, it could still be given *Skidmore* deference. *Christensen*, 529 U.S. at 597. Under this standard, a court *need not* adopt an agency's analysis; rather, it "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140 (emphasis added). After *Chevron* deference was overruled in *Loper Bright*, the Court attempted to provide clarity by stating that, in the absence of Congressional delegation, *Skidmore* deference would still be a permissible standard for agency deference. *Loper Bright*, 144 S. Ct. at 2262–63. Under *Skidmore* deference, WTR still fails.

In *Catskill I*, the Court analyzed whether pollutants added during a water transfer from a reservoir, through the Shandaken Tunnel, and into a creek, constituted an "addition" under the CWA. *Catskill I*, 273 F.3d at 484–85. Since WTR had not been formally recognized yet, the court afforded EPA's interpretation *Skidmore* deference—the appropriate standard in the present case. *Id.* at 490–91. Under this standard, the court refused to adopt EPA's Unitary Waters Theory, instead arguing that the reservoir and creek could not have physically transferred water, absent the tunnel. *Id.* at 492. Since pollutants were *introduced* to the creek by the tunnel, a specified "point source" under the CWA, the tunnel fell within the CWA's permitting requirements. *Id.* at 493; 33 U.S.C § 1362(12), (14) (emphasis added). The court concluded that EPA's interpretation advocates for a "logical impossibility" and ignores CWA's plain meaning. *Catskill I*, 273 F.3d at 492.

The validity of EPA's interpretation of CWA was placed before the courts again in *Dubois*. *Dubois*, 102 F.3d 1273. To make snow for its ski hill, Loon Corporation ("Loon Corp.") was authorized to pump water from Loon Pond, a Class A waterbody with extremely low levels of phosphorus, and the East Branch of Pemigewasset River, which contained bacteria,

phosphorus, heat, turbidity, and other organisms. *Id.* at 1277–78. When Loon Corp. was done with the water, all of it was discharged into Loon Pond, regardless of where it originated. *Id.* at 1278. Although the Defendants attempted to raise the Unitary Waters Theory, the court vehemently rejected its position. *Id.* at 1296–97. In declaring that such an interpretation of CWA was an "irrational result," the court notes that "the water leaves the domain of nature and is subject to private control rather than purely natural processes." *Id.* at 1297. As a result of this interference, pollutants enter water bodies they would not naturally reach. *Id.* at 1297–98; therefore, the transfers must be subject to NPDES permitting requirements. *Id.* at 1299. Thus, under *Skidmore* deference, the EPA's interpretation of the CWA failed then and must fail again today.

The district court erred in holding WTR to be a valid promulgation pursuant to CWA. WTR is arbitrary, capricious, or contrary to law, because it contradicts the intent of CWA and refutes the plain meaning of "addition." Although it must be set aside, it may still be afforded *Skidmore* deference. However, EPA's interpretation of CWA still fails under this standard because it endorses logical impossibilities and ignores the unique biological, physical, and chemical composition of each waterbody.

IV. HIGHPEAK'S TUNNEL IS A POINT SOURCE UNDER THE NPDES, WHICH EXCLUDES IT FROM WTR.

Under the NPDES, Highpeak's tunnel is a "point source" because the tunnel introduces pollutants during the water transfer from Cloudy Lake to Crystal Stream. EPA agrees with this interpretation, and EPA's interpretation of its own rule should be given a higher level of deference than Highpeak's interpretation.

WTR explicitly states that the NPDES exemption does not "apply to pollutants *introduced by the water transfer activity itself* to the water being transferred." 40 C.F.R. §

122.3(i) (emphasis added). Highpeak transfers water from Cloudy Lake to Crystal Stream through its 30-year-old, poorly constructed tunnel that is partially made of iron pipe and partially carved through rock. R. 4. Tests revealed that water at the intake of Cloudy Lake contained 2–3% lower levels of iron, magnesium, and TSS than water at the tunnel's outfall. *Id.* at 5. Thus, every time Highpeaks' transfers water through the tunnel, the tunnel *itself* causes water to leave more polluted than when it entered. This pollution is a manmade—a direct consequence of Highpeak's inadequate construction and maintenance of the tunnel. Accordingly, Highpeak's decision to divert water in an unnatural manner through a dilapidated tunnel is the essence of introducing pollutants from human activity under CWA and should require a NPDES permit. Importantly, EPA agrees with CSP that Highpeak's water transfer falls under CWA and not WTR.

A. This Court should defer to EPA's interpretation of its own rule and thus require a NPDES permit for Highpeak's introduction of pollutants into Crystal Stream.

The district court correctly held that EPA interpreted an ambiguous regulation, in a reasonable manner, and should be given deference when reasonably interpreting its own ambiguous rule.

In *Kisor v. Wilkie*, the Supreme Court outlined the process for granting deference to an agency's interpretation of its own rule. *Kisor v. Wilkie*, 588 U.S. 558, 558 (2019). Courts must begin with the typical methods of construction: the text, structure, history, and purpose of the regulation. *Id.* at 559, 573–74. If these methods present more than one reasonable reading of the rule, a court may defer to the agency's interpretation of its own rule. *Id.* at 559. This deference is known as *Auer* deference. However, for *Auer* deference to apply, the agency's interpretation must be a reasonable reading of the rule and remain within the guardrails of the APA's arbitrary and capricious standard. *Id.* (citing *Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Additionally, the interpretation (1) must be the agency's official position, (2) must implicate the agency's substantive expertise, and (3) must reflect "fair and considered judgment." *Kisor*, 569 U.S at 559. First, an official position does not need to originate from the agency head. *Id.* at 577 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 566, n. 9, 567, n. 10 (1980)). An official position includes, for example, a statement published in the Federal Registrar. *Id.* Second, agencies naturally have technical or policy expertise. *Id.* at 578. If that special expertise is relevant to the rule, then the agency is in a comparatively better position than the court to interpret the rule. *Id.* (reasoning that the ADA is better able to determine what disability accommodations are best policy). Finally, the agency's interpretation must not be an "'unfair surprise' to regulated parties." *Id.* at 579 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

1. *WTR is ambiguous and EPA's interpretation falls within the scope of ambiguity.*

The text, structure, history, and purpose of the statute lead to at least two reasonable interpretations of WTR.

Beginning with the text, the plain language of WTR is ambiguous. Relevant here, WTR does not apply when the "transfer activity itself" introduces pollutants. 40 C.F.R § 122.3(i). However, the rule does not define what constitutes a "transfer activity itself." 40 C.F.R § 122.2. Therefore, a "transfer activity" could be the act of water moving through a tunnel and picking up particulates from its surface, or it could be understood as requiring an *additional* process beyond merely passing through a vessel.

Turning to WTR's history and purpose, either of these interpretations of "transfer activity" remains reasonable. Historically, EPA has followed WTR. *See* NPDES Water Transfers Rule at 33,697 (June 13, 2008). Instead, EPA left regulating water transfers under state authority

due to many states' significant dependence on water transfers for municipal water supply—especially for the western states. *Id.* at 33,698–99 (June 13, 2008). To further support its rationale to exclude transfers from NPDES requirements, EPA explained that transfers "do not require NPDES permits because they do not result in the 'addition' of a pollutant." *Id.* at 33699–702. Simply, moving water from one water body to another does not create *new* pollutants, under the Unitary Waters Theory adopted in by EPA's definition of "waters of the United States." *Id.;* 40 C.F.R § 120.2(a).

Importantly, when issuing its final rule, EPA made a distinction between "pollutants incidental to water transfers" and "when water transfers introduce pollutants." NPDES Water Transfers Rule at 33705. EPA elaborates by noting NPDES permits are required when "water transfers introduce pollutants to water passing through the structure into the receiving water," but identifies chemical and physical changes resulting from water sitting in a dam as incidental and not requiring NDPES permits. *Id.* Finally, EPA notes that "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." *Id.*

Given the purpose and history of WTR, the question here is whether physical and chemical changes caused by a tunnel like Highpeak's is an *introduction* which takes the discharge out of WTR or whether such a tunnel is sufficiently analogous to a dam for these changes to be *incidental*.

The answer to this question ambiguous, though it is more reasonable to find a tunnel not sufficiently analogous to a dam. It is unclear to what extent water passing through a tunnel will inevitably introduce new pollutants. In contrast, a dam *necessarily* traps and confined water in a way that will lead to some significant physical and chemical change. Additionally, dams serve

the important function of providing drinking water to municipalities which may be a pragmatic reason for excluding dams from NPDES permits. However, another ambiguity stems from the issue of the state and construction of Highpeak's tunnel: does the tunnel fall outside the scope of WTR because (1) the tunnel unacceptably introduces new pollutants regardless of its construction and maintenance, or (2) the tunnel's poor construction and maintenance causes unacceptable additions of pollutants? The poor construction and maintenance enhanced what might have otherwise been considered incidental addition of pollutants. But, even without the tunnel's flaws, the increase of metals and TSS could still be read as an introduction of pollutants rather than incidental. The water picks up pollutants—new pollutants—that otherwise would not be in the water.

Consequently, after considering the text, structure, purpose, and history of WTR, WTR remains ambiguous; WTR has at least two reasonable interpretations, which include EPA's interpretation that Highpeak's tunnel falls outside the scope of WTR.

2. *EPA's interpretation should be given* Auer *deference because its interpretation of WTR is official, related to EPA's expertise, and fair.*

EPA's interpretation of WTR meets the remaining criteria for *Auer* deference defined by *Kisor*.

First, EPA's interpretation of WTR in Highpeak's case falls within the language EPA provided in the Federal Register when promulgating WTR. In the Federal Register, EPA explicitly states that water transfer activities itself can sometimes introduce pollutants requiring a NPDES permit. EPA also states that "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." *Id.* Highpeak's tunnel is not properly maintained. Because it is not properly

maintained, it introduces pollutants into waters of the United States. This interpretation is entirely consistent with EPA's statements in the Federal Register.

Second, EPA's interpretation of WTR is related to its expertise. EPA, as an agency dedicated to protecting human health and the environment, has specific expertise and unique insights on pollutants, methods of pollution, and water properties. EPA, *Our Mission and What We Do* (May 1, 2024), https://www.epa.gov/aboutepa/our-mission-and-what-we-do. EPA has a researcher center which "provides robust research and scientific analyses to . . . support safe and adequate supplies of water—protecting people's health and livelihood while restoring and maintaining watersheds and aquatic ecosystems." EPA, About the Safe and Sustainable Water Resources Research Program (April 16, 2024), https://www.epa.gov/aboutepa/about-safe-and-sustainable-water-resources-research-program. Thus, determining whether a vessel transferring water adds a pollutant into that water is well within the scope of EPA's substantive expertise. Accordingly, EPA is comparatively in a better position than a court to evaluate the policy or technical considerations of WTR.

Finally, EPA's interpretation is fair. EPA's interpretation is not an "unfair surprise" because EPA's interpretation falls well within the scope of its language in the Federal Registrar. Highpeak's lack of notice in this matter is a result of its own choice to avoid consulting with EPA regarding its tunnel, its failure to test the transferred water for increases in pollutants, its failure to construct a better tunnel, and its failure to properly maintain the tunnel. EPA could not have evaluated or requested that Highpeak acquire a NPDES permit because Highpeak never consulted about the tunnel with EPA.

Thus, *Auer* deference applies in this matter because WTR is ambiguous, and EPA's interpretation is official, related to its expertise, and is fair

B. Deferring to EPA in this matter is consistent with separation of powers.

On a final note, this argument does not suggest that this Court is definitively bound by deference to EPA, only that it *should* defer to EPA's interpretation in this instance. This is does not infringe of separation of powers.

By deferring to the agency's interpretation of its own rule, this court would still exercise independent judgment over matters of law as required by *Marbury* and Article III of the United States Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803); U.S. Const. art. III, § 1. Incorporating the agency's interpretation of its *own rule* is a vital part of that independent judgment because of the agency's unique position to understand its own rule. The "unique position" refers to not solely the agency's relevant subject matter expertise, but more significantly includes the fact that the agency *itself* wrote the rule that is being interpreted. This gives substantial weight to the agency's interpretation. The agency is simply clarifying what it meant by the rule, rather than arguing what Congress meant in the relevant organic statute. Accordingly, if an agency's promulgation of a rule is found to be valid under the organic statute, it is reasonable for a court to defer to an agency's reasonable interpretation of that rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the motion to dismiss CSP's citizen suit; but should reverse the district court's grant of the motions to dismiss CSP's challenge to WTR.