TEAM 42

C.A. No. 25-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CRYSTAL STRAM PRESERVATIONISTS, INC.,
Appellant-Cross-Appellee,

v.

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

-and-

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

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

Brief of Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union granted motions to dismiss Crystal Stream Preservationists, Inc. ("CSP")'s challenge to the Water Transfer Rule ("WTR") and denied a motion to dismiss CSP's Clean Water Act ("CWA") citizen suit cause of action. The District Court had subject matter jurisdiction under citizen-suit provision of the CWA, section 1365(a), 33 U.S.C. § 1365(a), and under 28 U.S.C. § 1331 because the cause of action is provided by federal law. CSP, Highpeak Tubing, Inc. ("Highpeak"), and the United States Environmental Protection Agency ("EPA") all filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4. The Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291. "The courts of appeals…shall have jurisdiction of appeals…of the district courts of the United States[.]" 28 U.S.C. § 1291. CSP, Highpeak, and the EPA each filed motions seeking leave to appeal the District Court's order. This Court has granted leave to appeal.

STATEMENT OF ISSUES PRESENTED

I. Does CSP have standing to bring forth a citizen suit and challenge to the WTR due to an environmental injury caused by Highpeak?

II. Did CSP timely file the challenge to the WTR under the Administrative Procedure Act ("APA")?

III. Is the WTR a validly promulgated regulation pursuant to the CWA?

IV. Is Highpeak's discharge subject to permitting under the CWA because pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR?

STATEMENT OF THE CASE

CSP was an environmental group founded on December 1, 2023. CSP was created in the interest of preserving Crystal Stream ("the Stream" or "Crystal Stream") in its natural state. CSP has thirteen members, who all live in Rexville, New Union. Twelve of the members have resided in Rexville for more than fifteen years. One member, Mr. John Silver, moved to Rexville in 2019. Two of the thirteen members own land along Crystal Stream and have lived in their homes since 2008. These individuals united to preserve Crystal Stream's beauty. Crystal Stream runs through Rexville. It is known for its clear and pure water, which attracts locals to enjoy its scenery. Crystal Stream Park ("the Park"), is a public park located along the river that has walking trails for people to enjoy.

Unfortunately, members of CSP cannot enjoy Crystal Stream due to the discharge of polluted water into the Stream. The source of this polluted water comes from Highpeak. On the western side of New Union, Highpeak operates a tubing business on Crystal Stream. It uses Crystal Stream to launch its customers down innertubes. Highpeak also borders Cloudy Lake, which is a lake in the Awandack mountain range. In 1992, Highpeak obtained permission from New Union to construct a tunnel connecting Cloudy Lake and Crystal Stream. The tunnel is partially carved through rock and partially constructed with iron. The tunnel can be opened by Highpeak employees through valves on both ends. The purpose of the tunnel is to allow Highpeak to increase the volume and velocity of Crystal Stream to enhance the tubing recreation.

However, the water in Cloudy Lake contains significantly higher levels of certain minerals, such as iron and manganese and higher concentrations of total suspended solids. Samples taken from water discharged into Crystal Stream contained 2-3% higher concentrations of these pollutants than water taken at the tunnel's intake in Cloudy Lake on the same day. These

pollutants cause the Stream's otherwise clear water to become cloudy. CSP members, Ms. Cynthia Jones and Mr. John Silver, state the pollution is upsetting and prevents them from enjoying the Stream. Ms. Jones enjoys walking along the edge of the Stream and seeing the Stream's clear water. She has noticed the Stream becomes cloudy when Highpeak uses the tunnel to discharge water. Mr. Silver also observed the cloudiness of the Stream, caused by the discharge, while walking with his children and dogs. Both, Ms. Jones and Mr. Silver, would recreate even more frequently near the Stream, if not for Highpeak's discharge.

To stop Highpeak's pollution of Crystal Stream, CSP filed a citizen suit under the CWA, 33 U.S.C. § 1251 *et seq*. This complaint also brought a separate claim against the EPA under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq*. In the complaint, CSP challenged the EPA's interpretation of the National Pollutant Discharge Elimination System ("NPDES") Water Transfer Rule.

On December 15, 2023, CSP sent a CWA notice of intent to sue letter ("the NOIS") to Highpeak, the New Union Department of Environmental Quality, and to the EPA. The NOIS stated that Highpeak's discharge contains multiple pollutants, which is supported by the water samples taken. The NOIS also stated that, due to Crystal Stream being significantly fed by natural ground water, it is less burdened by the pollutants contained in Cloudy Lake. Therefore, every time Highpeak used the tunnel, it discharged pollutants into the Stream in violation of the CWA.

On December 27, 2023, Highpeak sent a reply stating it did not need to reply to the NOIS on the merits. Highpeak contended it did not need a NPDES permit due to the WTR; claiming a "natural" addition of pollutants did not bring the discharge out of the scope of the WTR. On February 15, 2024, CSP filed its citizen suit, after waiting the required sixty days. The citizen

suit contained both claims against Highpeak and the EPA. Highpeak and the EPA moved to dismiss CSP's challenge to the WTR. Both Highpeak and the EPA argue CSP lack standing in its citizen suit. They also argue the challenge was time-barred, and the WTR is a validly promulgated regulation. Highpeak also argues it did not need a permit, however, the EPA agreed with CSP that Highpeak does need to obtain a permit, regardless if the WTR is upheld or not.

On August 1, 2024, the District Court denied the motion to dismiss the citizen suit against Highpeak and granted the motion to dismiss the challenge to the WTR. The District Court waited until the Supreme Court issued its rulings on Loper Bright Enterprises v. Raimondo and Corner Post, Inc. v. Board of Governors of Federal Reserve Systems, which provided new, reverent case law for the present case.

SUMMARY OF ARGUMENT

The District Court properly held that CSP had standing and timely filed their citizen suit. Additionally, the District Court properly held that the pollutants released during Highpeak's discharge were out of the Water Transfer Rule's scope. Therefore, the discharge is subject to permitting under the Clean Water Act. The District Court erred in its decision that the Water Transfer Rule was a valid regulation promulgated pursuant to the Clean Water Act.

First, CSP meets all requirements to establish standing for their case. An association, like CSP, has standing to bring forth a suit when at least one of its members has standing. CSP's members have suffered an environmental injury due to Highpeak's discharge. CSP's members regularly enjoy use of Crystal Stream, indulging in outdoor activities along the Stream. Highpeak's discharge has caused the water to become cloudy due to releasing minerals and suspended dissolved solids which has gravely decreased CSP's member's ability to enjoy the Stream. The decreased ability to enjoy the Stream is an injury for the purpose of standing. This

injury is caused by Highpeak's discharge and can be redressed by the court. The redress would require Highpeak to have a permit to limit the discharge. The timing of CSP does not undermine this injury nor does it undermine its standing.

Further, for an association to have standing, the interest it seeks to protect must be germane to the association's purpose. Hunt v. Wash. State Apple Advet. Comm'n, 432 U.S. 333, 343 (1977). CSP was formed to protect and preserve Crystal Stream which is precisely what CSP is doing with this citizen suit. CSP is seeking to protect the Stream from discharge and preserve it for future generations. Finally, the claim or relief an association is seeking must not require participation of any individual members of the lawsuit. CSP is seeking relief through Highpeak needing a permit to discharge into Crystal Stream. Therefore, CSP has associational standing to bring forth this suit as its members were injured.

Second, CSP timely filed the challenge to the Water Transfer Rule under the APA. The APA allows a party six years to challenge a promulgated regulation after the right of action first accrues. In Corner Post, Inc. v. Board of Governors of Federal Reserve System, the Supreme Court has determined this six-year limitation begins when the party is injured, not when the defendant first acted. Corner Post, Inc. v. Bd. of Gov't Fed. of the Rsrv. Sys., 144 S.Ct. 2440, (2024). CSP could not have been injured until its formation in December of 2023. CSP promptly filed its Notice of Intent to Sue in mid-December of 2023 and challenge in February of 2024. This is well within the six-year period from when its right of action first accrued.

CSP should not be held to a different standard than Corner Post due to its not-for-profit status. The Supreme Court was clear in its interpretation of the APA provision that Congress intended it to be a plaintiff-centric provision. Corner Post, Inc., 144 S.Ct. at 2452. While Corner Post, Inc. was a for-profit organization, the Court did not explicitly limit their ruling to for-profit

organizations. Lower courts have already applied the Corner Post, Inc. interpretation of when a right first accrues to individuals challenging agency decisions. There is nothing so inherent about a not-for-profit, like CSP, to warrant CSP being held to a different standard, despite what the EPA and Highpeak argue. The six-year limitation was written in a plaintiff-centric provision. CSP had no right of action accrue until its formation in 2023 and it filed well within the six-year period. Therefore, CSP timely filed the challenge to the Water Transfer Rule.

Third, the District Court erred in holding the Water Transfer Rule was a valid regulation promulgated pursuant to the Clean Water Act. The Water Transfer Rule is inconsistent with the plain language of the Clean Water Act. The Clean Water Act clearly forbids any discharge of any pollutant into waters of the United States without complying with the Act, which includes obtaining a permit when required. The EPA cannot simply regulate away an entire category of discharge, such as water transfers, from the express requirement of the act.

Further, the Water Transfer Rule is not reasonably related to the Clean Water Act. The Clean Water Act restores and maintains the chemical, physical, and biological integrity of the Nation's waters. A goal of the Clean Water Act is to eliminate the discharge of pollutants into navigable waters. Regulations promulgated under Congressional authority, such as the Water Transfer Rule, are valid when it is reasonably related to the enabling legislation's purpose. The Water Transfer Rule, which allows for the discharge of pollutants into navigable waters, is inconsistent with the Clean Water Act.

Fourth, the District Court did not err in determining that Highpeak's discharge is subject to the permitting requirements under the Clean Water Act. Highpeak requires a permit for its discharge, regardless if the Water Transfer Rule is validly promulgated or not. The WTR does not apply to pollutants that are introduced by the water transfer activity. Water transfer activities

should be conducted in a way that ensures the transfers do not add pollutants to the receiving water. Highpeak's discharge is transferring pollutants from Cloudy Lake into Crystal Stream. As a result, the WTR does not apply to Highpeak's discharge.

STANDARD OF REVIEW

CSP's issues of standing and timeliness to bring forth a challenge to the WTR are to be reviewed under the de novo standard. Mixed questions of law and fact are reviewed de novo. U.S. Bank Nat'l Ass'n v. Vill. Lakeridge, LLC, 583 U.S. 387, 395 (2018). Under de novo review, a Court of Appeals is required to make an independent judgment without deference to the District Court's assessment. In re Piper Aircraft Corp., 244 F.3d 1289 (11th Cir. 2001).

An agency's statutory interpretation should not be binding, it can be persuasive based on the following factors, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

However, a court should give an agency's interpretation of its own regulation a high level of difference under the Auer standard. An agency's interpretation of its own regulation has long been entitled to a high level of respect. See Auer v. Robbins, 519 U.S. 452 (1997). The EPAs interpretation of its own regulation should be given respect. "When 'the meaning of [a regulation] is in doubt,' the agency's interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Kisor v. Wilkie, 588 U.S. 558, 568 (2019) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

ARGUMENT

I. CSP has standing to bring forth the challenge of the WTR and the citizen suit against High Peak.

The District Court correctly held that CSP has standing to bring forth a citizen suit against Highpeak. An association has standing to bring forth a suit on behalf of its members when one of its members has standing to sue. Hunt v. Wash. State Apple Advet. Comm'n, 432 U.S. 333, 343 (1977). Further, "the interests [the association] seeks to protect are germane to the organization's purpose[.]" Id. And "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id.

Hunt requires that individual members have standing to sue. To establish standing, an individual must show they sustained an injury in fact, the defendant caused the injury, and the injury can be redressed by a court decision in the party's favor. See generally Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

CSP's members have standing for this case. They have suffered an environmental injury caused by Highpeak's discharge. Highpeak's discharge clouds the Stream, which greatly depletes CSP's members ability to enjoy the Stream. This injury can be redressed by the court requiring a permit. Further, this issue is germane to CSP's mission and purpose. CSP invites individuals, who are interested in preserving Crystal Stream, to join them. This is precisely what CSP is doing by bringing forth its citizen suit. CSP is seeking to have this discharge stopped. This requested relief does not require the participation of CSP's members. Therefore, CSP meets all requirements under the Hunt test.

A. CSP members have standing on their own to bring forth the citizen suit and challenge to the WTR.

At least one member, Mr. John Silver, has standing to bring forth the claims in this case. All CSP members have suffered an environmental and aesthetic injury from Highpeak's discharge clouding Crystal Lake. The cause of the discharge, as supported by the water sample testing done, is from Highpeak's use of the tunnel. The members' injury can be remedied by this Court ordering Highpeak to obtain and follow a NPDES permit to control the quantity of pollutants Highpeak is allowed to discharge.

1. CSP members have sustained an aesthetic and environmental injury, which satisfied the injury-in-fact requirement to establish Article III Standing.

CSP has suffered an injury from Highpeak's discharge from Cloudy Lake into Crystal Stream. Highpeak's discharge causes the Stream's water to have a cloudy appearance. This appearance raises concerns with CSP's members, as it shows the Stream is being polluted. This pollution prevents the members from enjoying the Stream, which is a recognized injury-in-fact for standing purposes.

An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized…and (b) 'actual or imminent, not 'conjectural' or hypothetical'[.]" Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). A particularized injury affects the party in a "personal and individual way" and is not a generalized grievance. Id. An injury-in-fact can be an aesthetic or environmental injury for standing purposes, provided the party itself is among the injured. Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). The injury must have already occurred or be likely to occur soon. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., the Supreme Court found that Friends of the Earth ("FOE"), an environmental interest group, sustained an injury-in-fact and had standing. Friends of the Earth, Inc. v. Laidlaw Env't. Servs., 528 U.S. 167,

185 (2000). FEO and Citizens Local Environmental Action Network, Inc. ("CLEAN") brought forth a citizen suit against Laidlaw Environmental Services (TOC) Inc., owner of a hazardous waste incinerator facility. Id. at 175. This facility was on the North Tyger River. Id. at 176. Laidlaw had a NPDES permit authorizing the company to discharge treated water into the river. Id. Laidlaw's discharge often exceeded the limits set forth in the permit. Id. FEO and CLEAN filed a citizen suit under the Clean Water Act.

In their complaint, FEO included several affidavits from its members, depicting their injury from Laidlaw's excessive discharge. Id. at 176-77. One member, who resided one half mile from the North Tyger River, stated he would visit the river between three and fifteen miles from Laidlaw's facility. Id. at 181-82. The river would look, and smell, polluted on these visits. Id. at 181. His concern about this pollution prevented him from enjoying activities on the river, such as fishing at a childhood fishing spot. Id. at 182. Other members of FEO and CLEAN echoed these concerns. Id. Several members contended they enjoyed the river less, due to Laidlaw's discharge. Id. They no longer partook in activities like fishing, hiking, and picnicking along the North Tyger River. Id. These concerns that prevented FEO members from enjoying the North Tyger River were sufficient to show an injury-in-fact and establish standing. Id. at 185.

CSP's members suffer injuries identical to those in Friends of the Earth. The water in Cloudy Lake contains higher numbers of certain minerals, such as iron and manganese, and a higher concentration of total suspended solids. This gives the Lake's water a cloudy appearance. When Highpeak discharges the Lake into the Stream, the Stream also becomes cloudy. Ex. A. The aesthetic look of the Stream is negatively impacted when Highpeak discharges. This causes CSP's members less enjoyment of Crystal Stream due to the pollution. This is extremely similar

to the scenario that occurred in Friends of the Earth with Laidlaw's discharge. Friends of the Earth, Inc., 528 U.S. at 176-77.

Ms. Cynthia Jones lives approximately 400 yards from Crystal Stream Park, which has a walking trail along the Stream. Ex. A. Ms. Jones states she had regularly walked along the Stream and enjoyed its clear water. Id. However, her ability to enjoy the Stream diminishes when Highpeak's discharge makes the water cloudy. Id. Mr. John Silver, who resides approximately one-half mile from the Park, shares Ms. Jones's sentiment. Ex. B. He would enjoy the Stream more frequently, if not for his concern about the pollution. Ex. B. CSP's members' injuries are the same as the FOE's members' injuries. The United States Supreme Court found such harms sufficient to be an injury-in-fact in Friends of the Earth. Therefore, the District Court was correct to do so here. The ruling that CSP sustained a cognizable injury should be upheld.

2. CSP's injuries are caused by Highpeak's discharge through the tunnel. The water that enters Crystal Stream from the tunnel has higher levels of pollutants, which leads to the cloudiness. This can be redressed by Highpeak obtaining a NPDES permit.

CSP's injury is the environmental and aesthetic damage caused when Crystal Stream is clouded by pollutants. The source of these pollutants is from Highpeak, when it uses the tunnel to discharge water into Crystal Stream. Cloudy Lake contains higher levels of certain minerals, such as iron and manganese, and a much higher concentration of total suspended solids. Water samples support that there's a 2-3% higher concentration of these pollutants in the water discharged into Crystal Stream. For purposes of a motion to dismiss, the Court should treat all these allegations as true. Tyler v. Hennepin Cnty., 598 U.S. 631, 636 (2023). The pollutants are released into the Stream every time Highpeak uses the tunnel. This causes Crystal Stream to look cloudy.

Highpeak does not have a NPDES permit. A NPDES permit would limit the amount of pollutants Highpeak could discharge. Water Transfers Rule, 73 Fed Reg. 33697. Rather, Highpeak is free to discharge water, so long as New Union determines the water levels of Cloudy Lake are adequate. Highpeak's discharge is not currently limited as to the amount of pollutants it's releasing. Thus, Highpeak's discharge of pollutants is wrongfully going unregulated and has caused CPS's injuries.

In Clapper v. Amnesty International USA, the respondents alleged injuries related to possible government surveillance under Section 702 of the Foreign Intelligence Surveillance Act of 1978. Clapper v. Amnesty Int'l USA, 568 US 398, 401 (2013). While determining the respondents had not sustained an actual injury, the Supreme Court also noted the respondents could not show their alleged injury was fairly tracible to the government's surveillance under Section 702. Id. at 411-13. Clapper is the direct opposite of the present case. CSP does have a concrete injury. Further, that injury is fairly tracible to Highpeak's unregulated discharge, as the water samples show. Contra id. As stated, by requiring Highpeak to obtain and follow an NPDES permit, CSP's injury can be redressed by a favorable court decision. Therefore, in addition to meeting the injury requirement, CSP's members have met the causation and redress requirements to establish standing. CSP's members have standing, the issue is germane to CSP's purpose, and no member involvement is required for the remedy. The remedy requires Highpeak to obtain an NPDES permit, which does not require CSP action. Therefore, CSP has standing for the citizen suit and to challenge the WTR.

B. The timing of CSP's formation does not undermine its standing claim.

CSP's formation in December 2023 does not undermine its standing. CPS has all the standing requirements to bring forth the citizen suit and challenge to the WTR. CSP is a

legitimate environmental group whose members are suffering an environmental injury. As noted in the declarations of Ms. Jones and Mr. Silver, these members wish to enjoy Crystal Stream. The pollution from Highpeak's discharge not only upsets them but has caused them to recreate less at the Stream and surrounding park. The timing of CSP's formation does not subtract from the legitimacy of the injury or the present case.

In FDA v. Alliance for Hippocratic Medicine, the Alliance for Hippocratic Medicine ("Alliance") sought to force the FDA to change regulations to make the drug, mifepristone, more difficult to prescribe. FDA v. All. for Hippocratic Med., 602 U.S. 367, 372 (2024). The Alliance was a pro-life association of medical professionals who opposed the use of the pregnancy ending drug, mifepristone. Id. at 375. Their motion for preliminary injunction was initially filed on November 18, 2022, in the Northern District of Texas. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 510 (N.D. Tex. 2023). Notably, the Alliance's claim was filed mere months after the Dobbs v. Jackson decision which overturned Roe v. Wade's abortion protections. Id.; see Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); see also Roe v. Wade, 410 U.S. 113 (1973), rev'd, 597 U.S. 215 (2022).

The association's timing of filing a case so quickly after the Dobbs decision suggests they were eager to take advantage of the overturning of fifty-year old precedent. See generally, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). However, the Court made no mention of the timing of the Alliance's formation. FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024). Rather, the court focused on analyzing the Alliance's standing, specifically if the members were injured. Id. The Court determined the Alliance, nor its members, were not injured, therefore they were not found to have standing. Id. at 378-97.

Here, CSP was injured by the discharge by Highpeak. CSP suffered an environmental injury, which is sufficient for establishing an injury in fact. Further, the cause of the pollution to the Stream is the discharge, caused by Highpeak's use of the tunnel. This is unlike FDA v. Alliance for Hippocratic Medicine, where the petitioners did not suffer a recognizable injury caused by the FDA's actions. Id. at 378-97. The Alliance did not have standing due to their lack of injury, not due to the timing of their formation and subsequent initial filing. Id. The timing of CSP's formation also should not impact their standing.

Further, the Alliance was formed and filed their preliminary injunction *after* the Dobbs decision was released. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 510 (N.D. Tex. 2023); See Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (holding there is no right to an abortion). The new precedent set by Dobbs clearly appeared to support the Alliance's position, certainly more than its predecessor Roe. Roe v. Wade, 410 U.S. 113 (1973), (holding there was an implied right to privacy and therefore right to abortion access), rev'd, 597 U.S. 215 (2022).

In the present case, Highpeak and the EPA argue the timing of CPS's formation and filing of this case was to "take advantage" of new case law. However, Corner Post and Loper Bright decisions were not released until June and July, respectively, over four months after CSP's initial filing. See Corner Post, Inc. v. Bd. of Gov't Fed. of the Rsrv. Sys., 144 S.Ct. 2440, (2024); see also Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024). CSP did not have any definitive way of knowing the Supreme Court's ruling of those cases. In FDA v. Alliance for Hippocratic Medicine, the Supreme Court did not have the need to analyze the timing of the Alliance's formation and case. FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024). This is despite the case beginning mere months after new case law that seemingly

appeared to favor the Alliance's position. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 510 (N.D. Tex. 2023). CSP filed their case before any new, favorable or otherwise, case law was decided.

The Supreme Court focused on whether the Alliance had standing. The Court did not interact with the correlation between the Alliance's formation and case filing, which was just a few months after the Dobbs decision. This is unlike CSP's case, which was filed months before the decisions of Loper Bright and Corner Post were finalized. Therefore, this court should also focus on the well establish standing CPS has. CSP has sustained an environmental injury, which is a sufficient injury to satisfy standing, caused by Highpeak's discharge and the EPA's incorrect promulgation of the WTR.

II. CSP's challenge to the WTR was timely. CSP did not sustain an injury until its formation in December 2023. CSP filed its challenge in December 2023, well within the time requirements.

CSP filed their challenge to the Water Transfer Rule well within the required period. 28 U.S.C. § 2401(a) requires that a challenge be "within six years *after the right of action first accrues*." 28 U.S.C. § 2401(a) (emphasis added). A complaint first accrues when the plaintiff can first bring forth the complaint. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2449 (2024). CSP could not have sustained its injury from the discharge until they were formed on December 1, 2023.

In Corner Post, Inc., the Supreme Court held that in §2401(a) "accrues" refers to when the plaintiff can first bring forth a claim, not when the defendant first takes the action. Id. at 2450. The petitioners, Corner Post, Inc., challenged the Federal Reserve Board's Regulation II, which set a maximum interchange fee on debit card purchases. Id. at 2448. Corner Post, Inc. challenged Regulation II on the grounds it allows higher interchange fees than the related statute

permits. Id. Regulation II was published in 2011. Id. at 2449. Per 28 U.S.C. §2401(a), there was a six-year limitation to challenge Regulation II, which expired in 2017. Id. This was before Corner Post, Inc. opened in 2018. Id. at 2448.

The Supreme Court determined that "accrues" refers to when the *plaintiff* is first injured by an agency's action, not when the agency first acted. Id. at 2451. §2401(a) is a traditional, plaintiff-centric, rule that the "statute of limitations begins to run only when the plaintiff has a complete and present cause of action." Id. at 2452. For Corner Post, Inc., they could not have been injured by Regulation II until they "swiped [their] first debt card." Id. at 2449. In the present case, CSP could not be injured by the EPA's promulgation of the Water Transfer Rule, which allows Highpeak's unchecked discharge, until it was formed in December of 2023. CSP filed its challenge soon after it was injured, also in December of 2023. This is well within the six-year limitation of §2401(a).

In the present, the District Court is correct in determining that there is no meaningful distinction between CSP and Corner Post, Inc. Both could not have been injured until their formation. The Supreme Court was clear that §2401(a) is a plaintiff-centric traditional rule for a statute of limitations. Id. at 2452. The decision was not limited to for-profit entities, nor did it explicitly exclude not-for-profit entities. See generally id. Rather, the Supreme Court stated §2401(a), "respects our 'deep-rooted historic tradition that everyone should have his own day in court'." Id. at 2459 (citing Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

Further, Corner Post, Inc.'s decision has been used in cases involving individual people challenging an agency decision. See Balakirev v. Jaddou, No. 4:23CV3033, 2024 U.S. Dist. LEXIS 120742 (D. Neb. July 10, 2024) (A group of three individuals challenged the United States Citizenship and Immigration Services decision on a visa. The Nebraska District Court

used Corner Post Inc.'s definition of when an injury accrues.). Corner Post, Inc. has been used for for-profit organizations and individual plaintiffs already in its brief time as controlling precedent. Nothing about a not-for-profit status distinguishes CSP from the other two categories to the point that it would be logical to hold them to a different standard. Further, Corner Post, Inc. could also have been formed earlier but the Supreme Court determined that was not a reason to prevent them from bringing their challenge. The same logic applies here to CSP.

It cannot stand to reason that a not-for-profit organization would be held to a different standard. §2401(a) is a traditional, plaintiff-centric, statute of limitation. As such, §2401(a) focuses on when the plaintiff was injured, regardless of who the plaintiff is. CSP was formed in December of 2023, their right of action first accrued that December, and they filed their challenge two months later. Therefore, CSP's challenge is timely under 28 U.S.C.S § 2401(a). There is no logic nor reason CSP's challenge should not be subject to Corner Post Inc.'s holding due to its non-profit status.

III. The WTR is not a validly promulgated regulation as it is inconsistent with the plain meaning, does not align with the statutory structure, and does not fit with the purpose of the CWA.

The district court erred in holding that the WTR was validly promulgated by the EPA. The WTR was not a validly promulgated rule by the EPA because it is a result of the EPA's erroneous interpretation of the CWA. The EPA's interpretation of the CWA violated the Administrative Procedure Act ("APA") because, instead of using independent judgment, courts relied on the EPA when interpreting the CWA. Further, "special justification" exists to revisit prior holdings that found the WTR as validly promulgated under Chevron U.S.A., Inc. v. Natural Resources Defense Council.

Courts should have used the Skidmore standard of review which is a less deferential standard of review that relies upon an agency's "power to persuade" when interpreting statutes. Under the Skidmore standard of review, the EPA's interpretation would have been found to be lacking the power to persuade as it is inconsistent with the plain meaning, statutory structure, and overall purpose of the CWA.

Furthermore, a "special justification" exists to overrule case law that accepts the WTR as a validly promulgated regulation. The factors which constitute the "special justification" include the WTR's lack of quality of reasoning, lack of the rule's workability, and the lack of reliance on prior decisions. As a result, the EPA's interpretation, and subsequent promulgation of the WTR should no longer be valid and should be rejected.

A. The EPA's interpretation of the CWA should not be relied upon as it directly conflicts with the APA.

The APA was violated when deference was given to the EPA's interpretation of the CWA. The APA was enacted to govern the roles and procedures of federal agencies to ensure fairness and accountability for agency actions. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2261 (2024). The APA requires, "the reviewing court," to decide "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Chevron, or high deferential standard of review, used by courts to rely on the EPA's interpretation of the CWA directly conflicts with the APA's purpose by having the agencies, rather than the courts interpret Congress' statute. Loper Bright, 144 S. Ct. at 2263.

The Chevron standard of review included a two-step process in which the second step relies heavily on the agency's statutory interpretation. Id. at 2265. This unchecked power Chevron gave to the agencies blatantly defied the APA by allowing federal agencies to interpret

statutes with very little interference from the courts. Id. The Chevron standard was used to support the WTR as a validly promulgated regulation, prior to the Supreme Court's decision in Loper Bright.

For example, in Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA ("*Catskill III*"), the courts did not rely on independent judgment, as required of the APA, but rather turned to the EPA to interpret what the agency referred to as ambiguity in the CWA. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 507 (2d Cir. 2017). The EPA argued the CWA was ambiguous when it came to water transfers and whether or not these occurrences required a NPDES permit. Id. Specifically, the EPA stated the CWA's statutory phrase, "addition ...to navigable waters" was ambiguous because it could refer to "to *a* navigable water," "to *any* navigable water," or "*all* the qualifying navigable waters." Id. at 510-11. The EPA coined this theory the "unitary waters" approach which views "*all* the qualifying navigable waters" as "a single, 'unitary' entity." Id. (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 96 (2004)). As the EPA explains, even if the transferred water contains pollutants an NPDES permit is not required because this would not be considered an "addition" to "the waters of the United States" as the pollutants are not being "introduced from outside the waters being transferred." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33701 (June 13, 2008).

This theory is full of weaknesses including its reasonableness. The EPA is inconsistent with interpreting the terms "addition" and "the waters of the United States". It interprets these terms differently throughout the statute and the interpretations conflict with the CWA's purpose. Despite these weaknesses, however, courts have erroneously deferred to EPA's interpretation, instead of using independent judgment as required by the APA.

B. Under the less deferential *Skidmore* standard, the WTR is not a properly promulgated regulation.

Consistent with the APA, courts may seek guidance from federal agencies to use their "body of experience and informed judgment" when interpreting statutes. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Unlike the Chevron standard, courts do not need to delegate ultimate statutory interpretation to agencies in order to ensure their expertise is taken into consideration. Loper Bright, 144 S. Ct. at 2247. Rather, courts shall perform their duty of interpreting statutes but can include agency views into consideration amongst other factors while making their independent judgment. Id. The weight in which courts should give to agency guidance depends on a number of factors including, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

Under the Skidmore standard of review, courts have properly held a water transfer does constitute a discharge of pollutants and does require a NPDES permit under the CWA. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001) *("Catskill I").* These findings are predicated on the "power to persuade" factor in which the EPA falls short. The EPA's promulgation of the WTR is not persuasive because it is inconsistent with the plain meaning, statutory structure, and purpose of the CWA.

1. The WTR is inconsistent with the plain meaning of the terms in the CWA.

The plain meaning of the words "addition" and "nations of water" in the Clean Water Act are clear and unambiguous. This supports the notion that Congress did not intend for water transfers to have an exemption from requiring a permit. Catskill Mountains Chapter of Trout Unlimited, Inc., 846 F.3d at 534 (Chin, J., dissenting). Unless otherwise defined, words in

statutory construction should be interpreted as their common, ordinary meaning. Burns v. Alcala, 420 U.S. 575, 580 (1975).

For example, the Supreme Court examined the undefined word, “bribery”, in regard to the Federal Travel Act and concluded when terms are undefined, they should be interpreted based on the evolution of their common law definition in addition to the statutes purpose. Perrin v. United States, 444 U.S. 37, 45 (1979). When examining the common use of the term “bribery” at the time the statute was passed, it included “individuals acting in a private capacity.” Id. This definition was in turn used by the court to help interpret Congress’ intention when enacting the statute. Id.

Turning to the Clean Water Act, the CWA prohibits “any addition of any pollutant to navigable waters from any point source[.]” 33 U.S.C. § 1362(12)(A). Although the word “addition” is not clearly defined in the statute, the ordinary meaning of the word around the time the statute was enacted was defined as “the result of adding: anything added: increase, augmentation” and “a joining of a thing to another thing.” *Addition*, Webster’s Third New International Dictionary of the English Language Unabridged (1968); see also *Addition*, Webster’s New World Dictionary of the American Language (2d College ed. 1970 and 1972).

Therefore, water from Cloudy Lake containing pollutants that is transferring these pollutants to a second water body, Crystal Stream, is adding the number of pollutants to this new body of water. In this context, the increase in the number of pollutants in Crystal Stream can be understood as an “addition” under the plain meaning and thus a discharge that requires an NPDES permit.

2. The WTR does not align with the statutory structure of the CWA.

Moreover, when analyzing the context and structure of the CWA, Congress' intention was not to exempt water transfers from requiring a permit. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 534 (2d Cir. 2017) (Chin, J., dissenting). In addition to looking to the plain language of the words in a statute, the interpretation should also include "the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

In Wisconsin Central Ltd. v. United States, the Supreme Court examined the term "money remuneration" under the Railroad Retirement Tax Act (RRTA). Wisconsin Cent. Ltd v. United States, 585 U.S. 274, 277 (2018). The Court looked at the two words separately, reviewing their ordinary dictionary definition, and then looked at the two words together in the broader statutory context to determine the interpretation of the statute. Id. at 278.

In the present case, the term "to navigable waters" is defined in the CWA as "waters of the United States." 33 U.S.C. § 1362. "Navigable waters" is referenced in numerous provisions of the statute as individual water bodies rather than a collective whole. 33 U.S.C. §§ 1313-1314; § 1342. Reading the statute under the "unitary water" theory, where the movement of pollutants from one water source through a conveyance increasing the volume of pollutants into another distinct water source as not constituting an "addition" is unreasonable when compared to the broader context of the statute. Catskill Mountains Chapter of Trout Unlimited, Inc., 846 F.3d at 534 (Chin, J., dissenting).

Provided the plain meaning of the term "addition" and the understanding that "navigable waters" refers to individual bodies of water, the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.

3. The WTR does not fit with the purpose of the CWA.

The Water Transfer Rule is not a properly promulgated regulation because it contradicts the purpose of the CWA. A regulation is "valid, so long as [it] is 'reasonably related to the purposes of the enabling legislation.'" Graham Eng'g Corp. v. United States, 510 F.3d 1385, 1389 (2007) (citing Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973)). The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the "discharge of any pollutant by any person" from "any point source" to "navigable waters" of the United States, without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). The Water Transfer Rule undermines the NPDES permit program and directly interferes with the purpose of the CWA, as it does not require discharges from a water transfer to require a permit. 40 C.F.R. 122.3(i) (2023). The Rule defines water transfer as "an activity that conveys or connects waters of the United States." Id.

In Utility Air Regulatory Group v. EPA, the Supreme Court ruled an EPA's interpretation of the Clean Air Act (CAA) was not permissible when the interpretation conflicted with the CAA's purpose. Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 319 (2014). In this case, the EPA attempted to apply certain permitting requirements to greenhouse gas emissions. The Court rejected the EPA's interpretation and held it was an overreach of the agency, as it conflicted with the CAA's intended scope which did not allow permits to be required for smaller entities. Id. at 334.

Similarly in *Catskill I*, prior to the WTR being promulgated, the courts found the EPA's water transfer theory unpersuasive because it was not in accordance with the CWA's purpose. The court stated transferring water pollutants, whether artificially or naturally, might interfere

with the statute's purpose of maintaining integrity. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001). Although the EPA has since promulgated their interpretation in the WTR, the substance of their interpretation has not changed since *Catskill I*. As a result, the conclusion from *Catskill I* and similarly decided cases, remains accurate that the EPA's interpretation that water transfers between distinct water does not require a permit should be rejected even after the agency has promulgated their theory in the WTR. Id.

C. A special justification exists to review prior rulings on the EPA's interpretation of the CWA.

The EPA's prior interpretation and subsequent promulgation of the WTR should be rejected, as it is no longer due judicial deference under the Supreme Court's Loper Bright ruling. Id. However, a precedent cannot be overturned because of an argument that it was wrongly decided, there must be some special justification that exists. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014). Traditionally, when determining whether a "special justification" exists, the following factors are considered, "the quality of the [precedent's] reasoning, the workability of the rule it established, the consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 917 (2018).

1. *Prior rulings lack quality in their reasoning to defer to the EPA's interpretation of the CWA.*

The courts lacked valid reasoning in *Catskill III* to defer to the EPA's interpretation of the CWA. When determining whether to overrule a precedent, the quality of its reasoning is an important factor to consider. Janus, 585 U.S. at 917.

In the recent Supreme Court ruling of Dobbs v. Jackson, the court argued the prior cases "stood on exceptionally weak grounds" as they "failed to ground its decision in text, history, or precedent." Dobbs, 597 U.S. at 269-70. Similar to Dobbs, the prior decision from courts validating the WTR relies on erroneous reading of statutory text, inaccurate historical information, and improper reliance on precedent.

Catskill III's finding justifying the EPA's "unitary waters" theory is plainly erroneous considering the text in the CWA. Catskill Mountains Chapter of Trout Unlimited, Inc., 846 F.3d at 534 (Chin, J., dissenting). Cases prior to *Catskill III*, including *Catskill I* and *II* have repeatedly mentioned the CWA's plain meaning is unambiguous and the "unitary waters theory" is inconsistent with this plain meaning. Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 491; Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York ("*Catskills II*"), 451 F. 3d 77, 83 (2d Cir. 2006).

Secondly, *Catskill III* incorrectly relied on prior precedents, like Friends of Everglades, to support the theory. "In ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or can refer to any one body of water such as 'the waters of Mobile Bay.'" Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1223 (11th Cir. 2009). This reliance is misguided as these decisions were reciprocated on the EPA's deference under the inaccurate Chevron standard.

Lastly, the legislative history upon which *Catskill III* supports the EPA's reasoning is erroneous. The EPA justifies the WTR, contending it aligns with the Act's legislative history. The EPA references the House Committee Report indicating the Committee believes a State with an approved permit handling program should have primary responsibility to provide balanced management for both point source and non-point source allocations. Water Transfers Rule, 73

Fed. Reg. 33697. The CWA does provide the states the responsibility for establishing the water quality standards, however, the overall intent with the 1972 CWA Amendments was to, "establish a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511.

In conclusion, the erroneous reading of statutory text, inaccurate historical information, and improper reliance on precedent diminishes the quality of the court's reasoning in *Catskill III* to defer to the EPA's interpretation of the CWA.

2. The EPA's interpretation of the CWA is unworkable.

The lack of workability of the EPA's interpretation of the CWA should be a factor considered in overruling precedent. "[A] relevant consideration in the *stare decisis* calculus is the workability of the precedent in question[.]" Janus, 585 U.S. at 921. The Supreme Court recently overruled Abood v. Detroit Board of Education indicating among other reasons that Abood was unworkable. Janus, 585 U.S. at 881.

Abood v. Detroit Board of Education was a case where non-union members were disputing union fees they were being charged. Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977). The court explained the rule established in Abood was unworkable as it made it impossible to differentiate union expenses for non-union members. Janus, 585 U.S. at 881. Loper Bright is another example of when an unworkable rule factored into precedent being overturned. Loper Bright Enterprises, 144 S. Ct. at 2270 (2024). The first step in *Chevron* was noted as unworkable as it rests on identifying whether a statute is ambiguous, which is highly subjective and prone to inconsistency. Loper Bright Enterprises, 144 S. Ct. at 2270 (2024).

Similarly, the EPA's interpretation of the CWA that "'addition' of a pollutant under the Act occurs only 'when pollutants are introduced from outside the waters being transferred'" is

unworkable. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 505 (2d Cir. 2017) (citing 73 Fed. Reg. 33,697 at 33,701). This interpretation draws with it confusion, as courts questioned how "dredged mater" would be categorized. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 924 (5th Cir. 1983). In response, the EPA interpreted the word "addition" differently in different sections of each provision of the CWA. Different interpretations of the same word with different meanings are confusing and contribute to the unworkability of the EPA's rule and also the overruling of the promulgation of the WTR.

3. Reliance on prior decisions to uphold the WTR should not prevent overruling the EPA's interpretation of the CWA.

Prior decisions reliance on the WTR should not prevent the overruling of *Catskill III*. Beyond workability, the reliance interests at stake should be a relevant factor when overruling precedent. Pearson v. Callahan, 555 U.S. 223, 234-35 (2009).

For example, in Janus, the Court did not think reliance on the former rule carried prominent weight. Janus, 585 U.S. at 881. The reasoning was the uncertainty of the prior rule was known, especially because the prior rulings lack of workability, special characteristics, in addition to unions having their own ability to protect themselves outside of the Abood ruling. Id.

Likewise, Chevron was found not to have reasonable reliance due to its "constant tinkering." Loper Bright Enterprises, 144 S. Ct. at 2270 (2024). Courts argue the back-and-forth decisions on whether or not to honor the Chevron standard makes it unlikely anyone reasonably relied on Chevron. Id. They further made the point that Chevron destroyed reliance interests because it allowed agencies to overstep their power and make decisions outside agencies reach. Id.

Similarly, it is unlikely anyone has reasonably relied on the EPA's interpretation of the CWA, considering the topic of water transfers being exempt from permitting requirements has

been extensively litigated even prior to the WTR's promulgation. The uncertainty of the WTR's validity is known considering prior case law that rejected the EPA's interpretation including, Dubois v. U.S. Dept. of Agriculture, et al., 102 F.3d 1273, 1296-99 (1st Cir. 1996); *Catskill I*; *Catskill II*; Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1367-69 (11th Cir. 2002), vacated by S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians, et al., 541 U.S. 95, 112 (2004).

Additionally, the EPA has made the argument that several US cities depend on water transfers to meet their demand for their citizens. Water Transfers Rule, 73 Fed. Reg. 33697. Although "economic, regulatory, or social disruption" carry more weight in regard to reliance interest, this should not prevent the overruling of the WTR promulgation. Ramos v. Louisiana, 590 U.S. 83, 84-85 (2020). The CWA does not prevent water transfers from occurring, rather it simply requires a permit to be acquired for the act. The permitting process has been indicated not to be onerous and one that has flexibility. Nw. Env't Advocs. v. EPA, 537 F.3d 1006, 1010 (9th Cir. 2008).

In conclusion, there is "special justification" to overrule case law that accepts the WTR as a validly promulgated regulation. The factors which constitute the "special justification" include the overwhelming evidence of the WTR's lack of quality of reasoning, the lack of the regulation's workability, and the lack of reliance on prior decisions.

IV. Highpeak must obtain a permit for its discharges under the CWA.

Highpeak requires a permit for its discharges into Crystal Stream whether or not the WTR is upheld. It remains CSP's position that the WTR is not a validly promulgated regulation for the reasons above. However, even if this court determines the WTR is validly promulgated, Highpeak is required to obtain a permit under the CWA. The WTR "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). Since the discharge from Highpeak's tunnel contains higher concentrations of pollutants, they are "introduced" by the water transfer activity itself. These pollutants would not be exempt from permitting under the WTR.

The WTR is very clear in the text, structure, history, and purpose of the WTR that pollutants being introduced by the "water transfer activity" itself are not included in the exemption of the rule and would require a permit. Alternatively, if the WTR is found to be ambiguous, the Auer deference should apply to the EPA's interpretation, as the interpretation is reasonable, was made by the agency itself, the EPA has the expertise necessary to be interpreting this regulation, and the interpretation is "fair and considered judgement."

A. The EPA's interpretation of its own regulation is entitled respect.

The EPA indicates Highpeak discharges are not exempt under the WTR and require a NPDES permit. "An agency's interpretation of its own regulation has long been entitled to a high level of respect. The EPAs interpretation of its own regulation should be given respect. When "the meaning of [a regulation] is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Auer v. Robbins, 519 U.S. 452, 461 (1997).

The WTR is not genuinely ambiguous. The plain meaning of the regulations text should apply. The text, structure, history, and purpose of the WTR makes it clear that pollutants being introduced by "water transfer activity" are not included in scope under the WTR. 40 C.F.R. 122.3(i) (2023). A genuinely ambiguous regulation is one that has exhausted all "'traditional tools' of construction." Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). This includes careful consideration of "the text, structure, history, and

purpose of a regulation." Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991). If a regulation is not genuinely ambiguous, then the "regulation then just means what it means—and the court must give it effect, as the court would any law." Kisor v. Wilkie, 588 U.S. 558, 561 (2019).

The plain text of the WTR makes it clear that pollutants being added from Highpeak's tunnel into Crystal Stream would require an NPDES permit. As the EPA stated in the final rule of the WTR, "[w]ater transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." Water Transfers Rule, 73 Fed Reg. at 33705. Water transfers are defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Waters of the United States is defined in the regulation and includes "interstate waters" such as rivers, lakes, streams, etc. 40 C.F.R. § 122.3(i).

Furthermore, the history and purpose of the WTR support a finding that discharges from the "water transfer activity itself" does require a NPDES permit. The EPA finalized the WTR in 2008 with the purpose "to clarify that water transfers are not subject to regulation under the NPDES permitting program." Water Transfers Rule, 73 Fed Reg. 33697. The rule was promulgated in part because the EPA recognized that various entities, including federal, state, and local agencies, administer water transfers on a routine basis. The rule was created to help limit the regulatory burden for these entities and make the water transfer process more efficient for purposes including "providing public water supply, irrigation, power generation, flood control, and environmental restoration." Id.

The plain meaning, purpose, and history of the WTR leaves little room for ambiguity. The courts have made it clear "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." Kisor, 588 U.S. at 575. As a result, under the WTR Highpeak's discharge into Crystal Stream would require an NPDES permit, as the tunnel itself is the cause of the additional pollutants entering the stream.

B. The EPA's interpretation of the WTR should stand as the regulation is not ambiguous and the interpretation is reasonable and consistent with the WTR.

There should not be any ambiguity in how the WTR is read. However, if the Court should find "more than one reasonable reading" to apply to the WTR, then the EPA's interpretation still should prevail, as it is reasonable and consistent with the rule. Id. at 569. When a rule is found to be "genuinely ambiguous", the courts may in very specific circumstances apply the Auer deference, giving the agency significant respect in their interpretation of a regulation. Id. This is significantly different from the Chevron standard of review that was recently overturned, as the Auer deference is specific to agencies interpreting the rules in which they themselves have created. Id.

Recently, the Supreme Court upheld the Auer standard of review and elaborately explained when this level of deference is and is not appropriate. Id. In order for the agencies interpretation to prevail under the Auer standard, it must remain "within the bounds of reasonable interpretation." Arlington v. FCC, 569 U.S. 290, 296 (2013). This includes that the reasoning "come within the zone of ambiguity" and aligns with the text, structure, and history of the regulation. Kisor, 588 U.S. at 576. As previously explained, the EPA's interpretation of the WTR does align with the text, structure, and history of this rule.

Next, when determining if the Auer standard should apply, a court must determine if the interpretation was actually made by the agency as an "official position" and not just an "ad hoc

statement." United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting). Then, the agency's knowledge and expertise are to be analyzed to ensure the subject matter at hand falls within the scope of the interpreting agency. Arlington, 569 U.S. at 309 (2013). Finally, a court must confirm an agency's interpretation is "fair and considered judgment" for the Auer standard to apply. Auer v. Robbins, 519 U.S. 452, 462 (1997).

If the WTR is found to be ambiguous, the Auer deference should apply to the EPA's interpretation as it is reasonable, was made by the agency itself, the EPA has the expertise necessary to be interpreting the WTR, and the interpretation is "fair and considered judgement." Id. Courts have primarily looked to agencies to provide clarity to rules which they have written under the presumption Congress gave them this authority, when they were provided with rulemaking power. Kisor 588 U.S. at 570. Therefore, Highpeak must obtain a permit under the CWA because their poor construction of the tunnel that connects Cloudy Lake to Crystal Stream has introduced, and continues to introduce, pollutants to the stream outside the WTR exclusion.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's determination CSP has standing and timely filed this case. This Court should also affirm the District Court's decision that the pollutants introduced by Highpeak's discharge are subject to permitting under the Clean Water Act. Additionally, this Court should reverse the District Court's decision and hold that the Water Transfer Rule was not a valid regulation promulgated under the Clean Water Act.