Team 43

C.A. No. 24-CV-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 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 Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered judgement in case No. 24-CV-5678 on August 1, 2024. The district court had jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action) and 28 U.S.C. § 1331 (federal question). Crystal Stream Preservationists, Inc. (CSP), the United States Environmental Protection Agency (EPA) and Highpeak Tubes, Inc. (Highpeak), all filed timely motions seeking leave to appeal aspects of the district court's order pursuant to Fed. R. App. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292, which provides appellate courts with jurisdiction over interlocutory orders of district courts. Additionally, the district court indicated there are controlling questions of law where there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the litigation's ultimate termination. In light of this determination, this Court granted leave to appeal pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF ISSUES PRESENTED

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

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

III. Did the district court err in holding that the EPA validly promulgated the Water Transfers Rule because additions of pollutants are not regulated under the Clean Water Act?

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

STATEMENT OF THE CASE

A. CWA NPDES Overview

Congress enacted the current version of the Clean Water Act (CWA) in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act § 101(a), 33 U.S.C. § 1251(a). The CWA provides funding to municipalities and states to build sewage treatment facilities and provides a basic prohibition on discharging pollutants into U.S. waters. Id. §§ 1281, 1311. The CWA establishes two permitting programs: the § 404 "dredge and fill" permit program and the § 402 National Pollutant Discharge Elimination System (NPDES) permit program. See id. §§ 1344, 1311.

The federal government or any state with requisite EPA permitting authority can administer the NPDES permit program. Id. § 1342(b). Regardless, the requirements of an NPDES permit are the same. An NPDES permit will not be granted unless the permittee can ensure that the discharge will meet the CWA's substantive standards and requirements. Id. § 1342(a)(1). These requirements impose technology- and water-quality based effluent limitations on a permitee's discharge and new point sources. Id. §§ 1311, 1312, 1316. NPDES permittees must also comply with monitoring, reporting, and inspection standards. See id. § 1318(a)(4)(A). Noncompliance with an NPDES permit constitutes a violation of the CWA. Id. § 1342(h). Violations are punishable by fines or imprisonment. Id. § 1319(c).

B. Water Transfers Rule Overview

The Water Transfers Rule (WTR) is part of a broader regulation of activities exempt from NPDES permitting requirements under the CWA and states that "[d]ischarges from a water transfer" do not require a NPDES permit. 40 C.F.R. 122.3(i) (2024). The WTR further defines water transfers as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." Id. One important exception excludes "pollutants introduced by the water transfer activity itself to the water being transferred." Id. So, if a water transfer activity *itself* introduces pollutants to the water, the WTR is not applicable and the water transfer requires an NPDES permit.

The EPA promulgated the WTR in response to the Supreme Court case South Florida Water Management. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 98 (2004), in which the Court held that a NPDES permit is not required when two waters are not "meaningfully distinct," but declined to determine whether water transfers between two meaningfully distinct waterbodies require them. See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule 73 Fed. Reg. 33,697, 33,699 (June 13, 2008) (codified at 40 C.F.R. 122.3(i)) (discussing Miccosukee and its impact on the EPA's rulemaking). Following Miccosukee, the EPA issued an interpretive memorandum discussing the applicability of permitting requirements to water transfers. Env't Prot. Agency, Agency Interpretation On Applicability of Section 402 of the Clean Water Act To Water Transfers, 2005 WL 6523663. In this memorandum, the EPA General Counsel concluded that "Congress did not intend for water transfers to be regulated under section 402." Id. at *3. In the final rule, the EPA codified this understanding but excluded water transfers that introduced pollutants to new waters. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,699–33,700.

C. Facts of the Case

This controversy involves the relationship between two distinct bodies of water. Crystal Stream is a pristine, unpolluted river which rises from groundwater springs and flows through the state of New Union. R. at 4–5. Cloudy Lake is an alpine lake situated in the Awandack Mountains. R. at 4. Because of natural ecological conditions, Cloudy Lake harbors heightened levels of iron, manganese, and total suspended solids. R. at 5. Cloudy Lake and Crystal Stream are hydrologically distinct waters; their waters do not naturally commingle. R. at 4.

Highpeak owns and operates a recreational tubing facility on the Crystal Stream in Rexville, New Union. R. at 3. In 1992, it obtained permission from the state of New Union and constructed a tunnel connecting Crystal Stream to Cloudy Lake. R. at 4. The tunnel is partially carved through rock and partially constructed of iron pipe. R. at 4. It has valves on either end to allow Highpeak employees to regulate the water flow from Cloudy Lake to Crystal Stream. R. at 4. Highpeak has operated the tunnel since 1992, but has never sought or obtained an NPDES permit from the EPA. R. at 4.

In 2023, 13 Rexville residents, concerned about the increased pollution in the Crystal Stream, formed CSP for the purpose of preserving the stream in its natural state. R. at 4. Two of the members own land along the Crystal Stream. In December 2023, CSP gathered data and affidavits to support their claims against Highpeak and the EPA. The data that CSP gathered indicate heightened concentrations of iron, manganese, and total suspended solids at the outflow of Highpeak's tunnel. R. at 5. The affidavits include declarations from two members of CSP: Cynthia Jones and Jonathan Silver. R. at 14–17. In their affidavits, Ms. Jones and Mr. Silver each aver that they use the Crystal Stream for recreational purposes, and that the discharge from Highpeak's tunnel has negatively impacted their enjoyment of the area. R. at 14–17.

D. Procedural History

On December 15, 2023, CSP sent a CWA notice of intent to sue (NOIS) letter to Highpeak and provided copies to the New Union Department of Environmental Quality and the EPA pursuant to the CWA. R. at 4. Two days later, Highpeak replied to the letter and stated that it did not need to respond to the NOIS on the merits. R. at 5. After the required 60 days, CSP filed a complaint reiterating the allegations from the NOIS. R. at 5.

The complaint included a citizen suit claim reiterating the NOIS allegations against Highpeak. R. at 5. It further challenged the validity of the WTR under the Administrative Procedure Act (APA), arguing that the rule was inconsistent with the CWA's statutory language. R. at 5. CSP additionally argued that, even if the WTR was validly promulgated, Highpeak's water transfer activity requires a permit under the NPDES permitting system because it introduced pollutants into the water. R. at 5.

Highpeak moved to dismiss the complaint for lack of standing, lack of action, failure to state a cause of action, and as time-barred. R. at 5. The EPA also moved to dismiss CSP's challenge to the WTR and joined Highpeak's challenge to CSP's standing and timeliness. R. at 6. However, the EPA joined CSP in its argument that Highpeak is required to obtain an NPDES permit for the pollutants introduced to the water by Highpeak. R. at 6.

After fully briefing the motions in April 2024 and at the urging of CSP, the district court declined to rule on the motions because two cases were pending before the U.S. Supreme Court which could have provided additional legal foundation for CSP's claims. R. at 6. Those cases, Loper Bright and Corner Post, were decided in the previous Supreme Court term. See Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024); Corner Post, Inc. v. Board of Governors of Federal Reserve System, 144 S. Ct. 2240 (2024).

Following the U.D. Supreme Court's decisions on those cases, the District Court made the following determinations:

1. CSP has standing to challenge a regulation (NPDES Water Transfers Rule; 40 C.F.R. 122.3(i) (2023)) promulgated by EPA and had standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the Clean Water Act;
2. CSP's regulatory challenge was timely filed;
3. The Water Transfers Rule was not arbitrary, capricious, or contrary to law; and
4. CSP's citizen suit against Highpeak could proceed, as Highpeak's discharges introduce additional pollutants into Crystal Stream during the water transfer, thus taking the discharge out of the scope of the Water Transfers Rule.

R. at 2. Highpeak appeals the first, second, and fourth holdings; the EPA appeals the first and second holdings; and CSP appeals the third holding. R. at 2.

SUMMARY OF THE ARGUMENT

First, CSP argues that the district court correctly held that it has standing to bring claims against Highpeak and the EPA. CSP has adequately demonstrated the three elements of Article III standing for each of their claims: injury, causation, and redressability. See U.S. Const. art. III, § 2.

The first element is satisfied because CSP has documented an injury. An environmental plaintiff may adequately allege injury in fact when a challenged activity lessens the aesthetic and recreational values of an area that the plaintiff uses. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 183 (2000). CSP's affidavits have shown that Highpeak's discharge lessens the aesthetic and recreational value of the Crystal Stream. CSP's injury fits squarely within the rule announced by the Supreme Court in Laidlaw. Id.

The second element is satisfied because CSP has documented that Highpeak and the EPA caused their injuries. Highpeak caused CSP's injuries by constructing and operating the tunnel, which discharges pollutants into the Crystal Stream. R. at 4–5. If not for Highpeak's construction and continued operation of the tunnel, the additional pollutants from the tunnel would not be

present in Crystal Stream. CSP's injuries are therefore directly traceable to Highpeak's conduct. The EPA caused CSP's injuries by promulgating the WTR. Highpeak discharges pollutants without a permit because of their belief that the WTR exempts their discharge. R. at 5. When a plaintiff challenges the government's promulgation of a rule, a but-for connection between the rule and the harmful activity will satisfy the causation element of Article III standing. Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 74–75 (1978). The EPA's promulgation of the WTR creates a but-for causal relationship between Highpeak's discharge and CSP's injury: but-for the WTR, Highpeak would not discharge pollutants into the Crystal Stream without a permit. R. at 5. This relationship establishes causation under the rule articulated in Duke Power Co., 438 U.S. at 74–75.

The third element is satisfied because CSP has shown redressability. A favorable decision would require Highpeak to comply with the NPDES permitting program. R. at 4–5. Compliance with an NPDES permit would require Highpeak to set effluent limitations and water quality standards. 33 U.S.C. § 1342(a)(1). Effluent limitations regulate the concentrations of chemical constituents from a point source discharge. Id. §1311. Water quality standards further restrict the discharge of pollutants into a waterbody. See id. §§ 1312, 1313. Here, an NPDES permit would therefore have the effect of reducing the amount of iron, manganese and total suspended solids that Highpeak could discharge into Crystal Stream. A reduction in pollutants discharged, effected through the NPDES permitting program, would abate the injuries suffered by CSP. Because CSP has shown injury, causation, and redressibility, they have established Article III standing.

Next, CSP argues that the district court did not err in holding that CSP had standing to challenge Highpeak's discharge and the WTR because CSP filed the challenge within six years "after the right of action *first accrues*" as required by the APA. 28 U.S.C. § 2401(a) (emphasis

added). Because CSP did not exist until December 13, 2021, and thus could not have suffered injury until that date, CSP is well within the six year statute of limitations period to bring this action. This is further supported by the U.S. Supreme Court's ruling in Corner Post, in which the court held that an organization was not barred by the APA from bringing a challenge to a regulation that had been promulgated more than six years ago because the organization filed the challenged within six years of injury. Corner Post, Inc. v. Board of Governors of Federal Reserve System, 144 S. Ct. 2240 (2024).

Third, CSP argues that the district court erred in holding that the EPA validly promulgated the WTR. The EPA invalidly promulgated the WTR for two reasons: first, the CWA's text indicates that Congress did not intend to exclude water transfers from the regulatory scheme. Second, if the court finds this statute to be ambiguous, the court should still find the EPA invalidly promulgated the WTR under the standard for reviewing agency interpretations articulated in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The first reason why the EPA invalidly promulgated the WTR is because it goes against the CWA's plain meaning. The CWA precludes "the discharge of *any* pollutant by *any* person" which includes water transfers for four reasons. 33 U.S.C. § 1311(a) (emphasis added). The statute defines "discharge of a pollutant" as "addition of any pollutant to navigable waters from any point source." Id. § 1362(12). The WTR violates the plain meaning of this phrase for four reasons, described below.

The first reason the WTR violates the CWA's plain meaning is because "waters" denotes that the CWA regulates individual water bodies. The Clean Water Act's use of "the waters" grammatically suggests that "waters" refers to water in specific geographic features and within a specific waterbody, which the U.S. Supreme Court has recognized. See Catskill Mountains

Chapter of Trout Unlimited, Inc. v. Env't. Prot. Agency, 846 F.3d 492, 527 (2d Cir. 2017) (Chin, J., dissenting) (Catskill III). The EPA has promulgated other regulations using this interpretation too. Since statutes and rules must be read consistently with each other, this Court should find that the EPA invalidly promulgated the WTR because the WTR assumes that "waters" refers to water as a collective entity, not individual water bodies as the plain meaning suggests. As a result, water transfers add pollutants to navigable waters.

Second, the plain meaning of "addition" includes water transfers. The ordinary definition of "addition" is "the act of adding a substance or thing to something else." Addition, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/addition (last visited Nov.11, 2024). This means that an addition is adding water into a water body from the outside world. Case law previous to the WTR's promulgation has followed this interpretation when parties transfer water between two water bodies. See Maui v. Haw. Wildlife Fund, 590 U.S. 165, 187 (2020); Dubois v. U.S. Dept. of Agric., 102 F.3d 1273, 1277–1279 (1996); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 484 (2nd Cir. 2001) (Catskill I); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. at 112. Highpeak is adding a pollutant as contemplated in these cases because their tunnel adds pollutants to Crystal Stream and the water from Cloudy Lake is already polluted. R. at 5.

Third, the U.S. Supreme Court holds that exceptions cannot be read into a statute when exceptions are expressly enumerated. E.g. N.L.R.B. v. SW Gen., Inc., 580 U.S. 288, 302 (2017). The CWA exempts irrigation runoff, stormwater runoff, and dredged and fill materials from the NPDES program. 33 U.S.C. § 1342(l)(1–2) (irrigation and stormwater runoff); 33 U.S.C. § 1344(a) (dredge and fill) This does not include water transfers, so the EPA lacked authority to read an exception into the law.

Fourth, excluding water transfers prevents states from fulfilling their obligations under the CWA and thus frustrates its cooperative federalism design. States are legally obligated to continually plan and make rules governing both water quality and quantity. The EPA cannot read the rest of the statute to abrogate this goal. Jeffrey G Miller, Plain Meaning, Precedent, And Metaphysics: Interpreting The "Addition" Element Of The Clean Water Act Offense, 44 Env't L. Rep. 10770, 10787 (2014).

If the Court finds that the CWA is ambiguous, the court should apply Skidmore to reject the EPA's interpretation of the CWA. Loper Bright, 144 S. Ct. at 2262. Under the Skidmore standard, an "[a]gency's interpretation of ambiguous statutory language is entitled to respect based on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

While previous cases have upheld the WTR, the courts in these cases were applying Chevron doctrine which instructed the courts to defer to the agency's interpretations. See Chevron, U.S.A., Inc. Natural Resources Defense Council Inc., 467 U.S. 837 (1984); see Catskill III; Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009). However, the U.S. Supreme Court instructed courts to revisit prior Chevron decisions using Skidmore if there is special justification to do so. Loper Bright, 144 S. Ct. at 2262 (2024). When deciding to revisit precedent, the Supreme Court examines "the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision." Ramos v Louisiana, 590 U.S. 83, 106 (2020). Here, special justification exists to revisit the WTR rulings. The EPA's stance that the CWA excludes water transfers only found success after it promulgated the WTR, which triggered Chevron. This shows

inconsistency across the law and a poor quality of reasoning. Further, drought and climate change effects of climate change have decreased reliance on the old rule. States and water users are changing their water transfer practices as a result, which calls for reexamination of old rules.

Under the Skidmore test, all factors weigh in CSP's favor. Case law recognizes that CSP's interpretation is strong, thorough, and consistent. Even cases upholding the WTR under Chevron have questioned the EPA's interpretation and reiterated that the reasoning of the WTR is poor but upheld the WTR because *Chevron* dictated it. See Catskill III, 846 F.3d at 527 (2d Cir. 2017) (Chin, J., dissenting). So, Skidmore weighs in favor of CSP.

However, if this Court finds that the WTR was properly promulgated, it should find that Highpeak's water transfer is not protected by the WTR and must comply with NPDES requirements. Both CSP and the EPA agree that the WTR clearly does not apply to Highpeak's water transfer activity because it introduces pollutants into the water through the transfer activity itself. This interpretation is consistent with the "text, structure, history, and purpose" of the WTR and thus is unambiguously and should be given deference. Kisor v. Wilkie, 588 U.S. 558, 575 (2019); See 40 C.F.R. 122.3(i) (2024). However, if this Court does find ambiguity in the rule, it should still give the EPA Auer deference because its interpretation is not "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 454 (1997); Kisor, 588 U.S. at 575.

STANDARD OF REVIEW

The standard of review for questions of standing is de novo. E.g. Trustees of Upstate N.Y. Engineers Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566–567 (2nd Cir. 2016). This standard applies to questions of standing where the court only considered the allegations made and the facts of the case. Id. Federal courts will review questions of statute of limitations under

28 U.S.C. § 2401(a) as de novo. E.g., Barnes v United States, 776 F.3d 1134, 1139 (10th Cir. 2015). Federal courts decide legal challenges regarding the promulgation of agency rules under the Administrative Procedure Act (APA) when the agency action is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedures Act § 706; 5 USC § 706(2)(A); e.g., Ohio v. Env't Prot. Agency, 603 U.S. 279, 292 (2024) ("An agency action qualifies as "arbitrary" or "capricious" if it is not "reasonable and reasonably explained.") An agency must give a "satisfactory explanation for its action including a rational connection between the facts found and the choice made." E.g., F.E.R.C v. Electric Power Supply Ass'n, 577 U.S. 260, 292 (2016). When courts review questions of agency interpretation of their own regulations, the court applies Auer Deference. Kisor v Wilkie, 588 U.S. at 580–582 (2019).

ARGUMENT

I. CSP has standing to bring claims against Highpeak and the EPA

The district court correctly held that CSP has standing to bring claims against Highpeak and the EPA because CSP has satisfied the elements of Article III standing by demonstrating injury, causation, and redressability.

To establish standing, a plaintiff must satisfy three elements. First, the plaintiff must have suffered an injury in fact: an invasion of a legally protected right that is concrete, particularized, and actual or imminent. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Second, it must be likely that the defendant caused the injury, and third, that the injury would likely be redressed by the requested judicial relief. Food and Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 368 (2024). CSP has met all three elements. CSP's members have suffered injuries

in fact, which Highpeak and the EPA caused, and a favorable decision would give relief to the injured parties.

A. The members of CSP have suffered injuries in fact

The harms suffered by CSP satisfy the injury in fact requirement. An environmental plaintiff may adequately allege injury in fact when they use the affected area and when the challenged activity lessens the aesthetic and recreational values of the area. Friends of the Earth, Inc., v Laidlaw Envt'l. Servs. (TOC)., 528 U.S. 167, 183 (2000).

In Laidlaw, plaintiffs were a collection of environmental organizations who sued the operator of a hazardous waste incinerator and wastewater treatment plant. Id. at 177. Plaintiffs alleged noncompliance with the NPDES permit program and sought injunctive and declaratory relief. Id. A crucial issue was whether the plaintiffs had alleged sufficient "injury in fact" to meet the standing requirements outlined by Lujan. Laidlaw, 528 U.S. at 180. In Laidlaw, plaintiffs supported their theory of injury in fact by admitting affidavits from members of the plaintiff organizations. The affidavits averred that the plaintiffs had previously used the affected area before the pollution in the water kept them from recreating in the area. Id. at 182. One plaintiff, Linda Moore, attested that she "would use the North Tyger River… and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants." Id. Another plaintiff stated that they had refrained from fishing, hiking, and picnicking along the impacted river because of the discharges of the defendant's facility. Id. The U.S. Supreme Court held that these statements sufficiently documented injury in fact. Id. at 183. The Court concluded that "environmental plaintiffs adequately allege injury in fact when...they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Id. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

Here, CSP has introduced two affidavits that mirror those in Laidlaw. The affidavit of CSP member Cynthia Jones states that she lives four hundred yards away from the impacted stream and uses the affected area. R. at 14–15. Like Ms. Moore in Laidlaw, Ms. Jones stated that she would recreate more frequently near the affected area but for Highpeak's discharge. Id. at 15. Another CSP member, Jonathan Silver, stated that he would also recreate on the Crystal Stream but for the polluting activities of defendant Highpeak. R. at 16. Mr. Silver also refrained from allowing his dogs to drink from the stream because of the fear of pollution in the stream. R. at 16. Almost identical to the plaintiffs in Laidlaw, CSP has established that their members use the affected area and that the challenged activity has diminished the area's aesthetic and recreational value. Under the Court's rule in Laidlaw, plaintiffs in this case have documented an injury in fact.

Highpeak and the EPA argue that CSP suffers no cognizable injury, and that the association was formed only to pursue litigation against them. This argument misreads the standard for associational standing. An association must only allege that its members are suffering injury because of the challenged action, and that the case would be justiciable if any of the members had brought it themselves. Warth v. Seldin, 422 U.S. 490, 511 (1975). Here, CSP represents members who use the affected Crystal Stream area and who have seen the aesthetic and recreational value of that area diminished. Therefore, under the rules in Laidlaw and Warth, CSP has documented injuries sufficient for purposes of standing.

B. Highpeak and the EPA caused CSP's injuries

Article III standing requires causation between a plaintiff's injury and a defendant's conduct. Lujan, 504 U.S. at 560. A federal court will act to redress an injury that can be fairly traced to the challenged action of the defendant. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976).

1. Highpeak caused CSP's injury

The causation element of Article III standing is satisfied with regard to the claims against Highpeak because Highpeak caused CSP's injuries. In 1992, Highpeak constructed and installed an iron tunnel that connects Cloudy Lake to Crystal Stream. R. at 4. Water samples from both ends of the tunnel show that water passing through the tunnel collects pollutants. These pollutants are then discharged into Crystal Stream. According to water samples taken at the site of the tunnel, Cloudy Lake had a concentration of .80 mg/L iron, .090 mg/L manganese, and 50 mg/L total suspended solids at the water intake where the water entered the tunnel. R. at 5. However, once the water traveled through the tunnel, it contained 2-3% more pollutants. At the water outfall where the water exited the tunnel, the water contained .82 mg/L iron, 0.93 mg/L, and .52 mg/L total suspended solids. R. at 5. CSP's injuries stem from the increase of these pollutants. Highpeak's construction, operation and oversight of the tunnel facilitates the discharge of pollutants that harm the members of CSP. Therefore, the causation element of standing is satisfied with regard to Highpeak.

2. EPA caused CSP's injury

The EPA caused CSP's injury by promulgating the WTR. Highpeak's operation of the tunnel under the protection of the WTR establishes a sufficient causal relationship between the EPA's conduct and the injuries sustained by CSP. When a plaintiff challenges the government's promulgation of a rule, a but-for connection between the rule and the harmful activity will satisfy the causation element of Article III standing. Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 74–75 (1978).

In Duke Power Co., plaintiffs alleged a range of injuries stemming from the operation of nearby nuclear facilities. Id. at 73. As part of their complaint, they challenged the Price-Anderson Act, which limited liability for operators of nuclear power facilities. Id. at 65. The

plaintiffs argued that the construction of the nuclear facilities would not proceed but-for the existence of the Act, and that such a connection satisfied the causation requirement of standing. Id. at 74. This argument satisfied the Court, which granted the plaintiffs standing to sue the federal government. Id. at 78. The Court ruled that plaintiffs have standing to challenge a rule so long as a "substantial likelihood" exists that the relief requested will redress the injury claimed. Duke Power Co. 438 U.S. at 75 n.20.

Here, the EPA's WTR exempts certain activities from the NPDES permitting program. 40 C.F.R. 122.3(i) (2024). Highpeak asserts that it is exempt from NPDES permitting requirements because of the WTR. R. at 5. They continue to discharge pollutants because of this belief. R. at 5. Therefore, Highpeak's discharge of pollutants would not proceed but-for the existence of the WTR, establishing a but-for connection between the challenged rule and the harmful activity. Following the rule set forth in Duke Power Co., the Court should hold that CSP has satisfied the element of causation with regard to the EPA.

CSP has documented sufficient causal connections between the injuries they have suffered and the challenged actions of both Highpeak and the EPA. Therefore, the causation element of Article III standing is satisfied.

C. This Court can redress CSP's injuries

The third element of Article III standing is redressability. All. for Hippocratic Med., 602 U.S. at 368. To establish standing, a plaintiff must show that the injury likely would be redressed by the requested relief. Id. at 380. CSP's injuries would likely be redressed by the requested relief because a favorable decision would compel Highpeak to comply with NPDES permitting requirements, which would effectively abate the injuries suffered by CSP.

CSP brings three claims: (1) that Highpeak is discharging pollutants into the Crystal Stream without a permit, (2) that the EPA's Water Transfers Rule should be set aside, and (3) that

even if the WTR is valid, Highpeak's discharge still requires a permit. In any case, a favorable decision would compel Highpeak to comply with the NPDES permitting program. First, 33 U.S.C. § 1311(a)(1) of the CWA subjects violators of the Act to compliance orders. Second, the WTR exempts certain activities from the NPDES program. If the WTR was vacated, Highpeak would be subject to the NPDES program because their discharge wouldn't be exempted by the WTR. See r. at 5. Third, even if the WTR was held to be valid, a judicial determination that Highpeak's discharge falls outside the rule would subject Highpeak to NPDES requirements.

The pollutants harming CSP fall under the scope of NPDES permits. To accord with an NPDES permit, Highpeak would be required to set effluent limitations, which limit the concentrations of chemical constituents discharged by a point source into a navigable water. 33 U.S.C. § 1311. When subject to effluent limitations, Highpeak would be required to limit the concentration of iron, manganese and total suspended solids and thus reduce their concentrations at the outfall into Crystal Stream.

Highpeak's compliance with the NPDES program would reduce the concentrations of the polluting chemicals in the Crystal Stream. Because the Court may ensure such compliance with a favorable decision in this case, CSP have demonstrated redressability of their claims.

II. The APA Permits a Plaintiff to Challenge a Final Agency Rule Within Six Years of Injury.

Because CSP has standing to bring this claim, the second issue for this Court to determine is whether the CSP timely filed its challenge to the WTR when it filed on February 15, 2024. The statute of limitations for APA actions against government agencies allows plaintiffs to bring an action within six years "after the right of action first accrues." 28 U.S.C. 2401(a).

There are two reasons why this court should find that CSP's claim is not time-barred by the § 2401(a). First, the plain meaning of the statute is clear and unambiguous that the statute of

limitations runs once a plaintiff is injured by the rule. Second, Supreme Court precedent declares that the statute of limitations period for an APA claim does not start until a party has been harmed by a final agency action.

A. The plain meaning of "accrue" is clear that the statute of limitations does not begin to run on an APA claim until the plaintiff is harmed by the regulation.

A fundamental canon of statutory construction provides that words should be interpreted using their ordinary and contemporaneous meanings. E.g., New Prime Inc. v. Oliveira, 586 U.S. 105, 113 (2019); Southwest Airlines Co. v. Saxon, 596 U.S. 450, 455 (2021). Here, the operative term is when an action "accrues." In its ordinary meaning, something "accrues" when it "come[s] into existence as a claim that is legally enforceable." Accrue, The American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=accrue (last visited Nov. 18, 2024). In this case, the CSP could not have an enforceable claim until it suffered a legally cognizable injury, which, at the earliest, would be December 13, 2021—the date on which CSP was formed. Using CSP's formation date as the date of injury, the APA requires CSP to bring an action within six years of December 13, 2023, meaning that CSP could have waited until December 13, 2029, to bring this action. Because CSP properly filed this action, it is well within the statute of limitations.

B. Supreme Court Precedent further clarifies that a right to bring an action under the APA accrues once a party has been harmed by a final agency action.

The U.S. Supreme Court considered the meaning of "accrue" in § 2401(a) most recently in 2024. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2247–48 (2024). In this case, Corner Post, a North Dakota truck stop that opened its doors in 2018, challenged a 2011 regulation promulgated by the Federal Reserve Board regarding interchange transaction fees (Regulation II). Id. at 2248. After beginning its operations, Corner Post became frustrated by interchange fees and joined a suit against the Federal Reserve Board to challenge

Regulation II. Id. The North Dakota District Court dismissed the suit as time-barred, and the Eighth Circuit affirmed, holding that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." Id. at 2248–49 (quoting N.D. Retail Ass'n v. Bd. of Governors of FRS, 55 F.4th 634, 641 (8th Cir. 2022)).

On appeal, the Supreme Court considered "when a claim brought under the [APA] 'accrues' for purposes of [§ 2401(a)]." Corner Post at 2247–48. The Court pointed to the "well-settled meaning" of "accrue," stating that a "right accrues when it comes into existence—i.e., when the plaintiff has a complete and present cause of action." Id. at 2452 (internal quotations omitted) (internal citations omitted). Ultimately, the Court held that Corner Post was not barred by § 2401(a) and that a plaintiff suing under the APA "does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." Id. at 2450.

The present case is similar to Corner Post in two ways that indicate that this court should apply the same reasoning. First, like Corner Post, CSP could not have filed an action within six years of the WTR's final action because the organization did not exist. Second, both Corner Post and CSP filed a challenge to the rule within six years of formation—the earliest each entity could possibly face injury. In fact, CSP brought this action about two-and-a-half months after formation, far more expeditiously than Corner Post, which waited approximately three years to bring its suit against the Board. CSP filed this action on February 15, 2024, after suffering environmental injury from the increased pollutants in Crystal Stream resulting from Highpeak's water transfer activity. This difference shows that the injury caused by the WTR was quick to be felt and is more reason to apply the Court's reasoning in Corner Post.

C. Conclusion

For these reasons, we respectfully request that this court find that CSP filed the action within the applicable statute of limitations.

III. The Water Transfers Rule was Invalidly Promulgated by EPA.

The third issue on appeal is whether the district court erred in upholding the EPA's promulgation of the WTR. The district court ruled that the WTR was a valid exercise of EPA's authority under the CWA and was consistent with the CWA. CSP argues that the EPA invalidly promulgated the WTR because it is inconsistent with the CWA's plain meaning. However, if the court finds the statute to be ambiguous, they must apply the Skidmore standard, which supports CSP's interpretation of the CWA. See Skidmore v. Swift & Co., 323 U.S. 134 (1944). Skidmore supports revisiting past precedent because the standard weighs in CSP's favor and there is special justification for revisiting cases regarding the WTR's validity. It is for these reasons, described below, that this Court should find that the EPA invalidly promulgated the WTR.

A. The Plain Meaning of the Clean Water Act forbids water transfers without a permit.

The CWA states "the discharge of *any* pollutant by *any* person shall be unlawful." Clean Water Act § 301, 33 USC § 1311(a) (emphasis added). The discharge of a pollutant occurs when there is an "addition of any pollutant to navigable waters from any point source." Id. § 1362(12). This statutory phrase's plain meaning clearly shows water transfers require a permit under the CWA for four reasons. First, "waters" denotes individual, not collective, water bodies. Second, case law indicates "addition" includes water transfers. Third, courts prevent reading exceptions into a statute when exceptions already exist. And fourth, Congress intended for states to have control over water quality standards.

1. The use of the word "waters" denotes individual water bodies are regulated, not collective water bodies.

The reference to "waters" in § 1362 does not refer to water in general, but instead to individual water bodies. The WTR acknowledges that "for there to be an 'addition,' a 'point source must introduce the pollutant into navigable water from the outside world." NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701. However, the EPA still excludes water transfers because transferring water from one water body to another is not adding a pollutant since the CWA defines "navigable waters" as "waters of the United States." Id. (quoting 33 U.S.C. § 1362(7)). Because of this circular definition, the EPA contends that when parties transfer water, no new pollutants are added since the pollutant was already within "waters of the United States." Id. But the EPA's interpretation does not follow the plain meaning of the statute's definition of "the waters." A definite article and a plural word indicate that the law includes water, "[a]s found in streams and *bodies* forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or *bodies*." See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't. Prot. Agency, 846 F.3d 492, 535 (2d Cir. 2017) (Catskill III) (Chin, J., dissenting) (quoting Rapanos v. United States, 547 U.S. 715, 732 (2006)).

The EPA has created other rules with the understanding that "waters" means individual water bodies. 40 C.F.R. § 122.45(g)(4) regulates intake credits by giving industry actors credit for withdrawing pollutants from navigable water "if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." Catskill III, 846 F.3d at 536 (Chin, J., dissenting) (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 95 (2004). This regulation establishes standards to implement effluent limitations. 40 C.F.R. § 122.45(a) (2024). The EPA recognizes individual water bodies are distinct as the statute's plain language suggests. Id. § 122.45(g)(4). Courts presume that statutes

are to be read consistently. United States v. Pulsifer, 39 F.4th 1018, 1022 (8th Cir. 2022). Since the plain meaning of "[t]he [w]aters of the United States" indicates that "waters" refers to multiple water bodies and the EPA has inconsistently applied this understanding, the Court should find that the EPA invalidly promulgated the WTR. As a result, the court should require the EPA to vacate the rule. E.g., Alameda County Medical Center v. Leavitt, 559 F.Supp.2d 1, 5 (D.C. Cir. 2008) (striking down an administrative rule that was contrary to Congress' intent).

2. Case law Indicates "addition" includes inter-basin water transfers

While "addition" is not defined in the CWA, courts have interpreted "addition" to include water transfers. When words are not defined by statute, courts should construe the term "in accordance with its ordinary or natural meaning." Catskill III, 846 F.3d at 537 (Chin, J., dissenting) (quoting FDIC v. Meyer, 510 U.S. 471, 476, (1994)). The ordinary and natural meaning of "addition" is "the act of adding a substance or thing to something else." Addition, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/addition (last visited Nov. 17, 2024). This is inconsistent with the EPA's interpretation because the U.S. Supreme Court has previously interpreted "addition" to mean "addition of any pollutant to navigable waters." Maui v. Haw. Wildlife Fund, 590 U.S. 165, 187 (2020) (Kavanaugh, J., concurring) (Citing Rapanos, 547 U.S. at 723). This broad mandate prevents adding pollutants to navigable waters.

The Court applied this understanding of "addition" even before the promulgation of the WTR. In Dubois, 102 F.3d at 1277, a ski resort wanted to transfer water from a polluted stream to a pristine lake for use in snowmaking. The First Circuit ruled that the resort needed a permit because, under the statute, water transfers required a permit if a party added water from one water body to another. Id. at 1277–1279. The court reasoned that it would be against the

language of "addition of a pollutant" to rule that one could discharge polluted water into a pristine water body. Id. at 1297.

The Second Circuit followed this same reasoning in Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 484 (2nd Cir. 2001) (Catskill I), where it ruled a permit was required when New York City transferred water from a reservoir to a separate creek. "[A]n 'addition' of a 'pollutant' from a 'point source' has been made to a 'navigable water,' and the terms of the statute are satisfied." Id. at 492. The Supreme Court also noted "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 112 (2004). Thus, the "addition" of a pollutant requires a permit when water is added from one water body to another.

The water transfer at issue here precisely fits this interpretation. Highpeak is transporting water from Cloudy Lake to Crystal Stream via a tunnel. R. at 4. The transfer introduces water with .82 mg/L of iron, .093 mg/L of magnesium, and 52 mg/L of total suspended solids. R. at 5. The tunnel discharges water into Crystal Stream to maintain water levels for whitewater rafting. R. at 3. Tunnels are considered point sources when they are a proximate source of a pollutant. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe...tunnel...from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); Catskill I, 273 F.3d at 493.

Previous cases that rely on contrary interpretations do not apply in this case. In National Wildlife Federation v. Gorsuch, 693 F.2d 156 (1982), the court found that a dam releasing water back into a reservoir did not constitute the addition of a pollutant. As the WTR describes, an "addition" occurs if water is added from the "outside world". NPDES Water Transfers Rule, 73

Fed. Reg. at 33,700 (quoting Nat'l Wildlife Fed'n, 693 F.2d at 175). Even if the court finds the reasoning in National Wildlife Federation persuasive, it does not apply here. Highpeak is adding water from a lake to the stream, which are distinct water bodies, not water flowing through a dam. Thus, an "addition" of a pollutant clearly applies when pollutants are added from one water body to another. Highpeak's tunnel clearly meets this standard. Thus, the EPA invalidly promulgated the WTR since it does not follow precedent regarding "addition."

3. Courts prevent reading exceptions into a statute when none exist.

The third reason why the WTR was invalidly promulgated is because the EPA lacks the authority to read an exemption for water transfers into the statute. Courts have consistently applied the *expressio unius est exclusio alterius* canon of statutory construction, which bars courts from reading exceptions into a statute when Congress has already enumerated exceptions. E.g., N.L.R.B. v. SW Gen., Inc., 580 U.S. 288, 302 (2017). Congress chose to exempt irrigation runoff, stormwater runoff, and dredged and fill materials entering navigable waters from the NPDES Program. 33 U.S.C. § 1342(l)(1–2) (irrigation and stormwater runoff); 33 U.S.C. § 1344(a) (dredge and fill). Only Congress can amend these exceptions, not the EPA interpreting this statute. Catskill III, 846 F.3d at 538 (Chin, J., dissenting) (Nw. Env't Advocs. v. EPA, 537 F.3d 1006, 1021–22 (9th Cir. 2008); See N. Plains Res. Council v. Fidelity Expl. & Dev. Co., 325 F.3d 1155, 1164 (9th Cir. 2003)). In enacting the CWA, Congress intended to create an "all-encompassing" permit system to eliminate all pollutant discharge from every point source. Id. (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981). Since there is no exception for water transfers in the CWA, the EPA has the authority to create one.

4. Excluding water transfers from the Clean Water Act's statutory framework chills Congress' intent to let states regulate polluted waters.

CWA § 101(b) outlines that the act seeks to, "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). This does not include water transfers. Miller, supra, at 10787. The statute mandates that states must "plan" to designate water uses to achieve the CWA's no pollution goal. Id. Excluding water transfers under the CWA would hinder the states' power to "establish a 'continuing planning process" to achieve water quality standards." Id. (quoting 33 U.S.C. § 1313((e)(3)). States cannot fully enact their statutory power to continually plan water quality management measures if they cannot make rules regarding water transfers.

The same applies to water quantity. CWA § 101(g) adds "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." Id. (quoting 33 U.S.C. § 1251(g)). This section was added in 1977 with no mention of water transfers and with the express intention of not changing the statutory scheme. Miller, supra, at 10788. Excluding water transfers prevents states from meeting their statutory obligations under the CWA.

Courts could help states clarify policy concerns raised by the WTR and cases upholding the WTR by allowing states to regulate water transfers. The EPA justifies the WTR over concerns of the impact on agriculture in western states, but the CWA does not support these concerns. Id. at 10788; See NPDES Water Transfers Rule, 73 Fed. Reg. at 33,707. For instance, agricultural runoff and other common agricultural and industrial water returns are already exempted. *Id.* at 10788. No permit would even be necessary for most common uses. The permitting process is flexible and does not need to be "onerous" Catskill III, 846 F.3d at 539

(Chin, J., Dissenting) (quoting Nw. Envt'l Advocs., 537 F.3d at 1010). By giving states the ability to regulate water transfers, they can further issue rules that protect these interests.

As a result, the court should find that the WTR was invalidly promulgated to exclude water transfers because it infringes on the state's ability to meet their statutory requirements in accordance with the CWA's clear language and unfounded policy.

B. *Skidmore* supports the holding that water transfers are incorporated into the statutory scheme.

If the court finds that the CWA is ambiguous, the court should use the standard used in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) to interpret the ambiguous statute. The prior standard for interpreting ambiguous statutes was articulating in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). Courts previously utilized Chevron to uphold the WTR. See Catskill III, 846 F.3d 524-33; Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227-28 (11th Cir. 2009). In 2024, the U.S. Supreme Court overruled Chevron and stated a return to Skidmore, an older standard of statutory interpretation. Loper Bright Enter. v. Raimondo, 144 S. Ct 2242, 2262 (2024). Since Loper Bright reinstituted Skidmore as the method for interpreting ambiguous statutes, the court should apply it if they find the statute ambiguous.

Unlike Chevron, Skidmore applies when statutes "lack the force of law." Catskill III, 846 F.3d at 542 (Chin, J., dissenting). Under the Skidmore standard, an "[a]gency's interpretation of ambiguous statutory language is entitled to respect based on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140. However, case law relying on Chevron should still stand under principles of stare decisis unless "special justification" exists to revisit it. Loper Bright,144 S. Ct at 2273. A

special justification cannot exist if a court case was simply decided wrongly. Id. (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

If the court chooses to apply the Skidmore standard in light of the CWA's plain meaning, the Skidmore Test weighs in favor of CSP. We must first consider whether there is special justification for revisiting the cases that upheld the WTR. When considering whether to revisit precedent under stare decisis, the U.S. Supreme Court examines "the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision." Ramos v. Louisiana, 590 U.S. 83, 106 (2020).

These factors are relevant to determining if a special justification exists under Loper Bright. Courts can revisit precedent if legal error was the result of not construing the statute. "Stare decisis will not preclude a court from reconsidering decisions because of error in the interpretation of statutes nor from reassessing a decision...made without reviewing or construing the statute." 21 C.J.S. Courts § 193. After the adoption of the WTR, courts applied Chevron and did not even consider the merits of the arguments. Under traditional stare decisis understandings and Ramos, this is grounds for courts to reconsider past precedent.

The strongest factors that should lead this court to find special justification for revisiting past precedent include inconsistency with related decisions and reliance on the decision. As mentioned above, cases consistently found that the water transfers required a permit under the CWA. See R. at 9 ("See Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1296-99 (1st Cir. 1996); Catskill I, 273 F.3d at 491-94; Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 82-87 (2d Cir. 2006) (Catskill II); Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1367-69 (11th Cir. 2002), *vacated,* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 112 (2004)").

Case law only began to change once the EPA promulgated the WTR. This only required analysis of whether the interpretation was reasonable and not what the CWA allowed on its language and merits. While changing judicial interpretation methods are not reasons to reconsider case law, the cases of good law relied on Chevron deference and not upon the WTR's conformance with CWA language. *See* R. at 9; See Catskill III, 846 F.3d at 524-33; Friends of the Everglades, 570 F.3d at 1227-28. It is unclear what the law actually is since current case law did not construe the statute. 21 C.J.S. Courts § 193.

Parties do not know what the law is, which is particularly problematic when considering reliance interests. Many states have had to rethink the effectiveness of water transfers because of drought and climate change, decreasing reliance on the WTR. This is a prime opportunity to reconsider the rule. For a court to overturn stare decisis, there must be a "legitimate reliance interest." See United States v. Ross, 456 U.S. 798, 824 (1982). "Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287 (2022). "[T]o have such reliance, the knowledge must be of the sort that causes a person or entity to attempt to conform his or her conduct to a certain norm before the triggering event." 20 Am. Jur. 2d Courts § 132 (2024).

The realities facing water transfers today decrease reliance on the WTR because scientific realities are changing water transfer planning. Scientists and policymakers do not know how climate change and drought will impact water transfers. Kai Duan et al., Climate change challenges efficiency of inter-basin water transfers in alleviating water stress, Env't. Rsch. Letters 2022, at 1. Twenty-nine percent of all water transfers are considered inefficient at their task as users wrestle with changing populations, increasing demands for water, and crumbling

infrastructure. Id. at 1. Another third of all water transfers may become inefficient and increase water stress by the end of the century. Id.

Changing planning needs decreased reliance on the WTR, despite attempts to change by states. States have already made some regulatory changes to address water transfers, where water rights holders can "voluntarily transfer their water to rivers, streams and wetlands to benefit the environment and potentially generate revenue." Leon Szeptycki & Devon Ryan, Stanford ranks states in the Colorado River Basin on water rights transfers, Stanford Reports, (March 28, 2017) https://news.stanford.edu/stories/2017/03/states-rank-water-rights-transfers. Scholars stress the need for "policy advancements and clarification" to aid in these changes. Leon Szeptycki, David Pilz, Rachel O'Connor, & Bea Gordon, Environmental Water Transactions in the Colorado River Basin, Stanford Water in the West (Dec. 19, 2018) https://waterinthewest.stanford.edu/publications/environmental-water-transactions-colorado-river-basin. Wide-scale planning is obviously a need, but states have little political, legal, or technical guidance on adopting changes. This means states do not have the knowledge necessary to conform their conduct to the new water realities. So, the court must find special justification for revisiting the WTR.

Case law supports CSP's CWA interpretation, but Chevron forced courts to uphold the WTR despite its poor reasoning. Under Skidmore, the court must consider "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." Skidmore, 323 U.S. at 140. Each factor weighs in favor of CSP; the power to persuade should lead this court to find that the WTR was invalidly promulgated.

As previously mentioned, recognizing that water transfers are subject to the CWA's regulatory scheme is sufficiently thorough and is consistent with past case law. When courts applied Skidmore to water transfer cases, they ruled that water transfers require a permit when water from one water body is added to another. See Catskill I, 273 F.3d at 481*;* Catskill II, 451 F.3d at 82-87. Under Skidmore*,* courts has found that a permit is required when an addition from a point source that does not itself generate pollution. See Miccosukee, 541 U.S. at 95. Courts consistently found that water transfers need a permit based on the CWA's plain language, but only upheld the WTR due to Chevron*,* not on its merits. Catskill III, 846 F.3d at 524–33; Friends of the Everglades, 570 F.3d 1210, at 1227–28; supra page 31–32. Even cases that rely on Chevron admit that the EPA's CWA interpretation that upholds the WTR has a "low batting average" in court. Catskill III, 846 F.3d at 527. The lack of consistency between cases and different applications to different factual circumstances warrants reconsidering the cases that upheld the WTR. Thus, Skidmore standard weights in favor of CSP.

Given the plain language arguments stated above and that Skidmore weighs in favor of CSP, the court should find that the EPA invalidly promulgated the WTR.

IV. Pollutants Introduced in the Course of the Water Transfer Took the Discharge Out of the Scope of The WTR, Thus Making Highpeak's Discharge Subject to Permitting Under The CWA.

If the Court finds that the WTR was properly promulgated, it should find that Highpeak's water transfer activity does not qualify for the WTR's exemption from NPDES requirements. The WTR expressly states that "pollutants introduced by the water transfer activity itself" are not subject to the WTR's permitting exclusion. 40 C.F.R. 122.3(i) (2023). If the activity is not subject to the WTR's permitting exclusion, then it requires a National Pollutant Discharge Elimination System (NPDES) permit. See Clean Water Act § 402, 33 U.S.C. § 1342(a)

(authorizing the Administrator to issue permits for the discharge of pollutants notwithstanding CWA's prohibition on pollutant discharges under 33 U.S.C. § 1311).

In this case, Highpeak moved water from Cloudy Lake to Crystal Stream via an unmaintained, poorly constructed tunnel that does not have a pipe or other impermeable conduit running through it. R. at 4–5, 12. As previously discussed in Argument Section I-B (pg. 15), the amount of pollutants increased by 2-3% after traveling through Highpeak's tunnel. R. at 5. This demonstrates that the tunnel is introducing pollutants into the water supply itself and should be required to comply with NPDES requirements.

The EPA, which promulgated the WTR and implements the CWA, agrees with CSP's position. The district court also held that its interpretation was reasonable and consistent with the WTR's language. The Court should defer to the EPA's interpretation of the WTR since it is the agency that created the rule in the first place.

The EPA's interpretation of WTR should be given controlling weight because the WTR unambiguously excludes the activity in the instant case upon careful consideration of "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." Kisor v. Wilkie, 588 U.S. 558, 575 (2019). However, if the court finds that there is "genuine ambiguity" in the WTR, it should defer to the EPA's interpretation under Auer deference, as modified by Kisor. Auer v. Robbins, 519 U.S. 452, 454 (1997) (providing that an agency's interpretation of a rule should receive controlling weight unless it is "plainly erroneous or inconsistent with the regulation"). In Kisor, the Supreme Court held that Auer deference should only apply when there is genuine ambiguity in the regulation and the character and context to entitle the agency's interpretation controlling weight. Kisor, 588 U.S. at 575–76.

A. The WTR unambiguously excludes the Highpeak tunnel.

The first step in determining whether to give the EPA deference under Auer is to determine whether the WTR is truly ambiguous after considering its "text, structure, history, and purpose." Id. at 575. As the U.S. Supreme Court speculated would happen, this analysis will resolve any "seeming ambiguities out of the box, without resort to Auer deference." Id.

The last sentence of the WTR, which exempts most water transfer activities from NPDES requirements, provides that it "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). Thus, water transfers that introduce pollutants to a new water body through the transfer activity itself are still subject to NPDES requirements. In its plain and ordinary meaning, to "introduce" something means "to put something into use, operation, or a place for the first time." Introduce, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/introduce (last visited Oct. 28, 2024). Here, the tunnel adds pollutants into the water, meaning that the water is being introduced by the water transfer activity itself.

Further, this reading of the WTR is supported by its history and purpose. The WTR rule was promulgated to clarify that water transfer activities are generally not subject to NPDES permit requirements. The EPA was clear in promulgating that the WTR would not apply in situations like the instant case through a hypothetical. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699–70. In the final published rule, the EPA described a scenario in which water was released from River A into River B through a tunnel.

> This release constitutes a water transfer under the scope of this rule because it conveys water from one water of the U.S. to another water of the U.S. without subjecting the water to an intervening industrial, municipal or commercial use. Therefore, *unless this conveyance itself introduces pollutants into the water being conveyed,* the release will not require an NPDES permit under today's rule.

Id. (emphasis added). The use of this hypothetical to illustrate when the WTR does not apply makes it clear that the WTR contemplates situations in which a water transfer activity would still require an NPDES permit.

For these reasons, the Court should find that the WTR is unambiguous and hold that Highpeak's water transfer activity is excluded from the WTR's exemption from the NPDES program.

B. The EPA's interpretation is entitled to controlling weight under *Kisor.*

If this Court believes there are genuinely unresolved ambiguities, the next step in considering whether Auer deference should apply is to independently determine "whether the character and context of the agency interpretation entitles it to controlling weight." Kisor, 588 U.S. at 576. While Kisor did not create a test for this inquiry, it did lay out three "especially important markers for identifying when Auer deference is and is not appropriate." Id. at 576–77. These markers are (1) the interpretation was made in the agency's "official position," (2) the regulation implicates the agency's "substantive expertise," and (3) the agency's reading of the rule reflects "fair and considered judgment." Id. at 577–579.

The first marker reasons that an agency's interpretation must be "one actually made by the agency" that reflects the agency's "authoritative" or "official position." Id. at 577. This does not require that the interpretation come from the Secretary themselves, but rather, the Court has deferred to official documents by agency staff. Id. (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, n. 9 (1980) (declining to distinguish opinions issued by agency leadership and staff for Auer deference). In the aforementioned hypothetical, the EPA articulated its position that the WTR would not apply in a situation such as the instant case. NPDES Water Transfers Rule 73 FR at 33699–70. As this is an official document with legal effect, the interpretation was clearly

made in the EPA's official position. Thus, satisfying the first marker in determining whether Auer deference should apply.

The second marker reasons that an agency's interpretation "must in some way implicate its substantive expertise," with the Court noting that "the basis for deference ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority.'" Kisor, 588 U.S. at 577–78 (quoting City of Arlington v. FCC, 569 U.S. 290, 309 (2019) (Breyer, J., concurring)). Here, this interpretation implicates the EPA's expertise as it considers when something is or is not subject to NPDES permit requirements. In the CWA, Congress delegated its authority to "prescribe conditions" for administering the NPDES permit program. 33 U.S.C. § 1342(a)(2). In administering this program, the EPA continues to provide guidance on permit issuance, application, and regulations. See About NPDES, Environmental Protection Agency, https://www.epa.gov/npdes/about-npdes (updated March 14, 2024). The issue of whether an activity is subject to the NPDES permitting program is well within the EPA's ordinary duties and expertise and thus satisfies Auer's second marker.

The final marker reasons that a court should defer to an agency's interpretation that reflects "fair and considered judgment" and is not a merely "convenient litigating position" or "post hoc rationalizatio[n] advanced" to "defend past agency action against attack." Kisor, 588 U.S. at 579 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)). The EPA has interpreted the WTR to exclude transfer activities that introduce pollutants themselves since the WTR was finalized. The EPA remains consistent in interpreting the WTR to exclude Highpeak's tunnel because it introduces pollutants into the water being transferred.

C. Under *Auer*, the EPA's interpretation should control.

With each of the Kisor markers satisfied, the final step in this analysis is to apply Auer. As the Supreme Court stated, "[w]hen it applies, Auer deference gives an agency significant leeway to say what its own rules mean." Kisor, 588 U.S. at 580. In the instant case, the Court should apply Auer deference to the EPA's interpretation of the WTR since it is neither "plainly erroneous" nor "inconsistent with the regulation." Auer, 519 U.S. at 461.

D. Conclusion

For these reasons, we respectfully request that this court defer to the EPA's interpretation of its rule and find that Highpeak is required to obtain a permit from the EPA for its water transfer activity.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of CSP by affirming the district court's holding that CSP had standing to challenge Highpeak's discharge and the WTR, CSP timely filed its challenge to the WTR, CSP's citizen suit against Highpeak could proceed; and reversing the district court's granting of the EPA's motion to dismiss the challenge to the WTR.