Team Number: 48

Case No. 24-CV-5678

The United States Court of Appeals for the Twelfth Circuit

Crystal Stream Preservationists, Inc. v. United States Environmental Protection Agency, and Highpeak Tubes, Inc.

On Interlocutory Appeal from the District Court of the State of New Union

Brief for the Environmental Protection Agency's Interlocutory Cross-Appeal

Arguing for the EPA

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Jurisdictional Statement

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The District Court for the District of New Union issued an order on August 1, 2024, resolving critical questions of law and granting the parties leave to pursue interlocutory appeals. The district court certified that its rulings involved controlling questions of law as to which there exist substantial grounds for difference of opinion and that immediate appellate review may materially advance the ultimate termination of the litigation.

The district court exercised jurisdiction over this case, docketed as No. 24-CV-5678, pursuant to 28 U.S.C. § 1331 because this is a question that arises under the EPA's interpretation of the Clean Water Act, 33 U.S.C. § 1342.

Venue is proper in this Court under 28 U.S.C. § 1294(1), as the district court is located within the jurisdiction of the United States Court of Appeals for the Twelfth Circuit.

This appeal arises from the district court's rulings on standing, timeliness, regulatory validity, and applicability of the National Pollutant Discharge Elimination System Water Transfers Rule, 40 C.F.R. § 122.3(i), and addresses significant legal issues concerning the Clean Water Act and the Administrative Procedure Act that require this Court's resolution to guide further proceedings.

Statement of Issues

1. Did the District Court err in holding that Crystal Stream Preservationists had standing to challenge Highpeak's discharge and the Water Transfers Rule?
2. Did the District Court err in holding that Crystal Stream Preservationists timely filed the challenge to the Water Transfers Rule?

3. Did the District Court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act?
4. 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?

Summary of Argument

The Environmental Protection Agency (EPA) first argues, procedurally, that the district court improperly decided the issues of standing and timeliness. The Court should overturn the district court's decision that Crystal Stream Preservationists, Inc. (CSP) had standing to bring the challenge to the Water Transfers Rule (WTR). The EPA argues that CSP failed to allege the requisite injury-in-fact and redressability required. Additionally, the EPA argues that CSP did not timely file suit under the special 120-day limitation in the Clean Water Act (CWA). In the alternative, the EPA argues that regardless, CSP did not timely bring suit within the general statute of limitations against the government. Further, the EPA argues that *Corner Post*'s ruling does not help CSP, since the organization was not "harmed anew" by the EPA's regulation.

The district court properly upheld the WTR as a valid regulation under the CWA because it aligns with established legal principles, including stare decisis and statutory interpretation. The Supreme Court's decision in *Loper Bright* emphasized preserving stability in regulatory interpretations, stating that *Chevron*'s overturning does not undermine prior precedents upholding agency rules. Furthermore, both the Eleventh and Second Circuits have previously upheld the WTR as a reasonable interpretation of the CWA's statutory framework. These rulings demonstrated thorough statutory analysis, supporting the view that the term "navigable waters" refers collectively, consistent with Congress' intent. Even absent prior *Chevron*-based

precedents, the WTR reflects a proper exercise of EPA's regulatory authority under the CWA, accounting for the Act's goals and legislative compromises. Thus, the district court's decision should be affirmed.

Further, the district court properly held that Highpeak's discharges do not fall under the WTR exception and therefore require a permit to discharge. The EPA argues that the regulation is unambiguous about what constitutes introducing pollutants to a water transfer. If the regulation is ambiguous, under *Kisor*, the EPA's interpretation is entitled to deference and controlling weight. Thus, the district court's decision should be affirmed.

I. INTRODUCTION

The Environmental Protection Agency (EPA) respectfully requests the Court reverse the district court and hold that Crystal Stream Preservationists, Inc., (CSP) did not have standing to challenge the EPA's Water Transfers Rule (WTR). In the alternative, the EPA respectfully requests the Court reverse the district court and find that CSP did not timely file its challenge against the EPA's WTR. In the alternative, the EPA respectfully requests the Court reverse the district court and find that the WTR was a validly promulgated regulation. Lastly, the EPA requests the Court find the validly promulgated WTR requires Highpeak Tubes, Inc. (Highpeak), to obtain a permit to continue operating its water transfer tunnel.

II. FACTUAL BACKGROUND

a. Statement of Facts

In 1992, Highpeak, a tubing business, sought and obtained permission from the State of the New Union to construct a tunnel connecting Cloudy Lake and Crystal Stream. (R. at 4). The tunnel, which allows Highpeak to channel water from Cloudy Lake to Crystal Stream, is equipped with valves controlled by Highpeak employees to regulate the flow of water from Cloudy Lake into Crystal Stream. (R. at 4). The tunnel is partially carved through rock and supplemented with iron piping. (R. at 4). CSP alleges that this design facilitates the introduction of naturally occurring pollutants from Cloudy Lake into Crystal Stream.

On December 15, 2023, CSP filed a Notice of Intent to Sue (NOIS) alleging that the tunnel constitutes a point source under the CWA and that Highpeak's unpermitted discharges violate the Act. (R. at 4). All parties stipulate that Cloudy Lake and Crystal Stream are "waters of the United States" (WOTUS) under the CWA. (R. at 4–5). Tests indicate that water drawn from Cloudy Lake contains higher concentrations of iron, manganese, and total suspended solids

(TSS) than water naturally found in Crystal Stream. Moreover, water samples taken downstream of Highpeak's discharge reveal elevated concentrations of these pollutants compared to intake levels. (R. at 5). The EPA maintains that the WTR does not exempt transfers that introduce pollutants, regardless of the source, while Highpeak disagrees, asserting that the WTR should exempt their transfers. (R. at 3–4).

The NOIS was filed fourteen days after CSP's founding. Of its thirteen members, only one member moved into the area within the last fifteen years—Jonathan Silver. (R. at 4). His injury consists of reducing his walks along the stream and feeling "hesitant" to let his dogs drink from the stream due to its occasional cloudiness and CSP members' reports of pollutant presence. (R. at 5; 7). Another member of the group, Cynthia Jones, who moved into the area in 1997, expressed that her use of the stream has been diminished by the pollutants and that she is less likely to wade into and recreate around the stream. (R. at 5; 10; 12).

b. Procedural Posture

This appeal arises from a decision issued by the United States District Court for the District of New Union on August 1, 2024. In this case, CSP, a nonprofit environmental organization, filed a citizen suit on February 15, 2024, under the CWA, against Highpeak for discharging pollutants into Crystal Stream without a permit. CSP alleged a violation of the CWA. CSP also challenged the validity of the EPA's National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule (40 C.F.R. 122.3(i)) under the Administrative Procedure Act (APA), asserting that the rule was invalid and that, even if valid, does not exempt Highpeak's discharge due to the introduction of additional pollutants.

The district court held that CSP had standing to bring both the citizen suit and the regulatory challenge, and that CSP's challenge to the WTR was timely filed. The court further

ruled that the WTR was validly promulgated by the EPA and that Highpeak's discharges introduced additional pollutants, requiring a permit under the CWA.

Each party filed motions seeking leave to appeal different aspects of the district court's order. Highpeak appealed the court's findings on standing, timeliness, and the applicability of the WTR exemption to its discharges. The EPA appealed the findings on standing and timeliness, while CSP cross-appealed the validity of the WTR. The Court of Appeals granted interlocutory review given the complex and novel issues presented.

III. LEGAL ARGUMENT

a. The District Court Erred in Holding that CSP Has Standing Because CSP Failed to Allege Sufficient Injury in Fact, Failed to Adequately Determine Redressability, and Failed to Adequately Plead Organizational Standing.

i. Legal Standard

The APA allows plaintiffs to sue an administrative agency if the plaintiff is injured by an agency action. 5 U.S.C. § 702; *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) (citations omitted) ("We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question."). The APA also requires that the injury in fact was caused by an agency's "final agency action." 5 U.S.C. § 704; *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024).

Constitutional standing is a "bedrock . . . requirement . . ." *United States v. Texas*, 599 U.S. 670, 675 (2023). Standing doctrine requires that the plaintiff be more than a "mere bystander," and the plaintiff "must have a 'personal stake' in the dispute." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024) (citations omitted). *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[Standing] requires federal courts to satisfy

themselves that the plaintiff has alleged such a personal stake in the outcome of a controversy as to warrant *his* invocation of federal-court jurisdiction.") (citations omitted). Without standing, an Article III court lacks the subject matter jurisdiction to hear the case. *See* U.S. Const. Art. III § 2 (limiting Article III judicial power to resolving "Cases" and "Controversies"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998) ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.").

To establish standing, "a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *All. for Hippocratic Med.*, 602 U.S. at 380. *See also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The harm must not be generalized harm to the environment, but an "injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). "[A]t the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (cleaned up).

The CWA permits citizen[1] suits. 33 U.S.C. § 1365(a)(1). Specifically, as an environmental organization, CSP has standing to bring suit on behalf of its members when: "(a)

[1] "Citizen" means "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The definition of "citizen" is broad enough to include corporate entities and nonprofits who represent their individual members. *See, e.g.*, *Snake River Waterkeeper v. J.R. Simplot Co.*, No. 1:23-CV-00239-DCN, 2024 WL 3104623, at *18 (D. Idaho June 24, 2024) (holding that a nonprofit, Snake River Waterkeeper, survived defendant's motion to dismiss a CWA violation). However, corporate entities and nonprofits who represent their members must still show individualized injury-in-fact to establish standing. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. . . But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization

its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth*, 528 U.S. at 181 (applying *Hunt*'s organizational standing requirement to environmental associations).

In short, CSP failed to prove, in the pleadings, that its members have standing to sue in their own right, the redressability of its case, and that CSP has organizational standing. As such, the Court should overturn the district court and find that CSP has no standing to bring this suit.

ii. CSP Failed to Show Injury-in-Fact for its Members.

CSP failed to adequately allege injury-in-fact of its members, and the Court should overturn the district court and find that CSP lacks standing to challenge the EPA's WTR.

For CSP to have standing, CSP must show that its members suffered an injury-in-fact. *See Friends of the Earth*, 528 U.S. at 181 (holding that an environmental group would have to show at least some of its members suffered an injury-in-fact); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) ("But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

These injuries can be aesthetic or recreational. *See Friends of the Earth*, 528 U.S. at 183 (noting previous holdings in which "environmental plaintiffs adequately allege injury in fact" for "aesthetic" and "recreational values" of the land being lessened by the activity); *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) ("The 'injury in fact' requirement in environmental cases is satisfied if an individual adequately shows that she has an

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is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.").

aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct."). However, such injury must still be individualized and particularized. *See Sierra Club*, 405 U.S. at 734–35.

In *Friends of the Earth*, plaintiffs, Friends of the Earth (FOE), sued for injuries related to the Laidlaw Hazardous Waste Facility discharging pollutants, specifically mercury, over the amount allowed by permit. *Friends of the Earth*, 528 U.S. at 175–77. FOE sued, alleging noncompliance with the permit. *Id.* at 177. FOE alleged injury in fact through affidavits, which alleged member's inability to fish in the river and recreate near the river. *Id.* at 181–82. The court found that such particularized injury to individual members sufficient to meet Article III standing. *Id.* at 183 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that 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.").

Here, CSP alleges no facts which would indicate that its members suffered any injury whatsoever. CSP Member Cynthia Jones alleges only that her use of the stream is diminished because of her "concern[]" about the pollutants. (R. at 14.) Further, Ms. Jones alleges that she would walk into the stream if it were not for the presence of Iron and Manganese, but these pollutants are not dangerous for individuals who wish to wade or swim.[2] Unlike in *Friends of the*

[2] Courts may take judicial notice of universally recognized facts. *See Brown v. Piper*, 91 U.S. 37, 42 (1875) ("The courts of the United States take judicial notice of . . . such matters of science as are involved in the cases brought before him."). Additionally, many Courts of Appeals take judicial notice of documents on Agency websites. *See, e.g.*, *Lewis v. M&T Bank*, No. 21-933, 2022 WL 775758, at *2 n.4 (2d Cir. Mar. 15, 2022) ("We regularly take judicial notice of agency documents on official websites."); *Huskey v. Jones*, 45 F.4th 827, 831 n.3 (5th Cir. 2022) ("This court has upheld taking judicial notice of the contents of a state agency's website and we do so again here."). Here, the EPA would respectfully request that the court take notice of the EPA's website, noting that Iron and Manganese are only pollutants in drinking water, not in recreational swimming water. *See Drinking Water Regulations and Contaminants*, EPA

Earth, Ms. Jones's affidavit does not allege in inability to recreate in or near the river. (R. at 14). Further, Ms. Jones did, in fact, recreate and continue to recreate after the water transfer from the Highpeak tunnel, only "recently" learning of the discharge. (*Id.*) Ms. Jones's enjoyment of the stream was not diminished when the water transfer began, thirty-two (32) years ago, but rather when she *learned* of the water transfer. (R. at 4, 14). Ms. Jones alleges that she would recreate more frequently at the stream without the discharge, but her recreation did not stop when the alleged injury occurred, but rather when she learned of the transfer itself. (R. at 14–15). Thus, Ms. Jones does not allege injury-in-fact for an inability to recreate, like in *Friends of the Earth*, nor does she even allege injury at all. Thus, Ms. Jones, and by extension CSP, does not allege pertinent facts to plead injury-in-fact.

Additionally, CSP member Jonathan Silver alleges that he "regularly walked" his dogs and children along the stream when he moved to Rexville. (R. at 16). Mr. Silver alleges that he is only "hesitant" to allow his dogs to drink from the stream. (*Id*.) Further, Mr. Silver alleges that the stream is only cloudy "sometimes" and that he would recreate more frequently if not for the discharge. (*Id.)* Once again, Mr. Silver, unlike *Friends of the Earth*, does not allege a total inability to recreate nor does he allege a destruction of aesthetic beauty. Further, Mr. Silver, not Mr. Silver's dog, must be the one to incur actual harm. Mr. Silver's allegations amount to no more than a generalized concern, not to the level of injury-in-fact.

Lastly, while the EPA can sympathize with CSP's concerns, there is nothing in the record which suggests that the EPA's regulation is what injured the plaintiffs. Plaintiff's concerns do not raise to the required injury-in-fact for Article III standing. For all intents and purposes, Ms.

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https://www.epa.gov/sdwa/drinking-water-regulations-and-contaminants#Secondary (last accessed Nov. 1, 2024) (listing iron and manganese as secondary contaminants for drinking water, but not for recreational purposes).

Jones and Mr. Silver continue to recreate near Crystal Stream and the injury alleged seems to be their knowledge of the water transfer, not the water transfer itself.

Therefore, the EPA respectfully requests the Court to reverse the district court and find that CSP does not have standing to bring this suit since it has not alleged facts required to show injury-in-fact.

iii. CSP Has Failed to Establish Causality and Redressability.

If the Court were to find injury-in-fact, the EPA argues that CSP cannot establish facts for redressability. To establish standing, "a *plaintiff* must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *Food & Drug Admin.*, 602 U.S. at 380 (emphasis added). The second and third elements are often "flip sides of the same coin" because if a defendant's action "causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Id.* at 380–81 (citations omitted). "[A]t the pleading stage, the *plaintiff* must clearly allege facts demonstrating each element." *Spokeo, Inc.*, 578 U.S. at 338 (cleaned up, emphasis added).

Here, CSP has alleged no facts establishing causation or redressability. The water transfer between Crystal Stream and Cloudy Lake is the alleged cause of an alleged injury, but such cause is not linked to the EPA's regulation. Further, if the cause of the injury is a failure to regulate Highpeak, such cause is "substantially more difficult to establish" because the injury is linked "to the government's regulation (or lack of regulation) on another." *Lujan*, 504 U.S. at 562.

If anything, the only argument CSP seems to make, which the EPA joins, is that Highpeak must obtain a permit under the CWA for continued operation of the tunnel. Such a

permit will not necessarily halt the water transfer nor stop any alleged "pollutants" from entering the stream. Nothing in the records suggests that CSP argues for nor can achieve a complete stop of the water transfer.

Therefore, the EPA respectfully requests the Court to reverse the trial court and find that CSP does not have standing to bring this suit since it has alleged no facts to show redressability.

iv. CSP Has Failed to Establish Organization Standing.

Lastly, CSP has failed to establish organizational standing. Organizational standing does not exist merely because of an intense interest in or opposition to a government action (or lack thereof). *All. for Hippocratic Med.*, 602 U.S. at 394. Further, an organization does not have standing simply if a government action causes a "setback to the organization's abstract social interest." *Id.* (citations removed).

The medical association, in *FDA v. Alliance for Hippocratic Medicine*, alleged that if the alliance did not have standing, no one would have standing to challenge the FDA's actions. *All. for Hippocratic Med.*, 602 U.S. at 396. However, the court noted that such an assumption is not a basis for standing. *Id.* The Supreme Court stated further that even "sincere legal, moral, ideological, and policy objections" to the FDA's regulation "do not establish a justiciable case or controversy in federal courts." *Id.*

Like the Alliance for Hippocratic Medicine in *Alliance for Hippocratic Medicine*, CSP's abstract mission to preserve Crystal Stream for "environmental and aesthetic reasons" does not create organizational standing. (R. at 4). CSP's, and members Mr. Silver's and Ms. Jones's, intense opposition to stopping Highpeak's discharge does not by itself create standing. *Alliance for Hippocratic Medicine.*, 602 U.S. at 394; (R. at 14–15); (R. at 16). CSP may organizationally

be "set back" by the EPA's lack of regulating Highpeak's water transfer, but this does not create the requisite injury to the organization itself to grant it standing.

Thus, the EPA respectfully requests the Court reverse the district court and find that CSP does not have standing to challenge the WTR or discharge.

b. CSP Failed to File a Timely Challenge to the WTR.

To file a lawsuit under the APA, parties must bring the suit in a timely manner. A claim accrues when the "plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action." *Corner Post*, 144 S. Ct. at 2448; *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) ("Once the challenged agency action becomes final and invades a party's legally protected interest, the party's right to redress that injury under the APA accrues.").

Generally, suits against the United States have a statute of limitations of six years. *See* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

However, some statutes have specific statutes of limitations which supersede the general statute of limitations, such as the CWA. *See* 33 U.S.C. § 1369(b)(1) (noting for various actions under the CWA, "[a]ny such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day"). In the notice of the WTR, the Administrator stated that judicial review "can only be had by filing a petition for review . . . within 120 days after the decision is considered issued for purposes of judicial notice." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01 (hereinafter "NPDES WTR 73 FR 33697-01"). *See also Friends of the Everglades*

v. U.S. E.P.A., 699 F.3d 1280, 1284 (11th Cir. 2012) (noting the Administrator stated its position that challenges to the WTR must occur within 120 days).

The regulation in question, the WTR, exempts "[d]ischarges from a water transfer" from the NPDES permitting requirement. 40 C.F.R. § 122.3(i). The regulation was promulgated in 2008. NPDES WTR 73 FR 33697-01.

Here, there are two timeliness arguments: (1) CSP did not timely file a challenge to the WTR because it did not file within 120 days of its alleged injury and (2) even if the court were to hold that the proper statute of limitations were six years, *Corner Post* does not extend to nonprofits created specifically for litigation, so CSP still did not timely file its challenge to the WTR.

i. CSP Did Not Timely File Suit to Challenge the WTR, as CSP Did Not Challenge the WTR Prior to the 120 Days after Promulgation.

CSP did not timely file suit to challenge the WTR because the WTR should have been challenged within 120 days of its promulgation.

The CWA explicitly limits judicial review for certain agency action to 120 days after "promulgation . . ." 33 U.S.C. § 1369(b)(1); *Friends of the Everglades*, 699 F.3d at 1284 (noting the Administrator's position that the WTR could only be challenged within 120 days of promulgation). The CWA specifically limits the timing for judicial review to determinations of state permitting programs under the NPDES (33 U.S.C. § 1342(b)), issuing or denying permits under the NPDES (33 U.S.C. § 1342), or promulgating any effluent standard under 33 U.S.C. § 1317, among others. 33 U.S.C. § 1369(b)(1).

The promulgation of the WTR is a rule which exempts certain transfers from the NPDES permitting scheme. 40 C.F.R. 122.3(i). The authority for this rule came from 33 U.S.C. § 1342(b), one of the statutes in which the special, 120-day statute of limitations applies. *See*

NPDES WTR 73 FR 33697-01 ("This final rule is issued under the authority of sections 402 and 501 of the Clean Water Act., 33 U.S.C. 1342 and 1361.").

Here, CSP challenges a rule promulgated under the authority of § 1342(b). The special 120-day statute of limitations applies to such a rule, which essentially permanently exempts certain transfers from the NPDES permitting requirement. *See Nat'l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 932 (6th Cir. 2009) (holding that a final rule promulgated under 33 U.S.C. § 1369(b)(1)(F) granted jurisdiction, suggesting that the statute of limitations likewise applies). Further, the Administrator believed in promulgating the rule that the 120-day statute of limitations applied. A number of challenges to the WTR occurred within the 120-day limit, directly after the rule was promulgated.[3] CSP Filed its Notice of Intent to Sue on December 15, 2023, and its complaint on February 15, 2024, well beyond the 120-day time limit.

Thus, the EPA requests the Court reverse the district court and find that CSP did not timely file its challenge to the WTR as it is well beyond the 120-day limitations.

ii. CSP Did Not Timely File Suit to Challenge the WTR, as *Corner Post's* Holding Should Not be Extended to Nonprofits Formed Specifically to Sue.

Even if the Court were to find that the proper statute of limitations were six years after the plaintiff suffered an alleged harm, CSP still failed to timely file suit as *Corner Post*'s holding should not apply to nonprofits formed specifically to sue.

In *Corner Post*, the business at issue, a truck stop, was harmed anew at its founding by a regulation previously promulgated by the Federal Reserve Board. *Corner Post*, 144 S. Ct. at 2448. Corner Post was not harmed by the regulation prior to its existence, and it was harmed

[3] *See* Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A., 630 F. Supp. 2d 295, 303 (S.D.N.Y. 2009) (collecting cases).

only upon its creation, since then the regulation applied to it. Once Corner Post was harmed, the six-year statute of limitations started. *Id.* at 2450 ("An APA plaintiff 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*.") (emphasis added).

Here, CSP was formed December 1, 2023. (R. at 4). Its members are composed of residents who own land along Crystal Stream and who recreate near the area, and all but one member have lived in Rexville for more than 15 years. (R. at 4). These residents could have formed CSP at any time when the water transfer began, thirty-two (32) years ago. However, these residents did not do so, thus the six-year statute of limitations expired for them.

In an apparent attempt to use *Corner Post* to defeat the statute of limitations, these residents formed CSP. CSP appears to be nothing more than a tool created by members, who were allegedly harmed when the rule was promulgated, to avoid the timeliness issue. However, entirely unlike the truck stop in *Corner Post*, CSP itself was not harmed anew by the regulation. The alleged harm that occurred nearly thirty-two years ago to the same group of people is the same alleged harm that CSP alleges. Thus, this court should distinguish *Corner Post*'s truck stop and CSP since the truck stop experienced a "harm" from an agency regulation upon its founding, but CSP has not experienced any harm due to its formation. CSP is merely a tool to avoid a timeliness issue.

While one of CSP's members, Mr. Silver, moved to Rexville within the six-year statute of limitations, he has not alleged any injury-in-fact due to the existing regulation. (R. at 8). CSP was formulated as nothing but a litigant's tool to avoid the timeliness issue. The Court should clarify that *Corner Post*'s holding does not extend to opportunistic nonprofits, and nothing in the record alleges that CSP was harmed anew by its formation.

For this reason, the Court should reverse the district court and find that CSP did not timely file its challenge to the WTR as *Corner Post*'s holding does not extend to CSP.

c. The District Court Correctly Held that the WTR Was a Valid Regulation Promulgated Pursuant to the CWA.

The district court correctly upheld the validity of the WTR because it followed the Supreme Court's clear instruction that *Loper Bright* should not disturb prior decisions decided under the *Chevron* doctrine. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The doctrine of *stare decisis* says that courts should follow established precedent to ensure consistency and stability in the law. While *stare decisis* is not an "inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), a party advocating for the court to set aside the doctrine carries a substantial burden. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). To carry that burden, the party advocating for the abandonment of established precedent must show that there is a "special justification." *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). The Supreme Court made clear in *Loper Bright* that a prior decision's reliance on *Chevron* does not provide that "special justification." *Loper Bright*, 144 S. Ct. 2273. However, even if this court were to disregard prior decisions upholding the WTR, the rule would still stand as a valid exercise of the EPA's authority under the CWA.

i. The Supreme Court's Decision in *Loper Bright* Supports Adherence to Precedents Established Under *Chevron*.

When the Supreme Court overturned *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984), it did so with the knowledge that *Chevron* was one of the most cited Supreme Court cases used to uphold countless agency statutory interpretations. Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 Geo. Wash. Univ. L. Rev. 1392, 1394 n.5 (2017). If *Chevron* were overturned without preserving reliance on prior agency decisions upheld under

Chevron, it would have disrupted the legal stability surrounding regulatory interpretations and thousands of cases would be open to being relitigated, creating great uncertainty. Understanding the widespread impact that such a reality would have, the Court ensured that its decision did not "call into question prior cases that relied on the *Chevron* framework." *Loper Bright*, 144 S. Ct. at 2273. Instead, "the holdings of those cases that specific agency actions are lawful . . . are still subject to stare decisis despite [the Court's] change in interpretive methodology." *Id.*

Even if one were to argue that that this part of the *Loper Bright* decision is merely dictum, the Court's clear intent to safeguard decisions previously upheld under *Chevron* deference should still guide future rulings. The language used by the Supreme Court is not incidental; it reflects the Court's careful consideration of the consequences of overturning *Chevron* without undermining stability in agency interpretations already relied upon. As previously noted, the Court had compelling reasons to protect prior decisions and intended *Loper Bright* to be read with that understanding. Moreover, to dismiss the language as unworthy of serious attention undermines the significance of Supreme Court dicta, which often serves as a vital touchstone for lower courts, guiding their interpretations and signaling the Supreme Court's stance on important issues. Ignoring this language would discount the nuanced ways in which the Court communicates its perspective and shapes the broader legal landscape, even outside the confines of a binding holding. Thus, lower courts and litigants should view this dictum as a meaningful indication of how the Court would approach cases that revisit pre-*Loper* rulings decided using *Chevron* deference.

ii. There is No Special Justification for Departure from Prior Decisions Upholding the WTR.

1. The Burden to Overturn Precedent Upholding the WTR is Heightened Because the Prior Decisions Are Based on Statutory Interpretation.

Courts consider various factors when deciding whether to depart from prior precedent. One factor is whether the precedent involves statutory construction or constitutional issues. Judges should be least inclined to adhere to the principles of *stare decisis* when faced with a constitutional issue. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014). This hesitancy stems from the unique difficulty in amending constitutional rulings compared to statutory ones. When courts interpret a statute incorrectly, Congress has the authority to amend or clarify the statute, effectively overriding the court's interpretation. However, constitutional interpretations are insulated from legislative correction, leaving judicial error to stand indefinitely unless later overturned by the Court itself. This permanence demands greater caution when applying *stare decisis*, as erroneous rulings can only be corrected by future judicial action, not by legislative amendment. Conversely, the doctrine of *stare decisis* is strongest in cases involving statutory construction, where Congress is free to change the court's interpretation of its legislation. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). Accordingly, prior judicial decisions are less likely to contain the requisite "special justification" when they construe a statute.

Here, both prior cases upholding the WTR—*Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (*Friends I*) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) (*Catskill III*)— concern statutory interpretation, not constitutional issues. In *Friends I*, the Eleventh Circuit interpreted the CWA to assess whether the WTR aligned with the CWA's framework and concluded that the WTR was a permissible interpretation within the statutory scheme. *Friends I*, 570 F.3d at 1228. Similarly, in *Catskill III*, the Second Circuit analyzed the CWA, determining that the EPA's interpretation of the CWA was reasonable within its statutory structure, without addressing any constitutional

questions. *Catskill III*, 846 F.3d at 524. As both cases center on statutory construction, this court should respect the well-reasoned decisions of its sister circuits, fostering consistency in the law and avoiding unnecessary divisions among the circuits.

2. The Reasoning in Prior Decision Upholding the WTR Supports Adherence to the Principles Underlying Stare Decisis.

Courts also consider "the quality of the decision's reasoning" when deciding whether to overturn prior decision. *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020). In *Catskill III*, the Second Circuit's review of the WTR involved an independent and thorough analysis that exceeds mere deference to the EPA's interpretation. This robust review dispels any notion that the court uncritically accepted an interpretation of the CWA that was not the "best" interpretation. The court rigorously evaluated whether the WTR was a valid interpretation of the CWA by specifically examining whether water transfers required a NPDES permit. This analysis confirms that the decision was well-reasoned and does not possess a "special justification" to depart from its established precedent. While CSP might argue that the Second Circuit simply deferred to the EPA, the court took additional steps to ensure that the EPA's interpretation was grounded in a "reasoned explanation." *See Catskill III* at 520–21 (citing *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011)).

The Second Circuit found that the EPA's promulgation of the WTR was supported by a well-reasoned rationale that carefully considered the statutory framework of the CWA, balancing its language, structure, and legislative history. Specifically, the court found that the EPA reasoned that Congress did not intend to subject water transfers to NPDES permitting, noting Congress' desire to create a "balance . . . between federal and State oversight activities" that left primary oversight of water transfers to state authorities in cooperation with Federal authorities. *Catskill III* at 524 (citing National Pollutant Discharge Elimination System (NPDES) Water Transfers

Rule, 73 Fed. Reg. at 33701 (June 13, 2008)). This interpretation aligns with the EPA's finding that subjecting water transfers to NPDES permitting could impede states' ability to effectively allocate water and water rights—a concern explicitly considered by Congress as evidenced in the CWA's legislative history. Furthermore, in nearly four decades since the CWA's enactment, Congress has not mandated NPDES permits for water transfers, signaling tacit approval of the EPA's approach and reflecting an intent to not requires NPDES permitting for water transfers. *Id.* at 525. Based on this reasoning, the court thoroughly considered key elements of the Act's structure, underscoring the quality of its analysis. Accordingly, the reasoning underlying the decision in *Catskill III* does not constitute a special justification for overturning this decision.

Similarly, in *Friends I*, the Eleventh Circuit conducted a comprehensive analysis of the CWA and WTR language, demonstrating the depth and quality of its reasoning. The court analyzed Congress' use of the phrase "any navigable waters" to determine whether its usage supports the "unitary waters theory." The unitary waters theory is a legal interpretation of the CWA that considers all navigable waters of the United States as a unified entity for regulatory purposes such that transferring water containing pollutants from one navigable water body to another does not constitution an "addition" of pollutants as defined by the CWA. The court analyzed the plain language of the statute and determined that it supports the unitary waters theory because it implies that Congress was talking about *all* navigable waters. *Friends I* at 1224. To rule otherwise, the court held, would have required the court impermissibly add a fourth "any" to the statute so that it would read: "Any addition of any pollutant to *any* navigable waters from any point source." *Id.* The court also found that Congress' use of the phrase "any navigable waters" elsewhere in the Act supports the view that the phrase refers to the waters collectively. *Id.* Finally, the court considered the phrase's consistency with the purpose of the Act, concluding

that, despite the Act's goal of eliminating water pollution, because the CWA does not address all sources of pollution (e.g., non-point sources) the statutory language at issue does not have to be interpreted broadly to cover water transfers. *Id.* at 1227. Considering the court's extensive and well-reasoned statutory analysis, *Friends I* does not present a "special justification" for overturning established precedent, thus supporting adherence to the principles of stare decisis

iii. Even if the District Court Ignored Decisions Upholding the WTR Under *Chevron*, the WTR was Still a Valid Exercise of the EPA's Power Under the CWA.

1. The Statutory Text and Structure of the CWA Support Upholding the WTR.

The statutory text and structure of the CWA support upholding the WTR as a valid regulation. The key issue revolves around the interpretation of the term "navigable waters" within the statutory definition of "discharge of a pollutant" and whether this term refers to all waters collectively or to individual water bodies. This distinction is crucial in determining whether the NPDES permitting program applies to water transfers.

Under the CWA, the term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Notably, Congress did not include the word "any" before "navigable waters" in this definition. This omission suggests that "navigable waters" refers to the waters of the United States collectively rather than to any individual water body. As the Eleventh Circuit observed, "the conspicuous absence of 'any' before 'navigable waters' in § 1362(12) supports the unitary waters theory because it implies that Congress was not talking about any navigable water, but about all navigable waters as a whole." *Friends I*, 570 F.3d at 1224 (11th Cir. 2009).

Congress demonstrated throughout the CWA that it knows how to specify when it intends to refer to individual water bodies. For example, in other sections of the Act, Congress used

phrases like “any navigable waters” or “any navigable water” to indicate individual water bodies. *See, e.g.*, 33 U.S.C. § 1254(a)(3) (authorizing the EPA to investigate “the pollution of any navigable waters”); 33 U.S.C. § 1314(f)(2)(F) (referring to changes in the flow “of any navigable waters”). This consistent usage supports the conclusion that when Congress uses the unmodified term “navigable waters” without the word “any,” it intends to refer to the waters of the United States collectively. As the court noted, “the common use by Congress of ‘any navigable water’ or ‘any navigable waters’ when it intends to protect each individual water body supports the conclusion that the use of the unmodified term ‘navigable waters’ in § 1362(12) . . . means the waters collectively.” *Friends I*, 570 F.3d at 1224.

Courts are not permitted to add or subtract words from a statute to alter its meaning. As the Eleventh Circuit emphasized, “we are not allowed to add or subtract words from a statute; we cannot rewrite it.” *Id.* In *Friends I*, the Friends of the Everglades' interpretation effectively asks the court to insert an additional “any” before “navigable waters,” transforming the statute into “any addition of any pollutant to *any* navigable waters from any point source.” Such an alteration is impermissible because it changes the statutory language that Congress enacted.

The statutory context further supports this interpretation. The term “waters” can refer to either multiple water bodies collectively or an individual water body. As the court observed, “‘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 I*, 570 F.3d at 1223. The CWA uses the term “navigable waters” in both senses, sometimes regulating individual water bodies and other times addressing entire water systems. This dual usage indicates that the term is inherently ambiguous and can reasonably be interpreted to refer to the waters of the United States as a singular whole. The Second Circuit echoed this

interpretation in *Catskill III*, acknowledging that "the statutory text yields no clear answer to the question before us; it could support either of the interpretations proposed by the parties." 846 F.3d at 513. The court noted that "examination of the other uses of the terms 'navigable waters' and 'waters' elsewhere in the CWA does not establish that these terms can bear only one meaning." *Id.* at 513. This means that the statutory text does not unambiguously require NPDES permits for water transfers.

Accordingly, the statutory text and structure of the CWA support upholding the WTR as validly promulgated under the Act. The absence of the word "any" before "navigable waters" in the definition of "discharge of a pollutant" indicates that Congress intended "navigable waters" to refer to the waters of the United States collectively. This interpretation aligns with Congress' consistent usage of terms throughout the Act and respects the statutory language as enacted. Courts cannot rewrite the statute by adding words that Congress chose to omit. Therefore, the statutory text does not unambiguously require NPDES permits for water transfers, and the WTR appropriately reflects the Act's language and structure.

2. The WTR Was Properly Promulgated Based on the CWA's Statutory Purpose and Legislative History.

The statutory purpose and legislative history of the CWA support upholding the WTR as a valid regulation under the Act. The CWA's overarching goal of restoring and maintaining the integrity of the nation's waters is balanced with a recognition of states' traditional authority over water resources. This balance suggests that the EPA's interpretation exempting water transfers from the NPDES permitting program is consistent with congressional intent.

The statutory purpose of the CWA supports upholding the WTR because Congress intended to balance a strong federal commitment to water quality with respect for state authority over water resources, including decisions about water transfers. The primary 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). While this objective underscores a strong federal commitment to water quality, the Act is also "among the most complex" federal statutes, balancing "a welter of consistent and inconsistent goals." *Catskill III*, 846 F.3d at 514 (2d Cir. 2017) (quoting *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001) (*Catskill I*)). The CWA establishes a "complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation." *Id.* This complexity reflects Congress' intent to balance federal oversight with respect for state authority over water allocation and use. Furthermore, Section 101(b) of the CWA explicitly states that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The Act also emphasizes cooperation with state and local governments in developing "comprehensive solutions" for pollution "in concert with . . . managing water resources." *Catskill III*, 846 F.3d at 514 (citing 33 U.S.C. § 1251(g)). This statutory language indicates that Congress intended for states to have significant authority in managing water resources, including decisions about water transfers.

The CWA's inclusion of policy compromises also supports upholding the WTR as consistent with the Act's balanced approach between environmental goals and practical considerations. The Supreme Court has recognized that "no law pursues its purpose at all costs." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). The CWA is no exception; while it aims to eliminate water pollution, it also incorporates policy compromises and limitations. For instance, the NPDES program applies only to point sources and excludes non-point source pollution, such as agricultural runoff, despite its significant impact on water quality. As the Eleventh Circuit noted, "Non-point source pollution . . . is widely recognized as a serious water quality problem,

but the NPDES program does not even address it." *Friends I*, 570 F.3d at 1226–27 (11th Cir. 2009). This illustrates that the CWA's ambitious goals are tempered by practical considerations and a recognition of the complexities involved in water management. Accordingly, exempting water transfers from NPDES permitting is consistent with the Act's balanced framework, as reflects the legislative intent to balance the Act's environmental objective with practical realities.

Turning to the legislative history, there is a notable absence of clear congressional intent regarding the applicability of NPDES permits to water transfers. The Second Circuit in *Catskill III* observed that "the more than 3,000-page legislative history of the CWA appears to be silent, or very nearly so, as to the applicability of the NPDES permitting program to water transfers." 846 F.3d at 515. This silence extends to the meaning of the term "addition" within the statutory phrase "addition . . . to navigable waters," suggesting that Congress did not directly address this issue. *Id.* (citing *Catskill I*, 273 F.3d at 493). Courts have been reluctant to impose interpretations not clearly supported by legislative history, especially when the statutory text is ambiguous. As the Eleventh Circuit stated in *Friends I*, "[a]fter seizing everything from which aid can be derived we are left with an ambiguous statute." 570 F.3d at 1227 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)). The existence of such ambiguity, characterized by "two reasonable, competing interpretations," highlights the courts' hesitation to fill in legislative gaps without clear guidance. *Id.* at 1226 (quoting *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004)). Therefore, the absence of clear congressional intent in the legislative history regarding NPDES permits for water transfers, combined with the courts' reluctance to interpret ambiguous statutes without explicit guidance, supports upholding the WTR as validly promulgated under the CWA.

While the legislative history includes broad statements about the goals of the CWA, these do not specifically address water transfers or the requirement of NPDES permits for such activities. The Senate Conference Report expresses an intent for "navigable waters" to be given "the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236 (1972). However, as the Eleventh Circuit cautioned, courts "interpret and apply statutes, not congressional purposes." *Friends I*, 570 F.3d at 1226. Additionally, isolated statements in the legislative history about eliminating water pollution and the need to regulate every point source are insufficient to establish a clear legislative mandate regarding water transfers. The Second Circuit in *Catskill III* emphasized that such statements "do not speak to the issue before us with the 'high level of clarity' necessary to resolve the textual ambiguity." 846 F.3d at 515 (quoting *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007)). The court concluded that "Congress has not left us a trace of a clue as to its intent" on the specific question of NPDES permitting for water transfers. *Id.* at 509.

Both the statutory purpose and the legislative history of the CWA support upholding the WTR as a validly promulgated regulation. The Act's overarching goal of restoring water quality is balanced by a recognition of state authority and practical limitations. The absence of clear legislative intent regarding NPDES permitting for water WTR Transfers Rule aligns with the statutory purpose and legislative history of the CWA and should be upheld.

Therefore, the EPA requests the Court find that either the Second and Eleventh Circuit's precedents are persuasive and adhere to them to avoid needlessly creating a circuit split. In the alternative, the EPA requests that the Court find the WTR as a validly promulgated regulation in its own right. Thus, the EPA requests that the Court affirm the district court in finding the WTR was validly promulgated.

d. The WTR Does Not Exempt Highpeak's Tunnel from Permitting Requirements Under the CWA.

The tunnel constructed by Highpeak connecting Cloudy Lake and Crystal Stream does not fall into the WTR exception, because the transfer itself introduces pollutants. Therefore, Highpeak needs a permit under the CWA to continue the transfer. Highpeak interprets introduced to mean that the "pollutants must result from human activity and not natural processes like erosion." (R. at 11). EPA disagrees and has never interpreted the WTR to apply so broadly.

The WTR exempts activities "that convey[] or connect[] waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from permitting requirements under the CWA. 40 C.F.R. § 122.3(i). However, if pollutants are introduced "by the water transfer activity itself to the water being transferred," then the exemption does not apply and the transfer is subject to CWA permitting requirements. *Id.*

The EPA's interpretation of the meaning of "introduced" within the WTR to include Highpeak's discharges is the proper interpretation given the unambiguous nature of the regulation. Further, even if the regulation is ambiguous, the EPA's interpretation of introduced is entitled to deference under *Kisor*. Therefore, the Court should affirm the district court and find that Highpeak's tunnel is not exempt from the CWA permitting requirements, as the WTR does not apply to the tunnel.

i. The WTR is Unambiguous About the Meaning of "Introduced," and that Meaning is the One Adopted by the EPA.

The WTR is not ambiguous. The EPA, with guidance from the courts, determined that a pollutant is added "when it is introduced into a water from the outside world by a point source." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697 (2008) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174–175 (D.C. Cir. 1982).

Waters that contain pollutants before the transfer or "flow between potentially distinct bodies of water" do not count as transfers. *S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022). When water quality changes as it moves through something like a dam or sits in a reservoir, those changes in chemical or physical characteristics do not constitute the addition of a pollutant under section 402 of the CWA. 73 Fed. Reg. 33697-01; *Gorsuch*, 693 at 156. However, when pollutants are added to the transferred water due to actions of the transferor, including inadequate operation or maintenance, the pollutants added require a permit. 73 Fed. Reg. 33697; *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988); *Gorsuch*, 693 at n. 22.

The WTR is unambiguous on the meaning of introduced. Data shows that the water discharged in Crystal Stream contained 2-3% higher quantities of iron, manganese, and TSS than the water taken from Cloudy Lake at the start of the tunnel. (R. at 5). Thus, the water transfer itself, as initiated by Highpeak, is causing additional pollutants, above the ambient level, to be "introduced" into Crystal Stream. The pollutants come from a tunnel constructed by Highpeak; therefore, the pollutants are added to the transferred water due to the actions of the transferor. The regulations and agency interpretation is clear that such an introduction of a pollutant added by the water transfer itself would require Highpeak to obtain a permit for the water transfer.

Therefore, the EPA respectfully requests the Court affirm the district court and find that Highpeak requires a permit under the WTR.

ii. The EPA's Interpretation of the WTR is Entitled to Deference Under *Kisor*.

The EPA's interpretation of the WTR is entitled to deference under Kisor. Kisor requires first that the regulation being interpreted is genuinely ambiguous after all tools of interpretation have been utilized. *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019). Next, the agency's interpretation

of the regulation must be reasonable; the court should look to "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* at 575. Lastly, the court considers whether the character and context of the agency's interpretation entitles it to controlling weight. *Id.* at 577.

The character and context of the agency's interpretation entitle it to controlling weight when it was actually made by the agency in an authoritative or official capacity, rather than a convenient litigating position; when the agency's interpretation "implicate[s] its substantive expertise"; and when the agency's interpretation reflects a "fair and considered judgment," i.e. it is not a post-hoc rationalization or an unfair surprise. *Id.* at 577–79. In the current case, the EPA put forward an interpretation of the word "introduced" within the WTR that is entitled to Kisor deference because it meets the requirements laid out above.

If the regulation is ambiguous about the meaning of "introduced," the EPA's interpretation of introduced is reasonable in light of the text, structure, history, and purpose of the regulation. The text and structure of the WTR say that if pollutants are introduced "by the water transfer activity itself to the water being transferred" the water transfers exception no longer applies. 40 C.F.R. § 122(i). The plain reading of that regulation is that if water comes out of the transfer with more pollutants than it started with, the water transfer itself introduced the pollutants and subjects it to normal CWA permitting requirements. The record shows pollutants were added to the water during the water transfer itself. (R. at 5).

The EPA described the purpose and history behind the regulation to exempt water transfers as codifying Congress's "clearly expressed policy not to unnecessarily interfere with water resource allocation." 73 Fed. Reg. 33697. The WTR aims to "insure State water allocation systems are not subverted;" however, if the system itself adds the pollutants, the WTR does not

apply and a NPDES permit is required for those transfers. *Id.* The transfer in question has nothing to do with state's water systems, which are the primary water transfers the rule intends to exempt. Thus, the text, structure, purpose, and history of the regulation all support the EPA's interpretation of introduced in the regulation.

Further, the character and context of the interpretation entitle the EPA to controlling weight. The EPA's interpretation of introduced is fair and considered as it is the same interpretation of the CWA that the EPA has promulgated for decades.[4] Further, the interpretation promulgated by the EPA in this litigation is the same, or at the very least consistent with, the interpretation of introduced set out in the WTR itself. EPA states that when pollutants are added to the transferred water due to actions of the transferor, including inadequate operation or maintenance, the pollutants added require a permit. *Consumers Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at n. 22; 73 Fed. Reg. 33697. Thus, the EPA's interpretation represents an authoritative interpretation by the agency that first appeared in the WTR itself and is entitled to deference.

Therefore, the EPA respectfully requests the Court affirm the district court and find that Highpeak requires a permit under the WTR.

IV. CONCLUSION

For the forgoing reasons, the EPA respectfully requests the Court reverse the district court and find that CSP did not have standing nor did CSP timely file this action. The EPA likewise respectfully requests that the Court affirm the district court and find that the WTR was a validly

[4] Specifically, the Court of Appeals for the D.C. Circuit agreed with EPA that the term "addition" may reasonably be limited to situations in which "the point source itself physically introduces a pollutant into a water from the outside world." *Gorsuch*, 693 F.2d at 175; 73 FR 33697-01; *Catskill I*, 273 F.3d at 491.

promulgated regulation and find that Highpeak needs a permit to operate its water transfer system because pollutants were introduced during the water transfer.