C.A. No. 24 -01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
And
HIGHPEAK TUBES, INC.,
Defendant-Appellees-Cross-Appellants.

Petition for Review of Decision of the United States District Court for the District of New Union

Brief of Appellant, CRYSTAL STREAM PRESERVATIONIST, INC.

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JURISDICTION

Crystal Stream Preservationist, Inc. ("CSP") petitions for review the decision of the United States District Court for the District Court of New Union granting the motions to dismiss the Water Transfers Rule ("WTR") as an invalid regulation promulgated pursuant to the Clean Water Act ("CWA"). Record at 6.

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal. Under The Administrative Procedures Act (APA), 5 U.S.C. § 551 et. seq; 5 U.S.C. § 702, a court may review cases concerning the validity of a United States agency's regulation, in which the WTR, 40 CFR 122.3(i), was invalidly promulgated under CWA which prohibits the discharge of any pollutants by any person into a water of the United States without complying with the Act. 33 U.S.C. § 1311(a). CSP is incorporated under the laws of the State of New Union and filed timely petitions for review. R. at 5.

STATEMENT OF ISSUES PRESENTED

I. Does CSP have standing to challenge Highpeak's discharge and the WTR where its members have suffered injury because of increased pollutants in Crystal Stream?

II. Did CSP file its challenge to the WTR in a timely manner when it brought suit well within the six-year statute of limitations established under *Corner Post*?

III. Was the EPA's WTR a valid regulation promulgated pursuant to the CWA, when it conflicts with its plain language and purpose?

IV. If the EPA's WTR is validly promulgated, is Highpeak required to acquire an NPDES when Highpeak introduced discharges from water transfer activities?

STATEMENT OF THE CASE

This case is about a violation of the CWA from a recreational company, Highpeak Tubes, Inc. (Highpeak), that discharges pollutants into the water of Crystal Stream without a permit. This case also challenges the validity of the Environmental Protection Agency's (EPA) WTR, which exempts certain water transfers from permitting requirements. CSP is an environmental nonprofit organization dedicated to protecting Crystal Stream with the mission of preserving the stream for future generations from contamination resulting from industrial uses and illegal transfers of polluted water. Highpeak's continued discharge of pollutants into the Crystal Stream will harm the water and wildlife dependent on it for survival. Both the aesthetic and invaluable presence of Crystal Stream necessitate invalidating the WTR because it runs afoul of the purpose of the CWA.

I. Highpeak Has Contaminated Crystal Stream Since 1992 Through Its Illegal Discharges.

CSP was formed on December 1, 2023, as a nonprofit corporation. R. at 4. CSP is a membership organization with thirteen members who all live in Rexville, New Union, inviting individuals interested in the "preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." *Id.* at 4. Two of its members own homes along Crystal Stream before 2008 and reside approximately one mile south of the end of Highpeak's tube, five miles south of the discharge point. *Id.* at 4. All but one of the members have lived in Rexville for more than 15 years, with the lone exception of Jonathan Silver who moved to Rexville in 2019. *Id.* 4.

Since 1992, Highpeak has owned and operated a recreational tubing operation in Rexville, New Union (New Union). *Id.* at 4. Highpeak owns a 42-acre parcel of land in Rexville, to which on the northern border of the property lies Cloudy Lake, and on the southern portion of the parcel runs the Crystal Stream. *Id.* at 4. Crystal Stream is a stream upon which Highpeak launches its

customers in rented innertubes. *Id.* at 4. In 1992, Highpeak began the process of obtaining permission from the New Union to construct a tunnel connecting Cloudy Lake. *Id.* at 4. Once permission from New Union was obtained, Highpeak created a four-foot-in diameter and approximately a hundred-yard-long tunnel partially carved through rock and partially constructed with an iron pipe. *Id.* at 4. To enhance the tubbing recreation, the tunnel is equipped with valves at the northern and southern ends so that Highpeak's employees can open and close them to increase the volume and velocity of water flow from Cloudy Lake into Crystal Stream. *Id.* at 4.

New Union does not have a delegated CWA permitting program, so the EPA, rather than the New Union's own environmental agency, issues CWA permits under the National Pollution Discharge Elimination System ("NPDES"). *Id.* at 4. Highpeak does not have an NPDES permit and has not sought one for the discharge of waters from Cloudy Lake into Crystal Steam, which no one has previously challenged.

II. Highpeak Put on Notice of the Illegal Discharge of Pollutants into Crystal Stream.

On December 15, 2023, CSP sent a CWA notice of intent to sue (NOIS) letter to Highpeak and, as required by regulation, sent copies to the New Union Department of Environmental Quality and EPA. *Id.* at 5. The NOIS alleged that Highpeak's tunnel constituted a point source under the Act, which regularly discharges pollutants into the Crystal Stream without a permit. Crystal Stream and Cloudy Lake are "waters of the U.S" under the CWA. *Id.* at 5

The NOIS specifically alleged that this discharge contains multiple pollutants. *Id.* at 5. Samples showed that, due to natural conditions, the water in Cloudy Lake has significantly higher levels of certain minerals, such as iron and manganese. *Id.* at 5. Cloudy Lake also has a much higher concentration of total suspended solids ("TSS") than Crystal Stream water. *Id.* at 5. The NOIS contended that Crystal Stream is fed significantly by natural groundwater springs and is less

burdened by these pollutants. *Id.* at 5 However, higher levels of these pollutants are introduced into Crystal Steam every time Highpeak opens the valves, discharging pollutants into Crystal Steam and violating the CWA. *Id.* at 5. CSP further alleges in the NOIS that EPA did not validly promulgate the WTR, and in the alternative, that the additional iron, manganese, and TSS are introduced during the transfer process, thereby taking the discharge out of the exemption provided by the WTR. *Id.* at 5. The data supported this finding, indicating that the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of these pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day as shown:

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

Id. at 5.

On December 27, 2023, Highpeak sent a reply letter to CSP, stating simply that it need not respond to the NOIS on the merits, as Highpeak did not need an NPDES permit due to the WTR. *Id.* at 5. Furthermore, Highpeak stated that a "natural" addition of pollutants during the transfer did not bring the discharge outside the WTR's scope. *Id.* at 5.

III. The United States District Court for the District of New Union Rules in Favor of CSP Except on the Validity of the WTR.

After the required sixty-day waiting period, CSP filed its Complaint on February 15, 2024, reiterating the allegations from the NOIS. *Id.* at 5. The Complaint included both the citizen suit claims against Highpeak and a claim under the APA against EPA, challenging the WTR as invalidly promulgated and inconsistent with the statutory language of the CWA. *Id.* at 5.

Alternatively, even if the WTR is valid, then Highpeak must acquire a permit because of the pollutants introduced during the water transfer. *Id.* at 5.

Highpeak moved to dismiss on multiple grounds: (1) CSP's challenge to the WTR should be dismissed for lack of standing and as time-barred, (2) CSP's lacks standing in the citizen suit because CSP suffers no actual injury as a result of Highpeak's discharge, (3) CSP's Complaint fails to state a cause of action because the WTR was validly promulgated, and, as a result, no permit was required for the tunnel discharge. *Id.* at 5.

EPA also moved to dismiss on multiple grounds: (1) CSP's challenge to the WTR lacked standing and timeliness, (2) CSP's challenge to the WTR should fail as it is a valid promulgation under the CWA, (3) Highpeak's discharge is not out of the scope of the WTR, requiring a permit for the pollutants introduced to the water during the discharge. *Id.* at 6.

IV. Rulings Presented for Review.

On August 1, 2024, each party filed motions seeking leave to appeal different parts of the district court's order. *Id.* at 5-6. On appeal, CSP affirms that CSP had standing to challenge Highpeak's discharge and the WTR. CSP also affirms the holding that its regulatory challenge was filed in a timely manner. *Id.* at 5. CSP disputes that the WTR is a valid regulation under the CWA. *Id.* at 5. Lastly, CSP affirms that its citizen suit may proceed because Highpeak's introduction of additional pollutants into Crystal Stream during the water transfer takes it out of the scope of the WTR. *Id.* at 5.

SUMMARY OF THE ARGUMENT

This Court should affirm the first, second, and fourth holdings of the United States District Court of the State of New Union. However, this Court should vacate the third holding concerning the validity of the EPA's WTR because it is contrary to the intent and plain language of the WTR.

First, CSP has established standing to challenge the EPA's WTR and sue Highpeak. CSP's members have suffered concrete and particularized injuries to their recreational and aesthetic enjoyment of Crystal Stream due to pollution caused by Highpeak and exacerbated by the WTR. These injuries align directly with CSP's mission to protect the stream. Additionally, the lawsuit doesn't require significant individual member participation, further supporting associational standing. Finally, CSP's formation and purpose are genuine, demonstrating a commitment to environmental protection rather than strategic litigation.

Second, CSP's challenge to the EPA's WTR is well within the statute of limitations (SOL). The Supreme Court's ruling in *Corner Post* established that an injury must occur before the SOL starts ticking. For CSP, this injury happened upon its incorporation in December 2023. The subsequent challenge in February 2024 falls comfortably within the 6-year SOL. Even though some members might have experienced harm earlier, CSP as an entity could not sue until it was injured. This situation mirrors *Corner Post*, where a newly formed corporation challenged an existing regulation. Both cases highlight that a plaintiff's ability to sue arises upon their injury, not necessarily when the harmful regulation was enacted. This principle, grounded in the traditional understanding of "accrue," ensures a fair application of the SOL, regardless of the plaintiff's nature. Therefore, CSP's representative capacity and the potential earlier harm experienced by some members uphold the timeliness of their challenge.

Third, the EPA's WTR is invalid because it conflicts with the CWA intent. The CWA's explicit goal is to eliminate pollution, but the WTR improperly allows for certain discharges, undermining this objective. The role of courts is to interpret laws, not defer to agency interpretations, especially when such interpretations contradict the statute's plain language. The Supreme Court's recent decision in *Loper Bright* solidifies this principle, emphasizing the need for

courts to scrutinize agency actions, particularly environmental regulations. While overturning precedent requires special justification, the WTR's inconsistency with the CWA warrants such a step. Adopting the reasoning from the *Catskill I* and *Catskill II* cases, under the *Skidmore* standard, would ensure that the WTR is held invalid. This approach would align with the court's duty to interpret laws correctly and enforce the congressional purpose of the CWA- to protect environmental integrity.

Lastly, the EPA's interpretation of the WTR is subject to *Auer* deference, meaning the court should defer to the agency's interpretation unless it is erroneous or inconsistent with the regulation. The WTR's language regarding "introduced" pollutants is ambiguous, and the EPA's reasonable interpretation aligns with the CWA's goal of protecting water quality. Highpeak's discharge of pollutants, mainly due to the construction and maintenance of its tunnel, falls under the category of "introduced" pollutants. This interpretation is reasonable and consistent with the WTR's purpose of preventing pollution from human-engineered water transfer activities. Therefore, Highpeak must obtain an NPDES permit to discharge its discharges into Crystal Stream.

STANDARD OF REVIEW

A Court of Appeals reviews district court orders assessing the validity of a United States agency regulation under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"). *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105–06 (D.C. Cir 2014); 5 U.S.C. § 706(2)(A). Under this standard, courts ask "whether the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

An agency action is arbitrary and capricious if it has relied on factors "…which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem…." *Id.* at 43. An agency's factual findings are conclusive if supported by substantial evidence. 15 U.S.C § 717r(b). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, but the standard may be satisfied by less than a preponderance. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022).

ARGUMENT

I. The United States District Court for the State of New Union correctly concluded that CSP has a standing to challenge the EPA's WTR and bring a citizen suit against Highpeak because it suffers from a cognizable environmental injury.

Article III of The United States Constitution only extends the judicial power of federal courts to cases and controversies. U.S. Const. art. III § 2, cl.1. For an organization to satisfy Article III's standing requirement, the organization must show that it has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

It is undisputed that CSP's members' injuries are causal to Highpeak's introduction of pollutants into Crystal Stream and enabling such pollutants through the invalidly promulgated WTR by the EPA. Additionally, it is undisputed that a favorable decision would likely redress CSP's injuries from High Peak and EPA.

Here, CSP has adequately demonstrated its standing in the citizen suit against Highpeak and in challenging the EPA's invalidly promulgated WTR because it has suffered a constitutionally recognized cognizable injury through aesthetic and recreational harm to Crystal Stream.

A. CSP has associational standing to bring a Citizen Suit against Highpeak and challenge EPA's WTR because CSP members have standing to sue in their own right.

The first element to establish associational standing is the organization's members must have standing to sue in their own right. Id. For an individual plaintiff to satisfy Article III's standing requirements, they must show "(1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical…." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181. The relevant showing for Article III standing is not injury to the environment but to the plaintiff. *Id.* at 181. Environmental plaintiffs adequately allege injury 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. Id. at 184 (citing *Sierra Club Morton v. U.S.*, 405 US 727, 735). Additionally, sworn statements adequately document injury in fact. *Id.* at 184.

CSP members have suffered a concrete and actual injury from Highpeak's introduction of pollutants into Crystal Stream and the invalidly promulgated WTR from EPA. As the Supreme Court held, environmental plaintiffs who document sworn statements showing that their use of the affected area in aesthetic and recreational values are lessened by the challenged activity having standing for the purpose of Article III. *Id.* at 184. CSP's certificate of incorporation states that its mission statement is to protect Crystal Stream from contamination from industrial uses and illegal transfers of polluted waters and that it must be preserved for future generations. *See* Ex. A to Comp. (Decl. of Cynthia Jones) at Par. 4. CSP members joined the nonprofit environmental corporation to ensure its mission statement was fulfilled. Highpeak and the EPA have undermined that purpose as the introduction of iron, manganese, and TSS are elevated, disturbing the natural state of Crystal Stream.

Highpeak's illegal introduction of these pollutants has substantially prevented CSP members from enjoying the stream. Cynthia Jones, a member and the secretary of CSP, has lived 400 yards from Crystal Stream Park, which sits next to the Stream and has a walking trail right along the edge of Crystal Stream. *Id.* Par. 5-6. Ms. Jones has regularly enjoyed the crystal-clear color and purity of the stream. Still, the aesthetic charm Crystal Stream is known for has been disturbed by Highpeak because of the discharge of polluted water into the stream, making the otherwise clear water cloudy. *Id.* at Par. 7. This presence of contaminants from toxins and metals, including iron and manganese, has significantly diminished the aesthetic of Crystal Stream. *Id.* at Par. 8.

Furthermore, Ms. Jones's ability to recreate Crystal Stream has significantly diminished her ability to enjoy the stream for the past four years since she first learned about the pollutants, recreating less frequently and being unable to walk directly in the stream. *Id.* at Par. 12. Thus, Ms. Jones's ability to enjoy the aesthetic of Crystal Stream's previously clear water and recreate along its previously standard level of pollutants creates adequate injury, as stated in *Laidlaw*. *Id.* at 184.

Furthermore, CSP member Jonathan Silver has been negatively affected by Highpeak's introduction of pollutants and the invalidly promulgated WTR. Mr. Silver first moved to his current residence in August of 2019, approximately one-half mile from Crystal Stream Park, where Highpeak's Tube operates in the same area as Crystal Stream. Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 4. Mr. Silver regularly enjoyed the park by walking along the stream with his dogs and children. *Id.* at Par. 5.

However, since gaining membership into CSP and obtaining information on Highpeak's discharge of pollutants into Crystal Stream, Mr. Silver has grown concerned and significantly lost the ability to recreate on Crystal Stream peacefully. *Id.* at Par. 9. Mr. Silver's recreation on Crystal Stream with his family has become infrequent. Mr. Silver has become hesitant to allow his dogs

to drink from Crystal Stream because of the cloudiness of the water produced by Highpeak's introduction of pollutants from Cloudy Lake. *Id.* at Par. 7. Mr. Silver's ability to enjoy the aesthetic of Crystal Stream's previously clear water and recreate along its previously standard level of pollutants creates adequate injury, as stated in Laidlaw.

Thus, CSP members would have standing in their own right to sue in their own right because of the harm caused to the ability of CSP members to enjoy the aesthetic and recreation of Crystal Stream.

B. CSP has associational standing because preventing Highpeak from further introducing pollutants into Crystal Stream and challenging the invalidly promulgated WTR are germane to its purpose under its Articles of Incorporation.

The second element to establish associational standing is that the interests at stake are germane to the group's purpose. *Hunt*, 432, U.S. 333, 343 (1947). This element prevents litigious organizations from forcing the federal courts to resolve numerous issues to which the organizations enjoy little expertise and about which few of their members demonstrable care. *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138 (2d Cir. 2006). The critical inquiry is whether the association's lawsuit would further the general interests that individual members sought to vindicate in joining the association and whether the lawsuit bears a reasonable connection to the association's knowledge and experience. *Id.* at 150.

The CSP's interests are germane to the organization's purpose. CSP is a nonprofit corporation created to protect Crystal Stream from contamination from industrial uses and illegal transfers of polluted waters and preserve and maintain it for all future generations. R. at 6; Ex. A to Comp. (Decl. of Cynthia Jones) at Par. 4.

CSP brought suit against Highpeak and the EPA because it is pertinent to the organization's purpose of protecting Crystal Stream from illegal transfers of polluted waters. Without attaining

the relief requested, Crystal Stream will continue to be suffer by the conduct of Highpeak and the EPA's invalidly promulgated WTR. The interests at stake for CSP are germane to its purpose and are supported by similar findings of courts in several jurisdictions that have found such connections to be sufficient. *See Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988)(That the alleged injury is to members' aesthetic interest in viewing live animals and birds—makes the pertinence of the Society's claim to its humanitarian goals apparent.); *Presidio Golf Club v. National Park Service*, 155 F.3d 1153 (9th Cir. 1998) (The court noted "the organization's goals of maintaining the Clubhouse for the members' use in a manner suitable for the social and athletic activities surrounding the game of golf ... [and] the Club's [related] interest in maintaining the historical and environmental integrity of the Clubhouse.) CSP has furthered the general interests of its members who joined to prevent the illegal transfer of polluted water by bringing suit to ensure that Crystal Stream retains its clear waters and is a recreational area suitable for animals and families. Ex. A to Comp. (Decl. of Jonathan Silver) Par 5, 7.

Thus, CSP has established that the interests at stake are germane to the CSP's purpose under its articles of incorporation and would further the general interests of members who joined CSP.

C. CSP has associational standing because the claim asserted, and the relief requested by CSP requires significant individual member participation in the lawsuit.

The third element to establish associational standing is that neither the claim asserted nor the relief requested by CSP requires individual member participation in the lawsuit. *Hunt*, 432 U.S. 333, 343 (1977). The third prong is prudential, in which the general prohibition on a litigant's raising another person's legal rights is a judicially self-imposed limit on exercising federal jurisdiction, not a constitutional mandate. *United Food & Com. Workers Union Loc. 751 v. Brown Grp.,*517 U.S. 544, 557 (1996). The third prong focuses on "matters of administrative convenience and efficiency." *Id.* Courts assess this prong by examining both the relief requested and the claims

asserted. *Cornerstone Christian Schs. v. Univ Interscholastic League*, 563 F.3d 127 (5th Cir. 2009). The prudential inquiry concerns both the claims alleged, and the relief sought because only a case-specific analysis will reveal whether an association or its members are better positioned to present a case. *Int'l Union, UAW v. Brock,* 477 U.S. 274, 289–90 (1986).

CSP has been able to adequately present its case by obtaining sampling reflected in the NOIS and CSP Complaint that has set forth the data to show that there has been an increase in pollutants to Crystal Stream because of the conduct of Highpeak and the WTR invalidly promulgated by the EPA. R. 5. Additionally, CSP took the initiative to inform its members of the pollutants introduced into Crystal Stream that have affected its aesthetic and recreational value and the possible health harms that it may pose. This initiative from CSP in commencing suit displays administrative convenience and efficiency.

However, CSP may need minimal assistance from CSP members such as Ms. Jones and Mr. Silver in pursuit of this litigation, but this would still allow for associational standing under the third element. *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547 (5th Cir. 2010) (Held that as long as the resolution of the claims benefits the association's members and the claims can be proven by evidence from representative injured members, without a fact-intensive-individual inquiry, the participation of those individual members will not thwart associational standing); *see also Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.,* 280 F.3d 278 (3d Cir.2002)*; Hosp. Council of W. Pa. v. City of Pittsburgh,* 949 F.2d 83 (3d Cir.1991); *Retired Chi. Police Ass'n v. City of Chi.,* 7 F.3d 584, 601–02, 608 (7th Cir.1993). The participation from CSP members Ms. Jones and Mr. Silver would only minimally involve testimony to evidence the esthetic and recreational impact that the conduct of Highpeak and the EPA's WTR have had on Crystal Stream.

CSP has satisfied the third element of associational standing because the claim asserted nor the relief requested by CSP requires significant individual member participation in the lawsuit.

Thus, CSP has associational standing because neither the claim is not asserted, and the relief requested by CSP requires minimal individual member participation in the lawsuit.

D. CSP is a genuine not-for-profit corporation that was solely formed based on preserving and protecting Crystal Stream.

It is well-settled that a plaintiff cannot manufacture standing by making expenditures based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). A party cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. *Stoops v. Wells Fargo Bank, N.A.*, 197 F.Supp.3d 782, 802 (2016) (citing *Clapper*, 568 U.S. 398).

The purpose and timing of CSP's filings demonstrate that the not-for-profit corporations' commitment to preserving Crystal Stream is not to take advantage of Supreme Court precedent and unnecessarily challenge a long-standing regulation and long-standing practice by Highpeak but to remedy the aesthetic and recreational injuries to its members and promote its mission.

The timing of CSP and the lack of a previous challenge uphold its standing to bring its citizen suit and regulatory challenge. Formed on December 1, 2024, CSP has strived in making genuine efforts to protect Crystal Stream from contamination resulting from industrial uses and illegal transfers of polluted waters to preserve and maintain Crystal Stream for future generations. R. at 4. Highpeak has been in operation since 1992, and the WTR final rule was published in 2007, but this does not detract from CSP's standing as an organization. R. at 4. CSP's members have experienced aesthetic and recreational injury even before the formation of CSP.

Ms. Jones's ability to enjoy the stream has significantly diminished since she learned of the pollutants in 2020, introduced by Highpeak and enabled under EPA's invalidly promulgated

WTR, four years before the litigation commenced. Ex. A to Comp. (Decl. of Cynthia Jones) Par. 10, R. at 5. This is not a self-inflicted harm that was proposed to negate standing as proposed in *Clapper*, or to take advantage of Supreme Court precedent to challenge long-standing regulation and long-standing practices by Highpeak, but a harm that has been affecting Jones as an individual since 2020 from the conduct of Highpeak and EPA's invalidly promulgated WTR. 568 U.S. 398; R. at 5.

Furthermore, Mr. Silver moved to Lexville in 2019, has been a member of CSP since 2023, and has enjoyed the aesthetic and recreational features of Crystal Stream. Ex. B to Comp. (Decl. of Jonathan Silver) Par. 4, 3. Mr. Silver joined CSP in 2023 to stop the discharge that impacted his and his family's ability to enjoy Crystal Stream for approximately the past year. *Id.* at 8. The timing of Mr. Silver joining CSP does not detract from the importance of CSP bringing suit to defend its mission and the ability of its members to enjoy Crystal Stream, as Mr. Silver has also experienced harm to his ability to enjoy the aesthetic and recreational of Crystal Stream for approximately a year. It demonstrates the commitment of CSP and its members to preserve Crystal Stream for future generations and protect the environment.

CSP has established that it has standing to bring a citizen suit against Highpeak and challenge the EPA's WTR, and any question about its legitimacy as a not-for-profit corporation is unfounded. CSP has suffered a constitutionally recognized injury as a result of recreational and aesthetic harm to Crystal Stream. Thus, the decision of the United States District Court for the District of New Union was correct in concluding that any question as to the legitimacy of CSP as a not-for-profit corporation is unfounded and, ultimately, does not negate its standing.

II. The United States District Court of the District of New Union correctly found that CSP's regulatory challenge was timely filed.

A person suffering a legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof. 5 U.S.C. § 702. Section 704 limits the judicial review of agency actions. *Id.* at § 704. A plaintiff can only challenge an action that "marks the consummation of the agency's decision-making process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–178, (1997).

Section 702's injury requirement and Section 704's finality requirement work hand in hand: each is a "necessary, but not by itself ... sufficient, ground for stating a claim under the APA." *Herr v. U.S. Forest Services,* 803 F.3d 809, 819 (2015). "[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*. 28 U.S.C. § 2401(a). A right of action "accrues" when the plaintiff has a "complete and present cause of action"—*i.e*. when she has the right to "file suit and obtain relief." *Green v. Brennan*, 578 U.S. 547, 554 (2016)

A. The United States Supreme Court decision in *Corner Post* held that the APA statute of limitations begins when a regulation harms the plaintiff and as such, CSP's challenge to the WTR fits squarely within the statutory timeframe.

An APA plaintiff only has a complete and present cause of action once she suffers an injury from a final agency action, so the SOL begins to run when she is injured. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024). A "right accrues when it comes into existence," *U.S. v. Lindsay*, 346 U.S. 568, 569, (1954). Injury, not just finality, is required to sue under the APA. *Corner Post*, 144 S. Ct. 2240*,* 2452-53.

CSP is well within the SOL as held in *Corner Post*. *Id.* at 2450. The Supreme Court in *Corner Post* held that the SOL under the APA does not begin to run until the Plaintiff has been

injured. *Id.* This aligns with the definition that has appeared since the 19th century and the Black Law Dictionary since 1940. *Id.* at 2452. CSP sustained injury from EPA's invalidly promulgated WTR on December 1, 2023, when it was first incorporated in the State of New Union. Ex. A to Comp. (Decl. of Cynthia Jones) Par 3. The challenge to the WTR was filed on February 15, 2024, well within the relevant SOL following the Supreme Court's holding in Corner Post. R. at 5. CSP would not have been able to suffer injury until it was incorporated in 2023, which would then allow CSP to take action to fulfill its mission of preventing the illegal transfers of polluted water into Crystal Stream.

Furthermore, CSP members had long been affected by the pollutants that were wrongfully introduced into Crystal Stream because of EPA's invalidly promulgated WTR. R. at 5. CSP member Mr. Silver moved to Rexville from Arizona in 2019, joining CSP to preserve the Crystal Stream he often recreates with his family. Ex. B to Comp. (Decl. of Jonathan Silver) Par. 5. As a member of CSP, Mr. Silver is well within the six-year statutory period to bring suit. While individual members of CSP could not have brought timely challenges individually, this is not dispositive of the fact that CSP is getting the challenge in a representative capacity, and itself as a corporation could not have brought suit until it was injured in its incorporation on December 1, 2023.

Thus, CSP timely filed its challenge within the SOL held in Corner Post against EPA's invalidly promulgated WTR because it would not have been injured until it was incorporated.

B. There is no meaningful distinction between a for-profit business and an environmental group for the SOL as understood in *Corner Post.*

In *Corner Post*, the Supreme Court considered a facial challenge to Regulation II, promulgated by the Federal Reserve Board in 2011, which set the maximum interchange fee that issuing banks could charge merchants for debit card transactions. 144 S. Ct. 2240, 2448. Corner Post, a North Dakota truck stop and convenience store that opened in 2018, joined a suit against

the Board under the APA in 2021 alleging that Regulation II was unlawful because it permitted higher interchange fees to be charged than were allowed by the underlying statute, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *Id.*

The district court dismissed the case as barred by the SOL under the general federal statute of limitations, 28 U.S.C. § 2401(a), and the Eighth Circuit affirmed, reasoning 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." *Corner Post*, 144 S. Ct. 2240, 2448. Thus, the lower courts held that the statute's six-year statute of limitations period began upon the publication of Regulation II in 2011 and expired in 2017 before Corner Post even opened.

However, the Supreme Court settled the issue, focusing on the issue of when an action accrues, not on whether the business was regulated or when it started business. The Supreme Court emphasized that when Congress enacted 28 U.S.C. § 2401 in 1948, "accrue" had a well-settled meaning citing its precedent, as well as legal dictionaries. *Corner Post*, 144 S. Ct. 2240, 2450. The court solely assessed the meaning of accrue within the relevant statute, concluding that when Congress used the phrase "right of action first accrues" in the statute, "it was well understood that a claim does not 'accrue' as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court." *Id.* at 2445.

The Court understood and did not wish to replace the intent of the legislature with that of its own concerning the relevant statute, and acknowledged that Congress knew how to depart from the traditional rule to create a limitations period that began with the defendant's action instead of the plaintiff's injury. *Id.* 2452. This plaintiff-centric concept of accrue in the relevant statute as understood in *Corner Post* does not focus on the defendant or the status of an organization bringing suit, but instead when the plaintiff sustained an injury concerning the SOL. Any finding that

distinguishes *Corner Post* from this matter merely because CSP is an environmental organization runs afoul of the intent of the legislature in creating a plaintiff-centric standard.

Thus, there is no dispositive difference between *Corner Post* and the case at bar that would justify creating a new standard to deny CSP because of the SOL in 28 U.S.C. § 2401(a).

C. The Case at Bar is Analogous to Corner Post with Respect to the Representative Capacity of CSP for its Members.

The Supreme Court noted that its precedents had treated this understanding of "accrual" as the "standard rule for limitations periods" so that, unless and until Congress says otherwise in the legislation at issue, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Corner Post*, 144 S. Ct. 2240, 2451.

Like *Corner Post*, CSP could not have filed suit and obtained relief until it was incorporated, with the incorporation occurring a lengthy period after the final regulation had been promulgated. *Id*. at 2448. Additionally, like the plaintiffs in *Corner Post*, CSP could not have brought this challenge until the date of its incorporation. *Id.* However, as the lower court correctly pointed out, CSP bringing the challenge in a representative capacity on behalf of its members does not alter the conclusion made in *Corner Post*. The fact that some of the members of CSP would be unable to bring suit on their own is not dispositive of the issue, with the District Court persuasively comparing that any owner of the plaintiff corporation in *Corner Post* could hypothetically have entered into the business at an earlier date. Additionally, as the lower court correctly concluded, any doubt as to the timely filing concerning CSP is resolved by the fact that Mr. Silver is a member of CSP and moved to the area four years prior to the action being filed. Ex. B to Comp. (Decl. of Jonathan Silver) Par. 4.

Furthermore, the Supreme Court nonetheless allowed the plaintiffs in *Corner Post*, a newly formed corporation, to challenge an existing regulation many years after the regulation was

promulgated. *Corner Post*, 144 S. Ct. 2240, 2460. This furthers the underlying plaintiff-centric purpose of the relevant statute notwithstanding some of the members may have brought suit previously does not bar a corporation from bringing suit under the relevant SOL. This aligns with the relevant statute and focuses on the SOL in which a plaintiff may bring suit concerning the time of injury. Any contrary finding would supplant the intent of the legislature by barring plaintiffs from bringing suit because the challenge is in a representative capacity and some of the members could not have previously brought suit.

CSP has established that it has timely filed its regulatory challenge to the WTR. Thus, the case at the bar is analogous to Corner Post with respect to the representative capacity of CSP for its members, finding that CSP timely filed its challenge.

Thus, CSP has established that it has timely filed its regulatory challenge to the WTR.

III. EPA's interpretation of the WTR is inconsistent with the CWA, rendering the WTR invalid.

Under the APA, it is the responsibility of the court to decide whether the law means what the agency says. 5 U.S.C. § 706. When the best reading of a statute involves delegating discretionary authority to an agency, then the role of the reviewing court under the APA is to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. *Id.* The court fulfills that role by recognizing constitutional delegations fixing the boundaries of the delegated authority. *Id.*

Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. It further requires courts to "hold unlawful and set

aside agency action, findings, and conclusions found to be ... not in accordance with law." *Id.* § 706(2)(A).

The EPA's WTR was invalidly promulgated because it is inconsistent with the intent of the legislature and the plain language of the CWA, requiring the WTR be held invalidly promulgated.

A. The EPA's WTR is invalidly promulgated because it contradicts legislative intention and the plain language of the CWA because it impermissibly allows discharges.

Congress enacted the CWA, in 1972, presenting a distinct change in federal water pollution control policy. Prior to 1972, the CWA "emphasized state enforcement of water quality standards." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 11 (1981). This system of pollution control led to substantial problems in enforcement because of the difficulty in establishing precise limitations for particular pollutants on the basis of the water quality desired for the receiving bodies of water. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 8, 12 (1971). The effort to control water pollution using only this method was found to be inadequate in every vital aspect." S. Rep. No. 414, *supra,* p. 7.

The 1972 legislation "shifted the emphasis to 'direct restrictions on discharges,' and made it 'unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms". *Sea Clammers,* 453 U.S. 1, 11. The change in both emphasis and method were described in the Senate Report (S. Rep. No. 414, *supra,* p. 42). 33 U.S.C. 1311 clearly establishes that the discharge of pollutants is unlawful.

The CWA as currently implemented prohibits the discharge of any pollutant by any person shall be unlawful, which the WTR undermines. 33 U.S.C. 1311(a). The WTR allows for Discharges from a water transfer. 40 C.F.R. 122.3(i). A water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to

intervening industrial, municipal, or commercial use. *Id.* The exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred. *Id.*

Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, Congress clearly established that no one has the right to pollute. This is demonstrated through the legislative history of the relevant statute because it previously allowed limitations for particular pollutants. However, the statute as stands clearly prohibits the discharge of *any* pollutant. *Id.* The CWA's overall goal of completely eliminating the discharge of all pollutants is frustrated by the EPA's WTR because it undermines the CWA's purpose and statutory requirements, threatening to reverse the CWA's accomplishments

Thus, EPA's WTR is invalidly promulgated because it contradicts legislative intention and the plain language of the CWA.

B. The WTR is invalid because special justifications require that this Court adopt *Catskill I* & *II* holding, invalidating the WTR.

Under the APA, it "remains the responsibility of the court to decide whether the law means what the agency says." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (citing *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 109, (2015) (Scalia, J., concurring in judgment). Overturning long-settled precedent…requires 'special justification,' not just an argument that precedent was wrongly decided. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Regulations upheld under *stare decisis* are not an "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

The Supreme Court's shift from *Chevron v. NRDC* reflects the checks and balances system put forth by the Founders, that courts must resolve statutory ambiguity, including in cases involving environmental regulations. The Court should revisit these earlier rulings, such as *Catskill III*, which applied *Chevron*'s deferential standard, and instead subject the agency's interpretations

to the more exacting scrutiny afforded by *Skidmore*, consistent with the principles articulated in *Loper Bright*. *Loper Bright*, 144 S. Ct. 2244, 2262-2363 (2024). This shift is not merely a doctrinal shift but a necessary correction to prevent over-deference to agencies, particularly in highly specialized areas where the agency may interpret statutes in ways that conflict with congressional intent, such as in the case of the EPA's WTR.

The EPA's WTR directly conflicts with the plain language of the CWA and warrants the overturning of settled precedent to ensure that courts adhere to the precedent established in *Loper Bright*. *Id.* at 144 S. Ct. 2244 (2024). The Supreme Court in *Loper Bright* found that the previous standard required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret ... statutory provisions." *Id.* This is not solely a proposition that precedent was wrongly decided, but that it is the obligation of courts to ensure that they do not violate the APA by further yielding to an agency's interpretation, which has now been revoked under *Loper Bright*.

Additionally, what the lower court has held would enforce the principles of *Chevron* to which the Supreme Court has expressly disavowed. The lower court read *Loper Bright* as requiring respect for the decisions of the Second and Eleventh Circuits under *Chevron* as overturning precedent would threaten disruption, confusion, and uncertainty for necessary legal stability. R. at 10. While the Supreme Court stated that it would not call into question prior cases that relied on the *Chevron* Framework, it is warranted through special justification. *Halliburton*, 572 U.S. 258, 266 (2014) The Supreme Court found that deferment fostered unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty. *Loper Bright*, 144 S. Ct. 2244, 2292 (2024). This uncertainty justifies overturning precedent, as the lower court's reading of *Loper Bright* does just that, deferring to an agency's interpretation to continue

the confusion and disruption surrounding the WTR and maintain precedent to support a previous decision that contradicts the legislative intent of the CWA.

With the doctrinal shift brought about by *Loper Bright*, it is appropriate for this Court to adopt *Catskill I and Catskill II* under the *Skidmore* standard, as Chevron is no longer the controlling framework for judicial review. Under *Skidmore*, the court would evaluate the agency's reasoning in light of factors such as its expertise, the consistency of its interpretations, and the persuasiveness of its justifications for its regulations. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). This judicially active role ensures that agencies do not exceed their statutory authority or act in ways that contradict Congressional intent. By applying *Skidmore*, this Court would engage more critically with the regulatory actions taken by the agency, ensuring they are both reasonable and consistent with the statutory text.

Furthermore, by reinstating *Catskill I* and *Catskill II* under the *Skidmore* standard, this Court would be taking appropriate action to ensure the EPA does not exceed its statutory authority and that its interpretations are reasonable with the relevant statutory text. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 495 (2d Cir. 2001) (holding that the plain meaning of the statutory text in the Clean Water Act is inconsistent with the Environmental Protection Agency's Water Transfer Rule); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84-85 (2d Cir. 2006) (holding that the Environmental Protection Agency's Water Transfer Rule is inconsistent with the Clean Water Act and that the court will adhere to the balance Congress has struck and remains free to change).

Thus, this court should adopt the decisions in *Catskill I & II* under the Skidmore standard and hold that the WTR was invalidly promulgated.

IV. Regardless of whether the WTR was validly promulgated, Highpeak nevertheless needs a permit for its discharges into Crystal Stream

The NPDES program regulates the discharge of pollutants from point sources into the navigable waters of the United States. 33 U.S.C. § 1362(4). NPDES limitations specify the quantity or concentration of certain pollutants that may be discharged from a point source. 33 U.S.C. § 1342(a)(1). A discharger is liable under the CWA if he does not comply with the NPDES permit, which requires that the discharger meet pollutant limitations and monitoring requirements before the discharge is allowed. *Id.*

A. This Court should grant *Auer* deference to the EPA's interpretation of the WTR.

The agency that promulgated a rule is in a "better position [to] reconstruct" its original meaning. *Martin v. Occupational Safety & Health Rev. Comm'n*,499 U.S. 145, 152 (1991). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159, (1987). The drafters are in the best position to know the meaning of the regulation in question. *Kisor v. Wilkie*, 588 U.S. 558, 570 (2019).

As the lower court correctly held, *Loper Bright* is better read as a standard of review that is adequately utilized to interpret statutes enacted by the legislature. R. at 12 There is a significant difference between interpreting a statute drafted by Congress and a regulation drafted by an agency, warranting assessment under *Auer* deference. The Supreme Court has noted that it has often deferred to the agency's construction of its own regulations. *Kisor*, 588 U.S. 558, 568 (2019). This idea is rooted in the presumption of congressional intent, the presumption that Congress generally would want the agency to play the primary role in resolving regulatory ambiguities. *Id.* at 569. The presumption- although rebuttable- is one that "the power authoritatively to interpret its

regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. 144, 151 (1991).

The ability of the relevant agency to interpret its own regulations logically follows from the intention of the legislature in having agencies resolve ambiguities in the statutes it enacts, with *Loper Bright* better understood as applying to the interpretation of statutes enacted by the legislature. This is further supported by the fact that the agency is the one that promulgated its interpretation of the relevant regulation and has a direct insight into what the rule was intended to mean. *Martin*, 499 U.S. 145, 152 (1991) (noting that because the agency promulgated the rule it is in a "better position to reconstruct its original meaning.")

Furthermore, the Supreme Court in *Loper Bright* noted that "it is emphatically the province and duty of the judicial department to say what the law is." 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). This best applies to interpretations of statutes enacted by the legislature, not to the interpretation of an agency rule that is exercised in a judgment grounded in policy concerns. The presumption of *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entails the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 505, 512 (1994).

This court is best to allow the legislature and the executive branch handle issues concerning policy decisions as they are better equipped to address such issues and are checked through political safeguards. *Loper Bright* 144 S. Ct. 2244, 2267; *see also Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 696 (1991) (discussing as a matter of democratic accountability the "proper roles of the political and judicial branches" in filling regulatory gaps); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499, (2010); *Martin,* 499 U.S. 144 at

151 (1991) (Agencies, unlike courts, have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances.")

Additionally, unlike courts, agencies can conduct factual investigations, consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167–168 (2007). It is precisely because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. Thus, *Auer* deference is the appropriate standard of review because when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take a significant position.

Thus, the *Auer* deference standard is warranted in interpreting the WTR.

B. EPA's interpretation of the WTR under *Auer* deference is consistent with the regulation.

The ultimate criterion in interpreting what a regulation means "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.*, 324 U.S. 410, 414 (1945). Respect for an agency's interpretation is only due where the regulation is genuinely ambiguous. *Kisor*, 588 U.S. 558, 573 (2019). The agency's interpretation must be reasonable, "within the zone of ambiguity the court has identified after employing all of its interpretive tools." *Id.* 75-56. Additionally, the "character and context" must entitle the interpretation "controlling weight." *Id.*

1. The WTR is genuinely ambiguous under *Kisor v. Wilkie*.

A court should not afford *Auer* deference unless the regulation is genuinely ambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Before concluding that a rule is genuinely

ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron*, 467 U.S. 837, 843 (1984). A court must "carefully consider" the text, structure, history, and purpose of regulation in all the ways it would if it had no agency to fall back on. *Kisor*, 588 U.S. 558, 575 (2019).

In the case at hand, the term "introduced" in the context of the WTR is indeed ambiguous. The WTR does not provide a clear definition of "introduced", nor does it specify whether the term applies only to pollutants resulting from human activity, or whether it also encompasses natural processes that contribute to contamination during water transfers.

"Introduced" could be interpreted broadly to include any pollutants that become part of the transferred water, including those added through natural processes like erosion or mineral deposits. Alternatively, it could be interpreted more narrowly to apply only to pollutants added by human-engineered activities, such as improper construction of transfer systems. Thus, the ambiguity in the regulation's language means that EPA's interpretation is not self-evidently correct or incorrect, but instead presents an area where EPA's expertise and understanding of the regulation and its context becomes particularly important.

2. The EPA's interpretation is reasonable because it aligns with the purpose of the CWA.

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." *Thomas Jefferson Univ.*, 512 U.S. at 515 (2012). It must come within the zone of ambiguity the court has identified after employing all its interpretive tools. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) *Kisor*, 588 U.S. 558, 575–76 (2019).

The EPA's interpretation that Highpeak's discharge involves the introduction of pollutants falls well within a reasonable interpretation of the regulation. The CWA provides for the issuance of discharge when the discharger properly obtains a NPDES permit. 33. U.S.C § 1342(a)(1). It

authorizes the EPA or a State, if its permit program has been approved by the EPA, to issue NPDES permits, requiring each permit to: (a) include discharge limitations; (b) require the permittee to remain in compliance with the discharge limitations in the permit; and (c) require the permittee to monitor its discharges as EPA requires and report the results accurately to EPA and the state in discharge monitoring reports ("DMR's"). *Id.*

The requirements of obtaining a permit show the permits are designed to impose progressively more stringent limitations on the discharge of pollutants in order to improve the nation's waters. EPA's interpretation ensures the WTR is applied in a manner that upholds the core purpose of the CWA: protecting the nation's waters from pollution. If water transfers that introduce pollutants through human activity were excluded from NPDES permitting, this could allow widespread pollution from poorly constructed transfer systems, undermining the regulatory goal of safeguarding water quality. EPA's interpretation provides clarity that discharges resulting from human-caused contamination, even if the pollutants are naturally occurring substances, still require permitting to prevent damage to water quality.

Moreover, EPA's position aligns with its historical regulatory approach, as expressed in the Federal Register and in its guidance surrounding the WTR. For example, EPA's guidance explicitly states that: "Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." 73 Fed. Reg. 33,697, 33,705 (2008).

This interpretation is reasonable and does not eviscerate the entire rule because it ensures that human-engineered transfer activities, which can introduce pollutants, are regulated in accordance with the CWA's broad goals of environmental protection and pollutant control.

3. EPA's expertise and reasoned judgment support deference.

The regulatory interpretation must be one actually made by the agency, requiring that it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *U.S v. Mead*, 533 U.S. 218, 257–259 (2001). The agency's interpretation must in some way implicate its substantive expertise through administrative knowledge and experience largely "account for the presumption that Congress delegates interpretive lawmaking power to the agency." *Martin*, 499 U.S. 145, 153. The basis for deference ebbs when "the subject matter of the dispute is distant from the agency's ordinary" duties or "falls within the scope of another agency's authority." *Arlington v. FCC*, 569 U.S. 290 at 309 (2013).

Furthermore, EPA has significant expertise in both interpreting and implementing the WTR. The EPA has drawn upon its specialized knowledge and implemented its reasoned judgment in the WTR about how to regulate complex environmental issues. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 482, n. 14, (1951) (noting that as originally proposed, the APA's judicial review provision would have included an explicit requirement for courts to accord "due weight" to "the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it"). EPA's interpretation is not arbitrary; rather, it is based on the expert understanding of how water transfer activities affect water quality and the potential for contamination. EPA's interpretation of the WTR, as it applies to Highpeak's discharge, reflects this expertise and is entitled to substantial deference because it is grounded in the agency's experience with environmental policy, water quality standards, and the technical aspects of water transfers.

Under *Auer* deference, EPA's WTR pertaining to water transfers introducing pollutants requiring an NPDES permit should be upheld.

C. Highpeak is required to acquire an NDPES permit because it illegally introduced pollutants into Crystal Stream.

The WTR, as codified at 40 C.F.R. 122.3(i), excludes discharges from water transfer activities from requiring a permit. However, the WTR does not protect discharges where pollutants are "introduced" by the water transfer activity itself, requiring an NPDES permit. NPDES Water Transfer Rule, 73 Fed. Reg. 33,697, 33705 (June 13, 2008).

Highpeak is required to acquire an NDPES because pollutants were “introduced” because of its poor construction and maintenance of the tunnel. The pollutants found in Highpeak’s discharge—iron, manganese, and TSS—are not naturally present at such a high rate in the transferred water. Rather, these pollutants were introduced through Highpeak’s own engineering decisions, including the construction of a tunnel that allowed pollutants to leach into the water. The metal conduits and Highpeak’s construction of a tunnel with insufficient measures to prevent contamination directly contributed to the introduction of pollutants. Pollutant levels in the water, such as 2-3% increases in iron, manganese, and TSS. The sampling indicates approximately a 2-3% increase in concentrations of all three contaminants concerned because of Highpeak’s design and maintenance choice. This increase in the concentration of contaminants shows that the discharge is not merely a natural byproduct of the transfer but a result of human-induced pollution. This human-induced pollution in the transferred water violates the intent of the WTR, thus, requiring Highpeak to acquire an NPDES permit.

Furthermore, any proposition that pollutants naturally accumulate during water transfer—through erosion or natural mineral deposits—does not align with the purpose of the WTR exception. The purpose of the WTR is to protect the nation’s waters from pollution The narrow exception is specifically intended to exclude discharges caused by the natural flow of water, not those arising from human activity such as poor construction or lack of maintenance. The fact that

the pollutants were introduced due to the construction and operation of Highpeak's tunnel is sufficient to bring this discharge within the exception, requiring Highpeak to acquire an NDPES permit under the CWA.

Thus, Highpeak is required to obtain an NDPES for its discharges into Crystal Stream and the lower court did not err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR, thus making Highpeak's discharge subject to permitting under the CWA.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the lower court regarding CSP's ability to bring suit on behalf of its members because they have suffered concrete and particularized injuries to their recreational and aesthetic enjoyment of Crystal Stream due to pollution caused by Highpeak and exacerbated by the WTR. Additionally, this Court should hold that CSP's regulatory challenge was timely filed within the six-year statute of limitations established under *Corner Post*. Furthermore, this Court should reverse the holding that the EPA's WTR was a valid regulation because it contradicts the plain language of the CWA and its purpose of maintaining water quality for all to enjoy. In the alternative, this Court should affirm the holding that Highpeak is required to acquire a permit because Highpeak's illegal introduction of pollutants into Crystal Stream takes their discharge outside of the scope of the WTR, preserving the water of Crystal Stream clear for all future generations to come.