UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 24-001109

CRYSTAL STREAM PRESERVATIONISTS, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and HIGHPEAK TUBES, INC.,

Defendants-Appellees-Cross-Appellants.

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

WRITING FOR CRYSTAL STREAM PRESERVATIONIST, INC.

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QUESTIONS PRESENTED

1. Whether the District Court erred in holding that an environmental organization has standing to sue under the citizen suit provisions of the CWA and APA when it alleges that its members use of a stream it desires to protect is interfered with by discharges of pollutants into the stream.

2. Whether the District Court erred in holding that CSP's challenge to the WTR was timely filed under 28 U.S.C. §2401(a) when CSP could not bring suit until its incorporation in December 2023, despite the EPA's ongoing failure to properly enforce the CWA.

3. Whether the District Court erred in holding that the EPA's promulgation of the WTR under the CWA remains valid when the precedent upholding the rule relied on *Chevron* deference, which conflict with the recent Supreme Court holding in *Loper Bright*.

4. Whether the District Court erred in holding that pollutants introduced during a water transfer take the discharge out of the scope of the WTR, thus making Highpeak's discharge subject to permitting under the CWA.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered its judgment in this case on August 1, 2024. R. at 2. The United States Court of Appeals for the Twelfth Circuit granted leave for interlocutory appeal. R. at 2. This court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF THE CASE

Crystal Stream ("the Stream") has long been a source of pride for Rexville, New Union, offering residents a serene escape. Yet, for 32 years, Highpeak Tubes, Inc. ("Highpeak") has steadily disrupted its natural state. Highpeak operates a tubing business on a 42-acre property bordered by Cloudy Lake and the Stream. R. at 4. Its operation relies on a 100-yard tunnel of rock and iron pipe, equipped with valves to regulate water flow from the lake into the Stream, increasing its volume and velocity for tubing. R. at 4.

Though Highpeak obtained state permission in 1992 to use the tunnel with seasonal restrictions, it never sought a National Pollutant Discharge Elimination System ("NPDES") permit from the EPA, which handles permitting in New Union. R. at 4. For decades, no one challenged

this—until CSP stepped in. R. at 4.

Highpeak's discharges have caused lasting harm. Water from Cloudy Lake carries elevated levels of iron, manganese, and total suspended solids ("TSS"), further exacerbated by Highpeak's aging infrastructure. R. at 5. CSP testing revealed pollutant levels rise 2–3% during the transfer process. R. at 5.

Concerned residents formed Crystal Stream Preservationists, Inc. ("CSP") on December 1, 2023, to protect the Stream. R. at 4. Its 13 members include longtime residents and property owners. R. at 4. Cynthia Jones, a lifelong resident, and Jonathan Silver, who moved in 2019, both avoid enjoying the Stream as they once did due to its worsening pollution. R. at 14–16.

On December 15, 2023, CSP sent a Notice of Intent to Sue to Highpeak, the New Union Department of Environmental Quality, and the EPA, citing violations under the Clean Water Act ("CWA"). R. at 4. Highpeak claimed exemption under the Water Transfers Rule ("WTR"). R. at 5. On February 15, 2024, CSP filed suit under the CWA's citizen suit provision, 33 U.S.C. § 1251, and challenged the WTR under the APA. R. at 3. Highpeak and EPA sought dismissal, arguing CSP lacked standing, the WTR challenge was time-barred, and the WTR exempted Highpeak's discharges. R. at 3, 5.

On August 1, 2024, the lower court ruled for CSP on standing and timeliness, finding its members suffered environmental injury and that CSP could not challenge the WTR before 2023. R. at 8, 11. The court also rejected Highpeak's exemption defense, holding its discharges fell outside the WTR's scope and required permitting. R. at 12. However, the court upheld the WTR's validity and dismissed CSP's regulatory challenge. R. at 11.

All parties appealed, and this Court granted review to address standing, timeliness, the WTR's validity, and the permitting requirement. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's decisions regarding CSP's standing, the timeliness of its claims, and the regulation of Highpeak's tunnel operations. However, it should reverse the holding that the WTR is valid under the CWA. Affirming the WTR and Highpeak's reliance on it would endorse a rule that fundamentally undermines the CWA's purpose of protecting the integrity of the nation's waters.

First, the District Court correctly determined that CSP has standing under the CWA and the Administrative Procedure Act ("APA"). CSP's members' injuries are not diminished by the timing of its organization because its members curtailed their use of Crystal Stream due to pollution, and denying CSP standing would subvert Congressional intent. These injuries trace back to Highpeak's unlawful conduct and can be redressed through civil penalties and injunctive relief. Additionally, CSP's challenge to the WTR aligns directly with its mission of preserving waterways from unlawful discharges of pollution for current and future generations.

Second, the District Court correctly found that CSP's challenge to the WTR is timely and essential to curbing regulatory inaction. Under the principles of the recent Supreme Court holding in *Corner Post*, CSP's limitations period under the APA began when CSP incorporated, since a cause of action cannot accrue before the plaintiff exists. Furthermore, the EPA's repeated failure to review and revise the WTR, as required by the CWA, constitutes an ongoing violation. Each instance of regulatory inaction resets the limitations period under the continuing violations doctrine, supported by cases such as *McCarthy* and *Wilderness Society*. By considering CSP's timely challenge, this Court ensures that regulatory neglect does not shield flawed rules from accountability.

Third, the District Court erred in finding that the WTR was validly promulgated, particularly in light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which eliminated *Chevron* deference. Under *Skidmore* deference, the court must assess the persuasiveness of the agency's interpretation based on the thoroughness of its reasoning, consistency with the statute's purpose, and its practical consequences. Here, the EPA's unitary waters theory underlying the WTR is unpersuasive and demonstrably erroneous. The interpretation defies the plain meaning of "addition" in the CWA, disregards earlier court precedents rejecting the unitary waters theory, and directly conflicts with the CWA's purpose of protecting the integrity of the nation's waters. By exempting water transfers from the NPDES permitting requirements, the WTR creates loopholes that undermine the regulatory framework, allowing pollutants to spread unchecked between water bodies.

Further, *Catskill III* and *Friends I*, which upheld the WTR under *Chevron*, are egregiously flawed and must be reconsidered under the Supreme Court's evolving *stare decisis* principles. These decisions relied on the now-abandoned *Chevron* framework, ignored the CWA's intent to prevent water pollution, and adopted an erroneous interpretation that treated distinct water bodies as a single navigable entity. The resulting practical harm—including regulatory gaps that exacerbate pollution—demonstrates significant real-world and judicial consequences. Applying *Skidmore* deference, this court should reject the WTR as an invalid promulgation under the CWA, restoring the statutory goal of maintaining the chemical, physical, and biological integrity of the nation's waters through the NPDES permitting framework.

Finally, this court should affirm the District Court's conclusion that Highpeak's operations fall outside the WTR's protections and require permitting. The CWA prohibits pollutant discharges without a permit, and Highpeak's tunnel introduces significant pollutants, such as iron and

suspended solids, into the Stream. The tunnel's commercial use as a recreational feature disqualifies it from WTR protections. Supreme Court precedent confirms that Highpeak's tunnel functions as a point source rather than a "water of the United States." These discharges are substantial, not incidental, and result from Highpeak's negligence.

In sum, this Court should affirm CSP's standing and the timeliness of its claims, invalidate the WTR as inconsistent with the CWA's goals, and require regulatory oversight of Highpeak's tunnel operations. These steps are essential to preserve the CWA's integrity, enforce environmental accountability, and protect vital waterways for future generations. Anything less would undermine the law's core purpose of safeguarding the nation's waters.

STANDARD OF REVIEW

The Court of Appeals reviews a district court's dismissal for lack of jurisdiction or failure to state a claim *de novo*, accepting the complaint's factual allegations as true and construing them in favor of the nonmoving party. *Magassa v. Mayorkas*, 52 F.4th 1156 (9th Cir. 2022). It also considers documents attached to or incorporated in the complaint and matters subject to judicial notice. *North Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244 (D.C. Cir. 2020). Here, Highpeak and EPA appeal the denial of their motions to dismiss for lack of standing and failure to state a claim.

ARGUMENT

I. The District Court correctly held that CSP has standing to bring a citizen suit against Highpeak for violating the CWA and to challenge the WTR under the APA.

The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Article III of the Constitution restricts federal courts to adjudication of "cases" and "controversies." To satisfy the "case" or "controversy" requirement, which serves as the "irreducible minimum" of standing, a plaintiff must allege personal injury fairly traceable to the

defendant's allegedly unlawful conduct and that the requested relief will likely redress the plaintiff's injury. *Allen v. Wright*, 468 U.S. 737, 751 (1984). This constitutional standing requirement ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate. *Id*. at 750.

In addition to the requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1978). Among these prudential requirements is that a plaintiff's grievance must arguably fall within the "zone of interests" that are protected or regulated by the statutory provision invoked in the suit. *Bennett v. Spear,* 520 U.S. 154, 162 (1997). Importantly, Congress can modify or abrogate these prudential requirements by creating statutory requirements for standing to invoke a specific provision of a statute. *Warth*, 422 U.S. at 501.

While applying these standards, the District Court correctly denied Highpeak and EPA's motion to dismiss for two reasons. First, CSP surpasses Article III and the CWA's standing requirement because its members suffer long-recognized environmental injuries traceable to Highpeak's discharges. Second, CSP has standing under the APA because the interest it seeks to protect, Crystal Stream, is closely related to the purposes of the CWA and the WTR.

A. CSP has standing under the CWA because its members have alleged injuries that are intended to be prevented by the CWA.

Congress enacted the CWA of 1972 to protect U.S. waterways from pollution, grounded in a clear environmental ethic that "no one has a right to pollute." S. Rep. No. 92-414, at 42 (1972), reprinted in Cong. Research Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1426 (1973) [hereinafter 1972 Legislative History]. The citizen suit provision of § 505, which sets forth the statutory standing requirement, states that "any citizen may

commence a civil action on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation." § 1365(a). This section is critical to the enforcement of the CWA.

The Act defines an "effluent standard or limitation" to include unlawful actions such as the discharge of pollutants without an NPDES permit. CWA §§ 301(a), 505(f)(1); 33 U.S.C. §§ 1311(a), 1365(f)(1). Under this statutory framework, the CWA defines "citizen" broadly to include "a person or persons having an interest which is or may be adversely affected" by environmental violations. 33 U.S.C. § 1365(g). Congress has indicated that this provision confers standing to enforce the CWA to the full extent allowed by the Constitution. *See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

Thus, § 505(f)(1) explicitly authorizes citizen suits against any person or entity discharging pollutants without the required NPDES permit so long as the adversely affected party has Article III standing. Therefore, CSP has standing to bring suit for Highpeak's unpermitted discharges under the CWA's citizen suit provision if CSP satisfies the Article III threshold for standing.

Accordingly, the lower court correctly held CSP has standing under the CWA for two reasons. First, barring CSP from adjudicating its claims should not be permitted as a matter of constitutional law because CSP's members suffer a cognizable injury to the Stream they desire to protect, satisfying the requirements of Article III standing. Second, the timing of CSP's formation should not bar adjudication of its claims as a matter of public policy.

1. Highpeak's discharges threaten CSP's members' recreational and aesthetic interests in the Stream.

As Justice Douglas powerfully observed in his *Sierra Club v. Morton* dissent, the river is "the living symbol of all the life it sustains or nourishes…., including man, who are dependent on it or who enjoy it for its sight, its sound, or its life." *Morton*, 405 U.S. at 743 (Douglas, J.,

dissenting). Those with a meaningful relation to that waterway should have the right to speak for the values the river represents, especially when its values are at risk. A connection to a stream inspires a sense of responsibility and personal identity with it, which explains organizations' profound sense of injury when these waters degrade.

CSP asserts representational standing on behalf of its members who have been harmed by Highpeak's discharges. It is well-settled than a conservation organization may represent its members in a proceeding for judicial review if its members suffer injuries. *Sierra Club v. Morton*, 405 U.S. 727 (1972). An organization can establish Article III standing on behalf of its members if: (1) at least one member would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, Highpeak and EPA only contest whether CSP has alleged sufficient injury to itself and its members. R. at. 6. Accordingly, we can quickly dispose of the second and third prongs of the test as they are undisputed. This leaves the first prong of the test for analysis.

For a member to have standing to sue in their own right, a member must show: (1) an invasion of a legally protected interest, constituting an "injury-in-fact"; (2) a causal connection between the injury and the defendant's conduct; and (3) a likelihood that the court can redress the injury by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Highpeak and EPA do not dispute that CSP meets the second and third elements. R. at 6. Highpeak and EPA only contend that CSP lacks standing because CSP's members have not shown injury-in-fact. R. at 6.

Environmental plaintiffs adequately allege injury-in-fact when the plaintiff asserts that they use the affected area and are persons for whom the challenged activity will lessen their aesthetic and recreational values of the area. *Friends of the Earth v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 504 U.S. 727, 735 (1972)). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

For example, in *Laidlaw*, the Supreme Court considered standing in a similar citizen suit under the CWA. *Laidlaw*, 528 U.S. 167 (2000). The Court held that an environmental group was able to demonstrate injury-in-fact when its group members submitted statements that unlawful discharges caused reasonable concerns of the group's members, which interfered with the members' ability to use and observe the North Tyger River for recreational and aesthetic purposes. *Id*. at 184.

Here, CSP's members are anything but environmental watchdogs attempting to vindicate their interests by manufacturing a claim. Rather, CSP members are real people who own real property near the Stream. R. at 14, 16. As in *Laidlaw*, they use the Stream and its banks, R. at 14, 16, and have recreational, aesthetic, and environmental interests in the Stream. CSP members Cynthia Jones and Jonathan Silver would enjoy the Stream more frequently if not for Highpeak's discharges. R. at 14. Jones and Silver's reduced use of the Stream due to the pollutants underscores the interference of their interest and enjoyment of the Stream. R. at 14. Ms. Jones, who owns property approximately 400 yards from Crystal Stream Park, regularly walks along the Stream and wishes to walk directly in the water. R. at 15. However, suspended solids and metals cloud the

water and heighten her concerns about contamination. R. at 14. Similarly, Mr. Silver, who lives about half a mile from the Stream, regularly walks with his children and dogs along its banks but is "deeply concerned about the presence of toxic chemicals polluting the water." R. at 16. Mr. Silver stated that he is now "hesitant to allow his dogs to drink from the Stream" due to the pollutants. *Id*. If not for Highpeak's unlawful discharges, Silver would allow his dogs to drink from the Stream. R. at 16. This interference with CSP's members' use and enjoyment of the Stream is sufficient to establish injury-in-fact because their values are lessened by Highpeak's unlawful discharges and have been properly acknowledged by the District Court as such.

2. The timing of CSP's formation does not undermine its standing because Congress empowered citizens to enforce the CWA, and organizations are essential for advocating shared interests.

Highpeak and EPA counter by arguing that CSP was formed only as a pretext for litigation and suggests that CSP lacks a genuine environmental mission. R. at 6. This argument is flawed. The timing of CSP's formation does not diminish the real injuries its members face due to Highpeak's unlawful discharges. Additionally, barring CSP from adjudicating its claims would weaken the effectiveness of organizations and undermine Congressional intent.

Unlike a purely litigative entity, CSP was formed with a clear mission to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters" and preserve the Stream for all future generations. R. at 6. The harm to the Stream caused by Highpeak's pollution exemplifies the environmental injuries CSP was formed to address, and a favorable ruling here would advance CSP's conservation efforts.

By denying Highpeak's motion to dismiss, the lower court followed Congress's intent behind the CWA's citizen suit provision. In fact, Congress has invited precisely the type of suit brought by CSP. The citizen suit provision is a critical component of the CWA's enforcement scheme, as it "permit[s] citizens to abate pollution when the government cannot or will not

command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). One of the Act's well-recognized goals is to ensure that the nation's waterways are "fishable and swimmable." See, e.g., *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 784 (4th Cir. 1988). Congress proclaimed this goal to provide "for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Denying CSP standing would subvert Congress's explicit intent to empower citizens as private attorney generals, ensuring waterways like the Stream remain clean and accessible for recreational use.

Additionally, denying CSP standing would diminish the utility of such associations and undermine the interests of their members. *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988). As the Supreme Court recognized in *International Union v. Brock*, 477 U.S. 274, 290 (1986), people often join organizations to create a "[collective] vehicle for vindicating interests they share." Associations bring unique advantages such as resources, expertise, and a unified mission that benefit both the judicial system and the individual members. *Id*. at 289.

Further, many individuals lack the means or expertise to pursue these claims independently. Therefore, CSP is the best party to promote the interests it was formed to protect by pooling its members' knowledge and resources to effectively address the harm to the Stream. Acknowledging this underlying justification, the District Court correctly held that CSP has standing to pursue its claims against Highpeak under the CWA.

B. CSP has standing to challenge the WTR under the APA because its interests align with the purpose of the CWA and WTR.

To the extent that this court determines CSP's claims may not proceed as a CWA citizen suit claim, this court should still allow CSP to proceed against the EPA under the APA. Section 10 of the APA provides judicial review to "a person suffering legal wrong because of agency action, or who is adversely affected or aggrieved by agency action within the meaning of a relevant

statute." 5 U.S.C. § 702 (1988). In *Association of Data Processing v. Camp*, 397 U.S. 150 (1970), the Supreme Court held that a plaintiff seeking judicial review under the APA must demonstrate that the interest sought to be protected by the litigant is arguably within the zone of interests to be protected or regulated by the statute in question. *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). However, the Court has subsequently commented that the zone of interests test is "not to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

Here, CSP makes two contentions, both of which are based on federal statutes or regulations designed to protect the waterways of the United States. R. at 5. CSP's claims against EPA are premised on violations of the CWA. R. at 5. CSP is a conservation organization which seeks to protect the Stream from pollution and preserve it for future generations. R. at 6. CSP's environmental protection mission and its members' aesthetic and recreational interests are directly related to the CWA's requirement that any transfer of pollutants requires a NPDES permit, thus satisfying the zone of interests test.

Second, CSP's claims against the EPA are based on the WTR, a rule promulgated by the EPA that exempts water transfers from regulation under the CWA's NPDES permitting requirement. The EPA's failure to regulate Highpeak's discharges under the WTR creates the conditions harming CSP's members. No doubt, challenging a rule which exempts water transfers from the CWA's permitting requirement aligns directly with CSP's interest in protecting the Stream from pollution. Thus, this Court should allow CSP to proceed against the EPA under the APA because the interests it seeks to protect fall within the zone of interests protected by the CWA.

II. The District Court correctly denied Highpeak's and EPA's motion to dismiss because CSP timely filed its challenge to the WTR.

CSP filed its Complaint against Highpeak and the EPA on February 15, 2024, challenging the WTR on the grounds that it was improperly promulgated and inconsistent with the CWA. R. at 5. In response, both Highpeak and the EPA moved to dismiss on grounds that CSP's challenge was not filed within the applicable statute of limitations. R. at 8. The District Court denied their motion to dismiss, ruling that the challenge was timely. R. at 8. This court should affirm the lower court's decision for the following reasons: first, the limitations period under the APA does not begin to run until one has the right to bring suit; second, the EPA's failure to promulgate the WTR constitutes a continued violation.

A. The statute of limitations under the APA does not begin to run until a right to bring suit under the APA comes into existence.

CSP's challenge was brought under § 2401(a) of the APA, which provides that, "every 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 first "accrues" when the plaintiff has a "complete and present cause of action," which is when she is both injured and has the right to "file suit and obtain relief." *Corner Post, Inc. v. Bd. Of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2444 (2024) (citation omitted).

1. CSP's right to bring suit under the APA did not come into existence until CSP incorporated in December 2023.

A plaintiff cannot be injured by a regulation if the plaintiff herself does not exist. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (explaining that a cause of action is complete and present only when the plaintiff herself has the ability to file suit and obtain relief); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 18 (2019). Instead, "[the] accrual rule looks to when the plaintiff—*this particular*

plaintiff—has a complete and present cause of action," and the "statute of limitations begins to run at that same time." *Corner Post*, 144 S. Ct., at 2455 (citation omitted; internal quotation marks omitted).

The Supreme Court recently applied the accrual rule in *Corner Post v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024). In *Corner Post*, a convenience store incorporated in 2017 used the APA to challenge a regulation promulgated under the Dodd-Frank Act of 2010. *Id.* at 2443. The Eighth Circuit heard the case on appeal and held that the convenience store was barred by the statute of limitations when it brought suit in 2022 because the limitations period began to run upon the regulation's publication in 2010. *N.D. Retail Ass'n v. Bd. Of Governors of FRS*, 55 F.4th 634, 641 (2022). On appeal, the Court reversed that decision, noting that the term "accrue" has long been understood as referring to "when [a cause of action] comes into existence." *Corner Post*, 144 S. Ct., at 2446 (citation omitted). Therefore, the store's suit was not barred by the limitations period because the cause of action did not accrue until the store incorporated in 2017. *Id.*

It is undisputed that CSP could not have brought its challenge until it was incorporated in December 2023. R. at 8. Accordingly, just as in *Corner Post*, CSP's right to challenge the WTR did not accrue until December 2023, and the limitations period could not have begun before that date. Therefore, CSP's claims are not barred by the APA's six-year statute of limitations.

2. CSP's status as an environmental group suing in a representative capacity does not change the legal application of the APA statute of limitations.

EPA and Highpeak counter that forming an environmental group like CSP—rather than a for-profit business like the convenience store in *Corner Post*—does not trigger a new statute of limitations because CSP lacks "legitimate business interests." R. at 8. This argument is incorrect—CSP members do, in fact, have legitimate economic interests in the Stream.

CSP is an organization composed of landowners along Crystal Stream, R. at 5, each with a direct interest in maintaining the Stream's quality, health, and value. The idea that CSP members lack "legitimate business interests" is nothing more than a convenient fiction, ignoring the reality that the environmental quality of one's land can impact not only personal enjoyment but also land value. *See, e.g.*, Adam I. Davis, *Ecosystem Services and the Value of Land*, 20 Duke Envtl. L. & Pol'y F. 339, 357 (2010) (noting that market demand for riverside property with improved water quality and environmental conditions had steadily increased since 1990). Similarly to the convenience store in *Corner Post*, CSP members have a legitimate business interest in a regulation that could affect the value of their property. Accordingly, EPA's and Highpeak's invocation of legitimate business interests is immaterial.

B. Barring environmental groups from filing representative suits based on the limitations period for its individual members would damage the environment and contradict the plain language of the CWA.

EPA and Highpeak further argue that CSP, acting in a representative capacity for members who "theoretically" could have brought this challenge within six years of 2008, should be barred by the statute of limitations. R. at 8. EPA's and Highpeak's argument is misplaced for two reasons: first, it fails to consider the long-term and cumulative nature of environmental harm; second, it overlooks the plain language of the CWA.

1. Allowing environmental groups to sue on behalf of members is crucial for effectively protecting the environment and ensuring accountability for environmental harm.

Permitting organizations like CSP to file suits on behalf of its members whose individual limitations periods have expired is essential to safeguarding the environment. Environmental harm is often difficult to detect, and the time between exposure and recognizable harm is significantly longer than in typical tort cases. Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 Calif. L. Rev. 965, 965-66 (1988). As such, limitations periods

functionally require plaintiffs to bring suit prematurely—before suffering any significant loss or obtaining sufficient scientific evidence of causation. *Id.* By the time sufficient evidence to indicate environmental damage is discovered, the limitations period has often passed. Michelle Sokol, Note, *Statute of Limitations and Pollutant Injuries: The Need for a Contemporary Legal Response to Contemporary Technological Failure*, 9 Hofstra L. Rev. 1525, 1527-34 (1981).

Similarly, rethinking the limitations period for challenging environmental regulations is critical to ensuring thorough review of regulatory actions—or failures—especially when environmental harm emerges long after the rule's enactment. Since environmental damage often remains hidden for years, a rigid application of the APA's statute of limitations can shield outdated or inadequate regulations from review, preventing timely correction of policies that could mitigate ongoing harm. *See, e.g., Appalachian Voices v. McCarthy*, 989 F.Supp. 2d 30 (D.C. Cir. 2013). Fortunately, this paradox can be remediated by applying the continuing violations doctrine to the present case.

2. Under the continuing violations doctrine, the statute of limitations does not begin to run until the EPA properly promulgates the WTR.

The continuing violations doctrine provides that, when an agency has an ongoing obligation to act, any harm caused by the agency's failure to fulfill that obligation continues to accrue until the agency takes proper action (e.g., until the agency correctly promulgates the regulation). *See Earle v. Dist. of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012). Once the agency begins to take proper action, then the limitations period begins. *See id.*

The continuing violations doctrine applies when "the text of the pertinent law imposes a continuing obligation to act or refrain from acting." *Id.* For example, in *McCarthy*, plaintiffs argued that the EPA was inadequately enforcing a statute that imposed a requirement on the EPA to continually review, and if necessary, revise a statute at least every three years. *McCarthy*, 989

F.Supp. 2d at 57-58. The EPA moved for summary judgment, claiming that the limitations period had passed. *Id.* The D.C. Circuit Court ruled in the plaintiffs' favor, holding that the statute created an ongoing duty to review regulations, and the EPA's failure to comply constituted a continuing violation that allowed the plaintiffs' claims to accrue over time. *Id.*

Determining whether a statute creates an ongoing duty "is a question of statutory construction," which begins with the plain language of the statute. *Id.* at 307 (citation omitted). Here, § 1361 of the CWA provides that the EPA is "authorized to prescribe such regulations as are necessary to carry out" the CWA. 33 U.S.C. § 1361. Then, § 1311(d) requires that EPA restrictions on pollutants "shall be reviewed at least every five years and, if appropriate, revised." 33 U.S.C. § 1311(d). By its plain terms, § 1311(d) charges the EPA with the ongoing obligation to review, and if necessary, revise the regulations promulgated under the CWA. 33 U.S.C. § 1331(d). Therefore, just as in *McCarthy*, the continuing violations doctrine applies to § 1311(d) because it imposes an ongoing obligation on the EPA to review and/or revise the WTR. Thus, the CSP's injury continues to accrue until EPA correctly promulgates the WTR, and CSP's limitations period does not begin to run until the EPA resolves this problem.

Additionally, applying the continuing violations doctrine to this case is supported by sound logic. CSP's recurring injuries are similar to the injuries sustained by the plaintiff in *The Wilderness Society v. Norton*, 434 F.3d 584 (D.C. Circuit 2006). In *Wilderness Society,* an environmental group brought an action claiming, *inter alia*, that the National Park Service ("NPS") was continuously failing to properly enforce wilderness regulations. *Id.* The NPS Director, Norton, argued that the statute of limitations barred the claim since it was brought more than six years after the NPS failed to meet its initial deadline to review and revise wilderness regulations. *Id.* at 588-89. The D.C. Circuit Court rejected Norton's argument, holding instead that Norton's actions

constituted a "continuing violation." *Id.* The court emphasized that the environmental group "[did] not complain about what the agency had done but rather about what the agency ha[d] yet to do." *Id.* at 589. Similarly, here, CSP is not challenging EPA's past actions, but instead, seeks relief from recurring injuries caused by the EPA's continuing failure to enforce the WTR in accordance with the CWA. R. at 5.

Therefore, just as in *Wilderness Society* and *McCarthy*, this court should hold that the EPA's failure to properly promulgate the WTR constitutes a continued violation, and the limitations period for CSP's members' claims do not begin to run until the EPA remedies the problem. *See Earle*, 707 F.3d at 306. Such a holding aligns with the plain language of the WTR and CWA while acknowledging the unique nature of environmental litigation.

III. The District Court erred in holding that the WTR was a valid regulation promulgated pursuant to the CWA.

In 2024, the Supreme Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 836 (1984), through its decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Under the former *Chevron* standard, courts deferred to an agency's interpretation of an ambiguous statute if the interpretation was "reasonable." *Chevron*, 567 U.S. at 843-44. However, after *Loper Bright*, courts must now apply the less deferential standard from *Skidmore v. Swift*, 323 U.S. 134 (1944). Under *Skidmore* deference, courts may consider an agency's interpretations and opinions as a body of experience and judgment, but the weight given to the agency's views depends on the persuasiveness of the interpretation itself. *Id.* at 139-40.

Although *Loper Bright* "place[d] a tombstone on *Chevron* no one can miss," *Loper Bright*, 144 S. Ct. at 2275 (Gorsuch, J., concurring), it did not nullify every decision that relied on *Chevron* deference, *id*. at 2253. Rather, the Court provided that cases relying on *Chevron* "are still subject to *stare decisis* despite the Court's change in interpretive methodology." *Id.* at 2253. To depart

from the decisions that applied *Chevron* deference, a litigant must offer a "special justification" beyond the mere fact that a case relied on *Chevron*. *Id.* (citation omitted).

Courts decide whether there is a "special justification" to depart from *stare decisis* by considering factors such as "the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision." *Ramos v. Louisiana*, 590 U.S. 83, 105–06 (2020) (citation omitted). However, although courts frequently analyze these factors, courts have not developed a consistent test for departing from *stare decisis*. *Id.* at 1414 (Kavanaugh, J., concurring in part).

Instead, four approaches have increasingly guided courts in deciding whether a "special justification" exists for departing from precedent. Santiago Legarre and Andrew Chenevert, *A Modified Approach to Overruling for the "Conservative Majority"*, 98 Tul. L. Rev. 591, 601 (2024). First, Justice Kavanaugh's two-prong analysis from *Ramos*. *Id.* at 601-04. Second, Justice Thomas's "demonstrably erroneous" standard from *Gamble*. *Id.* at 604-06. Third, Justice Alito's majority opinion in *Dobbs*. *Id.* at 606-08. Last, Chief Justice Roberts's concurrence in *Dobbs*. *Id.* at 608-09.

First, in his concurrence in *Ramos*, Justice Kavanaugh outlined a two-prong analysis for when courts should depart from precedent. *Id.* at 603-04. Step One asks whether the precedent is egregiously or grievously flawed. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part). If the answer is yes, the court proceeds to Step Two. *Id.* at 1415. At Step Two, the court makes a prudential judgment about whether the precedent has caused real-world or judicial damage. *Id.* If such harm exits, the court should depart from the precedent. *Id.*

Second, in *Gamble*, Justice Thomas argued that courts should disregard *stare decisis* when dealing with precedents that are "demonstrably erroneous." *Gamble v. United States*, 587 U.S.

678, 711 (Thomas, J., concurring). "Demonstrably erroneous" precedents are those that fall "outside the realm of permissible interpretation." *Id.* Justice Thomas's standard focused exclusively on whether the precedent's interpretation aligns with the text's permissible meaning. Legarre and Chenevert, *supra*, at 605.

Third, in *Dobbs*, Justice Alito's majority opinion applied what he deemed to be the factors traditionally considered in a *stare decisis* analysis. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). Justice Alito examined the nature of the precedent's error, the quality of the precedent's reasoning, the workability of the precedent, the precedent's disruptive effect on other areas of the law, and the extent to which the precedent has been relied upon. *Id.*

Last, Chief Justice Roberts's *stare decisis* framework asserted that "[w]hether a precedent should be overruled is a question entirely within the discretion of the court." *Dobbs*, 597 U.S. at 357 (internal quotation marks omitted). Justice Roberts emphasized that factors such as administrability and reliance interests should be considered when making this determination. *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 345-46 (2020).

Although courts have not adopted a uniform approach to *stare decisis*, the viewpoints discussed *supra* Section III share three common factors that should guide this court's *stare decisis* analysis. First, whether the precedent is demonstrably erroneous or egregiously flawed.[1] Second, the extent to which the precedent has caused negative real-world and judicial consequences.[2] Last, whether the precedent has harmed the ability to rely on established legal principles and

[1] This factor combines Justice Kavanaugh's Step One (egregious or grievous flaw), *Ramos*, 140 S. Ct. at 1414-1415, and Justice Thomas's "demonstrably erroneous" standard, *Gamble*, 587 U.S. at 711. Together, this factor captures the judicial impacts that a precedent creates.

[2] Borrowing from Justice Kavanaugh's Step Two, *Ramos*, 140 S. Ct. at 1415, and Alito's "disruptive effect" analysis, *Dobbs*, 597 U.S. at 268, this factor assesses the tangible harm the precedent causes in its practical application.

administrative practices.[3] Together, these factors reflect the Court's overall stance on *stare decisis*.

Based on those factors, the following analysis shows that this court should depart from *Catskill III* and *Friends I*, which upheld the EPA's promulgation of the WTR under the CWA. *Catskill Mountains Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) (*Catskill III*); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (*Friends I*). Thereafter, this analysis demonstrates that abandoning *Catskill III* and *Friends I* requires this court to rely on earlier precedent, under which the WTR is an improper interpretation of the CWA.

A. There is a "special justification" for departing from *Catskill III* and *Friends I*.

In *Catskill III*, environmental groups, states, and a Canadian province sued the EPA, arguing that the WTR unreasonably interpreted the CWA. *Catskill III*, 846 F.3d at 500. The plaintiffs claimed the WTR's NPDES permitting program risked spreading harmful pollutants between water bodies, harming ecosystems, economies, and public health. *Id.* The Second Circuit applied *Chevron* deference, finding the statute' stance on NPDES permits for water transfers to be unclear, and upholding the EPA's rule as reasonable and not arbitrary or capricious. *Id.* at 500–01.

Similarly, in *Friends I*, advocacy organizations filed action seeking injunction to force a water management district to obtain a permit under the NPDES program before pumping polluted canal water into a lake. *Friends I*, 570 F.3d at 1215**.** The Eleventh Circuit applied *Chevron* deference and held that the EPA's novel "unitary waters theory" was a reasonable, and therefore permissible, construction of the CWA. *Id.* at 1222.

There are three reasons why there is a special justification for this court to depart from the analyses in *Castkill III* and *Friends I*: first, the two cases are egregiously flawed and demonstrably

[3] This factor integrates Justice Roberts's focus on reliance interests and administrability, *Russo*, 591 U.S. at 345-56, with Justice Alito's "absence of concrete reliance" framework, *Dobbs*, 597 U.S. at 268, and considers whether overruling precedent would destabilize legal or administrative expectations.

erroneous; second, the cases have caused significant negative practical consequences; and third, the cases have harmed the judicial and administrative ability to rely on established legal principles.

1. *Catskill III* and *Friends I* are demonstrably erroneous and egregiously flawed.

First, the unitary waters theory is a "demonstrably erroneous" interpretation of the CWA. A precedent's interpretation of a statute is "demonstrably erroneous" if the interpretation "falls outside the realm of permissible interpretation." *Gamble*, 578 U.S. at 711 (Thomas, J., concurring). Here, the EPA argues that transferring contaminated water from a polluted body to a distinct, pristine body does not constitute an "addition" because both water bodies are considered part of the waters of the United States, which the agency treats as a single, unified navigable water. *Catskill III*, 846 F.3d at 505. This concept is known as the "unitary waters theory." *Id.*

The word "addition" is not defined in the CWA, so we must rely on its common meaning to assess whether the EPA's interpretation exceeds the bounds of permissible interpretation. *See Catskill III*, 846 F.3d at 536-37 (Chin, J., dissenting) (citation omitted). The term "addition" is commonly understood to mean "the result of adding: anything added: increase, augmentation." *Id.* (citing *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1968)). When polluted water is transferred from one body of water to a cleaner one, pollutants are effectively "added" to the cleaner water, increasing its pollutant load. *Id.* In this context, "addition" involves introducing pollutants into "navigable waters" where they would not naturally occur. *Id.* Considering the statute's purpose of preventing water pollution, "addition" logically includes the increase in pollution resulting from transferring water between bodies of water. *Id.* (citation omitted). The common understanding of "addition" directly contradicts the EPA's interpretation, which fails to recognize the difference between separate bodies of water and treats the transfer of pollution as though it does not introduce new pollutants into the receiving body of

water. *Id.* Hence, the EPA interpretation of "addition" is erroneous, since it entirely neglects the plain meaning of the word. *See id.*

Second, the holdings in *Catskill III* and *Friends I* are egregiously wrong. When deciding whether precedent is "egregiously wrong," courts look to factors such as the precedent's reasoning, consistency and coherence with other decisions, and changed law. *Ramos*, 590 U.S. at 1414 (Kavanaugh, J., concurring in part). Here, *Catskill III*'s and *Friends I*'s reliance on the unitary waters theory was egregiously wrong because the unitary waters theory conflicts with prior court precedent.

Multiple circuit courts rejected the unitary waters theory before the WTR adopted it since the unitary water theory conflicts with the CWA's goal of maintaining the health and safety of our Nation's waters. *See Dubois v. U.S. Dept. of Agriculture, et al.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2d Cir. 2001) (*Catskill I*); *Catskill Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) (*Catskill II*); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002), *vacated by S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 112 (2004). For instance, the First Circuit held there was "no basis of law or fact for the district court's 'singular entity' [unitary waters] theory." *Dubois*, 102 F.3d at 1296. The Supreme Court in *Miccosukee* also implicitly dismissed the unitary waters theory and held that the CWA protects both individual water bodies and the waters of the U.S. as a whole. *See Miccosukee*, 541 U.S. at 107.

Moreover, *Catskill III* and *Friends I* conflict with *Loper Bright* because *Catskill III* and *Friends I* used *Chevron* deference to interpret the CWA. *Catskill III*, 846 F.3d at 500. Although *Loper Bright* specified that reliance on *Chevron* alone does not justify overturning precedent,

nothing in *Loper Bright* indicates that reliance on *Chevron* is not a factor to be considered at all when evaluating precedent. *See Loper Bright*, 144 S. Ct. at 2273 (noting that arguing a precedent relied on *Chevron* can still constitute "an argument that the precedent was wrongly decided") (citation omitted). Rather, reliance on *Chevron* is a non-dispositive factor that, when paired with other justifications, indicates that a precedent was wrongly decided. *See id.*

The decisions in *Catskill III* and *Friends I* therefore contradict both the plain language of the CWA and established precedent. The reliance on *Chevron* deference in *Catskill III* and *Friends I*, combined with the adoption of the unitary waters theory, reflects a flawed interpretation of the CWA that undermines legislative intent to protect the nation's waters. Additionally, these cases disregard the common understanding of "addition" in the context of water pollution, thereby weakening the CWA's central goal of preserving water integrity.

2. *Catskill III* and *Friends I* resulted in significant negative practical consequences.

The holdings in *Catskill III* and *Friends I* have resulted in significant practical consequences. *See* Chase Corey, Note, *Concerning Catskill: Missed Opportunity, Broken Precedent, and the Plight of American Waters*, 44 Wm. & Envtl. L. & Pol'y Rev. 597 (2020). The EPA's interpretation of the WTR created a pathway for nonpoint source pollution to spread while simultaneously limiting states' ability to address such pollution effectively. *Id.* at 616-17 (citation omitted). The EPA identified nonpoint sources as "the most significant source of water pollution overall in the country." *Id.* (citation omitted). However, the WTR exempted pure water transfers from the NPDES permitting requirement, which created a loophole in the CWA that removed a federal mechanism for controlling nonpoint source pollution. *Id.* (citation omitted).

This loophole is problematic because NPDES permits for pure water transfers serve as a critical check on the spread of pollutants originally introduced by nonpoint sources. *Id.* at 617

(citation omitted). By exempting these transfers, the WTR allows pollutants to be carried unchecked, bypassing a regulatory framework designed to mitigate environmental harm. *Id.* For example, "loathsome concoction[s]" like the polluted canal water in *Friends I* can now flow into otherwise pristine water bodies without being monitored or permitted under the NPDES program. *Id.* (citation omitted). This regulatory gap has exacerbated certain types of pollution, such as nutrient pollution. Mary Rassenfoss, *Regulating Water Transfers in the Wake of Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA: Examining Alternatives to NPDES Permits*, 45 Ecology L.Q. 451, 459 (2018).

3. *Catskill III* and *Friends I* harmed the judicial and administrative ability to rely on established legal principles.

Overturning *Catskill III* and *Friends I* would restore coherence to administrative and judicial interpretations of the CWA. Previously, cases relying on *Chevron* deference effectively granted agencies the authority to change their positions at will, resulting in unwarranted instability in the law. *See* Adrian Vermeule, *The Deference Dilemma*, 31 Geo. Mason L. Rev. 619, 631-32 (2024). This instability has only been intensified by the growing uncertainty regarding *Chevron*'s status. *Id.*

The uncertainty surrounding *Chevron* came to a head in *Loper Bright*, which placed lawyers, judges, and administrators in an analytical "Catch-22." *Loper Bright* instructs courts that reliance on *Chevron* deference is not a dispositive factor in determining whether a precedent should be overruled, and instead directs courts to use traditional *stare decisis* analyses. *Loper Bright*, 144 S. Ct. at 2253. Yet, as discussed *supra* Section III.A, a key aspect of any *stare decisis* analysis is whether a precedent is consistent with binding case law. The instructions in *Loper Bright* therefore create a circular dilemma: courts must treat a precedent's reliance on *Chevron* deference as non-dispositive while simultaneously evaluating whether a precedent relied on outdated legal

principles—a category that naturally includes *Chevron*.

Following the guidance of *Catskill III* and *Florida I* would only compound the confusion created from *Loper Bright*'s circularity, effectively forcing this court to tie itself to a sinking ship. As noted, *Loper Bright* firmly signaled the end of Chevron's viability as a guiding principle. *Id.* at 2276. And though reliance on *Chevron* alone is not a dispositive factor for departing from precedent, *id.* at 2253, upholding a case that uses *Chevron* deference will undermine legal and administrable stability given the uncertainty around how *Chevron* deference will continue to shape agency deference moving forward.

4. Therefore, this court should disregard *Catskill III* and *Friends I*.

This court should depart form the analyses taken in *Catskill III* and *Friends I* so that it can align with the CWA's intent, mitigate harmful consequences, and establish a coherent framework for interpreting environmental statutes. Rooted in *Chevron* deference, *Catskill III* and *Friends I* are egregiously flawed and demonstrably erroneous. *See* discussion *supra* Section III.A. The cases conflict with the Supreme Court's evolving interpretative approach post-*Loper Bright* and fail to honor the CWA's purpose of maintaining the integrity of the nation's waters. *Id.* Moreover, these rulings have led to significant real-world consequences by allowing pollutants to spread unchecked through water transfers and weakening states' ability to regulate such pollution effectively. *See* discussion *supra* Section III.A.2. By departing from the holdings in *Catskill III* and *Florida I*, this court can restore consistency in judicial reasoning, bolster environmental protections, and ensure more effective implementation of the CWA. *See* discussion *supra* Section III.A.3. For these reasons, this court should depart from *Catskill III* and *Friends I*.

B. Since *Catskill III* and *Friends I* can no longer shield the WTR, this court should apply *Skidmore* deference to the WTR and hold that it was not validly promulgated under the CWA.

Without *Catskill III* and *Friends I* to lean on, the EPA loses the only crutch it has to support the promulgation of the WTR. In the absence of those cases, this court must now apply *Skidmore* deference in accordance with the instructions from *Loper Bright*. *Loper Bright*, 144 S. Ct. at 2267. Under *Skidmore* deference, the WTR is an invalid promulgation of the CWA because the WTR is at odds with the CWA's goal of maintaining water integrity. *See Catskill III*, 846 F.3d at 546-47 (Chin, J., dissenting).

Under *Skidmore* deference, courts will defer to an agency's interpretation of a statute if the agency can convince the court that the agency is an expert, that it brought that expertise to bear in reaching its interpretation, and that its interpretation is persuasive. Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The "Chevron" Two-Step and the "Skidmore" Shuffle*, 80 U. Chi. L. Rev 447, 451-52 (2013) (citing *Skidmore*, 323 U.S. at 140); *Loper Bright* 144 S. Ct. at 2267. We do not dispute the EPA's expertise regarding environmental issues. But the EPA's interpretation of the CWA reflected in the WTR is entirely unpersuasive.

Whether an agency interpretation is "persuasive" depends on the thoroughness evident in the agency's consideration, the validity of the agency's reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade. *Skidmore*, 323 U.S. at 140. Here, the EPA's promulgation of the WTR is unpersuasive because the unitary waters theory conflicts with the true intentions of the CWA. The purpose 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). Yet, as discussed *supra* Sections III.A.2 and III.A.4, the WTR has created loopholes to

NPDES permit requirements that opened the door to pollution in our Nation's waters.[4] Thus, since the WTR is inconsistent with the purpose and considerations of the CWA, it is unpersuasive under *Skidmore*.

Because the unitary waters theory is an unpersuasive interpretation of the WTR, it fails under *Skidmore* deference. Consequently, this court must decide for itself whether the WTR was validly promulgated. This court should hold that the WTR's promulgation of the unitary waters theory was invalid since it defied the textual meaning of the CWA, opened the door for increased pollution, and created uncertainty due to the holding in *Loper Bright*. *See* discussion *supra* Section III.A. Rather, the goal of the CWA is to maintain the integrity of our nation's waters, which is achieved by requiring NPDES permits for *any* discharge of *any* pollutant. *See* 33 U.S.C. 1311.

IV. The District Court correctly held that Highpeak must obtain an NPDES permit to operate its tunnel because its discharge is outside the scope of the WTR.

Under the CWA, "the discharge of any pollutant by any person shall be unlawful" unless that person obtains an NPDES permit for the discharge. 33 U.S.C. §§ 1311(a), 1342(a)(1). Taking the allegations in the complaint as true, as this Court must, Highpeak's tunnel is a point source that regularly discharges pollutants into Crystal Stream. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 195 (May 2024); R. at 4. Because the tunnel is a point source, Highpeak must obtain an NPDES permit to operate it. 33 U.S.C. §§ 1362(14), 1342(a)(1). Highpeak has never applied for nor obtained an NPDES permit. R. at 4. The only way it may operate its tunnel without one is if an exception to the permit requirement applies. In fact, the only argument Highpeak makes as to why it does not need an NPDES permit is that the WTR applies to its tunnel operations. For the reasons discussed *supra* Section III, the WTR is not validly promulgated and cannot apply to

[4] *See also* discussion *infra* Section IV.C.

Highpeak's tunnel operations. Still, even if the WTR is validly promulgated, it does not except Highpeak from the CWA's permit requirements.

A. Highpeak's use of the tunnel as a private recreational company constitutes an intervening commercial use of the water under the Water Transfers Rule.

As defined by the WTR, "[w]ater 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." 40 C.F.R. § 122.3(i) (2024). The parties have stipulated that both Cloudy Lake and the Stream are "waters of the United States." R. at 4–5. Highpeak built the tunnel to connect the two waters. R. at 4. Highpeak's tunnel, however, was not constructed for the sole purpose of moving water from Cloudy Lake to the Stream. Highpeak built its tunnel for the express purpose of "[enhancing] tubing recreation," and, in turn, enhancing its own revenue. R. at 4.

In explaining "intervening commercial use" under the WTR, the EPA stated, "if the water is withdrawn to be used as cooling water, drinking water, irrigation, *or any other use such that it is no longer a water of the U.S. before being returned to a water of the U.S.*, the water has been subjected to an intervening use." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33704 (June 13, 2008) (emphasis added). Consistent with this Court's holding in *Rapanos v. United States*, Highpeak's tunnel is not a water of the United States. 547 U.S. 715, 733–34 (2006).

In *Rapanos,* a plurality of the Supreme Court held that a series of wetlands areas were not sufficiently connected to a traditionally navigable body of water because the drainage canals connecting them were not waters of the U.S. *Id.* at 735, 739. The canals were not waters of the U.S. because "the CWA itself categorizes channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Id.* at 735. Here, Highpeak's tunnel is a point source that only carries intermittent flows

of water. The tunnel flows only when Highpeak employees manually open the tunnels valves. R. at 4. Further, Highpeak's employees are not merely opening the valves during the day and closing them at night; they only open the valves for a specific period from spring to late summer and keep them closed the rest of the year. R. at 4. For half of the year, the Stream and Cloudy Lake are separate, much like how the wetlands and traditional "navigable waters" in *Rapanos* are separate except when the drainage channel is flowing between them.

Although *Rapanos* was a plurality opinion, the Supreme Court recently upheld this view in *Sackett v. EPA*, 598 U.S. 651, 671 (2023). There, the Court held that a wetland could be a water of the U.S. only if it was indistinguishable from traditionally understood navigable waters. *Id.* at 678–79. Thus, wetlands like the kind at issue in *Rapanos* were not waters of the U.S. because the only connection between the wetlands and waters of the U.S. was a tunnel or drainage canal. *Id.* By expressly adopting the *Rapanos* test, this Court solidified the notion that something like an intermittently flowing tunnel is excluded from "waters of the United States." *Id.* at 671. Consistent with *Rapanos* and *Sackett*, the water that flows through the tunnel is necessarily no longer a water of the U.S. because Highpeak's tunnel is not a water of the U.S. Highpeak therefore removes the polluted water from a water of the U.S. to use for its own purposes, then returns that water to the waters of the U.S., consistent with an intervening commercial use under the WTR. NPDES Water Transfers Rule, 73 Fed. Reg. at 33704.

What remains to determine then is whether the tunnel is used "solely to facilitate the transfer of water," or if it is subject to some other use. *Id.* at 33705. Highpeak uses the water flowing from the tunnel to increase Crystal Stream's volume and velocity to "enhance tubing recreation." R. at 4. In effect, Highpeak creates an artificial rapids area on the Stream to benefit those using its services, thus enhancing Highpeak's revenue. Moving water to enhance tubing

recreation is a use other than solely facilitating the transfer of water, therefore taking Highpeak's operations outside the scope of the WTR.

Further, Highpeak is not a resource agency, nor is it acting on behalf of the State of New Union when it operates its tunnel. When explaining its reasoning behind the final WTR, the EPA focused on the importance of water transfers in the context of State allocations of water rights. *Id.* at 33702. Specifically, the EPA noted that water transfers are "essential" to the nation's infrastructure and that "subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights[.]" *Id.* Indeed, the EPA discussed water transfers almost exclusively in the context of not burdening the States in their exercise of water rights and their own state water resource management. *Id.* at 33704.

The WTR might apply if Highpeak transferred water for New Union's water resource management. Id. at 33702–03. However, Highpeak uses the tunnel solely for its private commercial purpose of increasing Crystal Stream's velocity to boost revenue. This intervening commercial use makes the WTR inapplicable, and its discharge remains subject to the CWA's permitting requirement.

B. The pollutants in Crystal Stream are introduced by the water transfer activity itself because Highpeak poorly maintains and manually operates the tunnel.

The WTR does not apply "to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i) (2024). Highpeak's tunnel introduces pollutants into the Stream itself, above and beyond any pollutants it merely carries over from Cloudy Lake. Such an addition is evidenced by the fact that the level of pollutants in the water as it exits the tunnel is 2-3% higher than the level of pollutants in the water as it enters the tunnel. R. at 5.

While it is true that "water passing through any tunnel inevitably picks up some amount of 'new' pollutants," these inevitable additions are *de minimis*. R. at 11. The Second Circuit

recognized as much in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–92 (2d Cir. 2001). There, the Court held that polluted water diverted through a tunnel into a creek it would not ordinarily flow into was an "addition" of pollutants into the creek. *Id.* at 484–85. In holding, the Second Circuit considered two similar cases. *Id.* at 491–92. Both of those cases found no "addition" of pollutants because of the relative "sameness" of the recirculated water, which the Second Circuit illustrated by analogy. *Id.* ("If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.").

The Court then highlighted that even if one takes a ladle of soup out of the pot then pours it right back into the same pot, there is a chance for the addition of "perhaps, a *de minimis* quantity of airborne dust that fell into the soup ladle[.]" *Id.* The court distinguished the case before it, holding that the tunnel discharge "strains past the breaking point" of sameness because the water was "artificially diverted from its natural course and travel[ed] several miles from the reservoir through [the tunnel] to [the creek]." *Id.*

Here, water from Cloudy Lake is diverted 100 yards through Highpeak's tunnel to the Stream. If the tunnel added no pollutants, the water's pollutant levels entering and exiting the tunnel would be identical, akin to the Second Circuit's analogy of airborne dust not altering the character of soup. *Id.* However, sampling data shows pollutant levels increase by 2–3% in the water exiting Highpeak's tunnel. R. at 5. This is not a *de minimis* addition of airborne dust but more like adding a ladle of tomato soup to chicken noodle soup.

Still, Highpeak argues that the tunnel does not introduce pollutants because the reasonable interpretation of the WTR is that only those pollutants introduced by human activity during the water transfer are not exempted. R. at 11. Under its own argument, Highpeak's tunnel is outside

the WTR's scope. Highpeak constructed the tunnel out of carved rock and iron piping. (R. at 4.) Because Highpeak built the tunnel and the tunnel is entirely contained on Highpeak's property, it falls on Highpeak to maintain the tunnel's integrity. When the water enters the tunnel, it contains a certain level of iron and TSS. When the water exits the tunnel, iron and TSS levels are 2-3% higher, indicating that rock and iron are sluffing off Highpeak's tunnel and into the water in more than just trace amounts. R. at 5, 12. Highpeak is in the best position to either have constructed a tunnel such that it would not allow more than trace amounts of pollutants into the water, or to at least maintain its current tunnel to mitigate any potential additions to the water as it passes through the tunnel. Highpeak's failure to properly construct and maintain its tunnel is a human activity that affects the water transfer because the choice to do nothing is just as much of an act as any affirmative action would be. A company should not be able to shirk liability under the CWA by turning a blind eye to a degrading tunnel it built. Further, use of the tunnel itself is human activity, as water only flows through the tunnel when Highpeak chooses to open the valves. This tunnel is not some continuously flowing pipeline to allocate water resources like a dam or levee system. The tunnel only operates because of human activity and the amount of water that flows through the tunnel is dictated by that same human activity. R. at 4.

If, as Highpeak contends, water that flows through its tunnel and picks up more than trace amounts of pollutants results from a natural process, then so too would the polluted runoff collected by the canal and pump station in *Southern Florida Water Management District v. Miccosukee Tribe of Indians* be considered a completely natural process. 541 U.S. 95 (2004). There, rainwater that fell on developed land absorbed pollutants, and the polluted runoff flowed into a canal. *Id.* at 101. The Supreme Court expressly noted that those pollutants were "produced by human activities." *Id.* Here, Highpeak intentionally created a tunnel out of iron piping, and the water that

passes through that pipe acquires more than trace amounts of pollutants. If the natural process of rainwater absorbing pollutants created by human activities can constitute an "addition" of a pollutant as in *Miccosukee*, absorbing more than trace amounts of pollutants through a pipe created by human activities constitutes an "introduction" of a pollutant.

C. Allowing the Water Transfers Rule to apply to Highpeak's tunnel is inconsistent with the purpose of the rule.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As with all statutes, this Court must view the statute as a part of its regulatory scheme and attempt to reach an interpretation that harmonizes the provision at issue with the statute's purpose and larger statutory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The CWA and its regulations are no exception. *United States v. Moses*, 496 F.3d 984, 992 (9th Cir. 2007) ("Exceptions from the CWA must be analyzed in light of the Act's purposes and exceptions must be construed narrowly.") (internal quotations omitted).

Indeed, the EPA highlighted in its promulgation of the WTR that "the purpose of the CWA is to protect water quality." NPDES Water Transfers Rule, 73 Fed. Reg. 33697 at 33701. The EPA focused on the balance between federal and State action aimed at achieving that purpose, especially to explain that requiring a permit for water transfers could interfere with State's water rights and upset the balance between federal, state, and local programs that work to protect water quality. *Id.* at 33701–02. However, the EPA did not mention use of the WTR by private recreational companies trying to make a profit. The purpose of the WTR is to aid in cooperative federalism efforts to achieve the overall objective of water quality. *Id.* at 33703. Highpeak installed and uses the tunnel for the exclusive purpose of generating more revenue. Allowing Highpeak to proceed without an NPDES permit does not further the purpose of the WTR because New Union does not

have a permitting agency of its own, nor does it have any water quality programs to which Highpeak is adhering. In no way does Highpeak's tunnel engage in the kind of cooperative federalism for the sake of water quality that envisioned by the scope of the WTR.

If this Court allows Highpeak to proceed without a permit, there is no way to draw a line as to which private commercial activity would require a permit and which would not, outside the most egregious examples. Highpeak argues that not allowing the WTR to apply vitiates the purpose of the WTR, but allowing it to apply here vitiates the purpose of the CWA. 33 U.S.C. § 1251(a)(1). When Congress enacted the CWA, it expressly stated that the national goal was to eliminate discharges of pollutants into waters of the United States by 1985. *Id.* That is why the permit program is titled the National Pollution Discharge Elimination System. 33 U.S.C. § 1342. Applying the WTR to a point source like Highpeak's tunnel would expand the scope of the WTR so far that it would effectively except from the NPDES permit requirement the very thing the program was enacted to regulate.

Not only is such an outcome inconsistent with the purpose of the CWA and the WTR, but it also runs afoul of Congress's statutory mandate as to how environmental statutes and regulations should be interpreted. 42 U.S.C. § 4332(1). In the National Environmental Policy Act of 1969 (NEPA), Congress stated in no uncertain terms that the policy for the Nation is to "use all practicable means and measures. . .in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony[.]" 42 U.S.C. § 4331(a).

The CWA must be interpreted consistently with NEPA's policies, including EPA regulations like the WTR. *Id*. While the WTR aligns with NEPA for state and local water management programs, it does not when applied to Highpeak's private commercial use of a poorly

maintained tunnel that introduces pollutants into the Stream. Exempting Highpeak from the NPDES permit program contradicts NEPA's goal of ensuring safe, healthful, and aesthetically pleasing surroundings. 42 U.S.C. § 4331(b)(3). Thus, Highpeak must obtain an NPDES permit, and this Court should affirm the lower court's decision.

CONCLUSION

For the above reasons, this Court should affirm the District Court's order on the standing, timeliness, and permitting requirement issues and reverse the District Court's order on the challenge to the WTR.