Team 25 (Non-Measuring Brief)

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS FOR
THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellee-Cross Appellant

-and-

HIGHPEAK TUBES, INC.,
Intervenor Plaintiff-Appellant-Cross Appellant

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

Brief of Appellee, United States Environmental Protection Agency

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union issued a Decision and Order dated August 1, 2024, in case 24-CV-5678. The District Court had initial subject matter jurisdiction over this case pursuant to 18 U.S.C § 1331 (federal question), 5 U.S.C. § 702 (appeals of agency action), and 5 U.S.C. § 704 (actions reviewable). All parties filed motions seeking leave to appeal the District Court's order and timely notice of appeal of the District Court's decision pursuant to Fed. R. App. Pro. 4(a). Accordingly, the United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291 (providing appellate courts with jurisdiction over appeals from final decisions of the federal district courts).

STATEMENT OF ISSUES PRESENTED

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

II. Did the District Court err in holding that Crystal Stream Preservationists timely filed the challenge to the Water Transfers Rule?

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

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

STATEMENT OF THE CASE

I. CLEAN WATER ACT

The Clean Water Act ("CWA" or "Act") was enacted in 1948 to fight water pollution but has since been amended to have broad authority concerning regulation of federal water quality legislation. 33 U.S.C. § 1251 *et seq*. At the core of the statute's regulatory framework is the prevention of point source pollution from a specific location, such as an industrial site, and nonpoint source pollution, like natural runoffs. 33 U.S.C. § 1362(14). As a result, the statute covers several programs including the National Pollutant Discharge Elimination System ("NPDES") and the Water Quality Standards Act ("WQS"). 33 U.S.C. §§ 1313, 1342. At issue in this case is the NPDES program's exclusion of water transfers. *See* 40 C.F.R. 122.3(i). This program governs pollutants by implementing controls for facilities that discharge into Waters of the United States ("WOTUS"). *See* 33 U.S.C. § 1342. The program's permitting requirements approve, or disapprove, of discharges based on percentage, composition, and location of pollutant discharges. *See id.*

Businesses engaged in any activity resulting in pollutant discharges into bodies of water are impacted by the CWA, and therefore subjected to NPDES requirements. *See id.* Whether a facility needs a permit to carry out its activity will depend on two main factors: (1) if pollutants are discharged into a body of water and (2) if this discharge is directly or indirectly attributable to the activities of the facility. *See* 33 U.S.C. §§ 1342(122-24). The United States Supreme Court held in *S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians, et.al.*, that even if pollution discharges into a body of water indirectly, they still need to be regulated under the CWA. 541 U.S. 95, 98 (2004).

The Act contains a right of action for citizens to file lawsuits against businesses alleging violations, specifically entities that discharge pollutants regulated by the NPDES program without a permit to do so. 33 U.S.C. § 1251 *et seq*. This is also true for private right of actions against the

Environmental Protection Agency ("EPA") for failing to enforce the provisions of the CWA. *Natl. Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 173 (D.C. Cir. 1982).

II. WATER TRANSFERS RULE

The Water Transfer Rule ("WTR") is a regulation promulgated under the NPDES program by the EPA. *See* 40 C.F.R. 122.3(i). The WTR excludes discharges that are not subject to regulation under the NPDES permitting program, like water transfers. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11 Cir. 2009). The rule defines non-regulated discharges as "activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 533 (2d. Cir. 2017) (*Catskill III*).

III. HIGHPEAK'S BUSINESS

Highpeak has operated a recreational tubing business in Rexville, New Union for the last 32 years. (Decision & Order at 4). Their business rests on a 42-acre parcel of land that borders Cloudy Lake to the north and Crystal Stream to the south. *Id.* Highpeak obtained state permission in 1992 to construct an iron pipe tunnel, partially carved through rock. *Id.* Highpeak controls the water flow from Cloudy Lake into Crystal Stream through valves at both ends of the tunnel, but only when water levels in the lake are adequate, typically from spring to late summer. *Id.* Highpeak has never sought or obtained an NPDES permit from the EPA for their discharges and no one has previously challenged this discharge. *Id.*

IV. CRYSTRAL STEAM PRESERVATIONISTS FORMATION AND ACTION

In December 2023, a non-profit group known as Crystal Stream Preservationists ("CSP") was formed with 13 members to advocate for the preservation of Crystal Stream. *Id.* All members of CSP live in Rexville, with two owning land along Crystal Stream. *Id.* On December 15, 2023,

CSP sent a Notice of Intent to Sue ("NOIS") to Highpeak, the New Union Department of Environmental Quality ("DEQ"), and the EPA, alleging that Highpeak's discharge violates the CWA. *Id.* CSP alleged that Highpeak's tunnel is a point source that discharges pollutants into Crystal Stream without an NPDES permit. *Id.* The NOIS offers evidence that the water from Cloudy Lake is naturally rich in minerals like iron and manganese and contains higher concentrations of total suspended solids ("TSS") compared to Crystal Stream. *Id.* at 5. Thus, CSP argues that Highpeak's activity adds pollutants from Cloudy Lake into Crystal Stream, resulting in a 2-3% increase compared to water samples taken from Cloudy Lake on the same day. *Id.*

CSP further brought a claim under the Administrative Procedure Act ("APA") challenging the validity and the promulgation of the WTR by the EPA as improper and inconsistent with the CWA. *Id.* CSP argues that CWA's plain language requires a permit for any discharge of pollutants into WOTUS, and that EPA cannot create an exemption for water transfers. *Id.* Highpeak contends the WTR applies to its activities as an exemption from needing a NPDES permit because the increased pollutants was a result of a natural addition process. *Id.* CSP argues that even if the WTR applies, because additional pollutants are introduced during the water transfer as a direct result of Highpeak's business, it is within the regulatory framework of the NPDES permitting program and out of the scope of the WTR exclusion. *Id.*

V. MOTIONS AFTER THE FACT

Highpeak and the EPA moved to dismiss CSP's complaint on two grounds: CSP's standing and the timeliness of the challenge. *Id.* at 3. Highpeak further challenged the applicability of the WTR to its discharge. *Id.* Highpeak also argued that CSP was created specifically to challenge Highpeak's discharges and that CSP did not suffer actual injury. *Id.* at 6. Finally, the EPA agreed with CSP's alternative argument that even if the WTR was upheld, Highpeak would still need a

permit due to the pollutants introduced during the discharge process. *Id.* The District Court granted the motions to dismiss CSP's challenge to the WTR, concluding that the WTR was valid. *Id.* However, the Court denied Highpeak's motion to dismiss the citizen suit, allowing CSP's claims against Highpeak to proceed. *Id.* The Court ultimately found that the EPA and Highpeak's motions to dismiss CSP's challenge to the WTR were granted and that Highpeak's motion to dismiss CSP's CWA citizen suit is denied. *Id.* at 12.

SUMMARY OF THE ARGUMENT

First, EPA asserts that CSP does not have standing to challenge the WTR. (Decision & Order at 2). There are two types of standing necessary to bring a claim: constitutional and prudential. U.S. CONST., ART. III., § II, CL. I. Constitutional standing requires the plaintiff to establish an injury in fact, causation, and redressability. *FDA v. All for Hippocratic Med.*, 602 U.S. 367, 368 (2024). Of these three requirements, injury in fact is the most important, and correspondingly the most difficult, to establish. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). To establish an injury in fact, it must be concrete and particularized, *and* actual or imminent. *Id.* Supposing a plaintiff has constitutional standing, they must also have prudential standing. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). A court must evaluate whether the plaintiff's claim falls within the zone of interests of the statutory or constitutional provisions under which they wish to bring their claim. *See Chem. Serv. v. Envtl. Monitoring Sys. Lab. Cincinnati*, 12 F.3d 1256, 1262 (3d Cir. 1993) (citations omitted). CSP cannot meet the requirements of constitutional and prudential standing and therefore are unable to bring their claim.

Second, EPA asserts that CSP filed their claim after the designated statute of limitation has passed. (Decision & Order at 2). The statute of limitations begins to run the moment that the right

of action accrues. *See* 28 U.S.C. § 2401(a). Where the plaintiff asserts a right of action against an agency, the statute of limitations begins when the agency decision is final. *See* 5 U.S.C. § 704. A plaintiff must bring their claim within 6 years of the agency's final action or decision. *See* 28 U.S.C. § 2401(a). The WTR was promulgated in 2008 and is the date on which CSP's right of action (presuming they have one) starts. *See* 40 C.F.R. 122.3(i). CSP had until 2014 to bring their claim to the court and CSP did not bring their claim until 2024, 10 years after the statute of limitations had run. *See* (Decision & Order at 5).

Third, EPA validly promulgated the WTR under the CWA. While *Loper Bright* overturns the *Chevron* doctrine that grants agencies deference, under the doctrine of stare decisis, the rulings decided under *Chevron* will not be overturned unless there is a special justification. *See generally Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). To determine whether there is a special justification to overturn stare decisis, the court must determine whether the precedential cases were egregiously wrong, caused significant negative jurisprudential or real-world harm, or if overruling the prior decision would upset reliant interests. *See Ramos v. Louisiana*, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring). If agency is action is overturned, it must be re-evaluated under *Skidmore*. *See Loper Bright*, 144 S. Ct. at 2273; *see Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). Under *Skidmore*, the agency's interpretation of the statute is granted weight if the agency can demonstrate thoroughness, the validity of its reasoning and its consistency with earlier and later pronouncements. 323 U.S. at 140. The WTR transfer rule cannot be overruled because there is no special justification to overturn the precedential cases. *See Ramos*, 590 U.S. at 122. If stare decisis is overturned, even under a *Skidmore* analysis, EPA has thoroughly shown its consideration to its interpretation, the validity of its reasoning, and the cases and statements are consistent with both earlier and forthcoming pronouncements. *See id.*

Fourth, the premise of the WTR is straightforward, and the application of the rule by the EPA is consistent and unambiguous. The rule seeks to preserve the right of facilities to allocate quantities of water within a controlled jurisdiction without being subject to unnecessary regulation. *See generally South Side Quarry v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684 (6th Cir. 2022). EPA's interpretation of the WTR has been supported by various court decisions, including Catskill *III*, which highlight EPA's long-standing passive approach to regulating water transfers. *See generally Catskill* III, 846 F.3d at 520. The WTR states that when a new pollutant is added from a facility's activity rather than simply introduced, the discharge is not excluded from receiving an NPDES permit under the WTR. *See* 40 C.F.R. 122.3(i). EPA agrees with CSP that Highpeak's tunnel construction adds higher concentrations of pollutants into the water transfer. *See* (Decision & Order at 11). Because contaminants are added through the transfer process of Highpeak's tunnel activities, Highpeak must obtain a permit under the CWA. *See* 40 C.F.R. 122.3(i).

STANDARD OF REVIEW

Standard of review for Issue I, III, and IV call upon questions of law and applicability, and thereby are reviewed de novo. *See Lujan*, 504 U.S. at 560-61 (plaintiff must show that injury suffered is traceable to the challenged conduct of the agency action); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 181-82 (2000) (for citizen suits plaintiff must show that injury is connected to discharge of pollutants in violation of a statute or agency regulation). The determination of timely filings, as in Issue II, are to be reviewed under the clearly erroneous standard as they call into question issues of fact. *See* Fed. R. Civ. P. 52(a)(6). (stating "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless

clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

ARGUMENT

I. CSP LACKS BOTH THE CONSTITUTIONAL AND PRUDENTIAL STANDING REQUIRED BY THE UNITED STATES CONSTITUTION AND CURRENT CASE LAW, AND THUS, CANNOT FILE A CITIZEN SUIT.

Federal courts review three types of standing: constitutional, prudential, and statutorily. *Stoops v. Wells Fargo Bank*, N.A., 197 F. Supp. 3d 782, 796 (W.D. Pa. 2016). The Standing Doctrine of the United States Constitution designates both constitutional and prudential standing. U.S. CONST., ART. III., § II, CL. I. Moreover, when raising a claim that involves the APA, courts must analyze both constitutional and prudential standing. *See* U.S. CONST., ART. III., § II, CL. I.; *see generally Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Because prudential standing may be verified through statutory interpretation, the same as statutory standing, the two forms will be discussed together. *Stoops*, 197 F. Supp. 3d at 796; *Chem. Serv.* 12 F.3d at 1262 (citations omitted).

A. CSP is unable to establish constitutional standing as set out by the United States Constitution.

The importance of constitutional standing lies within its origins as it was created to serve those directly affected by legal issues that arise. It is the "bedrock constitutional requirement that this court has applied to all manner of important disputes." *United States v. Texas*, 599 U.S. 670, 675 (2023). Constitutional standing, also known as Article III standing, limits the federal courts to cases and controversies. U.S. CONST., ART. III., § II, CL. I; *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). The purpose of the cases and controversies clause it to avoid overwhelming the courts with frivolous claims, while still answering important legal questions. U.S. CONST., ART. III., § II,

CL. I; *Massachusetts*, 549 U.S. at 516. To maintain this balance, a plaintiff must have standing to bring forth a claim. U.S. CONST., ART. III, SEC. II, CL. I. Article III standing requires injury in fact, causation, and redressability. U.S. CONST., ART. III, SEC. II, CL. I; *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 368 (2024).

1. CSP does not meet the requirements for injury in fact.

The purpose of injury in fact is to screen for legitimate legal issues by separating those that incite general disagreements or annoyances. *All. for Hippocratic Med.*, 602 U.S. at 368. *Lujan* details the specific requirements the plaintiff must establish to show their injury in fact:

> "First, the plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical." Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative, that the injury will be redressed by a favorable decision.'"
>
> 504 U.S. 555, 560-61 (1992) (citations omitted).

To clarify, any "*future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2012) (citation omitted). Not only must a plaintiff's claim be certainly impending, but the injury must also be fairly traceable and cannot come forth as a result of the party's own actions based in fear of what could be. *Id.* at 416 (stating "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). Lastly, plaintiffs would not be able to prove their injury in fact if they were unable to demonstrate that a federal court could effectively remedy their injury, which would be a violation of constitutional standing. *Simin v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

In *Clapper*, the Court found that Amnesty International's argument that there was "an objectively reasonable likelihood" of harm, failed because the alleged injury was a hypothetical. 568 U.S. at 398. Amnesty International's main argument to establish Article III standing revolved around several hypotheticals that would have to occur in order for their organization to be faced with a certainly impending legal issue that could be fairly traced back to the source. *Id.* at 411 (explaining the "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending"). This case emphasizes that the courts are not in the practice of issuing opinions that speculate future decisions that are out of their control. *Id.* at 398.

Further, in *All. for Hippocratic Med.* the Court found that the plaintiffs lacked Article III standing because their claim was based on their personal morals and values, rather than a legal issue. 602 U.S. at 368. The plaintiffs were not personally affected by the ongoing case but wanted to regulate others who were. *Id.* Article III standing cannot be achieved "simply based on the 'intensity of the litigant's interest or because of strong opposition to the government conduct.'" *Id.* (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church and St., Inc.*, 454 U.S. 464, 486 (1982)).

2. CSP does not meet the requirements showing environmental harm in connection to Crystal Stream.

In this case CSP alleges environmental injuries. (Decision & Order at 4-5). While environmental injuries must meet the requirements of an injury in fact, there is an additional caveat that must be addressed. *See Laidlaw*, 528 U.S. at 181; *See generally Clapper*, 568 U.S. 398. If a plaintiff asserts environmental injury, they must further cite an injury to themself. *See Laidlaw*, 528 U.S. at 181. Examples of environmental injuries appear in lawsuits in the form of water pollution, extinction of an animal species, and contaminated air. Marisa Martin & James Landman,

Standing: Who Can Sue the Environment?, AMERICAN BAR ASSOCIATION (Oct. 9, 2020) https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment/. Generally, injury in fact is shown through economic harm, because environmental injures are more difficult to prove as they are "far less direct and perceptible." *United States v. Students Challenging Regul. Agency Proc.*, 412 U.S. 669, 688 (1973). Even when the Supreme Court allowed plaintiffs to bring suit based on their perceived aesthetic injuries, the Court emphasized that "the party seeking review be [themself] among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

As stated above, the first requirement for injury in fact is "(a) concrete and particularized; *and* (b) 'actual or imminent.'" *Lujan*, 504 U.S. at 560-61 (citations omitted) (emphasis added). CSP's certificate of corporation states that their mission is to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." (Decision & Order at 6.) Yet their organization has not engaged in any such activities other that issuing complaints about the aesthetics of Crystal Stream. *See generally* (Decision & Order). "Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (citation omitted). While the Supreme Court recognizes that aesthetic injuries can amount to an injury in fact, the aesthetic injury must be so egregious that its recreational value is lessened. *See id.* While CSP's members assert that they can no longer enjoy the beauty of Crystal Stream or take part in it recreationally, they do not have Article III standing because the discharge into Crystal Stream is not so drastic as to lessen the recreational value. *See* (Decision & Order at 14-17).

Considering CSP's lack of an injury in fact, CSP consequently cannot prove causation or redressability. Causation and redressability are considered as "flip sides of the same coin," hence why the last elements to establish constitutional standing are typically discussed together. *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 288 (2008). Logically, there cannot be causation without an initial injury. *See All. For Hippocratic Med.*, 602 U.S. at 382. Ergo, CSP cannot be redressed or prove causation without an injury. *See id.*

B. CSP does not have prudential standing because the purpose of their complaint does not fall within the zone of interests.

Similar to constitutional standing, prudential standing determines whether "a party should be granted the right to sue." *Prudential-Standing Doctrine*, *Black's Law Dictionary* (11th Ed. 2019). Prudential standing entails the following elements:

> "[A] litigant assert his or her own legal interests rather than those of third parties; courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances; [and] a litigant [can] demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based."

UPS Worldwide Forwarding v. U.S. Postal Serv., 66 F.3d 621, 626 (3d Cir. 1995). Element (3) is what differentiates constitutional from prudential standing. *See generally Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 150 (1970). For a plaintiff to bring suit they must have *both* Article III standing *and* prudential standing. *Stoops*, 197 F. Supp. 3d at 803 ("[e]ven if … [a] plaintiff had suffered an injury-in-fact, [the] [p]laintiff would still lack standing because [they] do not have prudential standing") (emphasis added). Prudential standing is required because the zone of interests "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'" *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (citing to 5 U. S. C. § 702). It also denies the party's right to review if their interests are only marginally related or inconsistent with the purpose of the corresponding statute. *Id.* Therefore, there must be an "integral

relationship" between the party and the statute in order to claim prudential standing. *Davis by Davis v. Phila. Hous. Auth.*, 121 F.3d 92, 98 n.8 (3d Cir. 1997) (citations omitted). To determine whether the party's claim falls within the zone of interest, the courts determine through statutory interpretation if the claim falls within the specific statutory or constitutional provisions. *Chem. Serv.*, 12 F.3d at 1262.

The purpose of the CWA is to protect the United States' bodies of water. 33 U.S.C. § 1251(a). Further, Congress states it is their policy to:

> "[R]ecognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."
>
> 33 U.S.C. § 1251(b).

The Supreme Court's decision in *Laidlaw* involved an environmental organization suing a company under the CWA for discharging pollutants into a river that impacted the environment and recreational use of the water. 528 U.S. at 175-76. The Court emphasized that the CWA does not focus exclusively on aesthetic concerns. *Id.* at 183-85. While the Court found standing based on the harm to the public health, it highlighted that environmental harm to public water resources were central to the issue, rather than aesthetic concerns. *Id.*

Aesthetic concerns, such as the visual appeal of a body of water, do not promote the goals of the CWA. *See* 33 U.S.C. § 1251 *et seq.* CSP's argument of injury in fact is reliant on the aesthetics of Crystal Stream. (Decision & Order at 14-17). Even if this court holds that CSP has Article III standing, CSP does not have prudential standing necessary to bring their claim because it does not fall within the zone of interest of the CWA. *See* 33 U.S.C. § 1251 *et seq.* The CWA's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's

waters." 33 U.S.C. § 1251(a).

The CWA further granted the EPA the power to prescribe conditions for permits that allow certain discharges. *See* 40 C.F.R. § 122.1. CSP's claim does not fall within the CWA's zone of interest, as it focuses primarily on the aesthetic "injuries" rather than the actual chemical, physical, or biological integrity of Crystal Stream that would have given rise to a claim. *See* 33 U.S.C. § 1251 *et seq.*

II. REGARDLESS OF CSP'S STANDING, THEY DID NOT BRING THEIR CLAIM WITHIN THE STATUTE OF LIMITATIONS.

Statute of limitations are essential to civil cases as they ensure fairness to defendants. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Tel*. v. *Ry. Express Agency, Inc*., 321 U.S. 342, 348-349 (1944).

A. Under 28 U.S.C. § 2401(a), CSP is barred by the statute of limitations.

28 U.S.C. § 2401(a) states "every civil action commenced against the United States shall be barred unless the complaint is filed with six years after the right of action first accrues." *See also Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv, Sys*., 144 S. Ct. 2440, 2445 (2024); *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 7-8 (2014). §2401(a) also applies to claims that are brought under the Administrative Procedure Act. *See* 28 U.S.C. § 2401(a); *see generally Barnes v. Babbit*, 329 F. Supp. 2d 1141 (D. Ariz. 2004). The rule was recently emphasized in *Corner Post*, stating that the statute of limitations begins when the plaintiff is *injured* by the regulation, rather than a general action of first accruement. 144 S. Ct. at 2452 (emphasis added).

A "right accrues when it comes into existence." *United States.* v. *Lindsay*, 346 U. S. 568, 569 (1954); *See also, Accrue, Black's Laws Dictionary*, 11th Edition (2019). Therefore, "it does

not *accrue*—'until the plaintiff can file suit and obtain relief.'" *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997); *see also Corner Post, Inc.*, 144 S. Ct. at 2455 (citations omitted) (quoting "statute of limitations begins to run at the time *the plaintiff* has the right to apply to the court for relief." More specifically, the use of "the" in "the right of action first accrues," implies that is the plaintiff's responsibility to bring forth their cause of action. *Corner Post, Inc*., 144 S. Ct. at 2455 (explaining "the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint*—the plaintiff 's cause of action—is complete.").

B. <u>If CSP has standing, its right of action begins in 2008 when the WTR was introduced and ends in 2014.</u>

The statute of limitations may begin once an agency decision is final, rather than when the plaintiff could bring forth their suit. 5 U.S.C. § 704. "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. To determine whether and agency has promulgated a final decision, the Supreme Court issued the following test: "[f]irst, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). This includes an agency adopting a new rule into their administration after going through the proper notice and comment procedure. CONGRESSIONAL RESEARCH SERVICE, *Defining Final Agency Action for APA and CRA Review*, April 22, 2023. This was confirmed by the Supreme Court, which stated agency's decision are final when the regulation or rule introduced is binding. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

Highpeak has been in business since 1992. (Decision & Order at 4). 16 years later, in 2008, the WTR was introduced by the EPA. (Decision & Order at 8). The introduction of the WTR is when CSP's right of action started to accrue. *See Hawkes Co.*, 578 U.S. at 597. CSP filed its claim 10 years too late as the statute of limitations barred the claim in 2014. *See id;* (Decision & Order at 8). CSP asserts that because their organization did not form until 2023, their right of action did not start until 2023, and their statute of limitations has not yet run. (Decision & Order at 8). However, 12 of the 13 members of CSP have lived in Rexville for more than 15 years. *Id.* Additionally, the two members that live directly off the stream have lived there prior to 2008. *Id.* at 4. The members of CSP are not entitled to an exemption to the statute of limitations, simply because they formed the group in 2023. *See generally* (Decision & Order). Ultimately, 12 out of CSP's 13 members were either aware or living in the conditions alleged in their complaint and continued to live with them for 15 years since the passage of the WTR. *See id.* at 8. CSP asserts that because one of its members moved to Rexville in 2019, the member could file an individual claim. *Id.* at 4. However, because this claim was filed as an organization and the bulk of the organization's members could have brought their claim anytime between 2008 and 2014, CSP has untimely filed and is barred by the statute of limitations. *See Hawkes Co.*, 578 U.S. at 597; *see* (Decision & Order at 4).

III. EPA VALIDLY PROMULGATED THE WTR PURSUANT TO THE CWA.

The District Court correctly held that the WTR was a valid exercise of EPA's authority under the CWA, and that the rule is consistent with the Act. *Id.* at 2. Congress has expressly authorized the EPA to establish regulations as necessary to administer the Act. *See* 40 C.F.R. § 501.2 (2024); 33 U.S.C. § 1361(a). A rule is considered valid under the APA if it complies with the procedural requirements set forth within it. *See* 5 U.S.C. § 551 *et seq.*

A. EPA acted within its statutory authority.

The APA allows any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review, so long as the decision challenged is a final agency action. 5 U.S.C. §§ 701-706; *Webster v. Doe*, 486 U.S. 592, 599 (1988). The reviewing court must then identify the relevant questions of law, interpret statutory and constitutional provisions, and determine the meaning or applicability of the terms of an agency action. 5 U.S.C. § 706. The court will then decide whether the agency has acted within a "zone of reasonableness." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). A final rule that is not satisfactorily explained may be deemed arbitrary and capricious under the APA as it fails to meet the standards of reasonable decision-making that is required of it. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 682 (2020). A rule is not satisfactorily explained if it "entirely fail[s] to consider an important aspect of the problem [or] offer[s] an explanation for its decision that runs counter to the evidence before [it]." *Id. (*quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983)). If the rule is found to be arbitrary and capricious, then the reviewing court shall set it aside and hold it to be unlawful. 5 U.S.C. § 706(2)(A).

In 2024, the Supreme Court ruled in *Loper Bright* that a reviewing court must exercise its independent judgement in deciding whether an agency has acted within its statutory authority. *See generally* 144 S. Ct. 2244 (2024). Before *Loper Bright*, when a regulation was ambiguous, the courts would use a two-step framework (the *Chevron* doctrine) to interpret regulations administered by federal agencies. *Id.* at 2254. Under *Chevron*, a court would assess whether Congress had directly spoken to the precise issue. *Id.*; *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). If Congress was silent or ambiguous to the question at hand, then the

court would defer to the agency's interpretation of the regulation. *See generally Chevron*, 467 U.S. 837 (1984). *Loper Bright* now overturns the two-step framework. 144 S. Ct. at 2273. The Supreme Court concluded that if a statute is ambiguous or silent on a specific issue the reviewing court should, instead of deferring to the agency, interpret the statute independently and review and reject interpretations of statutes adopted by federal administrative agencies. *Id.* at 2249.

The Court explains the APA was enacted "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Id.* at 2261 (quoting, *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)). Further, the Court explained the APA incorporated the traditional understanding that courts must exercise independent judgment in determining the meaning of statutory provisions. *Id.* at 2262. A court may still "seek aid from the interpretations of [the agency] responsible for implementing particular statutes," in fact, "[s]uch interpretations 'constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance' consistent with the APA." *Id.* (quoting *Skidmore* 323 U.S. at 140). The Court admits that there may be statutes that expressly authorize the agency's discretionary authority but reiterates that under the APA the reviewing court must independently interpret the statute and effectuate the will of Congress. *Id.* at 2263.

Prior to *Loper Bright*, and after the WTR was promulgated, both the Second and Eleventh Circuits upheld the WTR as a valid interpretation of the Act. *Catskill III*, 846 F.3d at, 524-33; *Friends I*, 570 F.3d at 1227-28. CSP argues that before EPA promulgated the WTR as a regulation, courts had concluded that a water transfer between distinct waters of the United States constitutes a discharge of pollutants under the Act; EPA's interpretation that those transfers did not need a permit was rejected. *See Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002), *Miccosukee Tribe of Indians*, 541 U.S. at 112 (2004); *Catskill Mts.*

Chptr. of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491-94 (2d. Cir. 2001) (*Catskill I*); *Dubois v. U.S. Dept. of Agric., et. al.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996).

CSP implies that the views of the court conveniently changed after the WTR was promulgated but fails to acknowledge that the cases they rely on did not analyze any evidence from the EPA supporting the WTR. *See Miccosukee Tribe of Indians*, 280 F.3d at 1367-69; *Dubois*, 102 F.3d at 1296-99. *Catskill I* is the only case that remotely discusses the deference due to EPA before the WTR was promulgated. 273 F.3d at 489-90. The court in *Catskill I*, discussed how two circuit courts have provided great deference to EPA but how this deference was misguided. *See* 273 F.3d at 489-90; *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 590 (6th Cir. 1988); *Gorsuch*, 693 F.2d at 183. The crux of the Court's analysis was the process by which the EPA took their position on "discharges" and notes that "[EPA's] position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act." *See Catskill I*, 273 F.3d at 490. Further, the courts held "[had] EPA's position … been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate." *Id; see also Consumers Power Co.*, 862 F.2d at 584; *Gorsuch*, 693 F.2d at 175 (notably, *Gorsuch* was decided before *Chevron* and thus gave deference to the EPA under the *Skidmore* standard).

Since *Catskill I*'s decision in 2001, the WTR has been validly promulgated for 16 years, and the support for the rule has been consistent since the 1970s. *See* 40 C.F.R. 122.3(i); 273 F.3d at 489. The same court ultimately decidedly in *Catskill III*, that EPA should be granted deference; holding that EPA's interpretation of the CWA is "supported by several valid arguments—interpretive, theoretical, and practical." *See* 846 F.3d at 520.

B. <u>The WTR as upheld under the *Chevron* doctrine remains valid by virtue of stare decisis, and there is no special justification to overcome prior rulings.</u>

EPA acknowledges that a majority of the cases that favored EPA deference regarding the WTR were decided under *Chevron*. *Catskill III*, 846 F.3d at 500-33; *Friends I*, 570 F.3d. at 1213-27; *Consumers Power*, 862 F.2d at 584. While agency deference under *Chevron* is overturned, the Court made certain not to question prior cases that relied on *Chevron*. *Loper Bright*, 144 S. Ct. at 2273. Cases that granted deference to EPA prior to *Loper Bright* are still subject to stare decisis despite the change in interpretive methodology. See *id.* The Court further states that reliance on *Chevron* will not alone justify overruling a statutory precedent. *Id.* Therefore, if there are cases where ambiguous statutes were decided in reliance upon agency deference and the *Chevron* doctrine, those cases remain intact barring some other "special justification" for overruling the holding. *See id.*; *Ramos*, 590 U.S. 83 at 121-23 (Kavanaugh, J., concurring).

Stare decisis is based on the principle that, generally, it is of higher importance for the rule of law to be settled. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015); *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 798 (2014); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Stare decisis is a principle of policy and ensures that similar cases are treated alike, which is instrumental to the rule of law. *See Kimble*, 576 U.S. at 455. As stated above, any departure from stare decisis requires special justification, particularly where legislative correctness is practically impossible. *See Ramos*, 590 U.S. at 120 (Kavanaugh, J., concurring). Special justification is more than the belief that precedent was wrongly decided. *See Kimble*, 576 U.S. at 456. To analyze whether a case should be overturned against stare decisis, the court must consider whether the precedential cases were *egregiously* wrong, caused *significant* negative jurisprudential or real-world harm, or if overruling the prior decision would *unduly* upset reliant interests. *See Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring) (emphasis added). Together, these three considerations set a high bar for the overturning of a case. *Id.* at 123.

CSP argues that the language of *Loper Bright* regarding stare decisis is mere dicta that does not hold binding power. *See* (Decision & Order at 10). While dictum holds no precedential value, appellate courts are nonetheless bound by the dicta. *See Garrett v. Lumpkin*, 96 F.4th 896, 902 n.4 (5th Cir. 2024) ("[T]his Court is generally bound by Supreme Court dicta where that dicta is recent and detailed. … [C]ircuit courts treat Supreme Court dicta with greater reverence than dicta emanating from a fellow circuit-court panel." (internal quotation marks omitted)); *McDonald v. Master Fin., Inc.*, 205 F.3d 606, 612–613 (3d Cir. 2000) (circuit courts should not ignore dicta of Supreme Court, which uses dicta to control and influence issues it cannot decide because of its limited docket).

Regardless of dicta, stare decisis must be upheld in this case. *See Kimble*, 576 U.S. at 455. Since its infancy, EPA has held the position that water transfers are not included and warrant an exception to the NPDES permit system. *See Catskill I*, 273 F.3d at 489; *Friends I*, 570 F.3d at 1228. Contrary to what CSP suggests, there is no special justification for overruling the cases that uphold the WTR. *See generally Ramos*, 590 U.S. at 122. The cases decided in favor of EPA's interpretation of the CWA, and in regard to water transfers, are not egregiously decided. *See generally Catskill III*, 846 F.3d 492; *Friends* I, 570 F.3d 1210; *Consumers Power*, 862 F.2d 580; *Gorsuch*, 693 F.2d 156. Nor do they cause significant negative jurisprudence, real-world harm, or upset reliant interests. *See generally Catskill III*, 846 F.3d 492; *Friends* I, 570 F.3d 1210; *Consumers Power*, 862 F.2d 580; *Gorsuch*, 693 F.2d 156. For 42 years EPA's interpretation of water transfers has been upheld, and for the past 16 years the promulgated WTR has continued to be upheld by various courts; there is no indication that the WTR has or will upset reliant interests or spur negative jurisprudence. *See generally Catskill III*, 846 F.3d 492; *Friends* I, 570 F.3d 1210; *Consumers Power*, 862 F.2d 580; *Gorsuch*, 693 F.2d 156. Additionally, CSP does not suffer any

real-world harm. *See Laidlaw*, 528 U.S. at 181. Ultimately, there is no special justification for overturning stare decisis, and doing so would upset the evenhanded, predictable, and consistent development of legal principles. *See Kimble*, 576 U.S. at 455.

1. EPA's interpretation of the WTR under a Skidmore *analysis will prevail.*

Courts must now return to analyzing agency regulations under *Skidmore*. *See Loper Bright*, 144 S. Ct at 2273. Under *Skidmore*, "[agencies] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the *thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade*, if lacking power to control." 323 U.S. at 140 (emphasis added).

Even if the court overrules stare decisis, EPA has demonstrated thoroughness in its reasoning that water transfers are excluded under the CWA and will still prevail. *See Catskill III*, 846 F.3d at 505; *Skidmore*, 323 U.S. at 140. In accordance with the APA, on June 7, 2006, EPA published the WTR, which would amend the CWA regulations to exclude water transfers from regulation under the NPDES permitting system. *See* 71 Fed. Reg. 32,887, 32,887-95 (June 7, 2006) (to be codified at 40 C.F.R. pt. 122). The proposed rule allowed for parties interested and affected to submit comments by July 24, 2006. *Id.* EPA received over a thousand comments for and against the WTR. *See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, REGULATIONS.GOV, https://www.regulations.gov/docket/EPA-HQ-OW-2006-0141/comments (last visited Nov. 7, 2024). To fully consider all relevant materials and accommodate those asking for an extension, EPA extended the original deadline for comments from July 24, 2006, to August 7, 2006. *See* Extension of Public Comment Period for the (NPDES) Water Transfers Proposed

Rule, 71 Fed. Reg. 41,752 (July 24, 2006). Additionally, EPA included 50 documents, from various state, federal, and scientific origins, it relied on to devise its current promulgation of the WTR. *See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, REGULATIONS.GOV, https://www.regulations.gov/docket/EPA-HQ-OW-2006-0141/comments (last visited Nov. 7, 2024). After thorough consideration of the relevant material, EPA incorporated into the rule a statement that addressed public comments as well as the legal and statutory frameworks that supported the decision. *See* 71 Fed. Reg. 32,887, 32,887-95 (June 7, 2006). The final rule was published on June 13, 2008, and set to be effective on August 12, 2008, more than the 30-day period prescribed by the APA. *See* 5 U.S.C § 553; 71 Fed. Reg. 32,887, 32,887-95 (June 7, 2006). Accordingly, EPA has met the statutory requirements for the valid promulgation of the WTR and demonstrated the thoroughness and validity of its interpretation. *See* 5 U.S.C. § 551 *et seq*; 71 Fed. Reg. 32,887, 32,887-95 (June 7, 2006).

IV. HIGHPEAK'S ACTIVITIES REQUIRE AN NPDES PERMIT FOR THE DISCHARGE WHICH RESULTS IN AN ADDITION OF POLLUTANTS INTO CRYSTAL STREAM.

The premise of the WTR is based on the "unitary waters" theory, which posits that an "addition" occurs only when new pollutants (those that did not already exist within the composition) first enter navigable waters from a point source, not when they are moved between navigable waters. *Bang v. Lacamas Shores Homeowners Ass'n*, 638 F. Supp. 3d 1223, 1226 (W.D. Wash. 2022). This concept highlights EPA's assessment of whether an activity, the method through which the discharge occurs, requires a permit. *Id.* Though EPA agrees with CSP's position and the District Court's holding, it is important to clarify how the WTR characterizes exclusions depending on addition or introduction, even though the words were used interchangeably in the complaint and subsequent order. (Decision & Order at 11). When approving permits, additions are

precluded, introductions are excluded. *Id.* Contrasting the terms, EPA interprets "introduction" as pollutants already existing in water during and after the transfer, thus no "addition" occurs. *Nat'l Cotton Council. v. U.S. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). It calls attention to the purpose of the CWA and consequently the NPDES permitting system which regulates concentration and distribution of pollution in bodies of water so as not to impair water quality. *See id.* The WTR's primary purpose is to exclude WOTUS transferred without adding pollutants, and it outlines when such transfers fall within or outside the scope of the CWA's permitting requirements. 40 C.F.R. § 122.3(i). This is consistent with the CWA bestowing EPA the authority to regulate discharges of pollutants into the nation's waters. 33 U.S.C. § 1342.

Absent any exception, for example, the NPDES Permit Shield Provision, when water is transferred from one location to another resulting in the addition of pollutants, regardless of how little is added, it needs to be regulated through the NPDES permit program and cannot be excluded under the WTR. 33 U.S.C. § 1342(k) (generally, certain discharges that create additions may be excluded from additional permits if and only if the applicant already retains and NPDES permit, and the additional pollutant were not identified but anticipated to occur). Without a permit such a discharge, such as Highpeak's, is unlawful. *See* 33 U.S.C. § 1311(a).

A. Highpeak's discharge into Crystal Stream is considered an addition, and not merely an introduction as defined by the WTR.

The WTR primarily addresses the transfer between different bodies of water, such as rivers, lakes, or reservoirs, for the purpose of resource management, agricultural use, or industrial processes. 40 C.F.R 122.3(i). This distinction between introduction and addition is crucial when the EPA assesses cases, such as the activity of Highpeak. *See id.* Though a tubing organization generally does not come under the management of the agency, when it engages in activity directly controlled under administrative rules, the EPA can require that it come under compliance of

regulation to continue its activities. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 598 (2013). When completing an assessment of whether the WTR applies, EPA considers these two factors: (1) whether there is an activity resulting in water transfer through tunnels, channels, or natural streams, and (2) whether that intervening use introduces pollutants to the water's destination. *S. Side Quarry*, 28 F.4th at 686. If the answer to both is affirmative, then the WTR exemption cannot apply, and the activity is subject to regulation for its addition of pollutants from a point source. *Id*.

In the case of *NA KIA'I KAI v. Nakatani*, the court found that where a drainage system was considered a WOTUS normally within the WTR exception, the EPA properly required an NPDES permit for the activity because pollutants were added to the water as it flowed through the unlined ditches in the system. 401 F. Supp. 3d 1097, 1097 (D. Haw. 2019); *see also Matter of Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D.3d 235, 239, 892 N.Y.S.2d 651, 652 (App. Div.) (holding that water transfer activity via bodies of water that were "meaningfully distinct" constituted an unpermitted discharge not subject to the WTR exclusion).

In assessing the nature of Highpeak's activities, it is clear the tubing operations trigger the same regulatory requirements as shown above. (Decision & Order at 4). First, Highpeak's tubing operations involve the opening and closing of a valve at both ends of the tunnel to allow for water to be discharged from Cloudy Lake into Crystal Stream. *Id*. The process of opening and closing the valve is the activity that directly creates the water transfer meeting the first factor above. *See id.* Second, the composition of Highpeak's tunnel adds .02 mg/L of iron, .003 mg/L of manganese, and 2 mg/L of TSS into the water flowing into Crystal Stream. *Id.* at 5. This results in a higher composition of solids in Crystal Stream than in Cloudy Lake when tested on the same day by 2-3%, pointing to the fact that the tunnel deposited these solids as water was discharged. *Id.* The rule does not exempt transfers that involve the addition of pollutants or where the water is contaminated

during the transfer process. 40 C.F.R. § 122.3(i). As a result, the second factor is met, bringing Highpeak's discharge outside the scope of the WTR exclusion. *S. Side Quarry,* 28 F.4th at 686.

1. Highpeak's discharge increases the amount of pollutants into Crystal Stream.

The CWA Section 502(6) defines "Pollutant" to include "chemical wastes, biological materials […] discharged into water." 33 U.S.C. § 1362(6). The metals and solids added by Highpeak's discharge can fall under both chemical wastes and biological materials. *Id.* Though Highpeak's discharge results in trace amounts of these solids, the WTR does not establish a specific threshold for the amount of pollutants that must be added before a discharge falls outside the rule. *Friends of the Everglades v. United States EPA*, 699 F.3d 1280, 1286 (11th Cir. 2012); (Decision & Order at 5). Instead, the only distinction that WTR specifies is whether the pollutant discharged, regardless of the amount, is a new pollutant; in other words, it cannot have already existed within the composition in question. *Id* at 1285. This ensures that all water quality impacts are adequately assessed and mitigated to protect the nation's water resources, and that facilities are not unnecessarily burdened by regulation for inconsequential activity. *Id.; see also S. Side Quarry,* 28 F.4th at 685 (stating that subjecting water transfers to NPDES permitting could interfere with states' ability to effectively manage water resources and water rights). The presence of any measurable pollutant that can be added in the receiving body of water is sufficient to necessitate a permit. *S. Side Quarry,* 28 F.4th at 688. The WTR aims to balance regulatory oversight with the practical needs of water management, while still safeguarding the nation's water resources from harmful pollution. *Id.* It ensures that only those activities that truly pose a risk to water quality are subject to more stringent environmental oversight. *See* i*d.*

2. The percentage of pollutants added from the point source is irrelevant in the analysis of the WTR.

Highpeak argues that due to the minimal amounts of pollutants present, the addition must be a result of runoff and not of their activity. (Decision & Order at 11). The rule specifically notes that the addition of any pollutants to the transferred water, whether through runoff, contamination from equipment, or any other source, is grounds for requiring an NPDES permit. 40 CFR § 122.3(i). This is clearly the case with Highpeak's discharge. The EPA considers the cumulative effects of repeated transfers, as outlined in its 2015 NPDES Guidance on stormwater discharges and cumulative impacts. *See* 80 Fed. Reg. 34,403, 34,403-07 (June 16, 2015). In such cases, an NPDES permit may be required, even if the individual transfers appear to have minimal impact, as is the case with Highpeak. 40 CFR § 122.3.

B. EPA has the scientific expertise to decide the technical application of the WTR.

1. The technical application is reasonable and not ambiguous.

As the District Court recognized, "[t]here is a significant difference between interpreting a statute drafted by Congress and a regulation drafted by an agency." (Decision & Order at 12). As discussed *supra*, EPA has a body of experience, informed by expertise and consistency. Under the *Auer* Doctrine, courts should give deference to an agency's technical interpretation of its regulation as long as that interpretation is *reasonable*. *Auer v. Robbins*, 519 U.S. 452, 466 (1997) (emphasis added). Further in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, the court found that if the EPA's interpretation is consistent with the statutory language and based on its expertise in environmental regulation, weight should be allotted to the agency's findings and determinations. 545 U.S. 967, 967 (2005).

Highpeak claims that water passing through any tunnel will inevitably pick up some new contaminants, thus taking the discharge out of the scope of the WTR, which will create an overbroad application of the rule. (Decision & Order at 11). In *Decker v. Nw. Envtl. Def. Ctr.*, the

Supreme Court finds that the *Auer* deference is correct because "the [EPA] has been consistent in its view that the types of discharges…do not require NPDES permits." 568 U.S. 597, 614. EPA has regulated the WTR consistently by assessing the methods of addition and applying the WTR where an activity clearly meets or fails the factors considered. (Decision & Order at 11-12). Further, Highpeak had full control over the construction of the tunnel, and in choosing to build it through the rock, they availed themselves to an activity regulated under the NPDES permit. *See* (Decision & Order at 12). As the District court highlighted, EPA stated in promulgating its final rule: "[w]ater transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred." NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,705 (June 13, 2008). As a result, the burden is on Highpeak to disprove that its constructed tunnel does not add pollutants, it has failed to do so.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that CSP had standing to challenge the WTR and that CSP timely filed the challenge of the WTR. Additionally, this Court should affirm their ruling regarding the WTR as a valid regulation and that Highpeak is subject to receiving a permit under the CWA.