TEAM 3

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, and
HIGHPEAK TUBES, INC.,
Defendants-Appellees-Cross-Appellants.

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

Brief of Highpeak Tubes, Inc.,
Defendant-Appellee-Cross Appellant

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union granted Highpeak Tubes, Inc.'s and the United States Environmental Protection Agency's motions to dismiss Crystal Stream Preservationists, Inc.'s challenge to the Water Transfers Rule but denied Highpeak Tubes' motion to dismiss Crystal Stream Preservationists' Clean Water Act citizen suit in case No. 24-001109. The district court had subject-matter jurisdiction under 33 U.S.C. § 1365(a)(1) (citizen suits under the Clean Water Act), 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). Each party filed timely notices of appeal under Fed. R. Civ. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292(b), which provides courts of appeals discretionary appellate jurisdiction when a district judge makes an order in a civil action, which, in the judge's opinion, involves "a controlling question of law as to which there is a substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." Judge T. Douglas Bowman was of this opinion regarding the validity of the Water Transfers Rule and its interpretation.

STATEMENT OF ISSUES PRESENTED

I. Did the district court err in holding that Crystal Stream Preservationists had standing to challenge Highpeak Tubes' 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 Tubes' discharge subject to permitting under the Clean Water Act?

STATEMENT OF THE CASE

I. Highpeak's Water Transfer

Highpeak Tubes ("Highpeak") is a recreational tubing business located in New Union's Awandack mountains, between Cloudy Lake ("the Lake") to its north and Crystal Stream ("the Stream") to its south. The Lake and the Stream are both waters of the United States ("WOTUS"). In 1992, Highpeak got permission from New Union to connect the Lake and the Stream with a four-foot diameter, 100-yard tunnel, so that it could release water from the Lake into the Stream to increase the Stream's flow and give its tubing patrons an enjoyable outdoor experience on the Stream. The tunnel is partially carved through the natural rock that lies between the Lake and the Stream and partially made of iron pipe. New Union only allows Highpeak to release water from the Lake into the Stream when the Lake's water level is high enough.

II. The National Pollution Discharge Elimination System and the Water Transfers Rule

To realize the Clean Water Act's ("CWA") purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the CWA created the National Pollution Discharge Elimination System ("NPDES"). The NPDES allows EPA, or States that wish to regulate the WOTUS (or "navigable waters") within their borders, to issue permits for pollutant discharges into the navigable waters. 33 U.S.C. § 1342.

In 2008, EPA promulgated the Water Transfers Rule ("WTR"). The WTR excludes from the NPDES permitting requirement "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). This exclusion "does not apply" if the water transfer introduces pollutants

into "the water being transferred." *Id.* Highpeak believes its water transfers fall within the WTR and are therefore excluded from the NPDES permitting requirements.

III. The Creation of Crystal Stream Preservationists, Inc.

On December 1, 2023, some residents of Rexville, New Union, formed Crystal Stream Preservationists, Inc. ("CSP"), a nonprofit corporation whose "mission is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." R. 6. All of CSP's members but one have lived in Rexville for over fifteen years. Jonathan Silver, the newest resident, moved to Rexville in 2019. Silver also joined CSP after its initial incorporation. Two of CSP's members own property five miles downstream from Highpeak's water discharge point.

IV. Current Litigation

On December 15, 2023, fourteen days after its incorporation, CSP sent a notice of intent to sue letter ("the NOIS") to Highpeak and also sent copies to the New Union Department of Environmental Quality and EPA. The NOIS alleges that Highpeak's discharges of water from the Lake into the Stream violate the CWA's NPDES permitting system. It also alleges that the WTR, which Highpeak now relies upon to justify its discharges, was not validly promulgated by EPA and contravenes the CWA's substance. Finally, it alleges that Highpeak's discharges introduce pollutants into the Stream so that these discharges are not covered by the WTR in any case and thus require a permit.

In particular, CSP alleges that the Lake has higher levels of naturally occurring iron, manganese, and total suspended solids ("TSS") than the Stream. When Highpeak releases water from the Lake into the Stream through the tunnel, CSP alleges the concentration of these minerals and solids increases in the water being transferred as it flows over the rock and through the pipe by 0.02 mg/L of iron (2.5% increase), 0.003 mg/L of manganese (3.3% increase), and 2

mg/L of TSS (4% increase). CSP alleges that the discharge of this water into the Stream is an illegal discharge of pollutants, because Highpeak has not obtained an NPDES permit.

In the days before CSP sent the NOIS, two of CSP's members filed declarations in support of CSP. On December 12, 2023, Jonathan Silver wrote of his apprehensions about Highpeak's discharges. He claims he is "deeply concerned about the presence of toxic chemicals polluting the water," R. 16 at ¶ 5, "hesitant to allow [his] dogs to drink from the Stream due to the pollutants . . . [and is] concerned with pollutants entering the Stream and making it cloudy." R. 16 at ¶ 7. He claims he would "recreate more frequently on the Stream" without the discharges. R. 16 at ¶ 9.

The next day, December 13, 2024, Cynthia Jones filed her declaration expressing similar apprehensions in substantially similar language. Jones claims she learned about Highpeak's discharges in 2020, even though she had been living in Rexville since 1997, R. 14 at ¶ 5, and Highpeak had been discharging water from the Lake since 1992. She claims her "ability to enjoy the Stream has significantly diminished since learning about the pollutants introduced by Highpeak's discharge . . . in 2020." R. 15 at ¶ 10. Jones claims that Highpeak's "discharge and the suspended solids and metals in the Stream are upsetting to" her because "they make the otherwise clear water cloudy." R. 14 at ¶ 8. She claims she is "very concerned about contamination from toxins and metals, including iron and manganese." R. 14 at ¶ 9. She claims she would "recreate even more frequently on the Stream" without the discharges, but she is "afraid to walk in the Stream due to the pollution." R. 15 at ¶ 12.

On February 15, 2024, CSP incorporated its NOIS allegations into a Complaint challenging the WTR under the Administrative Procedure Act ("APA") and Highpeak's discharges under the CWA's citizen suit provision. Highpeak moved to dismiss CSP's claims,

arguing that CSP lacked standing for both challenges, that its claim concerning the WTR is time-barred, and that it had failed to state a claim in its CWA citizen suit because Highpeak did not need a permit for its discharges under the WTR. EPA, like Highpeak, moved to dismiss CSP's claim concerning the WTR on standing and timeliness grounds but agreed with CSP that Highpeak's discharges are not excluded from the NPDES permit requirement.

V. The Decision Below

The United States District Court for the District of New Union found that CSP has standing to challenge both the WTR and Highpeak's discharges. It also found that CSP had timely filed its challenge to the WTR. Further, the district court found that the WTR was validly promulgated by EPA but that Highpeak's discharges fall outside the WTR. Accordingly, the district court granted Highpeak's and EPA's motions to dismiss CSP's challenge to the WTR but denied Highpeak's motion to dismiss CSP's CWA citizen suit.

SUMMARY OF THE ARGUMENT

The District Court erred when it held that CSP had standing to challenge Highpeak's discharge and EPA's WTR. CSP lacks standing as an organization, because its injury is manufactured. It lacks associational standing, because its members would not otherwise have standing to sue in their own right. Their unreasonable subjective apprehensions of injury do not satisfy the standing requirement of injury in fact. They complain of toxicity in Highpeak's discharges, but the substances present in the water transfers are non-toxic, naturally occurring substances. Their alleged aesthetic injuries also fail to qualify as injury in fact. CSP therefore does not have standing.

The district court also erred in holding that CSP timely filed its challenge to the WTR. *Corner Post*'s analysis of timing implicates the standing requirement of injury in fact. Under *Corner Post*'s rule that the statute of limitations to sue the United States begins to run when a

party is injured, CSP is time-barred from challenging the WTR, because only CSP's founders' injuries are relevant to the timing analysis, and the only relevant injury occurred more than six years before CSP brought suit. CSP is therefore time-barred.

Next, the district court properly held that EPA validly promulgated the WTR, because EPA's interpretation of the CWA, which resulted in the WTR, did not create a regulatory exemption, and the WTR is the best reading of the statute. In promulgating the WTR, EPA interpreted the statute's entire text and structure to ascertain Congress's intent and properly limited its interpretation of "addition" within the term "discharge of a pollutant" to NPDES. This Court should uphold the WTR under Skidmore review: EPA's consideration of statutory and environmental factors relevant to the WTR demonstrates EPA's experience, informed judgment, and expertise, and EPA has consistently defended the WTR. Alternatively, this Court should follow the Supreme Court's recent decision in *Loper Bright*, which instructs courts to affirm settled regulations previously upheld under *Chevron*, unless there is a special justification to invalidate them. There is no special justification to invalidate the WTR.

Finally, the District Court erred in holding that Highpeak's water transfer required an NPDES permit. Highpeak's water transfer activity did not introduce pollutants to the water being transferred. This Court should not apply *Auer* deference, because this case presents a question of law, and to defer to EPA under *Auer* would violate Highpeak's due process rights and ignore *Loper-Bright*'s guidance. Instead, this Court should apply *Skidmore* review, because it preserves the benefit of EPA's expertise and Highpeak's due process right to an impartial decision-maker and provides stability to its interests. If this Court applies *Auer*, it should find that EPA's interpretation ignores the WTR's plain language, the CWA's objectives, and States' authority

under the CWA. This Court should find that Highpeak's water transfers do not require an NDPES permit, because Highpeak does not introduce pollutants to the transferred water.

STANDARD OF REVIEW

Federal courts of appeals review motions to dismiss for lack of standing *de novo*, "construing the factual allegations in the complaint in favor of the plaintiffs. A plaintiff has the burden to establish it has standing." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (citations omitted). Courts of appeals likewise review a district court's application of a statute of limitations and the date a statute of limitations accrues under undisputed facts *de novo* as questions of law. *See Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022). Finally, whether a district court applied a correct standard of review is a question of law that the courts of appeals review *de novo*. *See Menchaca v. CNA Grp. Life Assur. Co.*, 331 Fed. Appx. 298, 302 (5th Cir. 2009).

ARGUMENT

I. The district court erred when it held that CSP had standing to challenge Highpeak's discharge and EPA's WTR.

Federal courts have the power to hear and judge "cases and controversies." U.S. Const. art. III, § 2, cl. 1. The doctrine of standing "constitute[s] an essential and unchanging part of the case-or-controversy requirement of Article III." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (citation omitted). To have standing, (1) "the plaintiff must have suffered an injury in fact," that is, the injury must be "a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant;" and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted).

An organization "may have standing in its own right," *Warth v. Seldin*, 422 U.S. 490, 511 (1975), if it can show injury in fact "to itself as an organization (rather than to its members)." *Citizens United to Protect Our Neighborhoods v. Vill. of Chestnut Ridge*, 98 F.4th 386, 395 (2d Cir. 2024). Alternatively, an organization may have "associational standing" to "bring suit on behalf of its members [if] . . . its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

CSP does not have standing as an organization, because its injury is manufactured and inseparable from its members. It does not have associational standing, because its members would not have standing to sue in their own right.

A. CSP does not have standing as an organization, because its injury is manufactured.

Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (citations omitted). Federal courts of appeals have rejected plaintiffs' attempts to establish standing by manufacturing injury. For example, in *Gordon v. Virtumundo, Inc.*, the Ninth Circuit denied a plaintiff's attempt to turn himself into an internet service provider ("ISP") by providing email addresses to friends and family to "seek[] out spam for the . . . purpose of filing lawsuits" under the CAN-SPAM Act. 575 F.3d 1040, 1055 (9th Cir. 2009). These contrivances did not make him into a "bona fide" ISP, and he failed to show any "real harm" to himself traceable to "spammers." *Id.* at 1055. The "adverse" effects he experienced were "self-imposed and purposefully undertaken." *Id.* at 1057. He "s[ought] out and accumulated—rather than avoid[ed] or block[ed]—" the alleged source of his injury, so he had "not been adversely affected . . . in any cognizable way" and therefore did not have standing. *Id.* at 1057. As the concurrence explained, the plaintiff was seeking to "operate a litigation factory," and "the purported harm [was] illusory and more in the nature of

manufactured circumstances in an attempt to enable a claim." *Id.* at 1067–68 (Gould, J., concurring). Setting up a legal identity in a manner that will purposefully lead to injury does not establish injury in fact. *Id.* at 1068 (Gould, J., concurring).

Similarly, CSP's members manufactured circumstances by defining their organization in terms of the litigation it commenced with its NOIS letter only fourteen days after it was incorporated. R. 4. According to its charter, CSP's "mission is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." R. 6. CSP's mission mirrors the WTR, which defines a "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred waters to intervening industrial . . . use." 40 C.F.R. § 122.3(i). Further, the water transfers exclusion "does not apply to pollutants introduced by the water transfer . . . ." *Id.* CSP's members created CSP to be injured by the WTR to enable a claim, but they have not shown any injury to the organization itself independent of the litigation or its members. Such a manufactured injury does not establish injury in fact. CSP therefore lacks standing as an organization.

B. CSP lacks associational standing, because its members would not otherwise have standing to sue in their own right.

CSP's members do not have standing because their subjective apprehensions of injury are unreasonable, and they fail to show aesthetic injury in fact.

1. CSP's members have not established injury in fact, because their subjective apprehensions of injury are unreasonable.

An injury in fact is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations omitted). "A 'concrete' injury must be 'de facto'; that is, it must actually exist. . . . '[C]oncrete[]' . . . mean[s] . . . 'real,' and not 'abstract.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016) (citations omitted).

A "plaintiff's subjective apprehensions" of injury are not themselves sufficiently concrete to establish injury in fact. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."). *See also City of S. Miami v. Governor*, 65 F.4th 631, 638 (11th Cir. 2023) ("[W]e have rejected the argument that plaintiffs have standing based on their subjective fear of . . . harm and its chilling effect.") (citation omitted). When "subjective apprehension" forms the ground of a plaintiff's claim to injury, the question for determining injury in fact concerns "[t]he reasonableness of [the] fear." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC)*, *Inc.*, 528 U.S. 167, 184 (2000).

Under *Lyons*, *Laidlaw*, and *Spokeo*, therefore, subjective apprehension of harm can only support concrete injury in fact when the apprehension is reasonable. Subjective apprehension of injury is reasonable only if the injury is real.

Neither Cynthia Jones' nor Jonathan Silver's declarations in support of CSP's legal actions shows concrete injury. Rather, their injuries are based on their unreasonable subjective apprehension of harm. They express similar fears about "toxins" or "toxic chemicals" in the Stream, R. 14 at ¶ 9, R. 16 at ¶ 5. Jones is "upset[]" when the water becomes cloudy, R. 14 at ¶ 8, and Silver is "concerned" that Highpeak releases "pollutants" into the Stream, "making it cloudy." R. 16 at ¶ 7.

But Jones and Silver erroneously equate any presence of iron, manganese, and TSS with toxicity. Iron and manganese are not listed in the CWA's general definition of pollutants or in the lists of toxic and conventional pollutants. Total suspended solids are not toxic pollutants but are listed as conventional pollutants. *See* 33 U.S.C. § 1362(6) (general definition), 40 C.F.R. § 401.15 (toxic pollutants), 40 C.F.R. § 423, App. A (priority pollutants), 40 C.F.R. § 401.16

(conventional pollutants). Iron is listed as a "nonconventional pollutant" that may come under regulation with a showing of toxicity and other biological harms. 33 U.S.C. § 1311(g)(1), (2)(C). Potential CWA regulation of these substances does not, however, mean they are toxic.

Jones' and Silver's fears regarding iron, manganese, and TSS do not establish injury in fact, but CSP attempts to ground its injury in these fears. The Lake's minerals and total suspended solids are naturally occurring, R. 5, so they are not themselves the result of pollution. *See* 33 U.S.C. § 1362(19) (defining "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"). In other words, Highpeak does not release "polluted" water into the tunnel that leads to the Stream. As the water passes through the tunnel, CSP alleges it increases in its concentration of iron, manganese, and total suspended solids, but none of these substances is toxic under the CWA, so CSP has not alleged any toxic pollution.

The fear that led CSP's members to curtail their activities in the Stream, therefore, was unreasonable. Under *Lyons*, *Laidlaw*, and *Spokeo*'s rule for subjective apprehension, the "subjective issue here is the reasonableness of th[at] fear." *Laidlaw*, 528 U.S. at 184. In *Laidlaw*, another CWA case involving discharges into a river, the Court analyzed the reasonableness of nearby residents' fear concerning discharges of water polluted with amounts of mercury, a toxic pollutant, 40 C.F.R. § 401.15(45), in excess of its permit. *Laidlaw*, 528 U.S. at 175–76. The Court found the nearby residents' fear and withdrawal from recreating in the river to be "entirely reasonable" in these circumstances. *Id.* at 184–85. The same cannot be said for CSP's members' fears. Unlike *Laidlaw*, no toxic pollutants pass from the Lake to the Stream in Highpeak's water transfers. Any increased concentrations to the Lake's water during the transfers involve non-toxic substances that were already present in the water and wider ecosystem. Thus, CSP's

members curtailed their activities in the Stream due to an unreasonable fear of toxins when only naturally occurring non-toxic substances were involved in Highpeak's water transfers.

2. CSP's members fail to show aesthetic injury in fact.

Plaintiffs can show injury in fact when they allege that "the aesthetic and recreational values of the area [they habitually use] will be lessened" by a defendant's activities. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). But "someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533 (9th Cir. 2019). Here, Jones' twenty-three years of living near the Stream between 1997 and 2020 with no apparent concern for its aesthetic condition tell against the reality of her "aesthetic injury." Jones claims that she has "regularly walked along the Stream and enjoy[ed] its crystal clear color and purity." R. 14 at ¶ 7, but it was only after learning about Highpeak's discharges that she reports becoming upset about the "cloudy" water. R. 14 at ¶ 8. She went looking for pollution to manufacture standing and therefore cannot claim aesthetic injury from seeing it.

Silver does not allege an aesthetic injury. He says only "I am concerned with pollutants entering the Stream and making it cloudy," R. 16 at ¶ 7, and he connects the cloudiness to his fear of "toxic chemicals." R. 16 at ¶ 5. This fear is unreasonable and based on a misunderstanding of the CWA's regime of classifying pollutants. Silver therefore has not shown an aesthetic injury.

For these reasons, this Court should hold that CSP did not have standing to challenge Highpeak's discharges and EPA's Water Transfers Rule.

II. The district court erred in holding that CSP timely filed its challenge to the WTR.

Plaintiffs must bring civil actions against the United States "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The Supreme Court in *Corner Post v. Bd. of Governors of the Fed. Rsrv. Sys.* announced the rule that "[a]n APA claim does not accrue for

purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action." 144 S. Ct. 2440, 2460 (2024).

A. *Corner Post* links its timing analysis to standing.

Corner Post links its timing analysis to standing through injury in fact. In its analysis of when "a right of action first accrues," the Court reasoned that "[a] right of action accrues when the plaintiff has a complete and present cause of action—*i.e.*, when she has the right to file suit and obtain relief. . . . An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Corner Post, Inc.*, 144 S. Ct. 2440, 2450 (2024) (citations omitted). In other words, the statute of limitations begins to run for a plaintiff once that plaintiff has standing: when she has suffered a concrete injury and has a right to obtain relief against the cause of that injury.

B. CSP's founders' injuries began the statute of limitations under *Corner Post*'s rule, and CSP's challenge is therefore time-barred.

If this Court finds that CSP has standing to challenge the WTR, it should identify the injuries of its founding members as the injury that makes the statute of limitations start to run. When an entity has associational standing, the injury that gives it standing is not an injury to the organization itself but rather an injury to one of its members. As such, the ease of incorporating nonprofit organizations like CSP—and of adding members—makes plaintiffs' gaming the statute of limitations almost inevitable. The *Corner Post* dissent warns of "manipulation" of timing rules where "new groups [are] brought in (or created) just to do an end run around the statute of limitations." *Id.* at 2471 (Jackson, J., dissenting). Identifying injury with an organization's founders' injuires limits what the dissent calls "gamesmanship," *Id.* at 2470 (Jackson, J., dissenting), while still allowing organizations with bona fide interests to have their day in court.

Corner Post does not foreclose this rule. *Corner Post* looks to the reality of a party's injury and asks when it first occurred to determine when "the cause of action first accrued." CSP has not shown injury to itself as an organization. The only injury CSP could have had in relation to the WTR at the time of its founding belonged to Cynthia Jones, whose alleged injury regarding the WTR first occurred when Highpeak began to rely on the WTR for its discharges in 2008.

The difference between the injuries in *Corner Post* and the alleged injuries this case illustrates the appropriateness of limiting CSP's alleged associational injury to its founders' injuries. The injury to the Corner Post truck stop did not exist, and could not have existed, before Corner Post was incorporated and started to do business, whereas the only injury to CSP is the same injury claimed by its members. It is not just the same kind of injury, as in *Corner Post*, but the very same injury. CSP's only injuries are the injuries to its members.

If an organization can acquire standing by inheriting the injuries of its members, it should also inherit the timing limits of its founding members. Otherwise, statutes of limitations can't be meaningful. A time-barred individual could simply incorporate as a non-profit organization to restart the clock for her claim. Similarly, without the limitation to the founding members' injuries, an organization that would otherwise be time-barred could simply recruit a party to join and incur injury to restart the clock. This Court should therefore find that CSP's members' injuries start CSP's statute of limitations to challenge the WTR.

C. Jones' constructive knowledge of her injury time-bars CSP's claim.

Jones had constructive knowledge of her injury as early as 2008, more than six years before CSP filed suit in February 2024. Constructive knowledge of harm, that is, "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person," *Black's Law Dictionary* (11th ed. 2019), can cause a statute of limitations to

begin to run. *See, e.g.*, *Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) (statute of limitations running with constructive knowledge of securities fraud); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 (9th Cir. 2020) (statute of limitations running with constructive knowledge of copyright infringement); *Adams v. Zimmer US, Inc.*, 943 F.3d 159, 163 (3d Cir. 2019) (statute of limitations running with constructive knowledge of a tort).

Jones' alleged injury made CSP's claim challenging the WTR accrue in or soon after 2008, when EPA promulgated the WTR and Highpeak began relying on it for its discharges. She has "regularly walked along the Stream" "throughout [her] time in Rexville," which started in 1997. R. 14 at ¶ 5, ¶ 7. She would have seen cloudiness from Highpeak's discharges since that time, because the discharges began in 1992. She should have known, exercising reasonable diligence, that she had an aesthetic injury. Jones did exercise that reasonable diligence in 2020, when she inquired and learned about the discharges and the substances involved. But the six-year limitations period began to run when she had constructive knowledge in 2008, and CSP is therefore time-barred in its challenge to the WTR, because CSP's injury is Jones's injury.

Silver's alleged injury, which began in 2019 at the earliest, should not extend the statute of limitations, because he joined CSP after its founding. R. 16 at ¶ 3.

For these reasons, this Court should hold that CSP did not timely file its challenge to the Water Transfers Rule.

III. The district court did not err in holding that EPA validly promulgated the WTR under the CWA.

EPA validly promulgated the WTR. The WTR is not a regulatory exemption to the CWA. Rather, the rule resulted from EPA's interpretation of the CWA, which is the best reading of the statute. Accordingly, this Court should uphold the WTR under *Skidmore* review, because the WTR demonstrates EPA's subject-matter expertise, on which this Court may properly rely for

guidance. Alternatively, this Court should follow the Supreme Court's recent guidance in *Loper Bright*, which instructs courts to affirm settled regulations previously upheld under *Chevron*, unless there is a special justification to invalidate them. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). There is no special justification to invalidate the WTR.

A. EPA validly promulgated the WTR, because the WTR is not a regulatory exemption to the CWA.

EPA did not create a regulatory exemption when it promulgated the WTR. Courts have held that EPA does not have authority to exempt parties discharging pollutants from complying with the CWA permit requirements. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977); *see also Nw. Env't. Advocs. v. U.S. EPA*, 537 F.2d 1006, 1021–22 (9th Cir. 2008) (discussing EPA's attempt to create regulatory exceptions). When EPA interpreted the CWA, it concluded that the CWA does not require NPDES permits for water transfers. *See* NPDES Water Transfers Final Rule, 73 Fed. Reg. 33,697, 33,706 (June 13, 2008). EPA promulgated the WTR under its authority from Congress to prescribe necessary regulations to carry out its permitting functions, and this did not create an exemption not present in the CWA. *See* 33 U.S.C. § 1361(a). Thus, the WTR was validly promulgated under EPA's NPDES permitting authority.

B. The WTR is the best reading of the CWA.

Congress passed the CWA to protect water quality. *See* 33 U.S.C. § 1251(a). To achieve this objective, the CWA prohibits "the discharge of any pollutant by any person," unless the person complies with the six sections listed in 33 U.S.C. § 1311(a), which authorize the NPDES and the dredge-and-fill programs. *Id.* The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" and "navigable waters" as WOTUS. 33 U.S.C. § 1362(12), (7). Thus, § 1311 prohibits any addition of any pollutant to WOTUS by any person, except in compliance with either the NPDES permit or the

dredge-and-fill permit. Congress has not defined the term "addition" within the meaning of "discharge of a pollutant." The WTR addresses whether a water transfer constitutes an "addition" within the meaning of "discharge of a pollutant."

The WTR is the best reading of the CWA, because it interprets the statute's entire text and structure to ascertain Congress's intent and avoids absurd results by interpreting "addition" within the meaning of "discharge of a pollutant" for NPDES purposes only.

1. The CWA's text and structure demonstrate that Congress did not intend to subject water transfers to the NPDES program.

Several sections of the CWA demonstrate that Congress was aware of pollution associated with water transfers but chose to defer to State and local authorities to control such pollution. 73 Fed. Reg. at 33,702. Section 1251(g) limits the NPDES program's reach by excluding water transfers when it states "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or . . . impaired by this chapter." 33 U.S.C. § 1251(g). Water transfers move quantities of water from one waterbody (the donor water) to another (the receiving water). 73 Fed. Reg. at 33,699. Water transfer activity "deliver[s] waters that users are entitled to receive under State law." *Id.* at 33,702. Because water transfers are inherent in water use allocation, EPA's interpretation that the CWA does not require NPDES permits for water transfers is reasonable "absent a clear congressional intent to the contrary." 73 Fed. Reg. at 33,702; *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it [has not] significantly changed the federal-state balance.").

Additional sections of the CWA show that Congress chose to defer to State and local authorities for water transfer pollution control. Section 1370(2) provides that the CWA should not interfere with States' water allocation rights absent a clear congressional intent. *See* 33

U.S.C. § 1370(2) ("Except as expressly provided for in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."). Section 1251(b) recognizes the States' "primary responsibilities with respect to the 'development and *use* of land and water resources.'" *Id.* § 1251(b) (emphasis added). Section 1370 evinces Congress's intent to defer to State nonpoint source program authorities for water transfers generating nonpoint source pollution. 73 Fed. Reg. at 33,702. These sections provide strong support that Congress "generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,703.

2. Water transfers do not constitute an "addition" under NPDES.

Water transfers do not constitute an "addition" to "navigable water" because the donor water never loses its status as WOTUS during the water transfer process. An NPDES permit is required if the pollutant is an "*addition*" to WOTUS. 73 Fed. Reg. at 33,701 (emphasis added). The statute defines a "pollutant" broadly, including "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water." 33 U.S.C. § 1362(6). Because the CWA defines "pollutant" broadly, EPA interprets water transfers to "always contain intrinsic pollutants." 73 Fed. Reg. at 33,701. But the "pollutant" is not an addition *to* [WOTUS] because "pollutants in transferred water are already *in* the waters of the United States . . . before, during, and after the water transfer." *Id.* (emphasis added). In other words, "when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as waters of the United States, and thus nothing is added to those waters from the outside world." *Id.* Therefore, no pollutants are introduced to the conveyed waters from outside WOTUS during a water transfer.

Water transfers do not constitute an "addition" within the term's ordinary meaning unless the donor water loses its status as WOTUS during the transfer process. The term "addition" means "the *action* . . . of adding something to something else." *Addition*, Oxford English Dictionary (3d ed. 2024) (emphasis added). Although § 1362(12) uses the noun form "addition" of the verb "add" to define "discharge of any pollutant," the meaning of § 1311(a) can be rendered as follows: This section prohibits any person from adding any pollutant to WOTUS from any point source, unless the person complies with the CWA permit requirement. In a water transfer, the water transfer activity merely allows polluted WOTUS donor water to pass through to WOTUS receiving water, so there is no addition of pollutants to WOTUS because the WOTUS donor water is not subjected to any intervening use throughout the water transfer. *See* 40 C.F.R. § 122.3(i). Thus, water transfers are not considered an "addition" for NPDES purposes, because no one adds pollutants to the WOTUS donor water.

3. EPA's interpretation of "addition" in the WTR only applies to NPDES.

The WTR's interpretation of "addition" within the term "discharge of a pollutant" should be interpreted for NPDES purposes only. Water transfers have no effect on the dredge-and-fill permitting requirement. 73 Fed. Reg. at 33,704. Dredge-and-fill pollutants come from a waterbody, whereas pollutants added in a water transfer originate from outside WOTUS. Unlike intrinsic pollutants in water transfers, Congress "explicitly forbade discharges of dredged material except as in compliance" with the provisions cited in § 1311(a). 33 U.S.C. § 1362(6) ("dredged spoil" is a "pollutant"). Because Congress requires dredged material to comply with the dredge-and-fill permit program, the WTR excluding water transfers from NPDES has no effect on the dredge-and-fill permitting program. 73 Fed. Reg. at 33,704; 33 U.S.C. § 1344.

Limiting the WTR to NPDES addresses inconsistencies that could arise if courts applied the same interpretation of "addition" to the dredge-and-fill program. The Second Circuit

demonstrated this inconsistency when it applied EPA's interpretation of "addition" to the NPDES and dredge-and-fill permit systems. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 527–532 (2d Cir. 2017). The Second Circuit concluded that interpreting the WTR's interpretation of "addition" under 33 U.S.C. § 1344 would "eviscerat[e] Congress's intent to establish a dredge-and-fill permitting system," whereas such an interpretation under 33 U.S.C. § 1342 "would not require the dismantling of existing NPDES permitting programs." *See id.* at 531–32. Thus, EPA's interpretation of "addition" excludes water transfers for NPDES purposes only.

C. The WTR is valid under *Skidmore* review, because the WTR demonstrates EPA's experience and informed judgment.

EPA's WTR is valid under *Skidmore* review. Under *Skidmore*, an agency's interpretation of ambiguous statutory language is entitled to respect based 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." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Courts can properly rely on EPA's judgment to exclude water transfers from NPDES oversight. Congress appointed EPA to prescribe necessary regulations to carry the CWA's provisions into effect. 33 U.S.C. § 1251(a). After interpreting the CWA to exclude water transfers for NPDES purposes, EPA prescribed the WTR to carry the CWA's provisions into effect in accordance with Congress's intent. In promulgating the WTR, EPA provided extensive consideration of statutory and environmental factors. EPA demonstrated its expertise in water transfers with its reasoning for exempting certain water transfers from the NPDES permitting requirements. And EPA has been consistent in its defense of the WTR in its earlier and later pronouncements of the rule.

EPA provided extensive consideration of statutory and environmental factors when it promulgated the WTR. EPA compared competing interpretations of the phrase "addition . . . to navigable waters" to its own interpretation to demonstrate how its interpretation prevailed when the CWA was considered as whole, in light of Congress's intent "to leave primary oversight of water transfers to State authorities in cooperation with [f]ederal authorities." *Id.* EPA took a whole-text interpretive approach to the CWA by reading several CWA sections together to ascertain Congress's intent to interpret the term "'addition' . . . in accordance with the text of the more specific sections of the statute." 73 Fed. Reg. at 33,701. To interpret "addition" in accordance with the NPDES permit program, EPA interpreted 33 U.S.C. § 1342, which governs the NPDES program. EPA interpreted § 1342 to exclude water transfers, concluding that water transfers are "unlike" the effluent from industrial, commercial, or municipal operations governed under § 1342. *See* 73 Fed. Reg. at 33,702. Then, EPA analyzed Senate Reports to ascertain what discharges Congress intended to subject to the NPDES program. *Id.* Following this analysis, EPA concluded that water transfers were excluded from the NPDES program. Thus, because of EPA's thorough rulemaking procedures, this Court can properly rely on EPA's interpretation of the CWA, which resulted in the WTR.

EPA's expertise, based on its specialized experience in water transfers and the water regulatory regime, also supports the WTR's validity under *Skidmore*. EPA describes the various ways water transfers route water and how that water is used. 73 Fed. Reg. at 33,698. EPA then explains how water transfers "are regulated by various federal, State, and local agencies and other entities." *Id.* For example, EPA explains how the Bureau of Reclamation administers water transfers in Western States to provide farmers with irrigation water and how the Army Corps of Engineers uses water transfers to prevent flooding in Florida. *Id.*

EPA further demonstrates its expertise by evaluating the best way to regulate water transfers. It starts by explaining how rarely NPDES has been used to regulate water transfers. *Id.* at 33,699 (discussing how Pennsylvania is the only permitting authority that regularly issues NPDES permits for water transfers). Then, EPA provides an illustration to demonstrate how a water transfer is "merely movement within" WOTUS that would not require an NPDES permit. *Id.* at 33,700. EPA bolsters its conclusion that these water transfers fall outside of NPDES by providing a statutory interpretation of the CWA, concluding that the best way to regulate water transfers is "oversight by water resource management agencies and non-NPDES authorities, rather than the [NPDES] permitting program of the CWA." *Id.* at 33,699, 33,701–03. Thus, EPA's consideration of the best way to regulate water transfers shows the agency's expertise in water transfers and the water regulatory regime.

EPA has also consistently defended the WTR. In 1988, EPA's position was "that there can be no addition [of a pollutant] unless a source physically introduces a pollutant into water from the outside world." *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). In 2004, EPA issued an interpretive memorandum that concluded water transfers should be subject to "oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under § 402 of the CWA." Memorandum from Ann R. Klee to EPA Regional Administrators on Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005). On June 7, 2006, EPA proposed regulations based on the analysis contained in the interpretive memorandum. NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32,887, 32, 888 (June 7, 2006). On June 13, 2008, EPA published the final regulation, the WTR, which was "nearly identical to the proposed rule."

73 Fed. Reg. at 33,699. Thus, EPA's consistency in its earlier and later pronouncements of the WTR supports upholding the WTR under *Skidmore* review.

D. *Loper Bright* requires respect for the Second and Eleventh Circuits' decisions to uphold the WTR under *Chevron*.

Loper Bright does not disrupt the WTR. Before the WTR was promulgated as a regulation, three circuit courts applying *Skidmore* rejected EPA's interpretation that water transfers do not require an NPDES permit. *Dubois v. U.S. Dept. of Agriculture, et al.*, 102 F.3d 1273, 1296–99 (1st Cir. 1996)); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–94 (2nd Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82–87 (2d Cir. 2006). In 2008, EPA promulgated the WTR as a regulation, 40 C.F.R. 122.3(i), and the Second and Eleventh Circuits upheld the regulation solely under *Chevron*. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 524–33 (2d Cir. 2017); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (11th Cir. 2009). In *Loper Bright*, the Supreme Court instructed that holdings from "prior cases that relied on the *Chevron* framework . . . are still subject to statutory *stare decisis* despite [the Supreme Court's] change in interpretive methodology" unless there is a "special justification" for revisiting those prior rulings. *Loper Bright*, 144 S. Ct. at 2273. Arguing that the precedent was wrongly decided is not a special justification. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Thus, this Court should heed the Supreme Court's guidance in *Loper Bright* not to use the Supreme Court's new interpretive methodology as the basis to invalidate the WTR.

For these reasons, this Court should hold that the WTR is a valid regulation under the CWA.

IV. The district court erred in holding that Highpeak's discharge is subject to NPDES permitting under the CWA, because pollutants were not introduced in the course of the water transfer.

Highpeak does not require an NPDES permit, because its water transfers are not within the WTR exception. The WTR exception requires an NPDES permit when "pollutants [are] introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). This Court should apply *Skidmore* review to EPA's interpretation of the WTR so that it avoids deferring to EPA on a question of law, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (affirming the mandate that courts decide all relevant questions of law when reviewing agency action), and denying due process to Highpeak. If this Court applies the standard in *Auer v. Robbins*, 519 U.S. 452 (1997), it should find that EPA's interpretation ignores the WTR's text and purpose and the CWA's objectives.

A. This Court should not apply *Auer* deference to EPA's interpretation of the WTR, because *Auer* limits judicial authority over questions of law.

Courts decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action under the APA. 5 U.S.C. § 706. In evaluating *Chevron* deference, the Supreme Court has held that it could not accurately differentiate a policy question from a question of law. *Loper Bright*, 144 S. Ct. at 2265. Its holding addressed three issues: the inconsistent identification of ambiguities, the disconnection between ambiguities and policy, and the judiciary's role under the APA. *Id.* at 2265–66, 2270. These same issues are present in *Auer* deference, and the agency's role as author of a regulation should not override the APA's provision for judicial review, which requires courts to review questions of law *de novo*.

1. *Auer* deference is unworkable, because courts cannot consistently identify textual ambiguities in regulations.

"Ambiguity is a term that has different meanings to different judges." *Loper Bright*, 144 S. Ct. at 2271. The Supreme Court abandoned *Chevron*'s methodology, because "ambiguity" cannot be consistently measured and cannot reliably signal the presence of policy questions. *Id.* at 2270. *Auer*, like *Chevron*, interprets regulatory ambiguities as indications of the need for agency policy-making. *Auer*, 519 U.S. at 461–63. As with *Chevron*, when courts have used *Auer*, they have not performed equally exhaustive interpretations to identify whether ambiguities exist in a regulation. *Compare Kisor v. Wilkie*, 588 U.S. 558, 633 (2019) (Roberts, J., concurring) (broad, open-ended terms like "reasonable" and "appropriate" are ambiguous and give agencies policy discretion), *with Romero v. Barr*, 937 F.3d 282, 293 (4th Cir. 2019) (the phrase "appropriate and necessary" is unambiguous and no deference is owed to the agency's interpretation); *see also Trawler Carolina Lady, Inc. v. Ross*, No. 4:19-CV-19, 2019 WL 3213537, at *13 (E.D.N.C. July 16, 2019) (finding a provision to be ambiguous without engaging in exhaustive statutory interpretation because the parties presented two conflicting interpretations). This Court should follow *Loper Bright*'s reasoning and reject *Auer* deference, because *Auer*'s first step is unworkable and inconsistent.

Here, the district court did not adequately use the tools of statutory interpretation to determine the meaning of § 122.3(i). The court did not interpret the provision's plain language or examine it in the CWA's context. Although the district court examined the provision's final federal register notice, R. 12, this is only appropriate if a provision is truly ambiguous. The district court did not engage in exhaustive interpretation before finding the provision ambiguous, so it lacked reason to defer.

2. *Auer* deference limits a court's duty to interpret the law as an impartial reviewer, and thus violates parties' due process rights.

EPA should not be allowed to interpret its regulations during judicial review, because this would violate due process and would harm permittees' and their investors' reliance interests. In *Kisor*, the Court recognized that regulatory ambiguities are not synonymous with policymaking. 588 U.S. at 573, 570–71. To avoid the harm of violating due process by removing an impartial decision-maker, *Kisor* tried to guide *Auer*'s application. *Id.* But this guidance still allows agencies to form self-serving, post hoc interpretations, which deny parties due process and stunt the maturity of reliance interests. The best way to avoid the harms of misapplied deference is to adhere to our system of checks and balances. *Id.* 614–15 (Roberts, J., concurring). *Kisor*'s guidance does not establish a consistent standard of reasonableness, because it employs another limited search for ambiguity. Agency interpretations must fall within the zone of ambiguity identified by the tools of statutory interpretations. *Id.* at 576. This test is the same as *Chevron*'s first unworkable step. See *Loper Bright*, 144 S. Ct. at 2266. An inconsistent regulatory environment does not provide notice or stability to permittees and their investors.

Kisor does not always require that agency interpretations reflect the agency's official position. The Court first says that agency interpretations must reflect the agency's "authoritative or official position," not reflect ad hoc reasoning. *Kisor*, 588 U.S. at 577. However, it qualified this by stating that it may defer to a new interpretation introduced during litigation so long as it is not an "unfair surprise" to regulated parties. *Id.* at 579. The Court offered a further qualification when it noted that *Auer* deference has allowed agencies to substitute one rule for another during judicial review. *Id.* Finally, the Court rejected extending deference to a "merely convenient litigating position" and required "fair and considered judgment" without further definition *Id.*

These qualifications suggest that "unfair surprise" is the Court's fundamental criterion for preventing the harms of ad hoc agency interpretations.

Here, the district court did not identify EPA's self-serving, after-the-fact interpretation despite *Kisor*'s guidance. EPA first interpreted the WTR exception in this lawsuit despite promulgating the regulation sixteen years ago. 40 C.F.R. § 122.3(i). EPA's interpretation is self-serving, because it would allow EPA to collect fines from Highpeak for violating the CWA. 33 U.S.C. § 1319(d) (civil penalties). It is an after-the-fact interpretation, because it does not explain how the agency's choice of language in the provision was meant to give rise to the agency's interpretation. This Court should not yield its objective interpretation when EPA's interpretation ignores the regulations' plain language.

B. *Skidmore* review resolves *Auer*'s problems and identifies a regulation's best interpretation.

Skidmore review limits the reach of agency bias, because courts retain interpretive authority but can rely on agencies' expertise for guidance when it is valid, consistent, and persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, courts engage in statutory interpretation, identify the best meaning given the regulation's text, context, and purpose, and provide a basis in existing policy for that meaning. There is no risk of improperly deferring to an agency interpretation in the face of ambiguity. Under *Auer* deference, by contrast, the search for ambiguity has high stakes, because courts do not interpret ambiguous regulations only on their merits, and they can uphold inferior meanings. If a provision is ambiguous, *Skidmore* review prioritizes a court's objective, independent judgment and does not give an agency broad license to develop any nonconflicting meaning. *Id.* at 140.

Under *Skidmore*, courts do not abdicate their authority "to say what the law is," and they benefit from agency expertise and policy knowledge. The judicial branch was established to be

impartial and to respect due process. *Loper Bright*, 144 S. Ct. at 2284–85. When a court interprets a regulation without *Auer* deference, its review is limited to producing an interpretation from publicly available information, and this removes problems caused by post hoc rationalizations. Concerns about ad hoc rationalizations are also addressed when an objective judge, rather than a political agency, interprets regulations.

Skidmore respects reliance interests more than *Auer*, because it requires interpretations to be "consisten[t] with earlier and later pronouncements" of the law. 323 U.S. at 140. When interpretations are consistent, parties can accurately determine these interpretations for themselves and pursue their interests. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (directing agencies to be aware that "long-standing policies may have engendered serious reliance interests") (citation omitted). Regulated entities' reliance interests are the basis for the goods and services essential to society and the economy. Thus, they must be protected by the court's objective, independent judgment.

C. If this Court applies *Auer*, it should conclude that the WTR exception applies only to man-made or man-induced pollutants.

EPA's interpretation is arbitrary and capricious because it ignores the plain language of the regulation it chose and justifies doing so without examining the CWA's objectives regarding cooperative federalism and pollution.

1. EPA's interpretation ignores the regulation's plain language.

The WTR exception states that 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). The CWA does not define "introduced," like it does "discharge," a term of art in the CWA. The district court found that "introduced" referred to an increase in pollutants at the outflow of a point source, R.12, which is the statutory definition of "discharge." However, given EPA's subject matter

expertise, it would be absurd to employ an undefined term when it meant to convey the meaning of a term of art like "discharge." This Court should not permit this ad hoc rationalization.

EPA ignores the WTR's use of the phrase "water transfer activity itself." After defining "water transfer" in the previous sentence, EPA uses a new term, "water transfer activity." *Id.* The word "activity" is emphasized by the agency's use of "itself," focusing attention on the preceding term. But EPA's post hoc reasoning ignores this plain language in its interpretation as EPA turns its attention to the facility, instead of the activity. 73 Fed. Reg. at 33,705 (asserting that when "a water transfer facility does itself introduce pollutants into the water being transferred" an NPDES permit is required). EPA is not the best authority on its regulations when it ignores its own plain language, with which NPDES permittees must comply.

2. Limiting the meaning of "pollutants introduced" to human activity furthers the CWA's purpose.

The CWA's purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and the statute further requires that States be allowed to operate programs for this purpose within their borders. 33 U.S.C. § 1251(a), (b), (g). The WTR advances these objectives because it lets States try out new solutions for their individualized water availability and pollution issues.

The deregulation of water transfers advances States' individual needs, because it only requires an NPDES permit for water transfers that introduce pollutants due to human activity. The CWA defines pollution as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Unlike pollution, natural processes occur beyond the transfer operator's control. Because erosion is not the direct result of human activity, States are in the best position to determine how to address it within their borders.

Moreover, EPA has recognized that water transfers are essential to fulfilling States' needs and has allowed them even if one water body's integrity is impaired. To support States' needs for water transfers, EPA codified its unofficial policy of not requiring an NPDES permit for water transfers in the WTR. 73 Fed. Reg. at 33,701. Without federal regulation to preempt them, States may regulate water transfers. *See, e.g.*, Kansas Water Transfers Act, K.S.A. § 82a-1501. Therefore, the WTR does not defeat the CWA's purpose, because States may regulate water transfers to protect water quality.

For these reasons, this Court should hold that Highpeak's discharge was not subject to NPDES permitting under the CWA.

CONCLUSION

For these reasons, we respectfully ask this Court to reverse the district court and hold that CSP lacks standing to challenge Highpeak's discharges and EPA's promulgation of the WTR and that its challenge to the WTR is time-barred. We ask this Court to affirm the district court's holding that EPA validly promulgated the WTR. Finally, we ask this Court to reverse the district court and hold that Highpeak's discharges are not subject to NPDES permitting under the CWA.

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