Team 32

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, 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 Petitioner, CRYSTAL STREAM PRESERVATIONISTS, INC.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered its Order in No. 24-CV-5678 on August 1, 2024, partially granting and denying the United States Environmental Protection Agency's ("EPA" or "the EPA") and Highpeak Tubes, Inc.'s ("HP") respective motions to dismiss the claims brought against them by Crystal Stream Preservationists, Inc. ("CSP"). The district court had jurisdiction pursuant to 33 U.S.C. § 1365(a), 28 U.S.C. § 1331, and 5 U.S.C. § 702. The Notices of Appeal that EPA, HP, and CSP each filed on August 1, 2024, are timely and complete pursuant to Fed. R. App. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction because it accepted the appeal. 28 U.S.C. § 1292(b).

ISSUES PRESENTED

1. Whether the district court erred in holding that CSP had standing to challenge HP's discharge and the WTR?
2. Whether the district court erred in holding that CSP timely filed its challenge to the WTR?
3. Whether the district court erred in holding that the WTR was a valid regulation promulgated pursuant to the CWA?
4. Whether the district court erred in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR thus making HP's discharge subject to permitting under the CWA?

STATEMENT OF THE CASE

I. Legal Background

Over fifty years ago, Congress enacted the Clean Water Act ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA "forbids *any addition* of any pollutant from *any point source* to *navigable waters* without" a National Pollutant Discharge Elimination System

("NPDES") permit. *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 165 (2020) (citation omitted) (emphasis added and internal quotes omitted); 33 U.S.C. § 1311(a). Under the CWA, organizations wishing to discharge pollutants into navigable waters must apply for a NPDES permit from the EPA or an EPA authorized state agency.

When entities transfer water between two distinct bodies of water and pollutants are introduced into the receiving water, the CWA also requires a NPDES permit because the addition of pollutants constitutes a discharge. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996). However, as early as 2001, the EPA adopted an informal policy that water transfers do not require a NPDES permit. *Catskill Mtns. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001) (*Catskill I*). Courts consistently rejected this interpretation, finding it inconsistent with the plain language of the CWA. *See Dubois*, 102 F.3d at 1298; *Catskill I*, 273 F.3d at 491; *Catskill Mtns. Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 81 (2d Cir. 2006) (*Catskill II*); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368–69 (11th Cir. 2002).

Despite the water transfer policy being repeatedly rejected by the Circuit Courts, the EPA began rulemaking in 2006 to formalize its water transfer policy. NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (June 7, 2006). The EPA then formalized its policy by promulgating the Water Transfer Rule ("WTR") in 2008. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). The WTR exempts water transfers from NPDES permitting so long as the water is not being used for intervening industrial, commercial, or municipal use and to the extent the water transfer activity itself does not add pollutants. 40 C.F.R. § 122.3(i). The same courts that previously rejected the EPA's policy argument have since deferred to the EPA's WTR under the now debunked *Chevron*

deference. *Catskill Mtns. Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 524–33 (2d Cir. 2017) (*Catskill III*); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (11th Cir. 2009) (*Friends I*). *See Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024).

II. Factual Background

A. Crystal Stream

Crystal Stream ("the Stream" or "Crystal Stream") is a winding waterway that snakes through the foothills of the Awandack Mountains in Rexville, New Union. The Stream's flow is "fed in significant part by natural groundwater springs" and is less polluted than other waters in the Awandack Mountains, such as the nearby Cloudy Lake.[1] Order p. 5. The Stream winds through Crystal Stream Park, a public recreation area with a two-mile walking trail along the Stream's banks that has historically provided Rexville citizens an opportunity to enjoy the Stream's aesthetic beauty. *See* Order p. 4; Silver Decl. ¶ 4; Jones Decl. ¶ 6–7. HP, a recreational outfitter, utilizes the Stream for its tubing business. Order p. 4. However, HP's operations have degraded the Stream's ecological and aesthetic qualities since 1992 when the company began discharging water containing pollutants from Cloudy Lake into the Stream to enhance its customers' tubing experience. *See* Order p. 4–5; Silver Decl. ¶ 6; Jones Decl. ¶ 8.

B. Source and Discovery of Contamination

EPA maintains authority over NPDES permitting in the State of New Union ("New Union"), as it has never delegated this authority to New Union. Order p. 4. In 1992, HP developed plans to construct a tunnel that would convey polluted water from Cloudy Lake to Crystal Stream to increase the Stream's volume and velocity for purposes of enhancing its

[1] CSP, EPA, and HP have stipulated that both Crystal Stream and Cloudy Lake are "waters of the United States." Order 4–5.

customers' tubing experience. *Id.* HP did not consult the EPA regarding its plan to discharge the polluted water into Crystal Stream, although the EPA had not and still has not delegated CWA permitting authority to New Union. *Id*. Sampling results show that Cloudy Lake has significantly higher levels of minerals such as iron and manganese as well as total suspended solids ("TSS") than Crystal Stream. *Id*. at 5. HP has continued discharging without an NPDES permit. *Id.*

Ultimately, New Union permitted HP's construction of the tunnel in 1992. *Id*. HP then constructed the 100-yard long and four foot diameter tunnel through carved rock and iron pipes. *Id*. The tunnel discharges water from Cloudy Lake into Crystal Stream three to four miles upstream from Crystal Stream Park. *Id*. HP's employees control the velocity rate and flow at which the discharged water travels through the tunnel and the speed at which the water enters Crystal Stream. *Id*. at 4. The permit issued by New Union restricts HP's use to periods when water levels in Cloudy Lake are determined to be adequate, which is typically when seasonal rains occur in the spring and late summer. *Id*. at 5.

In addition to the pollutants already in Cloudy Lake, sampling results indicate that the design and operation of HP's tunnel causes even more iron, manganese, and TSS to accumulate in the discharged water as it flows through HP's tunnel. *Id*. Water samples show that the discharged water collects 2-3% higher concentrations of iron, manganese, and TSS as it runs through HP's tunnel. *Id*. This data indicates additional pollutants are added to the discharged water through the transfer process. *Id.*

C. Crystal Stream Preservationists, Inc.

In December 2023, a group of Rexville citizens formed CSP, a non-profit membership organization. *Id*. at 4. Almost half of CSP's members have homes within a mile of Crystal Stream Park, which only sits three to four miles downstream from HP's discharge. *Id.* The

Stream has historically provided a pristine riparian area for CSP's members to recreate and enjoy nature as the Stream has a reputation for its "crystal clear color" and "purity." Jones Decl. ¶ 7. Two CSP members live alongside Crystal Stream approximately five miles downstream from where HP discharges the polluted water into the Stream. Order p. 4.

CSP's purpose is to protect the ecological and aesthetic integrity of Crystal Stream for present and future generations. Jones Decl. ¶ 4. CSP has focused its organizational mission on preventing industrial pollution and illegal water transfers as these constitute the largest known source of pollutants to Crystal Stream. Order p. 6. The elevated levels of pollutants, including manganese and iron, that exist in Crystal Stream because of HP's discharge has raised health concerns among CSP's members, including Jonathan Silver, who moved to Rexville in August of 2019. *See* Silver Decl. ¶¶ 4–7; Jones Decl. ¶ 9. Further, the discharge introduces additional TSS that muddies Crystal Stream's water and decreases the Stream's aesthetic beauty that CSP's members have historically enjoyed. *See* Silver Decl. ¶ 10–12; Jones Decl. ¶ 9. To safeguard the Stream, CSP members have united to hold HP accountable for its actions. *See* Order p. 4; Silver Decl. ¶ 3. They envision a future where Crystal Stream can once again be enjoyed in its pristine state, free from pollution. *See* Order p. 6.

III. Procedural History

After complying with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3 (2023), CSP filed this action alleging that HP discharged pollutants without a NPDES permit and that EPA unlawfully promulgated the WTR. Order p. 5. HP and EPA responded to CSP's Complaint by filing motions to dismiss. *Id*. 5–6. HP and EPA both argued that CSP lacked standing and that its challenge to the WTR was untimely. *Id*. The EPA did not contest that CSP sufficiently alleged a citizen suit cause of action. *Id*.

The issues were fully briefed in April 2024, but the district court delayed its ruling given the potential impact of the pending Supreme Court cases *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024). Order p. 6. Upon the Supreme Court's decisions, the district court granted the motions to dismiss with respect to the WTR's validity and denied the motions with respect to CSP's standing, timeliness of the challenge to the WTR, and CWA claim. *Id*. HP, EPA, and CSP each appeal different parts of the district court's order as set forth in this Court's August 1, 2024 Order.

SUMMARY OF THE ARGUMENT

The district court did not err in finding that CSP has Article III standing to challenge HP's unregulated discharge and the WTR. CSP meets the three requirements of organizational standing because (1) CSP members have standing in their own right, (2) the interests at stake are central to CSP's purpose, and (3) participation of individual members is not necessary. The declarations from CSP members clearly establish that members' environmental, aesthetic, and recreational interests in Crystal Stream and the surrounding area have been diminished by HP's unregulated discharge and the WTR. Such harm would be redressed by a favorable decision in this action, therefore establishing that CSP members have standing in their own right. Further the interests at stake – HP's discharge and the resulting environmental and aesthetic harm to CSP members – is germane to CSP's purpose of preserving and maintaining Crystal Stream for future generations. Finally, because neither the claim asserted nor the relief requested requires the participation of CSP's individual members, organizational standing is established.

The district court also did not err in finding CSP's challenge to the WTR timely because CSP's cause of action could not have accrued prior to CSP's formation in December 2023.

Alternatively, CSPs claim is timely because the claims of CSP's individual members are timely and being brought by CSP in its representational capacity.

Further, the EPA's WTR represents an unlawful overreach of agency authority, directly contravening the CWA and established legal precedent. Prior to the WTR's formal promulgation, numerous courts had consistently rejected its underlying policy, emphasizing the critical role of NPDES permits in protecting water quality. The WTR, which exempts certain water transfers from critical permitting requirements, undermines the CWA's plain language and core purpose of protecting the nation's water quality.

The WTR's validity was previously upheld through a misapplication of *Chevron* deference. However, the Supreme Court's recent decision in *Loper Bright* has overturned this deference standard, empowering courts to independently assess agency actions. 144 S. Ct. at 2273. By applying *Loper Bright*, this Court can correctly exercise its independent judgment to determine the water quality protections congressionally mandated by the CWA. Doing so would align with the CWA's clear intent, protect the nation's water resources, and correct the EPA's unlawful overreach. While the dicta in *Loper Bright* may offer guidance, it does not control the outcome of this case. Even if the dicta were applicable, a special justification exists for overturning the WTR.

Alternatively, if this Court finds the WTR to be valid, the district court erred by deferring to EPA's interpretation of the WTR without first resolving whether the regulation was ambiguous. This Court does not need to defer to EPA's interpretation of the WTR because the text of the regulation unambiguously prohibits HP's unregulated discharge. The history and purpose of the WTR further supports the plain reading of the regulation as EPA promulgated it to formalize its policy that certain water transfers do not require a NPDES permit.

Even if this Court finds the WTR to be ambiguous, EPA's interpretation is reasonable because it furthers the WTR's purpose in facilitating water transfers that do not add new pollutants. The character and context of EPA's interpretation entitle it to deference because it represents EPA's official position as demonstrated by its rulemaking, it addresses the complex interplay between federal and state water regulation, and HP's discharge has been subject to the NPDES permitting since the WTR's inception.

STANDARD OF REVIEW

As this case comes before the court on motions to dismiss for failure to state a claim, the court reviews the case *de novo*. *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 (8th Cir. 2017). A complaint needs only to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must take the facts in the complaint as true as this matter comes on a motion to dismiss for failure to state a claim. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023). The court must "construe the pleadings in the light most favorable to the nonmoving party.'" *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 507–08 (9th Cir. 1996) (citation omitted).

Questions of standing are reviewed *de novo* on appeal. *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1228 (9th Cir. 2013). The plaintiff "need not definitively prove [its] injury" at the motion to dismiss stage of the case so long as the plaintiff has "plausibly pleaded on the face of [its] complaint that [it] suffered" a cognizable injury. *Tyler*, 598 U.S. at 637 (citation omitted).

ARGUMENT

I. CSP has Article III standing.

CSP has standing to challenge HP's unregulated discharge and the WTR. To demonstrate Article III standing, CSP must establish that it has organizational standing, which requires CSP

to show "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). Therefore, to bring suit on behalf of its members, CSP must also demonstrate that at least one member suffered an "injury-in-fact," that is traceable to HP's unregulated discharge, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560–61 (1992).

It is well established that "a question of standing can be answered chiefly by comparing the allegations of a particular complaint to the allegations of prior standing cases." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384 (2024). Here, an examination and comparison of the Supreme Court's prior standing cases establishes that CSP has Article III standing under the organizational standing doctrine.

1. <u>CSP members have standing in their own right.</u>

CSP's members have individual standing because they have suffered aesthetic and recreational harms as a result of HP's unregulated discharge into the Stream, which would be redressed with a favorable decision in this action. A plaintiff establishes individual standing by showing they have suffered injury-in-fact that is fairly traceable to the defendant's challenged action and likely to be redressed by a favorable decision. *Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000). An organization that brings a claim on behalf of its members satisfies the individual standing requirement when any *one* of its members has standing; thus, standing for one establishes standing for all. *Hunt,* 432 U.S. at 342; *Rocky Mtn. Wild v. Dallas,* 98 F.4th 1263, 1287 (10th Cir. 2024). Therefore, individual standing established by any one of CSP's members establishes standing for CSP as an organization.

a. Individual CSP members have suffered, and continue to suffer, injury-in-fact.

CSP's allegations demonstrate that members have an injury-in-fact because HP's ongoing, unregulated discharge has diminished CSP members' ability to recreate alongside the Stream due to their concerns of toxins. A plaintiff establishes injury-in-fact by showing they suffered a real, concrete injury that is particularized and affects them in a personal and individual way. *Laidlaw,* 528 U.S. at 180–81. Further, the injury must be "actual or imminent," meaning that the injury must have already occurred or is likely to occur soon. *Lujan*, 504 U.S. at 559–60. Where a plaintiff seeks an injunction, as CSP is here, "the plaintiff must also establish a sufficient likelihood of future injury." *All. for Hippocratic Med.*, 602 U.S. at 382.

In environmental cases, the injury-in-fact inquiry considers injury to the specific plaintiff, not injury to the environment. *Laidlaw*, 528 U.S. at 181. An environmental plaintiff establishes injury-in-fact by demonstrating that they use the affected area and that the challenged activity diminishes the aesthetic and recreational values of the area. *Id*. at 184. In *Laidlaw*, the Supreme Court considered whether an environmental organization had standing to bring a claim on behalf of its members to challenge a wastewater treatment facility's discharge as a violation of the CWA. *Id.* at 173. Individual members living within a few miles of the discharge attested to seeing and smelling pollutants in the river. *Id.* at 181–82. The members asserted that absent the discharge, they would engage in more recreational activities like fishing, camping, swimming, and picnicking downstream of the facility. *Id.* at 181–83. The *Laidlaw* court determined that the plaintiffs sufficiently alleged an injury-in-fact by asserting that the unlawful discharge was occurring at the time of filing and by providing affidavits and testimony that indicated a direct adverse effect on their recreational, aesthetic, and economic interests. *Id.* at 184–85.

Like the members in *Laidlaw*, Jones and Silver, who are both CSP members, asserted that the Stream's polluted appearance adversely affected their aesthetic and recreational interests in the Stream and surrounding areas. Jones Decl. ¶¶ 7–8; Silver Decl. ¶ 6. Similar to the *Laidlaw* plaintiffs, Jones and Silver expressed concerns about potential contamination from toxins and metals. Jones Decl. ¶ 10; Silver Decl. ¶ 5. Further, like the members in *Laidlaw*, Jones and Silver declared that, were it not for HP's discharge, they would recreate along the Stream more frequently. Jones Decl. ¶ 12; Silver Decl. ¶ 9.

The declarations by Jones and Silver allege harms that closely reflect those presented in *Laidlaw,* and therefore *Laidlaw* serves as a guide. *See All. for Hippocratic Med.* 602 U.S. at 384 (noting that "question[s] of standing can be answered chiefly by comparing the allegations of a particular complaint to the allegations of prior standing cases").

Here, like the defendant's conduct in *Laidlaw*, HP's persistent, unregulated discharge is adversely affecting Jones's and Silver's recreational and aesthetic interests. Jones Decl. ¶¶ 8–12; Silver Decl. ¶¶ 6–9. Jones and Silver allege that they use the affected area and that HP's discharge has diminished the area's aesthetic and recreational value. Jones Decl. ¶ 12; Silver Decl. ¶ 9. Under *Laidlaw*, these harms plainly establish injury-in-fact.

b. The injury-in-fact of CSP's members is traceable to HP's unregulated discharge of pollutants.

HP's discharge, and the erroneous WTR exempting it from regulation, diminishes CSP members' aesthetic and recreational interests. Individual standing requires that there be a causal connection between the injury and the conduct complained of, such that "the injury is fairly traceable to the challenged action." *Lujan,* 504 U.S. at 560–61. However, traceability does not mean a plaintiff must show causation with scientific certainty. *Friends of Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000). Nor is traceability the equivalent to tort

causation. *Id.* Rather, a plaintiff only needs to establish that the alleged injury was likely caused by the defendant's conduct. *Id.*

To establish traceability in the context of a CWA claim, a plaintiff only needs to show that a defendant discharges a pollutant that causes, or even just contributes to, the kinds of injuries alleged in the specific area of concern. *Id.* at 161. Further, "where a plaintiff has pointed to a polluting source as the seed of their injury, and the owner of the polluting source has supplied no alternative culprit," the traceability requirement is met. *Id.* at 162.

Here, Jones and Silver allege that HP's discharge harms their aesthetic and recreational interests by clouding the water with pollutants and raising their concerns regarding the consequences of contamination. Jones Decl. ¶¶ 7–12; Silver Decl. ¶¶ 5–9. It is undisputed that HP discharges water from Cloudy Lake into Crystal Stream. Order p. 4. CSP has submitted data indicating that Cloudy Lake has higher concentrations of pollutants than Crystal Stream, and HP has not presented any explanation for an alternative source, so the harm is fairly traceable to HP. Order p. 5.

In the context of traceability to government regulation, the Supreme Court has consistently recognized that when the government regulates parks, national forests, or bodies of water, a regulation–or lack of regulation–may cause harm to individual users. *All. for Hippocratic Med.,* 602 U.S. at 384–85.

Here, the EPA's promulgation of an unlawful exemption to the CWA has allowed HP to discharge the pollutants that are harming the aesthetic and recreational interests of CSP's members. *See* Order p. 4–5. Thus, a causal connection is established between the EPA's regulation and members' injury-in-fact.

c. A favorable decision is likely to redress the injuries of CSP's members.

CSP seeks vacatur of the WTR along with declaratory and injunctive relief, all of which are likely to redress the injuries of CSP's members in the event of a favorable court decision. The redressability prong requires that a plaintiff's injury is likely to be redressed by a favorable decision. *Laidlaw,* 528 U.S. at 181–82. To satisfy the redressability requirement, a plaintiff must show that they will "benefit in a tangible way from the court's intervention." *Gaston Copper Recycling Co.*, 204 F.3d at 163. However, a plaintiff is not required to show that they are entitled to the relief sought, only that if granted, the relief would redress the injury. *Salmon Spawning & Recovery All. v. U.S. Cust. & Border Protec.,* 550 F.3d 1121, 1130–31 (Fed. Cir. 2008). Where a plaintiff seeks injunctive relief, redressability can be shown by alleging a continuing violation of the statute at issue. *Id.* at 163.

Traceability and redressability are often considered "flip sides of the same coin," but while traceability looks backward, redressability looks forward by considering whether a favorable decision is likely to alleviate the harm. *All. for Hippocratic Med.*, 602 U.S. at 380 (citations omitted).

Here, vacatur would nullify the WTR and restore the NPDES requirement for discharges such as HP's. Vacating the WTR would alleviate harm to CSP members by prohibiting HP's discharge absent an NPDES permit. While an NPDES permit, if granted, may allow for HP to continue its operations, the discharge would be monitored and regulated as a result. This is likely to reduce contamination of the Stream, or at the very least, it will provide CSP members with data necessary to monitor the Stream's health. Additionally, a declaratory judgment stating that the WTR is inconsistent with the statutory language of the CWA and therefore unlawful would clarify the rule's invalidity, providing precedent to better guide future rulemaking.

Alternatively, CSP seeks a declaratory judgment establishing that HP's discharge falls outside the scope of the WTR, coupled with an injunction prohibiting HP from discharging water into the Stream absent a valid NPDES permit. This relief is likely to alleviate the injury by halting HP's discharge until a valid NPDES permit is issued.

2. <u>The interests at stake are germane to CSP's purpose.</u>

Consistent with CSP's mission statement, the organization's primary objective is to preserve and maintain the Stream's natural state for environmental and aesthetic purposes, which are precisely the interests that have been compromised by HP's unregulated discharge. This alignment of CSP's mission with the interests at stake in this litigation supports CSP's organizational standing.

Organizational standing requires that the interests at stake in the litigation be germane to the organization's purpose. *Hunt*, 432 U.S at 343. The Supreme Court has also recognized that where an organization exists for the purpose of protecting certain interests, the organization may prosecute litigation to protect those interests. *Id.* at 344.

Here, CSP seeks to protect Crystal Stream by preserving and maintaining the natural state of Crystal Stream for environmental and aesthetic reasons. Order p. 4. Further, CSP's certificate of incorporation specifically references CSP's mission to "protect the Stream from contamination resulting from industrial uses and illegal transfer of polluted waters." Order p. 6. The interests at stake from HP's unregulated discharge include the contamination of Crystal Stream and the resulting aesthetic and recreational harms experienced by CSP's members. These interests are plainly tied to CSP's purpose and therefore establish the second required element of organizational standing.

3. Individual participation of CSP members is not required.

Neither CSP's claim nor its request for relief require any individual CSP member to participate in the lawsuit, making CSP's organizational standing appropriate. The third prong of *Hunt* is satisfied "so long as the nature of the claim and the relief sought do not make individual participation of *each* injured party indispensable to proper resolution of the cause." *Warth v. Seldin*, 422 U.S. 490, 512 (1975) (emphasis added). Therefore, organizational standing is not precluded when there is some member participation in discovery or at trial. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 602 (7th Cir. 1993). Additionally, injunctive or declaratory relief that benefits an organization and its members satisfies the third prong of *Hunt* because such relief does not require individualized proof of damages. *Warth*, 422 U.S. at 515.

Here, CSP seeks injunctive and declaratory relief. While some individual member participation may be necessary through discovery and at trial, individualized proof of damages is not. Therefore, the third prong of *Hunt*'s organizational standing doctrine is satisfied.

4. The nature of CSP's formation does not permit additional scrutiny.

HP and the EPA, without any legal justification, contend in their motions to dismiss that the nature of CSP's formation, including the congruence between the interests at stake and its stated purpose, undermines CSP's standing. *See* Order p. 6. This argument is flawed and contradictory to the precedent and principles established under the organizational standing doctrine.

Precedent establishes that the timing and nature of CSP's formation are irrelevant to the standing inquiry. *E.g. Hunt*, 432 U.S. at 342; *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 200 (2023). Rather, when an organization has voluntary members supporting its mission and the organization represents those members in good faith, the

Supreme Court has expressly rejected applying any further scrutiny into how the organization operates. *Id.* at 200–01.

Here, CSP has satisfied all the organizational standing requirements articulated in *Hunt* and is therefore entitled to rely on the organizational standing doctrine without any additional scrutiny. The arguments that HP and EPA proffered in the district court directly contradict precedent and disregard the tenets of the organizational standing doctrine, and ultimately fail to undermine CSP's claims. Therefore, the district court properly held that CSP, on behalf of its members, had standing to challenge HP's discharge and the validity of the WTR.

II. CSP filed a timely challenge to the WTR.

CSP's substantive challenge to the WTR is timely because CSP's cause of action did not accrue until CSP existed as an organization with members who had been adversely affected by the regulation. Alternatively, CSP's challenge is timely because CSP's individual members have claims that have accrued within the applicable statute of limitations period.

The Supreme Court's recent decision in *Corner Post* confirms that outside of where Congress has otherwise legislated, 28 U.S.C. § 2401(a) operates as the general statute of limitations to all civil actions brought against the United States. 144 S. Ct. at 2451–52. Since Congress has not displaced § 2401(a)'s application to the APA with a more specific statute, § 2401(a) is the applicable limitations period for all APA challenges, including CSP's. *Id.* Therefore, in light of the limitation principles clarified by *Corner Post*, CSP's claim accrued within § 2401(a)'s six-year limitations period.

1. Under *Corner Post*, CSP's claim did not accrue until it existed as an organization with members adversely affected by the WTR.

For limitations period purposes, CSP's claim did not accrue until CSP had the right to file suit and obtain relief. Under the plaintiff-centric accrual rule clarified in *Corner Post*, the proper

accrual inquiry looks to when CSP – as the plaintiff – has a right to file suit and obtain relief, not when EPA – as the defendant – was last culpable of a wrongful act. *Id.* at 2452.

Under § 2401(a), "a complaint for a civil action against the United States must be filed within six years after the *right of action first accrues*." (emphasis added). Section 2401(a) acts as the default limitations period for suits brought against the government; it applies unless Congress has specifically legislated a timing provision in another statute to displace it. *Id*. at 2450, *E.g.,* 33 U.S.C. § 1369(b) (certain CWA claims); 42 U.S.C. § 9613(g) (statute of limitations for a CERCLA removal action).

Until recently, circuit courts were split on when a claim "accrues" for purposes of § 2401(a), particularly in the context of regulatory challenges under the APA. *Compare Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 1015) (holding that the action accrued when the plaintiff purchased the property falling subject to the regulation), *and Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 229 (5th Cir. 2020) (holding that action accrued upon publication of the regulation). *See also Wind River Mon. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *Harris v. FAA*, 353 F.3d 1006, 1009–10 (D.C. Cir. 2004). However, the Supreme Court addressed these inconsistencies in *Corner Post* by holding that a claim accrues for an APA plaintiff "when the plaintiff is injured by final agency action." *Corner Post*, 144 S. Ct. at 2448. The Supreme Court clarified that the text of § 2401(a) unambiguously demands application of a plaintiff-centric accrual rule, and therefore operates as a statute of limitations that should be applied consistently in all § 2401(a) claims, including those brought under the APA. *Id.* at 2452. On this basis, the Supreme Court expressly rejected the assertion among most circuit courts that a regulatory challenge accrues at the time of promulgation. *Id.* at 2449. Determining that it would be "particularly inappropriate to read language into a statute of limitations," the Supreme Court

rejected any interpretation of "accrues" that would apply differently in different contexts. *Id.* at 2457. Ultimately, the Supreme Court relied on the plain language of § 2401(a) to conclude that its plaintiff-centric accrual rule applies a limitations period to the APA in the same manner that it applies to claims brought under other statutory schemes. *Id.* at 2457–58.

Corner Post makes clear that an APA claim accrues when there is both finality and injury – not just finality. *Id.* at 2450. Although finality and injury may occur simultaneously (and they often do in the context of procedural challenges), *Corner Post* clarifies that a substantive regulatory challenge can accrue decades after a rule is promulgated. *Id.* In fact, the plaintiff in *Corner Post* did not even exist until years after the challenged rule was promulgated. *Id.* at 2448. While the plaintiff, a truck-stop convenience store, challenged a debit card processing fee in 2021, the challenged regulation had been promulgated 10 years earlier in 2011, at which point the plaintiff did not even exist. *Id.* at 2449. The Supreme Court vehemently rejected even the possibility that a limitations period could begin at a time when the plaintiff could not yet file suit. *Id*. at 2451–52. Applying the plaintiff-centric accrual rule, the Supreme Court held that the cause of action accrued when the plaintiff was injured rather then when the regulation was promulgated. *Id.* at 2460. Therefore, the claim accrued when the plaintiff opened for business and swiped its first credit card in 2019. *Id.*

Here, like the plaintiff in *Corner Post,* CSP did not exist when the WTR was promulgated in 2008. *See* Order p. 4. It would be inconsistent with the limitations principles reinforced in *Corner Post* that a plaintiff must be in existence before it can establish a right to file suit and obtain relief. *See Corner Post*, 144 S. Ct. at 2452 ("we have rejected the possibility that a limitations period commences at a time when the plaintiff could not yet file suit as

inconsistent with basic limitations principles"). Accordingly, CSP's cause of action could not have accrued prior to it forming as an organization in 2023.

Defendant's argue that *Corner Post*'s plaintiff centric-accrual rule does not apply to CSP because CSP is a nonprofit organization bringing suit in its representative capacity whereas the plaintiff in *Corner Post* was a regulated for-profit entity. *See* Order p. 8. Rather, according to defendants, § 2401(a) should apply as a statute of repose and not of limitations. *Id.* This argument completely contradicts *Corner Post*'s demand for consistent application of § 2401(a) as a statute of limitations and is the exact argument that was expressly rejected by the Supreme Court. *Id.* at 2456–57. Under § 2401(a)'s statute of limitations and the clear limitations principles set forth in *Corner Post,* CSP's right to file suit and obtain relief under the APA accrued once CSP was formed as an organization and had at least one member adversely affected by the WTR.

a. CSP's claim accrued when Jones joined CSP.

CSP's claim is timely because it accrued when Jones joined CSP as a member. The declaration establishes Jones had been adversely affected by the WTR as of 2020, when she first learned of the discharge. Jones Decl. ¶ 10. Thus, when Jones joined CSP on the date of its founding, December 1, 2023, CSP's complete and present cause of action accrued because at that point CSP could file suit and obtain relief on Jones's behalf. *See* Jones Decl. ¶ 3.

b. Alternatively, CSP's claim is timely because it is brought on behalf of members with causes of action that first accrued within the limitations period.

Alternatively, this Court should apply *Corner Post*'s plaintiff-centric accrual rule to the claims of each CSP member since CSP is bringing this claim in its representative capacity. Therefore, if any one of CSP's members' causes of action first developed within the six year limitations period, CSP would be timely in bringing a claim on that member's behalf. This application of § 2401(a) is consistent with the plaintiff-centric accrual rule as well as the

organizational standing doctrine. Since CSP has organizational standing to bring a claim on behalf of its members when any one member has standing to sue in their own right, it follows that CSP's claim is timely if any one member has a cause of action accrue within the statute of limitations period.

Both Silver and Jones have causes of action under the APA that accrued within the statute of limitations period under § 2401(a). While Jones attests to first being adversely affected by the WTR when she learned about HP's discharge in 2020, it is not clear the specific time period in which Silver was first adversely affected by the discharge. Jones Decl. ¶ 10; Silver Decl. ¶ 6. However, the declarations establish that Silver was adversely affected sometime between his move to Rexville in August, 2019, and CSP filing its complaint. Silver Decl. ¶¶ 4–6. Accordingly, the earliest Silver could have been adversely affected by the WTR was upon his move in August 2019. Being that both Jones's and Silver's right to file suit and obtain relief first accrued within the six year statute of limitations period, CSP can bring claims on their behalf under the organizational standing doctrine.

Consequently, CSP's challenge to the WTR is timely and consistent with the Supreme Court's decision in *Corner Post.* The accrual of CSP's cause of action properly aligns with the plaintiff-centric rule under § 2401(a), as CSP did not exist as an organization – and thus could not have asserted a claim – until 2023. Moreover, CSP's claim accrued no earlier than the point when its members were adversely affected by the WTR within the limitations period. Defendants' attempts to frame § 2401(a) as a statute of repose directly contradicts the Supreme Court's clear guidance in *Corner Post*. Accordingly, this Court should affirm district court's ruling on the timeliness of CSP's APA challenge and reject any interpretation of § 2401(a) that decouples accrual from the plaintiff's injury.

III. The EPA's promulgation of the WTR exceeded its statutory authority under the CWA.

The EPA's unlawful promulgation of the WTR, which directly contradicts the CWA and established precedent, was enabled by misplaced deference under *Chevron*. The Supreme Court's *Loper Bright* decision has cleared the way for this Court to correct this long-standing error. *Catskill III* and *Friends I*, incorrectly applied *Chevron* deference to uphold the WTR. Applying *Loper Bright* to the WTR allows this court to rectify this misapplication. As the *Loper Bright* test is applicable to this case, this Court should follow the precedent set in *Catskill I* and *II* and hold that the WTR violates the CWA. The dicta in *Loper Bright* does not dictate the analysis in this case. Even if the dicta applies, there is a special justification for invalidating the WTR.

The WTR directly undermines the CWA's core purpose. However, recent legal precedent empowers this Court to right this error and uphold the CWA's clear intent and plain language. Over fifty years ago, Congress passed the CWA mandating that the government "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §§ 1251–1387. To enforce this goal, the CWA declares that "the discharge of any pollutant by any person shall be unlawful" except as otherwise permitted, like through the NPDES. 33 U.S.C. § 1311(a). The NPDES has been coined as the cornerstone of the CWA. *Dubois*, 102 F.3d at 1294 ("The most important component of the Act is the requirement that an NPDES permit be obtained").

Based on the CWA's plain language and clear legislative intent, the EPA cannot regulate away its responsibility to monitor an entire category of discharges, like polluted water transfers. The WTR does exactly this and contradicts the CWA's express and clear mandate to restore and maintain the integrity of waters within the United States.

The EPA has circumvented its statutory duty to prevent water pollution by issuing the WTR. The WTR exempts certain water transfers from the NPDES, a system designed to limit and monitor pollutant discharges into WOTUS. 33 U.S.C. § 1342; 40 C.F.R. § 122.3(i). Water transfers involve moving water from one navigable body of water to another navigable body of water. The WTR exempts water transfers that do not undergo intervening industrial, municipal, or commercial use from NPDES permitting, even if those waters are polluted or fail to reach water quality standards. *See* 40 C.F.R. § 122.3(i). By allowing these transfers, the WTR undermines the CWA's purpose, enabling polluted water to flow into clean bodies of water.

Previous courts have applied the debunked *Chevron* deference to the WTR, and this Court should not perpetuate this erroneous application. The CWA forbids "the discharge of any pollutant" into a WOTUS without complying with the CWA, which includes obtaining the necessary permits. 33 U.S.C. § 1311(a). The term "discharge of pollutants" encompasses "any addition of any pollutant to navigable waters" from "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(12), (14). By allowing the unregulated transfer of polluted water into clean water sources, the WTR directly undermines the CWA's plain text and purpose.

Multiple circuit courts had already rejected the WTR's underlying policy before the EPA formalized this incorrect exemption from the CWA. *See Friends I*, 570 F.3d at 1217 ("The [EPA's]… theory has a low batting average. In fact, it has struck out in every court of appeals where it has come to the plate."). Courts have held that a water transfer between distinct WOTUS constitutes a discharge of pollutants, rejecting the EPA's interpretation that these transfers did not require a permit based on the plain language of the CWA. *See Dubois*, 102 F.3d at 1298; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 81; *Miccosukee*, 280 F.3d at 1368–69.

In holding that polluted water transfers required a permit, the *Catskill I* court focused on the phrase "any addition" in the definition of "discharge of pollutants," and held that it "unambiguously means that permits are required whenever there is something added to a body of 'navigable waters'" from another meaningfully distinct body of water. *Catskill I*, 273 F.3d at 491–92. The promulgation of the WTR as a formal regulation does not change the clear judicial precedent holding that a discharge of polluted waters without an NPDES permit into another WOTUS violates the CWA.

The WTR was erroneously upheld under *Chevron* deference in *Catskill III* and *Friends I*. *See Catskill III*, 846 F.3d at 524-33; *Friends I*, 570 F.3d at 1227–28. *Loper Bright* overturned *Chevron*, rendering the EPA's reliance on it in defending the WTR improper and misplaced. *See* 144 S. Ct. at 2273. Overruling the longstanding *Chevron* doctrine, the Supreme Court in *Loper Bright* held that judges must exercise independent judgment when determining whether an agency has acted within its statutory authority. *Id*.

1. Previous courts erred in affording the WTR *Chevron* deference.

The EPA should not have been afforded *Chevron* deference in the promulgation of the WTR. The court in *Chevron U.S.A., Inc. v. NRDC, Inc.* held that agency deference is only appropriate when the statute is ambiguous, and the agency's interpretation is not unreasonable, so long as Congress has not directly addressed the specific issue. 467 U.S. 837, 842–43 (1984).

The Eleventh Circuit's decision in *Friends I* incorrectly applied *Chevron* deference by misinterpreting the CWA's clear and unambiguous NPDES permit requirement. The court focused on the term "navigable waters" rather than the plain meaning of "any addition," which led it to defer to EPA's erroneous interpretation when it should have followed the precedent in *Catskill I*. *See Friends I*, 570 F.3d at 1216–18, 1223–27; *Catskill I*, 273 F.3d at 491–92. Instead,

the court misdirected its analysis by focusing on a narrower interpretation of "navigable waters," finding ambiguity where none existed. *See Friends I*, 570 F.3d at 1223–27. This flawed analysis caused the court to defer to the EPA's interpretation in the WTR when the CWA's plain language requires the EPA to limit water pollution. In doing so, the Eleventh Circuit failed to analyze how the WTR undermines the CWA and limits opportunities to combat water pollution.

Furthermore, the WTR directly conflicts with the Supreme Court's precedent in *Miccosukee*. *Miccosukee*, 541 U.S. at 105–12. In *Miccosukee*, the Supreme Court held that NPDES permits are mandatory for water transfers between meaningfully distinct bodies of water, regardless of the pollutant's origin. *Id.* at 105. The WTR, however, exempts such transfers, blatantly disregarding the Supreme Court's clear intent. *See* 40 C.F.R. § 122.3(i). The WTR's underlying policy is a dangerous misinterpretation of the CWA which courts have repeatedly rejected and undermines the CWA's goal of protecting the nation's water quality. *Friends I*, 570 F.3d at 1217–18. By adopting this theory, the EPA has created a loophole that allows for the unchecked transfer of polluted water.

The initial deference granted to the EPA in promulgating the WTR was a misstep that jeopardizes the nation's water resources. By exempting water transfers from federal oversight, the WTR directly undermines the core purpose of the CWA and puts the nation's water quality at risk. The EPA's unlawful overreach should be remedied, particularly in light of the Supreme Court's decision in *Loper Bright*.

2. The WTR is incompatible with the CWA under *Loper Bright*.

The Supreme Court's recent decision in *Loper Bright* directly applies to this case. By expressly overturning *Chevron* deference, *Loper Bright* enables this Court to rectify the erroneous application of *Chevron* deference in *Catskill III* and *Friends I. Loper*, 144 S. Ct. at

2273; *Catskill III,* 846 F.3d at 524–33; *Friends I*, 570 F.3d at 1227--28. The CWA explicitly delineates the tools available to the EPA to protect and restore WOTUS. 33 U.S.C. § 1342. The WTR, however, formalized EPA's unlawful policy contrary to the CWA's plain language and intent. By creating an exemption that hinders the CWA's core purpose of restoring the quality of the nation's waters, the EPA has exceeded its statutory authority.

Loper Bright mandates that this Court exercise independent judgment when determining whether an agency has acted within its statutory authority. 144 S. Ct. at 2249. This standard requires a fresh look at the WTR, unburdened by the deference previously granted to the EPA. *See id.* In exercising its independent judgment, this Court should carefully weigh the precedent set by other courts regarding the WTR's incompatibility with the CWA. *See id.* Prior to the WTR's promulgation, numerous courts held that transferring polluted water into clean waterways without a permit was inconsistent with the CWA. *See Dubois*, 102 F.3d at 1298; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 81; *Miccosukee*, 280 F.3d at 1368–69. These decisions emphasized the critical role of NPDES permits in federal water pollution control, characterizing them as the "linchpin," "centerpiece," and the "most important component" of the CWA. *United States v. Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983); *Am. Iron & Steel Inst. v. Env't Prot. Agency*, 115 F.3d 979, 990 (D.C. Cir. 1997); *Dubois*, 102 F.3d at 1294. The WTR's underlying policy has consistently been rejected by courts as incompatible with the CWA's intent and purpose.

Previously upheld only through *Chevron* deference, the WTR is now legally untenable. Based on courts' previous interpretation of what constitutes an 'addition' of a pollutant within the meaning of the CWA, and Congress's clear intent, the EPA's promulgation of the WTR constitutes a failure to comply with its statutory duty under the CWA. By exempting the transfer

of polluted water into other water bodies from NPDES permitting, the WTR directly undermines the CWA's core purpose of protecting water quality and compromises the integrity of our nation's water resources. *See Friends I*, 570 F.3d at 1217. In light of *Loper Bright* and the weight of prior judicial interpretations, the WTR should be deemed invalid. This Court must exercise its independent judgment and invalidate the WTR, aligning with the sound reasoning of *Catskill I* and *II*. *See Loper*, 144 S. Ct. at 2249; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 81.

3. The dicta in *Loper Bright* does not constrain this Court's analysis of the WTR's legality.

The dicta in *Loper Bright* does not constrain this Court's analysis. Courts are bound by holdings, not dicta. *Tokoph v. United States*, 774 F.3d 1300, 1303 (10th Cir. 2014). While Supreme Court dicta carries significant weight, it remains non-binding on lower courts. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1106 (9th Cir. 2010) ("Supreme Court dicta . . . are not binding"). "[D]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n.3 (10th Cir. 2009) (citing *Rohrbaugh v. Celotex* Corp., 53 F.3d 1181, 1184 (10th Cir. 1995)).

Here, the statement at issue in *Loper Bright* states that "[w]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful ... are still subject to statutory stare decisis despite our change in interpretive methodology." *Loper Bright*, 144 S. Ct. at 2273. This statement is clearly dicta, as it is not essential to the Supreme Court's holding overturning *Chevron* deference and merely offers guidance. As such, it does not bind this Court's analysis of the WTR.

a. Alternatively, a "special justification" exists to invalidate the WTR.

Even if this Court were to consider the *Loper Bright* dicta, a "special justification" exists for overturning the WTR. Pursuant to the doctrine of stare decisis, "[s]etting aside any precedent requires a 'special justification' beyond a bare belief that it was wrong." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 413 (2010). When determining whether to overturn precedent, the court should weigh if the current precedent is workable, relied upon, whether the law has changed, and whether the facts have changed. *South Dakota v. Wayfair*, 585 U.S. 162, 186 (2018).

Here, the precedent in *Catskill III* and *Friends I* is not workable. The WTR's underlying policy that transferring polluted waters to clean water has been repeatedly challenged, and courts have consistently found this theory to conflict with the CWA. *See Dubois*, 102 F.3d at 1298; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 81; *Miccosukee*, 280 F.3d at 1368–69. Moreover, the legal landscape has significantly shifted since the WTR's promulgation, particularly after *Loper Bright*, in which the Supreme Court underscores the importance of limiting agency discretion and adhering to statutory text. *See Loper*, 144 S. Ct. at 2249. Additionally, the WTR's potential to facilitate the transfer of polluted water into clean waterways without necessary permits raises serious environmental concerns that directly contradict the plain text of the CWA. These factors further highlight the WTR's lack of workability and inconsistency with the statute. When weighing these considerations, it is clear the precedent in *Catskill III* and *Friends I* should not be followed by this Court.

The Supreme Court in *Loper Bright* stated that "mere reliance on *Chevron* cannot constitute a ‘special justification’ for overruling such a holding." 144 S. Ct. at 2272. However, here the primary basis for special justification is not in reliance on *Chevron*. Rather, two key

factors provide a special justification. First, the WTR directly conflicts with the core purpose of the CWA to restore and maintain the nation's waters. *See* 33 U.S.C. §§ 1251–1387. A central component to restoring and maintaining the nation's waters is the NPDES permitting program. *See* 33 U.S.C. § 1342. The WTR directly undermines the CWA's fundamental purpose and plain language by exempting discharges from NPDES permitting.

Second, prior to the WTR's promulgation, numerous courts held that the EPA's policy allowing transferring polluted water into clean waterways without a permit was inconsistent with the CWA. *See Dubois*, 102 F.3d at 1298; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 81; *Miccosukee*, 280 F.3d at 1368–69. These decisions emphasized the critical role of NPDES permits in controlling the pollution of federal water. The WTR conflicts with this established precedent. Therefore, the *Catskill III* and *Friends I* precedent should be overturned, even when considering the *Loper Bright* dicta.

IV. Alternatively, if the WTR is upheld, HP's discharge violates the WTR.

Alternatively, if the Court finds the WTR to be valid, the district court erred when it deferred to EPA's interpretation of the WTR without first determining whether the regulation was ambiguous. If the district court had properly analyzed the text of the WTR, it would have determined that the regulation unambiguously requires HP to obtain an NPDES permit for the pollutants added to its discharge during the transfer process. The WTR's history and purpose supports this plain reading of the regulation. Even if this Court determines there are multiple reasonable readings of the WTR, the district court correctly deferred to EPA's interpretation as post-*Loper Bright* jurisprudence confirms that courts can still properly defer to an agency's reasonable interpretation of an ambiguous regulation. *See* 588 U.S. 558 (2019). *See also Auer v. Robbins*, 519 U.S. 452 (1997).

1. HP's discharge is not exempt from the NPDES program.

The traditional tools of interpretation establish that the WTR does not exempt HP's discharge from the NPDES program and this Court does not need to defer to EPA's interpretation. However, even if the WTR is ambiguous, this Court should defer to EPA's reasonable interpretation because the character and context warrant deference. A court applies the three-part test articulated in *Kisor v. Wilkie* to interpret a regulation and determine whether it needs to defer to an agency's interpretation of a regulation. *See* 588 U.S. 558 (2019).

A court will first apply the "traditional tools" of construction to determine whether the regulation is "genuinely ambiguous." *Id*. at 574–75. Next, a court evaluates the reasonableness of the agency's interpretation. *Id*. at 576 (citation omitted). Lastly, even if the regulation is ambiguous and the agency's interpretation is reasonable, a court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id*. Here, the traditional tools of interpretation establish the WTR unambiguously requires HP to obtain a NPDES permit for its discharge. Even if the WTR is ambiguous, EPA's reasonable interpretation warrants deference based on its character and context.

a. The WTR unambiguously requires HP to obtain an NPDES permit.

The WTR is unambiguous because it can only be reasonably interpreted as requiring NPDES permits for water transfers that add pollutants during the transfer activity. A court first analyzes the regulation's "text, structure, history, and purpose" to determine whether ambiguity exists. *Kisor*, 588 U.S. at 575. A regulation is unambiguous when "there is only one reasonable

construction of [the] regulation." *See id*. An unambiguous regulation "just means what it means–and the court must give it effect, as the court would any law." *Id*.

i. Text and Structure

The WTR provides that discharges from a "water transfer," meaning "an activity that conveys or connects [WOTUS]," does not require an NPDES permit, but only if the transfer does not add further pollutants. 40 C.F.R. § 122.3(i). While the WTR exempts the pollutants that already exist within the transferred water from the NPDES program, this exemption does not include "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). The text, history, and purpose of the WTR foreclose any ambiguity that the WTR does not apply to pollutants that are generated by the water transfer activity itself, like the pollutants originating from HP's tunnel.

Here, the text of the WTR requires HP to obtain an NPDES permit for its discharge into the Stream. CSP's complaint alleged sufficient facts to indicate that HP's tunnel introduces new pollutants during the transfer activity because the tunnel adds pollutants to the discharged water as it flows through the tunnel. Order p. 5. *See* 40 C.F.R. § 122.3(i). In a similar case the Hawai'i Agribusiness Development Corporation transferred water through an "unlined, earthen canal" that discharged water and sediment into the Pacific Ocean without an NPDES permit. *Nia Kia'i Kai v. Nakatani*, 401 F.Supp.3d 1097, 1108 (D. Hawaii 2019). The district court in *Nia*, rejected the argument that the WTR exempted the discharge from the NPDES program on the basis that the canal's "unvegetated and unstable banks" added pesticide-laden sediment to the water being transferred. *Id.*

Similarly, CSP's allegations show that HP's tunnel has comparable flaws that cause the tunnel itself to add pollutants–iron, manganese, and TSS–during the water transfer. Order p. 5.

See 33 U.S.C. § 1632(6) ("'pollutant' means . . . rock [and] sand"). Like *Nia,* CSP's allegations show that HP's design and operation of the tunnel, which is carved in rock and incorporates ironing piping, causes erosion and contamination to the water being transferred. Order p. 4. Therefore, the allegations establish that HP's tunnel adds additional iron, manganese, and TSS, to the transferred water.

ii. Purpose

The purpose of the WTR further supports the plain reading of the regulation. EPA promulgated the WTR to facilitate water transfers while continuing to regulate new pollutants that a defunct channel might add. *See* 73 Fed. Reg. 33,700. The WTR codified EPA's longstanding policy that regulating water transfers under the NPDES is unnecessary when the water transfer does not add pollutants from "the outside world" to the transferred water. EPA consistently relied upon this policy in litigation that challenged whether water transfers are subject to the NPDES. *Catskill III*, 846 F.3d 492, 503–04. In doing so, the EPA argued that transferring water from a polluted WOTUS to a non-polluted WOTUS did not require an NPDES permit because the "transfer does not increase the sum of pollutants in the navigable waters as a whole." *See* Memo. from Ann R. Klee & Benjamin H. Grumbles, EPA, Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers 13 n.13 (Aug. 5, 2005) (hereinafter "Klee Memo").

The plain reading of the WTR also effectuates the congressional intent of the CWA by permitting states like New Union to oversee water allocation in cooperation with Federal authorities. *See* 71 Fed. Reg. at 32,891. The WTR did not abrogate EPA's authority to manage water transfers that diminish water quality. 73 Fed. Reg. at 33,704 Rather, it clarifies that EPA cannot use the CWA to unduly interfere with how New Union allocates water. 73 Fed. Reg. at

33,702. EPA's management is consistent with the congressional intent of the CWA, as New Union's non-NPDES management of HP's tunnel has not adequately protected the water quality of Crystal Stream and requiring HP to obtain an NPDES permit would not unduly infringe upon New Union's allocation authority. *See* Klee Memo, 17.

iii. History

The EPA has historically allowed water transfers that do not add new pollutants to WOTUS. The WTR stemmed from the EPA's policy that water transfers did not constitute a discharge because a transfer does not add additional pollutants to the sum of pollutants in WOTUS as a whole. NPDES Water Transfers Final Rule Fact Sheet (2008). EPA incorporated this longstanding policy into the formal rulemaking of the WTR. *Id*. The EPA's policy and legal arguments that prompted promulgating the WTR supports the plain reading that the HP's tunnel, which itself adds new pollutants, still requires an NPDES permit. Unlike the situations where the water transfer simply transported one WOTUS to another WOTUS without adding pollutants, HP's tunnel adds pollutants to the water it transfers.

Therefore, the traditional tools of interpretation render the WTR unambiguous. Thus, HP must obtain an NPDES permit for its discharge because the tunnel itself adds pollutants.

b. Even if the WTR is ambiguous, EPA's interpretation warrants deference.

Even if the Court finds that the WTR is ambiguous, EPA's interpretation warrants deference, as it satisfies the second and third prongs of the *Kisor* test: (1) the interpretation is reasonable and (2) the character and context of the interpretation justifies deference.

i. EPA's interpretation is reasonable.

EPA's interpretation that the WTR does not exempt HP's discharge from the NPDES program is reasonable because it furthers the WTR's purpose. An agency's interpretation is

reasonable when it is "within the zone of ambiguity the court has identified after employing all its interpretive tools." *Kisor*, 588 U.S. at 576. Here, the EPA's interpretation is reasonable because the interpretation furthers the regulation's purpose in facilitating water transfers that do not add new pollutants. *See Diamond Servs. Corp. v. Curtin Mar. Corp.*, 99 F.4th 722, 733–34 (5th Cir. 2024).

ii. The character and context of the EPA's interpretation warrants deference.

The Court should defer to EPA's interpretation as it reflects the agency's longstanding and official position and addresses the complex interplay between state and federal oversight of water quality. EPA's longstanding policy apprised HP that its discharge required an NPDES permit.

A court will defer to an agency's interpretation when the court finds the interpretation is "based on the agency's substantive expertise, reflect[s] [the agency's] fair and considered judgment, and represents the agency's authoritative or official position." *League of Cal. Cities v. FCC*, 118 F.4th 995 (9th Cir. 2024) (citation omitted). An agency's interpretation reflects a fair and considered judgment, rather than a "convenient litigating position" or a "post hoc rationalization," when the agency does not substitute "one view of a rule for another." *Kisor*, 588 U.S. at 579.

Here, the WTR implicates EPA's substantive expertise as the regulation addresses the interplay between state management of water allocation and federal oversight of water quality. The meaning of the regulation is within the EPA's expertise as Congress "generally intended that EPA would exercise substantial discretion in interpreting the [CWA]." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 173 (D.C. Cir. 1982). The fact that EPA drafted the regulation further supports that interpreting the WTR implicates EPA's substantive expertise. *See Kisor*, 588 U.S. at 576–77.

Additionally, the EPA's interpretation represents its longstanding and official position as the EPA has consistently advocated that a water transfer is exempt from the NPDES program when it does not add additional pollutants. *Friends I*, 570 F.3d at 1217. The EPA first asserted this position in litigation in 2001 and EPA's then-General Counsel, Ann R. Klee, subsequently supported EPA's position in a 2005 memo addressed to the regional administrators. *Catskill I*, 273 F.3d at 491; Klee memo at 2, 13 n.13. The EPA has always treated manganese, iron, and TSS as pollutants. *See Gorsuch*, 693 F.2d at 174 n.56 (EPA considers "sediment" to be a pollutant). Therefore, EPA's position that the pollutants that HP's tunnel adds during the water transfer represents its longstanding and official position and, thus, not a *post hoc* rationalization. *See Idaho Conserv. League v. Poe*, 86 F.4th 1243, 1251 (9th Cir. 2023) (EPA took "an official position and made a fair and considered judgment" because EPA codified its interpretation and coordinated with impacted agencies).

The EPA also apprised HP of the extent of the WTR through the initial and final rulemaking process. During the rulemaking process, EPA notified government agencies that control erosion, like the state agencies of New Union who permitted HP's tunnel, that the WTR may impact their management of water transfers. 73 Fed. Reg. at 33,698 (alerting governmental agencies "primarily engag[ing] in the administration, regulation, and control of land use, including recreational areas [and] . . . erosion control"). EPA further explained that "[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." 73 Fed. Reg. at 33,705.

Therefore, even if the court finds the WTR ambiguous, the court should defer to EPA's interpretation, because EPA's interpretation represents EPA's longstanding policy and implicates EPA's substantive expertise.

2. *Auer* deference still applies if the WTR is found to be ambiguous.

Auer deference still applies when a court interprets an agency's regulations. The *Loper Bright* decision overruled *Chevron* deference, which applies to an agency's interpretation of a statute, not a regulation. *See Loper Bright*, 144 S. Ct. at 2273. The *Loper Bright* decision did not overrule the deference a court may give to an agency's interpretation of its own ambiguous regulation under *Auer* and *Kisor*. *United States v. Arizaga-Acosta*, 436 F.3d 506, 508 (5th Cir. 2006) (circuit courts are bound to follow precedent "unless and until the Supreme Court itself determines to overrule it"). *E.g.*, *United States v. Trumbull*, 114 F.4th 1114, 1118 (9th Cir. 2024); *United States v. Ponle*, 110 F.4th 958, 961 (7th Cir. 2024); *United States v. Boler*, 115 F.4th 316, 322 (4th Cir. 2024); *United States v. Charles*, No. 22-5424, 2024 WL 3831984, *13 (6th Cir. Aug. 15, 2024). Therefore, *Auer* and *Kisor* are the proper standard in this case.

CONCLUSION

For the foregoing reasons, CSP respectfully requests this Court to affirm the district court's Order with respect to CSP's standing and timeliness. Additionally, CSP respectfully requests this Court to vacate the district court's Order with respect to the validity of the WTR and remand with instructions to examine the WTR's validity based on the plain language and purpose of the CWA with the standard set forth in *Loper Bright*. Alternatively, if the Court finds the district court did not err in analyzing the WTR's validity, CSP respectfully urges this Court to affirm the Order with respect to HP's violation of the WTR.