Team No. 05
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.-

HIGHPEAK TUBES, INC.,
Defendant-Appellees-Cross-Appellants

-and-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-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 APPELLEE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from an interlocutory order of the United States District Court for the District of New Union. In the district court, plaintiff Crystal Stream Preservationists, Inc. ("CSP") asserted jurisdiction ostensibly pursuant to the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq*. As explained further *infra*, defendant United States Environmental Protection Agency ("EPA") challenged the district court's jurisdiction for lack of standing. Record at 3–4. By order dated August 1, 2024, the court below denied EPA's motion to dismiss. Record at 12. EPA timely sought leave to appeal under 28 U.S.C. §1292(b), which grants to the Court of Appeals of the United States jurisdiction over interlocutory orders determined by the district court to "involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." This Court granted EPA's motion for leave to appeal by order dated August 1, 2024. Record at 1.

STATEMENT OF THE ISSUES

I. Did the district court err by finding that CSP has standing to challenge the Water Transfers Rule ("WTR"), where CSP alleges only subjective aesthetic and self-inflicted recreational injury?

II. Is CSP's challenge to the Water Transfers Rule fifteen years after it was promulgated barred by the statute of limitations?

III. Is the WTR a valid regulation under the Clean Water Act?

IV. Are Highpeak's transfers exempt from the CWA's permit requirements under the WTR given that additional pollutants are introduced during those transfers?

STATEMENT OF THE CASE

For over three decades, Highpeak Tubes, Inc. ("Highpeak") has operated a recreational tubing business in Rexville, New Union, utilizing the waters of Crystal Stream. Record at 4. Highpeak's property is uniquely positioned between two waterbodies: Cloudy Lake to the north and Crystal Stream to the south. *Id.* To sustain its operations, Highpeak obtained state approval in 1992 to construct a 100-yard tunnel connecting Cloudy Lake to Crystal Stream. *Id.* This tunnel, composed of rock and iron piping, allows Highpeak to regulate the flow of water between the two bodies, contingent upon state determinations of sufficient water levels in Cloudy Lake. *Id*. Despite operating this water transfer system for over thirty years, Highpeak has never secured a National Pollutant Discharge Elimination System ("NPDES") permit under the CWA *Id.* Crystal Stream Preservationists ("CSP"), a nonprofit organization comprised of Rexville residents, was formed on December 1, 2023. Record at 4. All but one of CSP's members have lived in Rexville for more than fifteen years. *Id.* Following water sampling by CSP, evidence emerged showing increased concentrations of iron, manganese, and total suspended solids ("TSS") in water discharged through Highpeak's tunnel. *Id*. at 5.

On February 15, 2024 CSP filed a dual-action suit against Highpeak and EPA. *Id*. Under § 505 of the CWA, CSP contended that Highpeak's tunnel constitutes a regulated discharge source due to the addition of pollutants during the water transfer process, disqualifying it from the exemptions provided under the EPA's Water Transfers Rule ("WTR"). *Id.* CSP simultaneously challenged the legality of the WTR under the Administrative Procedure Act ("APA"), asserting that the rule exceeds EPA's regulatory authority under the CWA. *Id*.

Highpeak and the EPA responded by filing motions to dismiss. *Id.* at 5–6. Highpeak argued that its discharges are exempt from NPDES permitting under the WTR and thus, CSP

failed to state a claim under the CWA. *Id*. EPA and Highpeak also jointly moved to dismiss CSP's claims for lack of standing and alleged that the APA challenge was time-barred. *Id.* The district court partially denied these motions: It upheld CSP's citizen suit under the CWA but dismissed CSP's APA challenge, finding that the WTR was a lawful exercise of EPA's authority. *Id*. at 6. All parties filed motions for leave to appeal the district court's order, which were granted on August 1, 2024. *Id*. at 2.

STANDARD OF REVIEW

A district court's grant of a motion to dismiss for failure to state a claim is reviewed de novo, "accepting as true the complaint's well-pleaded allegations and drawing all reasonable inferences in the plaintiffs' favor." *Chaidez v. Ford Motor Company*, 937 F.3d 998, 1004 (7th Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

Likewise, questions of standing and timeliness are reviewed de novo. *See, e.g., City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.,* 637 F.3d 169, 173 (2d Cir. 2011) (timeliness); *Winkler v. Gates*, 481 F.3d 977, 982 (7th Cir. 2007) (standing). However, in the jurisdictional context, "[n]o presumptive truthfulness attaches to [a] plaintiff's allegations" and the district court may "hear evidence regarding jurisdiction" and "resolv[e] factual disputes where necessary." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008) (citation omitted). A district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. *Id.*

SUMMARY OF THE ARGUMENT

This Court should dismiss CSP's claims for lack of standing. CSP fails to demonstrate standing because neither its members' alleged recreational injuries nor its claims of aesthetic injury satisfy the constitutional requirements for injury-in-fact. CSP's recreational injuries are self-inflicted and based on unreasonable fears about hypothetical harms from Highpeak's discharges, which scientific evidence demonstrates pose no health risks. Its members' ongoing recreational use of Crystal Stream further undermines any claim of imminent harm. CSP's aesthetic injury theory, based on the claim that Highpeak's discharges cloud the water, is overly subjective, lacks specificity, and amounts to an abstract emotional grievance insufficient to establish standing under Article III. Additionally, CSP cannot establish causation or redressability. Highpeak's water transfers began decades before the promulgation of the WTR and have not changed in response to the regulation. Because the WTR does not apply to Highpeak's discharges, invalidating the rule would not redress CSP's claimed injuries.

CSP's challenge is also untimely. Under the APA's six-year statute of limitations, its claim accrued at the time the WTR was promulgated. CSP's reliance on the Supreme Court's *Corner Post* decision is misplaced, as that case does not extend to nonprofit organizations or associational standing claims. Allowing such an extension would subvert the finality of agency action and incentivize strategic delays in bringing challenges.

Even if CSP's claims are justiciable, this Court should affirm the district court's judgment that the WTR is a valid regulation under the CWA. The WTR appropriately exempts water transfers from NPDES permitting requirements because the transfer of water from one water body to another does not constitute an "addition" under the CWA. This interpretation

aligns with the CWA's text, structure, and legislative history, which emphasize cooperative federalism and preserve state authority over water allocation and nonpoint source pollution.

Finally, this Court should affirm the district court's judgment that Highpeak's discharges fall outside the WTR's exemption because the tunnel used in its water transfers introduces additional pollutants into Crystal Stream. The WTR expressly excludes pollutants added by the transfer process itself, and EPA's longstanding interpretation supports this conclusion. Highpeak's operations thus remain subject to NPDES permitting requirements under the CWA.

ARGUMENT

I. CSP LACKS STANDING TO CHALLENGE THE WTR.

"Standing" is a fundamental component of the "case-or-controversy" requirement that delimits the jurisdiction of courts under Article III. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). To establish standing, a plaintiff must demonstrate the "irreducible constitutional minimum" that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). At the pleading stage, a plaintiff must "clearly . . . allege facts demonstrating each element." *Id.* (internal quotations omitted). An association has standing to bring suit on behalf of its members if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Because EPA—which undoubtedly has standing to enforce the CWA—joins CSP's citizen suit, CSP need not demonstrate standing to challenge Highpeak's specific discharges.

See, e.g., Massachusetts v. E.P.A., 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). However, CSP must separately demonstrate standing for its regulatory challenge. *See Murthy v. Missouri,* 144 S.Ct. 1972, 1988 (2024) ("plaintiffs must demonstrate standing for each claim that they press against each defendant and for each form of relief that they seek.") (internal quotations omitted).

a. CSP has not demonstrated injury-in-fact stemming from the WTR.

To pursue injunctive relief, a plaintiff must show that (1) they face injury-in-fact that is "concrete and particularized" and (2) the threat of injury is "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst*., 555 U.S. 488, 493 (2009). To qualify as "imminent," a threat of injury must be "certainly impending" rather than merely "possible." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Further, a "concrete" injury must be "real and not abstract." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). CSP's claims of recreational and aesthetic harm fail to satisfy both requirements. While CSP's members' recreational injuries are concrete, they are not imminent; conversely, its aesthetic injuries may be imminent but lack concreteness.

1. CSP's members' recreational injuries are insufficient to establish injury-in-fact because they are self-inflicted and based on unreasonable concerns.

CSP does not allege that its members have been directly injured by Highpeak's discharges. Instead, it asserts that its members have curtailed their recreational activities on Crystal Stream due to "concern[s]" over potential iron and manganese contamination. *See* Decl. of Jonathan Silver at ¶¶ 5-9; Decl. of Cynthia Jones at ¶¶ 7-9. However, as the Supreme Court has clarified, "[p]laintiffs cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper,* 568 U.S. at 416. CSP cannot evade the "imminent" standard by self-inflicting present injury based on

the threat of future harm, and the relevant inquiry remains whether CSP's members face a "certainly impending" threat of harm from Highpeak's discharges.

No such threat exists. CSP's members aver that they avoid recreating on Crystal Stream due to concerns about iron and manganese. Decl. of Jonathan Silver at ¶ 9; Decl. of Cynthia Jones at ¶ 12. However, iron poses no health risk to humans, even if ingested directly. *See Secondary Drinking Water Standards: Guidance for Nuisance Chemicals*, EPA (June 14, 2024), https://www.epa.gov/sdwa/secondary-drinking-water-standards-guidance-nuisance-chemicals (describing iron as "not health threatening"). Likewise, dermal exposure to manganese carries minimal health risk due to poor skin absorption. *See, e.g., Toxicological Profile for Manganese*, Agency for Toxic Substances and Disease Registry (Sep. 2012), https://www.atsdr.cdc.gov/ToxProfiles/tp151-c2.pdf ("dermal contact with manganese is not generally viewed as an important source of exposure"). EPA has further determined that *lifetime* exposure to manganese levels up to 0.3 mg/L in *drinking water* is safe.[1] In contrast, Highpeak's discharges contain only 0.093 mg/L of manganese—69% below safe limits. Record at 5. Thus, even if CSP's members were drinking directly from Crystal Stream, they face no "certainly impending" threat to their health and cannot "manufacture standing merely by inflicting harm on themselves" in response to an unfounded fear. *Clapper,* 568 U.S. at 416.

To be sure, a plaintiff's avoidance of an area due to contamination may, in limited circumstances, support standing. *See, e.g.*, *Laidlaw,* 528 U.S. at 183-84. However, these fears must be "reasonable," which depends on "the *reality* of the threat . . . not the plaintiff's

[1] *Drinking Water Health Advisory for Manganese*, U.S. ENVIRONMENTAL PROTECTION AGENCY (January, 2024), https://www.epa.gov/sites/default/files/201409/documents /support_cc1_magnese_dwreport_0.pdf, at 2. While EPA advises reducing manganese concentrations below 0.050 mg/L, this level is set "based on staining and taste considerations" rather than a risk to health and is irrelevant outside the context of drinking water. *Id*.

subjective apprehensions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n. 8 (1983) (emphasis in original); *see also Laidlaw*, 528 U.S. at 184 (recognizing that injury-in-fact depends on "[t]he reasonableness of [the] fear that led the affiants to . . . refrain[ ] from use of [the area]"). This is merely a reiteration of the "certainly impending" requirement, as a plaintiff cannot "reasonably" fear a purely conjectural threat.

Here, the record demonstrates that CSP's members' concerns are not reasonable. For over thirty-two years Highpeak's discharges have been occurring with no health impacts on those who use the river. Record at 4. Ms. Jones herself acknowledges that she has "[r]egularly" recreated on Crystal Stream for over twenty-six years without adverse effects despite Highpeak's ongoing discharges. Decl. of Cynthia Jones at ¶¶ 7–10. Nonetheless, she avers that her "ability to enjoy the stream has significantly diminished" since only recently learning of Highpeak's discharges. *Id.* at ¶ 10. While this may be the case, her sudden "subjective apprehensions" are insufficient to confer standing. *Lyons*, 461 U.S. at 107 n. 8.

The Supreme Court's holding in *Laidlaw* is not to the contrary. There, members of an environmental organization demonstrated injury-in-fact after completely ceasing their recreational activities due to fears of contamination from a hazardous waste facility's "continuous and pervasive" discharges of mercury—"an extremely toxic pollutant."[2] *Laidlaw,* 528 U.S. at 183–84. Given mercury's significant health risks, the plaintiffs in *Laidlaw* had "reasonable concerns" about the contamination. *Id*. at 183. By contrast, Highpeak's water transfers contain only benign metals. Additionally, in *Laidlaw*, the plaintiffs entirely ceased

[2] The World Health Organization ("WHO") has warned that "exposure to mercury – even small amounts – may cause serious health problems" including "toxic effects on the nervous, digestive and immune systems, and on lungs, kidneys, skin and eyes." *Mercury Fact Sheet*, WORLD HEALTH Organization (Oct. 24, 2024), https://www.who.int/news-room/fact-sheets/detail/mercury-and-health#:~:text=Exposure%20to%20mercury%20%E2%80%93%20even%20small,%2C%20kidneys%2C%20skin%20and%20eyes.

using the river and surrounding areas due to their concerns. *Id*. at 182–184. Here, CSP's members continue to recreate on Crystal Stream, albeit less frequently. Decl. of Cynthia Jones at ¶ 12; Decl. of Jonathan Silver at ¶ 9. The Supreme Court has never extended *Laidlaw* to cases where plaintiffs merely reduced, rather than ceased, their activities and CSP's members' ongoing recreational use of Crystal Stream belies their claimed concern.

Further, there is ample reason to hesitate before accepting CSP's members' alleged fears at face value.[3] CSP was established immediately after the Supreme Court granted certiorari in *Loper Bright*[4] and *Corner Post*,[5] and just *two weeks* before sending its notice of intent to sue letter ("NOIS"). Record at 4, 6. CSP's mission explicitly references "illegal transfers of polluted waters," suggesting it was formed solely to challenge the WTR under new favorable precedent. Record at 6. Neither Mr. Silver nor Ms. Jones raised prior objections to Highpeak's discharges and admit that they joined CSP specifically "to try to stop this discharge," not for any broader conservation purpose. Decl. of Cynthia Jones at ¶ 11; Decl. of Jonathan Silver at ¶ 8. Thus, CSP's members' purported concerns appear disingenuous, and should not be accorded "greater weight than substantive evidence to the contrary." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 685 (7th Cir. 1998).

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[3] CSP's allegations need not and should not be taken at face value: because a motion to dismiss for lack of standing implicates a court's very power to hear a case, "no presumptive truthfulness attaches to plaintiff's allegations" and a court "may properly look to evidence beyond the pleadings." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *see also Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998) ("a court need not close its eyes to demonstrated jurisdictional deficiencies in a plaintiff's case and accord a plaintiff's unproven allegations greater weight than substantive evidence to the contrary."); *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) ("When a district court is presented with a challenge to its subject matter jurisdiction, [n]o presumptive truthfulness attaches to [a] plaintiff's allegations") (internal quotations omitted).

[4] *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024).

[5] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S.Ct. 2440 (2024).

While there is no precise test for standing, "the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Alliance for Hippocratic Medicine v. FDA*, 602 U.S. 379, 384 (2023). Even in *Laidlaw*, where the discharges were "extremely toxic," plaintiffs ceased all recreational activity, and there was no reason to doubt the organization's legitimacy, standing was established "by the very slimmest of margins." 528 U.S. at 177. Thus, *Laidlaw* appropriately serves as a "lower bound" for injury-in-fact based on recreational curtailment. While *Laidlaw* may have been "an awfully close call," this case is not. *Id.* at 201 (Scalia, J., dissenting) (quoting trial transcript).

2. CSP's aesthetic injury theory lacks concreteness and cannot, without more, establish injury-in-fact.

Aside from its members' self-inflicted recreational harm, CSP's entire theory of standing rests on Ms. Jones's statement that Highpeak's discharges are "upsetting" to her because they "make the otherwise clear water cloudy." Decl. of Cynthia Jones at ¶ 8. This allegation is suspect given that CSP appears to have been formed solely to mount this legal challenge, and Ms. Jones previously voiced no objection to the discharges despite twenty-six years of frequent recreation near Highpeak's tunnel. *See supra* at 9. "[N]o presumptive truthfulness attaches" to these allegations and this Court should evaluate whether such claims are genuine. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

Moreover, this aesthetic harm lacks the "essential dimension of specificity" required for injury-in-fact. *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 221 (1974). Ms. Jones may find cloudy water unpleasant, but "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact." *Humane Soc. of U.S. v. Babbitt,* 46 F.3d 93, 98 (D.C. Cir. 1995); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc*., 454 U.S. 464, 485–86 (1982) ("psychological consequence . . . produced by

observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III."). While aesthetic injury may support a finding of injury-in-fact in limited circumstances, it is typically accompanied by other harms.[6] Courts have rightfully hesitated to recognize injury based exclusively on a plaintiff's subjective emotional response to their surroundings. *See, e.g.*, *Babbitt*, 46 F.3d at 98 (finding plaintiffs' allegations that they "suffered severe distress" insufficient to confer standing); *Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985) ("A general contention that [plaintiffs] will suffer distress… does not constitute an allegation of individual injury."). Abstract emotional concerns fail to "present[ ] the factual context within which a court . . . is capable of making decisions." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. at 221 (1974); *see also Metcalf v. National Petroleum Council*, 553 F.2d 176, 187 (D.C. Cir.1977) (refusing to recognize "purely subjective" claims of injury that could not be measured by "readily discernible standards"). Here, allowing standing based on Ms. Jones's subjective reactions alone would reduce the injury-in-fact requirement to a mere formality.

b. Even if CSP's members satisfy injury-in-fact, they fail to demonstrate causation and redressability.

Causation and redressability are "flip sides of the same coin;" if a regulation does not cause a claimed injury, invalidating it typically will not provide a remedy. *All. for Hippocratic Med.*, 602 U.S. at 380–81. To meet these requirements, a plaintiff must show a "predictable chain of events" linking the regulation to the alleged harm that is not "too speculative or too attenuated." *Id.* at 383, 385. Where, as here, a plaintiff is not itself regulated, the chain of

[6] *See, e.g.*, *Laidlaw*, 528 U.S. at 184 (finding standing where "recreational, aesthetic, and economic interests" were harmed); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (injury-in-fact satisfied where "aesthetic and recreational values of the area" used by plaintiffs would be harmed).

causation becomes "substantially more difficult" to establish, as it hinges on "the unfettered choices made by independent actors" that "courts cannot presume either to control or to predict." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citations omitted). Thus, CSP must demonstrate that Highpeak "will likely react in predictable ways" to the WTR "that in turn will likely injure [it]." *All. for Hippocratic Med.*, 602 U.S. at 383 (internal quotations omitted).

Here, it is undisputed that Highpeak's water transfers have persisted since 1992—more than a decade before the WTR was issued—without any subsequent changes. Record at 6. CSP cannot credibly argue that discharges originating before the regulation are attributable to it, nor can it assert that Highpeak will "likely react in predictable ways" in response to a regulation it has ignored for over two decades. Even if it could, CSP's claimed injuries cannot be redressed by invalidating the WTR. As CSP itself concedes, the WTR does not apply to the discharges in question due to the introduction of pollutants from the water transfer itself. Record at 5–6. Thus, Highpeak must obtain a permit independently of the WTR and invalidating it would have no impact on CSP's alleged injuries. *See infra* at 27–31.

CSP lacks standing to challenge the WTR for multiple reasons. CSP has not demonstrated that its members face an imminent and concrete injury-in-fact because their alleged recreational and aesthetic injuries are either self-inflicted or insufficiently specific. Additionally, CSP cannot establish that the WTR caused its members' claimed harms, nor that invalidating the regulation would redress them. Instead, CSP appears to be leveraging Highpeak's discharges as a means to broadly contest the legality of the WTR without having a genuine, "personal stake" in its continued enforcement. *All. for Hippocratic Med.*, 602 U.S at 379 (citation omitted). Consequently, CSP's challenge should be dismissed for lack of standing.

II. CSP'S CHALLENGE TO THE WTR IS UNTIMELY.

Under the APA, a plaintiff must bring a challenge to a promulgated regulation within six years of the date their "right of action first accrues." 28 U.S.C. § 2401(a). In *Corner Post,* the Supreme Court held that the right of action for a commercial entity "accrues" for purposes of § 2401(a) "when [the entity] is injured by final agency action," rather than at the time of the regulation's initial issuance. 144 S.Ct. at 2447. However, the district court's reliance on *Corner Post* in finding CSP's complaint timely fails to acknowledge the limitations of that holding, which applies exclusively to regulatory challenges raised by for-profit entities with distinct commercial interests.[7] Extending *Corner Post* to CSP—a nonprofit organization suing "in a representative capacity"—would constitute a significant and unsupported expansion of this precedent. Record at 4. Notably, none of the cases cited in *Corner Post* involved claims brought by nonprofit entities.[8] Indeed, no court has ever extended the holding in *Corner Post* to cover APA claims filed in a representative capacity. For good reason: applying *Corner Post* to nonprofit challenges would compromise the dual purposes of statutory limitations to ensure finality for defendants and prevent plaintiffs from "sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983).

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[7] Indeed, Justice Jackson emphasized that the Court's holding enables "*commercial entit[ies]* to bring fresh facial challenges to long-existing regulations." *Id*. at 2470 (Jackson, J., dissenting) (emphasis added).

[8] Each case featured individuals, companies, merchant associations, or a mix thereof. *See North Dakota Retail Ass'n. v. Board of Governors of FRS,* 55 F.4th 634 (8th Cir. 2022) (merchant associations and an individual merchant); *Odyssey Logistics and Tech. Corp. v. Iancu*, 959 F.3d 1104 (Fed. Cir. 2020) (patent applicant company); *Herr v. U.S. Forest Service*, 803 F.3d 809 (6th Cir. 2015) (owners of property); *NACS v. Board of Governors of FRS*, 746 F.3d 474 (D.C. Cir. 2014) (merchant association); *Hire Order Ltd. v. Marianos*, 698 F.3d 168 (4th Cir. 2012) (limited liability company and an individual); *Dunn-McCampbell Royalty Interest Inc., v. National Park Serv.*, 112 F.3d 1283 (5th Cir. 1997) (owner of a mineral estate); *Harris v. FAA*, 353 F.3d 1006 (D.C. Cir. 2004) (172 current and retired air traffic controllers); *Wind River Min. Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991) (mining company).

a. Extending *Corner Post* to nonprofit entities would encourage plaintiffs to sleep on their rights and would incentivize tactical litigation gamesmanship under the APA.

Corner Post's rationale is inapplicable here. In *Corner Post*, the commercial plaintiff—a newly incorporated truck stop and convenience store—"ha[d] no other way to obtain meaningful review" because it was formed over six years after the challenged regulation was enacted. 144 S.Ct. at 2459 n. 9. Consequently, the Court sought to prevent a situation where "only those fortunate enough to suffer an injury within six years" of a regulation's enactment would be able to bring a claim. *Id*. at 2459. This rationale does not apply to CSP, which brought this action on behalf of its thirteen members, all but one of whom have lived in Rexville for more than fifteen years and could have challenged the WTR within the prescribed limitations period.[9] Record at 8.

Justice Jackson cautioned that *Corner Post* opens the door for litigants to "game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline." *Corner Post*, 144 S.Ct. at 2470 (Jackson, J., dissenting). This concern is even more relevant in the associational context, where plaintiffs who have slept on their rights may create a new nonprofit or add fresh members with non-expired limitations periods, indefinitely extending the timeline for bringing claims until the legal landscape is favorable. Here, CSP's formation and subsequent challenge are paradigmatic of this "manipulation." *Id.* CSP was formed only after the Supreme Court agreed to review *Loper Bright* and *Corner Post*, and it filed its NOIS a mere two weeks later, with a mission statement explicitly referencing "illegal transfers of polluted waters." Record at 6. CSP's membership consists of individuals who have long resided in Rexville and had ample opportunity to challenge the WTR within the original limitations period but elected

[9] Jonathan Silver, the only member of CSP whose claim is not clearly barred by the statute of limitations, was approached and informed of the discharges by other members of CSP, suggesting that CSP sought out a member like Mr. Silver for this express purpose. Decl. of Jonathan Silver at ¶ 6.

not to do so. These members cannot sidestep their inaction by forming a new entity for the purpose of challenging the WTR based on shifting legal interpretations.

b. Extending *Corner Post* to cover challenges brought by nonprofit organizations would undercut the finality of agency action and upset the reliance interests of regulated parties and agencies.

Allowing CSP's challenge to the WTR to proceed—nearly two decades after its promulgation and amid deeply embedded reliance interests—would undermine the "very purpose of a period of limitation:" to ensure that "there may be, at some definitely ascertained period, an end to litigation." *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926); *see also Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013) (stating that statutes of limitations provide "security and stability to human affairs") (citation omitted). Indeed, "repose" and "certainty about . . . a defendant's potential liabilities" are "basic policies of *all* limitations provisions[.]" *Gabelli*, 568 U.S. at 448 (emphasis added). Finality is especially crucial in the administrative context, where agencies promulgate rules that industries rely upon to structure their long-term plans, make investments, and enter into contractual obligations. *Corner Post*, 144 S.Ct. at 2481 (Jackson, J., dissenting). Extending *Corner Post* to nonprofit organizations like CSP would shatter this regulatory stability, creating perpetual uncertainty and leaving industries in constant fear of litigation. Such an extension would also impair agencies' ability to manage resources and implement policy consistently, because they would face an unending risk of legal action from shifting nonprofit constituencies with evolving agendas.

Here, the WTR exemplifies a "baseline rule[ ] around which businesses and individuals order their lives," *Corner Post*, 144 S.Ct. at 2481 (Jackson, J., dissenting). At the time the WTR was promulgated, water transfers were an "integral component of U.S. infrastructure" and reliance on them has only deepened. *NPDES Water Transfers Rule*, 73 Fed. Reg. 33697, 33698

(June 13, 2008). Thousands of transfers are operational nationwide, from urban water supply systems in cities like Seattle and Phoenix to agricultural operations in the Central Valley of California. *Id.* As just one example, the City of New York's water supply system "relies on transfers of water" to "provide[ ] approximately 1.2 billion gallons of . . . water a day to nine million people—nearly half of the population of New York State." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 503 (2d Cir. 2017) ("*Catskill III*") (citation omitted). This system, along with many others, was built on the assumption that the WTR would not be subject to indefinite legal challenges. Allowing nonprofits like CSP to mount delayed challenges to regulations like the WTR would wreak havoc on the settled expectations of parties who depend on established regulations to invest significant time and resources. CSP's delayed challenge should be dismissed to maintain the "security and stability" that the APA's statute of limitations was designed to protect. *Gabelli,* 568 U.S. at 448.

III. THE WTR IS A VALID REGULATION.

The WTR appropriately exempts water transfers from NPDES permitting requirements because the transfer of water from one water body to another does not constitute an "addition" under the CWA. The CWA's structure, emphasis on cooperative federalism, supporting caselaw, and legislative history all support this conclusion.

a. The district court correctly declined to revisit the validity of the WTR.

Every circuit to consider the matter has upheld the WTR as a valid interpretation of the CWA. *See Catskill III,* 846 F.3d at 524–33; *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) ("*Friends I*"). Contrary to CSP's contention, the legal weight and legitimacy of these decisions are unaffected by their reliance on *Chevron*.[10]

[10] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Record at 9. *Loper Bright* expressly rejected this notion: "by [overruling *Chevron*] we do not call into question prior cases that relied on the *Chevron* framework." *Loper Bright,* 144 S.Ct. at 2273. *Loper Bright* merely introduced a "change in interpretative methodology," and the Court was careful to confine its ruling to agency actions that have not been previously challenged. *Id.* at 2273 (stating that previous decisions upholding regulations under *Chevron* "are still subject to statutory *stare decisis*"); *see also CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same"). CSP's request to reconsider the WTR rests solely on its contention regarding *Chevron* without any "special justification over and beyond the belief that the precedent was wrongly decided." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (2015) (internal quotations omitted). However, "[m]ere reliance on *Chevron* . . . is not enough to justify overruling [these] statutory precedent[s]." *Loper Bright,* 144 S.Ct. at 2273.[11]

Although this court is not strictly bound by the decisions of sister circuits, such decisions are owed "great weight and precedential value." *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001); *see also Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) ("[W]e accord great weight to the decisions of our sister circuits when the same or similar issues come before us"); *Mayer v. Spanel Int'l Ltd.,* 51 F.3d 670, 675 (7th Cir.1995) ("We do not create conflicts among the circuits without strong cause."). This practice is "more than a mere

[11] CSP's attempt to brush these pronouncements aside as "mere dicta" is unavailing. Record at 10. While not technically binding, courts "do not treat considered dicta from the Supreme Court lightly." *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996); *see also Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) ("we do not blandly shrug [Supreme Court dicta] off because they were not a holding."). Dicta from the Supreme Court is accorded "more weight than other judicial dicta as a prophecy of what the Court might hold." *Dahle v. Kijakazi*, 62 F.4th 424, 428 (8th Cir. 2023); *see also Cerro Metal Prod. v. Marshall*, 620 F.2d 964, 978 (3d Cir. 1980) ("A judicial dictum may have great weight").

courtesy" in light of the strong federal interest in maintaining "uniformity and predictability of outcome." *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 278 (6th Cir. 2010). Indeed, "[a]ny other rule would lead to confusion and injustice" by creating inconsistency in the application of federal law and encouraging forum shopping. *Warren Bros. Co. v. City of New York*, 187 F. 831 (2d Cir. 1911).

These considerations are especially salient where, as here, the possibility of a nationwide injunction threatens to effectively nullify other circuits' rulings upholding the WTR.[12] *See, e.g., New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020) ("issuing a nationwide injunction may in effect override contrary decisions from co-equal and appellate courts"). Were this allowed, a litigant seeking to overturn well-settled and previously litigated regulations need only find a single circuit that has yet to address the issue (a near certainty) and petition a district court within that circuit to issue a nationwide injunction under the more lenient *Loper Bright* standard. Such a scenario would circumvent the intent of *Loper Bright* to honor prior cases decided under *Chevron*. *See Loper Bright*, 144 S.Ct. at 2273 ("we do not call into question prior cases that relied on the *Chevron* framework").

In limiting its decision, the *Loper Bright* Court emphasized the need to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Id.* at 2247. Additionally, this fundamental principle of *stare decisis* is "at [its] acme . . . where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Here, reconsidering the settled interpretation of the WTR would open the door to the precise "erratic[

[12] Under 5 U.S.C. § 706(2), courts are required to "hold unlawful and set aside" agency action it deems to be invalid. Interpreting this language, district courts routinely award nationwide injunctive relief under the APA. *See, e.g. District of Columbia v. U.S. Dep't of Agriculture*, 444 F. Supp. 3d 1, 52 (D.D.C. 2020) ("nationwide injunctive relief is sought and granted on the merits in APA cases all the time").

]" change in law the Court sought to avoid and upset the reliance interests of millions of parties. Water transfers are foundational to U.S. infrastructure, facilitating essential water distribution for municipalities, agriculture, and industry. *See, e.g., Catskill III*, 846 F.3d at 503 ("Many of the largest U.S. cities draw on water transfers to bring drinkable water to their residents"). Indeed, "[m]any large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins." 73 Fed. Reg. at 33698. Thousands of regulated entities and millions of citizens have ordered their affairs around the WTR framework. Undermining this well-litigated and settled regulation would disrupt the expectations of these parties, harming stakeholders who have invested heavily based on established regulatory interpretations. This would be "a serious jolt to the legal system" and weighs heavily against reconsideration. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 357 (Roberts, C. J., concurring in judgment); *see also Loper Bright*, 144 S.Ct. at 2270 (noting that "reliance on [a] decision" weighs against reconsideration).

b. Even if the legality of the WTR merits reconsideration, the WTR is a validly promulgated rule pursuant to EPA's authority under the CWA.

The CWA prohibits the "discharge of a pollutant" by any person except as in compliance with the NPDES requirements of § 402.[13] *See* 33 U.S.C. §§ 1311(a), 1342. Section 502(12) of the Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

The WTR exempts "water transfers" from the NPDES program. 40 C.F.R. § 122.3(i). A "water transfer" is an activity that "conveys or connects waters of the United States" without

[13] The NPDES program requires anyone wishing to discharge pollutants from a point source into the nation's waters to first obtain a permit, the conditions of which must assure compliance with water quality standards. *See* 33 U.S.C. § 1342(a)–(c).

subjecting the transferred waters to an "intervening industrial, municipal, or commercial use." *Id*. The exemption reflects EPA's longstanding position that NPDES pollutants are only "added" when they are "introduced into water from the 'outside world' by a point source." 73 Fed. Reg. at 33701. Thus, the legality of the WTR hinges on whether the movement of pollutants between waterbodies vis-à-vis a water transfer constitutes an "addition" under § 502(12). The CWA's structure, emphasis on cooperative federalism, supporting caselaw, and legislative history all indicate that it does not.

1. The CWA's structure and emphasis on cooperative federalism indicate that Congress did not intend to subject water transfers to NPDES regulation.

When interpreting a statute, a court "begin[s] by analyzing the statutory language, assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The words of a statute must "be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016). "Where a statute's text is ambiguous, relevant legislative history, along with consideration of the statutory objectives, can be useful in illuminating its meaning." *United States v. E.I. Dupont De Nemours and Co., Inc.*, 432 F.3d 161, 169 (3d Cir. 2005).

The Supreme Court has only twice had occasion to interpret the term "addition" under the CWA. *See South Florida Water. Mgmt. Dist. v. Miccosukee Tribe of Indians* ("*Miccosukee*"), 541 U.S. 95 (2004); *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* ("*LA Flood Control"*), 568 U.S. 78 (2013). In *Miccosukee*, the Court held that there is no "addition" unless a discharge occurs between "meaningfully distinct water bodies." 541 U.S. at 112. Similarly, in *LA Flood Control* the Court held that no "addition" occurs when water flows "from an improved portion of a navigable waterway into an unimproved portion of the

very same waterway." 568 U.S. at 83. Every Court of Appeals to address whether a water transfer constitutes an "addition" has determined that the term "addition" is at least ambiguous as to whether pollutants must be "added" from the outside world to trigger NPDES requirements.[14] Given this consensus, the CWA's plain text is not dispositive as to whether water transfers constitute an "addition."

While the CWA's plain text fails to provide an answer, the Act's statutory structure and emphasis on cooperative federalism indicate that the movement of pollutants via water transfers does not constitute an "addition." The CWA "joined the [EPA] and the fifty states in a delicate partnership" to eliminate water pollution throughout the United States. *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1284 (5th Cir. 1997). Under this scheme, states may become authorized to run their own NPDES program, subject to EPA approval and oversight. *See* 33 U.S.C. §§ 1314(i)(2), 1342(b)–(c). The priorities of this partnership are reflected in the Act's Congressional declaration of goals and policies, which expressly seeks to preserve the states' "primary responsibilities and rights" to abate pollution, 33 U.S.C. § 1251(b), including their traditional prerogatives to "plan the development and use (including restoration, preservation, and enhancement) of . . . water resources," *id.*, and to "allocate *quantities* of water within [their] jurisdiction." 33 U.S.C. § 1251(g) (emphasis added). These provisions do not

[14] *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) ("the language of the statute permits either construction"); *National Wildlife Fed'n v. Consumers Power Co*., 862 F.2d 580, 584 (6th Cir. 1988) ("EPA's definition of 'added' as the introduction of a pollutant . . . from the outside world is a permissible construction . . . [and] there are no compelling indications . . . that such a construction is wrong."); *Friends I,* 570 F.3d at 1277 ("[t]here are two reasonable ways to read the § 1362(12) language 'any addition of any pollutant....'"); *Catskill III,* 846 F.3d at 519 ("Congress did not . . . speak directly to . . . whether NPDES permits are required for water transfers. The Act is therefore silent or ambiguous as to this question...."); *but see Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1298 (1st Cir. 1996) (there is nothing in the statute evincing a Congressional intent to distinguish between "unrelated" water bodies and related or "hydrologically connected" water bodies).

"limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720–21 (1994). They are, however, indicative of Congress's intent to avoid unnecessary interference with state water allocation decisions.

The contours of this partnership are further illustrated by the scope and limits of the NPDES program. The NPDES program applies only to "point source" pollution, defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Non-point source pollution, chiefly runoff, is . . . a serious water quality problem, but the NPDES program does not even address it." *Friends I*, 570 F.3d at 1226–27. Instead, the CWA leaves regulation of nonpoint source pollution primarily to the states. *See Cnty. Of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 175 (2020) ("as to . . . nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States."). While EPA's involvement in these efforts is limited, EPA may approve grants for state nonpoint source pollution control projects. *See* 33 U.S.C. §§ 1288(f), 1329(h). Additionally, section 304(f) of the CWA requires EPA to issue informational guidelines for the identification, evaluation, and control of nonpoint source pollution. *See* 33 U.S.C. § 1314(f). Notably, this section specifically addresses water management activities: "The Administrator . . . shall issue to . . . the states . . . information including . . . processes, procedures, and methods to control pollution resulting from . . . changes in the *movement, flow or circulation of any navigable waters* . . . including changes caused by the construction of . . . *channels, causeways, or flow diversion facilities*." 33 U.S.C. § 1314(f)(2)(F) (emphasis added).

This statutory structure and context indicate that interpreting "addition" to require NPDES regulation of water transfers would upset the "delicate partnership" created by the CWA.

Save the Bay, 556 F.2d at 1284. When the WTR was issued, there were "thousands of water transfers currently in place in the United States" which "numerous States, localities, and residents [were] dependent" upon for use as both municipal drinking water and irrigation for agriculture. 73 Fed. Reg. at 33698–99. Requiring NPDES permits for every such transfer would impose a significant permitting burden upon this "integral component[] of U.S. infrastructure," *id.*, and interfere with the states' traditional role in "allocat[ing] quantities of water within [their] jurisdiction." 33 U.S.C. § 1251(g).[15] Courts accordingly have recognized that EPA's "hands-off approach to water transfers aligns with the CWA's emphasis on cooperative federalism." *South Side Quarry v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022) (quoting *Catskill III*, 846 F.3d at 502).

Section 304(f) of the CWA also evinces Congress' intent to leave pollution issues caused by water transfers for the states to address under their nonpoint source programs. To be sure, § 304(f) does not "explicitly exempt" a discharge otherwise subject to the NPDES program from the permit requirements. *Miccosukee*, 541 U.S. at 106. Nonetheless, the placement of § 1314(f) in a provision that generally "concerns nonpoint sources," *id.*, supports the view that Congress intended for pollution caused by water transfers to be handled outside the NPDES program. Numerous other circuit courts have also made this inference. *See Consumers Power Co.*, 862 F.2d at 588 (noting that § 304(f) supports the view that "water quality changes caused by the

[15] It is perhaps for these reasons that almost every state with an authorized NPDES program exempts water transfers from regulation. *See* 73 Fed. Reg. at 33699 ("Pennsylvania is the only NPDES permitting authority that regularly issues NPDES permits for water transfers"); *see also Catskill III*, 846 F.3d at 529 (noting that subjecting water transfers to the NPDES program "could cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States, and that obtaining an NPDES permit and complying with its conditions could cost a single water provider hundreds of millions of dollars").

existence of dams and other similar structures were intended to be regulated under the 'nonpoint source' category of pollution") (citing *Gorsuch*, 693 F.2d at 177).

These intertwined provisions relating to nonpoint source pollution and cooperative federalism demonstrate that exempting water transfers from NPDES regulation does not lead to an absurd result. It is not absurd to effectuate Congress' desired statutory scheme.[16] Nor does exempting water transfers frustrate the Act's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). After all, that is just one of the Act's goals, another of which is to preserve the state's traditional prerogative to "allocate *quantities* of water within [their] jurisdiction." 33 U.S.C. § 1251(g) (emphasis added). Even if regulating water transfers under the NPDES program would be a more effective means of reducing pollution, "the question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended[.]" *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).

Lastly, this reading of the CWA is consistent with recent Supreme Court guidance on how courts should interpret the CWA's ambiguous provisions. In *Sackett v. EPA*, the Court stated that "Congress [must] enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power[.]" 598 U.S. 651, 679 (2023). Here, subjecting water transfers to NPDES regulation would "significantly alter the balance between federal and state power," and Congress did not use "exceedingly clear language" indicating that it wished to do so. *Id*. As discussed above, Congress has indicated just the opposite, specifically mentioning water transfer activities in the context of nonpoint source pollution with respect to which

[16] *See Catskill III*, 846 F.3d at 517 ("[e]xempting water transfers from the NPDES program does not . . . lead directly to a result so absurd it could not possibly have been contemplated by Congress").

"Congress intended to leave substantial responsibility and autonomy to the States." *Maui*, 590 U.S. at 174. Thus, interpreting "addition" to require regulation of water transfers under the NPDES program would be inconsistent with the CWA's overall statutory scheme and purpose.

2. The CWA's legislative history indicates that Congress did not intend to subject water transfers to the NPDES program.

First, the legislative history of § 101(g) reveals that "[i]t is the purpose of this [provision] to ensure that State [water] allocation systems are not subverted." 3 CONGRESSIONAL RESEARCH SERV., U.S. LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT AMENDMENTS OF 1977, at 532 (1978). This shows that the 1977 Congress recognized that many states had existing water allocation systems and did not intend for other provisions of the CWA to disrupt those systems.

Second, the Act's legislative history discusses water flow management activities only in the context of nonpoint source regulation. In discussing § 304(f), the House Committee Report noted that it "expect[ed] [EPA] to . . . gather[ ] and distribut[e] . . . the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from [ ] nonpoint sources [such] as . . . *natural and manmade changes in the normal flow of surface and ground waters*." H.R. Rep. No. 92–911, at 109 (1972), *reprinted in* 1 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 796 (emphasis added). This indicates that under the CWA, water flow management was meant to be an area where EPA would provide technical guidance to the states, rather than an area that would be regulated under § 402.

Lastly, the legislative history surrounding CWA § 208 indicates that Congress generally did not intend a wholesale transfer of responsibility for water quality away from state water resource agencies to a NPDES authority. The House Committee report for § 208 recognizes that

"in some States[,] water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality." H.R. Rep. No. 92–911, at 96 (1972), *reprinted in* 1 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 783 (1973). To "avoid duplication . . . a State which has an approved [NPDES program] . . . and which has a program for water resource allocation should continue to exercise the primary responsibility in *both of these areas* and thus provide a balanced management control system." *Id*. (emphasis added).

This report makes clear that Congress did not intend for the NPDES program to supplant existing water allocation authorities. Instead, the existing state program was meant to work in concert with the new NPDES authority to ensure a "balanced management control system." *Id.* This consideration is especially relevant where, as here, the state at issue does have an authority responsible for allocating water resources and stream flow. *See* Record at 4 ("Under an agreement with the State of New Union, Highpeak is prohibited from using the tunnel unless the state determines that water levels in Cloudy Lake are adequate . . .").

3. EPA's longstanding and consistent interpretation of the term addition is entitled to significant respect from this Court.

Even without *Chevron*, this Court should accord great weight to EPA's interpretation. The Supreme Court stated in *Loper Bright* that courts exercising their "independent judgment in determining the meaning of statutory provisions" may continue to seek aid "from the interpretations of those responsible for implementing particular statutes." 144 S.Ct. at 2262. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and "interpretations issued contemporaneously with the statute at issue" that have "remained consistent over time, may be especially useful in determining the statute's meaning." *Id.* (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140

(1944)). EPA's consistent interpretation of "addition" with regard to water transfers deserves *Skidmore* deference. Throughout the CWA's nearly fifty-year history, "water transfers have never been subject to a general NPDES permitting requirement." *Catskill III*, 846 F.3d at 525. Indeed, this practice of "not issuing NPDES permits [ ] has prevailed for decades without Congressional course-correction of any kind." *Id.* at 516. "Addition" is also a general term, undefined by the statute. Partly for this reason, courts have accorded substantial discretion to EPA in interpreting the term. *See Gorsuch*, 693 F.2d at 175 (concluding that Congress would have given EPA discretion to define "addition" had it expected the meaning of the term to be disputed); *Consumers Power*, 862 F.2d at 584–85 (agreeing with *Gorsuch* and noting that "EPA's construction is entitled to deference for the additional reason that the EPA is principally responsible for administering the NPDES system.").

The CWA's text, structure, and legislative history are replete with references to the Act's intent to embrace cooperative federalism. Since 1972, EPA has respected this intent by declining to regulate water transfers as part of the NPDES program, an approach which is neither absurd nor unreasonable. This Court should therefore affirm the district court's decision to uphold the WTR as a valid exercise of EPA's authority pursuant to the CWA.

IV. HIGHPEAK'S DISCHARGES ARE NOT EXEMPT UNDER THE WTR BECAUSE ADDITIONAL POLLUTANTS ARE INTRODUCED DURING THE TRANSFERS.

Exemptions from the CWA's permitting requirements "must be narrowly construed to achieve the [Act's] purposes[.]" *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007), *cert. denied,* 552 U.S. 1180 (2008). Highpeak has failed to meet its burden of demonstrating that its discharges qualify for exemption under the WTR. The WTR expressly excludes from its exemption "pollutants introduced by the water transfer activity itself to the

water being transferred." 40 C.F.R. § 122.3(i). Here, Highpeak's tunnel introduces additional pollutants, including manganese, iron, and TSS to water transferred from Cloudy Lake to Crystal Stream. Record at 4. Specifically, concentrations increase by 0.2 mg/L, 0.3 mg/L, and 2 mg/L, respectively as water from Cloudy Lake passes through the tunnel. *Id.* This is a textbook example of pollutants being "introduced" by a water transfer activity, disqualifying Highpeak's discharges from exemption under the WTR.

a. The WTR does not apply to pollutants introduced during a water transfer itself regardless of whether that introduction is the result of human activity or natural processes.

Highpeak erroneously argues that pollutants introduced by natural processes, such as erosion, do not trigger permitting requirements. Record at 11. This argument is inconsistent with the CWA's framework, which is concerned with the alteration of navigable waters by point sources, regardless of whether the pollutants originate from human activity or natural processes. *See* 33 U.S.C. § 1362(19) (defining "pollution," as any "man-made or *man-induced* alteration of the chemical, physical, biological, and radiological integrity of water" (emphasis added)). Courts have repeatedly emphasized that liability under the CWA focuses on the source of a discharge itself—not the intention behind or mechanism by which pollutants are introduced from the point source. *See, e.g., Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133, 1143 (10th Cir. 2005); *U.S. v. Earth Sciences, Inc.,* 599 F.2d 368, 374 (10th Cir. 1979).

For example, in *El Paso Gold Mines* the Tenth Circuit rejected the argument that the CWA penalizes only "active conduct by persons" and not "purely passive owners of a point source." 421 F.3d 1133, 1143 (10th Cir. 2005), *as corrected* (Oct. 21, 2005). It was "apparent," the court held, that the Act's liability sections "focus on the point of discharge, not the underlying conduct that led to the discharge." *Id*; *see also Earth Sciences*, F.2d at 374 ("the

regulatory provisions of the [CWA] were written without regard to intentionality . . . making the person responsible for the discharge of any pollutant strictly liable."). Point source owners are therefore liable for any discharge of pollutants that occurs on their land, "whether or not they acted in some way to cause the discharge." *El Paso Gold Mines*, 421 F.3d at 1145; *see also Puget Soundkeeper All. v. Cruise Terminals of Am., LLC,* 216 F. Supp. 3d 1198, 1213 (W.D. Wash. 2015) (holding that the owner of a port facility "may also be liable if it had sufficient control over the cruise terminal and knowledge of the alleged unpermitted discharges, even if it did not create the discharges itself").

Additionally, courts have consistently held that naturally occurring pollutants discharged through point sources are subject to the CWA's permitting requirements. *See, e.g., N. Plains Res. Council v. Fidelity Expl. & Dev. Co*., 325 F.3d 1155, 1162-63 (9th Cir. 2003) ("*Fidelity*") (holding that naturally occurring groundwater contaminants introduced into a freshwater river constituted "pollutants" under the Act); *Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 43–44 (5th Cir. 1980) (finding that naturally eroded materials discharged via man-made conveyances are pollutants under the CWA). Indeed, in *Fidelity*, the Ninth Circuit specifically rejected the notion that groundwater was not a pollutant because it was "unaltered" and "naturally occurring." *Fidelity*, 325 F.3d at 1162-63. Instead, the court held that "[i]t is the introduction of these contaminants, not their transformation by humans, that renders them pollutants." *Id*.; *see also Bang v. Lacamas Shores Homeowners Ass'n*, 707 F.Supp.3d 1013, 1023 (W.D. Wash. 2023) (holding that so long as a discharge is introduced by a "point source," whether the pollutants themselves are "artificial" or "natural" is "a distinction with[out] legal significance under the CWA"). Contrary to Highpeak's contention, it would be unreasonable to construe the term "introduces" differently in the context of the WTR, which operates solely as an exemption

to the typical permitting requirements imposed by the CWA. *Cf. United States v. Castleman*, 572 U.S. 157, 174 (2014) ("[T]he presumption of consistent usage [is] the rule of thumb that a term generally means the same thing each time it is used") (Scalia, J., concurring).

Highpeak's argument also ignores the plain language of the WTR and relevant case law. The rule uses the term "introduced" without any qualification. *See* 40 C.F.R. § 122.3(i). It would therefore be improper to impart to the term some unexpressed meaning, especially given that exemptions from the CWA's permitting requirements "must be narrowly construed to achieve the [Act's] purposes." *City of Healdsburg*, 496 F.3d at 1001. The only two cases as of date to consider the exception to the WTR have concluded that pollutants added through natural processes during a water transfer fall outside the WTR exemption because they were introduced by the water transfer system itself. *See Kai v. County of Kaua'i,* 2023 WL 3981422 (D. Haw. 2023); *Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1108 (D. Haw. 2019).

For example, in *Na Kia'i Kai v. Nakatani*, the court held that the WTR did not apply where a defendant used a system of "earthen, unlined canals and ditches" to drain water from wetlands for agricultural purposes, resulting in "pesticide-laden sediment" being "added to the water flow during the transfer." *Na Kia'i Kai,* 401 F. Supp. 3d at 1100, 1108 (internal quotations omitted). The fact that pollutants were introduced via natural processes—groundwater movement and soil erosion—was immaterial to the court's analysis. *Id.* So too here. The pollutants at issue would not reach Crystal Stream but for the existence of Highpeak's tunnel, a point source under the CWA.[17] Record at 3-4. This is enough to trigger the CWA's permitting requirements. Thus,

[17] *See* 33 U.S.C. § 1362(14) (defining point source to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, *tunnel* . . .") (emphasis added).

the district court correctly concluded that Highpeak's discharges introduce pollutants to the receiving water and are not exempt under the WTR.

b. Even if the WTR is ambiguous, EPA's interpretation of its own regulation warrants judicial deference.

The EPA's interpretation of the WTR, as articulated in the preamble to the final rule, makes clear that the regulation does not encompass water transfer activities like Highpeak's—those that introduce pollutants into the transferred water. 73 Fed. Reg. at 33705 ("where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required."). EPA emphasized 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." *Id*. This interpretation is entitled to judicial deference under the principles established in *Auer v. Robbins*,[18] and reaffirmed in *Kisor v. Wilkie*.[19]

Judicial deference to an agency's interpretation of its own regulations applies where the regulation is "genuinely ambiguous." *Kisor*, 588 U.S. at 573. The interpretation must also be reasonable and within the "zone of ambiguity" identified by the court after exhausting its interpretive tools. *Id*. at 575-76. Further, the interpretation's "character and context" must justify giving it "controlling weight." *Id.* at 576. The Supreme Court in *Kisor* outlined specific criteria for determining when judicial deference is appropriate. *Id*. at 576-77. First, the interpretation must be "authoritative," reflecting the agency's "official" stance, rather than an "ad hoc" or informal statement. *Id*. at 577. The interpretation must "emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id*. Second, the interpretation must invoke the agency's "substantive expertise." *Id*. Third, the interpretation must

[18] 519 U.S. 452 (1997).
[19] 588 U.S. 558 (2019).

reflect the agency's "fair and considered judgment" and avoid "post hoc rationalizations" or interpretations that "unfair[ly] surprise" regulated parties. *Id*. at 579 (emphasis removed).

The Supreme Court's recent decision in *Loper Bright* did not alter this standard. 144 S.Ct. 2244 (2024). While *Loper Bright* overruled *Chevron* regarding judicial deference to agency interpretations of ambiguous statutes, it did not disturb the validity of *Auer* deference, under which courts must defer to agencies' interpretations of their own regulations. Justice Kagan, in her dissent in *Loper Bright*, highlighted that the Supreme Court recently declined to overrule *Auer*, which remains binding precedent. *Loper Bright*, 144 S.Ct. at 2306-07 (Kagan, J., dissenting). Moreover, the *Loper Bright* majority cited *Kisor* multiple times without suggesting any intent to overturn its framework. *See* 144 S.Ct. at 2261, 2262, 2267, 2268. Since *Loper Bright*, every lower court reviewing agency interpretations of their own regulations has relied on *Auer* and/or *Kisor*.[20] These precedents remain authoritative and binding.

Applying the *Kisor* framework here, the EPA's interpretation of the WTR is entitled to "controlling weight." *Kisor*, 588 U.S. at 576. EPA set forth its interpretation in the preamble to the final WTR, 73 Fed. Reg. at 33705, an "authoritative" expression of its "official opinion." *Kisor*, 588 U.S. at 577.[21] This interpretation also implicates EPA's substantive expertise, as administering the NPDES program, to which the WTR is an exemption, falls squarely within the scope of EPA's authority. *See* 33 U.S.C. § 1342(a). Finally, EPA's interpretation reflects a "fair

[20] *See, e.g., United States v. Haggerty*, 107 F.4th 175, 182-183 (3rd Cir. 2024); *Duke Energy Progress, LLC., v. FERC*, 106 F.4th 1145, 1154 (D.C. Cir. 2024); *Love v. McDonough*, 106 F.4th 1361, 1368 (Fed. Cir. 2024); *Rivera v. Garland*, 108 F.4th 600, 606 (8th Cir. 2024); *Federal Trade Commission v. Walmart, Inc.*, 2024 WL 3292800, *6 (N.D. Ill. 2024); *McCoy v. Biomat USA, Inc.*, 2024 WL 3594627, *5 (S.D. Ind. 2024); *Short v. New Jersey Department of Education*, 2024 WL 3424729, *10 (D.N.J. 2024).

[21] *See, e.g.,* Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1261 (2016) (features of a regulation's statement of basis and purpose "make the statement part and parcel of the agency's act of rulemaking, [and] also give the statement an inherent authority.").

and considered judgment" because it has remained consistent since the WTR's promulgation in 2008. The agency has never revised the WTR nor suggested any change in its interpretation.

The district court correctly concluded that Highpeak cannot shield itself from liability under the WTR. EPA's long-standing interpretation, entitled to judicial deference, supports the conclusion that Highpeak's discharges are subject to NPDES permitting requirements under the CWA because they introduce pollutants to the transferred water.

CONCLUSION

For the foregoing reasons, this Court should dismiss CSP's claims for lack of standing and untimeliness. Alternatively, this Court should affirm the district court's judgment on the validity and applicability of the WTR.