Non Measuring Brief
Team 6

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CRYSTAL STREAM PRESERVATIONISTS

Plaintiff-Appellant-Cross-Appellee

v.

HIGHPEAK TUBES, INC.

Defendants-Appellee-Cross Appellant

-and-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendants-Appellee-Cross Appellant

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

Brief of Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered decisions and orders on motions to dismiss in case No. 24-CV-5678. The District Court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 appeals of agency action and 28 U.S.C. § 1331 federal question. Crystal Stream Preservationists, Inc. ("CSP"), the United States Environmental Protection Agency ("EPA") and Highpeak Tubes, Inc. ("Highpeak"), each filed timely Notices of Appeal pursuant to Fed. R. App. P. § 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Dismissal of a case is final and thus appealable. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (noting that "denial of a motion to dismiss is conclusive.").

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule ("WTR")?

II. Did the District Court err in holding that CSP timely filed the challenge to the WTR?

III. Did the District Court err in holding that the WTR was a valid regulation promulgated pursuant to the Clean Water Act ("CWA")?

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

STATEMENT OF THE CASE

I. Origins of the Tunnel.

Highpeak has owned and operated a recreational tubing company on Crystal Stream in Rexville, New Union for the past 32 years. (R-4). Highpeak owns 42 acres of land in Rexville; the southern portion of its land runs along Crystal Stream and the northern boundary abuts Cloudy

Lake. *Id*. In 1992, the State of New Union granted permission for Highpeak to construct a tunnel connecting Cloudy Lake to Crystal Stream. *Id*. Highpeak's use of the tunnel is conditioned on the State of New Union determining the water levels in Cloudy Lake are adequate to release water, which typically occurs from spring through late summer due to seasonal rains. *Id*. When in operation, Highpeak utilizes the tunnel to transfer water from Cloudy Lake to Crystal Stream to enhance Crystal Stream's flow for tubing recreation. *Id*. However, New Union has deferred the evaluation and authorization of National Pollution Discharge Elimination System ("NPDES") permitting to the EPA. (R-4).

Highpeak's tunnel is constructed through rock; some of the tunnel is lined with iron pipe while the rest of the tunnel is unlined and thus exposed to the natural elements. (R-4). Because a portion of the tunnel is exposed to natural elements, it deposits .02 mg/L of iron, .003 mg/L of manganese, and 2 mg/L of total suspended solids ("TSS") into the water flow during water transfers. (R-5). Relative to levels at intake, Highpeak's tunnel increases concentrations of these three containments by 2-3% by the time water outfalls. *Id*. Highpeak's operation of the tunnel has remained consistent and unchallenged since its initial construction until CSP filed its Complaint. (R-4).

II. Discovery of the Contamination.

CSP formed as a not-for-profit corporation on December 1, 2023. (R-4). CSP's stated purpose is "to protect [Crystal Stream] from contamination resulting from industrial uses and illegal transfers of polluted waters." (R-6). CSP is a membership organization with thirteen members who all live in Rexville, two of whom own land along Crystal Stream. (R-4). All but one of CSP's members "have lived in Rexville for more than 15 years," yet none have filed challenges to Highpeak's discharge in their individual capacities. *Id*. Jonathan Silver is the only member of CSP who has moved to Rexville within the past six years, arriving in August of 2019.

(R-16). Shortly after its formation, CSP's members informed Johnathan Silver of Highpeak's discharge into Crystal Stream. *Id*. Jonathan Silver "joined CSP to try to stop this discharge." (R-14, 16). One of CSP's first actions as an organization was to send a notice of intent to sue ("NOIS") letter to Highpeak, the New Union Department of Environmental Quality, and the EPA on December 15, 2023. (R-4).

III. Procedural Posture.

CSP's NOIS alleged that Highpeak's tunnel constitutes a CWA point source which regularly discharges pollutants into Crystal Stream without an NPDES permit. (R-4). All Parties have stipulated that both Cloudy Lake and Crystal Stream are waters of the United States ("WOTUS"). (R-4-5). CSP's NOIS alleges that Highpeak's tunnel improperly introduces iron, manganese, and TSS pollutants during the water transfer, resulting in Crystal Stream becoming polluted. (R-5). Highpeak responded to CSP on December 27, 2023, asserting that it did not need to respond to the NOIS on the merits, that the WTR exempts Highpeak from needing an NPDES permit for its water transfer activities, and that a "'natural' addition of pollutants during the transfer did not bring the discharge outside the scope of the WTR's" NPDES permit exception. *Id*.

CSP filed its Complaint on February 15, 2024, restating its NOIS allegations. (R-5). CSP's Complaint contained a citizen suit claim against Highpeak and an Administrative Procedures Act ("APA") claim against the EPA. *Id*. CSP asserts that the WTR is an invalid promulgation, is inconsistent with the CWA, and that, even if the WTR is valid, Highpeak's water transfer requires an NPDES permit. *Id*.

Highpeak and the EPA moved to dismiss CSP's challenge on three grounds. (R-5-6). First, they allege that CSP lacks standing. *Id*. Second, they allege that CSP is time barred. *Id*. Finally, they assert that the WTR is a proper promulgation. *Id*. However, the EPA joined CSP in urging the court to require NPDES permitting for Highpeak's particular discharge of pollutants while

Highpeak asserts that its discharge is merely a water transfer exempt from NPDES permitting. (R-6).

Despite motions being fully briefed by April of 2024, the District Court granted a stay requested by CSP to—

> [refrain] from ruling on the pending motions given two cases pending before the Supreme Court, which, CSP argued, could provide additional legal foundation for CSP's claims: *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024).

(R-6). Once the Supreme Court had ruled upon those cases, the District Court granted "the motions to dismiss the challenge to the WTR but [denied] the motion to dismiss the citizen suit against Highpeak." *Id*.

SUMMARY OF THE ARGUMENT

The District Court erred in finding CSP had standing to bring their challenge to the WTR because CSP does not meet the heightened standing requirements for organizations. To possess standing, CSP must first demonstrate that they, or their members, have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("*DOW*"). Second, CSP must show that their demonstrated injury in fact was caused by the EPA's conduct in promulgating the WTR. *Id.* Third, CSP must prove that it is likely, not merely speculative, that CSP's injury is redressable by a favorable decision by the Court. *Id.* at 561.

The aesthetic injury that CSP alleges does not meet the bar for such injuries set by precedent favorable to environmental plaintiffs. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) ("*FOE*"). In CSP's case, the organization provided two affidavits which state that CSP informing their members of possible pollution led to the members ceasing to use Crystal Stream recreationally. CSP's evidence starkly contrasts with the evidence from *FOE* where it was proven that the defendant was illegally dumping mercury which prohibited members

of the public from engaging in recreational activities and was causing members of the public economic harm by devaluing their properties. *Id*. at 184.

CSP fails to meet the higher bar required for organizational standing. *Food and Drug Administration v. Alliance for Hippocratic Medicine* ("*Hippocratic Medicine*"), 602 U.S. 367, 381 (2024). Article III standing requires a higher bar for organizations seeking to find out whether government action is illegal. U.S. Const. art. III, sec. 2.; *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982). CSP must meet the high bar of demonstrating that they, or their members, have suffered a concrete and particularized injury that is not merely conjectural or hypothetical. *DOW*, 504 U.S. at 561. CSP has simply provided insufficient evidence to causally link the WTR allowing Highpeak's water transfer to damage to CSP and its members.

CSP fails to meet the standing bar required for third party plaintiffs challenging regulations. *Hippocratic Medicine*, 602 U.S. at 383 (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984)). CSP needs to demonstrate that the discharge is actually preventing their members from enjoying the stream, rather than CSP's warnings merely causing unfounded fear and apprehension. This Court should not reward CSP with standing for stirring up fear over unproven, conjectural claims that a beloved community recreation area is now dangerous. Instead, this Court should dismiss CSP's claim and only allow standing if CSP were to file a future claim that actually alleged concrete and non-conjectural injury caused by the WTR.

The District Court erred in holding that CSP timely filed their challenge to the WTR. CSP's claim against the WTR under the APA has a six-year statute of limitations. CSP relies on *Corner Post*, which CSP broadly interprets to assert that CSP's statute of limitations did not begin to toll until it was formed in 2023. *Corner Post,* 144 S.Ct. at 2450.

Corner Post does not give an unlimited statute of limitations to membership organizations. *North Dakota Retail Association v. Board of Governors of the Federal Reserve System* ("*NDRA*"), 55 F.4th 634, 637 (8th Cir. 2022), overturned by *Corner Post*, 144 S.Ct. at 2440 (holding that the singular store's, Corner Post, statute of limitations did not begin to run until formation). CSP is erroneous in asserting that its statute of limitations began to toll upon its advantageous formation when only one member can claim to be first 'injured' by the WTR within the past six years. CSP's members could have sued individually or formed to sue organizationally at any point once the WTR was promulgated as they all, except for Jonathan Silver, lived in Rexville within six years of 2008. Like the membership organization in *Corner Post*, the members of CSP did not timely file suit when they had the opportunity; instead, they sought out a single member with standing to piggyback on Silver's still active statute of limitations period, thereby providing the members of CSP with a second bite at the apple. *NDRA*, 55 F.4th at 638, 642.

Corner Post resolves a deep, old circuit split and should be interpreted narrowly. *Corner Post*, 144 S.Ct. at 2449 (noting that six circuits held that statute of limitations began upon final agency action). Due to *Corner Post* advancing an opinion of the overwhelming minority of the circuit split, this Court should carefully consider the consequences of the novel decision of extending *Corner Post* to apply to a non-profit, membership organization instead of a singular for-profit entity. *Herr*, which *Corner Post* relies upon, presents a strong argument against allowing CSP to argue its claim is timely. *Herr v. United States Forest Serv.*, 803 F.3d 809, 819-20 (2015). *Herr* promotes barring claims based on timeliness when "the right of action happened to accrue at the same time the final agency action occurred, because the plaintiff either became aggrieved at the time or had already been injured." The court in *Herr* even explicitly held that an environmental membership organization failed to bring a timely claim when it did not challenge an agency's

action within six years when seeking relief on behalf of its members. *Id*. at 820. Though *Corner Post* does not address environmental nonprofit plaintiffs, other circuits have also consistently held that the statute of limitations for environmental nonprofit plaintiffs begins upon final agency action. *See Izaak Walton League of Am., Inc. v. Kimbell* ("*Izaak*"), 558 F.3d 751, 759 (8th Cir. 2009). Finally, circuits have pointed out that overly permissive erosion of statute of limitations requirements will damage the concept of statutes of limitations in their entirety. *See Preminger v. Sec'y of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir. 2007). Thus, while the Supreme Court has recently created a narrow loophole in the statute of limitations for newly formed, single location business entities, it would be wrong and harmful to use this as an opportunity to extend the scope of the loophole in a manner novel to that of other circuits.

The District Court did not err in holding that the WTR was a valid regulation promulgated pursuant to the CWA. The CWA issues multiple mandates to the EPA in 33 U.S.C. § 1251. Accordingly, while the EPA is bound by its 33 U.S.C. § 1251(a) mandate to preserve the integrity of the nation's waters, the EPA is equally bound by its 33 U.S.C. § 1251(b) and (g) mandates to respect the authority of each state to manage their water resources. The WTR preserves water transfers as the primary responsibilities of the states but allows the EPA to step in to maintain the integrity of the nation's waters where water transfers transfer more than water. While the details of the WTR are not expressly authorized nor restricted by the CWA, other language of the CWA, the legislative history of the CWA, and case law all indicate that the WTR is a program which comports with the CWA by facilitating the EPA's 33 U.S.C. § 1251(a) mandate, subject to its 33 U.S.C. § 1251(b) and (g) mandates, via cooperative federalism. *See* 33 U.S.C. § 1314(f)(2)(F); *see also* H.R. Rep. No. 92-911, at 109 (1972); *see also PUD No. 1 of Jefferson County v. Washington*

Dep't of Ecology, 511 U.S. 700, 721 (1994); *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178-79 (D.C. Cir. 1982).

To interpret the CWA to require NPDES permits for all water transfers is facially untenable with the plain language of 33 U.S.C. § 1251(b) and (g) and creates patently absurd results. The state of New Union granted Highpeak's water transfer proposal subject to restraints; the EPA is bound to respect New Union's right to manage its water resources per 33 U.S.C. § 1251(b) and (g). Furthermore, water transfers are a common and "integral part of America's water-supply infrastructure" which would be severely disrupted should this Court read the CWA to require NPDES permits for each water transfer. *See Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 500 (2d Cir. 2017) ("*Catskill III"*) (also noting that requiring NPDES permits would be resource intensive and cost billions nationally). This absurdity is particularly compounded considering that even before the WTR was promulgated, it was a "matter of longstanding practice" for the EPA to not require NPDES permits for water transfers. *See* A Memorandum from Kenneth von Schaumburg, General Counsel for the EPA, et al. on the Agency Interpretation of the Applicability of the Clean Water Act to Water Transfers to Regional Administrators of the EPA, 2 (Aug. 5, 2005) ("Von Schaumburg Memorandum").

However, even if this Court does not find that the WTR facially comports with the CWA, the WTR is also valid because there is no special justification which would warrant overcoming *stare decisis*. Principals of *stare decisis* guide courts to avoid disturbing previously established principles of law. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). It is only appropriate to disturb *stare decisis* is when there is a sufficient "special justification" beyond mere changes to interpretive methodologies. *Loper Bright*, 144 S. Ct. 2244. While a high bar in and of itself, the already high burden to overcome *stare decisis* is exacerbated by additional factors that

enhance the weight of *stare decisis* here. *See Wagner v. PennWest Farm Credit, ACA*, 109 F.3d 909, 912 (3d Cir. 1997) (noting that effectuating a circuit split where there is currently a consensus strengthens *stare decisis*); *see also Kimble*, 576 U.S. at 470 (noting that where precedent interprets a statute, *stare decisis* is "superpowered.").

In determining whether a special justification is sufficient to overcome *stare decisis*, courts consider [i] the reasonability and workability of the precedent, [ii] the consistency of that precedent with developments, and [iii] the reliance interests in the precedent remaining. *Janus v. AFSCME*, 138 S. Ct. 2448, 2478-79, 201 L. Ed. 2d 924 (2018). Here, the WTR is [i] reasonable and workable because courts have consistently held it to be a reasonable and workable interpretation – if not the most reasonable interpretation – of the CWA. *See Catskill III*, 846 F.3d at 526; *see also The Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) ("*Friends I*"). The WTR is [ii] consistent with valid precedent, particularly when noting that CSP directs this Court to rely upon a moot line of cases. *See Friends I*, 570 F.3d at 1218 (noting that cases decided prior to the 2008 promulgation of the WTR lack precedential value). The WTR also has [iii] significant reliance interests in its maintenance because numerous critical water transfers would be upended by the WTR being struck, costing billions and extensively disrupting the existing water transfer network nationally. *Catskill III*, 846 F.3d at 529. Consideration of these factors fail to present a sufficient justification to overcome *stare decisis*, particularly when noting that *stare decisis* carries additional 'superpowered' weight in this matter.

However, even if this Court finds a sufficient special justification to be present, the EPA's interpretation that the WTR facially comports with the CWA is due significant respect. *Skidmore* directs courts to convey respect to agency interpretations proportional to that agency's "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 164 (1944). Here, the EPA's power to persuade

is immense because the WTR is the thoroughly reasoned, longstanding practice of environmental law specialists. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33703-33704 (Jun. 30, 2008) ("WTR Promulgation"). As such, *Skidmore* directs a high level of weight be given to the EPA's interpretation that the WTR facially comports with the CWA.

The District Court properly held that Highpeak requires an NPDES permit to operate their tunnel because Highpeak has introduced external pollutants into its water transfer. 33 U.S.C. § 1311(a) provides "the discharge of any pollutant by any person [is] unlawful." Discharge of a pollutant to navigable waters from a point source is in direct violation of the CWA. *Id.*; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1083 (9th Cir. 2019) ("*PCFFA*"). In order to lawfully discharge a pollutant into WOTUS, an NPDES permit is required. *Catskill III*, 846 F.3d at 502 (citing 33 U.S.C. § 1342 and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) ("*Miccosukee II*")).

The EPA has adopted the WTR, which possesses an exemption from NPDES permit requirements for certain discharges. However, the WTR exemption does not apply "where water transfers **introduce** pollutants to water passing through the structure into the receiving water." WTR Promulgation, 33705 (emphasis added). The EPA contends that an introduction of any pollutants, whether natural or unnatural, violates the WTR. Thus, Highpeak cannot continue their water transfer activities without an NPDES permit. However, Highpeak contends that natural erosion does not constitute introduction of pollutants per the WTR. Thus, the WTR exempts them from needing a NPDES permit to continue their water transfer activities. Since it is undisputed that Highpeak's tunnel deposits .02 mg/L of iron, .003 mg/L of manganese, and 2 mg/L of total

suspended solids ("TSS") into the water flow during water transfers via erosion, whether the WTR exempts Highpeak from permitting hinges on the definition of "introduce." *See* (R-5).

Because ambiguity exists, the EPA's reasonable interpretation of the WTR controls through *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* deference means that an agency's interpretation of its own regulation controls unless the interpretation is "plainly erroneous," "genuinely ambiguous," or completely "inconsistent with the regulation" as a whole. *See e.g*. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The EPA's reasonable reading of the WTR interprets "any pollutant" as that of both natural and unnatural contaminants. Thus, utilizing *Auer* deference, this Court must defer to the EPA's reasonable interpretation of the WTR.

Nevertheless, if this Court does not grant *Auer* deference to the EPA's interpretation of the WTR, *Skidmore* weight still applies. The EPA satisfies the *Skidmore* factors, reasonability, workability, consistency, developments, and reliance interests through its experienced and informed rationale. *Skidmore*, 323 U.S. at 140. "*Skidmore* instructs that 'the rulings, interpretations and opinions' of an agency may constitute 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Catskill III*, 846 F.3d at 509. The EPA has consistently and successfully argued that where any pollutant would not reach the WOTUS but-for a water transfer, an addition has occurred, requiring the proper permitting. *Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *see also PCFFA*, 945 F.3d at 1356-57. As such, even under *Skidmore*, the EPA's interpretation of the WTR is entitled to strong weight.

Thus, under either *Auer* deference or *Skidmore* weight, the EPA's interpretation of the WTR is controlling. Highpeak must obtain an NPDES permit for its water transfer activities due to the introduction, i.e., the addition, of pollutants from their tunnel to Crystal Stream which increases the concentration of contaminants, in direct violation of the WTR.

STANDARD OF REVIEW

The standard of review for a grant of motion to dismiss is *de novo*. *Shomo v. City of New York*, 579 F.3d 176, 183 (2nd Cir. 2009). Facts in a *de novo* motion to dismiss review are interpreted as true. *Tyler v. Hennepin Cnty*, 598 U.S. 631, 636 (2023). Dismissal per Fed. R. Civ. P. § 12(b) is appropriate if there is no "sufficient factual matter to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also* U.S. Const. art. III.

ARGUMENT

I. The District Court erred in finding that CSP has standing to bring their challenge to the WTR because CSP does not meet the heightened standing requirements for organizations.

The United States Constitution states: "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party." U.S. Const. art. III, sec. 2. The Supreme Court interprets Article III to require parties to meet certain requirements to achieve constitutional standing. *DOW*, 504 U.S. at 560-61. To possess standing, CSP must first demonstrate that they, or their members, have suffered an injury in fact, meaning "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. at 560 (internal citations omitted). CSP asserts that they have suffered an injury in fact because Highpeak's discharge creates cloudy conditions in Crystal Stream which have caused CSP members to refrain from engaging in recreational pursuits along the Stream. (R-14, 16). However, the record lacks concrete and particularized evidence demonstrating that CSP's injury is actual, rather than merely a hypothetical injury rooted in conjecture.

Second, CSP must show that their demonstrated injury in fact was caused by the EPA's conduct in promulgating the WTR and that it is "not ... th[e] result [of] the independent action of some third party not before the court." *DOW,* 504 U.S. at 560 (internal citations omitted). Third,

CSP must prove that it is likely, not merely speculative, that CSP's injury is redressable by a favorable decision by the court. *Id*. at 561. Therefore, the lack of record evidence that Crystal Stream is either cloudy or contains the pollutants above Highpeak's outfall casts doubt on whether Highpeak and the WTR are to blame for the aesthetic harm or whether this Court overturning the WTR will redress CSP's supposed injury. (R-4-5).

A. The aesthetic injury that CSP alleges does not meet the bar for such injuries set by precedent favorable to environmental plaintiffs.

CSP's standing rests on the aesthetic harm and obstruction of use that they claim is caused by the WTR's allowance of Highpeak's outfall. (R-7). However, CSP's claim does not meet the standard set by the Supreme Court in *FOE*. 528 U.S. at 167. In *FOE*, the Court held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id*. at 181-83 (where the environmental plaintiff provided affidavits that many members did not engage in recreational activities and that the economic value of their property was depleted by the discharge which was already held to violate regulations regarding industrial mercury). In CSP's case, the organization provides two affidavits which state that CSP informing their members of possible pollution led to the members ceasing to use Crystal Stream recreationally. (R-14 & 16). These affidavits are insufficient.

CSP's affidavits are nothing more than "mere general averments and conclusory allegations." *FOE*, 528 U.S. 184, citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (holding that, while the facts in a motion for summary judgment should be assumed most favorable to a non-moving party, that does not mean that general and conclusory evidence are sufficient to achieve standing). At the motion to dismiss stage, the facts in the complaint should be interpreted as true. *Tyler*, 598 U.S. at 636. However, even taking CSP's allegations as true, CSP

presents scant and conclusory evidence that Crystal Stream **may** be cloudier due to Highpeak's water transfer. (R-5). CSP's evidence starkly contrasts with the evidence from *FOE* where it was "undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed" prohibiting members of the public from engaging in recreational activities and was causing members of the public economic harm by devaluing their properties. *FOE*, 528 U.S. at 184. Yet here, CSP has presented scant evidence of the alleged injury resulting in concrete denial of recreational use or economic harm.

B. CSP fails to meet the higher bar required for organizational standing.

CSP cannot sue merely because they believe that the EPA's regulations are illegal. *Hippocratic Medicine*, 602 U.S. at 381. In fact, Article III standing requires a higher bar for organizations seeking to find out whether government action is illegal. *Valley Forge Christian College,* 454 U.S. at 487 (evaluating U.S. Const. art. III, sec. 2); *cf. Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (allowing review of a rule promulgated but not yet enforced). CSP must meet the high bar of demonstrating that they, or their members, have suffered a concrete and particularized injury that is not merely conjectural or hypothetical. *DOW*, 504 U.S. at 561.

According to Jonathan Silver's declaration, CSP recently notified Rexvillians of the supposed danger presented by Highpeak's discharge. (R-16). However, the discharge began in 1992 when Highpeak obtained a permit to construct the discharge tunnel in question, far before the promulgation of the WTR. (R-4). Until CSP notified its members of the pollution, said members had voiced no complaints, which indicates that the injury suffered by CSP's members stems from what they were told by CSP about Highpeak's discharge, not from the discharge itself. Furthermore, in failing to provide a control study of iron, manganese, and TSS levels of Crystal Stream, CSP has simply provided insufficient evidence to causally link Highpeak's water transfer to injury of CSP or its members. (R-5).

C. CSP fails to meet the standing bar required for third party plaintiffs challenging regulations.

"The [Article III] injury in fact requirement prevents the federal courts from becoming a 'vehicle for the vindication of the value interests of concerned bystanders.'" *Hippocratic Medicine*, 602 U.S. at 383 (discussing U.S. Const. art. III, sec. 2) (citing *Allen*, 468 U.S. at 756). Thus, CSP needs to demonstrate that the discharge is **actually** preventing their members from enjoying the stream, rather than CSP's warnings merely causing unfounded fear and apprehension.

"Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements." *Hippocratic Medicine*, 602 U.S. at 382 (citing *DOW*, 504 U.S. at 561-562). Thus, Highpeak has clear standing to challenge the EPA's regulation of its discharge, although Highpeak would still lose on the merits. However, "when . . . a plaintiff challenges the government's unlawful regulation (or lack of regulation) of **someone else**, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Hippocratic Medicine*, 602 U.S. at 382 (emphasis added) (citing *DOW*, 504 U.S. at 562). Here, CSP is an unregulated third-party,[1] but "causation and redressability ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *DOW*, 504 U.S. at 562. There is a higher standard to grant standing to unregulated parties like CSP because unregulated parties "have more difficulty establishing causation—that is, linking their asserted injuries to the government's regulation (or lack of regulation) of someone else." *Hippocratic Medicine*, 602 U.S. at 382 (citing *Clapper v. Amnesty Int'l*, 568 U.S. 398, 413-414 (2013)). In this case, CSP has presented scant evidence regarding pollutant levels and whether the discharge is even actually causing CSP's alleged injury and thus CSP lacks standing. (R-5).

[1] The WTR regulates Highpeak's discharge, not any action taken by CSP.

Unlike the plaintiffs in *Clapper*, CSP does not plead that it may one day become a regulated party. *Clapper*, 568 U.S. at 410 (holding that the plaintiffs had presented too little evidence that they would be impacted by government anti-terrorism actions). However, CSP is like the plaintiffs in both *Clapper* and *Hippocratic Medicine* in that CSP's complaint should be dismissed for lacking sufficient evidence that the WTR is at the root of the cloudiness and supposed pollution in Crystal Stream. *Hippocratic Medicine*, 602 U.S. at 386-93 (pleading, unsuccessfully, that the relaxing of medicine regulations would force the doctors to engage in actions that they morally objected to without providing any occurrences of forced behavior); *Clapper*, 568 U.S. 410-14. Therefore, this Court should at least dismiss this case without prejudice until such time as CSP has developed the record with sufficient evidence to plausibly link Highpeak's discharge to the downstream pollution that they allege.

CSP's reliance on the aesthetic injury and discouragement of recreational activity that allegedly occurred to its member Jonathan Silver is akin to the injury that Melody Stoops was able to achieve in buying enough phones to receive an illegal phone call. *Stoops v. Wells Fargo Bank, N.A.*, 197 F.Supp. 3d 782, 796-800 (W.D. Pa. 2016) (claim dismissed for lack of standing). The plaintiff in *Stoops* manufactured entry into the zone of interest protected by the statute in question by buying enough phones to greatly increase the likelihood that she would receive an illegal phone call from a creditor. *Id*. at 796. CSP engages in similar behavior by informing many Rexvillians of the supposed pollution shortly after forming and shortly before filing its claim in order to increase its chances of achieving standing. (R-14 & 16). This Court should not reward CSP with standing for stirring up fear over unproven, conjectural claims that a beloved community recreation area is now dangerous. Instead, this Court should dismiss CSP's claim and only allow standing if CSP

were to file a future claim that actually alleged concrete and non-conjectural injury caused by the WTR.

II. The District Court erred in finding that CSP timely filed its complaint as CSP delayed forming as an organization and then filing its complaint until beneficial precedent was created.

"[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Thus, CSP's claim against the WTR under the APA has a six-year statute of limitations. The WTR was promulgated in 2008, more than sixteen years ago. 40 C.F.R. § 122.3; *see generally* WTR Promulgation (promulgated on June 30th, 2008). However, CSP erroneously asserts that its claim is timely due to its formation on December 1, 2023. (R-8). CSP relies on *Corner Post*, which CSP broadly interprets to assert that CSP's statute of limitations did not begin to toll until it was formed. *Corner Post,* 144 S.Ct. at 2450.

A. *Corner Post* does not give an unlimited statute of limitations to membership organizations.

The litigation surrounding *Corner Post* is colored by the fact that that suit was initially brought by the North Dakota Retail Association ("NDRA"). *Corner Post*, 144 S.Ct. at 2448. A different organization brought suit against the regulation four months after it was initially promulgated. *NACS v. Board of Governors of FRS*, 746 F.3d 474 (D.C. Circuit 2014) (holding that the rule was reasonable). The NDRA, on its own, lacked standing to bring its suit as it was time barred. *NDRA*, 55 F.4th at 637, overturned by *Corner Post*, 144 S.Ct. 2440 (holding that the singular store's, Corner Post, statute of limitations did not begin to run until formation). The Supreme Court's majority opinion and concurrence only mention the Corner Post store in holding that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Corner Post*, 144 S.Ct. at 2450. CSP is erroneous in asserting that its statute of limitations

began to toll upon its advantageous formation when only one member can claim to be first 'injured' by the WTR within the past six years. (R-8).

CSP's members could have sued individually or formed to sue organizationally at any point once the WTR was promulgated as they all, except for Jonathan Silver, lived in Rexville within six years of 2008. (R-8). This Court should discerningly look upon CSP's advantageous time of formation. *Id*. It would be overbroad to interpret *Corner Post*, a narrow Supreme Court holding which only addresses the newly formed, singular for-profit entity's claim to a statute of limitations to challenge agency action beginning upon its formation. Instead, if CSP resembles any plaintiff in the *Corner Post* litigation, CSP resembles the NDRA, which the circuit court held to be time barred for failing to sue within six years of agency action. *NDRA*, 55 F.4th at 638, 642. Like the membership organization in *Corner Post*, the members of CSP did not timely file suit when they had the opportunity; instead, they sought out a single member with standing to piggyback on Silver's still active statute of limitations period, thereby providing the members of CSP with a second bite at the apple. *Id*. at 638, 642.

CSP's members, excluding Jonathan Silver, all could have sued within six years of the WTR's promulgation as Highpeak's activity has been consistent since the 1990s; therefore, Highpeak has assumably been constantly 'injuring' the members in the same way since then. (R-4). Furthermore, CSP seemingly had knowledge of the *Corner Post* case as it was not formed until the case was on the Supreme Court's docket and urged the District Court to refrain "from ruling on the pending motions given two cases pending before the Supreme Court, which CSP argued, could provide additional legal foundation for CSP's claims." (R-6). Therefore, because of the limited nature of *Corner Post* and the suspicious timing of CSP's formation and claim filing, this Court should dismiss CSP's claims as time barred. Even if this Court is concerned that Johnathan

Silver's valid individual standing would be undercut by denying CSP standing, it should be noted that Jonathan Silver could still file an independent claim, as the individual business entity in *Corner Post* did.

B. *Corner Post* resolves a deep, old circuit split and should be interpreted narrowly.

The Supreme Court notes that "[a]t least six Circuits now hold that the limitations period for facial APA challenges begins on the date of final agency action – e.g., when the rule was promulgated – regardless of when the plaintiff was injured." *Corner Post*, 144 S.Ct. at 2449 (internal citations omitted). However, in *Corner Post*, the majority sided with the Sixth Circuit in *Herr*, which held that "[w]hen a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings." *Id.*, (citing *Herr*, 803 F.3d at 820-822 (2015)). Therefore, due to *Corner Post* advancing an opinion of the overwhelming minority of the circuit split, this Court should carefully consider the consequences of the novel decision of extending *Corner Post* to apply to a non-profit, membership organization instead of a singular for-profit entity.

In fact, *Herr*, which *Corner Post* relies upon, presents a strong argument against allowing CSP to argue its claim is timely. *Herr* promotes barring claims based on timeliness when "the right of action happened to accrue at the same time the final agency action occurred, because the plaintiff either became aggrieved at the time or had already been injured." *Herr*, 803 F.3d at 819-20. Similarly, CSP's leadership and all of its members, save Jonathan Silver, could have brought claims within six years of the final promulgation of the WTR, yet they did not. (R-8).

The court in *Herr* even explicitly held that an environmental membership organization failed to bring a timely claim when it did not challenge an agency's action within six years when seeking relief on behalf of its members. *Herr*, 803 F.3d at 820 (noting that "[n]othing in the case

suggests that any member first became aggrieved after, rather than when, final agency action occurred.") (citing *Southwest Williamson County Community Ass'n v. Slater*, 173 F.3d 1022 (6th Cir. 1999)). Furthermore, in another environmental case, the Sixth Circuit held that "[m]echanical application, however, is generally the *sine qua non* of a statute of limitations, and while the plaintiffs conclusorily allege the malfeasance by the defendants, they do not articulate an equitable-tolling argument." *Sierra-Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997).

Though *Corner Post* does not address environmental nonprofit plaintiffs, other circuits, in addition to the Sixth, have also consistently held that the statute of limitations for environmental nonprofit plaintiffs begins upon final agency action. For example, in *Izaak*, the Eighth Circuit held that the statute of limitations does not continually restart due to unmet government action requirements; it begins upon the initial final action designating a lake as protected. *Izaak*, 558 F.3d at 759. The Eleventh Circuit also held that the statute of limitations on agency action begins on final agency action and does not restart with each day that the agency fails to commit a further action. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334-35 (11th Cir. 2006) (regarding habitat designation for endangered minnows). Thus, while *Corner Post* does not address environmental nonprofit plaintiffs, the cases that do consistently hold that the statute of limitations begins upon final agency action.

Finally, circuits have pointed out that overly permissive erosion of statute of limitations requirements will damage the concept of statutes of limitations in their entirety. In *Shiny Rock*, the Ninth Circuit points out that "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1363 (9th Cir. 1990) (rejecting the opportunity to hold in a way that would extend statute of limitations indefinitely). Furthermore,

in *Vincent Murphy Chevrolet Co.*, the Tenth Circuit emphasizes that "when conditions, such as a statute of limitations, are placed on laws waiving the sovereign immunity of the United States, '[t]hose conditions must be strictly observed and exceptions thereto are not to be lightly implied.'" *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 452 (10th Cir. 1985) (holding that it goes against congressional intent to extend statutes of limitations too permissively) (citing *Block v. North Dakota,* 461 U.S. 273, 287 (1983)). Additionally, in *Preminger*, the Federal Circuit asserts that "[t]here is no question that, as of that time, the regulation was in full force and effect and was operative. Moreover, were we to accept Mr. Preminger's continuing violation theory, there effectively would be no statute of limitations because the injury would always be ongoing." *Preminger*, 498 F.3d at 1272. Thus, while the Supreme Court has recently created a narrow loophole in the statute of limitations for newly formed, single location business entities, it would be wrong and harmful to use this as an opportunity to extend the scope of the loophole in a manner novel that of other circuits.

III. The District Court did not err in holding that the WTR was a valid regulation promulgated pursuant to the CWA.

The CWA restricts "the discharge of any pollutant by any person," without an NPDES permit. 33 U.S.C. § 1311(a). However, the WTR allows "[d]ischarges from a water transfer," without requiring a NPDES permit. 40 C.F.R. § 122.3(i). This is because "[a]n addition occurs . . . only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Friends I*, 570 F.3d at 1217. However, NDPES permits are still required if additional "pollutants [are] introduced by the water transfer activity itself." 40 C.F.R. § 122.3(i). CSP challenges the WTR for permitting some water transfer activity that does not require a NDPES permit.

For an agency rule to violate the APA, a court must determine that the rule in question is either "(A) arbitrary, capricious, an abuse of discretion," or "(C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706. The CWA broadly directs the EPA to promulgate rules which "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," subject to the preexisting "authority of each State." 33 U.S.C. § 1251(a)-(b) and (g). The WTR is compliant with 5 U.S.C. § 706(c) because it was promulgated in compliance with the broad grant of authority from 33 U.S.C. § 1251(a). The WTR was promulgated to facilitate such an environmental program, subject to other internal limits of the CWA. Furthermore, the WTR complies with 33 U.S.C. § 1311(a) because 40 C.F.R. § 122.3(i) only exempts water transfers that do not introduce pollutants to national waters.

A. The WTR is valid because a plain text reading of the CWA indicates that the EPA is bound to preserve state's rights to manage their local water resources.

Though the CWA does not directly speak to the authority of the EPA to promulgate the WTR, statutory interpretation of the CWA indicates that a water transfer program does not require NPDES permitting to be compliant with the CWA. While the EPA is directed to uphold its 33 U.S.C. § 1251(a) directive, Congress has also explicitly cabined that directive by instructing the EPA to "recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources," 33 U.S.C. § 1251(b), and to "[not supersede] the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(g). The CWA anticipates "cooperative federalism" between the states and the federal government in the management of the nation's water resources. *See New York v. United States*, 505 U.S. 144, 167 (1992). As such, 33 U.S.C. § 1251(b) and (g) provide clear cooperative federalism limitations upon the EPA. Any rule promulgated by the EPA **must** simultaneously

consider both the integrity of national waters and state's rights to manage their local water resources, lest the EPA violate its own Congressional mandates.

Though the CWA contains little regarding water transfers specifically, 33 U.S.C. § 1314(f)(2)(F) does direct the EPA to issue "guidelines for . . . processes, procedures and methods to control pollution" from, among other things, "changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). Furthermore, legislative history indicates that Congress intended for 33 U.S.C. § 1314(f)(2)(F) to apply to both "natural and manmade changes in the normal flow of surface and ground waters." H.R. Rep. No. 92-911, at 109 (1972). As such, Congress was aware that there might be pollution associated with water management activities but made the conscious decision to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. A plain text reading of the CWA makes clear that Congress intended to leave oversight of water transfers to the States. *See PUD No. 1*, 511 U.S. at 721 (noting that the purpose of 33 U.S.C. § 1251(g) is to "insure that state allocation systems are not subverted and that any effects on individual rights are prompted by legitimate and necessary water quality standards."); *see also Gorsuch*, 693 F.2d at 178-79 (noting that "Congress did not want to interfere any more than necessary with state water management.").

To facilitate both its 33 U.S.C. § 1251(a) and its 33 U.S.C. § 1251(b) and (g) directives, the EPA has structured the WTR to facilitate maintenance of the integrity of the nation's waters **subject to** state's rights to develop water resources. However, just because some water transfers are preserved for the states under the WTR, does not mean that there is a blanket permission for states to transfer pollutants between waters. Where water transfers introduce pollutants to

WOTUS,[2] NPDES permits are required. 40 C.F.R. § 122.3(i). This preserves water transfers as the primary responsibilities of the states but allows the EPA to step in to maintain the integrity of the nation's waters where water transfers transfer more than waters.

It is the right of New Union to determine whether its internal waters from Cloudy Lake may be transferred into its waters from Crystal Stream and how such transfers are done. As applied here, Highpeak has been engaged in water transfer activities with permission from the state of New Union since 1992. (R-4). Furthermore, New Union has restricted Highpeak's water transfer activity to only when the water levels in Cloudy Lake are adequate to release water. *Id*. Taking the CWA together, requiring Highpeak to seek an NPDES permit for a water transfer when they have already obtained state permission for a mere water transfer flies in the face of Congress's directives for water transfer activities to be deferred to the states.[3]

To read the CWA as completely barring water transfers between distinct bodies of water inherently leads to absurd results. Water transfers are a common and "integral part of America's water-supply infrastructure." *Catskill III*, 846 F.3d at 500. In the United States, there are at least 641 wholly distinct water transfer infrastructure projects which transfer roughly 12 trillion gallons of water between separate river basons annually. *See* Siddik MAB, et al., *Interbasin water transfers in the United States and Canada*. SCI. DATA 1, 8 (2023). However, "compliance with an NPDES permitting scheme for water transfers is likely to be burdensome and costly for permittees, and may disrupt existing water transfer systems." *Catskill III*, 846 F.3d at 529 (noting that requiring

[2] WOTUS primarily includes any traditional navigable waters, territorial seas, interstate waters, and other qualifying waters. *See* 40 C.F.R. § 120.2.

[3] However, it should be noted that Highpeak transfers more than just water from Cloudy Lake; its water transfer adds 2-3% concentrations of iron, manganese, and TSS. The WTR still requires Highpeak to obtain an NDPES permit for the addition of these pollutants. *See* 40 C.F.R. § 122.3(i).

NPDES permitting for water transfers would cost billions of dollars and require extensive modification of the present water transfer infrastructure nationwide). Furthermore, even before the WTR was promulgated, it was a "matter of longstanding practice" for the EPA to not require NPDES permits for water transfers. *See* Von Schaumburg Memorandum, 2.[4] To strike the WTR would place immense logistical and financial strain on this comprehensive, longstanding state water transfer system and directly contradict the EPA's directives per 33 U.S.C. § 1251(b) and (g).

B. The WTR is valid because there is no special justification which would warrant overcoming *stare decisis*.

Principals of *stare decisis* guide courts to "stand by yesterday's decisions. Application of [*stare decisis*], though not an inexorable command, is the preferred course." *Kimble*, 576 U.S. at 455 (internal citation omitted). However, now, CSP asks this Court to create a circuit split where the law is already settled; following the promulgation of the WTR in 2008, circuit courts have consistently upheld the WTR. *See generally Catskill III,* 576 U.S. 446; *see also Friends I*, 570 F.3d 1210. Though *Loper Bright* overrules *Chevron*, the Supreme Court nonetheless emphasized that regulations upheld under the *Chevron* framework remain valid under *stare decisis* unless there is a "special justification" for revisiting those prior rulings, noting that "we 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 (overturning *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Even if the overturning of the *Chevron* framework has significantly changed the interpretive methodologies used to analyze agency action by federal courts, "[p]rinciples of *stare*

[4] The EPA does require NPDES permits for water transfers in Pennsylvania in compliance with Pennsylvania state law, which only serves to reinforce the interpretation that water transfers are the domain of the states. *See DELAWARE Unlimited v. DER*, 508 A.2d 348 (Pa. Cmwlth, 1986).

decisis . . . demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (noting that special justification is more than "just an argument that the precedent was wrongly decided."). As such, *stare decisis* demands that regulations without previous challenges be upheld unless a sufficient special justification is present. Here, no sufficient special justification exists.

The determination that a special justification exists and is sufficient to overcome *stare decisis* lies heavily on the party seeking to overturn the precedent. *Kimble*, 576 U.S. at 455 (noting that "[o]verruling precedent is never a small matter. *Stare decisis* . . . is a foundation stone of the rule of law.") (internal citation omitted); *see also Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (noting that "[t]ime and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law.") (internal citation omitted). However, here, the already high burden to overcome *stare decisis* is exacerbated by additional factors that enhance the weight of *stare decisis*.

When deviating from a settled interpretation would create a circuit split, as is the case here, appellate courts require a "compelling basis to hold [against the consensus] before effectuating a circuit split." *Wagner*, 109 F.3d at 912. Furthermore, where precedent interprets a statute, as the EPA interprets the CWA here, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Supreme Court has called this enhanced standard a "**superpowered form of *stare decisis*** that renders statutory interpretation decisions nearly **impervious to challenge**." *Kimble*, 576 U.S. at 470 (emphasis added). This is exactly the case here: "[i]n the nearly forty years since the passage of the Clean Water Act, water transfers have never been subject to a general NPDES permitting

requirement. Congress thus appears to have . . . acquiesced in this state of affairs." *Catskill III*, 846 F.3d at 525.

In considering whether there is a sufficiently special justification to overcome principals of *stare decisis*, courts consider "the quality of [threatened case]'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S. Ct. at 2478-79.

i. *Reasonability and Workability.*

First and foremost, since the promulgation of the WTR in 2008, circuit courts have routinely held that the WTR is a reasonable, workable rule. *See Friends I*, 570 F.3d at 1228 (noting that the "EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it."). In both *Friends I* and *Catskill III*, the courts were not required to determine whether the WTR was the best interpretation of the CWA and consequently declined to do so. *See Friends I*, 570 F.3d at 1228 (noting that "[w]hatever position we might take if we had to pick one side or the other of the issue, we cannot say that either side is unreasonable."); *see also Catskill III*, 846 F.3d at 507 (noting that "[w]hat we may think to be the best or wisest resolution of problems of water transfers and pollution emphatically does not matter."). Nonetheless, in *Catskill III*, the Second Circuit did note that "[b]y acknowledging the arguments against requiring NPDES permits for water transfers, and noting that unitary-waters arguments would be open to the parties on remand, the [Supreme Court] can be read to have suggested that such arguments are reasonable, even if not, in [their] view, **preferable**." *Catskill III*, 846 F.3d at 526 (emphasis added) (interpreting *Miccosukee II*, 541 U.S. 95). Additionally, the Second Circuit also discusses the workability of the WTR, noting that—

> the [CWA] does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers.

Id. at 501.

ii. *Consistency and Developments.*

The main development in judicial consideration of the WTR has been the promulgation of the WTR itself. While CSP points to a slew of cases decided under the weaker deference standard of *Skidmore*,[5] in which each case declined to adopt the unitary-waters theory prior to the promulgation of the WTR, these pre-promulgation cases do not render the post-promulgation cases – *Catskill III* and *Friends I* – inconsistent holdings. *Skidmore*, 323 U.S. at 164. The pre-promulgation cases all notably predate the promulgation of the WTR in 2008, rendering them moot. As the post-promulgation cases note, "[b]ecause [the WTR] was not available at the time of the earlier decisions [pre-promulgation cases] cannot be precent against the [WTR]." *Friends I*, at 1218; *see also Catskill III*, 846 F.3d at 510 (noting that *Catskill I* would have been held differently "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding," as it did later with the WTR).

iii. *Reliance Interests.*

As aforementioned, there are numerous critical water transfers that would be upended by the WTR being struck. As the Second Circuit noted in *Catskill III*, requiring an NPDES permit for

[5] CSP cites *Dubois*, 102 F.3d at 1296-99, *Catskill Mts. Chapt of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-94 (2nd Cir. 2001) ("*Catskill I*"), *Catskill Mts. Chapt of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-87 (2d Cir. 2006) ("*Catskill II*"), and *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002) ("*Miccosukee I*") (vacated by *Miccosukee II*). **None of these cases reviewed the WTR.**

all water transfers would "cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States," obtaining and complying with NPDES permits "could cost a single water provider hundreds of millions of dollars," will push levy and dam costs onto state water agencies – in turn raising agricultural and property taxes, and would "throw the status of agricultural water-flow plans into doubt." *Catskill III*, 846 F.3d at 529. As such, overturning the WTR would result in **extensive** disruption of reliance interests.

Considering these factors, there is no special justification that overcomes superpowered *stare decisis* and warrants overturning *Friends I* and *Catskill III*.

C. The WTR is valid because the EPA's interpretation is entitled to *Skidmore* Weight.

Even if this Court were to disregard *stare decisis*, an agency ruling is entitled to "respect proportional to its 'power to persuade,' . . . . [s]uch a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, and any other sources of weight." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). The extent of the weight "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 164.

CSP urges this Court to adopt the reasoning of pre-promulgation cases merely because they too utilized *Skidmore* weight. As aforementioned in Section (III)(B)(i)-(ii), the WTR is both a reasonable interpretation of the CWA and is consistent with valid precedent. However, even if this Court were to consider the reasoning of the moot pre-interpretation cases, as a threshold matter, those cases implicitly concede that the CWA leaves open the possibility of a unitary-waters approach "before considering the persuasiveness of the agency's interpretation." *Catskill III*, 846 F.3d at 510 (further noting that "we made clear that we did not intend to foreclose the EPA from adopting a unitary-waters reading of the Act [in *Catskill I* and *Catskill II*].").

Furthermore, the "EPA had demonstrated thoroughness in its reasoning, as [the EPA] provided extensive consideration of environmental and statutory factors in its promulgation of the WTR, evidenced by its detailed rulemaking process." (R-10, n. 2). As detailed by the APA, any formal rule must go through a detailed notice and comment process before its promulgation, and the agency is tasked with justifying its rule in response to these comments. 5 U.S.C. § 553. Here, the EPA has done exactly that. Prior to even proposing the WTR, the EPA conducted extensive initial analysis regarding the potential basis for the WTR in 2005, ultimately concluding that the EPA had authority to promulgate the WTR. *See generally* Von Schaumburg Memorandum. Then, in 2006, the EPA distributed a proposed rule where they fielded and responded to comments regarding their compliance with 5 U.S.C. § 553, again determining that the EPA had authority to promulgate the WTR as written. *See* WTR Promulgation, 33703-33704. Ultimately, the WTR was promulgated as 40 C.F.R. § 122.3(i), but throughout the rulemaking process, the EPA has thoroughly justified its authority and rationale, as noted in Section (III)(a).

Additionally, it is a longstanding principle for courts to give "the most respectful consideration" to interpretations of agents of the Executive Branch because "[t]he officers concerned are usually able men, and masters of the subject." *United States v. Moore*, 95 U.S. 760, 763 (1878); *see also NLRB v. Noel Canning*, 573 U. S. 513, 525 (2014) (noting that "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'"). Such is the case here, where the EPA has instituted and consistently defended the position that water transfers do not require NPDES permits, even long before the 2008 promulgation of the WTR. The EPA has been "consistent in its defense of the WTR across four subsequent administrations." (R-10, n. 2). Additionally, "in light of the potentially serious and disruptive practical consequences of requiring NPDES permits for water

transfers, the EPA's interpretation here involves the kind of difficult policy choices that agencies are better equipped to make than courts." *Catskill III,* 846 F.3d at 501 (internal citation omitted).

Considering these factors, "even under *Skidmore* review, the WTR should be upheld." (R-10, n. 2).

IV. The District Court did not err in holding that Highpeak's water transfer introduced pollutants through its discharges into Crystal Stream, subjecting Highpeak's activity to permit requirements.

A. The statutory language of the CWA creates ambiguity.

The EPA correctly asserts that because Highpeak's activity introduces pollutants in its water transfer, rather than being a water transfer that does not introduce pollutants, Highpeak must obtain an NPDES permit. To establish a violation of the CWA, it must be proven that "defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source." *PCFFA*, 945 F.3d at 1083; *see also* 33 U.S.C. § 1311(a). A discharge of a pollutant means "**any** addition of **any** 'pollutant' or combination of pollutants to [WOTUS] from any 'point source.'" 40 C.F.R. § 122.2 (emphasis added). A point source "means any discernible, confined, and discrete conveyance, including but not limited to, any pipe." *Id*.

"With narrow exceptions . . . a party must acquire an NPDES permit in order to discharge a specified amount of a specified pollutant." *Catskill III*, 846 F.3d at 502 (citing 33 U.S.C. § 1342 and *Miccosukee II*, 541 U.S. at 102). Accordingly, "without an NPDES permit, it is unlawful for a party to discharge a pollutant into the nation's navigable waters." *Catskill III*, 846 F.3d at 502. Since an NPDES permit is required when a point source discharges pollutants into WOTUS per 40 C.F.R. § 122.1, noncompliance with required permits for such discharge is in direct violation of the 33 U.S.C. § 1342(h).

The EPA has adopted the WTR to solve any novelties pertaining to the interpretation of the CWA. The WTR Promulgation states the following:

> Water 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. However, where water transfers **introduce** pollutants to water passing through the structure into the receiving water, NPDES permits are required.

WTR Promulgation, 33705 (emphasis added). A water transfer is "an activity that conveys or connects [WOTUS] without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Connecting WOTUS to qualify as a "water transfer" under the CWA may be accomplished "through artificial tunnels and channels," such as a man-made pipeline. *Catskill III*, 846 F.3d at 503. Moreover, if connecting WOTUS through a structure, such as a pipeline, introduces pollutants, the water transfer must be under the supervision of an NPDES permit.

However, the WTR possesses an exemption for certain discharges that do not require an NPDES permit. The WTR details its exemption as:

> Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants **introduced** by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3. (emphasis added). The WTR does not define "introduced" or "introduce" in the statute, creating ambiguity. Therefore, this Court must rule on whether the EPA should be given deference for their interpretation of the statutory language.

In 1992, Highpeak built a tunnel, partially constructed through exposed rock and partially constructed with an iron pipe, which connects WOTUS – Cloudy Lake to Crystal Stream. (R-4). However, Highpeak's water transfer transfers more than water. The record reflects that as water passed through Highpeak's tunnel from Cloudy Lake to Crystal Stream, the presence of iron, manganese, and TSS increased by 2-3% from intake to outfall. (R-5). As such, Highpeak has introduced external iron, manganese, and TSS into Crystal Stream via its water transfer activity.

But-for Highpeak's poorly sealed tunnel, Crystal Stream's iron, manganese, and TSS levels would be consistent at intake and outfall. Therefore, since Highpeak introduces pollutants to WOTUS, Highpeak **must** obtain an NPDES permit in accordance with the WTR to continue its water transfer activity as it currently conducts them.

Highpeak argues that the addition of pollutants naturally occurs from erosion and, therefore, does not count as an addition by them. Essentially, Highpeak contends that introduction of pollutants must result from human activity – not natural processes. If this interpretation of the WTR was correct, then Highpeak would not be required to obtain an NPDES permit because they have not added any unnatural pollutants. However, the EPA's reasonable plain language reading of the WTR renders Highpeak's interpretation unreasonable. The WTR is explicit that an introduction of pollutants occurs through **any** addition of **any** pollutants to WOTUS without any limiting language. 40 C.F.R. § 122.2.

B. The EPA's interpretation of the CWA controls because its administrative interpretation utilizing the WTR is reasonable.

The EPA's interpretation of the WTR commands a higher level of respect than Highpeak's because statutory ambiguity exists as to the application of the WTR and the EPA asserts a reasonable analysis. Administrative interpretation gain *Auer* deference if the agency interpretation pertains to its own regulation. *See Auer*, 519 U.S. 452. Utilizing *Auer* deference, the Supreme Court has repeatedly held that an administrative interpretation of its own regulation should be recognized as controlling and true unless such interpretation is "plainly erroneous," "genuinely ambiguous," or completely "inconsistent with the regulation" as a whole. *See e.g*. *Seminole Rock*, 325 U.S. 410 at 414. Notably, though *Chevron* has been overruled, *Auer* deference is an equivalent level of deference as *Chevron* formerly commanded. *See Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (noting that "[i]n practice, *Auer* deference is *Chevron* deference applied to

regulations rather than statutes."). To be granted *Auer* deference, an agency must prove that its interpretation of its rule is a reasonable interpretation of an ambiguous rule, that it is an official position, that the agency is an expert in that area, and that the interpretation reflects fair and considered judgement. *Kisor v. Wilkie*, 588 U.S. 558, 581 (2019). The EPA's interpretation that "any 'pollutant'" includes both natural and unnatural pollutants plainly satisfies each *Kisor* factor. As such, *Auer* **mandates** that this Court defer to the EPA's reasonable interpretation of the WTR.

However, should this Court not grant *Auer* deference to the EPA's interpretation of the WTR, it should still grant *Skidmore* weight. *Skidmore* warrants that agency interpretations be given the "power to persuade" pursuant to their fulfilment of the *Skidmore* factors: reasonability, workability, consistency, developments, and reliance interests. *Skidmore*, 323 U.S. at 140. *"Skidmore* instructs that 'the rulings, interpretations and opinions' of an agency may constitute 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Catskill III*, 846 F.3d at 509. Therefore, under *Skidmore*, although an agency's interpretation of regulations is not binding in a court of law, it's interpretation of such regulation may hold significant weight due its understanding and profound intelligence over such matter that the Court does not possess.

In the instant case, this Court should give significant weight to the EPA's interpretation of the WTR. As aforementioned in Section (III)(b), the EPA has provided extensive rationales as to the rationality, workability, consistency, developments, and reliance interests in the WTR generally. The EPA's interpretation of the WTR equally meets these factors. First and foremost, the EPA's interpretation is reasonable and workable because **any** pollutant inherently includes both natural and unnatural pollutants. Furthermore, this interpretation is consistent with the development of the WTR because numerous times, even before the promulgation of the WTR, the

EPA has successfully argued that, where natural pollutants would not otherwise reach WOTUS but-for a water transfer activity, the introduction of natural pollutants "was an addition for which a permit was required." *See Dubois*, 102 F.3d 1273; *see also PCFFA*, 945 F.3d at 1356-57 (holding that the "commingling" of polluted water discharged from the defendant's drain with WOTUS qualified as an addition of pollutants under the CWA). While Highpeak would be burdened by having to obtain an NPDES permit, they lack a reasonable reliance interest because it is irrational to rely upon an interpretation directly contrary to the implementing agency's consistent and longstanding interpretation and execution.

As such, under either *Auer* deference or *Skidmore* weight, this Court should utilize the EPA's reasonable interpretation of the WTR. Applying the EPA's interpretation here, an "'addition' means the introduction of a pollutant from the outside world . . . [the] 'outside world' is construed as any place outside the particular water body to which pollutants are added.'" Von Schaumburg Memorandum, 12 (quoting *Catskill I*, 273 F.3d at 491). Highpeak's tunnel alters the concentration of pollutants in WOTUS. Highpeak adds .02 mg/L of iron, .003 mg/L of manganese, and 2 mg/L of TTS to WOTUS via its water transfer activity, rendering Highpeak ineligible for the WTR's exemption from an NPDES permit. Without an NPDES permit, Highpeak is in direct violation of the CWA for its water transfer activity.

CONCLUSION

For the foregoing reasons, this Court should reverse its summary judgement in favor of CSP as to Issues I and II but should affirm its summary judgement in favor of the EPA as to Issues III and IV.