Team 8

C.A. No. 24-001109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellee-Cross-Appellant

-and-

HIGHPEAK TUBES, INC.
Defendant-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 Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union granted the United States Environmental Protection Agency's ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss Crystal Stream Preservationists, Inc.'s ("CSP") federal regulation challenge, and denied Highpeak's motion to dismiss CSP's citizen suit in case No. 24-CV-5678 on August 1, 2024. 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 jurisdiction). CSP, EPA, and Highpeak all filed timely motions seeking leave to appeal pursuant to Fed. R. App. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which grants courts of appeals jurisdiction over appeals from all final decisions of the district courts. The court may grant the parties' interlocutory appeals. 28 U.S.C. § 1292.

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?

II. Did the District Court err in holding that CSP timely filed the challenge to EPA's Water Transfers Rule?

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

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

STATEMENT OF THE CASE

I. Origin of Highpeak's Tunnel

In 1992, Highpeak began operating a recreational tubing business on a 42-acre parcel of land it owned in Rexville, New Union. R. at 4. Highpeak conducts its operations in Crystal Stream, which runs along its land. *Id.* To enhance customers' tubing experience, Highpeak received permission from New Union to construct and operate a tunnel connecting Cloudy Lake to Crystal Stream. *Id.* The tunnel, installed in 1992, is constructed partially with iron pipe and partially carved through natural rock and is fitted with valves that Highpeak uses to control the flow of water from Cloudy Lake into Crystal Stream. *Id*. Highpeak did not obtain a permit for the tunnel, nor have its discharges been previously challenged. *Id*.

II. EPA Regulation

Because New Union has not implemented its own state permitting program under the Clean Water Act ("CWA"), EPA issues CWA permits in New Union under the National Pollution Discharge Elimination System ("NPDES permits") to regulate pollution from point-sources. *Id*. The NPDES Water Transfers Rule ("WTR"), promulgated by EPA in 2008, excludes certain water transfer activities from permit requirements. *Id*. at 3.

III. Basis for CSP's Claims

On December 1, 2023, CSP was formed as a nonprofit organization. *Id*. at 4. CSP's stated mission "is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." *Id*. at 6. CSP has thirteen members who all live in Rexville, New Union. *Id*. at 4. Two members live along Crystal Stream. *Id*. All but one have lived in Rexville for more than fifteen years. *Id*. Of the thirteen members, three hold executive positions as President, Vice President, and Secretary. *Id*. at 14.

CSP member and Secretary Cynthia Jones has lived in Rexville since February of 1997, approximately 400 yards away from Crystal Stream Park. *Id*. Jonathan Silver, CSP's newest member, moved to Rexville in 2019, approximately one-half mile from Crystal Stream Park. *Id*. at 16. In Jonathan Silver's declaration on December 12, 2023, he said he learned of the discharge from CSP "[i]n the days leading up to [CSP's] complaint being filed." *Id*. He is now "hesitant to allow [his] dogs to drink from the Stream" and is "concerned with pollutants entering the Stream and making it cloudy," noting that "[i]f not for Highpeak's discharge, [he] would recreate more frequently on" and "allow [his] dogs to drink from the Stream." *Id*. Similarly, in Cynthia Jones's declaration on December 13, 2023, she said she is "afraid to walk in the Stream due to the pollution." *Id.* at 15.

On December 15, 2023, fifteen days after CSP's formation, CSP sent a notice of intent to sue letter ("NOIS") to Highpeak, alleging the tunnel violates the CWA and does not fall under the WTR exception. *Id*. at 4. There is no indication of any prior action taken by CSP. *Id*. at 6. In the NOIS, CSP alleged the water in Cloudy Lake has higher levels of iron and manganese and a higher concentration of total suspended solids ("TSS") than in Crystal Stream. *Id*. at 5. They alleged these pollutants are introduced during the water transfer, taking the discharge out of the scope of the WTR. *Id*. CSP provided data indicating the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of these pollutants than water from Cloudy Lake on the same day. *Id*. On December 27, 2023, Highpeak responded to the NOIS contending the tunnel does not require an NPDES permit under the WTR. *Id*.

IV. CSP's Actions against Highpeak and EPA

On February 15, 2024, CSP filed a complaint against Highpeak re-alleging the citizen suit claims made in the NOIS, that Highpeak is discharging pollutants into Crystal Stream

without a permit and in violation of the CWA. *Id*. at 3, 5. Additionally, CSP brought a claim under the Administrative Procedures Act ("APA") against EPA, challenging the validity of the WTR. *Id*. at 3. CSP argued alternatively that, assuming the WTR is valid, Highpeak is still required to obtain a permit for the tunnel because pollutants are introduced during the water transfer. *Id*.

In the U.S. District Court for the District of New Union, Highpeak moved to dismiss the action on grounds that (1) CSP lacked standing to bring the citizen suit and the regulatory challenge, (2) CSP's challenge to the WTR was not timely filed, (3) the WTR was validly promulgated by EPA under the CWA, and (4) Highpeak's discharge is exempted from the NPDES permit requirements because of the WTR. *Id*. EPA joined Highpeak's motions to dismiss for standing and timeliness, and defended the WTR as validly promulgated under the CWA. *Id*. EPA separately joined in CSP's argument that Highpeak's discharge is not exempt from an NPDES permit under the WTR because pollutants are introduced during the water transfer. *Id*. at 3-4.

The District Court postponed ruling on these motions at CSP's behest, until the U.S. Supreme Court decided two cases which, according to CSP, could enhance the legal rationale for its claims: *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024). *Id*. at 6.

On August 1, 2024, the District Court granted EPA's and Highpeak's motions to dismiss CSP's challenge to the WTR, and denied Highpeak's motion to dismiss CSP's citizen suit under the CWA. *Id*. at 12. Specifically, the court ruled: (1) CSP had standing to challenge the WTR and to bring a citizen suit against Highpeak for discharges allegedly in violation of the CWA, (2) CSP's challenge to the WTR was timely filed, (3) the WTR was validly promulgated by EPA,

and (4) Highpeak's discharges introduce pollutants during the water transfer, taking the discharge out of the scope of the WTR. *Id*. at 2.

V. Appeal

Each party filed a motion for leave to file interlocutory appeals, which this Court granted. *Id*. EPA appeals from the District Court's first and second holdings, Highpeak appeals from the first, second, and fourth holdings, and CSP appeals from the third holding. *Id*.

SUMMARY OF THE ARGUMENT

The Supreme Court's recent decisions in *Loper Bright* and *Corner Post* have opened new avenues for litigation. However, these new opportunities for plaintiffs to present meritorious claims are accompanied by increased risk of abuse to the legal system. Mindful of those risks, the Supreme Court in those cases established safeguards to balance access to justice with efficiency of agency and judicial functions.

The District Court erred in holding that CSP had standing to bring a citizen suit against Highpeak for discharges under the CWA, and to challenge the WTR. To establish standing under Article III of the constitution, a plaintiff must demonstrate (1) they have suffered or likely will suffer an injury in fact, (2) the injury was or will be caused by the defendant, and (3) the injury would likely be redressed by the requested relief. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). CSP did not have standing to bring the citizen suit against Highpeak because its members did not suffer an injury in fact. Further, CSP did not have standing to challenge the WTR, because its members did not suffer an injury and there was no causal link between the alleged injuries and the EPA's promulgation of the WTR.

Organizations can establish standing so long as their "members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333,

343 (1977). However, CSP does not have organizational standing because its members did not suffer an injury in fact. While courts have held that aesthetic and recreational harms may satisfy the injury requirement to standing, the alleged injuries suffered by CSP members here are too speculative to amount to a concrete injury. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000). CSP cannot demonstrate that its members' aesthetic and recreational values were *lessened* as a result of the pollution, as is required under *Laidlaw*. *Id*. at 183. Further, CSP members allege only a subjective fear of future harm, not a real, concrete or imminent threat of harm. *See Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Nor did CSP have standing to challenge the WTR. CSP members failed to allege an injury in fact. Further, there is no causation under this challenge. The pollutants introduced by the water transfer took the discharge out of the scope of the WTR, making the discharge subject to permitting. Because Highpeak's discharge is not within the scope of the WTR, CSP members' alleged injuries cannot be traced to this regulation.

Further, it appears CSP manufactured standing to bring these claims. CSP gathered information to advocate against Highpeak's actions, then approached nearby residents of Crystal Stream who had no prior issues with the contamination, encouraging them to join CSP to manufacture standing. CSP was also conveniently created just as the Supreme Court took on *Loper Bright* and *Corner Post*, two cases which have made it easier to raise these challenges. Further, CSP's stated mission is to protect the Stream from "illegal transfers of polluted waters," suggesting CSP was created purely to challenge the WTR rather than to redress alleged harms to its members.

The District Court also erred in holding that CSP timely filed the challenge to the WTR. CSP's challenge is brought under the APA. Claims brought under the APA are subject to 28

U.S.C. § 2401(a) which requires a party to bring a suit against the government within six years after the right of action first accrues. *Corner Post*, 1440 S. Ct. at 2450. *Corner Post* held a right of action first accrues when the plaintiff is injured by final agency action. *Id*. at 2448. This interpretation of the statute of limitations does not apply to CSP's facial challenge. Instead, accrual of this claim should begin at final agency action. Even assuming the court follows *Corner Post*, CSP still fails to satisfy the APA requirements for timeliness.

Because CSP was formed to mount a fresh challenge to the WTR, Corner Post does not apply here. In *Corner Post*, the petitioner brought its claim to remedy an injury. Here, CSP's creation, purpose, and membership show it brought this claim to reset the statute of limitations to challenge the WTR instead of redressing any alleged injury.

Since Corner Post does not apply, the court should determine when accrual starts based on the context of the claim. Courts look to the general purpose of the statute and the context in which the right of action was brought. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (citing *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). 28 U.S.C § 2401(a) is a catchall provision for claims that do not have a governing statute of limitations. CSP's claim was brought under the APA which regulates agency action, so the court should consider policy concerns about stability, certainty, and the gaming of the judicial system in this application of section 2401(a).

Even if *Corner Post* applies, CSP would first have the complete and present claim necessary to start accrual of the statute of limitations at the promulgation of the WTR. Under *Corner Post*, a complete and present claim for an APA challenge is established once a plaintiff is injured by final agency action. *Corner Post*, 144 S. Ct. at 2450. Here, CSP's members would have first been injured when the tunnel began operating in 1992. Accrual then could only start at

final agency action, when the WTR was promulgated in 2008. Therefore, the challenge to the WTR is untimely.

The District Court properly ruled that EPA's promulgation of the WTR was valid. EPA interpreted the ambiguous language of Section 402 of the CWA, which governs NPDES permits, to not encompass the mere transfer of water without subjecting it to intervening use. 40 C.F.R. § 122. EPA based its interpretation on the statute as a whole, harmonizing the CWA's broad goal of protecting the nation's water quality with state jurisdiction over the management of its waters. Congress tasked EPA as administrator of the CWA to put comprehensive programs in place to address changes in the flow of navigable waters resulting from the construction of causeways or tunnels like that constructed by Highpeak. 33 U.S.C. § 1316. In light of this grant of policymaking authority from Congress, the Court should review EPA's Rule deferentially.

Even if the court applies the *Skidmore* test, the WTR still passes muster under the APA's "arbitrary and capricious" standard. 5 U.S.C. § 706. The WTR was promulgated after an extensive public comment period, where EPA took in and responded to thousands of stakeholder concerns. EPA justified its decision with policy considerations based on evidence adduced from that process. The WTR formulated its interpretation of section 402 in light of the prohibitive cost of implementing NPDES permitting for complex water management projects across the nation. This understanding is reflected in widespread industry practices, backed by the full weight and consideration of EPA's expertise. The WTR has also been consistently applied by the EPA, further legitimizing the rule.

Finally, although the interpretive framework for review of agency action has been retooled by the Supreme Court's decision in *Loper Bright*, the Court emphasized its decision should not upend settled precedent involving agency actions that have been litigated and decided.

Recognizing the widespread potential impact of its decision, the Court stressed that plaintiffs require special justification to upend settled precedent decided under the former *Chevron* framework. Because CSP cannot advance any such justification, *stare decisis* also counsels in support of the WTR.

Finally, the District Court properly ruled that pollutants introduced in the course of the water transfer takes the discharge out of the scope of the WTR, making Highpeak's discharge subject to permitting under the CWA. Because this analysis involves the interpretation of an administrative regulation, the court should defer to EPA's interpretation of the WTR. *See Kisor v. Wilkie*, 588 U.S. 558, 563 (2019); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945). The WTR excludes water transfers from the NPDES permit requirements, unless "pollutants are introduced by the water transfer." NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008); 40 C.F.R. 122.3(i) (2023). EPA interprets the WTR to say that "an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source," meaning when pollutants "are introduced from outside the waters being transferred." NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701.

Here, pollutants are introduced during the transfer. CSP's data showed that samples taken from Crystal Stream contained about 2-3% higher concentrations of iron, manganese, and TSS than water samples taken from Cloudy Lake on the same day, demonstrating that pollutants are being introduced into the stream as the water runs through Highpeak's tunnel. Thus, the water transfer from Cloudy Lake to Crystal Stream is excluded from the WTR and should be subject to NPDES permitting under the CWA.

STANDARD OF REVIEW

The first two issues are questions of law reviewed de novo. *See, e.g. Affum v. United States*, 566 F.3d 1150, 1158 (D.C. Cir. 2009) ("We review de novo the District Court's decision on standing."); *Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001) ("The existence of standing is an issue of law that we review de novo."); *Corner Post, Inc.* at 144 S. Ct. 2440; *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996) (stating courts review issues of timeliness de novo).

The third and fourth issues are brought pursuant to the Administrative Procedures Act ("APA"), since they involve challenges to an agency action. The APA directs judges to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. "'[A]gency action' includes the whole or part of an agency rule." 5 U.S.C. § 551. The APA provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. Under this standard, the Supreme Court's holding in *Loper Bright* has altered a reviewing court's framework for addressing an agency's interpretation of ambiguous statutory provisions. However, the ambiguous provisions analyzed in issues three and four should be reviewed deferentially, for reasons detailed below.

ARGUMENT

I. CSP DID NOT HAVE STANDING TO BRING A CITIZEN SUIT AGAINST HIGHPEAK FOR DISCHARGES ALLEGEDLY IN VIOLATION OF THE CWA, AND TO CHALLENGE THE WTR.

The District Court erred in holding that CSP had standing to bring a citizen suit against Highpeak for discharges under the CWA, and to challenge the WTR. For both claims, CSP does not have standing to sue under Article III of the Constitution. U.S. Const. art. III (stating the federal judicial power extends to all "Cases" and "Controversies"). Article III standing is a "bedrock constitutional requirement." *United States v. Texas*, 599 U.S. 670, 675 (2023). For CSP's challenge to the WTR, there is also a statutory standing provision which states that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Because the "CWA's citizen suit provision extends standing to the outer boundaries set by the 'case or controversy' requirement of Article III of the Constitution[,] . . . the statutory and constitutional standing issues therefore merge." *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981)).

To establish standing, "a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *FDA*, 602 U.S. at 380 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). This standing analysis applies to both of CSP's claims. The issue of redressability will not be addressed, as CSP fails to satisfy the first two prongs of

injury and causation, and because it is unclear what form of relief CSP seeks. *See Laidlaw*, 528 U.S. at 185 ("plaintiff must demonstrate standing separately for each form of relief sought.").

a. The District Court Erred in Holding CSP Had Standing to Bring a Citizen Suit Against Highpeak for Discharges Allegedly in Violation of the Clean Water Act.

CSP did not have standing to bring a citizen suit against Highpeak for discharges allegedly in violation of the CWA, because it lacked organizational standing and CSP did not demonstrate that its members suffered an injury in fact. The CWA allows a citizen suit against "any person . . . who is alleged to be in violation of … (A) an effluent standard or limitation under this Act . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365. Under this statute, "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." *Id*. CSP cannot demonstrate organizational standing because it has not alleged an injury in fact.

i. CSP did not have organizational standing to sue on behalf of its members.

An organization has standing to sue to redress its members' injuries when "its members would otherwise have standing to sue in their own right." *United Food & Com. Workers Union Loc. 751 v. Brown Grp.*, 517 U.S. 544, 545 (1996) (citing *Hunt*, 432 U.S. at 343). Thus, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The organization must "allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id*. (citing *Sierra Club*, 405 U.S. 727). Thus, so long as any CSP member would otherwise have standing to sue on their own, CSP has organizational standing. However, CSP did not have organizational standing because it did not adequately allege that its members faced an injury in fact.

ii. CSP did not have standing because its members did not suffer an injury in fact.

CSP failed to allege that its members suffered economic, aesthetic, or recreational harm, and instead only alleged a speculative fear of future harm, thus they did not suffer an injury in fact. Injury in fact is described as "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560–61 (citations omitted). The injury claimed need not be a traditional economic or personal injury; injuries to the "aesthetic and recreational values of [an] area" may also establish standing. *Sierra Club*, 405 U.S. at 735. However, it is a "bedrock rule that a case or controversy must be based on a *real* and *immediate* injury or threat of future injury that is *caused by the defendants*–an objective standard that cannot be met by a purely subjective or speculative fear of future harm." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) (finding "a purely subjective fear or the mere existence of a potentially adverse patent alone" is not enough to warrant standing).

CSP does not allege any economic injuries. Instead, CSP invokes *Laidlaw* to argue its members' harms amount to the kind of aesthetic and recreational harm required to establish standing. R. 6-7. However, the harms experienced by organization members in *Laidlaw* differ significantly from those alleged by CSP. In *Laidlaw*, several environmental organizations brought a CWA suit alleging defendant, Laidlaw, violated its NPDES permit at a hazardous waste incinerator facility and wastewater treatment plant, by "repeatedly" discharging pollutants that "exceeded the limits set by the permit." 528 U.S. at 175-76. The Supreme Court determined the environmental groups had standing because "Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id*. at 183-84.

The court in *Laidlaw* determined members suffered a concrete injury, because their injuries constituted more than "mere 'general averments' and 'conclusory allegations,'" and their "conditional statements—that they would use the [River] for recreation if Laidlaw were not discharging pollutants into it" were not "speculative 'some day' intentions.'" *Id.* at 184 (citing *Lujan*, 504 U.S. at 564). There, one plaintiff alleged he used to "fish, camp, swim, and picnic in and near the river" when "he was a teenager, but would not do so [now] because he was concerned that the water was polluted." *Id*. at 181-82. Another member said "before Laidlaw operated the facility, she picnicked, walked, birdwatched, and waded in and along" the river, but "she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants." *Id*. at 182. Others asserted economic injuries, saying their homes "had a lower value than similar homes located farther away from the facility." *Id*.

Here, however, CSP members' alleged injuries are more closely aligned with the kind of "speculative 'some day' intentions" that do not amount to a concrete injury. *Id*. at 184. In *Laidlaw*, the court followed the idea 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 183 (emphasis added) (citing *Sierra Club*, 405 U.S. at 735). CSP members' injuries are not adequately alleged because their aesthetic and recreational values of the area have not been *lessened*. Nothing in the record indicates that any CSP members have lived in Rexville or frequented Crystal Stream *before* Highpeak installed the tunnel 32 years ago; the record only states all but one of CSP's members have lived in Rexville for more than 15 years. R. 4. Thus, CSP's members' aesthetic and recreational values could not have been lessened if they had never experienced the river before the discharge began. Thus, CSP fails to meet its burden of alleging an injury.

The Supreme Court has stated a subjective fear of future harm is not a concrete injury, and many circuits agree. *See City of L.A. v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."); *Pennell v. Glob. Tr. Mgmt. LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021) ("Nor does stress by itself with no physical manifestations and no qualified medical diagnosis amount to a concrete harm."); *Freeman v. Ocwen Loan Servicing, LLC*, 113 F.4th 701, 711 (7th Cir. 2024) ("[P]sychological harm, standing alone, cannot amount to an Article III injury in fact."); *Nat. Res. Def. Council v. U.S. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013) ("[A]n injury is 'actual or imminent' where there is a 'credible threat' that a probabilistic harm will materialize.").

Here, CSP's alleged injuries are not concrete or imminent enough to justify standing. Instead they demonstrate a "speculative fear of future harm." *Sierra Club*, 405 U.S. at 735; *Prasco*, 537 F.3d at 1339. As in *Prasco*, where plaintiff's "purely subjective fear or the mere existence of a potentially adverse patent alone" was not enough of a concrete or imminent injury to warrant standing, CSP's members' subjective fear of the cloudy water and its potential effects are not concrete enough to warrant relief. *Id.*; R. 14, 16. For example, Jonathan Silver expressed he is "hesitant to allow [his] dogs to drink from the Stream" and is "concerned with pollutants entering the Stream and making it cloudy," noting that "[i]f not for Highpeak's discharge, [he] would recreate more frequently on" and "allow [his] dogs to drink from the Stream." R. 16. Similarly, Cynthia Jones is "afraid to walk in the Stream due to the pollution." *Id.* at 15. These fears are mere subjective apprehensions – there are no allegations of "physical manifestations" or "qualified medical diagnos[es]," nor is there "a 'credible threat' that a probabilistic harm will

materialize." *Lyons*, 461 U.S. at 107 n.8; *Pennell*, 990 F.3d at 1045; *NRDC*, 735 F.3d at 878. Apprehension alone does not establish standing.

Finally, although a showing of "actual environmental harm" is not required to have standing, there is a clear distinction in the severity of the pollution between *Laidlaw* and the present case. *Ecological Rts. Found.*, 230 F.3d at 1151 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163–64 (4th Cir. 2000) (en banc)). Mercury, the pollutant at issue in *Laidlaw*, is more hazardous than the pollutants here. Mercury is included in EPA's Toxic Pollutant List, discussed in the CWA, but Iron and Manganese are not. 40 CFR § 401.15; *see* 33 U.S.C. § 1317(a)(1). Further, the industry in *Laidlaw* was responsible for discharging this "extremely toxic pollutant" at rates where it "repeatedly exceeded the limits set by [its] permit." *Laidlaw*, 528 U.S. at 167. In contrast, CSP presents no evidence showing how a 2-3% increase in concentrations of these pollutants could pose a credible threat, further belying the presence of an injury in fact. R. 5; *see Hall*, 266 F.3d at 976 ("[E]vidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries . . . that may confer standing.").

b. The District Court Erred in Holding CSP Had Standing to Challenge the WTR.

CSP also did not have standing to challenge the WTR because CSP's members did not suffer an injury in fact, nor did they demonstrate a causal link between their alleged injuries and the WTR. The same injury analysis above can be applied to the standing inquiry under Article III and 5 U.S.C § 702 for this issue, so it will not be repeated. In addition to the injury requirement, "there must be a causal connection between the injury and the conduct complained of," meaning "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560–61 (citations omitted). As explained below in issue four, the pollutants introduced in

the course of the water transfer took the discharge out of the scope of the WTR, thereby subjecting Highpeak's discharge to NPDES requirements. Because Highpeak's discharge is not within the scope of the WTR, CSP's alleged injuries cannot be traced to this regulation. Therefore, no causal connection exists between the alleged injury and the WTR, so CSP lacks standing to challenge the WTR.

c. CSP Manufactured Standing to Bring These Challenges.

CSP does not have standing in part because they manufactured standing to bring these challenges not to redress any genuine member injuries, but to satisfy an ulterior motive. "An organization cannot manufacture its own standing" by "expending money to gather information and advocate against the defendant's action" when they have "not suffered a concrete injury." *FDA*, 602 U.S. at 394. The timing of the creation of CSP and the language in its mission statement, coupled with the lack of a concrete injury suffered by its members, suggests CSP manufactured its own standing.

Here, CSP gathered information to advocate against Highpeak's actions, collecting samples of pollutants and approaching nearby residents who had no prior issue with the contamination, encouraging them to join CSP. R. 4-5, 16. For example, Jonathan Silver learned of the discharge from CSP "[i]n the *days* leading up to [CSP's] complaint being filed." *Id*. at 16 (emphasis added). This suggests CSP was seeking out members who could potentially provide standing, as it needed members who frequent the stream to allege injuries.

CSP was also created conveniently just as the Supreme Court took up the *Loper Bright* and *Corner Post* cases, which, as explained in the sections below, have helped reopen the door to CSP's challenges. *Id*. at 6. Highpeak has operated the tunnel connecting Cloudy Lake to Crystal stream for over thirty years, and "no individual or entity, including any current member of CSP, has ever previously challenged the discharge." *Id*. Further, CSP's stated "mission is to protect the

Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." *Id*. This specific reference to "transfers" suggests that CSP was created solely to challenge the WTR, not to address the harms alleged by its members.

II. CSP FAILED TO BRING A TIMELY CHALLENGE TO THE WTR.

The District Court erred in holding that CSP filed a timely challenge to the WTR under the APA. A party may bring suit against the government if the complaint is "filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Statutes of limitations create a time limit for bringing a claim, based on the date when the claim accrued. *Corner Post*, 144 S. Ct. at 2452. A right of action accrues when the plaintiff has the right to assert it in court. *Id*. at 2448. In general, once a right of action begins, accrual is context-specific. *Crown Coat*, 386 U.S. at 522 (holding accrual begins at final agency action); *Koons*, 271 U.S. at 63-64 (holding accrual begins at injury). The APA governs procedures of administrative law, including judicial review of claims against agency action. 5 U.S.C. §§ 551, 702, 704; *Corner Post*, 144 S. Ct. at 2449.

In *Corner Post*, the court held a claim must satisfy both 5 U.S.C. § 702 and 5 U.S.C. § 704 for a plaintiff to assert it in court. *Id*. at 2450 (holding both are necessary for stating a claim). For challenges under the APA, that right ripens when "the plaintiff is injured by final agency action." *Id*. at 2448. Here, CSP fails to satisfy the necessary requirements to assert a complete and present claim under *Corner Post*. Therefore, accrual should begin when the WTR was promulgated in 2008, making CSP's claim untimely. However, even assuming *Corner Post* applies, CSP still fails to satisfy the APA requirements.

a. Because CSP Was Formed to Mount a Fresh Challenge to Business Practices and Long-Standing Regulations, *Corner Post* Does Not Apply Here.

Corner Post does not apply here because CSP was formed primarily to mount a fresh challenge to the WTR, not to remedy an injury. In *Corner Post*, petitioner Corner Post was a for-

profit convenience store which opened for business as a retailer in 2017. 1440 S. Ct. at 2448. After its first sale via debit card, the company was forced to pay interchange fees required by a regulation implemented by the Federal Reserve in 2010. *Id*. Corner Post brought action against the Federal Reserve Board, arguing the interchange fees were unlawful. *Id*. The Court agreed, holding Corner Post could bring a challenge to the regulation despite first being injured more than six years after the final agency action. *Id*. at 2460. They reasoned that accrual of a challenge to a regulation does not begin until the plaintiff is injured, based on the presumption that parties injured should have an opportunity to remedy their injuries. *Id.* at 2459.

Here, however, CSP has not carried its burden showing it has sustained an injury because its claim was intended to mount a fresh challenge to the WTR. When CSP was formed, the tunnel had been in operation for over 30 years, so any injury suffered by a CSP member would have occurred long before CSP's creation. Unlike *Corner Post*, where Plaintiff brought suit in order to remedy a distinct, actual injury, CSP's challenge to the WTR attempts to sidestep the statute of limitations by abusing *Corner Post*.

Unlike *Corner Post*, where Petitioner's cause of action arose organically from its regular business activities, CSP sent Highpeak a NOIS just fifteen days after its formation, suggesting CSP was formed specifically to mount this challenge. R. at 4. Further, CSP's President, Vice President, and Secretary, all of whom are members, each possess stale claims. *Id*. at 14. Shortly after CSP was formed, and in the days leading up to its initial complaint, CSP approached nearby residents like Jonathan Silver, informing them for the first time of Highpeak's activities. *Id*. at 16. Additionally, CSP's own mission statement concedes it was created with the express purpose "to protect the Stream from contamination resulting from industrial uses and illegal *transfers* of polluted waters," demonstrating CSP is more concerned with challenging the WTR than it is

with redressing their members' alleged injuries. *Id*. at 6 (emphasis added). The timeline of CSP being created and the NOIS being sent within a matter of weeks, right before the ruling on *Corner Post*, suggests CSP brought the claim to mount a fresh challenge to the WTR, using the *Corner Post* holding.

The District Court here found no reason to distinguish a nonprofit organization from a for-profit organization. R. 8. Yet, for-profits and nonprofits are distinct entities serving different purposes. While for-profits function with interests distinct from those of its employees, nonprofits, especially those acting in a representative capacity, function to serve member interests. Black's Law Dictionary (11th ed. 2019) (stating a corporation is "an entity that has legal personality distinct from the natural persons who make it up"). Nonprofits like CSP may not capitalize on *Corner Post's* holding when their members would have been barred from bringing a suit in an individual capacity.

b. The Court Should Interpret Accrual for CSP's Cause of Action as Beginning at Final Agency Action.

Because Corner Post does not apply here, the court should determine when accrual starts based on the context of this claim. *Crown Coat*, 386 U.S. at 522 (reasoning there are inherent hazards in attempting to define, for all purposes, when a cause of action first accrues). Thus, accrual should be "interpreted in the light of the general purposes of the statute...and with due regard to those practical ends which are served by any limitation of the time within which an action must be brought." *Id*. at 517 (citing *Koons*, 271 U.S. at 62).

First, the court should look to the general purpose of 28 U.S.C. § 2401(a). This section is a catchall statute of limitations which governs any claim brought against the U.S. when no other statutes of limitations apply, and thus it is the statute of limitations that applies here. *Corner Post*, 144 S. Ct. at 2450; *see also Friends of the Everglades v. U.S. E.P.A.,* 699 F.3d 1280, 1283,

(2012) (holding courts lack original jurisdiction under 33 U.S.C. § 1369 to review the WTR). Because the statute of limitations is applied generally, courts have looked to the context of the cause of action at issue. *Koons*, 271 U.S. at 62. Highpeak's challenge requires the Court to evaluate the validity of an administrative regulation, so accrual should start at the date of final agency action. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950); *SEC v. Chenery*, 318 U.S. 80, 95 (1943); *Corner Post*, 144 U.S. at 2472 (Jackson, J; dissenting) (finding accrual begins when a rule is finalized for "facial administrative-law claims [that] are not [plaintiff-specific]").

The court must also consider the "practical ends which are served by any limitation of the time within which an action must be brought." *Crown Coat*, 386 U.S. at 517. The main purposes of section 2401(a) are finality, certainty, and preventing abuses to the judicial system. *Corner Post*, 144 S. Ct. at 2470, 2475, 2479 (Jackson, J; dissenting). When considering finality, the Supreme Court has stated, "[t]he very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation." *Koons*, 271 U.S. at 65. Accrual beginning at final agency action provides that an agency regulation will not be subject to litigation after six years of the publishing of the regulation. *Corner Post*, 144 S. Ct. at 2452. Finally, accrual at final agency action fosters certainty and predictability in the legal system, allowing regulators, business, and wronged plaintiffs to understand and apply the law uniformly. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983).

Justice Jackson's dissent in *Corner Post* warns of a policy concern that the majority's decision could tempt "well-heeled litigants to game the system." *Corner Post*, 144 S. Ct. at 2470 (Jackson, J; dissenting). Here, CSP is doing just that, abusing the holding in *Corner Post* to challenge the WTR, just as Justice Jackson predicted. Therefore, accrual should begin at the date of final agency action, when the WTR was promulgated.

c. Even if Corner Post Applies, CSP Would First Have a Complete and Present Claim at the Promulgation of the WTR, so its Challenge is Still Untimely.

Assuming the Court does follow *Corner Post*, CSP would first have standing when Highpeak initially began operating the tunnel in 1992, and CSP would not have a complete and present claim under the APA until the WTR was promulgated in 2008, so its challenge is still untimely. *Corner Post* held that a right of action begins to accrue when it is complete and present. 144 S. Ct. at 2450. To have a complete and present claim, a plaintiff must satisfy the statutory provisions 5 U.S.C. § 702 and 5 U.S.C. § 704. *Id*. Section 702 determines whether an injured party has a cause of action, while section 704 provides that judicial review is only available to regulations where there has been final agency action. *Id*. at 2449-50. Each requirement is a "necessary, but not by itself . . . sufficient, ground for stating a claim under the APA." *Id*. While *Corner Post* emphasized the importance of a wronged party having their day in court, the accrual of a valid cause of action may nonetheless only begin once a plaintiff capable of bringing the claim is identified. *Koons*, 271 U.S. at 65.

In *Corner Post*, petitioner Corner Post first had a cause of action under 5 U.S.C. § 702 when they were required to pay an interchange fee, which occurred after the creation of Corner Post and after final agency action for the regulation. *Corner Post*, 144 U.S. at 2448. Here, however, CSP members would have been injured when the tunnel was first operated in 1992, as that is when a plaintiff's aesthetic and recreational value of the area would have been lessened by the pollution. R. 4; *Laidlaw,* 528 U.S. at 183-84. This is when CSP's cause of action would have formed. Then, when the WTR was promulgated in 2008, CSP would have had a complete and

present claim, and accrual would start. *Corner Post*, 144 S. Ct. at 2450. Since accrual here began fifteen years before CSP's cause of action, their challenge is untimely.

III. THE WTR IS A VALID REGULATION PROMULGATED PURSUANT TO THE CWA BECAUSE IT REASONABLY INTPERETS THE CWA'S AMBIGUOUS LANGUAGE PURSUANT TO EPA'S DELEGATED AUTHORITY.

The District Court did not err in holding the WTR was validly promulgated, because the CWA empowers EPA to engage in discretionary policymaking to regulate the Act to pursue its goals balancing water quality with State and local water keeping practices. Therefore, deference to EPA's reasoned interpretation, as set out in the WTR, should be preserved. Further, EPA's interpretation should be affirmed even if the court applies the *Skidmore* standard, as the WTR is precisely the kind of reasoned, policy-minded, long-standing interpretation afforded "great respect" under that framework. *Loper Bright* at 2283. Finally, because CSP does not advance any special justification for its challenge, the court should follow precedent set by *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210 (2009) ("Friends I") and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.,* 846 F.3d 492 (2017) ("Catskill III"), and uphold the rule.

a. <u>The Text of the CWA is Silent on the Applicability of Water Transfers to the NPDES Permitting System.</u>

Because review of the WTR under any standard requires that the CWA's provisions be ambiguous, the first step in the analysis remains whether the statute in question specifically addresses the issue covered by the rule. The CWA prohibits the discharge of a pollutant by any person except in compliance with the terms of the Act, one of which being discharges permitted by an NPDES permit. 33 U.S.C. § 1311. The CWA states that EPA, acting in its capacity as administrator, may "issue a permit for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharge will meet" requirements as specified in the

Act. 33 U.S.C. § 1342(a). The CWA defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). The term "addition," however, is not defined by the act.

The issue, then, as litigated by courts that have previously taken up the question, is whether the "'addition . . . to navigable waters'—meaning addition to 'the waters of the United States,'—refers to waters in the *individual sense* or as *one unitary whole*." *Friends I*, 570 F.3d at 1223 (emphasis added) (citing §1362(7)). EPA, as per its 2008 Final Rule, excludes water transfers from NPDES permitting because pollutants potentially moved from one body of water to another are not "added" since they already existed in the waters collectively. NPDES Water Transfer Rule, 73 Fed. Reg. at 33,699. In other words, because the pollutants were not introduced through a point source from the outside world, the CWA did not intend to manage such transfers through the NPDES framework.

After careful review of the plain text, the provision's immediate context, and the language within the broader context of the statute as a whole, reviewing courts were unable to resolve the ambiguity in favor of either definition. *Friends I*, 570 F.3d at 1227, ("[T]he statutory language is ambiguous"); *Catskill III*, 846 F.3d at 519, (holding "Congress did not in the [CWA] speak directly to the question of whether NPDES permits are required for water transfers" so the CWA is "silent or ambiguous as to this question.").

b. <u>In Resolving This Ambiguity, the Court Should Adhere to EPA's Holistic Interpretation of the CWA, Recognizing Congress' Express Delegation of Interpretive Policy-Making Authority to EPA.</u>

Loper Bright takes issue with the presumption that Congress, when passing a statute that contains ambiguous language, intended by default for agencies to independently fill in the gaps. 144 S. Ct. at 2265. "Mechanical reliance" on agency interpretations as "implicit delegations" through application of the *Chevron* test is, according to the Supreme Court, in direct conflict

with the APA. *Id*. However, agency interpretations are still afforded deference where congress explicitly grants an agency discretion to interpret a statute to formulate policy pursuant to its goals. *Id.* at 2259; *see Gray v. Powell,* 314 U.S. 402, 412 (1941) (holding that because Congress empowered agency to determine the meaning of "coal producer," its interpretation of the broad statutory provision, in light of competing policy aims, should stand); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941) (stating where Congress could not "define the whole gamut of ways to effectuate [its] policies in an infinite variety of specific situations . . ." it left "the adaptations of means to end" to the administrative process); *see also NLRB v. Hearst Publ'n.* 322 U.S. 111, 130 (1944) (finding it unnecessary to "make a completely definitive limitation around the term 'employee'" because that determination "has been assigned primarily to the agency created by Congress to administer the Act"). So, although the formal framework established by *Chevron* cannot be invoked to defend *any* agency interpretation, the WTR should be analyzed deferentially because it is founded on fact-finding and policy-making authority granted by Congress.

The text of the CWA suggests that Congress intended EPA, as administrator of the Act, to engage in broad discretionary activities to effectuate the CWA's competing goals. CWA section 101 allows the Administrator to "prescribe such regulations as are necessary to carry out his functions" under the Act. 33 U.S.C. § 1361(a). Congress further provides that EPA is tasked with promulgating guidelines for "identifying and evaluating *the nature and extent* of non-point sources of pollutants" and "methods to control pollution resulting from . . . 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 (emphasis added). The more specific language in section 304(f)(2)(F) modifies

the broad text of section 402, supporting an inference that Congress understood such movement of waters could cause pollution and that those risks were best addressed by other water management programs. *Id*. EPA's interpretation also pays heed to Congress' aim in section 101(g) that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired" by implementation of the CWA. 33 U.S.C. § 1251. The WTR rests on established practices of statutory interpretation that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701 (quoting Norman J. Singer, Statutes and Statutory Construction Vol. 2A § 46:05, 154).

c. Even if the *Skidmore* Standard Applies, the WTR Still Passes Muster Under the APA.

Loper Bright contemplates a return to a pre-*Chevron* landscape, when courts evaluating agency action applied the standard set out in *Skidmore v. Swift and Co.,* 323 U.S. 134 (1944). *Skidmore* instructed that, in evaluating the weight due an agency interpretation of an ambiguous act of Congress pursuant to the APA, courts should consider "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140; s*ee Loper Bright*, 144 S. Ct. at 2249 (approving the *Skidmore* approach).

After the enactment of the APA in 1946, and even before the Court's adoption of *Chevron* in 1983, the APA's "arbitrary and capricious" standard of review was viewed by contemporary courts as "a narrow one," where the court, after engaging in a thorough review of the record, upheld an agency interpretation if it made sense as a reasoned evaluation of relevant factors. *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1285 (1996); *see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) ("A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether

there has been a clear error of judgment." (internal quotations omitted)); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971), ("The court is not empowered to substitute its judgment for that of the agency."); *Wong Wing Hang v. Immigr. and Naturalization Serv.*, 360 F.2d 715, 719 (1966) (holding agency action is to be set aside "if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis"). Thus, EPA's interpretation of the CWA should remain untouched because the WTR constitutes a rigorous examination of the relevant textual and practical factors, reflecting industry expertise applied consistently over five decades.

i. The WTR should be upheld because it reflects "thoroughness evident in consideration" of the CWA by EPA.

The WTR was the result of considerable discussion and negotiation with stakeholders throughout the nation. In 2005, recognizing that EPA's longstanding position on transfers was resulting in costly litigation and potentially interfering with the uniform application of the law, EPA began the rulemaking process. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,697. Over the next three years, "EPA received a large number of comments on the proposed rule, including thousands of form letters." *Id.* at 33,698. EPA evaluated all of the comments and responded pursuant to the promulgation of the Final Rule in 2008. *Id*. This significant change in circumstances was decisive in the courts' decisions to uphold the WTR in *Friends I* and *Catskill III*. Indeed, *Chevron's* grant of deference to formalized agency interpretations of the law was premised on the rigorous nature of the notice-and-comment process that leads to the promulgation of an agency rule in accordance with the procedural safeguards established by the APA. 5 U.S.C. § 553; *United States v. Mead Corp*., 533 U.S. 218, 230 (2001); *accord, Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 741 (1996) (upholding regulation based in part by the deliberateness implicit in agency actions "adopted pursuant to the notice-and-comment

procedures of the [APA] designed to assure due deliberation"). Even if *Chevron* is no longer the preferred interpretive framework to address this question, agency interpretations based on the competing concerns of stakeholders have long been afforded considerable respect.

ii. EPA's reasoning in adopting the WTR reflected industry expertise and valid application of policy.

In the absence of clear congressional intent, EPA drew on its expertise and the policy considerations raised by the notice-and-comment process. Water transfers vary greatly in size and scope. Some may involve a single tunnel, while others draw billions of gallons of water into metropolitan areas throughout the country, ensuring access to drinking water for millions of people. *Catskill III*, 846 F.3d at 503. If NPDES permits were required for each of the thousands of point sources that together comprise these vast systems, costs could prohibit states from effectively managing water quantities. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004); *see* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,702; *Catskills III* at 529, ("[I]t could cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States, and . . . obtaining an NPDES permit and complying with its conditions could cost a single water provider hundreds of millions of dollars.").

In keeping with CWA's framing as a program of cooperative federalism, many regulatory alternatives are available in controlling the potential spread of pollution from water transfers. *See New York v. United States,* 505 U.S. 144, 167 (1992) (characterizing CWA as example of cooperative federalism). Alternatives include "nonpoint source programs; other federal statutes and regulations[;] . . . state permitting programs that have more stringent requirements than the NPDES program[;] . . . other state authorities and laws; interstate compacts; and international treaties." *Catskill III*, 846 F.3d at 529 (citing 33 U.S.C. § 1370(1)). The WTR preserves the

flexibility envisioned by Congress in developing "comprehensive programs" that balance state responsibility for the uses and quality of its waters. 33 U.S.C. § 1251(g).

iii. EPA has consistently exempted water transfers from NPDES permitting requirements since the adoption of the CWA.

Respect to executive branch interpretations of statutes is "especially warranted" if it was issued contemporaneously to the statute and "remained consistent over time." *Loper Bright*, 144 S. Ct. at 2248. The WTR was promulgated in 2008, three decades after the enactment of the CWA, to "clarify" EPA's long-standing interpretation of the ambiguous provisions in CWA § 402 regarding water transfers. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,697. Although never explicitly addressed by Congress, EPA has never required NPDES permits for water transfers. *Catskill III*, 846 F.3d at 525. Further, EPA's final rule, adopted in 2008, has been consistently applied over four administrations. R. 10, note 2. Congress, too, has acquiesced to EPA's interpretation, even after the uncertainty created by litigation on the issue in lower courts, and EPA's subsequent promulgation of the Rule. *See Catskill III*, 846 F.3d at 525 ("The permissibility of the rule is reinforced by longstanding practice and acquiescence by Congress."). The WTR merely clarifies and provides additional justification for its long-defended position, so it should be granted *Skidmore* respect as a reflection of EPA's contemporaneous, consistent understanding of the CWA's terms.

d. The Doctrine of *Stare Decisis* Strongly Cautions Against Overturning Settled Precedent Which Upholds the WTR.

In *Loper Bright*, the Supreme Court clarified that although it was changing its interpretative framework for evaluating agency action by overturning *Chevron* deference, its decision does "not call into question prior cases that relied on the *Chevron* framework." *Loper Bright*, 144 S. Ct. at 2273. Even the holding in *Chevron* itself, which involved an EPA

interpretation of the Clean Air Act, was not reversed or abrogated by the Court's change of course. *Id*. A mere change in interpretive framework, as the shift away from *Chevron* seems to indicate, cannot justify overturning a body of precedent just because those earlier decisions relied on *Chevron's* two-step inquiry. *See Dickerson v. United States,* 530 U.S. 428, 445 (2000) ("[W]e have always required a departure from precedent to be supported by some special justification" (internal quotations omitted)); *see also Arizona v. Rumsey,* 467 U.S. 203, 212 (1984); *United States v. Int'l. Bus. Machines Corp*., 517 U.S. 843, 856 (1996).

In 2004, the Supreme Court was asked whether the WTR was a reasonable interpretation of the CWA. *Miccosukee*, 541 U.S. 95. Although the Court there cast doubt on the "unitary waters theory," it declined to reach the issue and left the argument open to the parties on remand. *Id*. at 109. Then, in 2009, *Friends I* was decided in the Eleventh Circuit, upholding the WTR in light of EPA's promulgation of the Final Rule. 570 F.3d at 1228. Most recently, the Second Circuit decided *Catskill III* in 2017, concluding "the [WTR] satisfies *Chevron's* deferential standard of review" and is therefore not contrary to law. 846 F.3d at 520.

Here, the District Court questioned whether *Loper Bright* specifically addresses the effect of conflicting precedent when "circuit courts review[] a regulation under *both Skidmore* and *Chevron* and hold[] the regulation's validity to be lacking under the former precedent." R. 10. While it might be argued that *Loper Bright* suggests a return to *Skidmore* deference so the precedential value of pre-*Chevron* cases takes on a new importance, this view significantly downplays the importance of EPA's promulgation of the WTR itself. In *Friends I*, the court could not simply adopt the precedent available to it at the time because there had been an "important" change in circumstances. 570 F 3.d at 1218. EPA's WTR specifically addressed the question before them, and was "not available at the time of the earlier decisions." *Id*. Therefore,

the court concluded that those earlier precedents were not relevant to its decision and subsequently upheld the rule. *Id*. at 1222, 1228.

Accordingly, the Court should not rely on those precedents decided before the agency action at issue here. Further, because the group of decisions following EPA's promulgation of the WTR all upheld EPA's policy-based reasoning, and CSP's challenge to the WTR is based solely on a change in interpretive framework, the doctrine of *stare decisis* strongly advises against rejecting the WTR.

IV. POLLUTANTS INTRODUCED IN THE COURSE OF THE WATER TRANSFER TOOK THE DISCHARGE OUT OF THE SCOPE OF THE WTR, MAKING HIGHPEAK'S DISCHARGE SUBJECT TO PERMITTING UNDER THE CWA.

The District Court did not err in holding that pollutants introduced during the water transfer took the discharge out of the scope of the WTR, thus making Highpeak's discharge subject to permitting under the CWA. Because this analysis involves the interpretation of an administrative regulation, the "court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Seminole Rock*, 325 U.S. at 413–14. As explained above, this issue is reviewed under an arbitrary and capricious standard of review. 5 U.S.C. § 706(2)(A). Further, the Supreme Court has stated that, in interpreting a regulation, the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413–14; *see also Auer*, 519 U.S. at 461.

a. EPA's Interpretation of the WTR Should be Entitled Deference.

Agency interpretation of its own regulation is commonly entitled to a high level of respect, so the court should look to EPA's interpretation here. The Supreme Court "has often deferred to agencies' reasonable readings of genuinely ambiguous regulations," known as *Auer* deference. *Kisor*, 588 U.S. at 563; *see also Auer*, 519 U.S. at 463; *Seminole Rock*, 325 U.S. at

414. In *Kisor*, the Supreme Court upheld *Auer* deference but limited its scope, emphasizing agency interpretation is still subject to judicial review and "[a] court must assess whether the interpretation is of the sort that Congress would want to receive deference." *Kisor*, 588 U.S. at 590. Courts "must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 559.

Highpeak argues under *Loper Bright*, interpreting a regulation is a question of law for the courts, warranting at best a *Skidmore* analysis. However, the *Skidmore* approach applies to *statutory* interpretation, while here the issue concerns regulatory interpretation. *Loper Bright*, 144 S. Ct. at 2247 ("Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may . . . seek aid from the interpretations of those responsible for implementing particular statutes." (citing *Skidmore*, 323 U.S. at 140)). Unless *Seminole Rock* or *Auer* are overturned, the Court should respect EPA's interpretation of the WTR, following the *Seminole Rock, Auer,* and *Kisor* views of agency regulatory interpretation.

Highpeak contests EPA's definition of the word "introduced" in the text of the WTR. However, EPA's definition of the word "introduced" is not plainly erroneous or inconsistent with the regulation, so EPA's interpretation should be entitled deference. "EPA's longstanding position is that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source," meaning the pollutant is "introduced from outside the waters being transferred." NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701. Highpeak argues "water passing through any tunnel inevitably picks up some amount of 'new' pollutants, and, accordingly, this fact alone does not qualify as an 'introduction' of pollutants under the exception to the WTR." R. 11. They argue "the 'introduction' of pollutants must result from human activity and not natural processes like erosion. *Id*. Because EPA's interpretation of the

word "introduced" is consistent with the regulation, as their interpretation is derived from the WTR itself, it is not plainly erroneous or arbitrary and capricious. Thus, the court should defer to EPA's interpretation that any addition of pollutants during the transfer process, which would not be found in either body of water but for the transfer, constitutes an "introduction."

b. Based on EPA's Interpretation of the WTR, Highpeak's Discharge is Subject to NPDES Permitting Because the Pollutants Introduced Here are Excluded from the WTR.

The WTR "exclude[s] from NPDES permit requirements discharges from water transfers so long as pollutants are not introduced by the water transfer activity itself." NPDES Water Transfers Rule, 73 Fed. Reg. at 33,700; *see* 40 C.F.R. 122.3(i) (2023) ("This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred."). Thus, any pollutants introduced into the water as it travels through Highpeak's tunnel are excluded from the WTR and require an NPDES permit. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,705 ("[W]here water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required.").

Here, pollutants have been introduced by the water transfer activity. Approximately 2-3% higher concentrations of iron, manganese, and TSS were found in the water discharged into Crystal Stream than were found in Cloudy Lake on the same day, meaning the pollutants would not be found in either body of water but for the transfer. R. 5. Thus, additional pollutants are plainly "introduced" by the water transfer. 40 C.F.R. 122.3(i) (2023). Although Highpeak argues the pollutants are not introduced by the transfer because they are the result of a "natural processes like erosion" and not "human activity," that is not the case. R. 11. While erosion is a natural process, the additional pollutants are nonetheless the direct result of Highpeak's actions. Highpeak's tunnel was "partially carved through rock and partially constructed with iron pipe." *Id*. at 4. CSP has provided facts sufficient to support a contention that Highpeak was negligent in

the construction of its tunnel. Because Highpeak's alleged negligence is the cause of the erosion at issue, its discharges are not subject to the WTR. Therefore, the pollutants introduced should be subject to NPDES permitting under the CWA.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's denial to dismiss Highpeak's citizen suit for standing and timeliness and affirm the District Court's grant to dismiss CSP's challenge to the WTR.