Team 12

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 U.S. 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

November 21, 2024

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INTRODUCTION

Sometimes, a regulatory violation does not harm anyone. As a familiar example, many states require all cars to undergo a periodic safety and emissions inspection. If someone drives a car without a timely inspection, they have violated the law. This legal violation alone does not confer standing on just any driver or cyclist on the road to sue them. Instead, the private plaintiff would need to have an injury particularized to them. But the government could enforce the regulation without waiting for an actual injury—the whole purpose of the inspection system is prevention.

This case similarly presents a legal violation without an injury to the private plaintiffs. Highpeak Tubes, Inc. (Highpeak), has built a tunnel that transfers water from Cloudy Lake to Crystal Stream. Because the water picks up bits of solid metals in the tunnel itself, the tunnel must have a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA) and its implementing Water Transfers Rule (Rule). Thus, as the District court found, Highpeak's failure to obtain a NPDES permit is a violation of the CWA. Highpeak's theory that the Rule exempts transfers based on whether the pollutants are manmade or naturally occurring is atextual and was rightly rejected.

The CWA enforcement claim was brought as a private citizen suit by Crystal Stream Preservationists (CSP). For a lawsuit to proceed in federal court—for it to be a "case" or "controversy" under Article III—the plaintiff must have standing. As relevant here, standing requires an injury in fact to the plaintiff. CSP, however, failed to allege any injury in fact, either to the organization itself or to its members. So even though Highpeak violated the CWA, CSP lacked Article III standing and thus is a constitutionally improper plaintiff to bring this suit.

Separate from CSP's claim that Highpeak violated the Rule, CSP also claims that EPA violated the Administrative Procedures Act (APA) because its Rule was an unreasonable interpretation of the CWA. Although the Rule requires a NPDES permit for water transfers that introduce pollutants during the water transfer process, it does not require a NPDES permit based on pollutants that were already present in the relevant water of the United States prior to the transfer. For example, here the Rule requires Highpeak to obtain a permit based on pollutants introduced in the tunnel it built, not those that were already in Cloudy Lake. CSP argues that the Rule's exemption of transfers of waters of the U.S. per se impermissibly departed from the CWA.

CSP's Rule challenge fails for three reasons. First, CSP has suffered no injury, so it again lacks standing to challenge the Water Transfers Rule.

Second, even if CSP had standing to challenge the Rule, the District Court erred in ruling that their challenge was timely. The statute of limitations for APA violations starts when the relevant injury has occurred. The District Court's measurement of the statute of limitations from CSP's formation date, without regard to the members' earlier accrual of the relevant injuries, was an error. The District Court also provided an alternative rationale, that even if the statute of limitations began to run with the members' injuries (which it did), CSP member Jonathan Silver conclusively had a timely claim because he had moved to Rexville within the limitations period. But this conflates CSP's citizen suit claim over Highpeak's discharges in Rexville with CSP's challenge to the nationwide Rule. The statute of limitations applies to CSP's challenge to the nationwide rule. A finding that Silver could only have been injured by Highpeak within the limitations period does not answer whether, outside of the limitations period, he was injured in another location by the nationwide Rule.

Third, even if CSP had standing and its Rule challenge was timely, its Rule challenge would still fail on the merits. The CWA requires NPDES permits for the "addition" of pollutants to navigable waters of the U.S. As both courts of appeals to address this question have already held, that does not command EPA's rules to require NPDES permits for the mere *transfer* of waters that are already in navigable waters. CSP's attempt to discard this precedent based on *Loper Bright* is unavailing. *Loper Bright* explicitly disclaimed any such effect on settled caselaw resolving Rule challenges. The normal principles of stare decisis still apply, so the decisions upholding the Rule cannot be overturned absent a special justification. CSP failed to provide any such special justification, so the District Court rightly rejected its Rule challenge.

Because CSP lacks standing, this Court should vacate the District Court's order and CP's lawsuit should be dismissed. This will clear the way for EPA to ensure Highpeak's compliance with the Rule. If, however, this Court decides that CSP has standing, this Court should affirm the denial of Highpeak's motion to dismiss CSP's citizen enforcement claim. Further, if this Court decides that CSP has standing, this Court should still vacate the District Court's rulings on CSP's APA claim and remand for further factfinding on the APA claim's timeliness. If, however, this Court rules that CSP's APA challenge was timely, then it should affirm the dismissal of CSP's APA challenge on the merits.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered a motion to dismiss CSP's challenge to the Water Transfers Rule and denied a motion to dismiss CSP's Clean Water Act citizen suit. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 for civil actions arising under federal laws such as the CWA and the APA. Moreover, the question of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III," and so a federal question under 28 U.S.C. § 1331. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

EPA, Highpeak, and CSP all 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. § 1292(b), which permits interlocutory appeal of an order involving "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The District Court had indicated that the issues in its decision were controlling questions of law subject to a permissive appeal under § 1292(b). The Twelfth Circuit granted this appeal given the novel and complex issues that the District Court's decision raised, in satisfaction of 28 U.S.C. § 1292(b). Thus, permission to appeal an interlocutory order under Fed. R. App. P. 5 has been granted in this case.

QUESTIONS PRESENTED

I. Under Article III, does CSP have standing when it has not alleged that Highpeak's discharges caused its members to reduce their recreational activities?

II. Under 28 U.S.C. § 2401(a), was CSP's Water Transfers Rule challenge timely when CSP has not shown that any member's first putative injury from the Rule occurred within the limitations period?

III. Under the principles of stare decisis, does CSP meet the high burden of proving a special justification to overrule the well-established Rule when the cases upholding the Rule relied on *Chevron* deference?

IV. Under the Rule, does Highpeak need a NPDES permit when its water transfer process introduces metals into the water?

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To achieve this goal, the CWA created a comprehensive system to regulate water pollution through methods like water quality standards, 33 U.S.C. § 1313, and minimum effluent limitations, 33 U.S.C. § 1311. However, according to some courts, the "cornerstone" of the Clean Water Act is the NPDES. *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 822 F.2d 104, 108 (D.C. Cir. 1987). Under NPDES, permits are issued by EPA or by states delegated such responsibility for the "discharge of any pollutant." 33 U.S.C. § 1342(a)–(c). As a result, a violation of NPDES can occur in two circumstances: either a person fails to obtain a permit, or they violate the terms of the permit issued to them. 33 U.S.C. § 1311; 33 U.S.C. § 1342. This creates a system that covers all potential sources of water pollution and allows for flexibility in the individual permits tailored to specific polluters.

EPA promulgated the Rule to clarify whether NPDES permits must be obtained when water is transferred between two navigable waters. In 2004, the Supreme Court heard a case in which both parties agreed that a NPDES permit is not required for water transfers within the same watershed. The Tribe does not dispute that if C–11 and WCA–3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). In response to this case, EPA issued guidance clarifying their position on water transfers and later, in 2008, promulgated the Water Transfers Rule. The Rule states that a NPDES permit is not needed for a water transfer unless the water is subject to "intervening industrial, municipal, or commercial use" or pollutants are introduced "by the water transfer activity itself to the water being transferred." 40 C.F.R. §122.3(i).

II. Factual Background

Highpeak owns a 42-acre parcel of land in Rexville, New Union which contains Cloudy Lake to the north and Crystal Stream (the "Stream" or "Crystal Stream") to the south. Highpeak operates a recreational tubing business in Crystal Stream. Highpeak sought to increase the volume and speed of Crystal Stream to enhance their customers' experience. So in 1992, Highpeak obtained permission from the State of New Union to construct a tunnel measuring 100 yards long and four feet in diameter to connect Cloudy Lake to Crystal Stream. Although New Union granted the permission, they prohibited Highpeak from opening the tunnel for water transfers unless New Union determined that water levels in Cloudy Lake were adequate, which typically occurs from spring to late summer. Subsequently, Highpeak constructed a tunnel that is partially carved through rock and partially constructed with iron pipe, with valves on either end that Highpeak can operate to control water flow in the Stream.

In December 2023, thirteen members of the Rexville community created Crystal Stream Preservationists, Inc. (CSP), a not-for-profit organization dedicated to "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." Two of CSP's members own land and reside along the Crystal stream – Cynthia Jones, who moved to her current address in 1997, and Jonathan Silver, who moved from Phoenix, Arizona to Rexville in 2019. Shortly after the group's creation, CSP sent a notice of intent to sue letter to Highpeak for violations of the CWA, with copies sent to the New Union Department of Environmental Quality ("DEQ") and EPA as required by regulation. The letter alleged that Highpeak failed to obtain a NPDES permit for their water transfer which introduced several pollutants into the water being transferred. Highpeak replied to this letter on December 27, 2023, denying that their actions would require a NPDES permit and further arguing that a "natural" addition of a pollutant during a water transfer was outside the scope of the Rule.

III. Procedural History

After the required sixty days following their notice, CSP filed its Complaint in the New Union District Court making claims against both Highpeak and EPA. In the Complaint, CSP alleged that Highpeak's tunnel discharged iron, manganese, and total suspended solids (TSS) into the water being transferred, such that it needed to apply for a NPDES permit. 33 U.S.C. § 1342. Specifically, CSP conducted sampling at Cloudy Lake and at the discharge into Crystal Stream which showed a 2-3% increase in concentrations of pollutants from the tunnel directly. CSP also alleged that EPA failed to properly promulgate the Water Transfers Rule according to the APA.

Highpeak moved to dismiss CSP's Complaint for lack of standing and timeliness, and EPA defended the Water Transfers Rule as a valid promulgation under the Clean Water Act. Furthermore, EPA joined CSP's argument that Highpeak needed to obtain a NPDES permit under the Rule. The District Court refrained from ruling on this case while two relevant cases were pending before the Supreme Court: *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). Following the Supreme Court's ruling on these cases, the District Court issued a decision and order which denied Highpeak's motion to dismiss on standing, timeliness, and whether a NPDES permit was needed for the transfer of water from Cloudy Lake to Crystal Stream. J.A. 12. But the Court granted EPA's motion to dismiss CSP's claim that the Water Transfers Rule was not validly promulgated. *Id.* Highpeak and EPA appealed the decision as to standing and timeliness, CSP appealed the decision regarding valid promulgation of the Rule, and Highpeak appealed whether a NPDES permit was required for their water transfer. On August 1, 2024, the Court of Appeals for the Twelfth Circuit granted leave to appeal on these four issues.

SUMMARY OF THE ARGUMENT

The District Court erred in denying EPA's motion to dismiss on the grounds that CSP lacked standing, and the claim was not timely. Conversely, the Court properly held that the Rule was a valid promulgation and correctly dismissed CSP's challenge of the Rule because NPDES permitting is required.

First, CSP lacks standing. An organization may establish standing by showing that a harm was done to the organization or to its members so that the organization may stand in for its members. CSP has proven neither. CSP does not claim injury to itself as an organization, so it relies solely on representational standing. However, CSP's members were not harmed.

CSP must plead facts that show it has standing to sue, including injury in fact. Injury in fact may come in the form of harm to a plaintiff's aesthetic or recreational interest. However, CSP's members have suffered neither of these harms. CSP's members have not alleged any change in their recreational activities, but merely a theoretical position that they would use Crystal Stream more if not for Highpeak's water transfers. Thus, CSP offers no more than conclusory allegations.

Second, CSP's claim was time-barred. The statute of limitations on this claim began to run when the final Rule first—allegedly—injured CSP's members. Restarting the clock for the formation of an inanimate association would allow plaintiffs to easily evade statutes of limitations, and courts have rightly refused to allow such obvious gamesmanship.

Also, CSP has not shown that its claim is timely merely because its member Jonathan Silver moved to the Crystal Stream area within the limitations period. The statute of limitations at issue applies to CSP's challenge of the Rule, which was promulgated nationwide well before Silver relocated. Thus, the Rule could have affected Silver outside the limitations period, making CSP's claim untimely

Third, EPA's promulgation of the Rule was a valid use of its authority under the CWA. If this Court applies *Skidmore* deference, as the District Court suggests, it should find EPA's interpretation persuasive because it considered many factors relevant to the CWA and followed APA procedures when promulgating the Rule. However, this Court need not review the rulemaking through *Skidmore* deference.

A central holding to the Supreme Court's decision in *Loper Bright* guided courts to overrule precedent relying on *Chevron* deference only if there was a special justification to overrule. Contrary to the District Court's holding, this was not dictum because it was essential in shaping the results of *Loper Bright*. Applying this principle of stare decisis, this Court should not find a special justification because CSP provides no evidence of one. Rather, CSP argues the Rule is invalid because of the change in interpretive methodologies proscribed by the Supreme Court. This is inconsistent with well-established principles of stare decisis.

Fourth, the Court properly held that the water transfer here was subject to NPDES permitting. The language of the CWA is unambiguous in proscribing NPDES permitting for water transfers. However, even if this court were to find that the CWA is ambiguous, EPA is entitled to deference under *Kisor*. *Kisor* deference only requires that an agency's interpretation of its own regulation be reasonable. EPA's interpretation was reasonable here because it was a thorough consideration of the impacts of water transfers, including Highpeak's. Of course, *Loper Bright* did not overrule *Kisor* deference because interpretation of an agency's own regulation is markedly different than an agency interpreting a statute. However, EPA's interpretation is also entitled to *Skidmore* deference because it thoroughly considered the situation to conclude that NPDES permits are necessary for water transfers like Highpeak's.

STANDARD OF REVIEW

This Court "review[s] de novo [the] district court's decision on a Rule 12(b)(6) motion to dismiss" for failure to state a claim. *South Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 693 (6th Cir. 2022). Since the review is de novo, this Court may rule on the District Court's holdings based on "any reason in the record, including alternative grounds." *Id.* (internal quotations omitted). Also, "the district court's interpretation of unambiguous terms of the NPDES permit is subject to de novo review." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998).

ARGUMENT

I. CSP lacks Article III standing.

For a case to proceed in federal court—indeed, for it to be a "case" or "controversy" under Article III—the plaintiff must meet the irreducible Article III requirement of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (hereinafter *Lujan II*). Standing contains several elements, including—at issue here—that the plaintiff must have suffered an "injury in fact" caused by the plaintiff. *Id.*; *United States v. Texas*, 599 U.S. 670, 676 (2023); *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 380 (2024). Injury in fact is an invasion of a legally protected that must be (a) "concrete and particularized," and (b) "actual or imminent," not "conjectural," "hypothetical," or "speculative." *Lujan II*, 504 U.S. at 560, 565 n.2. CSP, as the party invoking federal jurisdiction, bears the burden of establishing Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

A. CSP has standing only if its members would.

When a plaintiff is an organization, it may establish standing either in its own right or solely as the representative of its members. *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023). The first type of organizational standing can

be established by harms to the organization's concrete interests such as collecting dues, contributions, or government funding. *See* 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.9.5 (3d ed., Supp. 2024) (collecting cases). The latter form of standing is also known as representational standing. *SFFA*, 600 U.S. at 199. At issue here, representational standing requires that the organization's members would otherwise have standing to sue in their own capacities. *Id.*

Here, CSP does not claim any injury to itself as an organization. *See* J.A. 7–8 (mentioning no such allegation). Instead, the District Court's standing analysis examined only whether any injury was suffered by CSP's members. J.A. 7. Accordingly, CSP's theory of standing is representational, and depends on whether its members would have standing in their own right.

B. CSP has not alleged any injury in fact to its members.

No party here disputes that standing can arise from factual harms to aesthetic or recreational interests. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (noting that standing can exist when environmental harm "in fact affects the recreational or . . . esthetic interests of the plaintiff"). Instead, the problem is that no such factual injury is alleged by CSP.

Here, at the pleading stage, CSP must "clearly allege facts" demonstrating standing. *Spokeo,* 578 U.S. at 338 (cleaned up). And this makes sense: plaintiffs at each stage of litigation must establish standing and the other matters on which they bear the burden of proof with the "same…degree of evidence." *Lujan II*, 504 U.S. at 561; *accord Murthy v. Missouri*, 603 U.S. 43, 58 (2024). The Court's remark that plaintiffs can "aver" that an area's recreational or aesthetic value lessening does not create some special pleading standard for environmental suits. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000). *Laidlaw* itself went on to say the plaintiff's submissions presented "*dispositively* more than

the mere 'general averments' and 'conclusory allegations' found inadequate" in prior cases. *Id.* at 184 (emphasis added). And even if "general averments and conclusory allegations" could have sufficed at the pleading stage, the Supreme Court has since abrogated that position. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (holding that a "conclusory allegation" did not supply "facts adequate to show illegality"); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (reaffirming that "conclusory" allegations are not entitled to an assumption of truth); *id.* at 687 (confirming that a "general allegation" does not preclude dismissal).

The *Laidlaw* plaintiff demonstrated a recreational injury when the challenged discharges caused its members' nearby recreational activities to stop. Prior to the first challenged discharges, several affiant members stated that they had enjoyed activities such as fishing and swimming in their local river. *Laidlaw*, 528 U.S. at 181–82. The defendant's hazardous waste incinerator then began to pollute the river with discharges "including—of particular relevance to th[e] case—mercury, an extremely toxic pollutant." *Laidlaw*, 528 U.S. at 176. As a result, these members "no longer engaged" in their previous activities in and along the river. *Id.* at 182. This established a "concrete" injury because it showed that the discharges, and affiant members' "reasonable concerns" about the discharges' effects, "directly affected" the members' recreational interests. *Id.* at 180, 183–84.

Plaintiffs have failed to establish a concrete recreational injury, however, when alleged environmental harms did not cause them to restrain their recreational use of the affected area. *See HEAL Utah v. PacifiCorp*, 375 F.Supp.3d 1231, 1243 (D.Utah 2019). In *PacifiCorp*, a CWA citizen suit, the court recognized that a plaintiff can establish injury if their reasonable concerns cause them to "cease or limit" their relevant activities. *Id.* at 1243. There, the plaintiffs' member had "concern" about unnatural change to upstream water that could affect the creek and pond on

her property. *Id.* at 1242–43, 1244. She also stated that her "enjoyment of the property is reduced by knowledge" of the unnatural changes upstream. *Id.* at 1244 n.81. But she did "not say, for example, that she limits her recreational use of the pond or property due to her concerns." *Id.* at 1244. Thus, she did "not state how her concerns directly and concretely affect her recreational . . . interests." *Id*. *See also Bruzek v. Husky Oil Operatons Ltd.*, 520 F.Supp. 3d 1079, 1089 (W.D.Wis. 2021) ("In *Laidlaw*, plaintiff's members testified that their fears and concerns were manifested by concrete injury that they no longer fished or waded in the river. By contrast, plaintiffs here aver simply that they are afraid or concerned without translating those feelings into similar, concrete actions against their interests.")

Here, CSP has alleged no change to its members' recreational activities due to Highpeak's discharges. For example, despite CSP member Jonathan Silver becoming "concerned" after he learned about Highpeak's water transfer to Crystal Stream, he still "ha[s] regularly walked" along the Stream "[t]hroughout [his] time in Rexville." J.A. 16. So his walks along the Stream have not stopped. And he still walks there "regularly," so no less frequently than before. J.A. 16. Instead, Silver claims that "[i]f not for Highpeak's discharge, I *would* recreate more frequently on the Stream." *Id* (emphasis added). In other words, Silver hypothesizes that, absent Highpeak's discharges, his walks would *increase* in frequency. But this is speculation, not a fact. It also is not credible: Silver lived in Rexville and has regularly walked along the Stream for five years. He gives no reason why his walk frequency did not increase before, or what would cause them to increase now. The court should not credit this conclusory—and implausible—speculation.

Nor does Silver demonstrate recreational injury by his declaration that, absent Highpeak's discharge, he would allow his dogs to drink from the stream. J.A. 16. Even if forbearance from drinking stream water could be a recreational injury to Silver's *dogs*, that would not suffice for

injury to Silver. *See Sierra Club v. Energy Future Holdings Corp.*, No. 12-CV-108, 2013 WL 12108600, at *4 (W.D. Tex. Nov. 22, 2013) (explaining that "a party cannot assert the injuries of someone else to establish standing"). In *Energy Future Holdings*, the plaintiff's member attested that her husband had breathing problems that get aggravated when he went outdoors in the vicinity of the defendant's smoke emissions. *Id.* at *3. But this caused an "inability to enjoy the outdoors *with* her husband" for the member herself. *Id.* at *4. Thus, the member herself had an "independent injury." *Id.* at *4. Here, on the other hand, Silver does not allege that he cannot enjoy his dogs' company along the Stream. *See* J.A. 16. In fact, he stated that he still walks his dogs along the stream "regularly." J.A. 16. Thus, Silver failed to show any injury to himself.

Similarly, CSP member Cynthia Jones also failed to allege any recreational injury. Jones has lived in Rexville since 1997. J.A. 14. Yet despite learning about Highpeak's discharge in 2020, Jones has "regularly" walked along the Streak "[t]hroughout her time in Rexville." J.A. 14, 15. Like Silver, Jones claims that but for Highpeak's discharge, she somehow "would" recreate more frequently along the Stream. J.A. 15. And just as it did for Silver, this barren—and implausible—speculation fails to establish any injury in fact for Jones. Jones also claims that, but for Highpeak's discharge, she would walk "directly in the stream." J.A. 15. But this is just more speculation. "Throughout" Jones's time in Rexville—including the 13 years before she learned about Highpeak's discharge—she has walked "along" Crystal Stream. J.A. 14, 15. Nowhere does she state that she ever had walked in the Stream, even before she learned of the discharges. *See* J.A. 14–15. And Jones gives no explanation of why she would want to start now. This baseless speculation fails to make out injury in fact.

II. The District Court erred in ruling that CSP's Rule challenge was timely.

Even if CSP had standing—which it does not—it has not shown that its APA challenge of the Rule is timely. The six-year statute of limitations for APA challenges began to run when the

Rule first injured CSP's members. Jones has been active along Crystal Stream since before the Rule's 2008 promulgation, so her 2024 Rule challenge is clearly barred. And the fact that Silver only moved to Rexville in 2019 does not resolve the timeliness of his 2024 Rule challenge because the Rule operates nationwide. The District Court's ruling to the contrary rested on two legal errors, which require reversal or at least vacatur and remand.

A. The statute of limitations began to run when CSP members were first injured.

Corner Post reaffirmed that in situations of representational standing, the statute of limitations begins to run when the claim was first allowed to be brought by "the 'real parties in interest.'" *Id.* at 2456–57 (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). In *Koons*, a wrongful death action was brought on behalf of the decedent's family by the estate administrator. *Koons*, 271 U.S. at 58, 62. The case concerned whether the cause of action accrued when the decedent died or when the court subsequently appointed the administrator. *Koons*, 271 U.S. at 60, 62. Importantly, no party disputed that the basic principle that claim accrued at whichever point the action was first allowed to be brought in court. *Id.* at 61. Instead, the question was only whether the action was allowed to be brought at the time of death or only after there was an administrator. *Id.* at 61. The Court held that the beneficiary family could validly initiate an action before the appointment of an administrator. *Id*. at 62–63. So the Court concluded that the claim accrued on death because that was when "the beneficiaries on whose behalf any administrator would seek relief—the 'real parties in interest'—had the right to 'procure the action.'" *Corner Post*, 144 S.Ct. at 2457 (quoting *Koons*, 271 U.S. at 62–63).

Here, the APA claim accrued when the final Rule first purportedly injured the "real parties in interest:" CSP's members. *See Corner Post*, 144 S.Ct. at 2450, 2457. The members are the "real parties in interest." *See Corner Post*, 144 S.Ct. at 2457; *Hunt*, 432 U.S. at 346 (explaining

associational standing as "standing to assert the rights of the individual [members] in a representational capacity."). The members' claims accrued as soon as they had the right to bring this Rule challenge. *See Corner Post*, 144 S.Ct. at 2457 (reaffirming the definition of accrual from *Koons*). And there is no question that CSP's members "could theoretically have brought this challenge" as soon as they were injured, with or without CSP. *See* J.A. 8; *Corner Post*, 144 S.Ct. at 2450. So CSP's APA claim accrued when the final Rule first injured CSP's members. *See Corner Post*, 144 S.Ct. at 2457.

The District Court's conclusion otherwise relied on a misunderstanding of *Corner Post*. The District Court ruled that CSP's challenge was timely because CSP "could not have suffered injury until December 1, 2023, the date of CSP's formation." J.A. 8. The District Court reasoned that this followed from *Corner Post*'s holding that "the statute of limitations under the APA does not accrue until the *plaintiff* is injured by the regulation." *Id.* (citing *Corner Post*, 144 S.Ct. at 2450). But the plaintiff here—CSP—has never been injured. *See* Part I, *supra*. Indeed, this is the verbatim holding from that page of *Corner Post*: "An APA plaintiff *does not have a complete and present cause of action* until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Corner Post*, 144 S.Ct. at 2450 (emphasis added). So on those terms, CSP—the plaintiff—has no cause of action at all. *See id.*; *id.* at 2449 ("Thus, a litigant cannot bring an APA claim *unless* and until she suffers an injury.") (emphasis added). Of course, *Corner Post* did not purport to abolish third-party standing. Instead, *Corner Post* addresses third-party standing in its discussion of *Koons*, where it reaffirmed that a claim accrues when the right to bring the action was first held by "the real parties in interest." *Id.* at 2457.

The District Court's analogy to the facts of *Corner Post* is confused. The District Court's statement that both CSP and the *Corner Post* plaintiff "could not have brought" APA challenges

before they existed is true in a banal sense. J.A. 8. What mattered in *Corner Post* was that the injury was to Corner Post itself—not to a third party represented by Corner Post—so the claim *could not accrue* before Corner Post existed. 144 S.Ct. at 2448, 2460. Here, on the other hand, the injuries were not to CSP itself but to its members, and they occurred before CSP's formation. J.A. 7. *Corner Post*'s whole formula is that the statute of limitations begins running when the relevant injury occurs. 144 S.Ct. at 2450. In *Corner Post*, the organization's founding determined the date of injury; here, CSP's does not. 144 S.Ct. at 2448; J.A. 7.

Finally, the District Court's insistence that "the fact that [the members] may not be able to timely bring this challenge is not dispositive" also contradicts background principles of third-party standing. The Supreme Court has explained that associational standing is standing "to assert the rights of the individual [members] . . . in a representational capacity." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 346 (1977). This is similar to assignment, which is the "transfer of rights . . . 'from one person to another.'" *Assignment*, BLACK'S LAW DICTIONARY (12th ed. 2024). In the assignment context, "an assignee stands in the shoes of an assignor. Consequently, an assignee's cause of action accrues at the same time as the assignor's did." *Dev. Corp. of Arizona v. Am. Nat'l Fire Ins. Co.*, No. CIV 99-0632, 1999 WL 35808988, at *3 (D.N.M. Aug. 3, 1999) (citations omitted). Likewise, an associational plaintiff such as CSP seeks "to proceed based on 'associational standing,' essentially by stepping into the shoes of their members." *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 586 F. Supp. 3d 893, 903 (E.D. Ark. 2022), *aff'd*, 86 F.4th 1204 (8th Cir. 2023). So by analogy, the association's cause of action accrues at the same time that the member's did. *See Bridgewater v. Double Diamond-Delaware, Inc.*, No. 3:09-CV-1758, 2011 WL 1671021, at *7 n.16 (N.D. Tex. Apr. 29, 2011) ("[I]f an association is going to stand in the shoes of its members, it cannot assert claims that the individual member could not

assert."); *Int'l Bhd. of Teamsters v. Am. W. Airlines, Inc.*, No. CIV-95-2924, 1997 WL 809760, at *1 (D. Ariz. Sept. 25, 1997) ("When an association seeks to represent its members in a representative capacity, the claims brought by the association are subject to the same defenses that could have been asserted had the individual members asserted their own claims.").

B. CSP has not shown that its members were first injured in the limitations period.

Because the Rule challenge's timeliness depends on whether limitations period encompasses the members' injuries, resolving this issue requires an inquiry into when the members were first injured. The District Court stated, effectively as an alternative holding, that "[a]ny doubts" about the Rule challenge's timeliness were "resolved" by the fact that Silver moved to the state in 2019, and that he "could not have been injured until he moved to the area." J.A. 8–9. In light of *Corner Post*, it is unclear whether an association is time-barred from bringing an APA challenge if the first injury to any of its members occurred outside the limitations period. But even if a timely claim by one member can suffice, the District Court's analysis of Silver's timeliness is mistaken.

To back up, CSP's lawsuit contains two claims: that Highpeak's permitless discharges violates the Rule, and that the Rule is invalid under the Clean Water Act. We agree that Silver could not have been injured by Highpeak's discharges until he first visited Crystal Stream. But EPA questions the timeliness of CSP's rule challenge, not their citizen suit against Highpeak. The Rule here has effect nationwide. See 40 C.F.R. 122.3(i). So the District Court's resolution of the timeliness challenge on the basis that Silver "could not have been injured until he moved to the area" is based on a conflation of the Rule enforcement claim and Rule invalidity claim.

III. The Water Transfers Rule should not be invalidated.

In overruling *Chevron*, the Supreme Court disrupted a key interpretative methodology in administrative law, giving rise to this case. *See Loper Bright*, 144 S. Ct. at 2273 (2024). *See also Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1989). Over 20,000 cases cited *Chevron* deference, including those upholding the Rule, which has left courts without a clear standard for reviewing such regulations. Though the Court in *Loper Bright* did not clearly establish *Skidmore* deference as the appropriate standard for reviewing such regulations, the District Court applied this deference. *See* J.A. at 9. Even if this Court applies *Skidmore* deference, it should not overrule EPA's interpretation of the CWA in promulgating the Rule because EPA's interpretation is persuasive. *See Loper Bright*, 144 S. Ct. at 2273; J.A. at 9.

Nonetheless, the Supreme Court offered guidance for reviewing precedent that relied on *Chevron* deference which "are still subject to statutory stare decisis." *Loper Bright*, 144 S. Ct. at 2273. This guidance is a central holding because it is essential to implementing the result of *Loper Bright*. Therefore, this Court need not even apply *Skidmore* deference when reviewing the Rule. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Instead, stare decisis requires a "special justification" to ignore the precedent upholding the Rule. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). No special justification was offered here. *See* J.A. at 9. Thus, this Court should uphold the Rule following the guidance of the Supreme Court in *Loper Bright* and apply stare decisis.

A. The Water Transfers Rule is a persuasive interpretation of the CWA.

The regulation should be upheld as a proper use of EPA's authority under the CWA to require "permits for discharge of pollutants" because the Rule requires NPDES permits for exactly that. 33 USC §1342; 40 CFR § 122.3. Requiring such permits is plainly intended to regulate the discharge of pollutants in water transfers, though it does not require permits for the mere transfer

of water in navigable waterways. *See* 40 CFR § 122.3. The District Court suggests that this interpretation should be reviewed under *Skidmore* deference, though it was not expressly adopted by the Supreme Court in *Loper Bright*. *See* Skidmore, 323 U.S. at 135; *Loper Bright*, 144 S. Ct. at 2273. However, even if this Court adopts this standard, it should uphold the regulation.

In 1944, the Supreme Court held that the proper way to review agency interpretation of a statute was through a standard similar to that of a trial judge reviewing expert testimony. *See Skidmore*, 323 U.S. at 135. The Court held that the weight of deference that would be afforded to the agency would depend on "all those factors which give it power to persuade." *Id.* at 140. Therefore, the Court would look to the reasoning behind agency action to determine if it was a proper use of authority. *See id.* Factors such as the thoroughness of its consideration, the validity of the reasoning, and the consistency with earlier decisions all impact this power to persuade. *Id.*

The Second and Eleventh Circuits have held that, based on a "holistic interpretation" of the CWA, EPA's interpretation was persuasive and therefore, the Rule was valid. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009); *Catskill Mts. Chptr. Of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017). The Second Circuit found that EPA considered the statutory language, congressional intent, the broader statutory scheme, EPA's previous positions on requiring NPDES for water transfers, and the importance of water transfers in the US. *Catskill*, 846 F.3d at 524. Through considering these factors, EPA reasonably determined that "Congress intended to leave primary oversight of water transfers" to federal and state authorities, thus warranting the Rule. *See id.* (citing 73 Fed. Reg. 33,697 at 33,699-703). Beyond the thorough consideration, the court also found that the purpose of the CWA was upheld by the Rule because it created an obstacle to water transfers to prevent unlimited transfers. *See id.*

at 529. Clearly, EPA was thorough in its justification for the regulation which complied with the purpose of the CWA and was careful in its interpretation.

The cases before EPA's regulation have no bearing on this case. *See e.g. Dubois v. U.S. Dept. of Agriculture, et al.*, 102 F.3d 1273, 1298-99 (1st Cir. 1996) (holding that the transfer of water is not subject to NPDES permits prior to EPA enacting the Rule and seeks EPA's expertise on this issue). Courts later displaced these cases when reviewing the Rule with *Chevron* deference. *See e.g. Catskill*, 846 F.3d at 524. The prior displaced cases do not indicate how a court should rule if it returns to *Skidmore* deference because these decisions were not reviewing the current agency action. *See e.g. Dubois*, 102 F.3d at 1298-99. Nor do these decisions implicate *Brand X*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005).

The Supreme Court in *Brand X* held that a court's interpretation of a statute supersedes a later interpretation from an agency when the court finds the statute unambiguous and defines its meaning. *See id.* However, this does not apply here because courts that reviewed water transfers before the Rule was promulgated did not find the statute unambiguous. *See e.g. Dubois*, 102 F.3d at 1298-99. Rather, courts like the First Circuit specifically requested EPA to use its expertise and weigh in on the issue. *See id.* Since EPA weighed in and promulgated the Rule, this Court should follow the persuasive precedent that upheld it along with the Court's guidance in *Loper Bright.*

B. Loper Bright held that prior cases upholding regulations receive stare decisis.

The Supreme Court's guidance to lower courts for reviewing precedent that relied on *Chevron* deference is central to the Court's holding. *See Loper Bright*, 144 S. Ct. at 2273 (holding cases relying on *Chevron* deference are "subject to statutory stare decisis"). The District Court considered the Supreme Court's guidance as mere dicta, but followed it, nonetheless. *See* J.A. at 10. However, the District Court failed to apply the proper test for distinguishing dicta from holdings. Federal district and circuit courts give substantial "respect" to guidance—even if it is in

dicta—from the Supreme Court. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1349 (Fed. Cir. 2000).

Federal courts have long held that the line between dictum and a holding is whether the statement encompasses the result of the decision. *See Powell v. Thomas*, 643 F.3d 1300, 1305 (11th Cir. 2011). The portions of a Supreme Court decision "that are necessary to the result" are binding. *Powell*, 643 F.3d at 1304-5. *See also Arcam Pharm. Corp. v. Faria*, 513 F.3d 1, 3 (1st Cir. 2007). For example, in *Faria*, the First Circuit found that guidance in a prior case was a holding because it directed action for future courts reviewing similar issues. *See, Faria* 513 F.3d at 3. This was "essential to the result" because it explained the meaning of the decision thereby providing guidance for future courts. *Id.*

Conversely, "dicta is defined as those portions of an opinion that are not necessary to deciding the case." *Powell*, 643 F.3d at 1304-5. Dictum is merely "observations in a judicial opinion" that do not affect the "determination of legal questions." *Faria*, 513 F.3d at 3. However, the Supreme Court's guidance for treatment of precedent that relied on *Chevron* deference was central to *Loper Bright.*

Given the significant impact of *Loper Bright*, the Court reasonably understood that it must guide federal courts reviewing related questions of administrative law in the future. *See Loper Bright*, 144 S. Ct. at 2273. Therefore, the Court specifically provided guidance for lower courts to control the result of *Loper Bright*. *See id.* (cases that rely on *Chevron* deference are "subject to statutory stare decisis"). If courts did not follow the Supreme Court's guidance, it would leave the impact and results of *Loper Bright* up to many different courts with varying interpretations. The resulting inconsistent standard is plainly contrary to the Court's holding which sought to avoid

creating a standard that would require "imposing one limitation…after another" to provide clarity, as was necessary, but ineffective, with *Chevron*. *Id.* at 2269.

In overturning *Chevron,* the Supreme Court noted its concern with the "inconsistent" application of its method of reviewing agency action. *See id*. at 2272. It also emphasized concern with the inconsistency between *Chevron* and the APA that the Court failed to "reconcile" over "four decades." *Id.* at 2265. The Court's decision was plainly intended to create a consistent method of reviewing agency action under the APA. *See id.* at 2263-64. However, courts cannot uniformly decide future APA cases if they vary on a question as fundamental as whether the enormous body of APA caselaw from before *Loper Bright* remains good law. Thus, it was necessary for the Court to provide guidance for the future treatment of this caselaw.

Even if this Court finds that the Supreme Court's attempt to guide the results of *Loper Bright* is dicta, it still must give significant respect to the high Court's guidance. *See Stone,* 229 F.3d at 1349. The Supreme Court may ignore its own dicta if it finds the point at issue was not "fully debated" in its prior decision. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). However, the issue of future treatment of precedent that relied on *Chevron* deference was a key issue "debated" by the Court. *Id. See generally Loper Bright*, 144 S. Ct. 2244. However, "as a subordinate federal court", this Court does not "share the Supreme Court's latitude in disregarding the language" of prior Supreme Court decisions. *Stone,* 229 F.3d at 1349. The Federal Circuit explained that the Supreme Court's discretionary review over its appellate docket suggests that it is intentional with everything in the cases it chooses. *See id.* This includes the language it employs in decisions. *See id.* Therefore, if the Court intentionally provided guidance to lower courts, it should be followed, especially if it is "explicit and carefully considered." *Id.* at 1350.

The Supreme Court's guidance in *Loper Bright* was clearly intentional. The expansion of the administrative state as the result of *Chevron* deference was key to the Court's decision. *See Loper Bright* 144 S. Ct. 2273. However, swiftly overruling much of the power granted to agencies, along with the regulations promulgated under this authority could significantly disrupt the U.S. government and the legal system. Understanding this, the Court carefully created explicit guidance to limit the risks and follow "statutory stare decisis despite [its] change in interpretive methodology." *Id.* at 2273 The guidance instructs that normal principles of stare decisis still apply when reviewing precedents decided under the Court's previous standard. *See id.*

C. There is no special justification to overrule the Water Transfers Rule.

The Supreme Court's guidance is consistent with the well-established principle that courts do not overrule precedent merely because it relied on authorities that were abrogated subsequently without a "special justification." *Halliburton Co.*, 573 U.S. at 266. However, courts seldom find that a special justification applies. *See id.*

In *Loper Bright,* the Court held that a special justification is necessary to overrule cases relying on *Chevron* deference. *See Loper Bright*, 144 S. Ct. at 2253, 2273. The Court specifically cited prior holdings that required a special justification, "not just an argument that the precedent was wrongly decided," to guide future review of precedent that applied *Chevron* deference. *Id.* (citing *Halliburton Co.*, 573 U.S. at 266). *See also CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (holding that stare decisis demands respect to judicial precedent "whether judicial methods of interpretation change or stay the same").

Similarly in *Halliburton*, the Court held that the petitioner gave "no new reason to endorse" its position that would overrule established precedent. *Id.* at 270. Rather, the Court found that the several factors offered were merely arguments against the established precedent. *See id.* Thus, the Court did not find a special justification. *See id.* If the Court did not follow the stringent special

justification standard, the principles of stare decisis would be undermined, creating instability throughout the legal system. *See CBOCS West, Inc.*, 553 U.S. at 457 (holding that this principle of stare decisis is necessary for "legal stability…upon which the rule of law depends").

The precedent upholding the Rule is similarly well established. *See Catskill*, 846 F.3d at 524; *Friends of the Everglades*, 570 F.3d 1227. The Second and Eleventh Circuits upheld the Rule because Congress implicitly "acquiesced" to its interpretation of the CWA and NPDES requirements. *Catskill*, 846 F.3d at 516. As the Second Circuit concluded, by declining to pass a law changing the language of the CWA or eliminating the permitting requirement in the eight Congresses since the Rule was promulgated, Congress has "acquiesced" to EPA's interpretation. *Id.* Thus, a special justification is required to disregard this well-established interpretation of the CWA.

The Supreme Court recently held that reversing a precedent requires a special justification beyond a mere belief that the "precedent was wrongly decided." *See Allen v. Cooper*, 589 U.S. 248, 259 (2020) (citing *Halliburton Co.*, 573 U.S. at 266). There, the Court found no special justification because no evidence of one was offered. *See id.* However, even with more evidence, the Court did not find a special justification. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 454-56 (2015). In *Kimble*, the petitioners presented economic data to rebut erroneous reasoning in the precedent. *See id.* Nonetheless, the Court did not find a special justification. *See id.* Rather, the Court found that "overruling precedent is never a small matter" and "respecting stare decisis means sticking to some wrong decisions." *Id.* at 455. Even economic data could not overcome the important stability created by stare decisis. *See id.* Here, far less is offered to establish a special justification for overruling the Rule. *See* J.A. at 8-10.

CSP does not offer any evidence to suggest that there is a special justification to overrule EPA's interpretation of the CWA in the Rule. *See* J.A. at 8-10. Instead, this Court is impermissibly asked to ignore the established precedent upholding the Rule merely because *Chevron* deference was overruled. *See id.* This is plainly inconsistent with the principles of stare decisis, and this Court should not signal to other courts that stare decisis may not apply to precedent that relied on *Chevron* deference.

If this Court decided that the relevant precedent that relied on *Chevron* deference may be ignored merely because *Chevron* was overruled, then courts across the country could reasonably do the same in the 20,000 other cases that applied *Chevron*. Such would be plainly inconsistent with the Supreme Court's explicit guidance in *Loper Bright. See Loper Bright*, 144 S. Ct. at 2273. Thus, this Court should find that a NPDES permit was necessary for Highpeak.

IV. Highpeak's discharge required a NPDES permit under the Water Transfers Rule.

The plain language of the Water Transfers Rule requires Highpeak to obtain a NPDES permit for the discharge of pollutants in the course of its transfer. 40 C.F.R. 122.3(i). Although this language is clear, even if it were ambiguous, the Court of Appeals should still give deference to EPA's interpretation of the regulation following *Kisor v. Wilkie*, 588 U.S. 558 (2019). Highpeak argues that *Loper Bright* overturned *Kisor*, but because the scope and purpose of *Loper Bright* applies specifically to agency interpretation of statutes, deference is still afforded to agency interpretation of their own regulations. *Loper Bright*, 144 S.Ct. at 2273. Still, even if *Loper Bright* did overturn *Kisor*, this Court should uphold EPA's interpretation of the Water Transfers Rule following *Skidmore* deference. *Skidmore*, 323 U.S. 134.

A. The Water Transfers Rule unambiguously requires a NPDES permit here.

According to established canons of statutory construction, courts determine whether statutory language is unambiguous, and if it is, their inquiry ceases. *Connecticut Nat. Bank v.*

Germain, 503 U.S. 249, 253–254 (1992). Because the language of the Water Transfers Rule unambiguously determines the application of the NPDES program to water transfers, no further analysis is needed. *Id.* Under the Clean Water Act, it is illegal for any person to discharge a pollutant unless they receive a permit issued by EPA or a state administrator approved by EPA. 33 U.S.C. §§ 1311(a), 1342(a)(1). Here, EPA has not delegated the permitting program to New Union's DEQ, so Highpeak must comply with the requirements of the NPDES program. J.A. 4; 33 U.S.C. § 1342(b). There are several instances where discharges do not require a NPDES permit, including the "discharge from a water transfer." 40 C.F.R. § 122.3(i). However, the plain text of the rule requires NPDES permits when pollutants are "introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). Sampling of the water in Cloudy Lake and the discharge into Crystal Stream clearly show a 2-3% increase in levels of iron, manganese, and TSS during the transfer. J.A. 5. Therefore, the Water Transfers Rule did not apply to Highpeak's water transfer and a NPDES permit was required under the Rule's unambiguous language.

The plain meaning of the word "introduce" confirms that Highpeak's water transfer requires a NPDES permit. 40 C.F.R. § 122.3(i). Highpeak argues that the Rule's requirement of a permit for pollutants "introduced" by water transfer activity applies only to pollutants introduced by human activity, not by natural processes like erosion. *Id.* There is no definition of "introduce" in either the Clean Water Act or in the definitions section of the Water Transfers Rule. *See* 33 U.S.C. § 1362; 40 C.F.R. § 122.2. Thus, courts construe the word "in accordance with its ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006). The dictionary defines "introduce" as a verb meaning to "place" or "insert" and makes no distinction between natural and unnatural processes. *Introduce*, Merriam-Webster.com Dictionary,

https://www.merriam-webster.com/dictionary/introduce (last visited Nov. 11, 2024). Highpeak's invented definition contradicts the word's ordinary meaning, so the District Court appropriately held that Highpeak needed a NPDES permit for its introduction of pollutants in the course of a water transfer.

B. Even if the Rule is ambiguous, EPA's interpretation receives *Kisor* deference.

The Supreme Court has long instructed courts to defer to an agency's construction of its own regulations. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency interpretation of regulations are controlling unless "plainly erroneous or inconsistent"). And the Court recently reaffirmed this principle, explaining that an agency interpretation receives deference when (i) the rule is genuinely ambiguous based on traditional tools of construction; (ii) the agency's reading is reasonable; and (iii) upon an independent inquiry, the court finds that the agency's interpretation entitles it to controlling weight. *Kisor v. Wilkie*, 588 U.S. 558, 574-580 (2019). Although the analysis in part IV.A *supra* suggests that the Rule is unambiguous, if the Rule is ambiguous, each of the elements in *Kisor* is satisfied and Highpeak is required to obtain a NPDES permit.

For regulations that are genuinely ambiguous, an agency's interpretation of the rule must be "within the bounds of reasonable interpretation." *Kisor*, 588 U.S. at 576. In the case of Highpeak's transfer from Cloudy Lake to Crystal Stream, a reasonable interpretation could find that a NPDES permit was needed for the water transfer. In its preamble to the Rule, EPA acknowledged that leaking oil from turbines in a hydroelectric dam would require a NPDES permit. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed Reg. 33697, 33705 (June 13, 2008). Following which, EPA determined that other methods of water transfers may introduce pollutants, like where "unlined, earthen ditches" add pesticide residue, heavy metals, and toxins into the water. *Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097, 1108 (D.

Haw. 2019). This has clear similarities to the tunnel Highpeak constructed which is partially lined and contributes iron and manganese, which can be considered heavy metals, and total suspended solids (TSS) which could include toxins or pesticides. Paul B. Tchounwou et al., *Heavy metal toxicity and the environment*, 101 Experientia Supplementum 133 (2012); G.S. Bilotta & R.E. Brazier, *Understanding the influence of suspended solids on water quality and aquatic biota*, 42 Water Research 2849 (2008).

Moreover, NPDES permits do not necessarily restrict the discharge of pollutants, but instead provide a mechanism for reporting discharges, so it would be reasonable for EPA to require such permits for any introduction of pollutants. 33 U.S.C. § 1342(a)(2); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), as amended (Feb. 3, 1994) (allowing polluters to discharge pollutants not in their NPDES permit as long as they abide by reporting requirements). Thus, EPA's interpretation that Highpeak should have obtained a NPDES permit is squarely within the reasonable bounds of interpretation given the language and purpose of the rule.

Finally, a court will conduct an independent inquiry to determine if the agency's interpretation entitles it to controlling weight. *Kisor*, 588 U.S. at 576. This inquiry is not an exhaustive test but will consider factors including the agency's authoritative or official position, whether the agency's interpretation implicates its substantive expertise, and if the agency's reading reflects "fair and considered judgment." *Id.* at 559. The Water Transfer Rule is a final regulation, and therefore is an official position advanced by EPA. 40 C.F.R. § 122.3(i); *Kisor*, 588 U.S. at 577 (defining authoritative or official position as an action taken by agency actors through their delegated vehicles to make authoritative policy and including "official staff memoranda" as an example). Next, the agency relies on its substantive expertise regarding water pollution controls,

including NPDES permits, to interpret the Water Transfers Rule. *See* 33 U.S.C. §§ 1252, 1342. Lastly, the agency's reading reflects "fair and considered judgment" about the Rule's scope. *Kisor*, 588 U.S. at 579. Instead of creating an "unfair surprise" to regulated parties, EPA's application of the Water Transfers Rule to Highpeak's situation is consistent with its past decisions to require NPDES permits for water transfers that introduce pollutants. *Id.*; *Nakatani,* 401 F. Supp. 3d at 1108. Therefore, the EPA's interpretation of the Water Transfers Rule satisfies each element enumerated in *Kisor*, requiring deference from this Court.

Unlike agency interpretation of statutes, which was addressed in *Loper Bright,* this case turns on a separate question regarding agency interpretation of its own regulations. Highpeak argues that *Kisor* deference is not applicable to EPA's interpretation of the Water Transfers Rule given the recent Supreme Court decision in *Loper Bright*. J.A. 11. However, *Loper Bright* cited *Kisor* multiple times but nowhere stated that it overruled *Kisor* in the way that it overruled *Chevron*. *Loper Bright,* 144 S.Ct. at 2273. In general, courts do not overturn earlier authority *sub silentio,* so if the Supreme Court intended to overturn *Kisor* it would have explicitly said so. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Also, *Chevron* concerned the standard of review for agency interpretation of its enabling statute, not the appropriate standard of review for agency interpretation of its own regulations. *Loper Bright,* 144 S.Ct. at 2273. In fact, the Court in *Loper Bright* agreed with *Kisor* that some interpretive issues of a regulatory scheme that appropriately fall within an agency's expertise. *Id.* at 2267 (citing *Kisor*, 588 U.S. at 578) (noting that while interpretive issues "often" fall within a "judge's bailiwick" the court leaves open the possibility that some of these issues are in the agency's "bailiwick."). Overall, Loper *Bright* does not extend to agency interpretation of its own regulation, thereby keeping *Kisor* good law.

Furthermore, the purpose of *Loper Bright* is consistent with an agency's ability to interpret its own regulations. By overturning *Chevron*, the majority aims to restore powers of legal interpretation to the courts and ensure compliance with the requirements of the APA. *Loper Bright*, 144 S.Ct. at 2257, 2263. But unlike statutes which are written by Congress, regulations are written by agencies themselves, so they are uniquely positioned to determine their meaning. *Kisor*, 588 U.S. at 570. Allowing agencies to make such interpretations does not contradict the aim of returning legal interpretation to the courts because regulations are distinct from statutes, and agencies have "unique expertise" to apply regulations to scientific, technical, or complex issues. *Id.* at 571. Moreover, the court in *Kisor* acknowledged that interpretation of regulations is inherently different from statutory interpretation because it often entails some degree of policymaking. *Id.* This is also consistent with the APA, because Section 706 requires deference to be given to agency policymaking and factfinding. 5 U.S.C. § 706. Overall, the narrow scope of *Loper Bright* and its purpose of restoring legal interpretation to the courts and complying with the APA supports maintaining *Kisor* as good law and allowing an agency to interpret the regulations it promulgates.

C. Even if *Kisor* is overturned, EPA's interpretation receives *Skidmore* deference.

If *Kisor* is overturned, then the replacing standard of review would be under *Skidmore* which still applies deference to agency interpretations. *Skidmore*, 323 U.S. at 140. Under *Skidmore*, a court will determine the quality of an agency's interpretation by examining factors like 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." *Id.* However, as Justice Kagan pointed out in her *Loper Bright* dissent, deference under *Skidmore* will mirror *Chevron* in the battles over the clarity of the text compared

to the expertise of the agency. *Loper Bright*, 144 S.Ct. at 2309 (Kagan, J., dissenting). Still, the District Court found that each of these factors was satisfied because EPA's thoroughness was evidenced by its detailed rulemaking process, EPA's reasoning behind exempting certain transfers from CWA permitting requirements was valid based on its expertise, and over the course of four administrations, EPA has been consistent in its defense of the WTR. J.A. at 10, n.2. Although this issue was not necessary to the District Court's holding, in an independent application of the *Skidmore* factors a court would similarly defer to EPA's interpretation. Therefore, the district court did not err in deferring to EPA's interpretation of the Water Transfers Rule and subsequently rejecting Highpeak's motion to dismiss.

CONCLUSION

Because CSP lacked standing, EPA respectfully requests that this Court vacate the District Court's order and that CSP's lawsuit be dismissed.

If this Court concludes that CSP has standing, however, EPA requests affirmance of the District Court's denial of the motion to dismiss the CWA citizen suit claim, and vacatur and remand for further proceedings on the Rule challenge.

If this Court concludes that CSP has standing and that the Rule challenge was timely, EPA requests affirmance of the District Court's dismissal of the Rule challenge on the merits.

CERTIFICATION

We hereby certify that the brief for ___ ___ Law School is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Date _____11/21/2024_____