Team 16

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 Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Statement of Jurisdiction

From the United States District Court for the District of New Union's issuance of a decision and order on a motion to dismiss on August 1st, 2024 in case 24-CV-5678, United States Environmental Protection Agency appeals. The District Court had subject matter jurisdiction under 5 U.S.C. § 702 (agency actions), 33 U.S.C. § 1365 (Clean Water Act), and 28 U.S.C. § 1331 (federal questions). United States Environmental Protection Agency ("EPA"), Highpeak Tubes, Inc. ("Highpeak"), and Crystal Stream Preservationists, Inc. ("CSP") 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 interlocutory appeal under 28 U.S.C. § 1292(b). The District Court granted leave to appeal to address the novel questions presented here as there is a "substantial ground for difference of opinion" and the appeal will "materially advance the end of litigation." *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247, 249 (D. Conn. 2009).

Statement of Issues Presented

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

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

III. Did the District Court err in holding that the 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. Tunnel connecting Crystal Stream and Cloudy Lake

Highpeak Tubes, Inc. has owned and operated a recreational tubing business in Rexville, New Union for the past 32 years. Highpeak rents out inner tubes to customers to float down Crystal Stream ("the Stream"), which runs through its property. In 1992, Highpeak sought and received permission from the State of New Union ("the State") to build a tunnel connecting the Stream to nearby Cloudy Lake ("the Lake") to transfer water to increase the Stream's water flow. The tunnel was built the same year. Both the Stream and the Lake are "waters of the United States" under the CWA.

The tunnel is four feet in diameter and approximately 100 yards long, with valves at both ends. Highpeak employees may open the valves so that water flows from the Lake into the Stream, increasing the Stream's volume and velocity. Such water transfers may only occur when the State determines that water levels in the Lake are high enough. Part of the tunnel consists of an iron pipe. The rest is carved directly through rock.

II. NPDES Water Transfers Rule

The National Pollutant Discharge Elimination System ("NPDES") is a permit program established by the Clean Water Act ("CWA") to regulate point sources that discharge pollutants into waters of the United States. Unless under permit, the CWA bans the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The NPDES Water Transfers Rule is a regulation promulgated by EPA in 2008. Under the WTR, water transfers are excluded from NPDES permit requirements. The WTR defines a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). This exclusion "does

not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.*

III. Alleged discharge of pollutants into Crystal Stream

Crystal Stream Preservationists ("CSP") is a not-for-profit corporation with the stated mission of "protect[ing] the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." App. A (Decl. of Cynthia Jones) at Par. 4. CSP has 13 members, all of whom have lived in Rexville for at least the past 15 years, except one who moved to Rexville in 2019. The corporation was formed on December 1st, 2023.

On December 15th, 2023, CSP served Highpeak a notice of intent to sue ("the NOIS") under the Clean Water Act, copying the New Union Department of Environmental Quality ("DEQ") and EPA. The NOIS alleged that Highpeak's tunnel is a point source that discharges pollutants into Crystal Stream without an NPDES permit. It was supported by sampling data showing that Cloudy Lake has higher concentrations of iron, manganese, and total suspended solids ("TSS") than the Stream.

CSP challenged the validity of the WTR, anticipating Highpeak's reliance on it as a defense. It further argued that even if the WTR were valid, addition of pollutants during transfer took the tunnel's discharge out of the scope of the WTR, providing sampling data showing that concentrations of iron, manganese, and TSS were 2.5-4.0% higher at the tunnel's discharge point in the Stream than at its intake at the Lake. App. B (Pollution Data).

On December 27th, 2023, Highpeak replied to CSP. It refused to respond to the NOIS on the merits and stated that discharge from its tunnel did not require an NPDES permit under the WTR. It also argued that natural addition of pollutants during transfer did not take the tunnel's discharge outside the WTR's scope.

On February 15th, 2024, CSP filed its complaint in the District Court for the District of New Union. The complaint contained claims against both Highpeak and EPA. It alleged that the WTR was invalidly promulgated and inconsistent with the CWA. Alternatively, it alleged that even if the WTR were valid, addition of pollutants during the water transfer meant that Highpeak required an NPDES permit for discharge from its tunnel anyway.

IV. Current litigation

Both Highpeak and EPA moved to dismiss the claim, arguing that CSP does not have standing, the claim was not timely filed, and the WTR was validly promulgated. Highpeak further argued that higher concentrations of pollutants in water after transfer due to a natural process such as erosion should not subject it to NPDES permitting. On August 1st, 2024, the District Court dismissed CSP's challenge to the WTR but held that CSP has standing, the claim was timely filed, and Highpeak's discharge falls outside of the scope of the WTR and requires an NPDES permit. All parties cross-appealed.

Summary of the Argument

The District Court erred in finding that CSP has standing to challenge the WTR. Organizations may assert either direct standing or representative standing. *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021). CSP cannot compellingly assert either.

Direct standing is found where an organization can establish the alleged harm has (1) frustrated its mission through concrete and demonstrable injury, and (2) caused it to divert resources in response to that frustration. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). CSP's alleged harm does not satisfy either prong. A mere interest in conservation, absent a particular adverse effect on the organization, does not grant standing. *Sierra Club v. Morton*,

405 U.S. 727, 739 (1972). CSP also does not allege any resources expended in response to the claimed harm.

Representational standing requires that an organization's members must otherwise have standing in their own right. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Individual standing requires (1) injury in fact (2) traceability; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). CSP fails to prove injury in fact and redressability. Aesthetic or recreational harms are recognized as injury in fact, but are limited to areas actually used by the plaintiff. *Id.* at 555. Damage to something merely in the vicinity is insufficient. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). CSP has failed to show disruption to an established history of use of the Stream. Redressability requires plaintiffs to show that a ruling in their favor makes it "significantly more likely" that these harms will be cured. *Baughchum v. Jackson*, 92 F.4th 1024, 1032 (11th Cir. 2024). CSP seeks relief that would plausibly allow Highpeak to get an NPDES permit and continue releasing pollutants. It is not "significantly likely" that CSP's injury will be redressed. Therefore CSP members lack individual standing and CSP lacks representative standing.

The District Court erred in finding CSP's challenge of the WTR to be timely. By statute, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401. Accrual occurs "when the plaintiff has the right to bring suit in court." *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2447 (2024). Here, the right to bring suit on which CSP relies was formed prior to CSP's incorporation, and CSP failed to file within six years of accrual. To find otherwise would create perverse and unjust incentives.

In *Corner Post*, plaintiff alleged a harm suffered directly by the organization. Individuals comprising the organization could not have brought a claim until the organization was founded. Conversely, CSP's claim is grounded in harms suffered by individuals independent of their connection to the group. No harm was suffered after CSP's founding that its members did not suffer the day before. There is no new claim because there has been no new infringement. Only "*different* legal wrongs give rise to different rights of action." *Herr v. United States Forest Serv.*, 803 F.3d 809, 820-21 (6th Cir. 2015) (emphasis added). CSP's claim is distinct from the claim in *Corner Post* because of its representative nature. In assuming its members' right to make a claim, CSP also assumes the limitations on those claims, including time-bars.

CSP's challenge is untimely. Its members have suffered the alleged harm since at least 2008, well outside of the six-year window. To hold otherwise would promote gamesmanship and functionally remove the civil statute of limitations. If the incorporation resets the statute of limitations of harms suffered by its members, no claim is truly outside the statute of limitations. To allow CSP's claim to proceed is to fundamentally reject the statute of limitations.

The District Court was correct in validating the WTR. The court correctly applied a *Loper Bright stare decisis* test. Even if that is found to be error, the court's holding is validated by a *Skidmore* deference test, or, if needed, a *State Farm* arbitrary and capricious test.

Loper Bright instructs that decisions regarding the validity of regulations are entitled to *stare decisis* respect. Overturning such decisions requires "special justification." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The WTR has been validated previously. *See, e.g.*, *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency* (*Catskill III*), 846 F.3d 492 (2d Cir. 2017). In determining the strength with which *stare decisis* protects rulings,

courts consider the workability of the rule created, the reliance it has induced, and Congress' action to correct the court. All three support preserving the WTR's validation.

A precedent's workability refers to its creation of predictable and consistent outcomes. Decisions validating the WTR are workable. Courts apply precedent uniformly and clearly, and always reach the same result with no presentation of difficulty. *See, e.g.*, *S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022).

The WTR has induced reliance. Resources have been spent to create dams, tunnels, and pipelines, and transferors depend on the WTR for residential and agriculture use. *Catskill III,* 846 F.3d at 500. The Supreme Court has noted that deviating from the WTR risks the water supply to millions of Americans by requiring thousands of new permits. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004).

Congress can correct erroneous interpretations of its statutes. It has taken no action to correct EPA or the courts that have affirmed EPA's position. Choosing to let the WTR and decisions validating the WTR stand suggests that Congress agrees with EPA's regulation.

Even if the court finds a special justification, the WTR is valid under *Skidmore* deference. An agency interpretation is most entitled to deference when a rule was promulgated after thorough consideration, on the basis of valid reasoning, and in accordance with previous pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The WTR was thoroughly considered. The WTR reflects longstanding EPA policy, formalized after an analysis of the legislative, judicial, and policy backgrounds and implications. *Water Transfers Rule*, 73 Fed. Reg. 33,697 (June 13, 2008).

The WTR was also validly reasoned from legal and policy perspectives. Legally, the rule is grounded on EPA's definition of "addition" in the context of adding pollutants to waters of the

United States. EPA has long viewed "addition" to mean only the first introduction of the pollutant into the waters of the United States. Transferring a pollutant already in one water of the United States to another is thus not an addition under the NPDES. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Because the CWA grants EPA large discretion to define terms, it is reasonable to give deference to EPA's definition of "addition." *Id.*

From a policy view, EPA mirrors the intent of the CWA: the authority to regulate water transfers belongs to the states. The CWA specifies that Congress does not intend to interfere with "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(g). Considering the states that rely on transfers to allocate water, the WTR is necessary to adhere to Congress' intent.

Even if not given deference under *Skidmore*, the WTR is still valid because it is not arbitrary or capricious. 5 U.S.C. § 706. Regulations are arbitrary or capricious when the agency considered factors Congress had not intended it to consider, failed to consider important factors, or explained its decision in a manner that is counter to the evidence or implausible. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Per the *Skidmore* analysis, the WTR aligns with Congress' state-delegation intent. With respect to the WTR's plausibility, *Gorsuch* has already ruled favorably. CSP's arguments to the contrary are grounded in reviving previous cases that predate the WTR and invalidated the policy underlying the rule. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill I*), 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill II*), 451 F.3d 77 (2d Cir. 2006). However, CSP fails to fill the gaps in these cases' reasoning. *Catskill I* offers no policy analysis, offering only an interpretation of the CWA that assumes a tunnel "is unlikely to have created the pollutants that it releases." 273 F.3d

at 493. The facts of this case disprove the weak assumptions upon which *Catskill I* sits; it would be unreasonable to view that case as controlling. *Catskill II* is similarly flawed, honing in on the CWA's intent to preserve states' rights over *quantity* of water while the CWA concerns *quality*. *Catskill II*, 451 F.3d at 83. It fails to think of the consequences of regulating quality. If there are enforcement mechanisms, there are conditions placed on states' access to their desired quantities, counter to the CWA's intent. If there are not, the permit requirement is pointless. Accordingly, prior cases give rise to no issue in the WTR's promulgation.

The District Court did not err in holding that the pollutants entering the water in the course of the transfer bring Highpeak's discharge outside the scope of the WTR. The WTR "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3. EPA's interpretation that Highpeak's tunnel "introduces" pollutants during water transfer is valid. An agency's reading of its own regulation stands when (1) an unambiguous regulation is interpreted correctly, or (2) an ambiguous regulation is interpreted reasonably, fairly, and in a manner implicating the agency's substantive expertise. *Garcia v. Garland*, 64 F.4th 62, 72 (2d Cir. 2023); *Kisor v. Wilkie*, 588 U.S. 558 (2019). EPA's reading stands under either path.

The WTR is unambiguous, and EPA's interpretation of the word "introduce" is clearly correct. A regulation is ambiguous if it "prove[s] susceptible to more than one reasonable reading." *Kisor*, 588 U.S. at 556 (2019). Based on the WTR's text, structure, purpose, and context, only the EPA's interpretation is reasonable. EPA's reading of "introduce" to include introduction of pollutants by natural processes such as erosion comports with the term's plain meaning and judicial precedent. *See Gorsuch*, 693 F.2d at 165. It also makes sense within the broader NPDES program and EPA's clear authority to regulate pollutants from natural processes

in other contexts, such as requiring permits for runoff and erosion and sediment control plans. *See* 40 C.F.R. §§ 122.34, 122.44. Contrary to Highpeak's claim that EPA's interpretation would undermine the purpose of the WTR, Highpeak's interpretation would undermine the purpose of the NPDES. Highpeak argues that pollutants from natural processes like erosion should not be considered pollutants "introduced" during the water transfer because transferred water will always pick up trace pollutants. This interpretation is not a legitimate alternative reading, but wishful thinking. Whether pollutants are "trace" is a question of science, not law. Highpeak forgets the language of the WTR—*no* additional pollutants are tolerated, trace or otherwise.

Even if the WTR is ambiguous, Highpeak's discharge still falls outside its scope. Courts give deference to agency interpretations of ambiguous regulations that (1) are reasonable, (2) implicate the agency's substantive expertise, and (3) are "fair and considered." *Kisor*, 588 U.S. at 579 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). EPA's interpretation of the WTR warrants deference. It is reasonable in consideration of the WTR's text and context. As a matter of science or prediction, it implicates EPA's substantive expertise. *W. Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003). It is also fair. Interpretations are only unfair when they come as a "surprise" to the affected party. *Christopher*, 567 U.S. at 155. Because EPA's interpretation is based so simply in the WTR's plain language and the purpose of the NPDES, there is hardly room to argue surprise.

Standards of Review

Standing is a matter of law that is reviewed *de novo*. *Tr. of Upstate New York Eng'rs v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). A motion to dismiss based on statute of limitations is reviewed *de novo*. *Orgone Cap. III, LLC v. Daubenspeck*, 912 F.3d 1039, 1043 (7th

Cir. 2019). Judicial review of agency actions is subject to the arbitrary and capricious standard prescribed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A); *Ohio v. Env't Prot. Agency*, 603 U.S. 279 (2024). Interlocutory appeals are reviewed only for the district court's conclusions of law. *Jammal v. Am. Fam. Ins. Co.*, 914 F.3d 449, 454 (6th Cir. 2019). These conclusions of law are reviewed *de novo* but any district court findings of facts are not reviewable. *Id.*

Argument

I. CSP lacks standing because neither the organization itself nor its members suffered an injury in fact.

The Court should reverse the denial of the motion to dismiss for lack of standing. The APA creates a cause of action for a party adversely affected by an agency action. 5 U.S.C. § 702. A party challenging an agency action must have standing under Article III. *See e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997); *see also* U.S. CONST. art. III, § 2. An organization can establish standing in two ways, direct organizational standing or representative associational standing. *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021). Organizational standing requires showing that an organization has a "personal stake" in the controversy. *Id.* Associational standing allows an organization to sue on behalf of injuries to its members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Represented members must have standing in their own right to confer standing on the organization. *Id.* The evidence offered by CSP is insufficient to show either a personal stake in the controversy or to justify that its members have standing in their own right. The organization itself has not had its purpose frustrated as to require spending of resources which could be the basis for injury. Injuries alleged by members of the plaintiff organization are inadequate to support the

conclusion that they suffered an injury. Finally, the desired relief sought by CSP fails to meet the redressability standard of individual standing because it is speculative whether voiding the WTR or requiring Highpeak to obtain a NPDES permit will prevent the pollution into Crystal Stream which is the actual cause of the injury alleged.

A. CSP lacks direct organizational standing because its mission was not sufficiently frustrated by the alleged conduct identified.

An organization has direct standing to sue when it establishes that conduct has (1) frustrated its mission and (2) caused it to divert resources in response to such a frustration. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982); *Nielsen v. Thornell*, No. 22-15302, 2024 U.S. App. LEXIS 16550, at *8 (9th Cir. July 8, 2024). The injury must be concrete and demonstrable, not merely a setback to abstract interests. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding an environmental organization's long standing interest in conservation insufficient to grant standing); *Havens*, 455 U.S. at 379. An organization cannot manufacture an injury by crafting a mission statement so broad that virtually any action could be a frustration of the stated organizational purpose. *Nielsen*, 2024 U.S. App. LEXIS 16550 at *9.

Here, CSP has not alleged any resources expended in responding to its alleged injury. That is enough to deny CSP direct standing. Like in *Sierra Club*, interest in conservation without injury is insufficient. 405 U.S. at 739. Furthermore, the construction of CSP's mission statement is an attempt to manufacture injury. App. A (Decl. of Cynthia Jones) at Par. 4 ("[T]o protect the Stream from . . . illegal transfers of polluted waters."). Like a mission statement that is overly broad, a mission statement written to implicate an existing regulation evinces creation with the intention of being injured. It is difficult to imagine why CSP would make special reference to water transfers in the group's mission statement if not to manufacture an injury under the WTR.

Tellingly, CSP filed their notice of intent to sue only two weeks after they were incorporated. Therefore the Court should find that CSP cannot assert direct organizational standing.

B. CSP lacks associational standing because its members have not suffered concrete injury and it is speculative that the relief requested will redress its injury.

Associational standing requires (1) an organization's members would otherwise have standing in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members of the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Only the first element is in dispute. An individual would have standing in their own right if they can show (1) an actual or imminent invasion of a legally protected interest which is concrete and particularized, (2) a causal connection between the injury and the defendant's conduct, and (3) that it will be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). CSP has not introduced evidence that can plausibly show concrete injury or likely redressability.

1. *Concrete Injury*

CSP members have not suffered concrete injury. Aesthetic and recreational harms, such as those on "scenery, natural and historical objects and wildlife," can cause injury giving rise to Article III standing. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). However, injuries found under aesthetic or recreation harm are limited to areas actually used by the plaintiff. *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992). Damage to something merely "in the vicinity of" an area used by a plaintiff is insufficient. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). Fear of possible health risks as a result of contaminated water is insufficient for

establishing standing where it is not clear that a plaintiff will actually suffer those health risks. *Pollack v. United States DOJ*, 577 F.3d 736, 741 (7th Cir. 2009). Additionally, courts have held that a plaintiff that manufactures standing has not suffered real injury. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016) (plaintiff who purchased 35 cell phones in order to receive advertising calls in violation of the Telephone Consumer Protection Act did not suffer injury).

Here, plaintiff's assertion of standing fails to establish that the Stream is actually used by any CSP member. CSP secretary Cynthia Jones averred in her affidavit that she "[has] regularly walked along the Stream and enjoy[ed] its crystal clear color and purity." App. A (Decl. of Cynthia Jones) at Par. 7. She goes on to say that she "would like to walk directly into the Stream" and that her fears over Highpeak's discharge are preventing her from doing so. *Id.* Had Jones claimed a history of wading into Crystal Stream, there would be a plausible case for an aesthetic or recreational injury to an area actually used by the plaintiff. In reality, Jones only recreates by walking along a path in Crystal Stream Park, a path that is in no way impacted by Highpeak's water transfer activity.

It is also worth noting at this point the timing concerns that underlie the claims of injury here. Cynthia Jones has lived in Rexville for more than two decades and claims to have walked along the trail in Crystal Stream Park "regularly" since moving to Rexville. App. A (Decl. of Cynthia Jones) at Par. 7. Highpeak has been running its tubing business, including transferring water, since 1992. Yet Jones claims to have only had her enjoyment of the walking trail diminished since learning about Highpeak in 2020, a full 23 years after she allegedly began walking along the trail. App. A (Decl. of Cynthia Jones) at Par. 5-7. This quirk of timing seems to imply that Jones does not have the subjective offense required to claim an aesthetic injury.

Surely if the turbidity of the stream was worsened enough to offend Jones' aesthetic sense she would have noticed and had her enjoyment diminished at some point in the 23 years between moving to Rexville and being told about the source of the pollutants.

CSP member Jonathan Silver likewise has not averred in his affidavit any actual use of Crystal Stream. *See* App. A (Decl. of Jonathan Silver). He too claims that he "would recreate more frequently on the stream" if not for Highpeak's activity, but fails to claim that he recreates on the stream at all in the first place. *Id.* Again, if there was evidence of his prior use of the stream for recreation, he might have a claim for an injury in fact. The only activity mentioned by Silver that implicates the stream itself is his dogs' drinking from it during walks through the park. Silver himself cannot be reasonably said to get recreational value out of his dogs' drinking. He cannot therefore plausibly claim to have any personal recreational interest in the stream. Nor does Silver allege in his complaint any subjective offense to the cloudiness of the water. Lacking this subjective offense voids any claim he might have to having suffered an aesthetic harm.

What is left is two people's concerns about pollutants in a stream in which they never recreate. Neither shows any evidence that they will come into contact with iron, manganese, or solids suspended in the water, nor do they claim that they will suffer any adverse health effects. This concern alone cannot be an injury in fact that grants standing. This is especially true when such concern only arose once Jones and Silver were told by other CSP members that the cloudiness in the stream was potentially dangerous. *See* App. A (Decl. of Cynthia Jones) at Par. 10; App. A (Decl. of Jonathan Silver) at Par. 6. Dissemination of knowledge as to the source of the contaminants by CSP is analogous to the plaintiff in *Stoops* purchasing the cellphones. *See Stoops*, 197 F. Supp. 3d at 787-88. In both cases the plaintiff took specific action to injure

themselves in order to create standing. What actually caused Jones and Silver to become concerned was conversations with other members of CSP, not Highpeak's discharge.

2. *Redressability*

Plaintiff's assertion of standing also fails for not being redressable by the relief sought. Relief sought by a plaintiff meets the redressability standard when the plaintiff would "benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Where a plaintiff challenges the regulation of a third party, the standard for redressability is heightened. *Lujan v. Defenders of Wildlife*, 504 U.S. at 562; *E.T. v. Paxton*, 41 F.4th 709, 720 (5th Cir. 2022) (applying the heightened standard for redressability to unregulated children attending public schools in Texas to deny standing to challenge an executive order banning mask mandates). To meet this heightened standard, plaintiff must show that the regulated party "will likely react in predictable ways." *California v. Texas*, 593 U.S. 659, 675 (2021) (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019)). The remedy granted must make it "significantly more likely" that plaintiff would "obtain relief that directly remedies [their] injury." *Baughchum v. Jackson*, 92 F.4th 1024, 1032 (11th Cir. 2024). When injunctive relief is sought, if the redress requires action by a third party, it does not fulfill Article III redressability. *Congaree Riverkeeper, Inc. v. Carolina Water Serv.*, 248 F. Supp. 3d 733, 748 (D.S.C. 2017).

Here, an order to void the WTR would not actually directly remedy the alleged injury of Jones or Silver. If the WTR is voided, it is near certain that Highpeak will need to apply for a NPDES permit. If adding that permit would prevent the pollution from entering Crystal Stream, EPA would be able to redress CSP's injury. However, it is speculative to say that requiring a permit would actually stop the discharge. Highpeak could plausibly continue its transfer activity in compliance with an NPDES permit. Under this plausible outcome, CSP members would still

have the same alleged injury to their recreational and aesthetic interests. An order banning Highpeak's transfer activity, separate from EPA regulations, would certainly redress CSP members' injury but no such order is sought by the plaintiff.

* * *

CSP therefore lacks both organizational and associational standing to challenge the validity of the WTR because the rule has not frustrated its mission in a way that required it to expend resources and because its members lack the injury and redressability needed to confer associational standing to the organization. The Court should reverse the District Court's finding of standing against the EPA.

II. CSP is not timely in its challenge of the promulgation of the WTR because the type of harm alleged supports accrual of the claim when the regulation was promulgated.

Even if the Court decides to grant standing, the Court should dismiss CSP's regulatory challenge for being untimely under the APA. By statute, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401. Judicial review of agency regulations is subject to this six year statute of limitations. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2447-48 (2024). Historically the meaning of the word "accrues" as it appears in Section 2401 depends on the context of the claim being considered. *Crown Coat Front Co. v. United States*, 386 U. S. 503, 517 (1967). *Corner Post* defined accrual for a claim for judicial review arising under the APA as "when the plaintiff has the right to bring suit in court." *Corner Post*, 144 S. Ct. at 2447; *see also* 5 U.S.C. § 704. Here it is unreasonable to understand the plaintiff to have first held the right to bring suit in court when CSP was formed in 2023. The difference in the regulation at issue in *Corner Post* and the regulation here justify approaching

accrual differently. Additionally, CSP's lack of any legitimate business practices suggests its true purpose is to use opportunistic judicial gamesmanship to get around the statute of limitations.

A. *Corner Post*'s standard of accrual is only reasonably interpreted to apply when a corporation asserts a claim for its own injury, not when it asserts a claim in a representative capacity.

To understand how to apply *Corner Post* to the present case, it is worth considering the regulation at issue in that case. *Corner Post* was a challenge to a Federal Reserve Board regulation, colloquially called Regulation II, that set a maximum interchange fee chargeable by issuers of debit cards. 12 C.F.R. § 235. Corner Post Inc. alleged that the interchange fee on issuers was being passed onto their business inflicting an economic loss to the business and the Supreme Court agreed. *Corner Post*, 144 S. Ct. at 2448. In bringing a claim for financial losses that frustrated its business purpose, Corner Post's theory of standing was direct organizational standing rather than representative associational standing. It is not contested that a new injury resets the statute of limitations for challenging an agency action. *Herr v. United States Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015). The six year statute of limitations for civil claims against the United States is explicitly action specific. 28 U.S.C. § 2401. An organization may be barred by the statute of limitations from bringing a suit in its representative capacity even when it did not exist at the time a final agency action occurred. *Herr*, 803 F.3d at 820 (discussing *Southwest Williamson County Community Ass'n v. Slater*, 173 F.3d 1033 (6th Cir. 1999).

This distinction between direct and representational capacity in creating a new claim is important for distinguishing *Corner Post* and this case. Interchange fees, the source of injury alleged in *Corner Post*, only affect a business engaging in debit card transactions. Conversely, aesthetic and recreational harms, as alleged here, are suffered by individuals. *Corner Post*'s claim could not have been raised by the individuals who owned or were otherwise associated

with the corporation until the corporation itself was formed as they did not accept debit card transactions in any capacity independent of the corporation's function. Individual owners and employees were not selling products to customers paying with debit cards until they opened a store. The members of CSP were allegedly injured independent of their connection to CSP. Associational standing relies on injuries to represented individuals, not to the corporation itself. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The fact that CSP's standing, if it exists, is an extension of its members' injury suggests that there has not been a substantively new infringement on a protected legal interest as would be required to justify calling it a separate claim because "*different* legal wrongs give rise to different rights of action." *Herr*, 803 F.3d at 820-21 (emphasis added). No new legal wrong occurred on December 1st, 2023 that had not been continuously occurring since 2008 when CSP members were first exposed to Highpeak's polluting activity. The lack of a new legal wrong means no new right of action accrued.

B. Extending *Corner Post*'s reasoning to organizations using representative capacity invites judicial gamesmanship.

Courts generally avoid holdings that invite gamesmanship in the judicial process. *See, e.g.*, *Bucklew v. Precythe*, 587 U.S. 119, 139 (2019) (gamesmanship in pleading standards in a death penalty case); *In re Cantu*, 94 F.4th 462 (5th Cir. 2024) (Jones, J., concurring) (gamesmanship in *habeas corpus* petitions); *Friedler v. Stifel*, 108 F.4th 241 (4th Cir. 2024) (Wilkinson, J., concurring) (gamesmanship in vague standards in federal review of arbitration).

Extending *Corner Post* to environmental organizations suing in their representative capacity for aesthetic or recreational harms of their members invites gamesmanship. If the formation of an environmental organization resets the statute of limitations of harms suffered by

its members, no claim is truly outside the statute of limitations. At any time an individual with a valid injury in fact could simply incorporate and reset the timer. Congress must not have passed the six year statute of limitations and intended for it to have no real application. By extending *Corner Post* the Court would be usurping the legislative authority to set statutes of limitation. Such a gamesmanship issue is not as much of an issue in cases of organizational standing. Under organizational standing, a corporation must directly suffer an injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Creating an organization that has the requisite financial capacity to be injured itself is more onerous than incorporating a nonprofit with no legitimate business practices. It is therefore less prone to abuse by untimely opportunistic plaintiffs.

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The Court should reverse the District Court's denial of the motion to dismiss for timeliness. As an organization suing in its representative capacity, accrual occurred when individual members of CSP were first injured by a final agency action, not when the organization itself could have first been injured by a final agency action. Allowing CSP's claim to proceed subverts the entire existence of a statute of limitations in APA challenges as future plaintiffs would know to simply incorporate prior to bringing suit to avoid any timeliness issues.

III. The district court's validation of the water transfers rule was correct under *Loper Bright*'s *stare decisis* standard, *Skidmore*'s deference standard, and *State Farm*'s arbitrary and capricious standard.

Courts have power to review EPA regulations under the APA. 5 U.S.C. § 706. The District Court correctly used this power to hold that the WTR was validly promulgated. First, the District Court correctly upheld the WTR in reliance on the *stare decisis* respect given to previously-upheld regulations. Second, even if this were to be found an error, the District Court's ultimate decision is not necessarily reversed. If not upheld under *stare decisis*, the regulations are

then tested for *Skidmore* deference. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2309 (2024) (Kagan, J., dissenting) (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The WTR is deserving of *Skidmore* deference. Third, even following a *Skidmore* failure, the WTR was validly promulgated under a *State Farm* arbitrary and capricious test. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. The WTR should be upheld under a *Loper Bright stare decisis* analysis.

Prior validation of the WTR ought to be guiding under *stare decisis*. While *Loper Bright* changed the interpretative methodology for new reviews of agency regulation, the Court "does not call into question prior cases," specifying they are subject to *stare decisis* and still valid unless there is a "special justification" to overrule. *Loper Bright*, 144 S. Ct at 2273.

While there are no Supreme Court or Twelfth Circuit reviews of the WTR, the Eleventh and Second Circuits found the WTR to be a reasonable interpretation of the CWA. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227 (11th Cir. 2009); *Catskill III*, 846 F.3d, at 501. No courts have rejected the WTR. To the contrary, the Sixth Circuit, the Northern District of Washington, the District of New Hampshire, and the District of Oregon have used the WTR to justify holdings. *S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 699 (6th Cir. 2022) (uses the WTR as an alternate justification); *Bang v. Lacamas Shores Homeowners Ass'n*, 638 F. Supp. 3d 1223, 1227 (W.D. Wash. 2022) (adopts the Second and Eleventh Circuits' view of the WTR); *Toxics Action Ctr., Inc. v. Casella Waste Sys., Inc.*, No. 18-CV-393-PB, 2021 WL 3549938, at *8 (D.N.H. Aug. 11, 2021) (recognizes the WTR as valid); *ONRC Action v. Bureau of Reclamation*, No. 1:97-CV-03090-CL, 2012 WL 3526828, at *1 (D. Or. Aug. 14, 2012), aff'd sub nom. *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2015) (District Court relied on WTR; appeal affirmed on simpler grounds).

While adherence to precedent is not absolute, the importance of *stare decisis* to a common law system is universally accepted. *Stare decisis* creates a predictable and consistent system of justice with actual and perceived integrity. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As such, courts must look to at least three factors to find special justification for overturning precedent: (1) unworkability of the current rule, (2) lack of reliance on the current rule, and (3) Congressional action to correct the courts' interpretation. None apply here.

1. *The WTR is workable.*

To achieve predictable and consistent outcomes, precedent must be predictably and consistently understood. When a holding would create arbitrary or anomalous results, it should not be controlling. *Montejo v. Louisiana*, 556 U.S. 778, 803 (2009) (Stevens, J., dissenting).

The WTR's high workability is clearly established by the consistency with which courts have applied it. All decisions considering the WTR listed above found the same result, and none expressed confusion about the rule. The limited number of disputes also shows the clarity of the rule as there is rarely a need for litigation. When disputes do arise, the lower courts show clear, uniform, and uncontested application of the rule, focusing on specific and novel factual nuances. *See, e.g.*, *Toxics Action*, No. 18-CV-393-PB at *8; *ONRC*, No. 1:97-CV-03090-CL at *1.

Further, invalidation of the WTR would lack workability. Water transferors' exposure to citizen suits is unclear but has the potential to be crushing in terms of both monetary and injunctive relief. Peter D. Nichols, *Water Transfers Litigation and EPA's Water Transfers Rule*, 21 U. Denv. Water L. Rev. 67, 80 (2017).

2. *Validation of the WTR has induced significant reliance.*

The purpose of common law is to provide guidance for how actors ought to behave.

When issued guidance has been followed, the bar for changing precedent—and thus demanding actors change their behavior—is raised. This is especially true for cases involving property-based reliance as adjustments often incur higher expense. *Payne*, 501 U.S. at 828.

Water transfer projects often involve huge pieces of infrastructure that require significant time and resources to construct. The WTR has guided these projects since it was promulgated in 2008, and the "longstanding" policy underlying the WTR is found in decisions as far back as 1982. *Water Transfers Rule*, 73 Fed. Reg. 33,697 (June 13, 2008); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004); *see also Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Accordingly, EPA has required a permit for a transfer just once, doing so only in response to a First Circuit decision. EPA, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers*, at 2 (August 5, 2005) [hereinafter *WTR Memo*] (referencing *Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273 (1st Cir. 1996)). Between decades of history and high-cost projects, the WTR is heavily relied on.

This is especially true in more-arid western states, where transfers are essential for supplying water to cities and farms. *Catskill III*, 846 F.3d at 500. That is why 32 intervenors joined EPA in defense of the WTR in *Catskill III*, including the governments of 11 states, as well as municipalities and water providers from many of those same states and four others. These intervenors highlight the reliance on water transfers to acquire and distribute water. Brief Of Intervenor Defendants-Appellants-Cross Appellees States Of Colorado et al. at 30, *Catskill III*, 846 F.3d 492, (No. 14-1823) [hereinafter Intervenor Brief]. These states often acquire water and distribute it to municipalities through transfers. Removing the WTR and imposing NPDES requirements would disrupt these schemes, which are not only heavily relied on to provide irrigation and drinking water across the western states but—because many transfers are from

interstate rivers—are often propagated by interstate compacts, Supreme Court decrees, or congressional acts. *Id*. The interstate and cross-country nature of this reliance further highlights the importance of joining the Second, Sixth, and Eleventh Circuits to create a uniform rule. Deviation risks disrupting the supply of water to millions of Americans by requiring thousands of new permits to be issued. *See Miccosukee*, 541 U.S. at 108.

3. *Validation of the WTR has not been corrected by Congress.*

Stare decisis is heavily favored in cases of statutory construction, where Congress is free to correct the courts' interpretation. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 721 (1977). The legislature's failure to do so can be fairly understood as tacit acceptance of judicial interpretation.

In 2005, EPA issued a memo declaring its intent to formalize the WTR because of its interpretation that Congress intended for states, not EPA, to control transfers. *WTR Memo*, at 2. In the nearly two decades since, Congress has taken no action to correct the Agency's view. "Indeed, it is unclear to us how one can argue persuasively that the Water Transfers Rule . . . could not possibly have been intended by Congress." *Catskill III*, 846 F.3d at 500.

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The strength with which the three *stare decisis* factors point to the value of keeping the WTR should persuade this court to adopt it. While there may be other factors, belief that precedent was wrongly decided is not one. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). The fact a regulation was first validated under the now-overturned *Chevron* standard does not constitute a special justification to deviate from *stare decisis* either. *Loper Bright*, 144 S. Ct. at 2247 (referencing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), overruled by *Loper Bright*, 144 S. Ct. 2244). As such, this Court should follow precedent upholding the WTR.

B. If not given *stare decisis* respect, the WTR should be upheld under *Skidmore* deference.

Should the Court not accept the WTR based on *stare decisis*, *Skidmore* would still instruct the Court to defer to EPA's interpretation. Courts view agency rules as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. This guidance is particularly persuasive when a rule was promulgated after thorough consideration, on the basis of valid reasoning, and in accordance with previous pronouncements. *Id.* Deference is especially likely when an agency interpretation is "longstanding." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

The WTR was thoroughly considered. EPA announced the WTR in August 2005. The rule was promulgated 35 months later alongside legislative, judicial, and policy backgrounds and implications. *Water Transfers Rule*, 73 Fed. Reg. 33,697 (June 13, 2008); *see also WTR Memo*. The extent to which EPA has detailed its reasoning shows thorough consideration.

The reasoning of the WTR is valid on both legal and policy grounds. Legally, the WTR rests on the definition of "addition" in the CWA's ban on the "addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12). The CWA gives EPA discretion to define other necessary terms, making it likely that Congress would have given EPA similar power over "addition" had it expected the definition to be disputed. *Gorsuch*, 693 F.2d at 175. EPA has long interpreted "addition" in this context to mean the initial introduction of pollutants to the navigable waters as a whole, excluding transfers between specific bodies of water. *Id.*

From a policy view, EPA mirrors the intent of the CWA to let states regulate transfers. EPA has long pointed to the CWA's clear declaration that Congress does not intend to interfere with "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(g). Considering the western states that rely on transfers to allocate their water, the WTR

is necessary to adhere to Congress' intent. The problem is exemplified by Colorado and its more than 40 major transfer points that move over 500,000 acre-feet (162 billion gallons) of water annually. Intervenor Brief, at 32. Without the WTR, EPA would be forced to impose NPDES standards, directly counter to the CWA's intent. Section 1251(g) has similar language for states' acquisition of water, presenting the exact same problem.

The WTR is consistent with decades of EPA policy. *Gorsuch* first accepted EPA's interpretation of "addition" in 1982. 693 F.2d at 175. EPA has not once deviated from its view. *Barnhart*'s respect for "longstanding" regulations applies here. 535 U.S. at 220. The Supreme Court itself has described the WTR as "longstanding." *Miccosukee*, 541 U.S. at 107.

The WTR is well considered, validly reasoned, and consistent with longstanding practice. Under *Skidmore*, the Court should thus defer to EPA's interpretation and preserve the rule.

C. If not given *Skidmore* deference, the WTR should be upheld under a *State Farm* analysis.

Under *State Farm*, the WTR is not arbitrary or capricious. When reviewing regulations, courts void rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Regulations are arbitrary or capricious when the agency considered factors Congress had not intended it to consider, failed to consider important factors, or explained its decision in a manner that is counter to the evidence or implausible. *State Farm*, 463 U.S. at 43. The agency is asked to show a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). In interpreting the text of a statute, an agency must "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.'' *United States v. Boisdore's Heirs*', 49 U.S. 113, 122 (1850). The Supreme Court also instructs

special weight to be given to interpretations of statutes that Congress has refused to alter. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 381 (1969).

As noted under the *Skidmore* analysis above, the WTR matches with Congress' state-delegation intent. No factors of consideration are excluded or wrongly included. Further, *Gorsuch* has already ruled that EPA's interpretation of "addition" is plausible. 693 F.2d at 175. CSP asks the Court to instead adopt the position of the two pieces of litigation preceding *Catskill III*, each predating the WTR but ruling against EPA's interpretation of "addition." *See Catskill I*, 273 F.3d 481; *Catskill II*, 451 F.3d. 77. However, these courts take a narrow view that is inconsistent with the CWA's intent. In trying to reconcile their interpretation with Congress', the courts make incorrect assumptions. *Water Transfers Rule*, 73 Fed. Reg. 33,701 (June 13, 2008).

Catskill I assumes a tunnel "is unlikely to have created the pollutants that it releases, but rather transports them." 273 F.3d at 493. It then uses this assumption to interpret the CWA, using tunnels as a proxy for transfers of pollutants at large and extending the regulation of tunnels to all transfers of pollutants. *Id.* But, here, CSP itself argues that tunnels *do* add pollutants. The *Catskill I* court relied on false assumptions.

Catskill II assumes that regulation of water *quality* can be separated from the CWA's mandate to not impede states' rights to *quantities* of water. 451 F.3d at 83 (referencing 33 U.S.C. § 1251(g)). There is no way to regulate quality without threatening quantity. The cost of compliance or punishment for failure necessarily affects the quantity states can plausibly obtain, violating the CWA. *Catskill II* even recognizes that the Supreme Court in "*Miccosukee* acknowledged the possibility that 'construing the NPDES program to cover such transfers would . . . raise the costs of water distribution prohibitively, and violate' section [1251 (g)].'" *Catskill II*, 451 F.3d at 84 (alteration in original) (quoting *Miccosukee*, 541 U.S. at 108).

The *Catskill I* and *II* views do not adequately consider the intent of the CWA, and thus fail to meet the *State Farm* standards. On the other hand, per *Red Lion Broad*, it is once again in the WTR's favor that it has been applied for decades without Congressional intervention.

The WTR follows Congress' intent more closely than any other possible interpretation, and gives a clear connection between the facts at hand and its policy. As such, the WTR easily passes a *State Farm* arbitrary and capricious test.

* * *

The District Court was correct in granting the motion to dismiss on the WTR challenge. There are no special justifications that would subject the WTR to review under the standard set forth in *Loper Bright*. If the WTR were to be reviewed, it warrants *Skidmore* deference. Even if the merits of the WTR itself are reviewed, it is valid under *State Farm*.

IV. The District Court did not 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.

Measurements of iron, manganese, and TSS levels in water before and after transfer via Highpeak's tunnel showed increases by 2.5%, 3.3%, and 4.0%, respectively, due to erosion of the tunnel walls. App. B (Pollution Data). The WTR states that discharges from water transfer do not require NPDES permits, but that "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3. Parties disagree on the interpretation of "introduced." Highpeak argues that it does not need an NPDES permit for its tunnel because pollutants from natural processes like erosion should not be considered "introduced." CSP and EPA argue that a permit is required because data plainly

shows Highpeak's tunnel "introduces" pollutants during the water transfer, taking it out of the scope of the WTR.

To determine if an agency's interpretation of its regulation stands, courts apply a two-step analysis. *See U.S. v. Haggerty,* 107 F.4th 175 (3d Cir. 2024); *Diamond Services Corp. v. Curtin Mar. Corp.*, 99 F.4th 722 (5th Cir. 2024); *Garcia v. Garland*, 64 F.4th 62 (2d Cir. 2023); *Kisor v. Wilkie*, 588 U.S. 558 (2019). First, courts determine if the regulation is "genuinely ambiguous" by examining "'the language itself, the specific context in which that language is used, and the broader context of the statute' or the regulation 'as a whole.'" *Garcia*, 64 F.4th at 72 (quoting *Kisor*, 588 U.S. at 574; and then quoting *Union Carbide Corp. v. CIR*, 697 F.3d 104, 107 (2d Cir. 2012)). If the regulation is unambiguous, the agency's interpretation stands if it is correct or "follows from the unambiguous language." *Id.* If the regulation is ambiguous, the court determines if the agency's interpretation warrants deference. Deference is warranted if the agency's interpretation (1) falls "within the bounds of reasonable interpretation," *Kisor*, 588 U.S. at 559 (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)), (2) implicates the agency's substantive expertise, and (3) is "fair and considered," *Kisor*, 588 U.S. at 579 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

In the instant case, the District Court did not err in accepting EPA's reading that the iron, manganese, and TSS introduced to the water during transfer via Highpeak's tunnel subjected Highpeak's discharge to permitting requirements. The WTR is unambiguous, and EPA's interpretation of the WTR is correct. Alternatively, even if the WTR were found to be ambiguous, the court properly deferred to EPA's reading. EPA's interpretation (1) is reasonable, (2) implicates EPA's substantive expertise, and (3) is fair and considered.

A. The meaning of "introduced" is unambiguous.

A regulation is only ambiguous if, exhausting "'traditional tools' of construction" such as the "text, structure, history, and purpose of [the] regulation," it does "not directly or clearly address every issue" or "prove[s] susceptible to more than one reasonable reading." *Kisor*, 588 U.S. at 559, 566 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)). Examining the language of the WTR and its broader purpose, EPA's interpretation of "introduced" is the only reasonable reading.

The plain meaning of the text comports with EPA's interpretation. The definition of "introduce" is "to lead or bring in especially for the first time;" "place, insert." *Introduce*, Merriam-Webster, https://www.merriam-webster.com/dictionary/introduce (last visited Nov. 17, 2024). By bringing iron, manganese, and TSS into transferred water, Highpeak's water transfer "introduces" such substances. While no court has explicitly addressed the meaning of the word "introduce" in the context of the CWA, the meaning of the word "addition" has been addressed. In *National Wildlife Federation v. Gorsuch*, the D.C. Circuit upheld as reasonable EPA's interpretation that, "for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world." 693 F.2d 156, 165 (D.C. Cir. 1982) (emphasis in original). This suggests "addition" and "introduction" are interchangeable. It follows that "introduction" of a pollutant can be defined as adding the pollutant to the water from the outside world. Here, the substances that line the walls of Highpeak's tunnel are added to water being transferred. The tunnel walls are the outside world. Regardless of whether the substances enter the water via natural processes, their addition to the water is an "introduction."

Context also supports EPA's interpretation of "introduced." The NPDES definition of "discharge" includes "surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2(b). This suggests that the regulation extends to pollutants introduced to water by natural processes like erosion, because runoff collects pollutants via such natural processes. It is true that the NPDES does not require permits for runoff in certain situations, such as non-industrial stormwater runoff and runoff from agricultural and some silvicultural activities. *See* 33 U.S.C. § 1342; 40 C.F.R. §§ 122.26, 122.27. However, these exemptions are premised on the types of runoff specified coming from *non-point* sources. *See Decker v. N.W. Envt. Def. Ctr.*, 568 U.S. 597 (2013). Here, Highpeak's tunnel is a point source. *See* 40 C.F.R. § 122.2

The purposes of the CWA, NPDES, and EPA also suggest that Highpeak's discharge requires an NPDES permit. One of Congress' stated goals for the CWA is "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved." 33 U.S.C. § 1251. Congress instituted the NPDES in pursuance of that goal. Within the NPDES, EPA may require applications for construction permits to include plans for erosion and sediment control. *See* 40 C.F.R. §§ 122.34, 122.44. This shows that EPA has an interest in regulating pollution from natural processes like erosion, which can affect water quality like any other source. In other contexts, too, EPA has undisputed authority over pollutants introduced by natural processes. Pursuant to the Safe Drinking Water Act, EPA regulates contaminants that enter water through "[e]rosion of natural deposits." 40 C.F.R. § Pt. 141, Subpt. O, App. A. Just because the source of a water pollutant is natural, does not mean it cannot affect the health and safety of people and wildlife, putting it under the purview of the NPDES and thus EPA.

Contrary to Highpeak's claim that EPA's interpretation would undermine the purpose of the WTR, Highpeak's interpretation would undermine the purpose of the NPDES and EPA altogether. Highpeak argues that introduction of pollutants by natural processes like erosion should not be included in "introduced" because water always picks up trace pollutants during transfer. This argument cannot stand. First, whether pollutants are "trace" is not a question of law for review by the court, but one of science within the scope of EPA's expertise as the body that routinely sets minimums for water contaminants. 40 C.F.R. § Pt. 141, Subpt. O, App. A. Second, even accepting that the pollutants here are "trace," Highpeak's argument is a misdirection from the true consequence of its interpretation—that *no* pollutants introduced by natural processes could be regulated, trace or otherwise.

Highpeak's argument also does not require for the pollutants themselves to be naturally-occurring materials. The pollutants could be anything collected by natural processes like erosion or rainfall. Highpeak's reading implies that someone could build a tunnel through a landfill, whereby water running through the tunnel picks up garbage, and escape liability simply because they did not throw the garbage into the water themselves. It implies that a company could leave industrial waste on a riverbank and escape liability as long as rain washes the waste into the river and not a hose. The WTR should not be used as a loophole to undermine the purpose of the regulation. Highpeak's interpretation of the regulation is unreasonable. EPA's reading, that the addition of a pollutant is an addition no matter what the cause, is the only reasonable one.

B. Even if the meaning of "introduced" was ambiguous, EPA's interpretation of the WTR warrants deference.

Even if the language of the WTR was ambiguous and Highpeak's reading also reasonable, EPA's interpretation of the regulation warrants deference. Courts have long deferred

to agencies' interpretation of their own regulation, assuming that the party that promulgated a rule is best equipped to determine its original meaning. *Kisor*, 588 U.S. at 560. Under *Auer v. Robbins*, an agency's interpretation of a regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011). *Kisor* "cabined" *Auer* deference but was careful to preserve it. *Kisor*, 588 U.S. at 564. Per *Kisor*, deference should still be granted to the agency's regulatory reading if it (1) is reasonable; (2) implicates the agency's substantive expertise, and (3) is fair and considered. 588 U.S. at 579. While the histories of *Chevron* and *Auer* deference are interlinked, the doctrines are separate and rely on distinct precedents. Thus, *Loper Bright* does not overrule *Auer* deference.

EPA's reading warrants deference under *Auer* and *Kisor*. First, it is reasonable for reasons previously discussed. EPA's interpretation of the word "introduced" to include Highpeak's discharge falls squarely within the dictionary definition. It comports with the definition of "addition" of a pollutant as "introducing" the pollutant from the "outside world," and with the rest of the NPDES program. Furthermore, regulation of pollutants from some natural processes, such as permits for runoff and plans for erosion and sediment control, lies within EPA's mandate.

Second, the question of whether pollutants "introduced" include pollutants added to the water by Highpeak's tunnel implicates EPA's substantive expertise. When determining whether an issue falls within the scope of an agency's expertise, courts consider whether it is a matter of science or prediction, as opposed to one based on principles of common law. *W. Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003); *Forest Guardians v.*

U.S. Forest Serv., 329 F.3d 1089, 1099 (9th Cir. 2003). Here, whether pollutants "introduced" by natural processes like erosion should be exempt from NPDES permitting is a scientific, not legal, question. Its answer has ecological implications. "[T]he concern is with the health of the water body, a concern that lies at the heart of the EPA's expertise." *Idaho Conservation League v. Poe*, 86 F.4th 1243, 1251 (9th Cir. 2023), cert. denied, 144 S. Ct. 2717 (2024).

Finally, EPA's interpretation is fair and considered. An interpretation of a regulation is not fair and considered if it is inconsistent with prior agency action and results in an "unfair surprise" for the affected party. *Christopher*, 567 U.S. 142 at 155. A fair and considered interpretation cannot merely be "a convenient litigating position." *Id.* (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)). Nor can it be a "*post hoc* rationalizatio[n]" adopted to "defend past agency action against attack." *Id.* (alteration in original) (quoting *ONRC*, 519 U.S. at 462). Highpeak will likely argue that requiring a permit for its discharge into Crystal Stream would be an unfair surprise, because it has discharged pollutants for many years without one. However, whether an interpretation is fair and considered does not depend on the surprise of the defendants in a particular case. Rather, it depends on the consistency of EPA's interpretation with the agency's own precedent. *Diamond Services Corp.*, 99 F.4th at 734-35. Indeed, a defendant in any given case may have been unaware of a longstanding regulation because of their own ignorance. Ignorance is no excuse for noncompliance. It is not EPA's job to proactively seek out these parties and sue them; instead, EPA enforces regulations when cases arise. Since, presently, there is no agency precedent for whether pollutants introduced by natural processes such as erosion fall under the scope of the WTR, Highpeak has no basis to claim departure from precedent. Rather than a convenient

litigating position or a *post hoc* rationalization, EPA's interpretation is the setting of an important standard, requiring permits for discharges like Highpeak's.

EPA's interpretation is also fair because it does not ask Highpeak to do the impossible. When Highpeak built the tunnel, it could have lined the entire project so that the walls did not erode and introduce pollutants into the water. Highpeak chose not to do so. Because of its choice, it must have an NPDES permit to continue using the tunnel. The next time someone builds a tunnel to conduct water transfers, they should consider the cost of a permit in deciding whether to line the tunnel walls. This is, after all, the point of the NPDES, or National Pollution Discharge *Elimination* System. It exists to encourage better decisions, so we may achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251.

* * *

The District Court did not err in accepting EPA's reading that pollutants introduced during transfer via Highpeak's tunnel subjected them to permitting requirements. EPA's interpretation of its regulation is unambiguously correct according to the text, structure, purpose, and context of the WTR. EPA's interpretation furthers the goals of the NPDES; Highpeak's undermines it. Even if the WTR were ambiguous, the Court properly deferred to EPA's reading.

Conclusion

For the reasons set forth herein the Court should reverse the District Court's denial of the motion to dismiss for lack of standing and timeliness, and affirm the District Court's holding that the WTR is validly promulgated and its denial of the motion to dismiss the citizen suit claim.

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Appendix A: Declarations

Declaration of Cynthia Jones

DECLARATION OF CYNTHIA JONES IN SUPPORT OF

CRYSTAL STREAM PRESERVATIONISTS

1. I am over the age of eighteen (18), am competent to testify about the following matters, and would testify about these matters if called upon to do so.

2. I submit this declaration in support of the Complaint of Plaintiff Crystal Stream Preservationists ("CSP") against Highpeak Tubes, Inc. ("Highpeak") and the United States Environmental Protection Agency ("EPA").

3. I am a member and Secretary of CSP, a nonprofit organization dedicated to saving and preserving the Crystal Stream ("the Stream") in the State of New Union. I have been a member of CSP since December 1, 2023.

4. CSP was formed with the express purpose of protecting the Stream, and its mission is as follows: "The Crystal Stream Preservationists' mission is to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations." CSP consists of 13 members and includes a President, Vice President and Secretary. I serve as Secretary for CSP.

5. I reside at 771 Lark Road, in the Town of Lexville. I have lived at this address since February of 1997, when my family moved here. My house is approximately 400 yards from Crystal Stream Park ("the Park").

6. The Park sits next to the Stream and has a walking trail right along the edge of the Stream. The Highpeak tube run operates in the same area of the Stream.

7. Throughout my time in Rexville, I have regularly walked along the Stream and enjoy its crystal clear color and purity.

8. Recently, I have learned that Highpeak has been allowing a discharge of polluted water into the Stream. The discharge and the suspended solids and metals in the Stream are upsetting to me, as they make the otherwise clear water cloudy.

9. I am very concerned about contamination from toxins and metals, including iron and manganese. I understand that these are added to the Stream by Highpeak's discharge.

10. My ability to enjoy the Stream has significantly diminished since learning about the pollutants introduced by Highpeak's discharge, which I first heard about in approximately 2020.

11. I joined CSP to try to stop this discharge.

12. If not for Highpeak's discharge, I would recreate even more frequently on the Stream. I would also like to walk directly in the Stream, but am afraid to walk in the Stream due to the pollution.

13. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 13, 2023

s/ Cynthia Jones

Cynthia Jones

Declaration of Jonathan Silver

DECLARATION OF JONATHAN SILVER IN SUPPORT OF

CRYSTAL STREAM PRESERVATIONISTS

1. I am over the age of eighteen (18), am competent to testify about the following matters, and would testify about these matters if called upon to do so.

2. I submit this declaration in support of the Complaint of Plaintiff Crystal Stream Preservationists ("CSP") against Highpeak Tubes, Inc. ("Highpeak") and the United States Environmental Protection Agency ("EPA").

3. I am a member of CSP, a nonprofit organization dedicated to saving and preserving the Crystal Stream ("the Stream") in the State of New Union. I have been a member of CSP since December 3, 2023.

4. I reside at 243 S. Eagle St., in the Town of Lexville. I moved to this address from Phoenix, Arizona, in August of 2019. My house is approximately one half mile from Crystal Stream Park, which is a public park alongside the Stream with a walking trail. The trail runs along the Stream for 2 miles. The Highpeak Tube run operates in the same area of the Stream.

5. Throughout my time in Rexville, I have regularly walked my dogs and walked with my children along the Stream. I am deeply concerned about the presence of toxic chemicals polluting the water.

6. Since moving to the area, I have observed that the water in the Stream occasionally

appears cloudy. In the days leading up to this Complaint being filed, I learned through members of CSP that this cloudiness, at least in part, is due to a discharge from Cloudy Lake. I also learned that Highpeak causes this discharge.

7. I am now hesitant to allow my dogs to drink from the Stream due to the pollutants, which I understand include metals. I am concerned with pollutants entering the Stream and making it cloudy.

8. I joined CSP to try to stop this discharge.

9. If not for Highpeak's discharge, I would recreate more frequently on the Stream. I would also allow my dogs to drink from the Stream.

10. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 12, 2023

s/ Jonathan Silver

Jonathan Silver

Appendix B: Pollution Data Table

Sample Location	Iron	Manganese	TSS
Cloudy Lake at Intake	.80 mg/L	.090 mg/L	50 mg/L
Outfall into Crystal Stream	.82 mg/L	.093 mg/L	52 mg/L

Data collected by CSP.