Team 18

C.A. No. 24-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

-v.-

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Appellees-Cross-Appellants,

and

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

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

Non Measuring Brief of Defendants-Appellees-Cross-Appellants, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

If CSP has standing, see Argument I, then this Court has jurisdiction to consider whether the challenge to the Water Transfers Rule under Title 5, Section 702 of the United States Code because it raises a federal question under Title 8, Section 1331 of the United States Code. Title 33, section 1311(o) of the United States Code authorizes the EPA's NPDES permitting regime under 40 C.F.R. § 122.3. Under 40 C.F.R. § 122.3(i), exclusions to the NPDES permitting requirement "[do] not apply to pollutants introduced by the water transfer activity itself to the water being transferred."

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing?

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

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

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

STATEMENT OF THE CASE

Highpeak Tubes, Inc. ("Highpeak") is a family-operated recreational company that has operated a recreational tubing business in Rexville, New Union, for 32 years, utilizing a 42-acre parcel of land bordered by Cloudy Lake to the north and Crystal Stream ("Crystal Stream" or the "Stream") to the south. In 1992, Highpeak constructed a state-approved tunnel to transfer water from Cloudy Lake to Crystal Stream, enhancing the stream's flow for tubing activities. The tunnel, carved through rock and partially constructed with iron pipe, is equipped with valves to

regulate water flow and operates only when the State of New Union deems water levels in Cloudy Lake sufficient. The water discharged into Crystal Stream collects two to three percent higher levels of iron, manganese, and total suspended solids ("TSS") from the Highpeak's tunnel than water at the point of intake in Cloudy Lake. Highpeak has never sought or obtained a National Pollution Discharge Elimination System ("NPDES") permit for its water transfers, and no challenges to the discharges were made until recently.

Crystal Stream Preservationists, Inc. ("CSP"), a nonprofit organization formed in December 2023, is dedicated to preserving Crystal Stream's natural state. Two of CSP's thirteen members own land along the stream, approximately one mile downstream of Highpeak's tubing operations. On December 15, 2023, CSP issued a notice of intent to sue Highpeak under the Clean Water Act (CWA), alleging that the water transfer discharges pollutants, including iron, manganese, and total suspended solids (TSS), into Crystal Stream without the required NPDES permit. CSP supported its claims with water sampling data showing that the water discharged into Crystal Stream contains a higher concentration of pollutants than the water in Cloudy Lake. CSP also challenged the validity of EPA's Water Transfers Rule (WTR), asserting that it was improperly promulgated and that the discharges fall outside its scope due to the introduction of pollutants.

Highpeak moved to dismiss the claims, arguing that CSP lacks standing, that the WTR challenge is untimely, and that Highpeak's actions fall within the WTR's exemption. EPA joined Highpeak's motions, supporting the validity of the WTR but agreeing with CSP that Highpeak requires a permit if pollutants are added during the transfer. The Court deferred ruling on the motions pending two Supreme Court cases potentially impacting the legal framework. Ultimately, the Court dismissed CSP's WTR challenge, finding it untimely, but denied

Highpeak's motion to dismiss CSP's citizen suit, allowing the claim of unpermitted pollutant discharges to proceed.

SUMMARY OF THE ARGUMENT

The District Court erred in finding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule because CSP fails to meet Article III standing requirements. Under established precedent, CSP needed to demonstrate a concrete, particularized injury directly caused by the alleged violation and likely to be redressed by a favorable ruling. Instead, CSP's claims rest on a generalized public interest in protecting Crystal Stream, which the Supreme Court has repeatedly rejected as insufficient for federal court jurisdiction. CSP's attempts to invoke associational standing also fail, as it has not shown that its members have standing to sue independently or that the organization authentically represents their interests. Further, the alleged procedural violations cited by CSP are speculative and disconnected from the substantive harm claimed. Moreover, CSP has not established that enforcing a permitting requirement would address the pollution affecting Crystal Stream. As federal courts cannot adjudicate abstract grievances or generalized public concerns, CSP's claims lack the required adverseness and personal stake to satisfy Article III, making dismissal appropriate.

The District Court erred in ruling that CSP's challenge to the Water Transfers Rule (WTR) was timely. Under 28 U.S.C. § 2401(a), challenges against the United States must be filed within six years of a regulation's finalization. The WTR was enacted in 2008, and CSP's claim, filed years later, is untimely. CSP's argument relies on Corner Post, which it misinterprets to restart the statute of limitations upon its organization's formation. However, Corner Post applies only when a new entity experiences a delayed regulatory impact, which is not the case for CSP. CSP's cause of action derives from its members, who were allegedly affected by WTR's regulation of Crystal Stream in 2008. Thus, the limitations period expired in 2014 or

2015. Additionally, Corner Post does not allow litigants to bypass time limits by forming new entities to revive lapsed claims. Allowing such tactics undermines regulatory stability and finality. The EPA's interpretation of the Clean Water Act, including its "Unitary Waters Theory," supports this view, emphasizing that CSP's members had actionable claims in 2008. CSP's attempt to reset the statute of limitations through its associational status fails under established legal principles, rendering its challenge invalid and untimely.

EPA argues that the WTR was validly promulgated and upheld under *Chevron*, and such decision is subject to *stare decisis* per *Loper Bright* and not special justification exists to reconsider the validity of the regulation. The principle of *stare decisis* evenhanded, predictable, and consistent development of legal principles by weighing (1) the quality of the reasoning of the underlying decision, (2) the workability of the rule it established for lower courts to apply, (3) any departures from the Court's other decisions on similar constitutional questions, (4) developments since the decision, and (5) the reliance upon the decision are considered. The majority of these factors support not revisiting regulations upheld by *Chevron*, and a contrary finding creates a mechanism for a challenge to hundreds of regulations. Even if the Court finds that WTR should be revisited, WTR is valid under the lesser deferential standard of *Skidmore*. The plain text of the Clean Water Act has been held ambiguous by multiple courts, and the EPA thoroughly considered WTR through its detailed rulemaking process. EPA also has significant expertise which should provide their interpretation significant persuasive power for the court to uphold WTR under *Skidmore*. Furthermore, the broader water pollution regulatory regime in the context of WTR should support the validity of the rule.

EPA argues that its interpretation that the Water Transfers Rule requires permitting for pollutants added during the water transfer process is entitled to deference under the standard of

Auer deference. To support this argument, EPA demonstrates that the required criteria for Auer deference are satisfied because (1) WTR is genuinely ambiguous, (2) the EPA's interpretation of WTR is reasonable, (3) the interpretation is the agency's official position, (4) the interpretation implicates the agency's substantive expertise, and (5) the interpretation constitutes a fair and considered judgment. EPA next argues that *Loper Bright v. Raimondo* does not justify reverting to *Skidmore* respect as the standard for judicial review of an agency's interpretation of its own regulation because (1) *Loper Bright's* congressional intent rationale does not apply to regulations and (2) *Loper Bright's* analysis related to stability and foreseeability are likewise inapplicable. In the alternative, EPA argues that its interpretation still satisfies the criteria for deference even under *Skidmore* respect because its interpretation (1) is the product of thorough consideration, (2) is the result of valid reasoning, (3) is consistent with earlier and later pronouncements, and (4) is supported by persuasive textual analysis, including sound linguistic analysis, the rule against superfluity, and the rule against absurdity.

STANDARD OF REVIEW

The Court reviews a district court's decision to allow a motion to dismiss, taking as true the well-pleaded facts in the complaint and drawing all reasonable inferences in favor of the plaintiff. *Marrero–Gutierrez v. Molina,* 491 F.3d 1, 5 (1st Cir. 2007).

ARGUMENT

I. The District Court erred in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule.

CSP, as the party seeking the jurisdiction of the federal courts, "carr[ies] the burden of establishing their standing under Article III" of the Constitution. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339–42 (2006). Standing "ensur[es] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *Id.* at 3390 (internal

quotation marks omitted). Thus, "courts have no business deciding it, or expounding the law," when a party fails to carry their burden of establishing standing. *DaimlerChrysler Corp.*, 547 U.S. at 341. To establish standing to pursue their claim in federal court, CSP must demonstrate that it has suffered "[1] an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; [2] . . . a causal connection between the injury and the conduct complained of; [3] . . . that the injury [likely] will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

CSP does not have standing because it has not suffered an injury in fact. Their invocation of federal jurisdiction rests on their interest in vindicating the public's interest through the preservation of Crystal "Stream from contamination resulting from industrial uses and illegal transfers of polluted water." Record at 14, Exhibit A, Declaration of Cynthia Jones. However, the Supreme Court has made clear that "vindicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. Vindicating the rights of the public cannot be the basis for invoking federal jurisdiction because "[a]t bottom, 'the gist of the question of standing' is whether [the party invoking federal jurisdiction] have 'such a personal stake [so] as to assure that concrete adverseness which sharpens the presentation of [the] issues'" as required for adjudication under Article III. *Massachusetts v. Env. Protection Agency*, 549 U.S. 497, 516–17 (2007). The litigation of public rights is a matter for the "'rarified atmosphere of a debating society,'" that is not "'conducive to a realistic appreciation of the consequences of judicial action.'" *Id.* at 516–17 (citing *Lujan,* 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in judgment)); *see also id.* at 535 (Roberts, J., dissenting) (finding "broad-ranging

injury" to be nonjusticiable under Article III). This constitutional prohibition applies regardless of a party's "'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." S*ierra Club v. Morton*, 405 U.S. 727, 733–37 (1972). Thus, because CSP does not, and is unable, unable to allege a concrete and particularized injury to the organization by WTR, Supreme Court precedent prohibits CSP from meeting constitutional standing requirements under Article III. Fundamentally, CSP "object[s] to what the law allows others to do [and while they] may always take their concerns to the Executive and Legislative Branches [to] seek greater regulatory or legislative restrictions on certain activities" they are categorically prohibited from seeking relief in federal court. *Food and Drug Administration v. All. for Hippocratic Med.*, 602 U.S. 367, 393 (2024).

A. CSP cannot sidestep Article III by stretching associational standing.

"[H]istory and tradition offer a meaningful guide to the types of cases that article III empowers federal courts to consider." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (quoting *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 274 (2008)). Historical practice demonstrates the associational standing cannot be wielded here. Geoffrey C. Hazard, Jr., John L. Gedid, & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1882 (1998) ("There are few federal cases dealing with any aspect of representative suits from 1789, when the federal court system was created, until 1853 . . . . Of the handful of cases, all dealt with class suits in the context of the necessary parties problem."). Our legal system is built on the historical understanding that the right of "taking reparations [for violation of a private right] . . . belongs only to the injured party" and cannot be transferred. John Locke, *Second Treatise on Government*, *in* TWO TREATISES OF GOVERNMENT 285, 291 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 80 (3d ed., Oxford,

Clarendon Press 1771). Thus, associational standing is an anomalous, narrow exception from Article III's general prohibition on third-party standing. *Sec'y of State of Md. v. Munson Co.*, 467 U.S. 947, 947 n.5 (1984) (citations omitted) (noting third-party standing violates Article III because it does not ensure "a 'sufficiently concrete interest in the outcome of the suit to make it a case or controversy,' and [invites] abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate.").

To prevent running afoul of Article III, an association must make the rigorous showing necessary to establish "[1] its members would otherwise have standing to sue 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 individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The final element of associational standing is met here. An organization must only prove a limited amount of individual participation is necessary. *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Claims seeking injunctive relief, like those at issue here, do not require the kind of extensive participation from individual members that bars associational standing. *Id.* at 515. However, CSP has failed to carry its burden to establish associational standing with respect to the first and second elements of the *Hunt* test.

1. CSP is an environmental law firm masquerading as a public interest organization and therefore cannot rely on the interest of its "members."

Mere "generalized harm to the forest or the environment will not alone support standing," just as generalized harm to a group of individual members cannot support associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). The violation of a statutory right is a procedural harm, insufficient to confer a cause of action, unless the statutory violation leads to a concrete, particularized injury conferring a legal right of action. *Spokeo, Inc. v. Robins*, 578 U.S.

330, 350 (2016) (rejecting proposition that a statutory right can confer standing under Article III absent an analogous injury in common law). Further, the injury complained of must affect the litigant in a personal way to assure the court that they have a genuine stake in the outcome of the litigation. *Lujan*, 504 U.S. at 563–64 (The litigant must "be *himself* among the injured.").

The Supreme Court routinely rejects efforts to expand associational standing to organizations that cannot establish that they adequately represent the interests of the members they claim to vindicate in court. *See, e.g.*, *Summers*, 555 U.S. at 498 (explaining that it would "make a mockery" of Article III to bend the injury requirement of Article III). Here, instead of asserting their true interest—protecting a geographical feature on behalf of the public—CSP has recruited two "members" on whose behalf to bring suit. These individuals joined the organization for the express purpose of "stop[ping] th[e] discharge" through impact litigation. Record Doc. 14–17, Exhibits A & B. Allowing any association to "manufacture" standing by temporarily enlisting individuals to meet jurisdictional requirements contravenes "[t]he law of Art. III standing [that] is built on a single basic idea—the idea of separation of powers" by improperly granting federal courts jurisdiction to matters more properly brought before the executive and legislative branches. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Morton*, 405 U.S. at 737. In addition, manufactured standing flouts our historical understanding that causes of action are nontransferable. John Locke, *Second Treatise on Government*, *in* TWO TREATISES OF GOVERNMENT 285, 291 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). Accordingly, this Court should dismiss CSP's claim of associational standing as CSP does not authentically represent the interests of its members.

i. Even if Declarants are "members," this Court cannot provide relief.

CSP must demonstrate a connection between the alleged procedural violations and the harm its members claim. Specifically, it must show "that the procedural step was connected to the substantive result." *Am. Rivers v. FERC*, 895 F.3d 32, 42 (D.C. Cir. 2018); *see also Lujan*, 504 U.S. at 573 n.8 (requiring plaintiffs to show that procedural protections were designed to safeguard a concrete interest as the basis for standing). To satisfy redressability, CSP would need to show that fixing the procedural violation could cause the agency to "change its position" on the environmental policy or action. *Sierra Club v. FERC*, 827 F.3d 59, 67 (D.C. Cir. 2016). CSP has failed to demonstrate how enforcing the procedural requirements will likely alter the ultimate regulatory decision, leaving redressability speculative.

Further, CSP must establish that pollutants causing the alleged harm would be cured if EPA required Highpeak to obtain a discharge permit, but a discharge permit would still see Crystal Stream subject to environmental pollution. It is unclear how enforcement of a permitting requirement would lead to a different result because CSP has not demonstrated the pollution is "fairly traceable" to the nonenforcement of the permitting requirement. *Cf. Lujan*, 504 U.S. at 573 n.8 (explaining an individual can enforce a procedural right in court "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing"). The Supreme Court has repeatedly held that parties lack standing in similar circumstances. *See, e.g.*, *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 413 (2013) (rejecting standing to challenge foreign surveillance statute because, even if the foreign contacts could establish an injury, other federal statutes would allow for the surveillance of the petitioners and a district court would have to first approve the surveillance); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (finding that indigent patients lacked

standing to challenge an Internal Revenue Service Revenue Ruling that allegedly "'encouraged' hospitals to deny services to indigents" because service to the petitioners may have been denied on grounds unrelated to the Revenue Ruling); *Warth v. Seldin*, 422 U.S. 490, 504–05 (1975) (denying standing to attack zoning ordinances because there was no showing that plaintiffs would be able to find housing in the town absent the ordinances). The reasoning of *Clapper*, *Simon*, and *Warth* applies equally here: if the source of pollution lies beyond Highpeak's permit, the CSP's claimed injuries would lack a direct causal link, and redressability remains uncertain.

2. The CSP's purpose diverges from the interests of affected "members."

Even if CSP met the other requirements, it cannot establish that the interests it seeks to protect are germane to its purpose in a manner that sustains associational standing. For associational standing, an organization's purpose must genuinely align with protecting members' concrete interests—not just a broad ideological aim. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc). This requirement "ensures a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing." *Humane Soc'y of United States v. Hodel*, 840 F.2d 45, 58 (1988) (citing *Warth*, 422 U.S. at 498). CSP's creation days before filing, with an explicitly litigious purpose, demonstrates that it primarily serves as a litigation vehicle to protect Crystal Stream rather than a robust association dedicated to advancing its members' long-term environmental interests in the aesthetics and pollution of the stream. *See Washington Leg. Found. v. Leavitt*, 477 F. Supp. 2d 202, 211 (D.D.C. 2007).

When an association's primary objective is advocacy through litigation rather than addressing specific grievances or providing concrete services to its members, courts scrutinize its standing to ensure it does not merely seek to act as a general-purpose public advocate. This principle is underscored in *Center for Biological Diversity v. EPA*, where the Fifth Circuit

emphasized that organizations whose focus lies heavily on litigation require closer examination to verify that their suit truly advances the particularized interests of actual, identifiable members affected by the defendant's actions. 937 F.3d 533, 543 (5th Cir. 2019).

In this case, CSP's interest, as an organization, is rooted in a generalized interest in protecting Crystal Stream from contamination, rather than remedying any specific harm suffered by its individual members because of that contamination. As CSP's purpose centers around broad public-interest objectives rather than targeted representation of its members' specific injuries, CSP struggles to meet the *Hunt* test's second prong—that the interests it seeks to protect are "germane" to the organization's purpose in a way that clearly serves its members rather than an abstract cause. *See Sec'y of State of Md. v. Munson Co.*, 467 U.S. 947, 947 n.5 (1984).

CSP's members allege they have suffered an aesthetic harm due to Crystal Stream appearing cloudy because of Highpeak's permit-less discharge. While "the desire to use or observe [nature], even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing[,]" this interest is not necessarily concurrent with CSP's interest in protecting the Stream from contamination. *Lujan,* 504 U.S. at 562–63. For example, the water levels in the stream would be significantly reduced without Highpeak's discharge, potentially reducing the aesthetic enjoyment of the stream by the individual members of CSP. Record at 4. In addition, CSP's aim of keeping the stream free from contamination is fundamentally at odds with its individual members' interest in recreating along the stream. *Report on the Environment: Water: Recreational Waters*, ENVIRONMENTAL PROTECTION AGENCY (May 21, 2024), https://www.epa.gov/report-environment/recreational-waters (finding that human recreational activity pollutes the environment). Thus, without an adequate showing that CSP's interests are

tied directly to concrete, particularized injuries suffered by members, CSP's purpose diverges too far from those it claims to represent to merit standing in this case.

II. The District Court erred in holding that CSP timely filed the challenge to the Water Transfers Rule.

28 U.S.C. § 2401(a) provides that, in the absence of legislation to the contrary, suits against the United States must be "filed within six years after the right of action first accrues." CSP challenges the validity of the sixteen-year-old Water Transfers Rule ("WTR") promulgated in 2008. CSP failed to file a challenge to WTR within six years of the final agency action but relies on the proposition that C*orner Post v. Bd. of Governors of Fed. Reserve System*, 144 S. Ct. 2440 (2024), operates to restart the statute of limitations to the date at which CSP, as an organization, first possessed a cause of action to challenge WTR. CSP's reliance on *Corner Post* is misplaced.

Corner Post does not permit, and did not envision, litigants to restart the statute of limitations in this context. The Court did not base its decision on the plaintiffs' ability to organize a fresh entity to circumvent an existing statute of limitations but rather on the specific, delayed regulatory impact that uniquely applied to the business entity. Since CSP is using its representational status to argue on behalf of its members, each member's potential time bar on filing remains controlling. CSP cannot demonstrate that the formation of its organization affected the applicability of WTR to Crystal Stream, or caused a legally cognizable harm giving way to the cause of action needed to bring suit in federal court.

A. CSP was formed expressly to challenge the Water Transfers Rule.

The business indirectly affected by the regulation in *Corner Post* was established to conduct business and thus faced regulatory impact only *after* it commenced commercial operations. CSP is axiomatic. CSP's formulation did not cause its members to be subject to the

regulatory impact, or indirect effects, of WTR. WTR regulated the pollutant levels in Crystal Stream, and more generally in the "waters of the United States" for sixteen years prior to the formation of CSP. While the store in Corner Post was not subject to the interchange fees until after its formation and operation as a business, Crystal Stream—the physical location that CSP's mission is to protect—was affected by WTF long before the formation of CSP.

1. The CSP's cause of action is dependent on its members.

A "right of action 'accrues' when the plaintiff has a 'complete and present cause of action'—*i.e.*, when she has the right to 'file suit and obtain relief.'" *Corner Post*, 144 S. Ct. at 2450 (citing *Green v. Brennan*, 578 U.S. 547, 554 (2016) (internal quotation marks omitted)). The store in *Corner Post* brought suit as an organization; thus, the store could only bring suit after its individual claim could be "file[d] . . . and obtain relief." *Id.* at 2451 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). In order for the store in *Corner Post* to file its claim, it had to establish an *individual* economic harm caused by the interchange rate to the store as an individual. *Corner Post, Inc.*, 144 S. Ct. at 2450–55; *see Morton*, 405 U.S. at 739 (An organization's "mere 'interest in a problem,'" cannot confer standing.). In contrast, CSP claims it has associational standing; thus, its right of action flows from the injury suffered by its members. *Hunt*, 432 U.S. at 343. Therefore, under *Corner* Post, CSP's right of action accrued when its members were "injured" by the promulgated regulation in 2008 because its basis for suit rests solely on the claims of its members. *Cf. Morton,* 405 U.S. at 739 (rejecting claim that aesthetic injury suffered by an organization is sufficient to confer standing).

As CSP brings this case in a representative capacity, its members' ability to challenge the WTR within the original limitations period is controlling. *Morton*, 405 U.S. at 739 (finding that associational standing is based on standing borrowed from a member). However, whether the

members had a cause of action to challenge WTR on the basis of pollution to Crystal Stream or on the basis of another injury caused by WTR is irrelevant because CSP is launching a *facial* challenge to the validity of WTR. *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 437 (D.C. Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) ("An organization that lacked standing to challenge various EPA actions at the time it filed its petition for review could not achieve standing by recruiting new members who would have standing after the time limits for seeking review had passed.").

2. All members of CSP were injured by WTR, if at all, when the rule was promulgated.

The District Court erred in finding that Mr. Silver's arrival in the area in 2019 foreclosed the possibility that he was injured by the WTR before being allegedly injured by the WTR's permit exception that allowed Highpeak to discharge water into Crystal Stream. The WTR establishes that, under the Clean Water Act, "an addition of a pollutant . . . occurs when pollutants are introduced from outside the waters being transferred." National Pollution Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008). Thus, a water transfer—*i.e.*, "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," and which does not introduce pollutants from "the water transfer activity itself," 40 C.F.R. § 122.3(i)—does not entail the "addition" of pollutants to "the waters of the United States." *See* NPDES, 73 Fed. Reg. at 33,700–02. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protec. Agency (Catskill III)*, the EPA's interpretation of the CWA, coined the "Unitary Waters Theory" was found to govern the application of the WTR under *Chevron*. 846 F.3d 492, 527 (2d Cir. 2017). While it is unclear whether the Unitary Waters Theory applies post *Loper Bright*, the Court made clear that *Loper Bright* does not apply

retroactively. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology.").

i. Under the Unitary Waters Theory, all individual members had a cause of action to challenge WTR when the rule was promulgated in 2008.

Since the Unitary Water Theory governed WTR when the rule was promulgated, the introduction of a pollutant at any point in the United States constituted pollution into the waters of the United States. Since 1992, Highpeak has operated its tunnel by releasing water from Cloudy Lake during the Spring and Summer, when the State of New Union "determines the water levels . . . are adequate." Record at 4. Thus, in the very year the water transfers rule was promulgated, the alleged "pollutants" were allegedly "introduced" to Crystal Stream, and thus, the waters of the United States. *Id.* at 4, 14–17, Exhibit A & B. Therefore, every individual member of CSP possessed a cause of action in the year WTR was promulgated because the waters of the United States were allegedly polluted by the actions of Highpeak. *See Corner Post, Inc.*, 144 S. Ct. at 2450. Thus, the six-year statute of limitations expired in 2014 or, at the latest, in 2015. 28 U.S.C. § 2401(a). As such, this Court must dismiss CSP's challenge as untimely.

B. EPA's interpretation affords meaning to the text of the statute.

"If the statutory language is plain, [the Court] must enforce it according to its terms." *King v.* Burwell, 576 U.S. 473, 486 (2015). As a statute of limitation, 28 U.S.C. § 2401(a) must operate to foreclose claims. *Amy v. City of Watertown*, 130 U.S. 320, 324 (1889) (cautioning that failing to enforce a statute of limitations on grounds not expressly within the statute would lead "the court [to] make the law instead of administering it"). A statute of limitations is toothless if it can be repeatedly reset by forming an impact litigation organization to challenge the validity of the statute. *See Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 437 (D.C. Cir. 1989), *cert.*

denied, 490 U.S. 1106 (1989). The CSP's reading of 28 U.S.C. § 2401(a) misapplies *Corner Post* in an attempt to open the door to endless cycles of litigation on long-standing regulations, undermining regulatory stability and certainty for both agencies and regulated entities. This Court should not indulge their attempt to stretch *Corner Post* into invalidating jurisdictional limitations.

The Supreme Court repeatedly stifles attempts to expand jurisdictional doctrines beyond what is necessary for the efficient and even-handed administration of the law to prevent jurisdictional gamesmanship from usurping Article III. *See, e.g.*, *TransUnion*, 594 U.S. at 423 (Injuries to statutory rights do not confer Article III standing absent a common law right of action.); *Clapper*, 568 U.S. at 416 (denying standing where plaintiff's inflict harm upon themselves due to a hypothetical future fear of harm). These concerns are particularly present now, given the uncertainty of administrative law jurisprudence and the fact that if every new nonprofit could claim injury upon formation, APA's statute of limitations would effectively be negated.

1. CSP's attempts to stretch *Corner Post* too far.

The *Corner Post* Court sought to account for entities that genuinely encounter regulatory injury *for the first time* upon beginning operations—not to allow for retroactive challenges to established rules by forming new organizations. If this ploy were permitted, "an organization without current standing to sue could file a timely petition for review and thereby extend the statutory period while it seeks out and signs up a person who could have sued but did not do so within the prescribed time. Such an approach to timeliness would render the finality of agency action an uncertain, sometimes thing." *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F.2d 433, 437 (D.C. Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).

The practical ramifications extend far beyond the technical concerns of timely filing. Permitting parties to sidestep long-settled agency regulations by opportunistically transferring their cause of action to a newly formed impact litigation organization would allow parties to get into court, not because they are seeking judicial redress for legal harm, but because they engineered a workaround to the standing doctrine by playing hot potato with their cause of action, refreshing the statute of limitation with each passage of the cause-of-action torch. Indeed, the new entity does not inherit a "fresh" injury; it is simply cloaking an old grievance in the cloth of associational standing.

III. EPA validly promogulated the Water Transfers Rule and no special justification exists for revisiting previous validity findings.

The Clean Water Act prohibits the discharge of any pollutant into the water of the United States without complying with the act by obtaining an NPDES permit. *See* 33 U.S.C. § 1311. The WTR, promulgated by EPA, exempts "[d]ischarges from a water transfer . . . an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from requiring an NPDES permit. 40 C.F.R. § 122.3(i) (2017). Two Circuits upheld WTR as a valid interpretation of the Clean Water Act under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d. Cir. 2017) (*Catskill III*); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (11th Cir. 2009). While the deferential framework to agency action provided in *Chevron* is no longer valid under *Loper Bright*, the prior cases that relied on *Chevron* analysis are still valid and subject to statutory *stare decisis,* absent special justification for overruling such cases. *Loper Bright Enters.*, 144 S. Ct. 2244, 2273 (2024). Reliance on *Chevron* alone cannot constitute a special justification for overruling such holdings as such an

argument is, at best, arguing that the precedent was wrongly decided. *Id.* Furthermore, even if the Court decides to apply the less deferential standard outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), WTR remains valid.

A. No special justification exists to overcome statutory *stare decisis* and overrule the holdings of *Catskill III* and *Friends of the Everglades*.

Principles of *stare decisis* require respect for precedent even when judicial methods of interpretation change. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). If such respect were not required, *stare decisis* would fail to achieve legal stability as it promotes the evenhanded, predictable, and consistent development of legal principles on which the rule of law depends. *Id.*; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 916 (2018) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)). When deciding to overcome precedent, such factors as (1) the quality of the reasoning of the underlying decision, (2) the workability of the rule it established for lower courts to apply, (3) any departures from the Court's other decisions on similar constitutional questions, (4) developments since the decision, and (5) the reliance upon the decision are considered. *Janus*, 585 U.S. at 917. In the present case, finding WTR invalid, and in effect overruling *Catskill III, Friends of the Everglades*, and every other decision that relied upon *Chevron* in its analysis, would create the uncertain circumstances the Court wishes to avoid when considering these factors in relation to *stare decisis*.

1. The quality of the reasoning of decisions upholding the Water Transfers Rule is not flawed.

In determining whether to depart from precedent, the Court considers the quality of the decision's underlying reasoning. *Knick v. Township of Scott*, 588 U.S. 180, 203, (2019) (quoting *Janus*, 585 U.S. at 917. Both *Catskill III* and *Friends of the Everglades* were not fundamentally misguided. While *Catskill III* did rely on *Chevron* to conclude WTR was valid, the decision did not find *Catskill I* or *Catskill II* held that the plain meaning of 33 U.S.C. § 1311 could only bear

one meaning in that "addition . . . to navigable waters" did not unambiguously mean transfers constituted "additions." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 512 (2d Cir. 2017) (*Catskill III*). *Catskill III* also points out that *Catskill II* held that WTR was unpersuasive under *Skidmore*, as expressed in the EPA's *informal* interpretation, not the rule promulgated by EPA. *Id.* (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 79 (2d Cir. 2006) (*Catskill II*) (emphasis added). The holdings of *Catskill I-III* do not support CSP's interpretation that 33 U.S.C. § 1311 is unambiguous and the plain language forbids water transfers without a permit. Record at 9.

Friends of the Everglades also found the language of 33 U.S.C. § 1311 as ambiguous and did not accept the position that the plain meaning of the statute prohibiting any addition of any pollutant to any navigable waters as this interpretation did not conform with the plain text of the statute. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1223 (11th Cir. 2009) (*Friends I*). Furthermore, both opinions explicitly do not rely on widely rejected theories such as the unitary waters theory. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 527-28 (2d Cir. 2017) (*Catskill III*). Therefore, as both decisions and their predecessors all found the statute ambiguous, the only portions of *Catskill III* and *Friends of the Everglades* capable of being scrutinized as poorly reasoned would be the reliance on *Chevron* for deference to the agency interpretation under step two of the *Chevron* analysis, which is at best "just an argument that the precedent was wrongly decided" and not special justification for overruling precedent. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

2. Lower courts upholding regulations under *Chevron* is workable, while requiring reexamination is unworkable and would produce varying results.

Courts also consider whether the workability of the precedent in question can be understood and applied consistently and predictably. *Montejo v. Louisiana*, 556 U.S. 778, 792

(2009). In the present case, the workability of the standard provided in *Loper Bright*, *stare decisis* on those decisions that rely on *Chevron*, is a workable standard for lower courts to apply as it does not require courts to reconsider every regulation formerly challenged. *Loper Bright Enters.*, 144 S. Ct. at 2273. Abandoning this holding and requiring lower courts to retroactively reexamine regulations previously upheld under *Chevron* under the *Skidmore* framework would be unworkable and produce inconsistent results, which *stare decisis* principles seek to avoid. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting the application of the *Skidmore* approach "has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other"). Lower courts applying *Skidmore* would thus produce more circuit splits and varied decisions on the validity of regulations across the country.

3. Regulations upheld under *Chevron* have garnered substantial reliance.

Reliance provides a strong reason for adhering to established law as it protects the interests of those who have previously acted based on past decisions. *Hilton v. South Carolina Pub. Railways Comm'n,* 502 U.S. 197, 202–203 (1991). *Chevron*'s doctrine was one of the most important holdings cited in over 18,000 cases and invoked to uphold numerous agency regulations that affect the everyday operations of society. *Chevron*, 467 U.S. at 837; *see, e.g.*, *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F.Supp.3d 66, 79–80, 93–106 (D.C.C. 2020) (examining when alpha amino acid polymers qualify as a protein under 42 U.S.C. § 262(i)(1) and thus regulatable); *Bellevue Hospital Center v. Leavitt*, 443 F.3d 163, 174–176 (2d Cir. 2006) (deciding how the Department of Health and Human Services measure a geographic area to affect Medicare reimbursements to hospital based on differences in hospital wage levels). Issuing a holding allowing parties to challenge regulations previously upheld under the *Chevron* doctrine

in direct conflict with the Supreme Court's guidance in *Loper Bright* would disrupt private and public action in industries across all of society.

As explained in *Catskill III*, actors have also relied on the validity of WTR. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529 (2d Cir. 2017) (*Catskill III*). Finding the regulation invalid would disrupt existing water transfer systems across the county and cost actors billions of dollars in compliance with the conditions of NPDES permitting scheme. *Id.* Furthermore, states such as New York, Florida, and California submitted *amicus curiae* to the Second Circuit, citing concerns over constructing costly water treatment plants, strains on state water projects, and the effects on the agricultural industry if the Court invalidated WTR. *Id.*

Therefore, due to the majority of *stare decisis* considerations in favor of upholding previous regulations upheld under *Chevron*, the Supreme Court's guidance in *Loper Bright* should be adhered to as the invalidation would have sweeping detrimental effects for private and public actors. Reverting to the holdings of *Catskill I* and *Catskill II* and other holdings, finding water transfers to require NPDES permits would not be appropriate as these holdings did not examine the WTR promulgated by EPA and did not hold 33 U.S.C. § 1311 unambiguously required NPDES permits for any discharge of any pollutant into the waters of the United States. Therefore, adhering to the guidance of the Supreme Court in *Loper Bright* promotes the evenhanded, predictable, and consistent development of legal principles on which the rule of law depends. *CBOCS*, 553 U.S. at 457.

B. The Water Transfers Rule is valid under *Skidmore*.

Even if the Court were to revisit the validity of WTR under *Skidmore*, the regulation is valid. *Skidmore* analysis occurs after a preliminary finding that the statutory language is ambiguous. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 509 (2d

Cir. 2017) (*Catskill III*). After a finding of ambiguity, the Court considers the agency's interpretation of a statute, which cannot "bind the court," but it may be informative "to the extent it rests on factual premises within [the agency's] expertise." *Loper Bright Enters.,* 144 S. Ct. at 2259 (citing *Skidmore v. Swift & Co.*, 323 U.S. 124 (1944)). Such expertise is one of the factors that may give the interpretation the "power to persuade, if lacking the power to control. *Id.* The weight of the agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Skidmore*, 323 U.S. at 140.

In the present case, the text of 33 U.S.C. § 1311 has been found ambiguous. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 512 (2d Cir. 2017) (explaining how neither *Catskill I, Catskill II*, nor the current Court found that "additions" under 33 U.S.C. § 1311 unambiguously included water transfers); *Friends of Everglades*, 570 F.3d 1210, 1223 (11th Cir. 2009) (finding that the language of 33 U.S.C. § 1311 was ambiguous and rejecting the plain meaning of the statute prohibiting any addition of any pollutant to any navigable waters violated the statute). The Court then should consider the power of persuasion of the *Skidmore* factor relating to the agency's power of persuasion. *Skidmore*, 323 U.S. at 140. The lower court found EPA provided thorough consideration through its detailed rulemaking process, which is a more extensive process than the informal interpretations of statutes by agencies previously subjected to *Skidmore* analysis. Record at 10; *see City of Arlington v. FCC*, 569 U.S. 290, 310 (2013) (explaining that informal interpretations such as interpretation letters are subject to *Skidmore* analysis).

EPA did engage in this detailed process when promulgating WTR as the agency considered relevant case law, the purpose of regulating point source polluters, and the larger

statutory regime of the Clean Water Act and took into account numerous public comments when formulating the final rule. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfer Rules, 73 Fed. Reg. 33697 (June 13, 2008). The lower court also found the EPA's expertise in water transfers and the agency's reasoning behind exempting certain transfers from NPDES permitting to reflect their agency expertise, and the agency has maintained its position on water transfers across four administrations since the promulgation of the rule. Record at 10. Due to the weight of these factors, the lower court found the regulation valid under *Skidmore*. Record at 10. For these reasons, the regulations should be found valid under *Skidmore*.

None of the previous cases finding that water transfers require permitting occurred before the promulgation of the rule in 2008. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–94 (2d Cir. 2001) *(Catskill I)*; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82–87 (2d Cir. 2006) (*Catskill II*). These decisions also clearly articulate that it was not impermissible for EPA to adopt a unitary water reading of the act in a formal proceeding. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d 481, 490–91 & n.2 (2d Cir. 2001). These decisions did not hold that a water transfer constituted a transfer under *Skidmore,* and the only factor making WTR valid was deference under *Chevron.* Therefore, applying the *Skidmore* analysis does not support a reading that the plain text of 33 U.S.C. § 1311 requires a permit for the transfer of any water into the waters of the United States. Such reading thus does not conform with the prior decisions analyzing water transfers under *Skidmore* and the validity of EPA's promulgation of the rule. Based on the factors considered under *Skidmore*, the EPA's interpretation based on their significant expertise in water transfer regulation should be given significant persuasive power.

C. Other statutory methods exist to regulate water transfers outside of NPDES permitting that support the rule's reasonability.

The WTR's validity should also be considered in the context of the broader water pollution regulatory regime. The Clean Water Act envisioned a "cooperative federalistic approach" in the management of the nation's resources. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (providing the Clean Water Act "anticipates a partnership between the States and the Federal Government"). Various other regulatory systems are in place to ensure the regulation of pollution in water transfers. Alternative federal and state statutes and regulations are in place, and they have more stringent requirements than NPDES program. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 846 F.3d 492, 529 (2d Cir. 2017) (*Catskill III*) (citing such provisions as the regulation of nonpoint source pollution under the Clean Water Act, the Safe Water Drinking Act, the Surface Water Treatment Rule, FERC's regulatory scheme for non-federal hydropower dams, interstate compacts, and international treaties).

State regulations also must not be less stringent than those imposed under the Clean Water Act. *Catskill Mountains Chapter of Trout Unlimited, Inc*, 451 F.3d 77, 79 (2d Cir. 2006) (*Catskill II*). Furthermore, "[s]tates can also enforce water quality standards through their certification authority under Section 401 of the Clean Water Act, which requires that applicants for federal licenses or permits obtain a state certification that any discharge of pollutants will comply with the water-quality standards applicable to the receiving water body" *Id.* (citing 33 U.S.C. § 1341, *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006), and *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994)). Such regulatory schemes and the power of states to enforce water quality provide alternative mechanisms for CSP to pursue the compliance and remedy the organization seeks. An invalidation of a valid rule

to accomplish this purpose is unreasonable, especially when such invalidation could potentially cause substantial detrimental effects and significant legal instability across society.

IV. The District Court properly held 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.

The District Court properly held that pollutants introduced in the course of Highpeak's water transfer took its discharge out of the scope of the Water Transfers Rule (WTR) because the EPA's interpretation of WTR is entitled to judicial deference under the existing precedent of *Auer* deference. Alternatively, although *Skidmore* respect would be an inappropriate standard of deference for the court to give an agency's interpretation of its own regulations, the EPA's interpretation of WTR would still succeed under *Skidmore* respect on the merits of sound statutory interpretation of the regulation's text.

A. The EPA's interpretation of the Water Transfers Rule should be upheld by the Court under *Auer* deference.

The EPA's interpretation of WTR should be upheld by the Court under *Auer* deference. In its current form, *Auer* deference requires courts to defer to an agency's interpretation of its own regulations if (1) the regulation is "genuinely ambiguous," (2) the interpretation is reasonable, (3) the interpretation constitutes "the agency's authoritative or official position," (4) the "interpretation . . . implicate[s the agency's] . . . substantive expertise," and (5) the interpretation qualifies as a "fair and considered judgment." *Kisor v. Wilkie*, 588 U.S. 558, 574–79 (2019) (internal citations omitted).

1. The Water Transfers Rule qualifies as genuinely ambiguous.

The Water Transfers Rule qualifies as genuinely ambiguous. Ambiguity in regulations is not always the result of carelessness or unforeseeable contingency. *Kisor*, 588 U.S. at 566. Rather, ambiguity can also arise when "[t]he subject matter of a rule . . . [is] 'so specialized and

varying in nature as to be impossible' . . . or . . . impracticable . . . to capture in its every detail." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

In the present case, the text of WTR indicates that no exception to the NPDES permit requirement exists for "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3 (i). However, two competing interpretations of the word 'introduced' are plausible, as the language does not explicitly differentiate between pollutants that are introduced to the water directly by the water transfer system and pollutants that are introduced to the water from outside the water transfer system. Under the EPA's interpretation, Highpeak introduces pollutants during the water transfer process because iron, manganese, and TSS increase by "approximately 2–3%" during transfer through a carved, rock tunnel. Record at 5. Conversely, Highpeak argues that the word 'introduced' implies an external source of pollutants from beyond the water transfer system itself. *Id.* at 11. Because the language of WTR does not explicitly distinguish between these two interpretations, genuine ambiguity exists.

2. The EPA's interpretation of the Water Transfers Rule is reasonable.

The EPA's interpretation of the Water Transfers Rule is reasonable. To be reasonable, an interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools" including "text, structure, history, and so forth." *Kisor*, 588 U.S. at 576. In the present case, the WTR's use of the word 'introduced' could refer to (1) any increase in pollutants that occurs during the water transfer or (2) only the addition of pollutants from outside the water transfer system. Because the EPA's interpretation is one of the two possible interpretations explicitly being considered as the point of ambiguity in question, the interpretation inherently falls within that zone of ambiguity.

3. The EPA's interpretation of the Water Transfers Rule is its authoritative or official position.

The EPA's interpretation of the Water Transfers Rule is its authoritative, official position. To qualify for *Auer* deference, an interpretation "must be the agency's authoritative or official position, rather than any more ad hoc statement not reflecting the agency's views." *Id.* at 577 (internal citations omitted). In the present case, EPA published a statement in the Federal Register upon the WTR's promulgation, stating that "[w]ater transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred" and clarifying that permits are required when such introductions do occur. NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,705 (June 13, 2008).

4. The EPA's interpretation implicates its substantive expertise.

The EPA's interpretation implicates its substantive expertise in the management of pollution involving water sources. To qualify for *Auer* deference, an interpretation must be directly related to its agency's specialized knowledge base. *Kisor*, 588 U.S. at 577–78. *Auer* deference is thus not available "[w]hen the agency has no comparative expertise" over the judicial branch. *Id. at* 578. In the present case, the regulation of pollutants in bodies of water is both highly technical and centrally relevant to the expertise of EPA. Because EPA has a privileged relation to the subject matter in question as compared to the Court, this requirement for *Auer* deference is satisfied.

5. The EPA's interpretation qualifies as a fair and considered judgment.

Finally, the EPA's interpretation qualifies as a fair and considered judgment. Fair and considered judgment is precluded when an agency defends a "merely convenient litigating position or post hoc rationalization[n] advanced to defend past agency action against attack." *Id.* at 579 (internal citations omitted). In the present case, EPA has maintained this interpretation of

WTR since its promulgation in 2008. NPDES Water Transfers Rule, 73 Fed Reg. at 33,705. Additionally, the purpose of the EPA's interpretation is to limit the exclusion created by WTR to instances in which no pollution occurs during transfer, which is consistent with its overall goal of preventing water pollution.

B. *Loper Bright* does not justify using *Skidmore* respect to evaluate an agency's interpretation of their own regulations.

Loper Bright does not justify using *Skidmore* respect to evaluate an agency's interpretation of their own regulations because of the inapplicability of its justifications for judicial priority involving (1) protecting congressional intent and (2) preserving stability and foreseeability in the legal system.

1. The congressional intent-based justifications in *Loper Bright* are inapplicable to regulatory interpretation.

The Court's reasoning in *Loper Bright* related to congressional intent is inapplicable to regulatory interpretation by agencies. In *Loper Bright*, the Court justifies overruling *Chevron* deference on grounds that "statutory ambiguity . . . is not a reliable indicator of actual delegation of discretionary authority to agencies." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024). In the present case, the ambiguity in question lies within the EPA's regulation and not Congress's statute. Consequently, congressional intent is not at issue. Additionally, agency intent is likewise not in question. Not only did EPA draft WTR, it also wrote accompanying explanatory materials specifically outlining its interpretation of the regulation. *See* NPDES Water Transfers Rule, 73 Fed Reg. at 33,705. As a result, *Loper Bright*'s congressional intent-based analysis has no relevance in the present case.

2. *Loper Bright*'s justifications for judicial priority involving stability and foreseeability in the legal system are likewise inapplicable.

Loper Bright's justification of judicial priority involving stability and foreseeability in the legal system are likewise inapplicable to the present case. *Loper Bright* overrules *Chevron* in part because it "fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty." *Loper Bright Enters.*, 144 S. Ct. at 2272. But creating a precedent of judicial priority for agencies' interpretations of their own regulations would create even more uncertainty. In the present case, EPA has been clear about its interpretation since 2008. *See* NPDES Water Transfers Rule, 73 Fed Reg. at 33,705. For the Court to overrule this agency's interpretation would be to create an environment in which actors could never trust an agency's own explicit statements about interpretation and enforcement, thereby creating considerable uncertainty.

C. In the alternative, even if merely entitled to Skidmore respect, the EPA's interpretation satisfies the *Skidmore* criteria for deference.

Alternatively, even if subjected to *Skidmore* respect, the EPA's interpretation satisfies the *Skidmore* criteria for deference. When weighing whether an agency's interpretation is owed deference under *Skidmore* respect, the Court considers (1) "the thoroughness evident in its consideration," (2) "the validity of its reasoning," (3) "its consistency with earlier and later pronouncements," and (4) "all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

1. The EPA's interpretation is the product of thorough consideration of the regulation in question.

The EPA's interpretation is the product of thorough consideration of WTR. The EPA's interpretation of WTR was published contemporaneously with the rule's promulgation. *See* NPDES Water Transfers Rule, 73 Fed Reg. at 33,705. Consequently, the EPA's

interpretation resulted from the detailed rulemaking process that yielded the regulation in the first place. Additionally, EPA published a written explanation in the *Federal Register* justifying its interpretation of WTR. *Id.* at 33,700.

2. The EPA's interpretation is the result of valid reasoning.

The EPA's interpretation of WTR is based on valid reasoning. The purpose of WTR is to create an exclusion for permit requirements only in those situations where water is transferred without adding pollutants. *See id.* at 33,701. Because the EPA's interpretation that water transfers introducing pollution require permits is complementary to this purpose, the interpretation is the result of valid reasoning.

3. The EPA's interpretation is consistent with earlier and later pronouncements.

The EPA's interpretation is consistent with earlier and later pronouncements. As previously discussed, the EPA published its interpretation of WTR in the *Federal Register* upon the promulgation of the regulation, writing that "[w]ater transfers [should] not themselves add pollutants to the water being transferred." *Id.* at 33,705. Almost two decades later, EPA is still defending this interpretation in the present case.

D. The EPA's interpretation is supported by a number of persuasive factors.

1. The EPA's interpretation is derived from sound linguistic and grammatical interpretation of the regulation.

The EPA's interpretation of WTR is derived from sound linguistic and grammatical interpretation of its own regulation. The final sentence of § 122.3(i) states 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(i). By using the preposition 'by' instead of 'during' in the phrase "introduced by the water transfer activity," the text requires an interpretation that specifically includes pollutants added from the water transfer system itself. Whereas use of the word 'during'

instead of 'by' might have supported a reading in which the sentence referred only to external pollutants introduced from outside the system, the word 'by' connotes a causal relationship between the water transfer activities and the introduced pollutants. It may very well be possible to argue that pollutants can only be *introduced* from outside the system *during* water transfer activities, but pollutants introduced *by* water transfer activities necessarily include pollutants *from* the water transfer system. This interpretation is further supported by the inclusion of the word 'itself' in the phrase "introduced by the water transfer activity itself," which again reiterates that the pollutants in question result directly from the water transfer activity.

2. The EPA's interpretation is justified by the rule against superfluity.

The rule against superfluity supports the EPA's interpretation that *any* introduction of pollutants from water transfer activities requires a permit. The WTR's final sentence requiring permits for pollutants introduced by water transfer activities follows immediately after the definition of '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." *Id.* This sentence thus clarifies that the WTR's permit exclusion applies only to water transfers that do not subject the water to any of the listed uses. To the extent that 'industrial, municipal, or commercial use' likely constitute the only sources of externally added pollution, contaminants from the water transfer system itself are likely the *only* sources of pollutants added during the water transfer process. Indeed, if WTR was not specifically requiring permits for pollutants from the water transfer system itself, it is unclear to which introduced pollutants the last sentence of § 122.3(i) would even be referring. In this scenario, the final sentence would serve no purpose and would become superfluous.

3. The EPA's interpretation is necessary to prevent absurdity.

Finally, the EPA's interpretation is necessary to prevent absurd results. Consider the alternative interpretation in which only pollutants introduced from outside the water transfer system require a permit. Under such an interpretation, EPA would be entirely unable to regulate the pollution that occurs from water transfer systems. Consider a scenario in which a water transfer is executed using harmful materials that leach enormous amounts of pollutants into the transferred water. If § 122.3(i) were interpreted to allow any incidental pollution without permits, the absence of maximum allowable thresholds in WTR would allow for any amount of pollution from the water transfer process. By categorically preventing EPA from regulating pollutants inherent to water transfer systems, the alternative interpretation necessarily allows for extreme scenarios in which transfer processes substantially contaminate water.

CONCLUSION

For the foregoing reasons, this Court should find (I) CSP did not have standing to challenge Highpeak's discharge and WTR, (II) CSP did not timely file its challenge, (III) WTR is a valid regulation promulgated pursuant to the Clean Water Act , and (IV) pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR, thus, making Highpeak's discharge subject to permitting under the Clean Water Act.