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.
Defendants-Appellee-Cross-Appellant

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

Brief of Appellant, HIGHPEAK TUBES, INC.

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STATEMENT OF JURISDICTION

This case appeals the Decision and Order of the United States District Court for the District of New Union (1) granting the United States Environmental Protection Agency's ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss Crystal Stream Preservationists, Inc.'s ("CSP") challenge to the Water Transfers Rule ("WTR") and (2) denying Highpeak's motion to dismiss CSP's cause of action. (R. 12.) The district court had subject matter jurisdiction under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. Jurisdiction to hear appeals from a final decision of the district court is properly with the United States Court of Appeals for the Twelfth Circuit. 28 U.S.C § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err in holding CSP had standing, where CSP cannot demonstrate an injury in fact and attempts to manufacture standing using the corporate form?

II. Did the district court err in holding CSP timely filed its challenge to the WTR where CSP lacks a pecuniary or business interest to challenge the WTR and allowing the suit would undermine the gatekeeping function of the statute of limitations?

III. Did the district court err in upholding the WTR as a valid regulation promulgated under the CWA, where EPA has consistently taken the position in the WTR and CSP failed to present reasons to revisit prior rulings upholding the WTR under the *Chevron* framework?

IV. Did the district court err in holding the release from Highpeak's tunnel is subject to permitting under the CWA, even though the release did not introduce pollutants into Crystal Stream?

STATEMENT OF THE CASE

This appeal seeks to prevent CSP from circumventing jurisdictional requirements for bringing a lawsuit, second-guessing the EPA's regulatory expertise on water transfers, and unfairly

penalizing Highpeak's 32 years of legitimate business activity. Accordingly, Highpeak respectfully requests that this Court reverse issues I, II, and IV, and affirm III in favor of Highpeak.

I. STATEMENT OF THE FACTS

A. Highpeak's Tunnel

Highpeak is a family-owned recreation company providing tubing experiences on a 42-acre parcel along the Crystal Stream ("the Stream") in Rexville, New Union since 1992. (R. at 3–4.) The northern border of the parcel touches Cloudy Lake, while the Stream runs through the parcel's southern border. (R. at 4.) Both Cloudy Lake and the Stream are "waters of the United States" under the CWA. (R. at 4–5.) Due to natural conditions, Cloudy Lake has higher levels of iron and manganese, and a higher concentration of total suspended solids ("TSS") compared to the water in the Stream. (R. at 5.) The Stream, on the other hand, is fed by groundwater and has lower concentrations of iron, manganese, and TSS. (*Id.*)

In 1992, with New Union's permission, Highpeak constructed a tunnel between Cloudy Lake and the Stream. (R. 4.) Highpeak typically seeks to use the tunnel from spring to late summer to increase the Stream's water levels for better tubing conditions. (*Id.*) The tunnel is four feet in diameter, 100 yards long, and equipped with valves at its northern and southern ends to regulate water flow. (*Id.*) New Union prohibits Highpeak from using the tunnel unless the State determines, based on seasonal rains, that Cloudy Lake's water levels support a water release. (*Id.*) Because New Union does not have a delegated CWA permitting program, EPA has authority to issue National Pollutant Discharge Elimination System ("NPDES") permits in the State. (*Id.*) Highpeak never sought an NPDES permit to use the tunnel. (*Id.*)

B. The Complaint

CSP presents the very first challenge to Highpeak's operations in the tubing company's 32-year history showcasing the Awandack range's natural splendor. (*Id.*) CSP, a non-profit

corporation and membership organization, supports the preservation of the Stream "for environmental and aesthetic reasons." (*Id.*) In August 2019, Jonathan Silver became the thirteenth and most recent CSP member to arrive in the State (R. at 4, 16), and he and another member, Cynthia Jones, supplemented the record with affidavits (R. at 14–17). Both members aver CSP is "dedicated to saving and preserving" the Stream (*id.*), state they have "regularly walked along the Stream," and live near Crystal Stream Park (R. at 14, 16). Only Ms. Jones asserts an aesthetic interest in the Stream's "crystal clear color and purity" (R. at 14.) Both are concerned about toxins in the Stream and would recreate more often if not for the releases. (R. at 14–16.) Mr. Silver refuses to let his dogs and children swim in or drink Stream water. (R. at 16.)

On December 15, 2023, two weeks after its formation, CSP sent a notice of intent to sue ("NOIS") to Highpeak, copying EPA and the New Union Department of Environmental Quality ("DEQ"). (R. at 4.) In the NOIS, CSP alleged Highpeak's Tunnel is a point source under the CWA that regularly discharged and continues to discharge pollutants into the Stream without an NPDES permit. (*Id.*) CSP also argued that because the Stream is less burdened by pollutants present in Cloudy Lake—manganese, iron, and TSS—Highpeak discharges pollutants into the Stream in violation of the CWA every time it opens the tunnel's valves. (R. at 5.)

CSP further argued that the WTR was not validly promulgated, and that even if the WTR was validly promulgated, the additional iron, manganese, and TSS Highpeak introduced during the water transfer process fell outside the WTR's exemption. (*Id.*) To support this claim, CSP presented data collected on the same day from water samples taken directly from Cloudy Lake and the outfall into the Stream. (*Id.*) The samples showed higher concentrations of iron, manganese, and TSS in the water released into the Stream. (*Id.*) The samples taken directly from the water intake at Cloudy Lake had concentrations of 0.80 milligrams per liter (mg/L) of iron, 0.90 mg/L

of manganese, and 50 mg/L of TSS. (*Id.*) The samples taken from the Stream's tunnel outfall had 0.82 mg/L of iron, 0.93 mg/L of manganese, and 52 mg/L of TSS. (*Id.*)

On December 27, 2023, Highpeak responded to CSP that they did not need an NPDES permit because the "natural" addition of pollutants during the transfer did not render the WTR inapplicable. (*Id.*) After the CWA's sixty-day waiting period, CSP filed suit on February 15, 2024 (*id.*), in the United States District Court for the District of New Union (R. at 2, 4). CSP restated its allegations from the NOIS and added a citizen suit claim against Highpeak under the CWA and a CWA and APA claim against EPA, challenging the WTR as invalidly promulgated and inconsistent with the CWA. (R. at 3, 5.) CSP also argued that even if the WTR was valid, Highpeak fell outside its scope when it "introduced" pollutants into the Stream without a permit. (*Id.*)

C. Motions to Dismiss

Highpeak and EPA filed motions to dismiss on multiple grounds. (*Id.*) Highpeak argues: (1) CSP lacks standing to bring its citizen suit and challenge to the WTR; (2) the WTR challenge was untimely; (3) EPA validly promulgated the WTR under the CWA; and (4) the WTR exempts Highpeak's discharge from permitting. (*Id.*) EPA moved to dismiss, joined Highpeak in challenging CSP's standing and timeliness, and defended the WTR as validly promulgated under the CWA. (R. at 3, 6.) But EPA agreed with CSP and joined them in their argument that Highpeak must obtain a permit for the pollutants introduced from the tunnel during discharge. (*Id.*)

The district court denied Highpeak and EPA's motions to dismiss the citizen suit for lack of standing and timeliness but granted the motion to dismiss CSP's challenge to the WTR. The district court's Order held, first, that CSP had standing to bring its APA and CWA claims. (R. at 2.). Second, CSP's WTR challenge was timely. (*Id.*) Third, the WTR was not arbitrary, capricious, or contrary to law. (*Id.*) Lastly, Highpeak's discharges did not fall under the WTR because they introduced additional pollutants into the Stream during the water transfer. (*Id.*)

Regarding the fourth issue, both CSP and EPA argued Highpeak's tunnel release contained higher levels of iron, manganese, and TSS—pollutants "introduced" into the Stream by the water transfer. (R. at 11.) Highpeak argued, under the WTR, that "introduction" can only reasonably refer to pollutants resulting from human activity, rather than natural processes like erosion. (*Id.*) The district court rejected Highpeak's argument and held that it must defer to EPA's reasonable interpretation of its own regulation. (R. at 12.)

D. The Parties Appeal

The three parties involved in this case timely appealed the district court's decisions. (R. at 2.) Highpeak appeals the holdings addressing standing, timeliness, and applicability of the WTR to its operations. (*Id.*) EPA appeals the holdings on standing and timeliness. (*Id.*) CSP appeals the issue whether the WTR was a valid regulation promulgated under the CWA. (*Id.*) This Court granted the parties' motions for leave to appeal. (*Id.*)

II. STANDARD OF REVIEW

An appellate court reviews *de novo* the district court's denial of a motion to dismiss for lack of standing. *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 929 (9th Cir. 2010). Questions of timeliness under the APA are also reviewed *de novo*. *Wyo-Ben Inc. v. Haaland*, 63 F.4th 857, 866 (10th Cir. 2023) ("We review *de novo* a district court's ruling that a plaintiff's [APA] claim is time-barred."). A court also reviews a lower court's ruling on a complaint for failure to state a cause of action *de novo*. *Schwartz v. Finn*, No. 21-15841, 2022 U.S. App. LEXIS 5763, at *7 (9th Cir. Mar. 4, 2022) (citing *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025 (9th Cir. 2021)). A claim for relief must be plausible on its face to survive a motion to dismiss for failure to state a claim. *Id.* (quoting *Plaskett v. Wormuth*, 18 F.4th 1072, 1083 (9th Cir. 2021)). Courts review a district court's interpretation of the CWA and its implementing regulations *de novo*. *Olympic Forest Coal v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018).

SUMMARY OF THE ARGUMENT

The district court erred in denying Highpeak and EPA's motions to dismiss because (1) CSP lacked standing to sue; (2) CSP's APA suit was untimely; and (3) the WTR would protect Highpeak's releases. The district court properly held EPA validly promulgated the WTR.

First, the district court lacked jurisdiction because CSP cannot establish associational standing via its members. Neither Ms. Jones nor Mr. Silver alleges a concrete and particularized, actual or imminent harm to recognized interests. Ms. Jones, who alleges a sense of "upset" at alleged cloudiness in the Stream, never states having once seen the "cloudy" Stream and bases her averments on what she "heard" about the water quality. Further, neither Ms. Jones nor Mr. Silver articulate specific harms to their recreational interests or the reasonable bases for their fears.

Second, CSP's APA suit is time-barred by the statute of limitations on federal claims. CSP has not demonstrated cognizable economic, business, or organizational injuries to itself or its members from the WTR that would reset the six-year limitations period. Allowing CSP's members to form a nonprofit entity solely as a litigation vehicle—after most individuals' claims would have lapsed—would violate the spirit and intent of the statute of limitations.

Third, EPA's promulgation of the WTR was not arbitrary and capricious. EPA often took the position that water transfers are not "additions" introducing pollutants. CSP fails to explain why this Court should undermine case law upholding the WTR's validity under *Chevron*. EPA's interpretation of its own regulation is reasonable and entitled to *Skidmore* deference. EPA shared the WTR through notice-and-comment rulemaking and adequately explained its decision.

Fourth, Highpeak did not introduce pollutants into the Stream when it transferred water from Cloudy Lake into the Stream using its tunnel. Under the WTR, a water transfer is an activity that conveys or connects waters of the United States ("WOTUS") without subjecting the

transferred water to intervening industrial, municipal, or commercial use. 40 C.F.R. § 122.3(i) (2023). This does not include water transfers where the activity itself introduces pollutants to the transferred water. *Id.* Here, EPA's new interpretation of the WTR is not entitled to deference because it runs afoul of the regulation's text and purpose. EPA's interpretation as applied to Highpeak does not reflect the agency's fair and considered judgment and fails to consider Highpeak's reliance on the WTR. Highpeak's tunnel falls under the WTR because the discharge involved a tunnel moving water a short distance without introducing pollutants.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE CSP LACKS STANDING TO SUE.

CSP fails to demonstrate the requisite standing to sue. Article III, Section 2 of the U.S. Constitution vests federal courts with "the judicial Power" to hear "Cases" and "Controversies," U.S. Const. art. III, § 2, "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The standing doctrine—a "landmark" feature of the American judicial system, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)—"determin[es] the power of the court to entertain the" case or controversy, *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). CSP must show, in relevant part, that at least one of its members individually would have standing before demonstrating associational standing as a membership organization. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (stating associational standing elements); *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Thus, for CSP to meet the associational standing requirement, at least one CSP member must show an injury in fact, causation "between the injury and the [complained-of] conduct," and a likelihood of redress. *Defenders of Wildlife*, 504 U.S. at 560.

This court should reverse the district court's decision denying Highpeak and EPA's motion to dismiss CSP's challenge to the WTR and CSP's CWA citizen suit. By way of its members, CSP has not established a stake in this dispute that would confer Article III standing for either the CWA or APA claims. First, CSP's membership lacks a cognizable injury in fact. Second, CSP was organized exclusively to pursue the instant lawsuit and has no substantial or legitimate activities apart from litigation, which further weakens its standing argument.

A. CSP Cannot Demonstrate an Injury-In-Fact.

The standing doctrine does not tolerate speculative allegations of harm. An injury must be concrete and particularized—"a generalized grievance" will not suffice, *Food & Drug Admin. v. All. for Hippocratic Medicine*, 602 U.S. 367, 381 (2024)—and actual or imminent, not conjectural or hypothetical. *Id.* (requiring "the injury [to] have already occurred or be likely to occur soon."); *Defenders of Wildlife*, 504 U.S. at 560–61. A person's interest in the "[a]esthetic and environmental well-being" of an area as an interest "deserving of [judicial] protection." *Sierra Club*, 405 U.S. at 734; *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (reminding that standing requires "injury to the plaintiff," not to the environment).

An injury or threat of future injury is neither direct nor imminent unless it is based on the complainant's specific averments "that they use the affected area and are persons 'for whom the aesthetic and recreational values of an area [have or] will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club*, 405 U.S. at 735); *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 316–17 (D.C. Cir. 2013) (finding injury where complainants specifically identified "land surrounding the West Antelope II tracts"). Imminence requires that the alleged injury be "'certainly impending.'" *Defenders of Wildlife*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Here, CSP lacks standing because it cannot establish that one or more of its members has suffered, or is likely to suffer, a cognizable injury. First, the CSP members' affidavits contained no more than generalized grievances that fall short of the "concrete and particularized" requirement to find actual or threatened injury to an aesthetic interest. Second, the members did not introduce any direct, imminent or actual threats to their recreational interests.

1. Cynthia Jones has neither experienced nor faces injury to her aesthetic interests.

CSP cannot allege an injury to an interest which at least one member has not individually experienced. Complainants must specify the actual or threatened imminent injuries against their own interests. *See Food & Drug Admin.*, 602 U.S. at 386 (2024); *Laidlaw*, 528 U.S. at 181, 184 (finding injury to member-affiant where he attested to polluted look and smell of the North Tyger River, which was subject to "continuous and pervasive" illegal discharges since complaint was filed). In *Food and Drug Administration*, the Supreme Court rejected alleged injuries to doctors' conscience interests to refuse to provide abortion care due to the FDA's regulation of Mifepristone, an abortion drug. *Food & Drug Admin.*, 602 U.S. at 372–74, 386–87. The doctors claimed making Mifepristone more available would increase the incidence of emergency abortions, which they would be forced to perform against their conscience objections. *Id.* at 376–77. The Alliance failed to "identif[y] any instances where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor's conscience." *Id.* at 388 (explaining doctors' declarations that they "saw a patient suffering complications" and "witnessed another doctor perform an abortion" are not conscience injuries).

Here, Ms. Jones is the only CSP member alleging harm to an interest in enjoying the Stream's "crystal clear color and purity." (R. at 14.) Mr. Silver claims to have "observed that the water in the Stream *occasionally* appears cloudy," (R. at 16) (emphasis added), but nowhere asserts an injured aesthetic interest or sense of "upset" due to the alleged occasional cloudiness. Ms.

Jones's affidavit never states that she ever observed or encountered cloudy water on any walks along any part of the Stream—only that she "first heard about [the discharges] in approximately 2020" and found those rumors "upsetting." (R. at 15.) The *Laidlaw* Court recognized associational standing where one member-affiant attested that the Tyger River "looked and smelled polluted." *Laidlaw*, 528 U.S. at 181. But here, the district court lacked any such statement from the person actually claiming an injury to her aesthetic interest. *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 540 (5th Cir. 2019) ("[C]rucial to an aesthetic injury is that the aesthetic experience was *actually offensive* to the plaintiff.") (emphasis added).

Ms. Jones's complaints about what she "heard" are no stronger grounds upon which to rest an injury or threat of injury than the doctors' complaints about what they "witnessed" in *Food and Drug Administration*. The doctors must have participated in providing abortion care, or been credibly threatened to do so, in some direct way as to offend their conscience interests. *Food & Drug Admin.*, 602 U.S. at 388. Likewise, Ms. Jones must, at a minimum, be capable of describing how the aesthetic qualities of the formerly "crystal clear" and "pure" water are now diminished—in her "personal and subjective" understanding, *Ecological Rts. Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000)—beyond what she "heard" from unspecified third parties. (R. at 14.) Allowing Ms. Jones to claim harm to an aesthetic interest, without even observing or describing the extent of the harm to that interest, is like allowing the Alliance doctors to assert conscience injuries for simply observing an abortion—an outcome the Supreme Court *unanimously* rejected, *Food & Drug Admin.*, 602 U.S. at 386.

Additionally, Mr. Silver described the cloudiness as "occasional" (R. at 16), which deprives Ms. Jones's aesthetic interests of an imminent risk of harm. The *Laidlaw* Court determined the threat of injury to the Friends of the Earth was imminent where the discharges into

the Tyger River were "continuous and pervasive." *Laidlaw*, 528 U.S. at 184. Here, Mr. Silver's averment that the Stream is only "occasionally cloudy" removes any continuousness. (R. at 16.) CSP thus lacks an injury-in-fact to aesthetic interests sufficient to confer standing.

2. CSP member-affiants' responses to their fears about pollution do not produce an actual or threatened injury to their recreational interests.

The CSP member-affiants' actions based on their fears of pollution do not amount to a direct injury in fact. Complainants cannot establish an injury by taking measures to avoid harm that is not "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 (2013); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) ("[A] plaintiff cannot create an injury by taking precautionary measures against a speculative fear."); *see also Nat'l Fam. Plan. & Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (reaffirming the principle that "self-inflicted harm doesn't satisfy the basic requirements for standing"); *cf. Laidlaw*, 528 U.S. at 183–84 (finding pollution concerns are "reasonable" where "discharges[] directly affected" plaintiffs' use of specific, affected areas).

In *Clapper v. Amnesty International USA*, the Supreme Court rejected the plaintiffs' theory of injury that depended on "tak[ing] costly and burdensome measures" to maintain confidentiality for a speculative threat of surveillance. *Clapper*, 568 U.S. at 415–16. There, the plaintiffs alleged "the threat of surveillance sometimes compel[led] them to avoid" using certain communications technology or refrain from discussing sensitive information. *Id.* at 415. Justice Scalia, writing for the majority, held the plaintiffs' speculative fears of government surveillance did not permit the plaintiffs to "inflict[] harm on themselves" to create an injury. *Id.* at 416. Justice Scalia required each link in the "chain of contingencies" to amount to more than speculation. *Id.* at 410, 415.

Here, the alleged injuries to CSP members' recreational interests are entirely self-inflicted and flow from the same type of unfounded fears that the Court rejected in *Clapper*. *Id.* To justify

not using the Stream "even more frequently" (R. at 15, 16), CSP offered only "subjective apprehensions," *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983), of discharges that are neither continuous and pervasive, nor "concededly ongoing" and dangerous, *Laidlaw*, 528 U.S. at 176, 184. In *Laidlaw*, the Court noted that discharges were "continuous and pervasive" and ongoing when the suit was filed. *Id.* at 184. By contrast, Mr. Silver's affidavit states that the cloudiness of the water is "occasional" (R. at 16), and neither he, Ms. Jones, nor the lower court's record provide any indication that the Stream is frequently or continuously subject to water releases. In fact, the record suggests the opposite: the releases are "typically" performed from spring to summer and depend on "seasonal rains." (R. at 4.)

Furthermore, the water measurements—taken at a single point in time at the tunnel outfall (R. at 5)—do not show whether pollution extends beyond the outfall or affects specific areas the members use. *See Defenders of Wildlife*, 504 U.S. at 565–66 (requiring complainants to "use the [affected] area . . . and *not an area roughly 'in the vicinity'* of it") (emphasis added) (citation omitted); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 558 (5th Cir. 1996) (finding standing where complainant showed "interest in that part of Galveston Bay around Cedar Point's discharge"). The record and affidavits do not even specify which areas CSP seeks to use or has used, let alone whether those areas intersect with the alleged cloudiness.

The record below does not indicate, nor do the affidavits allege, that the trace quantities of iron, manganese, and TSS observed at the tunnel outfall (R. at 5), occur frequently. Also absent is evidence that these substances pose *any* toxicity to the health of member-affiants or Mr. Silver's children and pets. Such a showing of health risk was unnecessary in *Laidlaw*, where mercury—a known "extremely toxic pollutant"—was among the toxins. 528 U.S. at 176. To resolve these factual uncertainties in favor of CSP would be to engage in the type of speculation against which

the Supreme Court has previously cautioned. *See Defenders of Wildlife*, 504 U.S. at 567 (rejecting injury theories that "go[] beyond the limit . . . into pure speculation and fantasy").

In addition to the unreasonableness of the member-affiants' fears, neither Ms. Jones nor Mr. Silver has stopped using the Stream or the walking trail, or otherwise "curtail[ed] the recreational use of th[e] waterway" like the Friends of the Earth, *Laidlaw*, 528 U.S. at 184. Instead, Mr. Silver and Ms. Jones attest they would like to use the walking trail "even more often" (R. at 15, 16), and that Mr. Silver would like to swim in unspecified portions of the Stream (R. at 16). This is an entirely different posture than the *Laidlaw* affiants, where the Court recognized perceptible curtailments of their use of the North Tyger River. *Laidlaw*, 528 U.S. at 184. CSP thus fails to demonstrate an injury-in-fact to its members' recreational interests as required for standing.

B. CSP Was Created Solely to Manufacture Standing to Bring the Instant Action.

The injury-in-fact requirement of standing requires CSP to demonstrate an injury to at least one of its members, *Hunt*, 432 U.S. at 343 (articulating associational standing requirements), or to itself through a "concrete and demonstrable injury to [its] activities," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (requiring also a "consequent drain on the organization's resources" for organizational standing). Courts critically examine standing where plaintiffs, in an attempt to manufacture standing, "inflict[] harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *Murthy v. Missouri*, 144 S.Ct 1972, 1995 (2024); *Reilly v. Ceridian Corp.*, 664 F. 3d 38, 46 (3d Cir. 2011).

Here, CSP manufactured its injury allegations to get its foot in the courthouse door, and accordingly cannot survive the Article III standing inquiry. This weakens CSP's credibility, which has already failed to demonstrate associational standing or allege harm to itself sufficient to initiate an organizational standing inquiry. First, CSP's member-affiants have offered nothing more than statements reaffirming the organization's "abstract social interest" in the preservation of the

Stream—insufficient to confer standing. Second, CSP's members established the organization solely to pursue the instant litigation—a posture which courts have treated with skepticism. This Court should reverse the district court and dismiss CSP's complaint for lack of standing.

1. CSP cannot establish standing by virtue of being a non-profit organization with a common interest in environmental preservation.

The nonprofit corporate form alone does not confer more than a common "abstract social interest," *Havens*, 455 U.S. at 379, in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons" (R. at 4). CSP cannot assert constitutional standing by virtue of its members' common interest in environmental preservation. *See, e.g., Food & Drug Admin.*, 602 U.S. at 390 n.3 (rejecting notion that Alliance "doctors [who] suggest that they are distressed by others' use of mifepristone and by emergency abortions" have injury); *Protect Our Aquifer v. Tenn. Valley Auth.*, 654 F. Supp. 3d 654, 680 (W.D. Tenn. 2023) (declining to find injury where complained-of action would allegedly undermine organization's "primary goals").

Here, the mere fact of CSP's nonprofit status does not salvage its standing claims. CSP's members do not transform their insufficient individual standing allegations into valid associational standing by simply forming a nonprofit with shared interests in environmental preservation. (R. at 4.) The *Food and Drug Administration* Court specifically declined to recognize the Alliance for Hippocratic Medicine's organizational pro-life mission as a source of injury available for standing. *Food & Drug Admin.*, 602 U.S. at 390 n.3. The court in *Protect Our Aquifer v. Tennessee Valley Authority* similarly held that offenses against the primary interests of an organization do not create a cognizable injury to confer standing. *Protect Our Aquifer*, 654 F. Supp. 3d at 680. CSP's members request, despite the absence of injuries to them, that this Court hold otherwise.

2. Courts are skeptical of corporate entities whose sole purpose is to pursue litigation.

Courts also decline to recognize standing where litigants form or alter organizations for the purpose of manufacturing standing, *see Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 288 (3d Cir. 2014), or act to create an opportunity for litigation, *see Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 801–02 (W.D. Pa. 2016) (declining to find standing where plaintiff "purchas[ed] her cell phones and minutes . . . to receive more calls, thus enabling her to file TCPA lawsuits" as a business). In *Blunt v. Lower Merion School District*, the Third Circuit declined to find standing for a plaintiff organization that altered its membership structure and made novel expenditures in an "attempt[] to create standing for itself." *Blunt*, 767 F.3d at 284, 288. The court expressed particular concern that "any individual or organization wishing to be involved in a lawsuit could create a corporation" through which to manufacture standing. *Id.* at 288.

Here, CSP's members incorporated the nonprofit 14 days prior to service of the NOIS in the instant suit. (R. at 4.) This attempt to create a litigation vehicle, so close to the filing date and without any other apparent business or organizational purpose, is contrary to the preference against "the artificial creation of standing" articulated in *Blunt*. 767 F.3d at 288. Therefore, CSP's manufactured nature and lack of any purpose except to create an avenue for litigation prevent CSP from meeting Article III standing requirements. Accordingly, the district court's denial of Highpeak and EPA's motion to dismiss should be reversed.

II. THE COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE CSP'S APA CHALLENGE WAS UNTIMELY.

The APA establishes a cause of action against a federal agency by "[a] person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The general statute of limitations for federal claims bars lawsuits brought more than six years "after [a] right of action first accrues." 28

U.S.C. § 2401(a). The Supreme Court recognizes a right of action as fully accrued "only after the plaintiff suffers the injury required to press her claim" and holds "a complete and present cause of action." *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S.Ct. 2440, 2451–52 (2024). Thus, to proceed with a regulatory challenge under the APA, *Corner Post* requires a plaintiff to proceed within six years after a final agency action causes injury. *Id.* at 2450–51.

This court should reverse the district court's decision denying Highpeak and EPA's motion to dismiss CSP's WTR Rule challenge. The *Corner Post* decision and the precedent it cites point to a clear purpose behind the statute of limitations provision: (1) protect the bona fide business or economic interests of complainants as to financial injuries caused by a government regulation; and (2) gatekeep parties seeking to air disagreements over policy and regulatory decisions. First, CSP lacks an economic interest in challenging the Water Transfers Rule. Second, to allow CSP's APA suit to proceed, despite the lapse of the statute of limitations, would offend the gatekeeping function underlying the statute of limitations as a matter of policy.

A. CSP and Its Members Lack a Business or Economic Interest in the Challenged Regulation.

While section 2401(a) "embodies the plaintiff-centric traditional" role of a statute of limitations, § 2401(a), the section 702 cause of action still requires an injury. *Corner Post*, 144 S.Ct. at 2452. Hence, "Corner Post's cause of action was not complete and present until it was injured by Regulation II." *Id.* at 2453. This required Corner Post, a truck stop and convenience store that accepts credit cards, to accrue "hundreds of thousands of dollars in [credit card] interchange fees" via transactions over the three years since it opened for business. *Id.* at 2448.

In *Corner Post*, the Court acknowledged the truck stop did not exist as a corporate formality until 2017 and only commenced operations in 2018—seven years after the original final agency action. *Id.* Additionally, Supreme Court precedent the majority cited in *Corner Post* repeatedly

recognized that some injury, to allow a statute of limitations to be applied retroactively to a corporate plaintiff, must harm the entity's business or economic interests. *See, e.g.*, *Bay Area Laundry & Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 198 (1997) (allowing pension plan suit for recovery of employer withdrawal payments when the "plan demands payment," not when the employer withdraws from the plan) (quoting *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 416–17 (1997)); *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 420–21 (2005) (holding limitations period for False Claims Act retaliation suits starts to run "when retaliatory action occurs"); *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (addressing causes of action for damages from undercharge actions by carriers under the Interstate Commerce Act).

Here, the record describes CSP as a non-profit, rather than for-profit, organization. (R. at 4.) The record does not describe any business or advocacy activities in which the newly minted CSP, and any of its thirteen members, participates or how the WTR would adversely affect those activities. *Corner Post*, by contrast, only held an "accrued" cause of action because the injury flowed directly from the business's bona fide operations. *Corner Post*, 144 S.Ct. at 2448, 2452–53. CSP members would plead the same underlying challenge to the WTR had they raised it in their individual capacities, because none of the allegations directly implicates CSP as a company.

Additionally, CSP's position is at odds with that of the truck stop in *Corner Post*, 144 S.Ct. 2448, and the individual and corporate plaintiffs in *Bay Area Laundry*, *Graham County*, and *Reiter*, which recognize accruals according to clear business or pecuniary injuries to the plaintiffs. CSP invites this Court to attribute the member-affiants' subjective aesthetic judgments about the Stream's "crystal clear color and purity" (R. at 14) to the corporate form. In the context of

measuring the "accrual" of a cause of action, such an outcome is not contemplated by *Corner Post* and its precedent. Therefore, CSP's WTR challenge is untimely under section 2401(a).

B. Extending *Corner Post* Beyond Bona Fide Business Plaintiffs Would Allow Individuals to Improperly Defeat the Statute of Limitations.

Allowing prospective plaintiffs whose claims have lapsed under a statute of limitations to form corporations to reset the limitations period defeats the purpose of time-barred claims and invites gamesmanship. Justice Barrett, writing for the majority in *Corner Post*, admonished that "the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit." *Corner Post*, 144 S.Ct. at 2459. Following this dictum, courts should bar challenges that are manufactured by a corporate vehicle solely intended to reset a statute of limitations.

Courts are skeptical when plaintiffs use the corporate form to manufacture an injury to bring a lawsuit, absent concrete or imminent harm to members or "perceptible impairment" to the organization's practices. *See Ctr. for L. & Educ. v. U.S. Dep't of Educ.*, 315 F. Supp. 2d 15, 24 (D.C. Cir. 2004) (reasoning the challenged regulation would not impact nonprofit's mission "in any discrete, programmatic way"). Likewise, individuals harboring time-barred complaints against a regulation—and sensing a new, perceived anti-regulatory jurisprudence—who form a non-profit corporation to reset the limitations period should not be considered "timely."

Here, this Court need not find that CSP's cause of action has "accrued" late enough to survive the section 2401(a) statute of limitations. Nothing in the record indicates that CSP members were unable to bring the claims themselves prior to the six-year statute of limitations, or why they pursued no such causes of action individually. Indeed, assuming Mr. Silver's injury immediately manifested upon his arrival in Lexville, he potentially enjoys another one-half year in which to sue individually. (R. at 4, 16.) CSP's formation did not vest the non-profit entity itself,

or its members, with new causes of action by virtue of any business operations or economic interests. Neither the lower court's factual findings nor the CSP members' affidavits contain evidence that CSP engages in any other activities, besides the instant litigation, that would be jeopardized by the WTR. By contrast, Corner Post's principal could not possibly have challenged Regulation II individually. The Court specifically reasoned Corner Post's "cause of action was not complete and present until it was injured by Regulation II," *Corner Post*, 144 S.Ct. at 2453—necessarily after forming and operating a business.

Moreover, Ms. Jones and Mr. Silver merely recite CSP's founding purpose to "sav[e] and preserv[e] the Crystal Stream." (R. at 14.) The plaintiffs in *Center for Law and Education v. Department of Education* also offered no concrete injuries to their members or organizational practices aside from vague references to their organizational mission, which amounted to nothing more than policy disagreements. *Ctr. for L. & Educ.*, 315 F. Supp. 2d at 24. Instead, the plaintiffs relied solely on alleged threats to their abstract mission, which the D.C. Circuit accordingly found did not support standing. *Id.* By analogy, merely creating the non-profit corporation with a common mission of environmental preservation does not, by itself, invent a new injury with which to reset the limitations period. CSP attacks the WTR using the same generalizations about its shared interests and the incompatibility of those interests with the regulatory scheme. Therefore, CSP's WTR challenge under the APA is untimely, and this Court should reverse the district court's decision denying Highpeak and EPA's motion to dismiss on timeliness grounds.

III. THE COURT SHOULD AFFIRM THE DISTRICT COURT BECAUSE THE WATER TRANSFERS RULE IS A VALID REGULATION PURSUANT TO THE CLEAN WATER ACT.

The WTR, promulgated in compliance with the CWA and the APA, highlighted EPA's expertise. The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). To accomplish this, the CWA authorizes

EPA administrator to issue regulations as necessary. 33 U.S.C. § 1361. The EPA has the authority to issue permits for the discharge of pollutants, prescribe conditions to permits, and approve State programs to issue such permits under the CWA. 33 U.S.C. § 1342.

A violation of the CWA occurs when a defendant discharges a pollutant from a point source into navigable waters without an NPDES permit. 33 U.S.C. § 1342; *NA. Kia'i Kai v. Cnty. of Kaua'i*, No. 22-cv-00304-DKW-KJM, 2023 U.S. Dist. LEXIS 102429, at *7 (D. Haw. June 13, 2023) (citing *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993)). A point source is a "discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [and] discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). In *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, the South Florida Water Management District and the United States argued that according to the EPA, NPDES permits are only required when a pollutant is added to navigable waters, not when unaltered water is discharged from one navigable water into another. 541 U.S. 95, 106 (2004). While the Supreme Court declined to resolve this "unitary waters theory" because neither party raised it on appeal, it left that argument open on remand. *Id.* at 109.

In 2008, the EPA issued a regulation that water transfers—an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use—are not subject to NPDES permitting. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. §122.3(i)). When the EPA first promulgated the proposed rule, they explained "no one provision of the [CWA] expressly addresses whether water transfers are subject to the NPDES program but described the indicia of Congressional intent that water transfers not be so regulated." *Id.* at 33,700.

The WTR is a valid exercise of EPA's authority under the CWA and the APA for two reasons. First, the WTR represents EPA's longstanding position that water transfers alone do not "add" a pollutant into navigable waters.[1] Second, the agency's explanation and interpretation of an "addition" of a "pollutant" is reasonable. Although the Supreme Court overruled *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1982), CSP fails to show why this Court should undermine cases upholding the WTR under the *Chevron* framework. Even if CSP presents a compelling justification to revisit these cases, the WTR is still entitled to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Lastly, EPA's enactment and promulgation of the WTR was not arbitrary and capricious.

A. The WTR Codified EPA's Longstanding Position That Water Transfers Are Not Additions Subject to Permitting under the CWA.

An agency regulation that reflects the agency's own longstanding interpretation weighs towards upholding that interpretation as reasonable and permissible. *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("[T]his Court tends to normally accord particular deference to an agency interpretation of 'longstanding' duration."). Prior to the WTR, EPA frequently took the position that water transfers are not discharges under the CWA. *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); (*Catskill I*); *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 81 (2d Cir. 2006) (*Catskill II*); *Dubois v. Dep't. of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996). But none of these cases classified EPA's position on water transfers as formal enough to receive *Chevron* deference. *Catskill II*, 451 F.3d at 82 (declining to apply *Chevron* deference to EPA's water transfer argument when EPA's argument was based on an interpretive memorandum).

[1] The proposed rule first published in the Federal Register by EPA was based on an August 5, 2005, interpretive memorandum written by EPA titled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers." 73 Fed. Reg. 33697.

Along with taking the position embodied in the WTR in litigation, EPA emphasized that water transfers routinely occur throughout the United States. 73 Fed. Reg. 33698. Water transfers route water through tunnels and channels and either pump or passively direct the water for flood control, irrigation, drinking water, and power generation. *Id.* (recognizing that water transfers range from sixteen large and complex diversion projects in the western United States to simple and direct diversions moving water short distances via tunnels); *see also Catskill Mts. Chptr. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 524 (2d Cir. 2017) (*Catskill III*) (recognizing EPA's holistic approach to the CWA considered (1) statute's language, (2) broader statutory scheme, (3) legislative history, (4) congressional concerns that the statute not unnecessarily burden water quantity management, (5) EPA's longstanding position that water transfers fall outside of NPDES permitting, and (6) importance of water transfers to infrastructure); *Everglades v. S. Fla. Water Mgmt. Dist.*, 865 F. Supp. 2d 1159, 1166 (S.D. Fla. 2011) (noting that EPA had not issued an NPDES permit for water transfers for over forty years and in promulgating the WTR, EPA "merely codified the law it had implemented since enactment").

CSP's challenge to the WTR is an attempt to second-guess EPA's policymaking and expertise. CSP fails to present a reason to challenge the WTR's validity and prior case law upholding it. EPA explained why water transfers are exempted from CWA permitting requirements based on the importance of water transfers to the U.S. infrastructure system and the CWA's language and overall structure. As noted in *Everglades*, the WTR reflected EPA's arguments and decades-long practice of not issuing NPDES permits for water transfers. 865 F. Supp. 2d at 1166. And even before the WTR, EPA raised the argument that water transfers are exempted both in response to litigation and internally through agency memoranda. *Catskill III*, 846 F.3d at 524; 73 Fed. Reg. 33697.

B. CSP Fails to Show a Special Justification for Disregarding Cases Upholding the WTR under the *Chevron* Framework.

Until recently, the Supreme Court gave substantial deference to an agency's reasonable interpretation of a statute. Under *Chevron* deference, courts examining the legality of an agency's interpretation of a statute applied two steps. 467 U.S. at 842. First, if the statute spoke unambiguously to the precise question at issue, then the Court gave effect to the expressed intent of Congress. *Id.* at 842–43 But if a statute did not speak clearly to the specific issue or congressional intent was ambiguous, the agency interpretation was upheld if it was based on a permissible construction of the statute. *Id.* at 843. An agency's implementation of a statute qualified for *Chevron* deference when it appeared that Congress delegated authority to the agency to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Notice-and-comment rulemaking pursuant to the agency's enabling statute and the APA shows a delegation of authority. *Id.* at 227. *But see Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that interpretations in opinion letters are not entitled to *Chevron* deference).

In enacting the WTR, EPA asked whether a water transfer constituted an addition within the discharge definition of 33 U.S.C. § 1362(12). 73 Fed. Reg. 33700. Because the CWA did not unambiguously speak on this issue, and EPA's interpretation of a water transfer as an addition was reasonable, courts found EPA's interpretation entitled to *Chevron* deference. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) (*Friends I*); *Catskill III*, 846 F.3d at 533. In *Catskill I*, the Second Circuit even noted that if EPA's position had been "adopted in a rulemaking or other formal proceeding, [*Chevron*] deference . . . might be appropriate." *Catskill I*, 273 F.3d at 490-91.

Then came the overruling of *Chevron*. In *Loper Bright Enters. v. Raimondo*, the U.S. Supreme Court held that courts need not defer to an agency's interpretation of the law because the statute is ambiguous; instead, the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. 144 S. Ct. 2244, 2273 (2024). In doing so, the majority overruled *Chevron*, instructed courts to apply *Skidmore* deference when necessary and reasoned that although an agency's interpretation of a statute cannot "cannot bind a court," that interpretation will be informative to the extent that it rests on factual premises within the agency's expertise. *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140). Overruling *Chevron* does not require calling into question cases that relied on the *Chevron* framework to uphold specific agency actions as lawful. *Id.* at 2273. The holdings of cases applying *Chevron* are still subject to *stare decisis* despite the change in "interpretive methodology." *Id.* "Mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron*, is at best, 'just an argument that the precedent was wrongly decided.'" *Id.* (citing *Halliburton Co. v. Erica P. Johnson Fund, Inc.*, 573 U.S. 258, 266 (2014)); *See also CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (recognizing that *stare decisis* demands respect for precedent, even if judicial interpretation methods change).

Stare decisis is the idea that "today's Court should stand by yesterday's decision" and follow precedent. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). Overcoming *stare decisis* requires more than an argument that a case was wrongly decided. *Id.* ("[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent . . ."). The goal of *stare decisis* is two-fold: encourage people to rely on the law going forward and protect people previously relying on the law. Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. 1125,

1133 (2019); *See also Kimble*, 576 U.S. at 457-58 (noting when there is a possibility that parties "structured their business transactions" in reliance of agency regulations, *stare decisis* provides another reason to follow that precedent).

CSP advances an argument based on wrongly decided precedent—the kind of argument that *stare decisis* prohibits. *Loper Bright*, 144 S. Ct. 2244 at 2273. CSP urges this court to follow the holdings of earlier cases rejecting EPA's water transfer argument before the WTR was enacted and before *Chevron* was overruled. (R. 10.) But *Humphries* cautions us that a change in the law is not enough to undermine cases upholding the WTR under *stare decisis*. 553 U.S. at 457. And even if prior cases like *Catskill I* and *Catskill II* are given more weight in determining whether the WTR was validly promulgated here, EPA's position on water transfers has now crystallized into a codified rule that went through proposal, notice and comment, and final publication.

1. Even If There Was A Special Justification for Revisiting Cases Decided under *Chevron*, the WTR is Valid and Entitled to *Skidmore* Deference.

Under *Skidmore* deference, the weight of agency judgment in a case depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. *Skidmore* deference allows courts to consider agency expertise in deciding cases, but the agencies' interpretations are not binding on courts. *Id.*

In *Catskill I*, the Second Circuit held that New York City violated the CWA by transferring turbid water from the Schoharie Reservoir through the Shandaken tunnel into the Esopus Creek without a permit because the transfer was an "addition" of a pollutant. 273 F.3d at 494. Based on the plain meaning of the term "addition," the Second Circuit declined to give *Skidmore* deference to EPA's interpretation of "addition" found in its letters and presentations to Congress. *Id.* at 491-92. The district court, on remand, imposed a $5,749,000 civil penalty against New York City and

ordered the city to obtain a permit to operate the Shandaken Tunnel. *Catskill II*, 451 F.3d at 80. On appeal, the Second Circuit affirmed the holding in *Catskill I* and again declined to give *Skidmore* deference—this time based on an interpretive memorandum arguing a holistic view of the CWA, not a focus on the meaning of the word "addition," is appropriate. *Id.* at 82, 84.

Here, EPA considered both the environmental factors and the statute's text and intent during the rulemaking process of the WTR. First, EPA recognized that water transfers play an important role in U.S. infrastructure. 73 Fed. Reg. 33698. Second, although the CWA does not define "addition," EPA found that the statutory language and structure of the CWA indicates that Congress generally did not intend to subject water transfers to NPDES permitting because they only convey one WOTUS into another, so effluents are discharged. *Id.* at 33702. Third, requiring permits for water transfers has the potential to unnecessarily interfere with State decisions on allocations of water rights. *Id.* Lastly, the legislative history of the CWA indicated the purpose of the CWA was not to usurp State water allocation systems. *Id.* at 33703.

CSP urges this Court to focus on cases like *Catskill I* and *Catskill II* that did not give the EPA's position on water transfers *Skidmore* or even *Chevron* deference. (R. at 10.) But CSP overlooks that both of those cases involved an agency's informal opinion and guidance letter, respectively. *Catskill I*, 273 F.3d at 490-91; *Catskill II*, 451 F.3d at 82. EPA's argument there was given much less weight because there was no solidified rule on water transfers to begin with. Today, the situation is different. *Skidmore* deference was not meant to bar EPA from adopting the position that water transfers are exempted from NPDES permitting through notice-and-comment rulemaking. In fact, EPA first proposed this rule because congressional intent was unclear, and judicial decisions created uncertainty as to whether water transfers are required to obtain NPDES

permits. 73 Fed. Reg. 33,703. Accordingly, this Court should affirm the district court's decision because it correctly recognized that the WTR is entitled to *Skidmore* deference. (R. at 10.)

2. The Promulgation of the WTR Was Not Arbitrary, Capricious, or an Abuse of Discretion under the APA.

Under the APA, a court shall set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A court must consider whether an agency decision was based on a consideration of all relevant factors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under arbitrary and capricious review, a reviewing court cannot substitute its judgment for that of the agency's. *Id.* But the agency must still examine the relevant data and articulate a satisfactory explanation for its action. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). An agency rule is arbitrary and capricious if the agency (1) relied on factors which Congress did not intend for it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.*

In reviewing the agency's explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). In *Overton Park,* the Secretary of Transportation approved the construction of a highway through a public park without issuing formal findings of fact or explaining why there were no feasible and prudent alternatives, as required by law. *Id.* at 407-08. The Supreme Court remanded the case to the district court, which had based its review on litigation affidavits providing *post hoc* rationalizations, to decide the case based on the full administrative record. *Id.* at 419 (citing *Burlington Truck Lines*, 371 U.S. at 168-69). The Supreme Court in *State Farm* held that the National Highway Traffic

Safety Administration's (NHTSA) decision to rescind the passive restraint rule for car manufacturers was arbitrary and capricious. 463 U.S. at 46. Although the Secretary of Transportation delegated his authority to promulgate safety standards to NHTSA, the agency failed to present an adequate basis for the rule rescission. *Id.* at 46-47.

Here, unlike in *Overton Park*, 401 U.S. 402 at 419, EPA is not advancing an argument for the first time in response to litigation. Quite the contrary. Congress expressly authorized EPA to promulgate regulations as necessary to administer the CWA. 33 U.S.C. § 1361(a). And unlike in *State Farm*, 463 U.S. at 47, EPA presented an adequate basis for its decision. EPA grounded its decision by starting with the definition of the discharge of a pollutant and explaining why a water transfer under the agency's definition constitutes an "addition" pursuant to the CWA. 73 Fed. Reg. 33,705. By issuing notice-and-comment rulemaking on its longstanding position on water transfers, responding to comments, and publishing the final rule, EPA complied with the APA.

IV. THE COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE HIGHPEAK'S DISCHARGES INTO THE STREAM FALL UNDER THE WTR.

To fall under the WTR and be exempt from the NPDES permitting requirement, the water must (1) be a WOTUS prior to being discharged to the receiving waterbody; and (2) be conveyed from one WOTUS to another. 73 Fed. Reg. 33699. Conveyances remaining within the same WOTUS are not water transfers. *Id.* "Activity" in the WTR means any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances constructed to transport water from one WOTUS to another. 73 Fed. Reg. 33704. This may consist of either a single tunnel or pumping station, or it may pass through multiple facilities to reach the second WOTUS. *Id.*

The WTR further states that "a discharge of a pollutant associated with a water transfer resulting from an intervening commercial, municipal, or industrial use or introduced by a water transfer facility in itself would require an NPDES permit as any discharge from a point source into

a [WOTUS] would." *Id.* Water withdrawn for cooling, drinking, irrigation, publicly owned treatment works, municipal storm sewer systems, or other uses before being returned to the second WOTUS was subjected to an "intervening use" under the WTR and is thus subject to NPDES permitting. *Id.* The reintroduction of intake water and associated pollutants from an intervening use through a point source and discharges from a waste treatment system are also "additions" of a pollutant subject to NPDES permitting. *Id.* Here, Highpeak's discharge falls under the WTR because it uses one tunnel—opened seasonally and with New Union's permission—to release water without subjecting it to an intervening use or introducing pollutants during the water transfer itself. (R. 4.); 40 C.F.R. §122.3(i).

A. EPA's Interpretation of the Water Transfer Rule as Applied to Highpeak's Discharge is Not Entitled to *Auer* Deference.

An agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation, and so long as the interpretation is based on a permissible construction of the governing statute. *Auer v. Robbins*, 519 U.S. 452, 457, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Justice Kagan, writing for the majority in *Kisor v. Wilkie* held that *Auer* deference arises only if, first, a regulation is genuinely ambiguous. 588 U.S. 558, 573 (2019). Second, before concluding that a regulation is ambiguous, a court must exhaust all the traditional tools of construction. *Id.* at 575 (requiring a court to carefully consider text, structure, history, and purpose of a regulation "in all the ways it would if it had no agency to fall back on"). The agency's reading of the regulation must amount to a reasonable interpretation. *Id.* at 576 (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). Third, the interpretation must be actually made by the agency in its official position, not in an *ad hoc* statement. *Id.* at 577. Fourth, the interpretation must implicate the agency's substantive expertise. *Id.* Lastly, the regulation must reflect the agency's fair and considered judgment. *Id.* at 579.

A court should not defer to an agency's interpretation if it is a "merely convenient litigating position" or "*post hoc* rationalization advanced to defend past agency action." *Id.* A court should also not defer to an agency's new interpretation if it lacks fair warning or if it would create unfair surprise to regulated parties, regardless of whether that interpretation was first advanced in litigation. *Id.* In *Kisor*, the Supreme Court held that the lower court erred in upholding the Board of Veterans' Appeals' interpretation of the term "relevant" in a Veterans Affairs regulation. *Id.* at 589–90. Specifically, the lower court found the regulation ambiguous, and the Board's meaning to be the only reasonable interpretation, without using the traditional tools of construction. *Id.*

Although the WTR was passed pursuant to EPA's authoritative capacity and substantive expertise, EPA's new interpretation of the WTR forcing Highpeak to seek a permit is not entitled to *Auer* deference. EPA interpreted "introduced" to account for when the discharge contains higher concentrations of contaminants such that pollutants are "introduced" by the water transfer. (R. at 11.) Yet Highpeak argued that the introduction of pollutants must result from human activities. (*Id.*) However, the district court failed to exhaust all the statutory construction tools in interpreting the regulation when it concluded that Highpeak fell outside the WTR because EPA and CSP's interpretation governed. (R. at 12.) This fails the second factor outlined in *Kisor* requiring courts to exhaust those tools, because the district court jumped to the conclusion that the regulation was ambiguous without analyzing it thoroughly. (R. at 12.); 588 U.S. at 575-76, 589-90.

1. EPA's Position that Highpeak's Discharge Does Not Fall under the WTR Is Unreasonable and Inconsistent with the WTR Itself.

Although *Auer* gives agencies deference when it comes to their authority in interpreting their own regulations, it still obligates courts to perform their "reviewing and restraining functions." *Kisor*, 588 U.S. at 574. An agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question when the agency's interpretation conflicts with

a prior interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)). In *Shalala*, the Supreme Court upheld the agency's position as consistent where the petitioner pointed to an agency intermediary letter intended as a comprehensive review of all conditions that could be imposed on educational costs, not a policy that directly conflicted with the Secretary of Health and Human Services' position. *Id.* at 516. An interpretation that looks like a convenient litigating position does not show the agency's fair and considered judgment. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Although the Secretary of Labor advanced his interpretation in *Auer* in a legal brief, the Secretary's position there did not amount to a "post hoc rationalization" advanced by the agency to defend past agency action. 519 U.S. at 462.

Here, EPA's position that Highpeak now needs a permit when they did not introduce pollutants during the water transfer contradicts its own reasoning in the WTR. Unlike in *Auer*, *Id.*, EPA's new argument that Highpeak's tunnel introduced pollutants looks like a convenient litigating position to try to enforce the WTR against the tubing company. In the WTR, EPA noted that a water transfer "activity" includes a system consisting of a single tunnel to transport water from one WOTUS to another. 73 Fed. Reg. 33704. Nothing in the regulation's text would indicate to Highpeak that its seasonally operated tunnel falls outside the WTR's scope. Although EPA presented this argument for the first time in litigation, like the Secretary did in *Auer*, 519 U.S. at 462, the agency's position is inconsistent with the WTR. This is unlike the intermediary letter entitled to deference in *Shalala*, 512 U.S. at 516, because EPA's interpretation here conflicts with its prior ones. The WTR contained no language indicating that higher concentrations of certain solids and chemicals like TSS, iron, and manganese (R. at 5)—already in the WOTUS—were pollutants that could subject Highpeak to permitting requirements and liability. Accordingly,

EPA's attempt to bind Highpeak to permitting requirements was inconsistent with the WTR and did not reflect the agency's fair and considered judgment. *Shalala*, 512 U.S. at 515-16. EPA's interpretation is thus not entitled to *Auer* deference. 588 U.S. at 579.

2. EPA's New Stance on the WTR Subjects Highpeak to Unfair Surprise.

Withholding *Auer* deference is warranted if allowing the agency's interpretation to stand would cause unfair surprise to regulated parties. *Kisor*, 588 U.S. at 579. "[W]here . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 158 (2012). In *Christopher*, the Supreme Court held that the Department of Labor's ("DOL") interpretation of its regulations, advanced for the first time in amicus briefs filed in the case, were not entitled to *Auer* deference. *Id.* at 159. Although an agency can receive *Auer* deference for a position advanced in a legal brief, deferring to the DOL's interpretation would result in unfair surprise to pharmaceutical sales representatives in the form of massive liability for conduct that occurred before the interpretation was announced. *Id.* 155-56. The Supreme Court noted the pharmaceutical industry did not suspect its longstanding practice of treating detailers as outside salesmen ran afoul of the Fair Labor Standards Act ("FLSA"), and DOL never undertook enforcement actions or otherwise suggested the industry acted unlawfully. *Id.* at 158.

EPA's interpretation is an unjust arrow in the agency's quiver. Allowing EPA to suddenly deviate from the WTR and take a position directly adverse to Highpeak, a regulated party, fails to consider the reliance interests at stake. This is analogous to DOL's interpretation in *Christopher* because Highpeak had no notice of EPA's new interpretation. 567 U.S. at 158. Like DOL's decades-long practice of classifying pharmaceutical dealers as exempt employees and not initiating any enforcement actions against them, *id.*, EPA has not regulated water transfers under the CWA. 73 Fed. Reg. 33699. Neither did EPA's argument that a tunnel like the one Highpeak operates,

which moves water of different concentrations, go through notice and comment rulemaking the same way the WTR did. *Id.* at 33697. Granting deference to EPA's position here would thus force Highpeak to go through the NPDES permitting process despite lack of fair notice.

B. Highpeak Did Not Introduce New Pollutants Into Crystal Stream.

A permit is required under the CWA when a "functional equivalent" to a direct discharge occurs. *Cty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 183 (2020). The WTR exempts water transfer releases from NPDES permitting. 73 Fed. Reg. 33697. A water transfer is an engineered activity that diverts water from one WOTUS into a second one. 73 Fed. Reg. 33704. Water transfers can look like "artificial tunnels and channels; or natural streams and water bodies; and [active pumping or passive direction]." *Catskill III*, 846 F.3d at 503. Indeed, the water transfer in *Catskill III*, which upheld the WTR as a reasonable interpretation of CWA Section 402, *Id.* at 528, involved drawing water from the Schoharie Reservoir north of New York City, the eighteen-mile-long Shandaken Tunnel into the Esopus Creek, where the Creek's water then flowed through another reservoir, an aqueduct, more reservoirs, and tunnels along the Hudson River. *Id.* at 499.

The water transfer in *Friends I* involved a pump station system connecting Florida's Lake Okeechobee with canals containing water with low oxygen content and polluted with phosphorous, nitrogen, ammonia, and suspended and dissolved solids. 570 F.3d at 1214. The pump stations move water from the lower levels in the canals outside the Hoover Dike into the lake. *Id.* Water moves into Lake Okeechobee after traveling sixty feet. *Id.* The pumps, though not adding anything to the canal water, move 900 cubic feet of water per second (400,000 gallons a minute). *Id.* Although the *Friends I* court focused on whether the EPA's interpretation of the CWA in the WTR was reasonable, it reversed the district court's holding that the pumps violated the CWA. *Id.* at 1228.

In *South Side Quarry v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, the Sixth Circuit reasoned that a diversion channel managed by the defendant sewer district as part of a flood control

project falls under the WTR. 28 F.4th 684, 699 (6th Cir. 2022). Although the court there concluded that the water flowing from Fishpool Creek into Vulcan Quarry was not meaningfully distinct from the water already sitting there, the court noted that even if they were distinct, the Fishpool Creek diversion falls within the WTR because it consisted of a short channel and spillway without subject the water to any intervening, industrial, or municipal use. even if it *might* contain pollutants *Id.*

Under the CWA, pollutant includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Changes in water quality are not pollutants. *Nat'l Wildlife Federation v. Gorsuch*, 693 F.3d 156, 161, 171 (D.C. Cir. 1982) (holding that changes in water quality caused by moving water through dams do not constitute additions of a pollutant subject to CWA permitting requirements). Although *Gorsuch* held that releasing water through a dam did not discharge pollutants, and the decision did not address whether the transfer of pollutants from one waterbody to another adds pollutants, it noted that changes in temperature, nutrient load, and oxygen content are not "pollutants" under the CWA. *Id.*

Highpeak's tunnel is a simpler system than those courts have found to still qualify as water transfers. Highpeak's tunnel is only 100 yards long and moves water within Highpeak's parcel (R. at 4), a more straightforward design than the framework of two reservoirs, an eighteen-mile-long tunnel, a creek, aquifers, and more tunnels in *Catskill III*, 846 F.3d at 499. Highpeak's tunnel is also used seasonally and with New Union's permission (R. at 4), so the water transfer here does not involve the constant pumping of thousands of gallons of water like in *Friends I*. 570 F.3d at 1214. The tunnel releases are constrained by Cloudy Lake's water levels and Highpeak's agreement with the State. (R. at 4.) Highpeak's tunnel is more analogous to the short diversion

panel seen in *South Side Quarry* to drain excess stormwater from Fishpool Creek during periods of heavy rainfall, because both involved short channels between water bodies. 28 F.4th at 691.

The CWA's definition of pollutants—which includes solid wastes, chemical wastes, and garbage, 33 U.S.C. § 1362(6)—expressly contemplates waste, not slight changes in the properties of the water transferred. The traces of iron, manganese, and TSS in the water entering the Stream are a change in water quality, not an addition of pollutants. Highpeak's discharges are analogous to the water passing through a dam in *Gorsuch*. 693 F.3d at 161. Even though *Gorsuch* was decided before the WTR and involved discharges from dams, the case is relevant to the question before this Court. *Id.* at 175. *Gorsuch* recognizes that changes in water quality, like temperature and oxygen content, are not "pollutants." *Id.* When EPA promulgated the final version of the WTR, it referenced *Gorsuch* to support its proposition that additions may be limited to situations in which the point source itself introduces a pollutant into water. 73 Fed. Reg. 33700. EPA was thus aware of *Gorsuch* and could have provided an exception to the WTR about changes in water concentrations. But it did not do so. Accordingly, this Court should reverse the lower court because Highpeak's discharges from the tunnel did not introduce pollutants during the water transfer.

CONCLUSION

For the foregoing reasons, Highpeak respectfully requests that this Court reverse the district court's denial of Highpeak's motion to dismiss because (1) CSP lacks standing to challenge Highpeak's operations and EPA's rulemaking authority; (2) CSP's challenge to the WTR was not timely filed; and (3) Highpeak's did not introduce pollutants into the Stream. Highpeak also respectfully requests that this Court affirm the district court's holding that the WTR was not arbitrary and capricious, and instead was a valid promulgation by the EPA pursuant to the CWA.