Team 31

NON-MEASURING BRIEF

C.A. No. 24-001109

In the

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v. C.A. No. 24-001109

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, 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

The Honorable Judge T. Douglas Bowman

BRIEF OF THE
APPELLEE, CROSS-APPELLANT,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Oral Argument Requested

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STATEMENT REQUESTING ORAL ARGUMENT

Appellee, the United States Environmental Protection Agency, respectfully requests fifteen minutes for oral argument. The issues raised in this appeal present questions that cannot be fully addressed by the record of these pleadings.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1331 based on an action brought under the Clean Water Act, 33 U.S.C. § 1251 *et seq*; the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et* seq; and the National Pollution Discharge Elimination System ("NPDES"), Water Transfers Rule ("WTR"), and 40 C.F.R. 122.3(i) (2023). This Court has jurisdiction under 28 U.S.C. § 1291, as Crystal Stream Preservationists, Inc. ("CSP"), the United States Environmental Protection Agency ("EPA"), and Highpeak Tubes, Inc. ("Highpeak"), each timely filed for leave to appeal the district court's order.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err in finding that an organization had standing to challenge Highpeak's discharge and the Water Transfers Rule when neither the organization nor any of its members could claim a concrete and cognizable injury, and the organization was formed for the sole purpose of filing litigation?

II. Did the district court err in finding that an organization timely filed a challenge to the Water Transfers rule when the organization failed to meet the six-year, accrual-based statute of limitations applicable in actions filed against the United States?

III. Did the district court correctly find that the Water Transfers Rule was validly promulgated under the Clean Water Act based upon the *Chevron* framework when there was no special justification for overturning precedent?

IV. Did the district court correctly find that an organization's discharge was outside of the scope of the Water Transfers Rule and was thus subject to permitting requirements in light of an agency's interpretation of its own regulation?

STATEMENT OF THE CASE

In Rexville, New Union, Highpeak Tubes, Inc., owns a recreational tubing operation which has been running for the past thirty-two years. R. at 4. Highpeak owns forty-two acres in Rexville, which is bordered by two of New Union's large bodies of water. R. at 4. On the northern portion of Highpeak's property is Cloudy Lake ("the Lake"), and on the southern portion lies Crystal Stream ("the Stream"). R. at 4. Highpeak uses the Stream to launch customers who have rented innertubes from them. R. at 4.

Highpeak received permission from the State of New Union, in 1992, to construct a tunnel to regulate water flow from the Lake to the Stream. R. at 4. The one-hundred-yard-long tunnel includes valves used by Highpeak employees to regulate the amount of water flowing from the Lake to the Stream. R. at 4. The stated purpose of the tunnel is to enhance tubing recreation for Highpeak's customers. R. at 4. The tunnel itself is partially carved through rock, and partially constructed using iron pipe. R. at 4. Highpeak is prohibited from using the tunnel without permission and confirmation from New Union, ensuring the Lake's water levels remain sufficiently high. R. at 4. Highpeak has used this tunnel since it was constructed in 1992.

The state of New Union does not have its own CWA permitting program. R. at 4. As a result, the EPA issues NPDES permits to entities in the state for purposes of complying with the CWA. R. at 4. In all its years of operation, Highpeak has never obtained or even sought a NPDES permit for the water discharge from Cloudy Lake to Crystal Stream. R. at 4.

CSP is a not-for-profit corporation comprised of individuals seeking to preserve Crystal Stream in its natural state for both environmental and aesthetic reasons. R. at 4. CSP was formed on December 1, 2023. R. at 4. CSP includes thirteen members, with all but one who have lived in Rexville for more than fifteen years. R. at 4. CSP members raise concerns regarding the

cloudiness of the Stream and the presence of alleged toxins and contaminants in the water as a result of Highpeak's tunnel discharge. R. at 14. Members allege that since learning of the discharge, their ability to use the park and trails adjacent to the stream has been disrupted. R. at 14–15.

On December 15, 2023, CSP sent a CWA Notice of Intent to Sue Letter to Highpeak, and to the EPA, as required by regulation. R. at 4. CSP alleges Highpeak's discharge from Cloudy Lake contains multiple pollutants which are being deposited into Crystal Stream, in violation of the WTR. R. at 5. CSP supports their claim with data showing that water in the Stream contains two-to-three percent higher concentrations of iron, manganese, and TSS than the water did prior to its discharge from Cloudy Lake. R. at 5.

Highpeak replied to the letter on December 27, 2023, stating that it was unnecessary for them to respond to the merits of the letter. R. at 5. On February 15, 2024, CSP brought suit under the CWA, 33 U.S.C. § 1251 *et seq*, against Highpeak and the EPA. R. at 3. In their complaint, CSP alleges the Highpeak's activity violates the CWA, and challenges the EPA's promulgation of the WTR. R. at 3.

On August 1, 2024 the district court found that CSP had standing to challenge the EPA's regulation and to bring a citizen suit against Highpeak for discharges allegedly violating the Clean Water Act. R. at 2. The court further held that CSP's claim under the Water Transfers Rule was timely filed. R. at 2. Additionally, the district court found that the Water Transfers Rules was not arbitrary, capricious, or contrary to law, and that Highpeak's discharges were subject to permitting under the Clean Water Act. R. at 2.

Highpeak, CSP, and the EPA all moved for leave to appeal their respective portions of the district court's judgment. R. at 2. Highpeak appealed from the court's ruling on standing,

timeliness, and promulgation of the Water Transfers rule. R. at 2. The EPA appeals from the court's ruling on standing and timeliness. R. at 2. CSP appeals from the court's holding on the valid promulgation of the Water Transfers rule. R. at 2.

SUMMARY OF ARGUMENT

The court erred in finding CSP had standing to bring suit against Highpeak for its water discharge from Cloudy Lake to Crystal Stream. For an individual or organization to have standing, for Article III purposes, he or it must have a concrete injury, which is traceable to the defendant, and which can be redressed by a favorable judgment. An individual lacks standing where he fails to establish a concrete and particularized tangible or intangible harm. An individual will be unsuccessful in claiming mere general grievances, failing to establish how the alleged harm they face is different from a harm experienced by the general public. An environmental membership association may have standing on behalf of its members if any member could have sued in his own right, if the interests the organization seeks to protect are germane to the organization's purpose, and neither the claim nor relief sought requires the presence of any individual member. A plaintiff further has failed to establish standing when redressability is no more than merely speculative. In this case, neither CSP as an organization nor any member of CSP has a cognizable, concrete injury upon which it can have standing to bring suit. As a result, CSP lacks standing to bring suit on behalf of itself and its members. Further, it is evident that CSP was formed for the sole purpose of bringing litigation, as the members themselves were not able to do so without forming the organization. The court should therefore reverse the district court's decision and dismiss the claim, as CSP has no standing to bring suit.

The district court erred in finding that CSP had met timeliness requirements necessary for challenging the WTR. CSP has failed timely to bring suit against the EPA, because all civil actions against the U.S. must be barred unless filed within six years after the right of action first accrues. The rule in *Corner Post*, which holds that a cause of action accrues on the date the plaintiff is harmed, is not applicable to a nonprofit membership group such as CSP. Further, no member of CSP would be timely in bringing his own challenge to the WTR. It is evident that CSP was formed for the sole purpose of bringing litigation, therefore application of the *Corner Post* rule to this case would allow the fabrication of organizations for the purpose of circumventing statutes of limitations and timeliness requirements. Further, the rationale behind statutory limitations would be frustrated if members are granted timely challenges in this case, as an exercise of due diligence would reveal that any alleged harm due to Highpeak's activity would have accrued long before the six-year limitation period expired. This court should reverse the district court's decision, as CSP failed to timely challenge the WTR.

The court was correct in finding that the WTR was validly promulgated by the EPA under the CWA. In considering whether an agency's regulatory authority is valid, the court must give due weight to stare decisis, despite the shift in the court's interpretive methods. In light of the recent *Loper Bright* decision, the court must not call into question those cases that decided agency action was proper under the *Chevron* framework, unless a special justification is present. Using the *Chevron* framework, the court has found the WTR to be validly promulgated by the EPA under the CWA. The court should not overturn settled regulations previously upheld under *Chevron*. Even in the event the court finds the less deferential standard under *Skidmore* to be applicable, the WTR must still be upheld as validly promulgated because the EPA's use of the WTR in furtherance of the CWA is based on its substantive expertise and thoroughness.

Therefore, the court was correct in finding that the Water Transfers Rule was validly promulgated under the Clean Water Act.

Finally, the court was correct in finding that Highpeak's activity introduced pollutants during its water transfers, thereby removing the discharge from within the scope of the Water Transfers Rule and subjecting the transfers to the permitting requirements of the CWA. The EPA's interpretation of its own regulation, the Water Transfers Rule, deserves deference, is reasonable, and is consistent with the language of the Rule. The EPA finds that Highpeak's activity introduces pollutants during the water transfer itself, thus it falls outside of the scope of the WTR exception to the CWA and is therefore subject to the NPDES permitting requirements of the CWA. Therefore, the district court did not err in giving due weight to the EPA's interpretation of the WTR and finding Highpeak subject to the permitting requirements of the CWA.

In summation, this Court should reverse the district court's finding that CSP had standing to challenge the WTR and reverse its finding that CSP filed a timely challenge to the WTR. This court should affirm the district court's holding that the WTR was a valid regulation promulgated under the CWA. Finally, this court should affirm the district court's finding that Highpeak's discharge was subject to permitting under the CWA in deference to the EPA's interpretation of the WTR.

ARGUMENT

Standard of Review:

The court reviews the decisions presented here under a *de novo* standard, "without according deference to the decisions of the district court." *Karpova v. Snow*, 497 F.3d 262, 267

(2d Cir. 2007). The applicable standard, as it relates to each of the issues presented, is set forth below.

Every federal appellate court must ensure that it has jurisdiction over the instant case and that the lower court had jurisdiction as well. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). The court views standing as a jurisdictional issue, and jurisdictional matters are reviewed *de novo* on appeal. *Ballentine v. United States*, 486 F.3d 806, 808, 810 (3d Cir. 2007); *Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, 1241 (9th Cir. 2008) (reviewing a court's assumption of jurisdiction *de novo*).

The Statute of Limitations on a challenge under the Administrative Procedure Act ("APA") is found at 28 U.S.C. § 2401(a). The Supreme Court has said that "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional, we will presume that Congress intended to follow that course." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (internal quotations omitted). Courts have "review[ed] . . . procedures for compliance with the Administrative Procedure Act ("APA") de novo." *EmeraChem Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 859 F.3d 1341, 1345 (Fed. Cir. 2017) (quoting 5 U.S.C. § 706). The Statute of Limitations at 28 U.S.C. § 2401(a) is one such procedure for compliance, therefore, it too is reviewed *de novo*.

The Supreme Court has recently held that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry; and, when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation while ensuring that the agency acts within its bounds. However, courts need not and, under the APA, may not defer to an agency

interpretation of the law simply because a statute is ambiguous. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Therefore, both the question of whether the Water Transfers Rule was properly promulgated and the question of whether Highpeak's discharge is exempt under the rule are subject to *de novo* review.

The court uses the same standard for decisions regarding standing. *Iowa League of Cities v. EPA*, 711 F.3d 844, 861 (8th Cir. 2013) ("The existence of subject-matter jurisdiction is a question of law that this court reviews de novo."). Where a statute does not provide for a standard of review, the court applies the Administrative Procedure Act standard of arbitrary and capricious in reviewing an agency action. *Nw. Env't Advocs. v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008); *see Legal Env't Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997); *see also Town of Southold v. Wheele*r, 48 F4th 67, 77 (2nd Cir. 2022).

I. THE COURT ERRED IN FINDING THAT CSP HAD STANDING TO CHALLENGE HIGHPEAK'S DISCHARGE AND THE WATER TRANSFERS RULE.

Article III Standing

Standing is the doctrine which "serves to identify those disputes which are appropriately resolved through the judicial process." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v Ark.*, 495 U.S. 149, 155 (1990)). Standing "subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). To satisfy Article III of the U.S. Constitution, as the Supreme Court has said, "[T]he plaintiff cannot be a mere bystander, but instead must have a 'personal stake' in the dispute." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). To bring a citizen suit under the CWA with proper standing, a person must have "an

interest which is or may be adversely affected." 33 U.S.C. § 1365(g); *Riverkeeper, Inc. v. Mirant Lovett, LLC*, 675 F. Supp. 2d 337, 349–50 (S.D.N.Y. 2009). However, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), *as revised* (May 24, 2016).

An individual has standing if he can prove "(1) he has 'suffered an injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180–81 (2000). The burden is on the party invoking standing to prove these elements. *Lujan*, 504 U.S. at 561.

Third Party Association Standing

A membership association can establish standing on its own behalf or on behalf of its members. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982). To establish standing for itself, it "must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals." *FDA*, 602 U.S. at 393–94. An environmental membership association has standing to sue on its members' behalf only if:

> (a) its members [or any one of them] would otherwise have standing to sue in their own right; (b) the interests [the entity] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Nat'l Wildlife Fed'n v. Lohr, No. 19-CV-2416 (TSC), 2024 WL 727695 (D.D.C. Feb. 22, 2024) (internal quotations omitted).

No member of CSP can establish the harm or redressability necessary for standing. CPS is equally unable to obtain standing, as it may only bring standing if a member could do so on his own.

A. CSP's members, and therefore CSP, lack standing because they have failed to establish a concrete and particularized intangible harm.

In environmental cases, the injury in question is that to the plaintiff rather than to the environment. *Laidlaw*, 528 U.S. at 181. The Supreme Court has held that to establish injury for standing purposes, a plaintiff "must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Spokeo*, 578 U.S. at 339 (internal quotations omitted). In determining whether an intangible harm is concrete, the court must consider whether the alleged harm has "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." *Spokeo*, 578 U.S. at 341. The Court recognizes that aesthetic and environmental harms "may" confer Article III standing, however, such alleged harms will only do so "if they describe a concrete and particularized injury in fact." *Nat'l Comm. for New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005). Where the alleged harms fail to meet this standard, the Court will find Plaintiff's lacking in standing. *See, e.g., Save Long Beach Island v. U.S. Dep't of Com.*, 721 F. Supp. 3d 317, 335 (D.N.J. 2024) (finding that plaintiffs failed to allege an injury-in-fact necessary for standing, both individually and as an organization, so the court declined to consider the remaining prongs of standing); *see, e.g., S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 789 F.3d 475, 484 (4th Cir. 2015) (finding that plaintiffs lacked standing because they failed to identify a concrete and particularized injury related to the EPA approval of mitigation banks); *see, e.g., Protect Our Aquifer v. Tenn. Valley Auth.*, 654 F. Supp. 3d 654, 670 (W.D. Tenn., 2023) (dismissing for lack of standing when Plaintiffs alleged harms were too speculative and not particularized).

CSP members, Jones and Silver, have similarly failed to establish a concrete and particularized intangible harm. Since learning of Highpeak's discharges, Silver claims that he is

now "hesitant to allow [his] dogs to drink from the stream," from which it is logical to infer that he had been allowing his dogs to drink from the stream prior to that point without incident. R. at 16. Jones claims her knowledge of the discharge is "upsetting", and that her ability to enjoy the Stream has been diminished since she learned of the discharges. R. at 14. She claims that she would recreate more frequently on the Stream if not for Highpeak's actions. R. at 15. These members fail to meet the standard of injury-in-fact necessary for standing. Though the members' claims raise aesthetic and environmental harms, they fail to establish concrete or particularized harms. The members of CSP could not establish standing on their own, nor can CSP claim to have standing to bring an action on their behalf.

B. The Court does not accept general grievances as sufficient for purposes of standing.

The Court takes into consideration prudential principles when standing is at issue, and refrains from adjudicating general grievances. *See Valley Forge Christian Coll.*, 454 U.S. at 464. General grievances are those which can be categorized as concerns shared by all. *Moyle Petroleum v. LaHood*, 969 F. Supp. 2d 1332, 1336 (D. Utah 2013). A plaintiff may not establish injury, for purposes of standing, in instances where he merely asserts general grievances. *Wyoming v. U.S. Dep't of the Interior*, 674 F.3d 1220, 1227 (10th Cir. 2012) (finding no standing where the alleged injuries were not only generalized grievances, but also speculative and hypothetical). A plaintiff "claiming harm or relief that no more directly or tangibly benefits him than it does the public at large," has put forth only a generalized grievance and does not have standing. *Sierra Club v. Glickman*, 156 F.3d 606, 621 (5th Cir. 1998); *Lujan*, 504 U.S. at 573–74.

Members Jones and Silver also allege they have suffered harm in the occasional cloudiness of the Stream. R. at 14, 16. It is inevitable in a moving stream, widely used for

recreational purposes by the public and the members themselves, for the water to appear cloudy. Members here can hardly assert an injury resulting from the occasional cloudy appearance of the Stream, nor is it an observation specific to them. Occasional cloudiness of a popular recreation area in a public park is hardly a specific harm. At best, is a mere general grievance insufficient to give the members of CSP standing in this case.

C. CSP and its members have further failed to establish redressability for the purposes of standing.

In the event that CSP or its members had established a concrete and particularized injury for purposes of standing, they must also establish that a favorable judgment will provide redress for their injury. To sufficiently establish standing, it must be "likely, as opposed to merely speculative" that the plaintiff's injury "will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. The court does not find redressability where the "inquiry hinges on the independent choices of third parties not before [the] court." *Food & Water Watch v. USDA*, 1 F.4th 1112, 1116 (D.D.C. 2021). Moreover, the Supreme Court emphasizes that "relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court," and that "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107.

Here, it is merely speculative that CSP or its members would receive redress from a favorable judgment in this case. Though the court may bind the parties before it, a judgment will do little to regulate the activities of absent third parties in their use of the Lake and the Stream. High levels of activity, by anyone, in the Stream will cause the water to appear cloudy, despite a judgment restricting Highpeak's activities. As the Court has noted before, mere peace of mind is insufficient to show redressability. The members here allege the appearance of the stream is 'upsetting' and makes them reluctant to recreate. R. at 14, 16. The court is not here to grant

peace of mind to plaintiffs; and, in the absence of redress for alleged injury, a plaintiff lacks standing to bring suit. As a result, neither its members nor CSP itself, nor CSP on its members' behalf, has standing to bring this action.

D. The Court should not grant standing where an organization has been formed for the sole purpose of bringing litigation.

Courts have concluded an injury did not happen if the plaintiff sought injury for the purpose of suing. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 800 (W.D. Pa. 2016) ("Because Plaintiff has admitted that her only purpose in using her cell phones is to file TCPA lawsuits, the calls are not a nuisance and an invasion of privacy.") (internal quotations omitted).

In any event, this Court should not grant standing due to prudential concerns. There is no standing for CSP's individual members as they have suffered no cognizable injury, therefore there is no standing for CSP as a whole. CSP was formed for the sole purpose of engaging in this lawsuit. CSP is a non-profit corporation made up of thirteen members, three of whom are officers of the corporation. R. at 14. Two of its members, Jones and Silver, live and recreate near Crystal Stream. R. at 4. Jones joined CSP on December 1, 2023, the day it was formed, and became its Secretary. R. at 14. Silver joined two days later—on December 3, 2023. R. at 16. There is no evidence in the record that CSP conducts meaningful business operations outside of this litigation. The timing of CSP's formation cannot be mere coincidence, and the court should conclude that CSP was formed for the sole purpose of engaging in this litigation and should not grant them standing to sue on behalf of its members.

II. THE COURT ERRED IN FINDING THAT CSP HAD TIMELY FILED ITS CHALLENGE TO THE WATER TRANSFERS RULE.

CSP brought this challenge pursuant to the APA. Under 28 U.S.C. § 2401(a): "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The court defined "cause of action" as "not the right to administrative action but the right to file a civil action in the courts against the United States." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967). The WTR was promulgated in 2008, more than sixteen years before CSP sued. Highpeak has been operating its business since 1992, using the tunnel for water transfer for more than thirty years. The timeliness of the challenge to the WTR hinges on when CSP or its members had a present cause of action.

A. CSP's action is time barred under 28 U.S.C. § 2401(a) because its members did not timely bring suit.

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, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024) (quoting *Green v. Brennan*, 578 U.S. 547, 554 (2016)). A cause of action begins "'on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injuries.'" *Corner Post*, 144 S. Ct. at 2451 (quoting Black's Law Dictionary). That definition led it to hold that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Corner Post*, 144 S. Ct. at 2450. "Statutes of limitations 'require plaintiffs to pursue diligent prosecution of known claims.'" *Id.* (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 8–9 (2014)).

Given that all but a single member of CSP have lived in Rexville for more than fifteen years, each of those members are time barred in their action under 28 U.S.C. § 2401(a). R. at 4. CSP members, such as Jones, claim to have frequently used the Stream and surrounding park for recreational purposes. R. at 14. If CSP members had been injured in any way by Highpeak's operations, that injury would have accrued once they began using the area for recreation after the WTR was promulgated in 2008. Specifically, Jones' alleged injury would have occurred the first time she used the Stream after the promulgation of the WTR, which, because she admits she regularly recreates near the Stream, would have been many years ago, well beyond the six-year statute of limitations period. Silver, too, is time barred because he has suffered injury. Occasional cloudiness hardly amounts to the type of injury which the CWA is meant to address. R. at 14, 16. Highpeak has been running its operation for over thirty years, all the while CSP members, including Silver and Jones, have continuously and frequently used the area for recreation. The court should not accept CSP's challenge to the WTR as timely, given the amount of time members have used the area, and that any member who could maybe allege an injury has failed to timely bring action.

B. CSP has not brought a timely challenge of the WTR because the organization was created to manufacture a fresh statute of limitation period.

The *Corner Post* rule, which is the isolated basis for CSP's contention that they have timely challenged the WTR, is inapplicable in this case. In *Corner Post*, the Supreme Court found that "a right accrues when it comes into existence," and held that because the business could not have been harmed by the regulation until it was formed, it had satisfied the six-year statute of limitation requirement. *Corner Post*, 144 S. Ct. at 2440. The case presently before this Court is distinguishable in crucial ways, and therefore, the *Corner Post* rule should not apply.

In *Corner Post,* the Court was considering the formation of a for-profit, regulated business entity. Unlike CSP, the business in *Corner Post* was formed for legitimate business purposes and the business could not have been harmed in any way by the regulation until its formation. Specifically, no owner, manager, or employee could have been harmed by the regulation until the entity was formed and began conducting business. CSP, on the other hand, is an environmental interest group and not a legitimate business. R. at 4. It was formed specifically to manufacture a fresh statute of limitation period. CSP was formed on December 1, 2023, and immediately began legal action. R. at 4. Further, unlike the business in *Corner Post*, the alleged harm did not begin once the organization was formed. Highpeak has been operating in the same manner for over thirty years, and any alleged harm resulting from that conduct would have existed long before the formation of CSP. The ability of CSP to bring suit on behalf of its members should depend on the ability of the members to have sought action on their own. As established above, CSP's members lack standing and cannot bring suit within the statutory limitations period. Therefore, they cannot seek action on their own. The Supreme Court in deciding *Corner Post* could not intended for individuals to revive barred claims simply by forming an organization to circumvent the statute of limitations.

The dissent in *Corner Post* warns of the "tsunami of lawsuits against agencies that the Court's holdings in this case … have authorized the potential to devastate the functioning of the Federal Government." *Corner Post*, 144 S. Ct. at 2440 (Jackson, J., with whom Sotomayor, J., and Kagan, J., join dissenting). The dissent finds it "utterly inconceivable that § 2401(a)'s statute of limitation was meant to permit fresh attacks on settled regulations." *Id.* Allowing CSP members to circumvent the APA's statute of limitations cuts directly against the purpose of the requirement and would only serve to realize the fears presented in the *Corner Post* dissent.

C. CSP members should have known, through exercise of due diligence in discovery, of alleged injury by Highpeaks activities and therefore their claims had begun to accrue.

In *Crown Coat*, the Supreme Court again pointed to the "hazards inherent in attempting to define" when action accrues. *Crown Coat*, 386 U.S. at 517. The Court also said that words such as "cause of action" and "accrues" should "be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.'" *Crown Coat*, 386 U.S. at 517 (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). For the purposes of a statute of limitations, "a cause of action accrues when the injured party discovers – *or in the exercise of due diligence should have discovered* – that it has been injured." *Hardin v. Jackson*, 625 F.3d 739, 743, 745 (D.C. Cir. 2010) (emphasis added) (quoting *Nat'l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 501 (D.C. Cir. 2004)) (holding plaintiffs' suit was time-barred when plaintiffs should have known of their injuries at least ten years before filing their complaint and therefore the statutory period had run).

Congress implements statutes of limitations to ensure that parties bring suits when they are injured, but also to ensure that defendants need not continuously fear the possibility of litigation. Given the amount of time Highpeak has been operating in Rexville, and the length of time since the WTR has been promulgated, the members of CSP should have been aware of any alleged injury far before the statutory period lapsed.

Additionally, it must not be overlooked that in 1992 Highpeak requested permission from the State of New Union to build the tunnel and each year confers with the State regarding its use. R. at 4. In no prior year has anyone—including Jones, Silver, or any other CSP member—raised a concern regarding its discharge. Any citizen of Rexville, in exercising due diligence, would have been aware of any alleged injury resulting from Highpeaks activity long before the

formation of CSP. This court should advance the policy rationale behind statutory limitations and consider the lack of diligence of Rexville citizens. Any claim of injury began to accrue far earlier than the requisite six-year period, and CSP and its members should thus be barred from timely bringing a challenge to the WTR.

III. THE COURT WAS CORRECT IN FINDING THE WATER TRANSFERS RULE TO BE A VALID REGULATION PROMUGLATED UNDER THE CLEAN WATER ACT.

A. The Water Transfers Rule was validly promulgated under *Chevron* and its promulgation is not called into question in light of *Loper Bright*.

A court must use its "independent judgment" when reviewing if an agency "has acted within its statutory authority." *Loper Bright*, 144 S. Ct. at 2273. However, if agency action was already found to be "lawful" under the previous judicial review framework of *Chevron*, the agency action will continue to be held as lawful. *Id.* at 22 ("[T]he Court does not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite [our] change in interpretive methodology."). Under the *Chevron* framework, the WTR has been deemed a valid regulation promulgated under the CWA. *Friends of the Everglades vs. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (2009) (holding that the statutory language of the CWA was ambiguous, and that the "unitary waters theory is a reasonable, and therefore permissible, construction of the statute").

Because the Water Transfers Rule was validly promulgated under *Chevron*, it remains valid even after the recent *Loper Bright* decision. In "announcing a general prospective rule," the Court does not necessarily "imply revisiting past precedents." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 111 (1990). To overturn existing precedent, the Court requires an explicit statement that it is no longer relying on the precedent. *John R. Sand & Gravel Co. v. United States*, 552

U.S. 130, 137 (2008). Here, the decision regarding the WTR was made relying on the now-overruled *Chevron* framework, but the Court stated that the decisions that had already been made under *Chevron* were still good law, unless there was a "special justification" to overturn them. *See Loper Bright*, 144 S. Ct. at 2273 (2024). Therefore, the WTR is still valid under *Chevron*, even in light of *Loper Bright.*

B. The Court has no "special justification" for overturning precedent, which found the WTR to be validly promulgated.

The Court has repeatedly emphasized that "[a]dherence to precedent is a foundation stone of the rule of law," and necessary to ensure the integrity of the judicial process. *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). As a result, precedent cannot be overturned without "special justification." *Ariz. v. Rumsey*, 467 U.S. 203, 212 (1984). Special justification is not satisfied by stating the "precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Here, CSP does not offer a special justification for overturning precedent beyond attacking the regulation's validity under *Loper Bright*. However, the Court stated, "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding[.]" *Loper Bright*, 144 S. Ct. at 2273 (internal quotations omitted). Thus, a regulation's established validity under *Chevron* does not itself satisfy the "special justification" expectation for overturning precedent. As there is no special justification for overturning precedent in this case, the Court has no obligation to revisit the issue applying the *Loper Bright* framework and should continue to hold that the WTR was validly promulgated.

C. In the event that the Court finds the *Skidmore* framework applicable, the WTR must still be upheld.

Even if the court finds CSP's argument regarding *Chevron* persuasive, an application of the *Skidmore* framework still entitles the EPA to deference in its valid promulgation of the WTR.

Under *Skidmore*, the Supreme Court recognized that an agency contains "a body of experience and informed judgements to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The value of an agency's judgment 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." *Id.* Courts have consistently recognized the EPA's expertise as it pertains to the CWA, paired with detailed and technical findings which are both consistent and well-supported. *Sierra Club, Inc. v. Granite Shore Power LLC*, 706 F. Supp. 3d 257, 273–74 (D.N.H. 2023); *see, e.g., Conservation L. Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 72 (1st Cir. 2021) (finding that issuing permits and determining their terms lie at the heart of the EPA's task); *see, e.g., Ark. v. Okla.*, 503 U.S. 91, 105 (1992) (recognizing the EPA's authority, as vested by Congress, to use broad discretion in CWA permitting).

The EPA's promulgation and enforcement of the WTR is supported by the same expertise, consistency, and thoroughness that courts have repeatedly recognized. The EPA possesses vast expertise in water transfers, and depended upon that expertise when it made certain activities exempt from permitting under the WTR, thereby excluding them from the CWA's exception. Such action is squarely within the purposes of the CWA. Therefore, in the event that the court finds the *Skidmore* framework applicable instead of the *Chevron* framework, the WTR must still be upheld as a valid promulgation by the EPA.

IV. THE COURT WAS CORRECT IN FINDING HIGHPEAK'S TRANSFER SUBJECT TO PERMITTING UNDER THE CLEAN WATER ACT.

The CWA was implemented to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA set "effluent limitations" on sources from which pollutants are or may be discharged. It also established the

NPDES to enforce such limitations. *EPA v. Cal. ex rel. State Water Res. Control Bd*., 426 U.S. 200, 204 (2022). The NPDES makes it unlawful for there to be any discharge of a pollutant without first obtaining a permit issued by the EPA. *Id.* at 205. To violate the NPDES requirements, a party must show that "defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982). Under 40 C.F.R. § 122.3, The WTR, exclusions to the permitting requirement are listed, and subsection (i) includes "[d]ischarges form a water transfer . . . . This 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). The EPA has further clarified that "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" is a water transfer that is not subject to NPDES permitting. 40 C.F.R. § 122.3.

A. The regulation governing discharges which are excluded from or subjected to permitting is unambiguous.

In resolving the issue of whether Highpeak's tunnels are excluded from the regulation's protection, the court must first determine if it is necessary to give deference to one interpretation over another. In *Kisor v. Wilkie*, 588 U.S. 558 (2019), the Court emphasized that a deference determination should not be made unless "after exhausting all the 'traditional tools' of construction, the regulation is *genuinely ambiguous*." *Kisor v. Wilkie*, 588 U.S. 558, 559 (2019) (emphasis added). Courts "must make conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id.* at 590. Deference is unwarranted where the language of a regulation is not ambiguous. *E.g.*, *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

The Court considered the plain meaning of the language in the regulation to determine whether the city's conduct necessitated a NPDES permit. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 489 (2d Cir. 2001). The court held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and . . . demands an NPDES permit." *Id.* at 491; *see Dubois v. USDA*, 102 F.3d 1273, 1299 (1st Cir. 1996). When the court determines, using traditional tools, that a regulation is not ambiguous, no deference is needed to uphold the agencies correct interpretation of a regulation. *Open Soc'y Inst. v. U.S. Citizenship & Immigr. Servs.*, 573 F. Supp. 3d 294, 315 (D.C. Cir. 2021).

Here, as in *Catskill*, the NPDES permitting regulation, which includes the WTR, is unambiguous and therefore requires no deference determination in its interpretation. The WTR states explicitly and unambiguously: "This 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). Highpeak's tunnel connecting Cloudy Lake to Crystal Stream passes through no other infrastructure, and the pollutants measured in Crystal Stream are introduced by the water transfer activity itself. R. at 4. Because Highpeak's transfer of water from Cloudy Lake to Crystal Stream causes an increase in pollutants in the Stream, it does not fall under the WTR, and instead falls under the NPDES permitting regulation. R. at 5. Highpeak's attempt to reinterpret the regulation to include pollutants which "result from human activity" would require far more than traditional tools of construction. R. at 11. Therefore, Highpeak must apply for and receive a NPDES permit to continue its activity of transferring water from Cloudy Lake to Crystal Stream.

B. In the event the Court finds the regulation ambiguous, the proper test to determine which interpretation is entitled deference comes from *Kisor*.

Assuming *arguendo* that the court finds the regulation ambiguous, the EPA's interpretation is entitled to deference under the *Kisor* and *Auer* frameworks as they apply specifically to interpretation of regulations. *See Kisor*, 588 U.S. at 563; *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). In *Kisor*, the court recognized its standard of deferring to "agencies' reasonable readings of genuinely ambiguous regulations." *Kisor*, 588 U.S. at 563. The Supreme Court has recognized the "ultimate criterion" in regulation interpretation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer*, 519 U.S. at 461. The court emphasizes that agencies have "the power authoritatively to interpret its own regulations [as] a component of the agency's delegated lawmaking powers." *Martin v. O.S.H.R.C.*, 499 U.S. 144, 151–53 (1991).

The Court in *Loper Bright* considered the interpretation of *statutes* not *regulations*. *Loper Bright*, 144 S. Ct. at 2244. The Court in *Loper Bright* found that "the interpretation of meaning of statutes, as applied to justiciable controversies was exclusively a judicial function." *Id.* at 2258. The Court nonetheless recognized that "when a particular statute delegates authority to an agency … courts must respect the delegation." *Id.* at 2273.

In considering the EPA's interpretation of its regulation governing NPDES permitting requirements, the EPA should be given deference under *Kisor* and *Auer.* It would be improper for the court to apply the *Loper Bright* rule regarding statutory interpretation to the regulation at issue here. There is a significant distinction between interpreting a statute drafted by Congress and a regulation drafted by an agency. This court should apply *Kisor/Auer* deference to the instant case and give due weight to the EPA's interpretation of its own regulation.

C. The EPA's interpretation of the permitting regulation is reasonable and entitled to deference under *Kisor.*

To make a deference determination, the regulation must first be genuinely ambiguous; and the agencies interpretation must be reasonable, it must be their authoritative or official position, the interpretation must implicate the agency's substantive expertise, and it must reflect fair and considered judgment. *Kisor*, 588 U.S. at 558; *see, e.g.*, *M&T Farms v. Fed. Crop Ins. Corp.*, 103 F.4th 724, 732 (9th Cir. 2024) (finding the agency's interpretation reasonable because its definitions were consistent, justified legitimate policy considerations, and implicated their substantive expertise). Courts have frequently held the EPA's interpretation of regulations under the CWA to be reasonable and entitled to great deference. *E.g.*, *Am. Waterways Operators v. Regan*, 590 F. Supp. 3d 126, 140–44 (D.C. Cir. 2022) (finding the EPA's interpretation of a regulation of the CWA reasonable and entitled to deference); *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (holding that the EPA's interpretation was reasonable and not inconsistent with Congressional intent).

This court should give deference to the EPA's interpretation of its regulation and, as a result, find that Highpeak's activities require a NPDES permit. Highpeak's tunnel from Cloudy Lake to Crystal Stream, i.e. the water transfer activity itself, introduces pollutants to the water of Crystal Stream. As a result, Highpeak's activity must be excluded from those activities exempt from permitting requirements under the WTR. The EPA's interpretation of the regulation is reasonable and a reflection of the agency's substantive expertise and official judgment. The court should therefore give *Kisor/Auer* deference to the EPA's interpretation and find that Highpeak is subject to the permitting requirements of the NPDES.

CONCLUSION

For the reasons set forth above, Appellee-Cross-Appellant, the United States Environmental Protection Agency, respectfully requests this Court reverse the district courts finding that Crystal Stream Preservationists, Inc., had standing to challenge the Water Transfers Rule and filed a timely challenge to the Water Transfers Rule. The Environmental Protection Agency further requests that this court affirm the district court's holding that the Water Transfers Rule was a valid regulation promulgated under the Clean Water Act, and affirm the district court's finding that Highpeak's water transfer is subject to permitting under the Clean Water Act.

Respectfully Submitted,

Counsel for Appellee
United States Environmental Protection Agency

Date: November 21, 2024