TEAM 4

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,

-and-

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

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

Brief of Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

I. STATUTORY BACKGROUND 2

II. FACTUAL BACKGROUND 3

A. Highpeak Tubes, Inc. ("Highpeak"). 3

B. Crystal Stream Preservationists, Inc. ("CSP") Citizen Suit Against Highpeak. 4

C. CSP's Water Transfers Rule Challenge. 5

SUMMARY OF THE ARGUMENT 6

STANDARD OF REVIEW 9

ARGUMENT 9

I. CSP DOES NOT HAVE STANDING. 9

A. CSP does not have Article III standing. 10

B. CSP does not have associational standing. 11

C. CSP does not have prudential standing. 13

II. THE DISTRICT COURT ERRED IN HOLDING THAT CSP TIMELY FILED THE CHALLENGE TO THE WATER TRANSFERS RULE. 14

A. CSP's claims accrue individually. 14

B. The individual members of CSP are not injured in fact by agency action. 15

i. Allowing CSP to proceed destroys judicial principles that statutes of limitations seek to protect. 16

III. IF THIS COURT FINDS THAT CSP HAD STANDING AND THEIR ACTION WAS TIMELY, THIS COURT SHOULD FIND THAT THE WATER TRANSFERS RULE WAS VALIDLY PROMULGATED UNDER THE CLEAN WATER ACT. 17

A. The Second Circuit and Eleventh Circuit's Chevron decisions upholding the Water Transfers Rule are persuasive. 18

i. CSP's reliance on Catskill I and II is misguided since those decisions were made prior to the rule being promulgated and found the Clean Water Act to be ambiguous. 20

ii. The Water Transfers Rule is consistent with the Clean Water Act's statutory language and purpose; the rule is neither arbitrary nor capricious. 22

B. Even if this Court does not find Friends of the Everglades and Catskill III persuasive, the Water Transfers Rule still stands under Skidmore deference. 23

IV. HIGHPEAK'S DISCHARGES ARE OUTSIDE THE SCOPE OF THE WATER TRANSFERS RULE. 25

A. EPA's finding that Highpeak's water transfer requires permitting should be upheld under Auer Deference. 26

i. The Water Transfers Rule is genuinely ambiguous as to what amount of pollutants introduced by a water transfer constitute pollutants. 26

ii. EPA's interpretation of the ambiguous term is reasonable. 29

iii. The character and context of EPA's interpretation entitles it to controlling weight. 31

iv. No special justifications apply. 33

B. EPA's finding that Highpeak's water transfer requires permitting should be upheld under Skidmore Deference. 34

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Artis v. District of Columbia, 583 U.S. 71 (2018) ---------- 17

Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970) ---------- 10

Auer v. Robbins, 519 U.S. 452 (1997) ---------- passim

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) ---------- 7, 23

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ---------- 26

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 273 F.3d 481 (2d Cir. 2001) ---------- 21, 24, 35

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 451 F.3d 77 (2d Cir. 2006) ---------- 21, 35

Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency, 846 F.3d 492 (2d Cir. 2017) ---------- passim

CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) ---------- 19, 20

Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984) ---------- 20

Christensen v. Harris Cnty., 529 U.S. 576 (2000) ---------- 21, 25

City of Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc., 637 F.3d 169 (2nd Cir. 2011) ---------- 9

Clarke v. Sec. Indus. Assn., 479 U.S. 388 (1987) ---------- 14

Cook v. City of Chi., 192 F.3d 693 (7th Cir. 1999) ---------- 17

Corner Post, Inc. v. Bd. of Governors of Federal Reserve Sys., 144 S.Ct. 2440 (2024) ---------- passim

Davis v. Provo City Corp., 193 P.3d 86 (Utah 2008) ---------- 17

Defenders of Wildlife, 504 U.S. at 562–563 ---------- 13

Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996) ---------- 8, 31

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000) --6, 10, 11, 12

Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009) - 7, 18, 20

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ------------------------ 7, 9, 18, 19

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977)---------------------------- 6, 12, 13

Hunt, 432 U.S. at 343 -- 10

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008)------------------------------ 19, 20

Kisor v. Wilkie, 588 U.S. 558 (2019)--- passim

Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244 (2024) -------------------------------------- passim

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) ---6, 10, 11, 13

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012) --- 14

Michigan v. EPA, 576 U.S. 743 (2015) -- 23

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) ------------------------ 29, 30, 32, 35

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) --------------- 22

National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) -------- 30, 32, 35

Patterson v. McLean Credit Union, 491 U.S. 164 (1989)--- 19

PUD No. 1 of Jefferson Cnty v. Wash. Dep't of Ecology, 511 U.S. 700 (1994)---------------------- 2

Rapanos v. United States, 547 U.S. 715 (2006) --- 23

S. Fla. Water Mgmt. Dist. v. *Miccosukee Tribe of Indians,* 541 U.S. 95 (2004) ------------------- 31

Sierra Club v. Morton, 405 U.S. 727 (1972) --- 13

Skidmore v. Swift, 323 U.S. 134 (1944)-- passim

United States v. American Trucking Assns., 310 U.S. 534 (1940) ---------------------------------- 24

United States v. Boisdore's Heirs, 49 U.S. 113 (1850) --- 3

United States v. Eaton, 169 U.S. 331 (1898)-- 26

United States v. Int'l Bus. Machs. Corp., 517 U.S. 843 (1996) ------------------------------------- 20

United States v. Mead Corp., 533 U.S. 218 (2001) ---21, 24

United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669 (1973)----11

STATUTES

28 U.S.C. § 1331--1

28 U.S.C. § 2401(a) --14, 17

28. U.S.C. § 1291 ---1

33 U.S. Code § 1342 ---

33 U.S.C. § 1251(a) --passim

33 U.S.C. § 1365(b)(1)(A)---5

33 U.S.C. 1361 ---22, 23

5 U.S.C. § 553--- 25

5 U.S.C. § 706--- 18

5 U.S.C. § 706(2)(A) --9

Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* -------------------------------------5

Clean Water Act § 101(b), 33 U.S.C. § 1251(b)---3

OTHER AUTHORITIES

3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95–14, *A Legislative History of the Clean Water Act of 1977* (1978)-- 29

3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95–14*,* A Legislative History of the Clean Water Act of 1977, at 532 (1978) --2

H.R. Rep. No. 92–911, at 109 (1972) ---2

H.R. Rep. No. 92–911, at 96 (1972) -- 29

MERRIAM-WEBSTER, INC, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip B. Gove et al. eds., 3rd ed. 2008)--31, 32

U.S. Env't Prot. Agency, D.C. 20460, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (2005) ---29, 35

<u>RULES</u>

Fed. R. App. P. 4. -- 1

<u>TREATISES</u>

54 C.J.S. *Limitations of Actions* § 2 (2024) -- 17

<u>REGULATIONS</u>

40 C.F.R. § 122 (2008)--27, 28

40 C.F.R. 122.3(i) (2023) --- 30

40 C.F.R. Part 122 --- 28

NPDES Water Transfers Rule, 73 Fed. Reg. 33697 (June 13, 2008) -------------------28, 30, 32, 33

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union issued a Decision and Order granting the Environmental Protection Agency ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss the Crystal Streak Preservationists ("CSP") challenge to the Water Transfers Rule. The District Court also denied Highpeak's motion to dismiss CSP's Clean Water Act citizen suit cause of action. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331. Pursuant to Fed. R. App. P. 4., EPA, CSP, and Highpeak timely filed Notices of Appeal. This Court has jurisdiction under 28. U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err when it determined that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule?

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

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

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

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The legislative history of the Clean Water Act shows that Congress intended to appropriately balance state and federal water management systems. On one side of the scale is a respect for a state's regulation of water transfers within its jurisdiction, and on the other side of the scale is the importance of the federal regulation of pollution where there have been man-made changes to the natural path of water flow.

Congress has historically recognized that states have an important role to play in water management. The Congressional Research Service declared that "[it] is the purpose of this [provision] to insure that State [water] allocation systems are not subverted" in a description of section 101(g) of the Clean Water Act that contemporaneously accompanied the statute. 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95–14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); *see PUD No. 1 of Jefferson Cnty v. Wash. Dep't of Ecology*, 511 U.S. 700, 721 (1994).

Congress has also historically recognized that federal regulations administered by EPA are necessary to address pollution. In 1972, the House Committee stated in its report regarding Section 304(f) of the Act that it expects EPA "to be most diligent" in guiding the "processes, procedures, and methods for control of pollution" from "natural and manmade changes in the normal flow of surface and ground waters." H.R. Rep. No. 92–911, at 109 (1972). Similarly, in its report regarding Section 208, the House Committee noted the importance of a "balanced management control system" between federal and state permitting under section 402. *Id.* at 96.

In determining the meaning of an act, the guiding statutory interpretation principle should be to "look to the provisions of the whole law, and its object and policy." *United States v.*

Boisdore's Heirs, 49 U.S. 113, 122 (1850). The principle of balance radiates through the Clean Water Act's text, legislative history, and policy goals.

It is clear that Congress intended for water transfers to be handled at the state level, not federally regulated under section 402. Under the Clean Water Act, states are primarily responsible for the "development and use (including restoration, preservation, and enhancement) of land and water resources." Clean Water Act § 101(b), 33 U.S.C. § 1251(b). However, Congress empowered EPA to regulate pollution when there are "changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of… flow diversion facilities." *Id.* § 1314. The Water Transfers Rule is an appropriate and necessary tool for maintaining this balance.

II. FACTUAL BACKGROUND

A. Highpeak Tubes, Inc. ("Highpeak").

Highpeak is a family-owned recreational tubing business that has operated in Rexville, New Union for 32 years. Order Granting in Part and Denying in Part (Aug. 2024) at 3-4 [hereinafter, "Order"]. Highpeak owns a 42-acre property that borders Cloudy Lake on its northern border and Crystal Stream on its southern border. Order at 4. Since its founding in 1992, Highpeak has operated out of this property, renting out innertubes for customers to use on Crystal Stream. *Id.*

In an attempt to enhance its customers' experience, Highpeak utilizes a tunnel connecting Cloudy Lake and Crystal Stream to alter the flow of water in the stream by opening and closing valves at either end of the tunnel. *Id.* When Highpeak employees open the valves, water discharges from Cloudy Lake to Crystal Stream, increasing the "volume and velocity" of water in the stream. *Id.* Crystal Stream is fed primarily by groundwater springs, so it naturally

contains lower levels of certain minerals and total suspended solids ("TSS") than Cloudy Lake. *Id*. at 5.

The tunnel, which is partially constructed with iron pipe and carved through rock, was constructed by Highpeak in 1992 with permission from the State of New Union. *Id.* at 4. The tunnel is four feet in diameter and approximately 100 yards long. *Id.* According to its agreement with the State, Highpeak may not utilize the tunnel to transfer water unless Cloudy Lake's water levels are sufficient to allow the release of water into Crystal Stream. *Id.* This determination is made by the State and typically occurs during spring through late summer. *Id.* Apart from its agreement with the State, Highpeak has not sought a National Pollution Discharge Elimination System ("NPDES") permit from EPA, as required by the Clean Water Act. *Id.*

B. Crystal Stream Preservationists, Inc. ("CSP") Citizen Suit Against Highpeak.

CSP is an environmental not-for-profit organization that formed on December 1, 2023 in Rexville, New Union with the express purpose of protecting Crystal Stream from contamination and illegal water transfers and to preserve Crystal Stream for future generations. *Id.*, Exhibit A to Complaint at ¶ 4 [hereinafter, "Decl. of Jones"]. CSP offers membership to those who wish to preserve Crystal Stream "in its natural state for environmental and aesthetic reasons." Order at 4. The organization currently has thirteen members, all of whom reside in Rexville. *Id*. Two members have owned land along Crystal Stream since before 2008, located approximately one mile south of the end of Highpeak's tube run and five miles south of the tunnel discharge point. *Id*. All members of CSP have lived in Rexville for over 15 years, with the exception of Jonathan Silver who moved to Rexville in 2019. *Id.* During this time, no individual or entity, including the members of CSP, challenged Highpeak's discharge. *Id*. at 6.

On December 15, 2023, CSP sent Highpeak a Clean Water Act notice of intent to sue letter ("the NOIS"), alleging that Highpeak is in violation of the Act because it discharges pollutants into Crystal Stream without a permit. *Id.* at 3. As required by regulation, CSP sent copies to the New Union Department of Environmental Quality ("DEQ") and to EPA. *Id.* at 4 (citing 33 U.S.C. § 1365(b)(1)(A). In the NOIS, CSP noted that Highpeak's tunnel constitutes a point source under the Clean Water Act, and that both Cloudy Lake and Crystal Stream are subject to the Act. *Id.* at 4-5. Thus, Highpeak's water discharges are in violation of the Act because every time it opens the tunnel's valves in its business operations, pollutants are introduced into Crystal Stream. *Id.* Highpeak denies the allegations against it, claiming that its discharge is exempt from the permitting requirements of the Act because of the NPDES Water Transfers Rule promulgated by EPA. *Id*. at 3.

CSP reiterated its allegations in its Complaint filed on February 15, 2024. *Id.* After the motions were fully briefed in April 2024, CSP urged this Court to await two cases on the docket of the United States Supreme Court, *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024) and *Corner Post, Inc. v. Bd. of Governors of Federal Reserve Sys.*, 144 S.Ct. 2440 (2024) to utilize the resulting rulings to their advantage in the instant case. *Id*. at 6.

C. <u>CSP's Water Transfers Rule Challenge.</u>

In addition to its claim against Highpeak, CSP brought a claim against EPA under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, to challenge the promulgation of the Water Transfers Rule. *Id.* In this claim, CSP alleges that the regulation is inconsistent with the Clean Water Act's statutory language and invalidly promulgated. *Id.* at 5. In the alternative, CSP argues that even if this Court upholds the Water Transfers Rule, Highpeak's transfer process introduces amounts of iron, manganese, and total suspended solids ("TSS"), which takes

it outside the scope of the regulation's exemption. *Id.* In a data set measuring the concentrations of these minerals in the water discharged into Crystal Stream, results showed concentrations approximately 2-3% higher than those taken on the same day at Cloudy Lake. *Id.* Thus, Highpeak's discharge is not exempted from permitting requirements. *Id.* at 6.

SUMMARY OF THE ARGUMENT

EPA brings forth several arguments on appeal. First, CSP lacks standing. Second, CSP's challenge to the Water Transfers Rule is time barred. Third, under the Supreme Court's instruction, this Court should respect prior precedents using *Chevron* deference that upheld the Water Transfers Rule as a valid promulgation. Fourth and finally, this Court should adhere to EPA's longstanding and consistent interpretation of "introduction," and require Highpeak to obtain a NPDES permit.

The District Court erred in holding that CSP had standing. CSP has no cognizable injury that is fairly traceable to the challenged action of EPA, and there is no possible decision by the court in CSP's favor that would be likely to redress its attenuated injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). CSP also does not have associational standing because no one member can demonstrate standing on her own part. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). Finally, there is no prudential standing because CSP is not within the zone of interest that Congress intended to protect under the Clean Water Act. *See* 33 U.S.C. § 1251(a).

The District Court also erred in holding that CPS's Water Transfers Rule challenge was timely. CSP's claims accrue not when the entity was formed, but instead when its individual members were injured. CSP fails to establish an injury for its individual members. *See Corner*

Post, 144 S.Ct. at 2449. And the nature of their alleged injuries is distinguishable from the nature of the organizational injuries that the plaintiff suffered from in *Corner Post*. *Id.* at 2448. Finally, allowing CSP to proceed is contrary to statute of limitations principles. *See id.* at 2470 (Jackson, J., dissenting).

This Court should uphold the District Court's holding that the Water Transfers Rule was a valid promulgation under the Clean Water Act. In *Loper Bright*, the Supreme Court upheld prior decisions using *Chevron* deference under statutory *stare decisis*. *See* 144 S.Ct. at 2273. So, this Court should defer to the holdings of *Catskill III* and *Friends I* which held that the Water Transfers Rule was a valid promulgation under the Clean Water Act. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492, 524-33 (2d Cir. 2017) (*Catskill III*); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) (*Friends I*). Absent "special justification," those statutory interpretations still stand. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

In the alternative, this Court may apply *Skidmore* deference. *See Skidmore v. Swift*, 323 U.S. 134, 140 (1944). But the outcome remains the same: The Water Transfers Rule is a valid promulgation under the Clean Water Act. *Id.* To find the contrary would be to undo a regulation that has remained consistent across administrations – a pillar for respecting an agency's action. *See Loper Bright*, 144 S.Ct. at 2258. Congress's lack of post-enactment legislation offers further proof that the Water Transfers Rule remains consistent with the Clean Water Act. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). Thus, the regulation must stand.

This Court should also uphold the District Court's holding that Highpeak is required to obtain a NPDES permit. Courts routinely uphold an agency's interpretation of their own regulation under *Auer* deference. *See Kisor v. Wilkie*, 588 U.S. 558, 563 (2019); *see also Auer v. Robbins*, 519 U.S. 452 (1997). And they recognize that agencies are better suited to construct the meanings of their own regulations. *See Kisor*, 588 U.S. at 560. The Supreme Court's decision in *Loper Bright* did not change this presumption. *See id.* 588 U.S. at 560-61.

Under *Auer*, this Court should adhere to EPA's interpretation of the term "introduced" in the NPDES Water Transfers Rule. *See id.* at 559. EPA finds the term "introduced" to be ambiguous, and the character and context of EPA's interpretation entitles it to controlling weight. *See id.* EPA's interpretation remains consistent with the Clean Water Act's purpose since it maintains cooperative federalism and ensures the management of pollutants. *See id*; 33 U.S. Code § 1342. Prior precedents support this contention. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996). And EPA's interpretation still survives under *Skidmore* deference. *See Skidmore*, 323 U.S. at 140. Therefore, Highpeak should be required to obtain a NPDES permit.

STANDARD OF REVIEW

The Court of Appeals reviews a district court's grant or denial of a motion to dismiss *de novo*. *City of Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2nd Cir. 2011). Additionally, "[a] district court's legal conclusions, including its interpretation and application of a statute of limitations, are likewise reviewed *de novo*." *Id.*

This Court also reviews EPA's decisions under the APA's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under the APA, agency actions may be set aside if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* Moreover, prior statutory interpretations using *Chevron* deference must be respected under statutory *stare decisis*. *See Loper Bright*, 144 S.Ct. at 2273; *Halliburton*, 573 U.S. at 266. In the alternative, *Skidmore* deference applies. *See Skidmore*, 323 U.S. at 140.

ARGUMENT

I. CSP DOES NOT HAVE STANDING.

To maintain this action, CSP must prove every element of Article III Constitutional standing, every element of associational standing, and prudential standing under the Clean Water Act. Additionally, CSP must prove every element of standing separately for each form of relief it requests from the court. *See Friends of the Earth,* 528 U.S. at 185.

First, under Article III standing, CSP must show that it has suffered a concrete and particularized 'injury in fact' that is actual or imminent, not conjectural or hypothetical. *See Lujan,* 504 U.S. at 560–561; *see also Friends of the Earth,* 528 U.S. at 180. CSP's injury must also be fairly traceable to the challenged action of a defendant, and a decision by the Court in CSP's favor must be likely to redress that injury. *See id.*

Second, associational standing is satisfied when: (1) Its members would have standing to bring the action as individuals if they chose to; (2) The "interests at stake are germane to the organization's purpose"; and (3) The lawsuit does not require the individual participation of the organization's members to move the claim forward or to obtain relief. *See Hunt*, 432 U.S. at 343.

Third and finally, to demonstrate prudential standing, CSP must show that its interests are "arguably within the zone of interests to be protected or regulated by the statute[s]" that it alleges was violated. *See Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970).

A. <u>CSP does not have Article III standing.</u>

When a plaintiff's injury "arises from the government's allegedly unlawful regulation (or lack of regulation) *of someone else*[,] much more is needed" to prove an injury-in-fact. *See Lujan*, 504 U.S. at 562. In the instant case, CSP must show that there is an "injury to a cognizable interest." *See id.* This is not an "ingenious academic exercise in the conceivable," but instead requires a "factual showing of perceptible harm." *See id.* (citing *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 688 (1973).

Here, unlike in *Friends of the Earth*, there has been no injury. In *Friends of the Earth*, a hazardous waste incinerator facility's actions injured the plaintiff by violating the law and exceeding the mercury discharge limitations of its NPDES permit. 528 U.S. at 176. It is a stretch to argue that a small family-owned recreational tubing company is industrial, or that its harms are comparable to an industrial hazardous waste incinerator facility exceeding its mercury discharge limitations. Order at 7-8. CSP's injury is neither concrete nor actual. *See Lujan,* 504 U.S. at 560.

CSP must also show that its injury is fairly traceable to a challenged action of EPA, and that a decision by the court in CSP's favor is likely to redress that injury. *See id.* at 560-561. Like in *Lujan*, CSP fails to "identify any particular agency action that was the source of these injuries." *See* 497 U.S. at 899. CSP claims they are injured by Highpeak's discharge of water that contains iron, manganese, and TSS into Crystal Stream, and they seek to invalidate the Water Transfers Rule, or alternatively, to require Highpeak to obtain a NPDES permit. Order at 3, 5. However, this alleged injury is not fairly traceable to EPA's promulgation of the Water Transfers Rule, because Highpeak obtained permission from the State of New Union to construct its tunnel and EPA was not involved in this agreement. *Id.* at 4.

Additionally, as to the redressability element, neither requested remedy would suffice. Invalidating the Water Transfers Rule may require Highpeak to obtain a NPDES permit, but it will not stop the discharge of water that contains iron, manganese, and TSS into Crystal Stream. CSP has not brought forth evidence in the record that its requested remedies will address their aesthetic and recreational interests in a clear stream, and on its face neither remedy will actually prevent Highpeak from discharging water into Crystal Stream.

B. <u>CSP does not have associational standing.</u>

When an association is suing on behalf of its members, at least one member must be able to demonstrate standing on her own part. *Hunt*, 432 U.S. at 333.

In *Friends of the Earth,* the court found that there must be an injury to the plaintiff, not to the environment. 528 U.S. at 176. The court in *Friends of the Earth* found that there was associational standing where an individual who lived half a mile from the facility saw and smelled pollution and submitted evidence to the court that he no longer swims or fishes as he did in his youth because of the pollution. *Id. at* 181, 704. In contrast, here, individual members of

CSP continue to recreate, and Highpeak's water transfer has not impacted their recreational activities. Decl. of Jones at ¶12, Exhibit B to Complaint at ¶ 9 [hereinafter, "Decl. of Silver"]. It is not enough that individuals would recreate more if Highpeak was not discharging water into the stream, because they have not submitted evidence or statements to the court that they actually recreate less than they did in the past.

In *Friends of the Earth,* an individual who lived two miles from the facility previously waded into the river, but no longer does so. 528 U.S. at 182 (2000). This individual also did not purchase a house because of the mercury pollution, and alleged economic injuries due to lower home values. *Id.* Here, no economic injuries were alleged and no recreational activities actually stopped. Although courts have stated that injuries exist "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity, this must be interpreted within the factual context of any given case. *See Sierra Club v. Morton,* 405 U.S. 727, 735 (1972); *see also Defenders of Wildlife,* 504 U.S. at 562–563.

In *Sierra Club,* the court found that there was no injury where the organization failed to submit to the court that individual recreation would be affected, or that any of its individuals actually used the valley. 405 U.S. at 735. Here, CSP has similarly failed to demonstrate a cognizable injury because it has failed to submit to the court that any of its individuals actually use the river, or that individual recreation will be affected. The individuals who submitted Declarations both use Crystal Stream *Park,* but they do not actually use Crystal Stream. *See* Decl. of Jones at ¶ 6, 7; *see also* Decl. of Silver at ¶ 4, 5. Under *Sierra Club's* holding, it is not enough that individuals walk near the stream if they do not actually use the stream to wade, swim, fish, etc. *See* 405 U.S. at 735; *see also* Decl. of Jones at ¶. Similarly, it is not enough that

individuals "would recreate even more frequently" if the challenged action has had no cognizable impact on their actual recreation. Decl. of Jones at ¶ 12.

On the other hand, in *Defenders of Wildlife,* the court found that there was a cognizable injury where individuals used or observed endangered animal species and were concerned that the animals may no longer exist in the future. *See* 504 U.S. at 562–563. However, here, there is no threat that may wipe out an entire animal species, but instead a water transfer into a stream where the stream may still be observed, used, and enjoyed. *See id.*

To prove associational standing, CSP must also show that the interests it seeks to protect are germane to the association's purpose and that neither the claim asserted nor the relief requested requires the participation of the individual member. *Hunt,* 432 U.S. 333. CSP's mission statement includes the word "transfer," which supports the conclusion that this organization was formed for the primary purpose of manufacturing a claim to challenge the Water Transfers Rule. Order at 6. Here, the interests CSP seeks to protect are not germane to its purpose because the organization was formed with the intent to sue, and thus its primary purpose is litigation.

C. CSP does not have prudential standing.

The test for prudential standing is not "especially demanding" and only closes the doors of the courtroom to plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Assn.,* 479 U.S. 388, 399 (1987); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209, 225 (2012). CSP's individual interests are in recreating more often and in soothing their minds. *See* Decl. of Jones at ¶ 9, 12; *see also* Decl. of Silver at ¶ 5, 9. These interests are only marginally related to the

Clean Water Act's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Similarly, CSP's interest as an organization is to "protect" Crystal Stream from "illegal transfers of polluted waters," which on its face appears to be a purpose statement that was manufactured specifically so that CSP could bring the very challenge to the Water Transfers Rule that is before this Court today. This interest in litigation is not the type of interest that Congress contemplated when it passed the Clean Water Act. Thus, CSP as individuals and as an organization are not within the zone of interest that Congress intended to protect.

II. THE DISTRICT COURT ERRED IN HOLDING THAT CSP TIMELY FILED THE CHALLENGE TO THE WATER TRANSFERS RULE.

Even if this Court finds that CSP has standing, their argument is still moot because they failed to timely file their challenge to the Water Transfers Rule. 28 U.S.C. § 2401(a) establishes the statute of limitations for challenging agency actions under the APA: "[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*." (emphasis added). And in *Corner Post*, the Supreme Court held that the claim first accrues "when the plaintiff is injured by final agency action[]" rather than when the final rule was promulgated. 144 S. Ct. at 2448 (2024).

A. CSP's claims accrue individually.

CSP asserts that they can commence a suit under *Corner Post*'s new holding. In CSP's view, the statute of limitations for their case began to accrue from the date of the organization's formation and not from when their members' individual claims accrue. But this demonstrates an incorrect understanding *Corner Post*'s holding and the nature of the claims in the instant case. Unlike Corner Post, Inc., who was a private company that pursued claims in furtherance of the organization's interests in redressing financial harm to its business, CSP is a newly formed

non profit organization pursuing claims that further the interests of their individual members. *See id.* at 2448.

A claim accrues "when the plaintiff has a complete and present cause of action," and this rule of law has "governed since the 1830s" and has appeared consistently in dictionaries for just as long. *Corner Post,* 144 S. Ct. at 2455, n. 5. CSP's claim did not become "a complete and present cause of action" when the organization was formed because it does not assert organizational claims. Instead, this timing inquiry should be focused on CSP's individual members because CSP brings claims before the court that further the environmental and aesthetic interests of its individual members. Otherwise, the court encourages the type of gamesmanship and judicial overwhelm that statute of limitations principles seek to destroy. *See id.* (Jackson, J., dissenting).

B. <u>The individual members of CSP are not injured in fact by agency action.</u>

Plaintiffs are unable to sue until they have suffered an injury-in-fact. *See id.* at 2449 ("We have explained that § 702 requires a litigant to show, at the outset of the case, that he is injured in fact by agency action.") (internal quotation marks omitted). The plaintiff in *Corner Post* satisfied this standard with ease: the truck stop business and convenience store was being continuously burdened by fees imposed by regulation at the time of, and after the formation of the business. *See id.* at 2448.

CSP has no such injury. Jonathan Silver states that "[i]f not for Highpeak's discharge, [he] would recreate *more frequently* on the Stream." Decl. of Silver at ¶ 9 (emphasis added). Mr. Silver has not *stopped* his recreational activity along the stream, nor does his statement suggest that any change has occurred to the frequency in which he recreates. Cynthia Jones also fails to meet this burden. Ms. Jones became upset after learning about the water

transfer but still "regularly walk[s]" along the stream. Decl. of Jones at ¶ 7. Absent any change to their recreational activity, the members' alleged injuries fails to amount to the "hundreds and thousands in interchange fees" that Corner Post, Inc. accrued.

Secondly, CSP's alleged injury is not caused by agency action. *See Corner Post*, 144 S.Ct. at 2449. The injury in *Corner Post* was a measurable financial injury directly resulting from agency regulation. *See id.* at 2448. The instant case is distinguishable because CSP's alleged injury results from Highpeak's actions. Moreover, Highpeak obtained permission for the construction and operation of the tunnel from the state of New Union, and did not involve EPA. Order at 4. EPA's Water Transfers Rule does not impact CSP's interest in Crystal Stream, and EPA's interpretation of the term "introduced" within the Water Transfers Rule is beneficial to their interests and supported by CSP.

i. Allowing CSP to proceed destroys judicial principles that statutes of limitations seek to protect.

To avoid disrupting legal stability, this Court should hold that CSP's claims are time-barred. This Court should prevent the onslaught of cases that would ensue if it allows CSP to proceed. *See Davis v. Provo City Corp.*, 193 P.3d 86, 91 (Utah 2008) ("The reasons for the procedural limits set by statutes of limitations are many, including preventing unfair litigation such as surprise or ambush claims, fictitious and fraudulent claims, and stale claims.") (internal quotation marks omitted).

Statutes of limitations were created for the purpose of ensuring judicial economy. Limitations foster reliance interests. They prevent stale claims, promote justice, and serve to protect finality, certainty, and predictability. *See Artis v. District of Columbia*, 583 U.S. 71, 91 (2018) ("[A] stop-the-clock rule is suited to the primary purposes of limitations statutes: 'preventing surprises' to defendants and 'barring a plaintiff who has slept on his rights.'"); 54

C.J.S. *Limitations of Actions* § 2 (2024). With respect to administrative law, enforcing a stricter limitations period ensures that agencies maintain stability. *See Cook v. City of Chi.*, 192 F.3d 693, 696 (7th Cir. 1999) ("The dual purposes of a limitations period are to force parties to litigate claims while the evidence is still fresh, *and to grant the prospective defendant relative security and stability by allowing it better to estimate its outstanding legal obligations*."). This stability extends to the very same entities the agencies seek to regulate. *See Corner Post*, 144 S.Ct. at 2480 (Jackson, J., dissenting) ("Indeed the obvious need for stability in the rules that govern an industry is precisely why a defined period for challenging the rules was needed at all.").

Admittedly, CSP's formation of an organization was a clever attempt to avoid the six year statute of limitations set in 28 U.S.C. § 2401. But the organizations' individual members alleged injury cannot meet this burden, and it evaporates all meaning to the procedural doctrine. To allow CSP to proceed is to "[wreak] havoc on Government, agencies, businesses, and society at large." *See id.* at 2470 (Jackson, J., dissenting). For these reasons, this Court should bar CSP's Water Transfers Rule claim.

III. IF THIS COURT FINDS THAT CSP HAD STANDING AND THEIR ACTION WAS TIMELY, THIS COURT SHOULD FIND THAT THE WATER TRANSFERS RULE WAS VALIDLY PROMULGATED UNDER THE CLEAN WATER ACT.

The District Court correctly held that the Water Transfers Rule was validly promulgated under the Clean Water Act.

Prior decisions using *Chevron* deference correctly held that the Water Transfers Rule was a valid promulgation under the Clean Water Act. *See Catskill III*, 846 F.3d at 524-33; *Friends I*, 570 F.3d at 1227-28. Although the Supreme Court in *Loper Bright* overturned the *Chevron* doctrine, the Court also protected prior *Chevron* decisions under statutory *stare decisis*. *See* 144 S.Ct. at 2273 ("[W]e do 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.").

CSP fails to provide "special justification" for overcoming statutory *stare decisis*, so *Friends I* and *Catskill III* should be respected. *See Halliburton*, 573 U.S. at 266. And the Water Transfers Rule is consistent with the statutory purpose of the Clean Water Act. *See Catskill III*, 846 F.3d at 525. Even if this Court chooses to ignore those prior decisions, the Water Transfers Rule still survives under *Skidmore* deference. *See Skidmore*, 323 U.S. at 140. Thus, regardless of the deference relied upon, this Court should find that the Water Transfers Rule is a valid promulgation under the Clean Water Act. And EPA's promulgation of the rule was neither arbitrary nor capricious. *See* 5 U.S.C. § 706.

A. <u>The Second Circuit and Eleventh Circuit's Chevron decisions upholding the Water Transfers Rule are persuasive.</u>

This Court should follow the Second Circuit and Eleventh Circuit's *Chevron* decisions upholding the Water Transfers Rule.

Loper Bright upheld prior *Chevron* decisions under statutory *stare decisis*. *See Loper Bright*, 144 S.Ct. at 2273. In the Court's view, a prior court's "mere reliance" on *Chevron* would not "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*, 573 U.S. at 266) (internal quotation marks omitted).

CSP seeks to use the same argument the Supreme Court sought to avoid. CSP asks this Court to ignore *Catskill III*'s and *Friends I*'s holdings that upheld the Water Transfers Rule on *Chevron* deference grounds. This is wrong. The Supreme Court had good reason to preserve earlier *Chevron* decisions – the alternative meant the stifling of judicial economy and reliance interests. Moreover, CSP has not shown a "special justification" for ignoring *Catskill III*'s

reasoning. *See Halliburton*, 573 U.S. at 266. Finally, CSP's reliance on *Catskill I* and *Catskill II* is misguided - those cases were decided prior to the promulgation of the Water Transfers Rule. *See Catskill III*, 846 F.3d at 504.

Statutory *stare decisis* has several considerations. And unlike constitutional *stare decisis*, the standard for statutory *stare decisis* is heightened: "[T]he principle of *stare decisis* has *special force* in respect to statutory interpretation because Congress remains free to alter what [the courts] have done." *Halliburton*, 573 U.S. at 274 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)) (quotation marks omitted) (emphasis added). Courts will only overturn old cases if they produce "unworkable" law. *Patterson v. McLean Credit Union*, 491 U.S. 164, 164 (1989). Shifting judicial methods are not enough to overcome precedent. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

In *Catskill III*, the second circuit upheld the Water Transfers Rule. *See Catskill III*, 846 F.3d at 520. Importantly, *Catskill III* was decided after EPA formally promulgated their interpretation of the Water Transfers Rule. *Id.* at 510. This heightened procedural formality afforded the court the opportunity to reevaluate their interpretation of the Clean Water Act in *Catskill I* and *Catskill II*. *Id.* And the Second Circuit engaged in an extensive statutory interpretation analysis. *See id.* at 508-33. The Eleventh Circuit in *Friends I* engaged in the same. *See Friends I*, 570 F.3d at 1222-28.

Even if *Catskill III* was decided on step two of the *Chevron* analysis, no special justification exists to overturn this precedent. *See CBOCS*, 553 U.S. at 457 (declining to

overturn a decision based on a change of judicial methods); *John R. Sand & Gravel Co.*, 552 U.S. at 139 (finding the same); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 857 (1996) (finding the same). Similarly, even after overturning *Chevron* deference, the Supreme Court expressly upheld the seminal *Chevron* decision. *See Loper Bright*, 144 S.Ct. at 2273; *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 864-65 (1984) (finding the Clean Air Act to be ambiguous but upholding EPA's interpretation of the term as reasonable).

Absent special justification, this Court should uphold the Water Transfers Rule based on the Second Circuit's and Eleventh Circuit's precedents establishing the rule as a valid promulgation.

i. CSP's reliance on Catskill I and II is misguided since those decisions were made prior to the rule being promulgated and found the Clean Water Act to be ambiguous.

CSP attempts to bypass the *Chevron* decisions by relying on the holdings of *Catskill I* and *Catskill II*. Those decisions rejected EPA's contrary interpretation of the Clean Water Act. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481 (2d Cir. 2001)("*Catskill I*"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 84 (2d Cir. 2006) ("*Catskill II*"). In the Second Circuit's view, water transfers *did* constitute a discharge of pollutants and NPDES permitting was required for such transfers. *See Catskill I*, 272 F.3d at 494; *Catskill II*, 451 F.3d at 84. But reliance on those cases ignores the breadth of the agency's "body of experience and informed judgment" that arose when EPA promulgated the Water Transfers Rule. *See Skidmore*, 323 U.S. at 140. And both *Catskill I* and *Catskill II* found the Clean Water Act ambiguous. *See Catskill III*, 846 F.3d at 510.

In *Catskill I*, the Second Circuit declined to apply *Chevron* deference since the only evidence supporting EPA's interpretation were informal documents. *See Catskill I*, 272 F.3d at 489-91. "If the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate. Instead, the EPA's position is based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s." *Id.* at 490 (citing *United States v. Mead Corp.*, 533 U.S. 218, 121 (2001); *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000). Thus, the Second Circuit's less deferential analysis may have been warranted there – EPA had not yet engaged in notice and comment rulemaking. But that is not the case anymore. This difference matters: *Catskill I* and *Catskill II* considered the meaning of "addition" while *Catskill III* addressed the validity of the promulgated rule. *See Catskill III*, 846 F.3d at 508.

And neither *Catskill I* nor *Catskill II* found the terms of the Clean Water Act to be unambiguous. *See id.* 846 F.3d at 510 (Acknowledging that the courts application of *Skidmore* in *Catskill I* and *Catskill II* proves that the meaning of addition is ambiguous). "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Such a limitation on statutory interpretation is what the Supreme Court sought to avoid: " . . . precluding agencies from revising unwise judicial constructions of ambiguous statutes" would "lead to the ossification of large portions of our statutory law[.]" *Id.* at 983.

Thus, because EPA formally promulgated its interpretation and CSP failed to show special justification for overturning prior precedent, this Court should uphold the Water Transfers Rule as a valid promulgation.

ii. The Water Transfers Rule is consistent with the Clean Water Act's statutory language and purpose; the rule is neither arbitrary nor capricious.

The Water Transfers Rule is consistent with the Clean Water Act.

The Clean Water Act grants EPA discretion to promulgate the Water Transfers Rule. *See* 33 U.S.C. §1342; 33 U.S.C. 1361. When engaging in statutory interpretation, courts are first tasked with determining the "constitutional limits" of a statute, "fixing the boundaries of the delegated authority[,]" and "ensuring that the agency . . . engaged in reasoned decision-making within those boundaries." *See Loper Bright*, 144 S.Ct. at 2263 (internal citations and quotations omitted). The Clean Water Act granted EPA flexibility to promulgate the Water Transfers Rule. 33 U.S.C. 1342(a)(2) states that "[t]he Administrator *shall prescribe* conditions for such permits . . . including . . . conditions on data, and information collection, reporting, and such other requirements as he deems *appropriate*." (emphasis added). 33 U.S.C. 1361(a) delegates the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." The inclusion of terms like "appropriate," as Congress did here, "leaves [EPA] with flexibility" to promulgate the Water Transfers Rule. *See Loper Bright*, 144 S.Ct. at 2263 (citing *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

Under that purview, we now move to the purpose of the Clean Water Act. Indeed, the purpose of the Clean Water Act is quite expansive: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But the Clean Water Act does not "pursue[] [that] purpose at all costs." *Rapanos v. United States*, 547 U.S.

715, 752 (2006). "To the contrary, the Clean Water Act is among the most complex of federal statutes, and it balances a welter of consistent and inconsistent goals[.]" *Id.* (internal citations, quotation marks omitted).

Congress's inaction is also telling. *See Bob Jones*, 461 U.S. at 600 (finding that Congress' failure to act on proposed bills provided support that Congress acquiesced). EPA's interpretation of water transfers has been in existence since the Clean Water Act was enacted. EPA has argued on behalf of its interpretation in several subsequent cases, both before, and after the promulgation of the Water Transfers Rule. And despite the expansiveness of the Clean Water Act, the Legislature has only amended the Clean Water Act four separate times, with the most recent amendment being in 2014, and the remaining three amendments happening before 1990.

Since the Water Transfers Rule was a reasonable interpretation of the Clean Water Act, the rule was neither arbitrary nor capricious. *See Catskill III*, 846 F.3d at 520-32.

B. Even if this Court does not find Friends of the Everglades and Catskill III persuasive, the Water Transfers Rule still stands under Skidmore deference.

Regardless of this Court's reliance on *Friends of the Everglades* and *Catskill III*, the Water Transfers Rule still stands under *Skidmore*.

In overturning *Chevron* deference, the Supreme Court reinstated *Skidmore* deference in determining the validity of an agency's promulgated rule. *See Loper Bright*, 144 S.Ct. at 2267. Under *Skidmore*, the "weight of such judgment" depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. And it entails a sliding scale approach. *See Mead*, 533 U.S. at 250 (Scalia, J., dissenting).

Although less deferential than *Chevron*, *Skidmore* does not dispose of an agency's own interpretation. Rather, "[s]uch interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]'" *Loper Bright*, 144 S.Ct. at 2262 (quoting *Skidmore*, 323 U.S. at 140). "And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Id.* (citing *United States v. American Trucking Assns.*, 310 U.S. 534, 549 (1940)).

EPA engaged in notice-and-comment rulemaking to formalize its interpretation of the Clean Water Act, which demonstrates the thoroughness of its reasoning. Courts have long held that interpretations undergoing formalized rulemaking deserve greater deference. *See Mead*, 533 U.S. at 218 (holding that regulations that undergo notice and comment rulemaking deserve greater deference); *See Catskill I*, 273 F.3d at 489-90 (applying only *Skidmore* deference since EPA's interpretation was only explained in *informal* policy statements). And unlike informal agency interpretations, notice-and-comment rulemaking carry "the force of law" and are "subject to the rigors of the [APA][.]" *See Christensen*, 529 U.S. at 587 (internal citations and quotation marks omitted). Adhering to the APA, an agency must follow a three-step procedure which includes: (1) issuing a general notice of proposed rulemaking; (2) allowing interested persons to participate in the rulemaking process and responding to significant comments; and (3) upon promulgating the final rule, incorporating changes based on the comments received, and publishing it in the federal register. 5 U.S.C. § 553. By undergoing this extensive process, EPA demonstrates the validity of its reasoning. *See Skidmore*, 323 U.S. at 140.

Since the enactment of the Clean Water Act, EPA has never wavered in its interpretation. One of the pillars the majority in *Loper Bright* rested on in overturning *Chevron*

was *Chevron*'s tendency to "afford *binding* deference to agency interpretations, including those that have been inconsistent over time." *Loper Bright*, 144 S.Ct. at 2265.

CSP asks this Court to engage in the kind of flip-flopping that the Supreme Court sought to avoid in overturning *Chevron*. *See Loper Bright*, at 2272. In choosing to abandon *Chevron*, the Supreme Court noted how *Chevron* encouraged the inconsistency of agency interpretations. *Id.* ("By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."). To find that the Water Transfers Rule is invalid is to undo what EPA has held since the Clean Water Act's promulgation. Such an action will lead to the type of inconsistency the Supreme Court seeks to avoid.

Since the Water Transfers Rule survives both *Chevron* and *Skidmore* deference, this Court should find that the rule was validly promulgated under the Clean Water Act.

IV. HIGHPEAK'S DISCHARGES ARE OUTSIDE THE SCOPE OF THE WATER TRANSFERS RULE.

This Court should find that Highpeak's discharges are outside the scope of the Water Transfers Rule such that Highpeak must obtain a NPDES permit. EPA's interpretation of the term "introduced" should be entitled to respect under *Auer* deference.

When regulations are genuinely ambiguous, as here, courts often defer to an agency's reasonable interpretation of regulations under *Auer* deference – often described as "pervad[ing] the whole corpus of administrative law." *See Kisor*, 588 U.S. at 563; *see also Auer*, 519 U.S. at 452. Before *Auer* was decided, this deference was known as *Seminole Rock* deference, which rested on decades of comparable decisions. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) ; *see also United States v. Eaton,* 169 U.S. 331, 343 (1898).

Courts have long given a significant amount of weight to the presumption that "Congress intended for courts to defer to agencies when they interpret their own ambiguous rules." *See Kisor*, 588 U.S. at 558. This presumption has been firmly established and refined for the following reasons: (1) An agency is often in a "better position [to] reconstruct" the original meaning of a rule that it promulgated initially; (2) Agencies are better situated than courts to resolve ambiguities by exercising "judgment grounded in policy concerns[;]" and (3) It is important that interpretations of regulations are uniform rather than pieced together through individual litigations. *See Kisor,* 588 U.S. at 560.

Recent Supreme Court cases, such as *Loper Bright*, have left *Auer* and *Seminole Rock* deference firmly intact as they have been interpreted by subsequent cases, likely because this deference has worked in tandem with the Administrative Procedure Act for "approaching a century." *See id.* at 560-61; *see also Loper Bright*, 144 S.Ct. at 2244. None of Highpeak's arguments describe sufficient reasons to reconsider this precedent.

A. EPA's finding that Highpeak's water transfer requires permitting should be upheld under *Auer* Deference.

Under *Auer* deference, the court should first ask whether the term "introduced" is genuinely ambiguous, and then consider (1) whether EPA's interpretation of the ambiguous term is reasonable, and (2) whether the character and context of EPA's interpretation entitles it to controlling weight. *See Kisor* 588 U.S. at 559.

i. The Water Transfers Rule is genuinely ambiguous as to what amount of pollutants introduced by a water transfer constitute pollutants.

Here, the threshold question is whether the Water Transfers Rule's term "introduced" is genuinely ambiguous. *See* Order at 11; *see also Kisor* 588 U.S. at 559. The regulation uses the term to describes an exception to the NPDES permit requirement for water transfers as follows:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants *introduced* by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122 (2008) (emphasis added).

Highpeak asserts that its transfer does not require a permit because there will "inevitably" be some amount of "new" pollutants introduced anytime water passes through any tunnel. Order at 11. But Congress granted EPA discretion through the Clean Water Act to decide when polluters must obtain permits. *See* 33 U.S.C. 1342. Here, EPA appropriately interpreted the Water Transfers Rule such that Highpeak's transfer must be permitted because its tunnel "introduced" manganese, iron, and TSS to the transferred water at a measurable concentration. Order at 11.

The fact that Highpeak and EPA interpret the term "introduced" differently points to ambiguity. An analysis of the "text, structure, history, and purpose" of the Water Transfers Rule reveals the same. *See* Kisor, 588 U.S. at 559; *see also* 40 C.F.R. Part 122.

The text and structure of this regulation when read in totality make the plain language of the term "introduced" ambiguous in nature. The regulation first defines water transfers and then states that the permitting "exclusion does not apply to pollutants *introduced* by the water transfer activity itself to the water being transferred." 40 C.F.R. Part 122. Read in totality, the meaning of "introduced" is ambiguous: it is impracticable that water traveling through an intervening material will remain entirely the same. Instead, moving water will inevitably pick up trace amounts of contaminants as it flows through a tunnel. To be clear, if any amount of pollutants would take the water transfer outside the scope of the exception outlined in 40 C.F.R. Part 122, the rule would be pointless. Instead, the plain language of the regulation and the structure of the

exclusion intentionally allow for ambiguities in the term "introduced" so that EPA may appropriately decide when permits are necessary.

The purpose of the Water Transfers rule also shows ambiguity in the term "introduced." This regulation was promulgated to "protect water quality" without "unnecessarily interfere[ing] with water resource allocation." NPDES Water Transfers Rule, 73 Fed. Reg. 33697, 33701 (June 13, 2008) (codified at 40 C.F.R. pt. 122). An evaluation of the overall statutory structure of the Clean Water Act and specific statutory provisions, including 101(g) and 304(f), reveales that "the heart" of Congress' purpose was to maintain balance "between federal and State oversight of activities affecting the nation's waters." *See id.* Ambiguity is a necessary component of any effective balancing act. This approach is also described in EPA's interpretive memo, where the preferred analytical approach to interpretation is holistic and "gives meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute." U.S. Env't Prot. Agency, D.C. 20460, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (2005) [hereinafter, "EPA's interpretive memo"].

The legislative history supports this conclusion as well, and shows a history of grappling with balancing state and federal water regulations. *See e.g.* 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95–14, *A Legislative History of the Clean Water Act of 1977,* at *532* (1978); *see also H.R. Rep. No. 92–911,* at 96, 109 (1972). Thus, the "text, structure, history, and purpose" of the Water Transfers Rule reveal that "introduced" is an ambiguous term. *See Kisor,* 588 U.S. at 559.

ii. EPA's interpretation of the ambiguous term is reasonable.

The first inquiry under *Auer* review is a reasonableness inquiry. Here, EPA's interpretation that Highpeak's water transfer "introduced" pollutants that require a permit is "within the bounds of reasonable interpretation." *See Kisor,* 588 U.S. at 559.

If EPA's interpretation "neither contradicts the language of the statute nor frustrates congressional policy" the court's reasonableness inquiry is limited in scope. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171 (D.C. Cir. 1982). Here, EPA's interpretation is reasonable because it is consistent with the text of the Clean Water Act and Congress' purpose in enacting the statute, it logically flows from the language of the Water Transfers Rule, it is consistent with judicial precedent, and it is even supported by Highpeak's oppositional argument.

First, EPA's interpretation is reasonable because the Clean Water Act clearly states that pollutants are subject to limitations. *See* 33 U.S. Code § 1342. Additionally, Congressional policy supports a balancing of state and federal regulatory regimes to manage water pollution. NPDES Water Transfers Rule, 73 Fed. Reg. at 33701, 33705 (June 13, 2008). Here, New Union does not have a formal regulating scheme in place, so it is appropriate for the pollution to be federally regulated by EPA. *See id.*; *see also* Order at 4.

Second, EPA's interpretation is reasonable because it logically flows from the language of the Water Transfers Rule which makes clear that "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i) (2023). Here, iron, manganese, and TSS are introduced by the water transfer activity itself to the water being transferred in detectable amounts that increase the concentration of the pollutants by 2-3%. Order at 5.

Third, EPA's interpretation is reasonable because it is consistent with judicial precedent. Highpeak may bring forward a line of cases where the court held that permits were not required. *See Gorsuch,* 693 F.2d 156 (D.C. Cir. 1982); *see also National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). However, these cases concerned dams or hydropower facilities where water flows within a naturally *connected* body of water. *See id.* Here, the water transfer connects two otherwise *distinct* waters of the United States, Cloudy Lake and Crystal Stream. Order at 4. Additionally, the court in *Gorsuch* found that dams were an integral part of state management because they provide drinking water and flood control. *See Gorsuch,* 693 F.2d at 178-79, 182. Here, there are not the same Federalism concerns. *See id.*; *see* Order at 4.

Highpeak may also argue that they are exempt from permitting because there is no pumping or diesel-fueled motor, as there was in *Dubois* and *Miccosukee. See Dubois*, 102 F.3d at 1273; *see also S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians,* 541 U.S. 95, 107 (2004). However, in *Dubois,* the court found that a NPDES permit was required for the pumping of water where (a) it would not flow naturally and (b) pollutants were introduced. *See* 102 F.3d 1273 (1st Cir. 1996). As here, it was these factors, not the pumping, that was dispositive. *See id.* Similarly, in *Miccosukee*, the court held that it was inconsequential whether the transfer involved a diesel-fired motor or gravity, but that the important considerations were the impacts of the transfer and seepage between artificially connected bodies of water. *See* 541 U.S. at 111. Here, the important factors of consideration are the impacts of pollutants and contaminated seepage between Cloudy Lake and Crystal Stream through the artificially created soil and rock pathway. *See* Order at 12. Thus, EPA's interpretation of the term "introduced" is reasonable because it is consistent with judicial precedent.

Fourth, Highpeak's own argument supports the conclusion that EPA's interpretation of the regulation is reasonable. Highpeak argues that the only reasonable interpretation of the Water Transfers Rule is that pollutants are introduced "from human activity and not natural processes like erosion" and that its water transfer falls into the second category. Order at 11. However, there is nothing "natural" about excavating a four foot by 100 yard tunnel between two distinct bodies of water. Furthermore, erosion is the process of wearing away materials of the earth's crust by natural elements. *See* MERRIAM-WEBSTER, INC, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 772 (Philip B. Gove et al. eds., 3rd ed. 2008). Erosion is not defined as the process of humans physically controlling the water that flows through an excavated tunnel with valves that are opened and closed by business employees. *See id.*; *see also* Order at 4. In this way, Highpeaks' very argument supports EPA's position.

In conclusion, the Court should find that EPA's interpretation is reasonable and affirm its finding that Highpeak's water transfer requires a NPDES permit.

iii. The character and context of EPA's interpretation entitles it to controlling weight.

The final step under Auer deference is a directive for courts to independently ask "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 588 U.S. 559; *Auer*, 519 U.S. at 462.

First, the court should ensure that EPA's regulatory interpretation is the agency's authoritative or official position and not just an ad hoc statement. *See Kisor*, 588 U.S. 559; *see also Auer*, 519 U.S. at 462. Here, EPA's interpretation of the term *introduced* is not an ad hoc statement. Instead, it is consistent with interpretive principles laid out in both the Water Transfers Rule and EPA's interpretive memo.

EPA's decision that Highpeak's water transfer does not fall into the permitting exception reflects the agency's official position on the scope of the exception. In response to public comments pertaining to *when water transfers introduce pollutants*, EPA formally provided the following rationale:

> Water transfers **should be** able to be **operated and maintained in a manner that ensures they do not themselves add pollutants** to the water being transferred. However, where water transfers *introduce* pollutants to water passing through the structure into the receiving water, NPDES permits are required.

NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,705 (June 13, 2008) (emphasis added); *see Consumers Power*, 862 F.2d at 588; *see also Gorsuch,* 693 F.2d at 165, n. 22.

Here, Highpeak affirmatively decided not to build a pipe or to install an impermeable conduit. Order at 4. Instead, Highpeak "carve[d] a tunnel through rock and soil" and only used partial "metal conduits." *Id*. Highpeak's pollution is not incidental because it did not operate and maintain its tunnel in a manner that ensured it would not add pollutants to the transferred water. *See id.* Thus, EPA's interpretation reflects its official position because it flows from the language of the agency's interpretive protocol, as described in the regulation itself. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,705 (June 13, 2008).

Second, EPA's interpretation must reflect its substantive expertise. *See Kisor*, 588 U.S. 559; *see also Auer*, 519 U.S. at 462. Congress empowered EPA to administer the Clean Water Act, a statute whose purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Thus, the subject matter of water pollution, the introduction of contaminants, and the movement of water between waters of the United States is well within the agency's usual duties. *See id., see also* 33 U.S.C. 1342. And its decision on the subject matter reveals its expertise.

Third and finally, EPA's interpretation of the rule must reflect "fair and considered judgment." *See Kisor*, 588 U.S. 559; *see also Auer*, 519 U.S. at 462. Here, the agency's interpretive principles are articulated at length in the Water Transfers Rule and in EPA's interpretive memo. This is not a "convenient litigating position" or an "unfair surprise" to regulated parties. Instead, EPA's interpretive position has been well established through the legislative history of the Clean Water Act, Congressional intent, and decades of agency interpretations. Thus, EPA's interpretation of the Water Transfers Rule reflects "fair and considered judgment." *See Kisor*, 588 U.S. 559; *see also Auer*, 519 U.S. at 462.

Thus, the court should apply *Auer* deference to EPA's interpretation of the ambiguous term "introduced" and affirm that Highpeak's transfer must obtain a permit.

iv. No special justifications apply.

Here, there are no "special justifications" for departing from *Auer* deference such that it is "unworkable" or "a doctrinal dinosaur." *See Kisor*, 588 U.S. 559-560. The court in *Loper Bright* does not disturb the court's deference to agency interpretations of their own regulations. *See* 144 S.Ct. 2244. *Auer* deference continues to "pervade the whole corpus of administrative law" as it was upheld and clarified by subsequent decisions. *See Kisor*, 588 U.S. at 563; *see also Auer*, 519 U.S. at 452.

Auer deference remains firmly intact because of the truth that agencies have unique and specific insight into the purpose, intent, and scope of their own rules. Under this standard, the court should affirm the lower court ruling that Highpeak's transfer must obtain a permit. EPA's interpretation of the Water Transfers Rule was far from arbitrary and capricious. Instead, EPA applied its specific expertise and insight into its interpretation through the lens of the Congressional purpose of the Clean Water Act and the scope of the regulation as written.

B. EPA's finding that Highpeak's water transfer requires permitting should be upheld under *Skidmore* Deference.

Even if this Court finds that the regulation is not ambiguous, or otherwise declines to apply *Auer* deference, EPA's interpretation still stands under *Skidmore* deference. *See* 323 U.S. at 140.

EPA's interpretation of the Water Transfers Rule was thoroughly and carefully considered because EPA relied on traditional tools of statutory interpretation, legislative history, Congressional intent, and its own interpretive guidelines, as described in the sections above. Additionally, EPA's reasoning is valid. The Water Transfers Rule is meant to be a tool for balancing state and federal regulatory regimes. As EPA officially stated, "transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water." EPA's interpretive memo at 9. Here, there is no evidence in the record that the State of New Union has a state regulatory regime for Water Transfers. Order at 4. Thus, although Highpeak appears to have informally obtained "permission" and an "agreement" with New Union, no state-delegated Clean Water Act permitting program exists. *Id.* EPA's interpretation of the Water Transfers Rule is valid because it is consistent with the underlying Congressional intent – cooperative federalism.

Lastly, EPA's interpretation is consistent with earlier and later pronouncements. Since the beginning, EPA has maintained a consistent interpretive approach, as described at length in the regulation itself and EPA's interpretive memo. EPA's interpretation of the Water Transfers Rule has "been consistently adhered to." *Gorsuch*, 693 F.2d. at 167. EPA has taken the position that permits are not required where water flows within a naturally connected body of water. *See id.*; *see also Consumers Power*, 862 F.2d at 580. However, EPA has consistently interpreted that "addition" means the introduction of pollutants from the outside world, as upheld by *Gorsuch*

and *Consumer Power* courts and reiterated in the *Catskill* cases. *See, e.g., Gorsuch,* 693 F.2d at 165; *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d 77. EPA's interpretation of the Water Transfers Rule in the instant case is consistent with this line of reasoning where permits are needed if water would not travel naturally between the distinct water sources and pollutants were introduced by the transfer itself.

Thus, even under *Skidmore* analysis, this Court should defer to EPA's interpretation of the term "introduced" and affirm that Highpeak's transfer must be permitted.

CONCLUSION

For the above reasons, EPA respectfully requests dismissal because CSP does not have standing and because its challenge to the Water Transfers Rule was not timely filed. After a thorough examination of the issues presented, this Court should find that the Water Transfers Rule was validly promulgated under the Clean Water Act. In the alternative, we respectfully request that this court uphold EPA's interpretation of the term "introduced" and affirm its decision that Highpeak's water transfer requires a NPDES permit.