Non Measuring Brief

Team 45

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Case No. 24-01109

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

v.

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

-and-

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and entered judgement (District Order) on August 1, 2024. All parties filed timely notice of appeal of that judgement with this Court pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has subject-matter jurisdiction over this issue pursuant 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1369(b)(1), which grants direct appellate jurisdiction to the U.S. Courts of Appeals for certain agency actions under the Clean Water Act (CWA or the Act).

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule.
2. Whether the District Court erred in holding that CSP timely filed the challenge to the Water Transfers Rule.
3. Whether the District Court erred in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act.
4. Whether the District Court erred in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Clean Water Act

The Clean Water Act, 33 U.S.C. §§ 1251 to 1387, is a federal statute that regulates the discharge of pollutants into the waters of the United States and sets quality standards for surface waters. The principal purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The Act grants the Environmental Protection Agency (EPA) the authority to regulate pollutant discharges and implement pollution control programs, including setting water quality standards and establishing the National Pollutant Discharge Elimination System (NPDES) permit program. 33 U.S.C. §§ 1311, 1342; *see also County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020). Section 301 of the CWA prohibits the discharge of pollutants into navigable waters without a permit through the NPDES program. 33 U.S.C. § 1311.

Promulgated in 2008, the Water Transfer Rule (WTR), codified at 40 C.F.R. § 122.3(i), exempts certain water transfers from NPDES permitting requirements, provided they do not introduce pollutants into the receiving waters during the transfer process. This rule defines "water transfers" as activities that move water between distinct waters of the United States without adding pollutants originating from outside the transferred waters. The exemption aims to balance federal oversight with local water management needs, ensuring that EPA only regulates discharges that introduce additional pollutants beyond those present in the water being transferred. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,698-99 (June 13, 2008). This WTR exemption does not apply to pollutants introduced by the water transfer activity itself to the water being transferred. 40 C.F.R. § 122.3(i)

II. Factual Summary

A. Highpeak's Tunnel

Highpeak Tubes, Inc. (Highpeak) is a recreational company that operates a tubing business on the Crystal Stream in the western part of the State of New Union. Record at 3. In 1992, Highpeak constructed a tunnel connecting Cloudy Lake to Crystal Stream. The tunnel is approximately 110 yards long and four feet in diameter, partly carved through rock and partly constructed with iron pipe. *Id.* at 4. At the northern and southern ends of the tunnel, valves are opened and closed by Highpeak's employees to regulate the flow of water from Cloudy Lake into Crystal Stream. *Id.* From Highpeak's perspective, the purpose of the tunnel is to enhance the tubing recreation experience by increasing the volume and velocity of Crystal Stream through releases of water from Cloudy Lake. Id. This tunnel constitutes the water transfer in dispute. The Parties have stipulated that both Cloudy Lake and Crystal Stream are "waters of the United States" under the CWA. *Id.* at 5.

B. Crystal Stream Preservationists, Inc.'s Complaint

CSP is a not-for-profit corporation with a total of thirteen members, all of whom live in Rexville, New Union. *Id.* at 4. CSP invites individuals interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." Id. Except for Johnaton Silver who moved to Rexville in 2019, all of the members have lived in Rexville for more than 15 years. *Id.* Two of CSP's members own land along Crystal Stream and both reside approximately one mile south of the end of Highpeak's tube run (five miles south of the discharge point). *Id.*

On February 15, 2024, CSP filed a Complaint against both Highpeak and the EPA. *Id.* at 5. The Complaint included both the citizen suit claims against Highpeak and a claim under the APA against EPA, challenging the WTR as invalidly promulgated and inconsistent with the

statutory language of the CWA. Id. CSP also argued, alternatively, that even if the WTR were valid, then Highpeak's tunnel constitutes a point source under the CWA and has regularly discharged and continues to discharge pollutants into Crystal Stream without a permit. *Id.* CPS specifically alleged that this discharge contains multiple pollutants and was supported by sampling results showing that, due to natural conditions, the water in Cloudy Lake has significantly higher levels of certain minerals, such as iron and manganese. *Id.* at 5. Cloudy Lake also has a much higher concentration of total suspended solids (TSS) compared to the water in Crystal Stream. *Id.* The NOIS contended that Crystal Stream is fed in significant part by natural groundwater springs and is less burdened by these pollutants, so every time Highpeak opens the valves, it is discharging pollutants into the Stream in violation of the Act. *Id.*

CPS goes further to allege that the WTR was not validly promulgated by EPA, and, alternatively, argued that additional iron, manganese and TSS are introduced during the transfer process, thereby taking the discharge out of the exemption provided by the WTR. *Id.*

C. Highpeak's Motion to Dismiss

Following, CSP's filing Highpeak moved to dismiss on multiple grounds. First, Highpeak argued that the challenge to the WTR should be dismissed for lack of standing and as time-barred. *Id.* Next, Highpeak similarly challenged CSP's standing in the citizen suit, arguing that CSP was created solely for the purpose of challenging Highpeak's discharges in order to "manufacture" a future challenge to the WTR in the event the United States Supreme Court altered the legal framework surrounding such challenges. *Id.* Therefore, Highpeak argues, CSP suffers no actual injury as a result of Highpeak's discharge. Finally, Highpeak argued that the Complaint fails to state a cause of action. *Id.* According to Highpeak, the WTR was validly promulgated, and, as a result, no permit was required for the tunnel discharge. *Id.*

D. EPA's Motion to Dismiss

The EPA also moved to dismiss CSP's challenge to the WTR and joined Highpeak in challenging CSP's standing and timeliness. *Id.* at 6. Similarly, EPA defended the WTR as a valid promulgation under the CWA. *Id.* However, EPA agreed with CSP that, even if this Court should uphold the WTR, Highpeak nonetheless needs to obtain a permit for the pollutants introduced to the water during the discharge. *Id.*

SUMMARY OF THE ARGUMENT

The District Court erred in holding that CSP had standing challenge Highpeak's Discharge and the WTR because its formation was primarily litigation-driven, and organizations cannot manufacture standing by incorporating to challenge preexisting agency actions. CSP proves its litigation-driven nature through the language of its mission statement and the timing of its incorporation following major Supreme Court decisions. Additionally, the alleged injuries of CSP's members do not rise to the level of harm required for standing, since they have not suffered tangible harm. Further, CSP cannot prove causation because the alleged injuries of the plaintiffs are not fairly traceable to Highpeak's discharge since the differences they claim to be pollution from discharge are consistent with natural processes.

Second, CSP's challenge to the WTR fails because it was not timely filed under the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). Challenges to agency rules must be brought within six years of the rule's promulgation, and the individual plaintiffs the claim is based on experienced their alleged injuries within the time limitations and could have brought it then. CSP was formed to litigate this issue and find injury where it does not tangibly or legally exist and so the challenge to the WTR is time-barred and cannot be brought.

Furthermore, the WTR represents a validly promulgated rule pursuant to the CWA. The rulings of the Second and Eleventh Circuits affirm that the validity of the rule must remain intact

under the doctrine of *stare decisis*. The workability and reliance interests involved with invalidating the WTR underscore the rules importance. Additionally, there is no special justification as required by the supreme court to diverge from the doctrine. Regardless, in the absence of *Chevron*, the EPA's interpretation of the CWA is awarded deference under the *Skidmore* Stanard. Under this standard, the EPA is persuasive in its interpretation due to the agency's thoroughness, reasoning, and consistency.

Lastly, EPA's interpretation of 40 CFR § 122.3(i) merits deference under the doctrine that courts should defer to agency interpretations of ambiguities in their own regulations. This is because 40 CFR § 122.3(i) has inherent ambiguities that are not addressed by the text of the regulation EPA's interpretation reflects its deliberate judgement and due consideration in forumlating the interpretation, and characteristics and context of EPA's interpretation afford it controlling weight. Even if deference to EPA's interpretation of 40 CFR § 122.3(i) is not due, respect must still be given to it because it likewise evinces thorough, deliberate, and due consideration, fidelity to EPA's long-standing position on the applicability of water transfers to NPDES permit requirements. The fact that this interpretation was not developed in response to this litigation further bespeaks that EPA is owed deference — or, barring that, respect — as to its interpretation of 40 CFR § 122.3(i). Moreover, under this interpretation, HighPeak *must* file a NPDES permit as its tunnel is a water transfer that adds pollutants to waters of the United States.

STANDARD OF REVIEW

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The court shall "set aside any agency action inconsistent with the law as they interpret it." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (discussing 5 USC § 706). This is mandated to occur

where the court finds that the agency action is "arbitrary, capricious, or otherwise not in accordance with law," and other considerations not at issue here. 5 U.S.C. § 706(2). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 43 (1983). When undertaking review under the "arbitrary and capricious" standard, courts must determine that an agency's decisions are "based on a consideration of the relevant factors;" courts are also to determine "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (noting that "[a] court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision*").* However, a court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974); *see also Ohio v. EPA*, 603 U.S. 279, 311 (2024); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945).

ARGUMENT

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

Standing requires plaintiffs to establish injury in fact, causation, and redressability. The standing requirement ensures federal courts adjudicate only actual, live controversies involving plaintiffs who suffer concrete and particularized harm. For a plaintiff to establish standing in federal court, they must establish injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) [Hereinafter *Lujan v. Defenders of Wildlife*]. The District Court's conclusion that CSP had standing to challenge Highpeak's Discharge and the WTR is error because CPS failed to satisfy injury-in-fact, causation, and redressability necessary to pass the standing threshold.

A. CPS failed to demonstrate injury-in-fact because its formation was litigation driven and not actual harm

To establish injury-in-fact, a plaintiff must show a concrete and particularized harm of a legally protected interest that is actual or imminent. *See Spokeo, Inc. v. Robins* 578 U.S. 330 (2016). Organizations can suffer direct organizational injury by either a diversion of organizational resources to identify or counteract the allegedly unlawful action or through frustration of the organization's mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). While CPS alleges that the discharge and WTR frustrates the mission of its organization, which is "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations", this mission shows the organization was formed with the intention of litigation. The timing of its formation and notice of intent to sue further proves this allegation because it filed suit shortly after its incorporation, and only after the Supreme Court of the United States

decided *Loper Bright* and *Corner Post, Inc. v. Board of Governors of Federal Reserve System* 144 S. Ct. 2440 (2024).

Courts have consistently held that plaintiffs cannot manufacture standing by creating an organization solely for the purpose of a legal challenge. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–14 (2013). CPS's mission of targeting "illegal transfers of polluted waters", it clearly aims to seek legal challenges rather than its alleged environmental objectives. Because CPS's challenge of Highpeak's discharge and the WTR relies on litigation-driven motives, the District Court erred in allowing its claims to have legal standing as an organization.

Further, the plaintiffs fail to prove any concrete and particularized harm connected to Highpeak's discharge and the WTR, which is a requirement for standing. See *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 386-93 (2024). CSP claims that its injury arises from the alleged reduced enjoyment of the Crystal Stream by two of its members due to pollutants. The first member, Cynthia Jones, alleges that "the suspended solids and metals in the Stream are upsetting" and that she is "very concerned about contamination from toxins and metals, including iron and manganese." See Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7-9. Plaintiffs can suffer concrete and particularized injury through environmental degradation. See Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000). However, in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc, the plaintiffs were unable to swim, fish, and canoe in the water due to their concern over the discharge's pollution on the water. Dissimilarly, the individuals in the current case claim this injury comes from the "upsetting" view of the steam and another's hesitance to allow his dogs to drink from the stream. See Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7-9; See Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 5-9. The current plaintiffs have not lost the ability to do their recreational activities like the plaintiffs in Friends of the Earth, Inc. and are still able to walk along the river despite their concerns. Although reasonable

concerns for standing include recreational, aesthetic, and economic interests, the concerns are not the same conditional statements made by the Friends of the Earth, Inc., and cannot amount to injury for CPS.

B. CPS failed to satisfy the causation prong of the standing requirement because the alleged injuries are not directly attributable to Highpeak's discharge.

In addition to proving injury-in-fact, the plaintiff must prove a causal connection between the plaintiff's injury and the defendant's actions. *See Lujan v. Defenders of Wildlife*. CPS has failed to demonstrate that the concerns its members raise are fairly traceable to Highpeak's discharge and therefore does not have standing.

The plaintiffs claim that their concerns arise from the negligible increase in iron, manganese, and TSS in the Crystal Stream compared to Cloudy Lake. The disparity between the lake and the stream is consistent with natural occurring processes such as erosion and sedimentation and cannot be directly attributable to Highpeak's water transfers. When the alleged harm is attributable to natural processes, rather than a defendant's conduct, the connection is merely speculative and insufficient to satisfy causation. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42–43 (1976).

II. CSP failed to timely file the challenge to the water transfers rule because the statute of limitations expired before CSP was formed.

The APA's six-year statute of limitations begins to run "after the right of action first accrues." 28 U.S.C. § 2401(a). The right to challenge the WTR accrued when it was promulgated in 2008, as parties affected by the rule were immediately able to bring suit, but failed to timely do so. CSP, formed in 2023, cannot evade this deadline simply by asserting that its corporate existence began after the limitations period expired under a *Corner Post* analysis, allowing the date of right of first action to accrue 15 years later.

A. The formation of an entity by individuals who have claimed injury does not create a loophole under Corner Post to bypass the APA statute of limitations.

The new statute of limitations granted to the for-profit business in *Corner Post* is unlike the current case. In *Corner Post*, the injury occurs to the organization, not its personal members, making it impossible for the members to have an injury and therefore standing before the creation of their business. Dissimilarly, CSP itself is not injured in the organizational sense, but in representation of its members. The injured members could have sought relief within the six-year period after 2008, dictated by 28 U.S.C. § 2401(a), since they were aware of Highpeak's operations and alleged impacts of the WTR, eliminating the ability to use *Corner Post*'s flexibility. The statute and case law do not allow plaintiffs whose claims have expired to organize as an entity and circumvent set limitations and proceed with litigation. *See* 28 U.S.C. § 2401(a); *see also Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S. Ct. 2440 (2024); *see also Califano v. Sanders*, 430 U.S. 99, 108 (1977).

B. BCPS was formed for the purpose of litigating an expired claim, precluding its ability to bring a timely challenge to the WTR.

Permitting organizations formed for the purpose of pursuing litigation and challenging agency actions beyond the temporal limitation undermines protections over finality in administrative decisions. *See Corner Post, Inc. v. Board of Governors of Federal Reserve System* 144 S. Ct. 2440 (2024). CSP fails to bring a new claim during the present case, but instead attempts to revive a time-barred injury through a new format disallowed by the courts. Statutory limitations must exist to prevent perpetual challenges to agency decisions, and repackaging expired claims contravenes this idea.

III. The Water Transfers Rule is a valid regulation promulgated pursuant to the Clean Water Act

The WTR represents a reasonable and lawful exercise of the EPA's authority under the CWA. 40 C.F.R. § 122.3(i). As a regulatory framework designed to address the unique complexities of water transfers without compromising environmental protections, the WTR has been consistently upheld by federal courts, including the Second and Eleventh Circuits. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Environmental Protection Agency*, 846 F.3d 492 (2nd Cir. 2017) [hereinafter Catskill III]; *Friends of the Everglades v. South Florida Water Management Distric*t, 570 F.3d 1210 (11th Cir. 2009) [hereinafter *Friends I*]. These precedents, established under *Chevron* deference, remain binding under the doctrine of *stare decisis*, which mandates adherence to settled legal interpretations unless a compelling "special justification" exists for overturning them. *Loper Bright*, 144 S. Ct. at 2247. Even absent *Chevron*, the WTR is entitled to deference under the *Skidmore* standard due to the EPA's thorough reasoning, policy expertise, and consistent defense of the Rule's application. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

A. The Doctrine of *Stare Decisis* compels adherence to precedent holding the WTR as a valid interpretation of the CWA

Stare decisis is a foundational principle in the American legal system that "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The Supreme Court has determined that the doctrine carries such "persuasive force" that a "special justification" is required to diverge from the doctrine and the precedent under its protection. Id. at 842 (Souter, J., concurring); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The Supreme Court has even admitted that "*stare decisis* carries enhanced force when a decision . . . interprets a statute." *Kimble v. Marvel Entertainment,*

LLC, 576 U.S. 446, 456 (2015). Over time, the Supreme Court has used several factors in determining whether to follow the doctrine. These factors are "the quality of the precedent's reasoning, the precedent's consistency, and coherence with previous or subsequent decisions, changed law since the prior decision, changed facts since the prior decision, the workability of the precedent, the reliance interests of those who have relied on the precedent, and the age of the precedent." *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring). However, depending on the facts involved, some factors may have more weight than others. *See Janus v. Am. Fed'n of State, Cnty., and Mun. Emp.*, 585 U.S. 878, 917 (2018).

The main factor supporting the decision of the Second and Eleventh circuits is reliance interest. This refers to the vested interest that individuals, businesses, or society at large have in a legal principle or precedent remaining stable over time. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992). When people or entities have structured their actions, contracts, or business practices around an existing legal rule or decision, they have a reliance interest in that rule not changing unexpectedly. *Id.* The Supreme Court considers whether individuals or institutions have relied on the precedent and whether overturning it would create significant disruption or injustice. *Id.* Here, thousands of water transfers in the U.S. rely on the WTR. 40 C.F.R. § 122 (2008). These water transfers can provide irrigation water for farms, drinking water to millions, and can span dozens of miles. *Id*. These water transfers rely on the WTR to provide efficient planning and necessary benefits throughout society and therefore the doctrine of *stare decisis* should be invoked to protect "the interests of those who have taken action in reliance on a past decision." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263 (2022).

The quality of the reasoning within the Second and Eleventh Circuits supports the invocation of *stare decisis*. In *Catskill III*, the Second Circuit determined the EPA's rationale for the WTR based in the CWA's statutory language, broader scheme, legislative history, and the

EPA's longstanding position that water transfers are not subject to NPDES permitting was sufficient. 846 F.3d at 528. The Court was also strong in its reasoning that an NPDES permitting scheme for water transfers is likely to be burdensome and costly for permittees and may disrupt existing water transfer systems. *Id.* In *Friends I*, the Eleventh Circuit found support in its reasoning through statutory language as well as a broader statutory scheme. 570 F.3d at 1217-28. In *Northwest Environmental Defense Center v. Brown*, the Ninth Circuit used the legislative history of the CWA to conclude that only Congress had the ability create exemptions to the Act's definition of "point source." 640 F.3d 1063, at 1072-73 (9th Cir. 2011). The court used this finding to strike down the Silvicultural Rule that created a categorical exemption for point source discharges based on the EPA's interpretation of the CWA. *Id.* at 1078-80. In *ONRC Action v. U.S. Bureau of Reclamation*, the Court upheld the WTR stating '[c]onversely [to the Silvicultural Rule], the [WTR] seeks to define the point at which the addition of a pollutant first occurs, and to apply NPDES permitting requirements in a manner consistent with the [CWA's] treatment of point and non-point source pollution. Civ. No. 97–3090–CL., 2012 WL 3526833, at *6 (D. Or. Jan. 17, 2012).

Supreme Court precedent suggests another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable, whether it can be understood and applied in a consistent and predictable manner. *Dobbs*, 597 U.S. at 280-81. Here, there is no issue with workability as no water transfers are subject to PNES permitting requirements under the current WTR. 7 C.F.R. § 122. Invalidating the WTR will create workability problems as "it could cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States, and that obtaining an NPDES permit and complying with its conditions could cost a single water provider hundreds of millions of dollars." *Catskill III*, 846 F.3d at 528.

Other than the removal of *Chevron*, there has been no substantial change in law that affects the validity of the WTR. The Supreme Court specified in *Loper Bright* that it did not "call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful[.]" 144 S.Ct. at 2247. The Court in *Janus* overturned *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had allowed public-sector unions to collect fees from non-members because *Abood* conflicted with later-developed First Amendment case law and could no longer align with current understanding. 585 U.S. 878. In *Janus*, the "special justification" was the inconsistency with evolving First Amendment doctrine. *Id.* In the landmark case *Brown v. Board of Education,* the Supreme Court justified overturning the "separate but equal" doctrine that allowed racial segregation in public facilities by noting that social science and legal understanding had evolved, rendering segregation inherently unequal. 347 U.S, 483 (1954). In the case at hand, there has been no change to current law that would make the WTR invalid.

In conclusion, binding precedent from the Second and Eleventh Circuits confirms the WTR's validity and underscores its workability, cost-efficiency, and alignment with reliance interests. *Catskill III*, 846 F.3d 492; *Friends I*, 570 F.3d 1210. As mentioned above, the doctrine of *stare decisis* does not support overturning established precedent without compelling justification. *Rumsey*, 467 U.S. at 212. No such justification exists here. Instead, invalidating the WTR would impose significant financial burdens and operational challenges, disrupting water management systems that provide an essential service to society. Consequently, the WTR remains a vital regulatory framework, deserving continued adherence under the doctrine of *stare decisis*.

B. Regardless of the Doctrine of *Stare Decisis*, the WTR should be upheld under Skidmore Deference

Generally, courts must give "great deference to the interpretation given the statute by the officers or agency charged with its administration." *EPA v. National Crushed Stone Association*, 449 U.S. 64, 83, 101 (1980). The decision in *Loper Bright* overturned *Chevron* deference and reinstated the less deferential standard articulated in *Skidmore*. 144 S.Ct. at 2244. In *Skidmore*, the Supreme Court held that an agency's interpretation of ambiguous statutory language is entitled to respect based 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. Courts have recognized that agency "interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. Under this standard, while the agency's interpretation does not have controlling weight, it warrants significant deference if the agency has provided a thorough, reasoned, and consistent approach to interpreting the statute.

First, the EPA's rulemaking process reflected significant thoroughness, taking "into account the statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position that water transfers are not subject to NPDES permitting, congressional concerns that the statute not unnecessarily burden water quantity management activities, and the importance of water transfers to U.S. infrastructure." *Catskill III*, 846 F.3d at 524. The EPA goes through its authority to prescribe regulations as are necessary to administer the CWA, the statutory language within the act that supports the agency's interpretation, and the the legislative history that points to congressional intent to not subject water transfers to the NPDES program. *See* NPDES Water Transfers Rule, 73 Fed. Reg. at 33,700-04. Next, the EPA's rulemaking record includes comprehensive studies, analyses, and responses to public comments,

ensuring that it adequately assessed the implications of the WTR for water quality and compliance with the CWA. *Id.* at 33,697-708. Finally, the agency detailed its obligations under various statutes and executive orders. *Id.* at 33,706-09. This attention to detail demonstrates the thoroughness of the agency's consideration, meeting the Skidmore standard.

Second, EPA's reasoning in support of the WTR is both valid and grounded in its mastery of the CWA. The agency starts by identifying the ambiguity in whether a water transfer constitutes an "addition of any pollutant to the waters of the United States." and the circuit split in the interpretation of the term "addition". *Id.* At 33,700; 33 U.S.C. §§ 1362(7)-(12). The EPA then reason that because a water transfer only connects waters of the United States, then no pollutant could be added unless from "the outside world". NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701. This determination, combined with "Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation[,]" led to an interpretation that "addition" does not include "the mere transfer of navigable waters." *Id.* At 33,702. This reflects the reasoning behind the EPA's long-standing unitary waters theory "all bodies of water which fall within the CWA's definition of "navigable waters" as "waters of the United States" are inseparable parts of a single whole. From this premise, the theory derives the rule that a pollutant enters the "waters of the United States" only once, at which point the pollutant, like the body of water it is discharged into, becomes part of the single whole." *ONRC Action*, 2012 WL 3526833, at *6. This reading of the CWA statutory language and structure led the EPA to determine water transfers are not subject to the NPDES program. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,702.

Third, the WTR has been consistently upheld in court before and since its codification, providing stability and continuity to the regulatory framework. Before the WTR's codification, the court in *National Wildlife Federation v. Gorsuch* upheld the EPA's interpretation that a pollutant is added "only if the point source itself physically introduces a pollutant into water

from the outside world." 693 F.2d 156, 175 (1982). The court in that case, found that no change in water quality has occurred when "the polluted water later passes through [a] dam from one body of navigable water (the reservoir) to another (the downstream river)." *Id.* The EPA's "interpretation does in fact merit full deference on the basis of agency expertise." *Id.* Even after the WTR was issued, courts continued to uphold the EPA's interpretation of the CWA that only water transfers that refrain from adding pollutants from the "outside world" are not subject to CWA permitting. *See Friends I*, 570 F.3d at 1228. In *Catskill III*, the Second Circuit found "nothing illogical in the EPA's rationale" and was "not adopted in an "arbitrary" or "capricious" manner." 846 F.3d at 524-25. This consistency prior to and after the WTRS promulgation strengthens the persuasive weight of the agency's interpretation under *Skidmore*, as it signals the agency's stable and well-supported approach to water transfer regulation.

The EPA's Water Transfers Rule exemplifies the agency's thorough and reasoned interpretation of the Clean Water Act, as required under Skidmore. The rule reflects a comprehensive rulemaking process that accounts for statutory language, legislative intent, and practical considerations of water resource management. The EPA's rationale, grounded in a nuanced understanding of the CWA, aligns with judicial recognition of its long-standing unitary waters theory. Moreover, the consistent judicial upholding of the rule both before and after its promulgation underscores its validity and stability. Together, these factors affirm the persuasive weight of the EPA's interpretation and its alignment with the principles of administrative law under the *Skidmore* framework. Accordingly, even under the less deferential *Skidmore* standard, EPA's interpretation of the Clean Water Act in promulgating the Water Transfer Rule should be upheld.

IV. The District Court did not err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act.

Courts have long afforded administrative agencies a great deal of respect for their actions and their interpretation thereof, as agency "interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140; *see also Loper Bright*, 144 S.Ct. at 2257-60; *Kisor v. Wilkie*, 588 U.S. 558, 569 (2019). This sentiment echoes in the later assertion that the "administrative interpretation" of an agency's own regulations is "the ultimate criterion" for resolving ambiguities in the regulation, so long as the interpretation is not "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). It is under this standard that the EPA is owed deference for its interpretation of the WTR, 40 CFR § 122.3(i), according to which HighPeak must obtain an NPDES permit for its water transfer.

Of course, "[i]f uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 588 U.S. at 574-75*; accord Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 398-99 (2008). Deference is appropriate where there is ambiguity in the regulation (and this ambiguity "come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools") and "the character and context of the agency interpretation entitles it to controlling weight," *Kisor*, 588 U.S. at 573-76, — and the interpretation is not "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" but "reflect[s] the agency's fair and considered judgement on the matter in question," *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). This case meets this standard.

Even if deference is inappropriate, the court may still be persuaded by EPA's interpretation. This is because agency "interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance;" these may still have a "power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. This is begotten by the "thoroughness evident in [the agency's] consideration, the validity of [the agency's] reasoning, [the interpretation's] consistency with earlier and later pronouncements," and other factors. *Id*. EPA's interpretation of 40 CFR § 122.3(i) meets this standard too.

40 CFR § 122.3(i) makes an exception to NPDES permitting requirements for water transfers that do not add pollutants to waters of the United States. *See also* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705. "Pollutant" is defined as a fulsome list of materials, all chemical, biological, and sedimentary. 33 U.S.C. § 1362(6); *see also* 40 CFR § 122.2. As shown by the record, HighPeak's water transfer added pollutants to Crystal Stream. Record at 5. Thereupon, HighPeak must file for an NPDES permit.

As a threshold matter, it is necessary to toss aside any assertion by HighPeak that the EPA's reading of the WTR violates *Loper Bright*. This merits only the most pro forma and bare statements. Loper Bright is a case about the agency interpretation of their own enabling statutes, their ability to interpret them, what deference agencies are due in such matters, and where agencies are given deference. *See, e.g*. *Loper Bright*, 144 S. Ct. At 2273. The WTR is a regulation duly-promulgated by EPA. See NPDES Water Transfers Rule, 73 Fed. Reg, 33,697 (June 13, 2008) (codified at 40 CFR § 122.3(i)). It is self-evidently inappropriate to apply *Loper Bright* here — *accord Auer*, 519 U.S. at 462 (stating that applying a rule concerning agency interpretation of statutes is inappropriate to apply to agency interpretations of their own regulations) — not to mention that we have already demonstrated that the WTR is a valid

exercise of EPA's authority in the foregoing pages. Any assertion by Highpeak to the contrary is utterly without merit. With all of that in mind, let us continue.

A. The EPA, as the agency that promulgated the WTR, is entitled to deference in its interpretation of the WTR

For the interpretation of an "administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Seminole Rock*, 325 U.S. at 413-14. Such "administrative interpretation" is "the ultimate criterion" for resolving this doubt, "which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id*., at 414; *see also Auer*, 519 U.S. at 461. This interpretation must not be "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" and must "reflect the agency's fair and considered judgement on the matter in question." *Auer*, 519 U.S. at 462 (quoting *Bowen*, 488 U.S. at 212); *accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007).

Nevertheless, "the possibility of deference can arise only if a regulation is genuinely ambiguous," and must remain so "even after a court has resorted to all the standard tools of interpretation." *Kisor*, 588 U.S. at 573. After exhausting its "legal toolkit" and finding no resolution to the nettlesome and besetting ambiguity, then the court must determine if the ambiguity "come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools," and "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 588 U.S. at 574-76.

Deference to an agency (here the Veteran's Administration) was inappropriate where it was unclear that the regulation was truly ambiguous and, assuming there was genuine ambiguity, where it was unclear that it was of the kind that "that Congress would want to receive deference." *Id.*, at 589-90. For the latter, Justice Kagan made especial note of the fact that the Veteran's Administration's Board has a hundred members who "act individually" and whose determinations

lack value as precedent. *Id.*, at 590. Contrariwise, where, among other things, the agency's "course of action" bespeaks the fact that the agency's view of its own regulations (here the Department of Labor's "third party" regulation and its general regulations concerning exemption from the Fair Labor Standards Act), "reflects its considered views," deference has been granted. *Long Island*, 551 U.S. at 169-171.

The foregoing cases serve one purpose: to make it clear that EPA is owed deference as to the contents of the WTR. EPA promulgated the WTR as a result of a notice-and-comment rulemaking and with fulsome discussion thereof in the pertinent Federal Register notice. *see* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,697-708. This is certainly EPA's "fair and considered judgement on the matter in question," and not some *ex post facto* justification brought to bear to shield the agency. *Auer*, 519 U.S. at 462. Moreover, EPA's regulation is ambiguous. 40 CFR § 122.3(i) indicates that the NPDES permit exclusion for water transfers does not apply to instances where pollutants are added during the water transfers. 40 CFR § 122.2 provides a definition for "pollutant". The NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705, even provides further information on pollutants that may enter waters of the United States during a water transfer. It does not indicate how these pollutants may enter, what type of water transfer systems might be more prone to effectuating the intromission of pollutants into waters of the United States, etc. These are all ambiguities whose interpretations by EPA are clearly reasonable ("within the zone of ambiguity") and the "character and context" of EPA's interpretation entitle "it to controlling weight." *Kisor*, 588 U.S. at 576. (Again, this interpretation derives from a notice and comment rulemaking. *See* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,697-708.) Moreover, EPA's "course of action" here is engendered by its "considered view", *Long Island*, 551 U.S. at 171, of 40 CFR § 122.3(i); namely that "where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required," NPDES Water

Transfer Rule, 73 Fed. Reg. at 33,705. All of these factors contribute to EPA's assertion that they are owed *Auer* deference here.

B. Even if EPA was not due deference, its interpretation of the WTR is still due respect under *Skidmore*.

Where deference to the agency's interpretation of the regulation is deemed to be inappropriate, courts may still deem such an interpretation to be persuasive. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012); *Kisor.*, 588 U.S. at 573. This is because agency "interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. "The weight of such a judgment," which must be evaluated on a case-by-case basis, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control." *Id.; accord Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382-88 (2003); *Holowecki*, 552 U.S. at 399-402. As a general rule, "where the regulatory scheme is highly detailed," and the agency "can bring the benefit of specialized experience to bear on the subtle question in [the] case," a determination that an agency interpretation or opinion merits *Skidmore* respect "may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

In *Christopher*, the interpretation of the Department of Labor regulations at issue —ones defining "outside salesman" under the Fair Labor Standards Act, 567 U.S. at 148-49 — were found to be "quite unpersuasive", *id*. at 159. These regulations had been interpreted in such a way so as to remove pharmaceutical detailers from the "outside salesman" exemption under the Fair Labor Standards Act's overtime requirements and had failed to achieve *Auer* deference. *Id*. at 152-53,

155-59. Thus, the Court reviewed the Department of Labor's interpretation and found it wanting; this was because it "plainly lack[ed] the hallmarks of thorough consideration" — by sheer dint of the fact that it arose in a series of *amicus* briefs "with no opportunity for public comment" and as a response to the realization that a previous "interpretation that initially emerged from the Department's internal decisionmaking process" was "untenable" in the instant litigation — and because it was "flatly inconsistent" with the Fair Labor Standards Act. *Id*. at 159-60. A further attempt to pass *Skidmore*'s hurdles with the interpretation of a different regulation failed as that regulation relied on the regulation whose interpretation by the Department of Labor was found wanting; whereupon the Department of Labor's interpretations *in toto* were deemed "wholly unpersuasive." *Id*. at 160-61.

Contrariwise, in *Keffeler*, the Commissioner's interpretation of the regulation at issue (which enabled the state to reimburse itself for unpaid foster care costs using Social Security payments) was upheld based on the canons of construction and other guidance and material issued by the Commissioner. 537 U.S. at 378, 382-88. Likewise, in *Holowecki*, the interpretation was upheld because it was a position consistently held by the agency and was not made in order to support the agency in the pending litigation, but in response to a need on the agency's part. 552 U.S. at 399-402. Furthermore, in *Mead*, the Supreme Court noted that the agency interpretation (which concerned what import duty should be imposed on certain items) could be upheld under *Skidmore* inasmuch as "the regulatory scheme is highly detailed" and the agency could "bring the benefit of specialized experience to bear on the subtle questions" of the case. 533 U.S. at 224-25, 235.

EPA's position on 40 CFR § 122.3(i) is more like the agency positions in *Keffeler*, *Holowecki*, and *Mead* than the agency position in *Christopher*. Unlike *Christopher*, EPA's position was *not* formulated in a series of *amicus* briefs "with no opportunity for public comment", 567 U.S. at 159, but was put forward as part of a notice and comment rulemaking, with EPA's position

that an NPDES permit is needed where pollutants are added during a water transfer included in a reply to a comment, NPDES Water Transfer Rule, 73 Fed. Reg. at 33,703-706. Further, this position was also not promulgated because EPA's position in this case was "untenable", *Christopher*, 567 U.S. at 159, but was put forward in the Federal Register notice for the final version of 40 CFR § 122.3(i), *see* NPDES Water Transfer Rule, 73 Fed. Reg. At 33,705. This notice was issued, of course, *long* before this litigation began, and it was merely "codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of a water of the United States into another water of the United States." NPDES Water Transfer Rule, 73 Fed. Reg. At 33,706, 33,707. This case is thus more like *Holowecki*. EPA has also taken great pains to demonstrate that 40 CFR § 122.3(i) is not "flatly inconsistent" with the Clean Water Act. *Christopher*, 567 U.S. at 159; *see* NPDES Water Transfer Rule, 73 Fed. Reg. At 33,700-703. Moreover, the fulsome discussion of the legal basis and background for the regulation and the clearly-deliberated and thorough answers to comments shows that this is an agency, with a "highly detailed" "regulatory scheme", bringing "the benefit of specialized experience to bear on the subtle questions," *Mead*, 533 U.S. at 235, on the determination that HighPeak must file a NPDES permit. It is to this question that we now turn.

C. HighPeak's water transfer adds pollutants to waters of the United States, and is therefore outside of the scope of WTR, and HighPeak thus needs to file an NPDES permit.

40 CFR § 122.3(i) makes an exception to NPDES permitting requirements for water transfers that do not add pollutants to waters of the United States. *See also* NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705. A water transfer is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 CFR § 122.3(i); *see also* 40 CFR § 120.2 (defining waters of the United States as, among other things, waters that are "[c]urrently used, or were used in the

past, or may be susceptible to use in interstate or foreign commerce"); *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (delimiting the extent to which wetlands are "waters of the United States"). In other words, "[a] water transfer is an engineered activity that diverts a water of the U.S. to a second water of the U.S." NPDES Water Transfer Rule, 73 Fed. Reg. At 33,704. The phrase "addition of a pollutant" also shows up in the definition of "discharge of a pollutant", more or less defined as the addition of a pollutant from any point source to navigable waters. 33 U.S.C. § 1362(12); *see also* 40 CFR § 122.2. "Pollutant" is defined as a fulsome list of materials, all chemical, biological, and sedimentary. 33 U.S.C. § 1362(6); *see also* 40 CFR § 122. A "point source" is "any discernible, confined and discrete conveyance" wherefrom "pollutants are or may be discharged," exclusive of "agricultural stormwater discharges and return flows from irrigated agriculture." 33 USC § 1362(14); *see also* 40 CFR § 122.2. A point source which does not itself "generate pollutants" still falls under the purview of NPDES requirements. *S. Fla. Water Mgmt. Dist. v. Miccosuke Tribe of Indians*, 541 U.S. 95, 105 (2004).

Water transfer facilities must be "operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred." NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705. This is because the introduction "pollutants to water passing through the structure into the receiving water" requires an NPDES permit. *Id*. In such instances, a permit is only needed for the pollutants being added. *Id*. "Naturally occuring changes to the water" do not require a permit. *Id*. Pollutants entering the water as a result of the water passing through the structure and intromitting pesticide-laden sediment counts as introducing a pollutant. *NA KIA'I KAI v. Nakatani*, 401 F. Supp. 3d 1097, 1108-09 (D. Ha. 2019).

It is clear from the facts that HighPeak's tunnel is a point source. Record at 4; s*ee* 33 USC § 1362(14); *see also* 40 CFR § 122.2. It is also an "engineered activity that diverts a water of the U.S. to a second water of the U.S." NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705. (The Record, at 4-5, indicates that both Cloudy Lake and Crystal Stream are "waters of the

United States"). This means that any pollutant that is discharged thereby will negate NPDES permit exception and will constitute a discharge from a point source, even if it does not "generate pollutants". 40 CFR § 122.3(i); NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705; 33 U.S.C. § 1362(12); 40 CFR § 122; *Miccosuke*, 541 U.S. at 105. There was definitely an addition of pollutants to Crystal Stream from Cloudy Lake, but the fact that Cloudy Lake is replete naturally with the pollutants in question might seem to defeat a claim that HighPeak must file a NPDES permit — Record at 5; NPDES Water Transfer Rule, 73 Fed. Reg. at 33,705 — inasmuch as the pollutants moved into Crystal Stream are "natural". The fact that the concentration of the pollutants in Crystal Stream was *higher* than those in Cloudy Lake on the same day clearly makes this moot. Record at 5. The only way this could have happened is if the pollutants leeched into the water as it was being transferred, akin to *Nakatani*, 401 F. Supp. 3d at 1108-09. Thereupon, HighPeak's tunnel (a *bona fide* and *ipso facto* water transfer) introduced pollutants into Crystal Stream from Cloudy Lake, requiring HighPeak to get an NPDES permit.

CONCLUSION

For the foregoing reasons, the holding of the District Court should be affirmed with respect to the WTR's validity and Highpeak's discharge and remanded with respect to CSP's standing and untimely filing.