TEAM 47

C.A. No. 24-001109
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Defendant-Appellee-Cross-Appellant,*

-and-

HIGHPEAK TUBES, INC.,
*Defendant-Appellee-Cross-Appellant*

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

# Brief of Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules**



**Regulations**



**Constitutional Provisions**

## STATEMENT OF JURISDICTION

The United States District Court for the District of New Union granted the United States Environmental Protection Agency's ("EPA") and Highpeak Tubes, Inc.'s ("Highpeak") motions to dismiss Crystal Stream Preservationists, Inc.'s ("CSP") challenge to the Water Transfers Rule in case No. 24-CV-5678 and denied Highpeak's motion to dismiss CSP's Clean Water Act ("CWA" or "the Act") citizen suit on August 1, 2024. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1367 (supplemental).

The EPA, Highpeak, and CSP all filed motions for leave to file interlocutory appeals pursuant to FED. R. APP. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292, which provides courts of appeals jurisdiction over interlocutory orders of the district courts of the United States. Motions to file an interlocutory appeal may be certified by the district court and may be granted by the appellate if it is a novel legal question or if it will have notable consequences. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009). The district court certified and this Court granted the motions for interlocutory appeals due to the novel and complex questions of law.

## STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding 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 courts 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. Clean Water Act

The purpose of the CWA is to outline provisions that will achieve the restoration and maintenance of the Nation's Waters, and the administrator of the EPA is deemed to be the administrator of the CWA unless there is an express provision that says otherwise. 33 U.S.C.S. § 1251(a); 33 U.S.C.S. § 1251(d). Most notably, the Act attempts to prevent pollution in navigable waters. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013). One of the methods to attain the CWA's goal is the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C.S. § 1342. The NPDES requires corporations, organizations, or individuals to obtain a permit before releasing pollutants from a point source—"any discernible, confined, and discrete conveyance"—into navigable waters. *Id.* A state may apply to the administrator of the program to establish its own permit program so long as the state can prove that through state laws or interstate compacts, they have the authority to carry out the described program. 33 U.S.C.S. § 1342(b). In the absence of such a rule, the EPA shall issue NPDES permits.

Under the Water Transfers Rule ("WTR"), certain discharges are exempt from NPDES permitting. 40 C.F.R. § 122.3 (2013). Specifically, the WTR excludes water transfers, which the EPA further defined water transfers as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (2013). Furthermore, if the water from a water transfer does happen to already include pollutants, this does not constitute an "addition." *Catskill Mts.*

*Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 505 (2d Cir. 2017). In recent decisions, courts have had to apply the *Chevron* Deference to agency decisions to evaluate the EPA's interpretation of "addition." *Id.*

## II. *Chevron* Deference

Prior to 1984, when the Supreme Court decided *Chevron*, courts often evaluated agency deference based on if the agency was competent, familiar with the legislation, and if the interpretation was reasonable. *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 84 (D.C. Cir. 1995). The Supreme Court held that agency decisions, although not binding, provided a good source of experience for courts to draw reasoning from when making decisions regarding agency interpretations. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) The Court further specified that the factors that they take into account when granting agency deference are: (1) the breadth of consideration evident, (2) the soundness of its reasoning, (3) consistency with other declarations, (4) and other factors that add to its persuasive capacity, even though it lacks the power to control. *Id.* Although the Court laid out these factors for agency deference, they still reserved the right to substitute their own judgment for that of the agency. *Barlow v. Collins*, 397 U.S. 159, 166 (1970). However, this changed in 1984, when the Court decided that unless there was an explicit term in a statute, the reasonable agency interpretation must be given deference over statutes that agency is responsible for overseeing. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). This is based on the implication that if Congress left a gap in the statute, it requires the agency to formulate the policy to fill the gap. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Ergo, a court must accept a reasonable interpretation made by the administrator of an agency and may not substitute its own interpretation. *Chevron*, 467 U.S. at 844.

This standard of deference shifted again in 2024, when the Supreme Court held that courts are not mandated to grant agency deference solely because a statute is ambiguous. This decision reinstated court interpretation to determine whether an agency acted within its constitutional limitations of statutory authority. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The Court, however, explicitly did not overturn every decision based on the *Chevron* deference. Instead, the Court reiterated that mere reliance on *Chevron* is "not enough to justify overruling a statutory precedent." *Id.*

## III. Highpeak's Installation of the Pipe

In the past thirty-two years, Crystal Stream has been a location for recreation for tourists and residents alike. Residents of Rexville that live directly along the stream purportedly enjoy recreating near the stream. A tubing company, Highpeak, began operating a recreational tubing operation in Rexville in 1992. Highpeak utilizes Crystal Stream for the tubing adventures of its customers. Highpeak obtained approval and built a tunnel between Crystal Stream and Cloudy Lake in that same year, in order to make these adventures more exciting, with higher water velocity and volume. The employees at Highpeak can release water from Cloudy Lake, but only when the State determines that there is enough water in Cloudy Lake. Highpeak has never applied for or held an NPDES permit for any discharge from Cloudy Lake to Crystal Stream. Additionally, Rexville does not have a permitting program. Therefore, the EPA issues CWA permits to the citizens under the NPDES program.

## IV. The Formation of Crystal Stream Preservationists

A mere six months after the Supreme Court's decision in *Corner Post* and *Loper Bright*, citizens of Rexville formed a not-for-profit organization, CSP, on December 1, 2023. The president, vice-president, secretary, and a majority of the members of CSP have all lived in

Rexville for more than fifteen years. The one member who just moved to the area, Jonathan Silver was subsequently added as a member on December 3, 2023, two days after the creation of CSP. Additionally, the two members who live along Crystal Stream, live about one mile south of the end of Highpeak's tube run and have lived there since at least 2008. According to the declaration of CSP's secretary, Cynthia Jones, the express purpose of CSP is to protect the stream.

## V. Current Litigation

Although the founding members of CSP have lived in the area for many years, immediately after the formation of CSP, on December 15, 2023, CSP filed a lawsuit against Highpeak and EPA. CSP alleged in this suit that the WTR was invalidly promulgated and therefore, Highpeak's discharge is not exempt from permitting requirements. CSP further alleges that Highpeak's discharge introduces pollutants and therefore takes this discharge outside of the scope of the WTR, should it be validly promulgated. CSP followed the procedures pursuant to 33 U.S.C.S §1365(b)(1)(A) by sending a Notice of Intent to Sue ("NOIS") to Highpeak and sending copies of the notice to the New Union Department of Environmental Quality and to EPA. 33 U.S.C.S. § 1365(b)(1)(A). Highpeak responded that it need not address the NOIS on the merits because they were not required to have an NPDES permit. Highpeak claimed that the addition of pollutants was "natural" and was within the scope of the WTR. Sixty days after sending the NOIS, CSP filed its Complaint on February 15, 2024. Both Highpeak and EPA moved to dismiss on the grounds that CSP lacked standing and timeliness to challenge the WTR. Furthermore, Highpeak and EPA insisted that the WTR was validly promulgated under the CWA. Highpeak additionally moved to dismiss due to CSP being invented for the purpose of manufacturing a suit

but suffering no actual injury. EPA joined CSP in stating that Highpeak's discharge needed a permit because the discharge introduced pollutants.

In April 2024, CSP urged the district court to stay the motions until the Supreme Court handed down decisions in *Loper Bright* and *Corner Post*. The district court complied with this request and subsequently issued a decision on August 1, 2024. The district court denied Highpeak and EPA's motion to dismiss because CSP did have standing to challenge the NPDES and this challenge was timely filed. The district court also held that the WTR was not arbitrary, capricious, or contrary to law. Lastly, the district court held that Highpeak's introduction of pollutants to Crystal Stream takes this discharge out of the scope of the WTR and therefore, CSP can bring a citizen suit against Highpeak. All parties filed motions to bring interlocutory appeals. This Court granted the motions to hear the interlocutory appeals.

## SUMMARY OF THE ARGUMENT

First, the district court erred in holding that CSP had standing to challenge the WTR or bring a citizen suit against Highpeak. The district court failed to evaluate whether the nexus of the creation of CSP and the inception of this lawsuit required stricter scrutiny of CSP's standing. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 800 (W.D. Pa. 2016). The plaintiffs may meet the requirements under APA because their injury falls within a zone of interest that the statute aims to protect, and this injury is caused by an agency action. *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532, 536 (6th Cir. 2005). Where the district court erred, however, is evaluating CSP's Article III standing. Under Article III of the Constitution, a plaintiff must be able to show injury in fact. U.S. CONST. art. III, § 2, cl. 1. For an organization to show injury in fact the defendant's conduct must directly offend the organization's mission or purpose. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 428 (1963). CSP's only

notable mission is to protect the stream for future generations, but it has been held that supposed future injuries do not grant a plaintiff standing. *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Since the organization cannot show that the injuries are concrete and direct, CSP cannot claim organizational standing.

The district court further erred in holding that the members of CSP had sufficiently established injury in fact to establish representational standing. CSP cannot claim associational standing because it fails to allege the injury in fact of its members. In order to show representational standing an organization must prove that its members would otherwise be able to establish Article III standing in their own right. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 176 (2000). The two members who testified did not claim that they were unable to participate in any activities they previously enjoyed. The declarations of both members only indicate the actions that they might have taken in the future but for the pollution. However, the Supreme Court held that hypothetical future injury is not sufficient to establish standing. *Id.* at 183. Furthermore, the complaint of one member that she suffered aesthetic harm is also insufficient to establish standing. The Supreme Court has established that in conjunction with other factors, aesthetic harm may help to establish standing, but no court has held that aesthetic harm on its own is enough to satisfy Article III standing. *Id.*

The district court's holding that CSP timely filed its challenge to the WTR was also incorrect. CSP's challenge to the WTR is untimely because the right of action for facial challenges accrues when the regulation is promulgated, not when the plaintiff is injured. The APA prescribes a six-year statute of limitations under 28 U.S.C.S. § 2401, and precedent establishes that facial challenges must be brought within six years of a regulation's promulgation. 28 U.S.C.S.§ 2401. The district court's reliance on *Corner Post* is misplaced

because that decision is better suited for application to as-applied challenges and injuries specific to individual plaintiffs, not facial challenges. *Corner Post*, *Inc. v. Board of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2470 (2024) (Jackson, J., Dissenting). Courts have consistently distinguished between facial and as-applied challenges in determining when the statute of limitations begins to run.

Applying *Corner Post*'s reasoning to facial challenges would render the six-year limitations period meaningless, allowing challenges to be brought indefinitely. This contradicts Congress's intent to create finality in administrative actions, specifically regarding the CWA. Moreover, the CWA imposes specific, short limitations periods for certain agency actions, such as permitting decisions, underscoring the importance of timely challenges. The six-year limitation in the APA should be read in harmony with these provisions to ensure the stability of regulatory frameworks.

The WTR has been in effect since 2008, providing ample opportunity for challenges to be brought within the six-year limitations period. Allowing CSP's late challenge—based solely on its recent formation—would destabilize the regulatory framework and undermine the purpose of the CWA to maintain consistency and protect the nation's waters. CSP's facial challenge to the WTR is untimely, and the district court erred in holding otherwise. The statute of limitations for such challenges begins upon promulgation of the regulation, not upon the plaintiff's injury or formation.

Next, the district court correctly upheld the validity of the WTR as a lawful and reasonable exercise of the EPA authority under the CWA. The WTR reflects a policy choice designed to facilitate the transfer of water between "waters of the United States" without imposing unnecessary regulatory burdens, so long as the transfers do not add pollutants. This

interpretation addresses statutory ambiguities and adheres to the Act's primary goal of preventing pollutant discharges into navigable waters. Under the *Chevron* doctrine, courts defer to an agency's interpretation of ambiguous statutory language if it is reasonable and consistent with legislative intent. *Chevron*, 467 U.S. at 842-43. The statutory silence on water transfers as discharges requiring NPDES permits invites *Chevron* deference, and the WTR meets this standard by focusing on regulating pollutant additions rather than water conveyance itself.

CSP's challenge to the WTR rests on a flawed interpretation of the CWA and an overly restrictive reading of the Supreme Court's decision in *Loper Bright*. Although CSP argues that *Chevron* deference is no longer applicable, *Loper Bright* expressly declined to overturn cases relying on *Chevron* or disturb the principle of administrative deference where ambiguity exists. Moreover, longstanding judicial precedent, including *Catskill* and *Friends of the Everglades v. South Florida Water Management District*, supports EPA's interpretation of the CWA as embodied in the WTR. These cases affirm that the WTR reasonably balances the goals of protecting water quality while minimizing undue regulatory burdens. Thus, the WTR constitutes a valid regulation, and the district court properly dismissed CSP's claims to the contrary.

Finally, the district court correctly determined that Highpeak's water transfer activity does not fall within the protections of the WTR because pollutants were added to the water during the transfer process. While the WTR exempts water transfers from NPDES permitting requirements, this exemption applies only to transfers that do not introduce pollutants into the conveyed water. CSP presented evidence of increased concentrations of iron, manganese, and total suspended solids ("TSS") in the receiving waterbody, Crystal Stream, compared to the source waterbody, Cloudy Lake. These changes demonstrate that pollutants were added during

the transfer, taking the activity outside the scope of the WTR and making it subject to the CWA's permitting requirements.

Deference to EPA's interpretation of the WTR under *Auer v. Robbins* and *Bowles v. Seminole Rock* is appropriate, as the agency's reading aligns with the regulatory text and the CWA's statutory framework. The regulation explicitly limits the WTR's exemption to transfers that do not add pollutants or subject water to intervening industrial, municipal, or commercial uses. Here, the increased pollutant concentrations clearly constitute additions under the CWA's definition of a "discharge of a pollutant." Furthermore, even under the less deferential standard set forth in *Skidmore*, EPA's interpretation is persuasive due to its consistency, thoroughness, and alignment with statutory goals.

The district court's ruling is further supported by *National Wildlife Federation v. Gorsuch*, which clarifies that NPDES permitting is required where pollutants are added to navigable waters from a point source. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1995). CSP's evidence demonstrates that Highpeak's construction and maintenance of its transfer tunnel introduced contaminants, satisfying all elements of a CWA discharge: the presence of pollutants, their addition to navigable waters, and the involvement of a point source. Highpeak's argument that these pollutants are "natural" fails because the introduction resulted from the transfer process itself and is inconsistent with the CWA's mandate to prevent unpermitted pollutant discharges.

## STANDARD OF REVIEW

The standard of review for an interlocutory appeal on a motion to dismiss is de novo. *Abrantes v. United States*, 54 F.4th 1332, 1335 (Fed. Cir. 2022). When appellate courts consider motions to dismiss for questions of law, the usual standard is de novo. *Kendall v. Balcerzak*, 650

F.3d 515, 522 (4th Cir. 2011). An interlocutory appeal may concern a controlling question of law when there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C.S. § 1292(b). A controlling legal issue is one which could substantially affect the outcome of the case. *W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, (In re City of Memphis), 293 F.3d 345, 351 (6th Cir. 2002). Such as in this case, courts will traditionally find that a difference of opinion could arise when it is a novel or complex legal issue of first impression. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Therefore, since this case concerns a motion to dismiss for a controlling legal question, the standard of review will be de novo.

## ARGUMENT

### I. CSP does not have standing because it was formed for the purpose of litigation and failed to meet the requirements necessary to establish Article III standing.

The district court erroneously held that CSP had standing to challenge the NPDES WTR and to bring a suit against Highpeak for alleged violations of the CWA. Courts must approach standing with stricter scrutiny if a corporation is formed solely for the purpose of bringing a lawsuit. An organization must meet the requirements set out in Article III of the Constitution in order to have standing. A showing that the organization itself incurred an injury in fact can satisfy this, and if this cannot be shown, the organization may establish representational standing through its members.

#### A. The district court erred in neglecting to evaluate if CSP was formed for the sole purpose of bringing this lawsuit.

Although the lower court's decision held that the organization was formed legitimately, the court failed to evaluate the evidence that indicates that CSP was formed for the purpose of

bringing this lawsuit against Highpeak. A plaintiff cannot establish standing by claiming violation of their rights under a certain statute, when they manufacture these injuries through hopes of bringing such a lawsuit. *Stoops*, 197 F. Supp. 3d at 800.

The Western District Court of Pennsylvania held that a plaintiff lacked standing because she sought out the supposed "injury." *Id*. Although she claimed injury by the telemarketers' phone calls, the court found that she was not injured because she was buying the phones in the hopes that they would be telemarketers' calls, so that she could bring a lawsuit. *Id.* A woman was buying multiple cell phones, specifically for the purpose of being able to bring a multitude of lawsuits under the Telephone Consumer Protection Act (TCPA). She claimed that this was her "business" and brought suit when debt collectors and telemarketers called these cell phones. *Id.* When Congress enacted the TCPA, their intent was to protect customers from nuisance and since the plaintiff was purposefully trying to receive these calls for business purposes, her rights that the TCPA intended to protect were not violated. *Id.*

CSP was formed recently on December 1, 2023, although all of the founding members have lived in the vicinity of the stream for more than fifteen years. R. at 4. Mr. Silver joined the organization on December 3, 2023, two days after its founding. R. at 16. Since all of the founding members have lived in the area and some along the stream, it does create some doubt as to why this organization was formed only two weeks before sending a NOIS letter to Highpeak on December 15, 2023. R. at 4. Furthermore, the court conflates the finding of standing for environmental claims and the legitimacy of the creation of the organization. R. at 7. The court only evaluates the member's claims to establish that the organization was formed for legitimate purposes instead of evaluating factors it considered important, such as, "whether the entity engages in substantial or legitimate business activities apart from litigation." R. at 7. Unlike in

*Stoop*, where the court evaluated if the plaintiff created this claim for economic gain, there is nothing in the record to indicate what, if any, other business activities CSP conducts or if the members created this organization to bring this lawsuit. Therefore, the court erred in failing to evaluate if CSP was properly formed or if the serendipitous formation of CSP "warrants additional scrutiny in determining standing." R. at 7.

B. CSP does not meet the requirements to establish standing under Article III of the Constitution for representational or organizational standing.

The district court erred in holding that CSP has standing to bring this claim. Although CSP may be able to meet the requirements of the APA, CSP does not have standing under Article III of the Constitution. The APA has two requirements regarding the plaintiff's injury: (1) falls within a "zone of interest" that the statute aims to protect, and (2) this injury is caused by an "agency action." *Lueckel*, 417 F.3d at 536. In addition to the APA requirements, a plaintiff must also establish Article III standing. Article III requires a plaintiff to show that (1) they have suffered "injury in fact," not a hypothetical injury; (2) this injury is traceable to the defendant; and (3) that the relief sought by the plaintiff is within the district court's power to award and is substantially likely to redress their injuries. U.S. CONST. art. III, § 2, cl. 1; *Laidlaw*, 528 U.S. at 180-81; *Juliana*, 947 F.3d at 1168.

**i. CSP failed to establish the "injury in fact" requirements for representational standing.**

The district court erred in holding that CSP has standing through representational standing because the members of the organization do not have to have standing in their own right. An association may only bring suit when: (1) its members would otherwise establish Article III standing and be able to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit. *Laidlaw*, 528 U.S. at 180-81. The Supreme Court recently held that since certain members of the organization were prevented from participating in activities that they used to enjoy this was sufficient to establish standing. *Id.* at 183. A company was granted an NPDES permit to discharge water into a nearby river. *Id.* at 176. Certain members of the nonprofit organizations claimed that the pollution prevented them from participating in recreational activities around the river, including swimming and wading in the river. *Id.* at 182.

The secretary of CSP, Cynthia Jones, claimed that she was injured by the pollution of the stream because of the appearance of metals in the stream. In the Declaration of Mrs. Jones, she stated that she "regularly walked along the stream and enjoy its crystal clear color and purity." R. at 14. She also stated that although she would like to, she is afraid to walk in the stream due to the pollution. R. at 15. Unlike the plaintiffs in *Laidlaw*, who alleged prevention of not being able to continue to recreate in the stream, Mrs. Jones only alleges aesthetic harm, which is not enough to establish standing.

Similarly, Mr. Silver does not have standing to bring this claim because he has not been personally injured by the alleged pollution of crystal stream. In the declaration submitted by Mr. Silver, he stated that he lives half of a mile from the park through which the stream runs but does not allege that this stream runs through his property, or that any of the water he uses for personal use comes from the stream. Mr. Silver's fear of pollution prevents him from *potentially* recreating in the stream and allowing his dogs to drink from the stream when they go for a walk alongside the river. R. at 16. He never explicitly asserts that he allowed his dogs to drink from the stream prior to the pollution.

Therefore, unlike the plaintiffs in *Laidlaw*, where their actual activities were hindered by the pollution, neither Mr. Silver nor Mrs. Jones claim an injury from no longer being able to participate in activities. Unlike the plaintiffs in *Laidlaw*, Mr. Silver and Mrs. Jones claim that they *may* have participated in these activities, but have not yet done so in the entire time of living in this area. Similarly to the court's finding in *Clapper v. Amnesty Int'l USA*, the plaintiffs cannot manufacture a future hypothetical injury to establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). In conclusion, since neither Mrs. Jones nor Mr. Silver were able to prove injury in fact, it is unnecessary to evaluate the other two prongs of Article III standing. CSP cannot bring this suit because an organization's members must meet Article III requirements to achieve representational standing.

**ii. CSP failed to establish standing as an organization because its mission was not directly offended by the pollution of Crystal Stream.**

The district court failed to evaluate whether CSP is able to sue under organizational standing. In order for an organization to prove standing, the organization must establish the requirements necessary under Article III of the constitution. Courts have held that the organization may show injury in fact if the defendant's conduct directly offends the organization's mission and the activities with which it is involved. *Button*, 371 U.S. at 428. However, standing cannot be manufactured in pursuit of economic damages or a claim waged for undetermined future injuries. *Cellco P'ship v. Wilcrest Health Care Mgmt.*, 2012 U.S. Dist. Lexis 64407, at *23 (D.N.J. May 8, 2012); *Juliana*, 947 F.3d at 1168.

The United Stated Court of Appeals for the Ninth Circuit held that an organization did not have standing merely because the members were interested in protecting the general public's interest in San Francisco Bay's waters. *Alameda Conservation Ass'n v. State of Cal.*, 437 F.2d

1087, 1090 (9th Cir. 1971). The court parsed the difference between organizational standing and associational standing of the organization, the Alameda Conservation Association. The court stated that the plaintiff's complaint references only the individual plaintiffs' standing requirements and not the organization's standing requirements. *Id.* The court reiterated that if the defendant's conduct directly interfered with the organization's operations or if the defendant's actions cause the organization's physical property to become unattractive, this could be enough to generate standing on behalf of the organization. *Id.* at 1091. This was further established by the Supreme Court when they held that an organization did have standing to sue, using the same evaluation as an individual, specifically looking at the organization's purpose. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). An organization's purpose was to provide equal housing opportunities regardless of race. *Id.* at 368. The defendant engaged in a racially discriminative practice, violating § 804 of the Fair Housing Act of 1968. *Id.* at 367. The court ultimately decided that the defendant's conduct directly offended the organization's purpose of providing equal housing opportunities and therefore, the organization met the Article III requirement of injury in fact needed to establish standing. *Id.* at 379.

Furthermore, an organization cannot bring a claim on behalf of its interest of future generations. The Ninth Circuit Court of Appeals held in *Juliana*, that supposed "future" injuries do not grant standing to a plaintiff and the injuries must be direct and concrete. *Juliana*, 947 F.3d at 1168. Additionally, the injuries cannot be too attenuated. The lower court did not evaluate in depth CSP's mission. At most, the court briefly mentions the purpose of the organization by quoting:

> The Crystal Stream Preservationists' mission 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. R. at 6. The organization's mission statement claims that CSP aims to protect the stream and preserve the stream for all future generations. Much like in the case of *Juliana*, where the court rejected the plaintiff's claim that protecting the environment for future generations does not constitute concrete harm to establish standing, the same logic should apply to CSP as well since CSP claims that their purpose as an organization is to preserve and maintain the stream for future generations. R. at 6. Even further, the court in *Alameda Conservationists Association*, determined that an organization must show that the injury is to the organization, not merely the organization's members. *Alameda*, 437 F.2d at 1090. Since the lower court failed to evaluate if CSP's purpose was directly frustrated by Highpeak's discharge, and only evaluated the standing of the members, CSP cannot claim organizational standing.

## II. CSP did not timely file the challenge to the Water Transfers Rule because the right of action accrues when the regulation was promulgated.

The district court erred in holding that CSP brought its challenge to the WTR in a timely manner. The APA allows a plaintiff six years to bring an action against the United States after the right of action accrues. 28 U.S.C.S. § 2401. Although six circuits have held that the statute of limitations clock starts running after the statute is promulgated, a recent decision by the Supreme Court followed the interpretation of the sixth circuit and held that the statute of limitations begins running when the plaintiff is injured. This decision interpreted 28 U.S.C.S. § 2401 to mean that a corporation could not be injured before it was formed and therefore the statute of limitations begins running when the specific plaintiff is injured. *Corner Post*, 144 S. Ct. at 2448.

Courts have differentiated when a right of action accrues based on whether the challenge to a regulation is a facial challenge or a challenge of how the agency is applying the specific

regulation. *Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 228 (5th Cir. 2020). In *Corner Post*, the Court relied on the sixth circuit's interpretation of this rule in *Herr v. United States Forest Serv.* to mean that the statute of limitations only began running after a right of action accrued for a specific plaintiff. *Corner Post*, 144 S. Ct. at 2458-59. However, the decision in *Herr* concerns as-applied challenges, not facial challenges. *Herr v. United States Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015). Even more illuminating is the refusal of a district court to apply this holding to questions regarding facial challenges. *See Linney's Pizza, LLC v. Board of Governors of FRS*, 2023 U.S. Dist. LEXIS 164203, *2-*4 (E.D. Ky., Sept. 15, 2023).

Applying the decision from *Corner Post* ad hoc to all facial challenges would be to effectively nullify the statute of limitations. When Congress drafted the APA it did not intend to allow plaintiffs the ability to sue indefinitely until the end of time. If so, the statute of limitations (six years) time frame is superfluous. The Court's ruling in *Corner Post* allows a regulation to be challenged until the end of time, whenever an organization is formed or plaintiff injured. This may be acceptable in the case of *Corner Post*, or other situations where the regulation could be challenged on a per-plaintiff basis, but this should not be applied to all regulations indiscriminately, facial challenges to a regulation, or when an agency has a more stringent standard. The CWA does use 33 U.S.C.S § 1369, which claims that review of the Administrator's action must be brought within 120 days of the permit issuance. 33 U.S.C.S § 1369; *Nat'l Pork Producers Council v. United States EPA*, 635 F.3d 738, 754 (5th Cir. 2011). Although the CWA only explicitly defines these short statutes of limitations for certain aspects of the CWA, such as grant or denial of permits, effluent limitations, prohibition, or pretreatment standard, this short time frame implies that the CWA intends to protect and preserve the finality

of some decisions. 33 U.S.C.S. § 1369(b)(1); *Narragansett Elec. Co. v. United States EPA*, 407 F.3d 1, 5 (1st Cir. 2005).

Due to this explicit application of a statute of limitations for NPDES permits, it would apply *a fortiori*, that the CWA is intended to imply a statute of limitations on the promulgation of the WTR. The interpretation of *Corner Post* applied a statute of limitations per plaintiff, not for facial challenges to the statute. It follows that 33 U.S.C.S § 1369(b)(1) states that the right of action accrues from the moment of decision as to a *specific* permit. 33 U.S.C.S. § 1369(b)(1). This is a good example of a claim affecting a specific plaintiff. However, CSP claims that they satisfy the timeliness requirement for their claim, a facial challenge to the WTR, because CSP was formed just last year and therefore could not have been injured until last year. Should the court apply the holding from *Corner Post* to CWA regulations, this would undermine the intent and purpose of the CWA, to maintain and preserve the nation's waters. Even more so, this would undermine the consistency and ability of EPA and state agencies to create a regulatory framework to carry out these goals. The WTR has been in force since 2008. It follows that in the last sixteen years a challenge to the WTR would have been brought when the right of action accrued, when the regulation was promulgated but before the statute of limitations expired.

In this case, the plaintiffs are challenging the existence of the WTR on its face. "A naked facial claim alleging that the regulation exceeds the agency's statutory or constitutional authority accrues upon the agency's publishing the regulation, the court continued, and such a challenge thus must be brought within six years thereof." *Am. Stewards of Liberty*, 960 F.3d at 228. In conclusion, the lower court inaccurately applied the holding from *Corner Post* to this scenario. The statute of limitations for facial challenges to a regulation should begin running at the promulgation of the regulation and therefore, this claim was not brough in a timely manner.

## III. The WTR was a valid regulation promulgated by EPA pursuant to the CWA.

The district court correctly held that the WTR, promulgated by EPA, represents a valid and lawful exercise of agency authority under the CWA. EPA maintains that the WTR aligns with the Act's goals by facilitating the movement of water between distinct "waters of the United States" without requiring a NPDES permit for transfers lacking intervening use. This argument, supported by precedent, is grounded in the deferential *Chevron* framework. However, CSP challenges the WTR, arguing it exceeds EPA's statutory authority and warrants a more stringent review under the *Skidmore* standard of deference. R. at 9. Although CSP contends that the Supreme Court's decision in *Loper Bright* warrants revisiting the applicability of *Chevron*, recent case law and the traditional reliance on administrative deference supports the district court's dismissal of CSP's challenge, affirming the WTR's validity under the Act.

The *Chevron* doctrine sets forth a two-step inquiry for reviewing an agency's statutory interpretation. *Chevron*, 467 U.S. at 842. Under Step One, the court first determines whether Congress has spoken directly to the issue in question. *Id*. If Congress's intent is not ambiguous, then the matter is resolved, and the agency must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the legislature's intent is not clear, however, the court moves to the second step. *Id.* at 843. Step Two requires that the court determine if the agency's interpretation is a "permissible construction" of the statute. *Id*. A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute," and is "given controlling weight." *Id*. at 844.

Moreover, deference to administrative agencies is particularly appropriate where the ambiguity of the statute in question "constitutes an implicit delegation" of authority from Congress to the agency to fill in statutory gaps. *Catskill*, 846 F.3d at 520. In *Catskill III*, where

the court held that the WTR is based on a reasonable interpretation of the CWA, the court noted that the framework for resolving administrative law questions is one that incorporates "all three branches of the Federal Government." *Id.* at 507. First, Congress passes a law which "reflects its judgement on the issue" and then the Executive Branch "may address the issue through its authorized administrative agency or agencies." *Id.* In *Catskill III*, the court abided by this constitutional scheme and relied upon the *Chevron* deferential standard of review to conclude that the WTR is a reasonable interpretation of the CWA. *Id*. at 508. This principle recognizes the EPA's role as the agency best equipped to interpret and implement the Act.

The EPA's promulgation of the WTR reflects a reasonable exercise of *Chevron* deference. Under 33 U.S.C.S. § 1362, the CWA establishes that "waters of the United States" are broadly defined and prohibits the discharge of any "pollutant" into such waters from a "point source." 33 U.S.C.S. § 1362. However, the statutory language does not directly address whether an NPDES permit is required when transferring water from one body of water to another without adding pollutants. Accordingly, *Chevron* deference permits EPA to interpret these gaps in a manner that is consistent with the goals of the Act—namely, to regulate discharges that introduce pollutants to navigable waters, not simply the conveyance of water itself.

Turning to the instant case, CSP submitted a CWA NOIS letter to Highpeak on December 15, 2023. R. at 4. The notice alleged, likely in anticipation of Highpeak's reliance on the WTR for its tunnel, that the WTR was not validly promulgated by EPA. R. at 5. CSP has argued that the plain language of the Act forbids any discharge of any pollutant into the waters of the United States without compliance, and that EPA cannot exempt through regulation a category of discharges. R. at 9. The plain language of the statute at issue notes that the "discharge of any pollutant by any person shall be unlawful" except in compliance with the Act. 33 U.S.C. §

1311(a). The Act defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C.S. § 1362(12). There has been considerable jurisprudence around whether water transfers are considered discharges of a pollutant, and prior to the promulgation of the WTR, multiple United States Courts of Appeals had ruled that water transfers were indeed discharges. R. at 9. However, following its promulgation, the WTR provides that water transfers between navigable waters are not discharges requiring a NPDES permit under the Act, and defines a "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i).

EPA's reading of the WTR is supported by case law from multiple circuits. The Eleventh Circuit, for example, noted that what matters under the *Chevron* framework is "whether the regulation is a reasonable construction of an ambiguous statute." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009). The court emphasized that requiring NPDES permits for simple water transfers would impose significant regulatory burdens that Congress likely did not intend, especially where there is no intervening industrial, municipal, or commercial use. *Id.* As a regulatory provision, the WTR exempts water transfers that do not introduce new pollutants, thus adhering to the statutory goals of the CWA by ensuring only actual pollutant discharges require permits. *Id*.

In *Catskill III*, the Second Circuit affirmed the propriety of *Chevron* deference for the WTR under similar reasoning, stating that "EPA's interpretation of the Act in the Water Transfers Rule represents a reasonable policy choice." *Catskill*, 846 F.3d at 508. Here, the court noted the balance EPA sought to strike between preventing harmful pollutant discharges and managing water resources in a practical way. *Id.* The court's analysis further establishes that the

WTR is based on a "reasoned explanation," a key aspect of *Chevron's* deferential review, which courts apply to agency actions that involve policy judgments within an agency's expertise. *Id.*

Thus, absent an express directive, the *Chevron* framework, as applied in *Friends of the Everglades* and *Catskill III*, remains the operative standard. EPA's regulation is thus entitled to *Chevron* deference because it embodies a reasonable interpretation of the CWA, consistent with the court's role in upholding agency interpretations that are reasonably within statutory bounds.

CSP's challenge relies heavily on the argument that the Supreme Court's recent decision in *Loper Bright*, requires a re-evaluation of *Chevron* deference and suggests that EPA's interpretation should instead be reviewed under the less deferential *Skidmore* standard. R. at 10. Under this standard, deference to agency interpretations is granted based on factors such as the thoroughness of the agency's reasoning, consistency with prior decisions, and overall persuasiveness. *Skidmore*, 323 U.S. at 140.

However, *Loper Bright* expressly stated that it did not seek to overturn cases relying on *Chevron*, nor did it seek to disturb stare decisis by requiring that past interpretations be re-evaluated. *Loper Bright* at 2273. Indeed, *Loper Bright* emphasized that the mere fact that a decision relied on *Chevron* does not constitute a justification for "overruling such a holding." *Id.* This is consistent with prior Supreme Court decisions. For example, the Court noted that judicial precedent demands respect even where "judicial methods of interpretation" have changed. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). Additionally, the Court has stated that overturning a past decision merely because of a new decision would undermine notions of legal stability by introducing "disruption, confusion, and uncertainty" into our jurisprudence. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008).

Ultimately, the WTR constitutes a valid regulation under the CWA and a lawful exercise of EPA's interpretative authority. Through *Chevron* deference, EPA's rule reflects a balanced approach to the complexities of managing water resources, exempting transfers of "waters of the United States" that do not involve intervening uses or introduce pollutants. Judicial precedent, as established in *Catskill III* and *Friends of the Everglades*, affirms that EPA's authority to interpret ambiguities within the Act extends to the WTR and justifies the district court's dismissal of CSP's challenge. Therefore, the Court should uphold the validity of the WTR, as it is both consistent with statutory language and supported by judicial precedent favoring deference to reasonable agency interpretations.

## IV. The pollutants introduced in the course of the water transfer took the discharge out of the scope of the WTR and made Highpeak's discharge subject to permitting under the CWA.

The district court correctly held that the higher concentration of contaminants found during Highpeak's water transfer activity took the discharge out of the scope of the WTR and made it subject to the permitting requirements of the CWA. While the WTR generally exempts water transfers from NP permit requirements, this exemption applies only to transfers that do not introduce new pollutants in the process. CSP's NOIS provided evidence of significant increases in specific mineral concentrations—including iron, manganese, and TSS—within the transferred water, which suggests that pollutants were added during the transfer process, thereby removing Highpeak's discharge from the WTR's protective scope. Consequently, the district court correctly held that Highpeak's discharge is subject to CWA permitting.

### A. Deference to EPA's interpretation of 40 C.F.R. § 122.3(i) is appropriate.

Courts have long upheld deference to an agency's interpretation of its own regulations under the doctrine established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and

*Auer v. Robbins*, 519 U.S. 452 (1997). This form of deference applies unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Bowles*, 325 U.S. at 414). Here, EPA's interpretation of 40 C.F.R. § 122.3(i) in the WTR indicates that while discharges from water transfers generally do not require NPDES permits, the exemption explicitly excludes any transfer activities that introduce pollutants to the water. 40 C.F.R. § 122.3(i). This interpretation is neither erroneous nor inconsistent; rather, it aligns with the plain language of the regulation, which states that only transfers that convey water "without subjecting the transferred water to intervening industrial, municipal, or commercial use" are exempt from permit requirements. Since the elevated mineral concentrations in the transfer from Cloudy Lake to Crystal Stream reflect an addition of pollutants during the process, the EPA reasonably determined that this transfer falls outside the WTR's exemption.

Highpeak may argue, relying on *Kisor v. Wilkie*, that the Court should not afford deference to EPA's interpretation if the regulation is not "genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019). *Kisor* clarified that deference applies only if a regulation remains ambiguous after applying standard interpretive tools. *Id.* However, the regulatory text in 40 C.F.R. § 122.3(i) is sufficiently clear in excluding transfers that add pollutants from exemption. 40 C.F.R. § 122.3(i). Given this clarity, the court need not deviate from longstanding *Auer* deference to EPA's interpretation, which clearly aligns with the regulation's language and the CWA's goals. Moreover, Highpeak may invoke the less deferential *Skidmore* standard in light of the decision made in *Loper Bright.* Even so, *Loper Bright* did not displace existing precedents that favor agency interpretations under *Auer* when regulations are ambiguous. Thus, under either

*Auer* or *Skidmore*, the EPA's interpretation should be afforded significant weight, as it is a reasonable and consistent construction of the regulation.

B. EPA's interpretation of the CWA is reasonable and consistent with statutory language.

EPA's interpretation aligns with both the statutory language and regulatory framework. Under 40 C.F.R. § 122.3(i), a transfer activity does not require a permit only if it does not subject water to "intervening industrial, municipal, or commercial use" or introduce pollutants into the water being transferred. 40 C.F.R. § 122.3(i). The EPA's regulations, as clarified in the 2008 Federal Register, emphasize that NPDES permits are required if a water transfer introduces pollutants. NPDES Water Transfers Rule, 73 Fed. Reg. 33697, 33697 (June 13, 2008). This clarification directly applies here, as the increase in mineral concentrations in Crystal Stream suggests that the transfer process itself introduced pollutants, exceeding the WTR's exemption criteria. The EPA's regulatory interpretation serves the CWA's goal of preventing pollutant discharges into navigable waters without a permit. By requiring Highpeak to obtain a permit, the EPA fulfills its statutory mandate to prevent unpermitted additions of pollutants to waters of the United States, thus ensuring the environmental protections intended by the CWA.

Moreover, The D.C. Circuit Court of Appeals outlined five necessary elements to trigger NPDES permitting: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Gorsuch*, 693 F.2d at 165. Turning to the instant case, Highpeak constructed the tunnel at issue through rock and soil and partially used conduits made of iron. R. at 4. In its NOIS, CSP alleged that Highpeak's water transfer activity introduced additional minerals, such as iron, manganese, and TSS, into Crystal Stream. R. at 5.

The first element—presence of a pollutant—is fulfilled by the increased concentrations of minerals, which qualify as "pollutants" under the CWA's definition. 33 U.S.C.S. § 1362(6). The second element—addition—is met, as sampling revealed that mineral levels in Crystal Stream were higher than those in Cloudy Lake, indicating that pollutants were introduced during the transfer. R. at 5. CSP introduced data indicating that the water discharged into Crystal Stream contained roughly 2-3% higher concentrations of the pollutants compared to water from Cloudy Lake sampled on the same day. R. at 5. More specifically, the concentration of iron increased by 0.02 mg/L, the concentration of manganese increased by 0.003 mg/L, and the concentration of TSS increased by 2mg/L. R. at 5. The third element—navigable waters—is established, as both Cloudy Lake and Crystal Stream are considered "waters of the United States." 33 U.S.C.S. § 1362(7). The tunnel used for transfer falls under the definition of a "point source" under the Act. 33 U.S.C.S. § 1362(14). Thus, based on *Gorsuch*, the discharge should be subject to NPDES permitting due to the presence and addition of pollutants from a point source.

Highpeak has argued that the addition of the minerals during the water transfer was "natural" and, therefore, the discharge does not fall outside of the scope of the WTR. R. at 5. In its complaint, CSP alleged that Highpeak's poor construction and maintenance tunnel, specifically its decision to build a pipe through the length of the tunnel or install another conduit, led to pollutants entering the water in more than trace amounts. R. at 12. In determining whether the introduction of the minerals was "natural" or whether Highpeak made errors in constructing and maintaining the tunnel, the intent and plain language of EPA regarding NPDES permitting is given consideration. R. at 12. EPA noted during the promulgation of the final rule:

> Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves do not 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. at 33705. Importantly, even if Highpeak operated and maintained the tunnel with errors, the statutory language and regulatory framework indicate that the mere introduction of pollutants passing through the tunnel would take the discharge out of the scope of the WTR.

Ultimately, the evidence provided by CSP's NOIS establishes that the transfer from Cloudy Lake to Crystal Stream introduced additional pollutants during the course of the transfer, taking Highpeak's discharge outside the scope of the Water Transfers Rule. EPA's interpretation of its own regulation warrants deference under *Auer* and *Bowles*, and even under *Kisor* and *Loper Bright*, the interpretation remains reasonable and consistent with the regulatory language. Additionally, *Gorsuch* and EPA's statements in the Federal Register confirm that when pollutants are added in the course of a water transfer, NPDES permitting requirements are triggered. Therefore, Highpeak's discharge is properly subject to permitting requirements under the CWA, and the district court's ruling should be upheld.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of Highpeak's motion to dismiss the citizen suit and affirm the district court's dismissal of CSP's challenge to the Water Transfers Rule in favor of EPA and Highpeak. In the alternative, this Court should reverse the district court's decisions to deny motions to dismiss for lack of standing and timeliness in favor of CSP and remand to the District Court on the specific issue of determining if CSP was formed for a legitimate purpose or solely to obtain standing in court for the purpose of filing this lawsuit.