MEASURING BRIEF
TEAM 26

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, HIGHPEAK TUBES, INC.

## TABLE OF CONTENTS

**TABLE OF CONTENTS**……………………………………………………………...I

**TABLE OF AUTHORITIES**…………………………………………………………..III

**JURISDICTIONAL STATEMENT**...................................................................................1

**STATEMENT OF ISSUES PRESENTED**……………………………………………...1

**STATEMENT OF THE CASE**……………………………………………………………2

**Operation of Highpeak Tubes in New Union**……………………………………...2

**Crystal Stream Preservationists**.............................................................................3

**Procedural History**…………………………………………………………………….3

**SUMMARY OF THE ARGUMENT**…………………………………………………6

**STANDARD OF REVIEW**……………………………………………………………...9

**ARGUMENT**……………………………………………………………………………10

**I. CSP did not suffer an injury in fact that is fairly traceable to Highpeak's operation of the tunnel because its claims refer only to a fear of hypothetical harm and are too speculative**…………………………………………………………………….……10

A. CSP has only alleged a fear of hypothetical harm even though its members continue to recreate in and around the Crystal Stream……………………………………………………………………11

B. Any increase in "pollutants" in the Stream is too speculative to be fairly traceable Highpeak because CSP has not alleged facts sufficient to prove a causal chain…………………………………………………………………...…15

**II. CSP lacks standing to challenge the promulgation of the WTR because it has not adequately alleged injury in fact and was created for the sole purpose of commencing litigation**……………………………………………………………..17

**III. The EPA validly promulgated the WTR under *stare decisis* and *Skidmore* because a mere change in interpretive methodology does not give rise to a special justification for overturning precedent and the persuasive weight afforded EPA's interpretation of the CWA is sufficient to withstand judicial review**……………………………...21

A. *Stare decisis* protects *Chevron*-based holdings because mere reliance on flawed interpretive methodology is insufficient to create a special justification for overturning long-standing precedent……………………………………………22

B. The WTR is valid under *Skidmore* because it is entitled to great deference due to the thoroughness of its consideration and the consistency with which it has held to that interpretation……………………………………………………………...24

**IV. The District Court erred when it held that Highpeak's discharges took it outside the scope of the WTR because trace amounts of pollutants are a natural consequence of water transfers**…………………………………………………………………………28

A. According to the EPA and precedent, the Unitary Waters Theory is the proper framework for addressing pollutants under the CWA……………………………28

B. *De minimis* amounts of additional pollutants are a natural consequence of water transfers, and are permissible so as not to destroy the Rule itself……………….30

1. There is a genuine ambiguity in 40 C.F.R. 122(i), and thus analysis of the "reasonableness" prong of *Auer* is necessary……………………………31

2. The EPA is not entitled to deference under *Auer* because its interpretation is unreasonable, as it leads to an absurd result.…………………………..32

**CONCLUSION**……………………………………………………………………………34

## TABLE OF AUTHORITIES

**Cases**

*Abbott Lab's v. Gardner*,
387 U.S. 136 (1967)....................18

*Abdin v. CBS Broad. Inc.*,
971 F.3d 57 (2d. Cir. 2020)....................9

*Arlington v. FCC*,
569 U.S. 290 (2013)....................33

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

*Bennett v. Spear*,
520 U.S. 154 (1997)....................17-18

*Bowles v. Seminole Rock & Sand Co.*,
325 U.S. 410 (1945)....................30

*Bragdon v. Abbott*,
524 U.S. 624 (1998)....................25

*Bureau of Alcohol, Tobacco and Firearms v. FLA*,
464 U.S. 89 (1983)....................25

*Burnet v. Coronado Oil & Gas Co.*,
285 U.S. 393 (1932)....................22

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,
273 F. 3d 481 (2d. Cir. 2001) ("*Catskill I*")....................29

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,
451 F. 3d 77 (2d. Cir. 2006) ("*Catskill II*")....................29

*Catskill Mountains Chapter of Trout Unlimited Inc v. EPA*,
846 F.3d 492 (2d Cir. 2017) ("*Catskill III*")....................*passim*

*Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,
467 U.S. 837 (1984)....................*passim*

*Christopher v. SmithKline Beecham Corp.*,
567 U.S. 142 (2012)....................31

*Christensen v. Harris County*,
529 U.S. 576 (2000)....................32

*Church of the Holy Trinity v. United States*,
143 U.S. 457 (1892)....................33

*Clapper v. Amnesty Intern. USA*,
568 U.S. 398 (2013)....................12,14-15,19

*Commissioner v. Brown*,
380 U.S. 563 (1965)....................33

*Corner Post*, *Inc. v. Board. of Governors of the Fed. Rsrv. Sys.*,
144 S. Ct. 2440 (2024)....................17-18

*FBI v. Abramson*,
456 U.S. 615 (1982)....................33

*FDA v. All. for Hippocratic Medicine*,
602 U.S. 367 (2024)....................11-12,19-20

*Franklin v. Massachusetts*,
505 U.S. 788 (1992)....................18

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

*Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*,
570 F. 3d 1210 (11th Cir. 2009)....................24,28,29

*Halliburton Co. v. Erica P. John Fund, Inc.,*
573 U.S. 258 (2014)....................22-23,29

*Havens Realty Corp. v. Coleman*,
455 U.S. 363 (1982)....................10

*Hunt v. Washington State Apple Advert. Comm'n*,
432 U.S. 333 (1977)....................10-11

*Kimble v. Marvel Ent., L.L.C.*,
576 U.S. 446 (2015)....................22

*Kisor v. Wilkie*,
588 U.S. 588 (2019)....................28,30-33

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

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992)....................10-12,14-15

*Michigan v. EPA*,
576 U.S. 743 (2015)....25

*Makarova v. United States*,
201 F.3d 110 (2d Cir. 2000)....9

*Moore v. PaineWebber, Inc.*,
189 F.3d 165 (2d Cir. 1999)....9

*Nat'l Wildlife Fed'n v. Gorsuch*,
693 F. 2d 156 (D.C. Cir. 1982)....26

*Patterson v. McLean Credit Union*,
491 U.S. 164 (1989)....22-23

*Payne v. Tennessee*,
501 U.S. 808 (1991)....22

*Pub. Citizen v. United States Dep't of Justice*,
491 U.S. 440 (1989)....33

*Sierra Club v. Morton*,
405 U.S. 727 (1972)....12-13,17,20-21

*Skidmore v. Swift & Co.*,
323 U.S. 134 (1944)....*passim*

*South Side Quarry v. Louisville & Jefferson County Metro. Sewer Dist.*,
28 F. 4th 684 (2022)....28

*Trans Alaska Pipeline Rate Cases*,
436 U.S. 631 (1978)....33

*United States v. Brown*,
333 U.S. 18 (1948)....33

*United States v. Turkette*,
452 U.S. 576 (1981)....33

**Statutes**

5 U.S.C. § 551(13)....25

5 U.S.C. § 702....1

5 U.S.C. § 706....25

28 U.S.C. § 1292....1

28 U.S.C. § 1331……………………………………………………………………………..1

28 U.S.C. § 2401(a)...............................................................................................17-18

33 U.S.C. § 1251…………………………………………………………………………27

33 U.S.C. § 1342……………………………………………………………………...18,21

33 U.S.C. § 1361……………………………………………………………………...18,21

33 U.S.C. § 1362(12).............................................................................................32,34

33 U.S.C. § 1365……………………………………………………………………………..1

**Regulations**

40 C.F.R. § 122.3 (2008)...................................................................................*passim*

National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule,
73 Fed. Reg. 33697, 33698 (June 13, 2008) (codified at 40 C.F.R. § 122.3)..............18,27

**Other Authorities**

Fed. R. App. P. 4………………………………………………………………………………..1

H. Monaghan, *Marbury* and the Administrative State,
83 Colum. L. Rev. 1, 27 (1983)...........................................................................25

## JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union ("District Court") granted the motions to dismiss by Highpeak Tubes, Inc. ("Highpeak") and the Environmental Protection Agency ("EPA") regarding their challenges to the Water Transfers Rule ("WTR"), but denied the motion to dismiss the citizen suit against Highpeak, in case No. 24-001109 on August 1, 2024. R. at 2, 6. The District Court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702, 28 U.S.C. § 1331, and 33 U.S.C. § 1365. 5 U.S.C. § 702; 28 U.S.C. § 1331; 33 U.S.C. § 1365. Highpeak, the EPA, and Crystal Stream Preservationists, Inc. ("CSP") all filed timely interlocutory appeals pursuant to Fed. R. App. P. 4. Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292. 28 U.S.C. § 1292. This is an appeal from a decision on motions to dismiss, thus granting this Court jurisdiction. 28 U.S.C. § 1292.

## STATEMENT OF ISSUES PRESENTED

I. Whether CSP has standing to challenge Highpeak's alleged actions regarding Crystal Stream when only two members of the organization have submitted Declarations in Support and natural causes for the pollution have not been ruled out.

II. Whether CSP has standing to challenge the EPA's promulgation of the Water Transfers Rule when the organization was created shortly after the Supreme Court announced it would hear *Loper Bright* despite its members living in Rexville for multiple years prior.

III. Whether a challenge to an administrative regulation upheld under *Chevron* is valid when the Supreme Court has held that *stare decisis* protects regulations from similar challenges under *Loper Bright*.

IV. Whether this Court should afford deference to the EPA's interpretation that pollutants introduced during the course of the transfer takes that transfer outside the scope of the rule when its interpretation creates a genuine ambiguity.

## STATEMENT OF THE CASE

**Operation of Highpeak Tubes in New Union**

Highpeak is a family-owned recreational company that has owned and operated a recreational tubing operation in Rexville, New Union since 1992. R. at 3-4. Highpeak owns a 42-acre parcel of land, wherein the northern border of the property lies on Cloudy Lake ("the Lake"), a 274-acre lake in the Awandack mountains, and the southern border runs on Crystal Steam ("the Stream")–the stream upon which Highpeak launches its customers in rented innertubes. R. at 4. Highpeak sought permission from the State of New Union to construct a tunnel connecting Cloudy Lake to Crystal Stream in 1992 in order to increase the volume and velocity of Crystal Stream for its customers. R. at 4. New Union was granted permission by the State that same year, under an agreement that Highpeak only use the tunnel when the State determines that water levels in Cloudy Lake are adequate for the release of water. R. at 4. Highpeak then proceeded to build the tunnel, which is four feet in diameter and approximately 100 yards long, partially carved through rock and partially constructed with iron pipe. R. at 4. The tunnel is equipped with valves at the northern and southern ends that Highpeaks' employees can open and close to regulate the flow of water from Cloudy Lake to Crystal Stream, with permission from the State. R. at 4. Highpeak has not sought a permit under the National Pollution Discharge Elimination System ("NPDES permit") due to this agreement with the State. R. at 4. To this day, Highpeak has never operated the tunnel system without first obtaining

permission. R. at 4. For the 32 years that Highpeak has operated, its water transfer process has never been challenged until this case. R. at 4.

**Crystal Stream Preservationists**

CSP is a not-for-profit corporation formed on December 1, 2023, seven months after the United States Supreme Court announced that it would hear *Loper Bright* and *Corner Post*. R. at 4, 6. The mission statement of the organization is: "[t]o 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. CSP invites individuals interested in "the preservation of Crystal Stream in its natural state for environmental and aesthetic reasons." R. at 4. The organization consists of thirteen members, all of which live in Rexville, New Union. R. at 4. Only two of its members, however, own land along Crystal Stream. R. at 4. Most CSP members have lived in Rexville for more than fifteen years. *Id.* Mr. Jonathan Silver is the only member who has moved in recently, moving into Rexville in 2019. R. at 4.

**Procedural History**

CSP sent a notice of intent to sue letter ("NOIS") under the Clean Water Act ("CWA") to Highpeak on December 15, 2023–within fifteen days of its creation–alleging that Highpeak's tunnel constitutes a point source under the CWA which has regularly discharged and continues to discharge pollutants into Crystal Stream without a permit. R. at 4. CSP sent copies as required to the New Union Department of Environmental Quality and the EPA. R. at 4. The NOIS specifically alleged that the discharge contains multiple pollutants, pointing to a one-time study conducted by CSP analyzing the concentration of iron, manganese, and total suspended solids ("TSS") in both Cloudy Lake and Crystal Stream during water intake and outfall. R. at 5. The data from this study indicated that Cloudy Lake had a consistency of .80 mg/L of iron, .090 mg/L

of manganese, and 50 mg/L of TSS at the time of collection; it also indicated that the outfall into Crystal stream consisted of .82 mg/L of iron, .093 mg/L of manganese, and 52 mg/L, only two to three percent higher than the intake at Cloudy Lake. *Id.* CSP also alleged in the NOIS that the WTR was not validly promulgated by the EPA and, alternatively, additional iron, manganese, and TSS are introduced during the transfer process thereby taking the discharge out of the exemption provided by the WTR. R. at 5.

Highpeak responded to the NOIS on December 27, 2023, stating that it need not respond to the NOIS on the merits because it did not need a NPDES permit due to the WTR. R. at 5. Specifically, Highpeak argued that a natural addition of pollutants during the transfer did not bring the discharge outside of the scope of the WTR. R. at 5. CSP then filed its Complaint on February 15, 2024, after waiting the required 60 days. R. at 5. The Complaint included a citizen suit against Highpeak and a claim under the Administrative Procedures Act ("APA") against the EPA, challenging the WTR as "invalidly promulgated and inconsistent with the statutory language of the CWA." R. at 5. CSP also argued that even if the WTR were valid, Highpeak would require a permit due to the pollutants allegedly introduced during the water transfer. R. at 5. The parties have stipulated that both Cloudy Lake and Crystal Stream are "waters of the United States" under the CWA. R. at 4-5.

Highpeak moved to dismiss on three grounds. R. at 5. First, Highpeak argued that the challenge to the WTR should be dismissed due to lack of standing and as time-barred. R. at 5. Second, Highpeak challenged CSP's standing in the citizen suit, arguing that "it 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 . . . Supreme Court altered the legal framework surrounding such challenges." R. at 5. Lastly, Highpeak argued that the WTR was validly

promulgated and, as a result, it was not required to obtain a NPDES permit. R. at 5. Particularly, Highpeak argued that CSP suffered no actual injury as a result of Highpeak's "discharge" during the transfer process. R. at 5.

The EPA joined Highpeak's motion to dismiss, challenging CSP's standing and timeliness. R. at 6. Additionally, the EPA defended the WTR as a valid promulgation under the CWA. R. at 6. Lastly, the EPA agreed that Highpeak nonetheless needs to obtain a permit for the pollutants introduced to the water during the discharge. R. at 6. Motions were briefed by all parties in April 2024, when the District Court refrained from ruling on them given the then-pending *Loper Bright* and *Corner Post* cases. R. at 6. On August 1, 2024, after the *Loper Bright* and *Corner Post* decisions were released, the District Court granted Highpeak's and the EPA's motion to dismiss the challenge to the WTR but denied the motion to dismiss the citizen suit against Highpeak. R. at 6. Both Highpeak and the EPA appealed. R. at 2. All parties appealed portions of the District Court's decision. R. at 2. Highpeak appealed the District Court's first decision that CSP has standing to challenge the WTR and to bring a citizen suit against it for alleged violations of the CWA, its second decision that CSP's regulatory challenge was timely filed, and its fourth decision that the citizen suit against it could proceed because the introduction of additional pollutants took the discharge outside the scope of the WTR. R. at 2. The EPA appealed the District Court's first and second decisions. R. at 2. CSP appealed the District Court's third decision that the WTR was not arbitrary, capricious, or contrary to law. R. at 2. The case is now before this Court for decision on the four issues addressed by the District Court. R. at 2.

## SUMMARY OF THE ARGUMENT

Four primary issues come before this Court today: whether CSP had standing to bring a citizen suit against Highpeak, whether it had standing to bring a suit against the EPA for the EPA's promulgation of the WTR, whether the WTR was validly promulgated pursuant to the CWA, and whether Highpeak's discharge of pollutants subjected it to the permitting requirements of the CWA. These issues share the theme of CSP forming for the sole purpose of challenging Highpeak and the EPA after the Supreme Court took up the *Loper Bright* and *Corner Post* cases.

Article III standing is required in every civil suit brought against a defendant. The plaintiff must establish that they have suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressable by a judicial decision. When a suit is brought against an agency, the plaintiff must establish Article III standing as well as other elements, including: there must have been an agency action; the action must have been "final;" review must not be excluded by the APA or any statute; the plaintiff must have "zone of interest," or prudential, standing; and the case must be ripe for decision. Accordingly, CSP lacks standing both to challenge Highpeak's operation of the tunnel connecting Cloudy Lake and Crystal Stream and the EPA's promulgation of the WTR because it has not adequately alleged an injury in fact that is fairly traceable to Highpeak's actions.

CSP alleged injury in fact based on two members, Ms. Jones and Mr. Silver, who had moved to the area and noticed occasional cloudy water in the Stream. Ms. Jones has lived in Rexville, near the Stream, since 1997, yet had not noticed any cloudiness until 2020. Even after noticing some cloudiness, she continued to recreate in the area, not complaining about any visual impairments until she joined CSP. Mr. Silver moved to Rexville in 2019 and has observed occasional cloudiness in the Stream, yet never complained of the cloudiness nor believed the

cloudiness to be harming the environment or its aesthetic until becoming a member of CSP. There was no other evidence of harm, such as a toxic smell or look, in or from the Stream.

Additionally, CSP cannot prove that any injury in fact can be fairly traced to Highpeak's operation of the tunnel or the EPA's promulgation of the WTR. CSP presented evidence of outtake levels of "pollutants" from Cloudy Lake and intake levels of "pollutants" in the Stream; yet no evidence exists of when this study took place, how often–if more than once–it took place, or whether other environmental factors could have been the cause. CSP is alleging an injury that is far too hypothetical or speculative to be linked to Highpeak. Highpeak's tunnel has been in operation since 1992, and it wasn't until CSP and its members learned that the Supreme Court would hear *Loper Bright* that any claim against it was formed. Because the organization was formed for the sole purpose of initiating litigation and has not alleged adequate injury in fact fairly traceable to Highpeak or the EPA's actions, CSP lacks standing to bring its claims against Highpeak and the EPA.

The Supreme Court's recent decision in *Loper Bright* has changed the landscape of administrative law for the foreseeable future. However, *Loper Bright* only overruled *Chevron*, not cases decided using the *Chevron* framework. The Court expressed in no unclear terms that *stare decisis* is still the rule of law and that it would be erroneous to overturn decisions made under the *Chevron* framework merely because of the change in interpretive methodology. An argument on those grounds amounts to no more than an argument that the case should be overruled merely because it was wrongly decided, which the Court has held is insufficient justification to rule contrary to established precedent.

Additionally, the interpretation of the CWA by the EPA is still afforded great deference under *Skidmore*. Under *Skidmore*, the reasonable interpretation by an administrative agency

interpreting its own statutory authority may not be binding, but it is to be given weight in judicial considerations according to its power to persuade. A particularly persuasive reading may be given great weight by the court, while a particularly unpersuasive reading may be given little to none at all. The persuasiveness of the agency's reading depends upon multiple factors, such as the thoroughness of its consideration and the consistency in its application. The EPA's interpretation was thoroughly considered in the Federal Register entry in which the reasoning behind the final rule was explained. The EPA's interpretation of the CWA in regard to the applicability of the NPDES to water transfers has remained consistent since 2005.

Additionally, the court should not afford deference to the EPA's interpretation that pollutants introduced during the course of the transfer take that transfer outside the scope of the Rule because that interpretation creates a genuine ambiguity which is not reasonable due to the unavoidable and absurd results that would follow. When there is a genuine ambiguity subject to differing interpretations of an agency's regulation, the agency which drafted the regulation will be given deference under *Auer* in its interpretation if the interpretation is reasonable. This deference, distinguishable from *Chevron*, entitles the EPA to an *Auer* analysis since the WTR was created and promulgated by the EPA. However, while the EPA is entitled to *Auer* analysis, deference should not be given under these facts. The EPA postulates that any amount of pollutants added in the course of the transfer in any amount from any source takes the transfer outside the scope of the Rule; but, because the very act of transferring water will necessarily introduce at minimum *de minimis* amounts of pollutants, the interpretation provided by the EPA is unreasonable. To give effect to the EPA's interpretation would be to attach an interpretation to a Rule that would then eviscerate the Rule itself. To assume that such a result was intended would make deference under this analysis *per se* unreasonable.

Finally, CSP alleges that every time Highpeak transfers water between Cloudy Lake and Crystal Stream, Highpeak is in violation of the Act–notwithstanding the addition of pollutants introduced by the transfer itself–because Crystal Stream is less burdened by the pollutants found in greater quantities in Cloudy Lake. Because the EPA adopted the Unitary Bodies of Water approach when it created the WTR, this argument cannot succeed for two distinct reasons. First, The Unitary Waters theory posits that all bodies of water within the nation are connected, and are considered to be of one body so as to be "unified." Following this approach, transferring water from Cloudy Lake into Crystal Stream is not a discharge of pollutants because the pollutants are part of one "unitary" body. Second, the WTR expressly excludes the necessary application and issuance of permits under the NPDES when the water is not subjected to intervening uses for municipal, commercial or industrial purposes. Because transfering water containing pollutants into another body of water that has not been subjected to any intervening uses for municipal, commercial, or industrial purposes is proper, Highpeak is not in violation of the Act.

**STANDARD OF REVIEW**

Courts review *de novo* the dismissal of a complaint under Rule 12(b)(6) on appeal, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor. *Abdin v. CBS Broadcasting, Inc.*, 971 F.3d 57, 66 (2d. Cir. 2020). The standard of review is identical when the dismissal is made under Rule 12(b)(1). *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 n.3 (1999). A dismissal under Rule 12(b)(1) is proper when the district court lacks the statutory or constitutional power to adjudicate it, such as in the absence of Article III standing. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

## ARGUMENT

**I. The District Court erred by holding that CSP suffered an injury in fact that is fairly traceable to Highpeak's operation of the tunnel because its claims refer only to a fear of hypothetical harm and are too speculative.**

CSP lacks standing to bring this citizen suit against Highpeak because it and its members lack injury in fact and cannot prove causation. The law has long held that plaintiffs in civil actions must establish standing under Article III of the United States Constitution to challenge another's actions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs must establish three elements to meet this requirement: (1) the plaintiff must have suffered an "injury in fact;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Id.* at 560-561. The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* at 561. Under Supreme Court precedent, organizations or associations may have standing to sue on their own behalf for injuries they have sustained, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982); however, they must still satisfy the three elements required of individual plaintiffs for standing. *Id.* at 378-379. If an organization or association cannot satisfy the three elements, it may still have standing to bring a suit on behalf of its members even where it has suffered no injury so long as (a) its members would otherwise have standing to sue in their own right, (b) the interests at stake are germane to the organization or association's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

It is uncontroverted that CSP is seeking an injunction against Highpeak to prevent Highpeak from continuing to operate its tunnel between Cloudy Lake and Crystal Stream. R. at 4-5. This relief, if granted, would act to the benefit of CSP; therefore, any injury in fact fairly

traceable to Highpeak would likely be redressed by such an injunction. *Hunt*, 432 U.S. at 343. It is also uncontroverted that the interests that CSP seeks to protect are germane to its purpose. *See Id.* at 343-344. Its mission statement specifically lists that it wishes to protect Crystal Stream from "contamination resulting from industrial uses and illegal transfers of polluted waters." R. at 6. Thus, it is clear that this litigation is within CSP's interests. Additionally, CSP does not require the participation of its individual members in this litigation to establish injury. *Laidlaw* utilized several affidavits and testimony by FOE's members to support the court's position that injury in fact was met, thereby holding that such affidavits and testimony were not necessary to require the participation of the corporation's individual members. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183-184 (2000). The same results here. CSP has presented declarations by Ms. Jones and Mr. Silver in support of their claim for injury in fact; however, such declarations do not require the participation of these individuals in this suit. R. at 14-17; *Laidlaw*, 528 U.S. at 183-184. Lastly, since CSP instituted a citizen suit on behalf of its members, standing to sue on its own behalf need not be addressed; rather, because CSP's members have not adequately proven injury in fact that is fairly traceable to Highpeak's actions, CSP lacks standing to bring the citizen suit.

A. CSP has only alleged a fear of hypothetical harm even though its members continue to recreate in and around the Crystal Stream.

CSP's members have not alleged sufficient injury in fact. Under Article III, a plaintiff must establish that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). By requiring the plaintiff to show that they are among the injured, Article III screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular action. *FDA v. Alliance for Hippocratic Medicine*, 602 U.S.

367, 381 (2024). A concrete and particularized injury is one that is real and not abstract and affects the plaintiff in a personal and individual way, instead of a generalized grievance. *Lujan*, 504 U.S. at 560 n.1. An actual or imminent injury is one that must have already occurred or is likely to occur soon; the plaintiff must establish a sufficient likelihood of future injury to the plaintiff, such that the injury is *certainly* impending and allegations of *possible* future injury are not sufficient; *Alliance for Hippocratic Medicine*, 602 U.S. at 381; *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (emphasis in original). For an environmental plaintiff to adequately allege injury in fact, they must prove that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

In both *Sierra Club* and *Lujan*, the Supreme Court held that the plaintiffs lacked standing because they failed to allege facts showing that any member of the suit would be affected by the claimed environmental damage. *Id.* at 735; *Lujan*, 504 U.S. at 564. In *Lujan*, the court struck down the plaintiffs' argument that "certain funded activities" were increasing the rate of extinction of endangered and threatened species, which injured the plaintiffs since their desire to use or observe the species would be lessened. *Lujan*, 504 U.S. at 562-563. The court held that a plaintiff's profession of an intent to engage in the activity they had engaged in before–where they will presumably be deprived of the activity this time–is "simply not enough." *Id.* at 564. The court reasoned that past exposure to such conduct does not "in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." *Id.* In *Sierra Club*, the Sierra Club alleged that a development plan by Disney would "destroy or otherwise adversely affect the scenery, . . . and would impair the enjoyment of the park for future generations." *Sierra Club*, 405 U.S. at 735. The Supreme Court affirmed the Ninth Circuit's

holding that the Sierra Club lacked standing because it had failed to allege that it or its members would be affected by the Disney development since none of its members had connections to Mineral King. *Id.*

The Supreme Court analyzes standing under environmental harm injury claims based on facts that show whether the *specific* plaintiff has been injured; therefore, the Court carefully analyzes each case according to the facts in front of it. *Laidlaw*, 528 U.S. at 182 (emphasis added). In *Laidlaw*, the Court determined that the Friends of Earth ("FOE") had standing to challenge Laidlaw's discharge of pollutants past the levels granted to it by permit. *Laidlaw*, 528 U.S. at 183. FOE member Kenneth Curtis averred that he lived half a mile away from Laidlaw's facility next to the North Tyger River and that the river began to look and smell polluted after Laidlaw increased pollutants beyond its permitted level. *Id.* at 181. He further testified that he would like to fish, camp, swim, and picnic in and near the river but has not done so because he was concerned about the over-pollution of the river. *Id.* at 181-182. The Court ultimately held that, under the facts of its case, FOE adequately alleged more than mere "general averments" and "conclusory allegations," and that the FOE members' concerns about the effects of Laidlaw's discharges over the permit limit directly affected the members' recreational, aesthetic, and economic interests. *Id.* at 183-184.

Here, injury in fact must be determined utilizing the same fact-specific analysis. Highpeak has been operating the tunnel for which it transfers water from Cloudy Lake into Crystal Stream since 1992, over thirty years. R. at 4. Prior to this litigation, Highpeak had been operating its tubing business and the tunnel connecting the two waters without issue. R. at 6. Ms. Jones, who had been living approximately 400 yards away from Crystal Stream since 1997, admitted that she did not notice any cloudiness in Crystal Stream until 2020. R. at 14-15. Even

after noticing some cloudiness in 2020, Ms. Jones continued to recreate around the Stream, claiming that she would recreate "even more frequently" if not for the Stream's occasional cloudiness. R. at 15. Mr. Silver, who moved to the area in 2019, noticed occasional cloudiness in the Stream, yet continued to recreate in and around the stream, also claiming that he would recreate "even more frequently" if not for the Stream's occasional cloudiness R. at 16. Out of CSP's thirteen members, Ms. Jones and Mr. Silver were the only ones to submit declarations in support of CSP; and in each declaration, the complainants conceded that they continued to recreate in and around the stream regardless of their knowledge of the additional iron, manganese, and TSS in the Stream. R. at 6, 15-16.

CSP cannot allege that the occasional cloudiness of the Stream is a *certainly* impending injury when its members knew about the change in opacity of the Stream and continued to recreate in and around it. *Clapper*, 567 U.S. at 409 (emphasis in original). While CSP argues that the aesthetic and recreational values of the Stream have been lessened, its own members admitted to recreating in and around the Stream both before and after learning about its supposed "pollution." R. at 15-16. CSP has thus not shown a concrete and particularized and actual or imminent injury, instead only showing a general moral or ideological objection. *Lujan*, 504 U.S. at 560; *Alliance for Hippocratic Medicine*, 602 U.S. at 381. The "injury" suffered by CSP's members is abstract and is a generalized grievance because its members continued to recreate in and around the Stream regardless of knowledge of "pollution." *Lujan*, 504 U.S. at 560 n.1. CSP has brought forward a hypothetical injury; its members could not have been injured if they continued to recreate in and around the Stream after discovering the "pollution." *Id.* at 560. The members continued to utilize the environment in a way they saw fit, and should not be able to halt Highpeak's business after it has operated for over thirty years without causing any harm to

the environment or the surrounding citizens. In other words, CSP cannot manufacture standing merely based on its members' fears of hypothetical future harm that is certainly not impending. *Clapper*, 568 U.S. at 409. Thus, CSP has not proven an injury in fact and this action must be dismissed. *Lujan*, 504 U.S. at 560 n.1.

B. Any increase in "pollutants" in the Stream is too speculative to be fairly traceable Highpeak because CSP has not alleged facts sufficient to prove a causal chain.

The record lacks facts to support CSP's claim that Highpeak was the cause of any injury in fact. Causation is shown when a plaintiff establishes that their injury likely was caused or likely will be caused by a defendant's conduct–that the injury is fairly traceable to the defendant's conduct. *Alliance for Hippocratic Medicine*, 602 U.S. at 382; *Clapper*, 568 U.S. at 411. The line of causation between the illegal conduct and injury must not be too speculative or too attenuated. *Clapper*, 568 U.S. at 410-411. Speculative links are defined by the Supreme Court as those which are not sufficiently predictable how third parties would react or cause injury to plaintiffs. *Alliance for Hippocratic Medicine*, 602 U.S. at 383. Attenuated links, on the other hand, are defined as those where the defendant's action is so far removed from its effects that the plaintiff cannot establish Article III standing. *Id.* The causation inquiry can be heavily fact-dependent and a "question of degree" for courts to determine. *Id.*

In *Clapper*, the Supreme Court held that attorneys and organizations that brought a challenge to the Government's enactment of the FISA Amendments Act of 2008 did not have standing because they could not prove that the injury in fact was fairly traceable to the amendment. *Clapper*, 568 U.S. at 410-411. The court reasoned that the respondents' argument was too speculative–that they did not present enough facts to show that the Government would target the communications of non-U.S. persons with whom they communicate, nor that the respondents would be parties to the communications that the Government would intercept. *Id.* at

410. The court held that such a hypothetical was not fairly traceable to the Government's conduct, and therefore that the respondents had not proven causation. *Id.* at 416. In contrast, the Supreme Court in *Laidlaw* held that FOE had standing because it adequately proved that Laidlaw's dumping of pollutants *beyond its granted amount* was the cause of its members' decrease in recreational, aesthetic, and economic interests in the River. *Laidlaw*, 528 U.S. at 184-185 (emphasis added). Laidlaw was originally granted a NPDES permit by the South Carolina Department of Health and Environmental Control to discharge water containing mercury into the River. *Id*. at 176. Laidlaw repeatedly discharged pollutants at rates exceeding its permit, however. *Id.* Thus, the Court reasoned that Laidlaw's unlawful conduct led to FOE members' refrain from use of the River. *Id.* at 184.

This case is factually distinguishable from *Laidlaw*. While Highpeak similarly obtained permission from the State of New Union to build and utilize the tunnel connecting Cloudy Lake to Crystal Stream, it was to utilize the tunnel only when given permission by the State. R. at 4. CSP has not proven what the iron, manganese, and TSS levels of both Cloudy Lake and Crystal Stream are typically, only at the time that it decided to measure the intake and outfall. CSP has not shown that the additional .02 mg/L of iron, .03 mg/L of manganese, and 2 mg/L of TSS are the purposeful or accidental result of the transfer of water from Cloudy Lake to Crystal Stream; rather, it has only alleged, without proof, that Highpeak has purposefully introduced two to three-percent higher concentrations of these substances during the transfer process. R. at 5.

This belief is too speculative to afford CSP standing. Many other environmental factors could have played a role in this slight increase. Among them, there could have been an increase in toxic rainwater prior to the survey conducted by CSP, or another nearby company could have contributed to runoff into the Stream. Additionally, Highpeak began its transfer process from

Cloudy Lake to Crystal Stream in 1992 and CSP conceded that no one had noticed any cloudiness in Crystal Stream until 2019, *twenty-seven years after* Highpeak began its transfer process. R. at 4, 16 (emphasis added). Since 2019, the Stream has only *occasionally* been cloudy. R. at 16 (emphasis added). It is far too speculative to assume that CSP has been adding pollutants during the water transfer process for over thirty years when the Stream has only shown signs of "increased pollutants" since 2019. Because CSP reaches too far in speculating that Highpeak is the cause of cloudy water in the Crystal Stream, this Court should hold that any "injury in fact" is not fairly traceable to Highpeak and thus dismiss this suit.

## II. The District Court erred by holding that CSP has standing to challenge the promulgation of the WTR because it has not adequately alleged injury in fact and was created for the sole purpose of commencing litigation.

CSP cannot bring a suit against the EPA under the APA for its promulgation of the WTR due to the organization's lack of standing. Claims brought under the APA must satisfy six standing elements: (1) Article III standing; (2) review is not excluded from the judiciary under 5 U.S.C. § 701(a) of the APA or by statute; (3) review under the APA is limited to "agency action;" (4) the agency action must be "final;" (5) the organization must have "zone of interest," or prudential, standing; and (6) the case must be ripe for decision. *Bennett v. Spear*, 520 U.S. 154, 175-176 (1997); *Sierra Club*, 405 U.S. at 733. Two years after Congress enacted the APA, it enacted 28 U.S.C. § 2401(a), which bars civil action commenced against an agency unless the complaint is filed within six years after the right of action first accrues. *Corner Post*, *Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440, 2450 (2024). Thus, 28 U.S.C. § 2401(a) acts as a statute of limitations for plaintiffs to bring claims of their injuries. *Id.* at 2452.

This Court is not precluded from reviewing the promulgation of the WTR, nor is it contended that the WTR was a final agency action. No statute exists that precludes this Court from reviewing the promulgation of the WTR by the EPA. *Id.* at 2450. Additionally, an agency action is final when its impact is "sufficiently direct and immediate" and has a "direct effect on . . . day-to-day business," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), the core question being whether the agency has completed its decision-making process and whether the result of that process is one that will directly affect the parties. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). There is no question that the promulgation of the WTR was a final agency action. The WTR was issued under the authority of §§ 402 and 501 of the Clean Water Act, 33 U.S.C. §§ 1342 and 1361. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33698 (June 13, 2008) (codified at 40 C.F.R. § 122.3). CSP is also within the zone of interests protected by the CWA because the CWA protects the right of plaintiffs to challenge it or rules promulgated under it. *Bennett*, 520 U.S. at 176. Lastly, if this Court finds that Mr. Silver did suffer an injury in fact and that CSP was not created for the sole purpose of initiating litigation, then it should also find that CSP timely filed this suit. 28 U.S.C. § 2401(a) states that "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Under 28 U.S.C. § 2401(a), a right of action accrues when the plaintiff has a "complete and present cause of action," which begins when the plaintiff has suffered an injury in fact from a final agency action. *Corner Post*, 144 S. Ct. at 2450. Mr. Silver moved to Rexville in August of 2019 and thus would be within the six year time bar provided by the statute of limitations in 28 U.S.C. § 2401(a). R. at 16. However, CSP cannot sufficiently allege injury in

fact because it was solely created for litigation and both CSP and its members cannot satisfy Article III standing.

CSP cannot meet Article III standing as previously discussed, as well as because the corporation was created as an avenue for litigation in light of the recent Supreme Court decision in *Loper Bright*. *Loper Bright* overturned forty years of precedent established in *Chevron, U.S.A., Inc. Nat. Res. Def. Council, Inc. Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Rather than agency deference given by courts in the *Chevron* decision, *Loper Bright* returned agency statutory interpretation to the judiciary. *Id.* at 2262. However, the court stated that in exercising judgment courts still may seek aid from the interpretations of the agencies who implemented particular statutes since such interpretations "constitute[] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The decision in *Loper Bright* has led to an increase in challenges to agency actions, and CSP is the latest corporation to try its hand at overturning long-standing rules.

The Supreme Court has continuously held that, if an entity is formed entirely to sue and cannot show how it is or will be concretely affected by the regulation it challenges, it does not have standing to challenge the regulation. *See Clapper*, 568 U.S. at 410-414. *Alliance for Hippocratic Medicine* held that an organization may not establish standing simply based on "the intensity of the litigant's interest" or because of strong opposition to the government's conduct, "no matter how long[-]standing the interest and no matter how qualified the organization;" thus, a plaintiff must show far more than simply a setback to its abstract and social interests. 602 U.S. at 394. In *Alliance for Hippocratic Medicine*, medical associations claimed that they were forced to "expend considerable time, energy, and resources" drafting petitions against the FDA. *Id.* The

Court held that, although the plaintiffs have proven sincere legal, moral, ideological, and policy objections to the challenged FDA regulation of mifepristone, such objections alone did not establish a justiciable case or controversy. *Id.* at 396. In doing so, the court ruled that an organization cannot "spend its way into standing" simply by expending money to gather information and advocate against an agency's action. *Id.* at 394.

A mere interest in environmental protection is also not enough for organizations. *Sierra Club*, 405 U.S. at 738-739. Mere interest in a problem is not sufficient by itself to render an organization "adversely affected" or "aggrieved" within the meaning of the APA. *Id.* at 739. The Supreme Court has reasoned that, if a "special interest" in a subject were enough to commence a litigation, "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived." *Id.* at 739-740.

As discussed above, the record does not indicate that CSP or its members suffered any injury in fact by Highpeak or the EPA through the WTR. It does indicate, however, that CSP was formed for the sole purpose of manufacturing a claim after the United States Supreme Court announced that it would hear *Loper Bright*. R. at 6-7. CSP was not formed until December 1, 2023, seven months after the Supreme Court announced it would hear *Loper Bright*. R. at 4. Within fifteen days of its formation, CSP sent a NOIS to Highpeak, the New Union DEQ, and the EPA. *Id.* CSP's mission statement even references its intent to sue by including the language: "[r]esulting from *industrial uses* and illegal *transfers* of *polluted* waters." R. at 6 (emphasis added).

Additionally, out of the thirteen members of CSP, only two actually own property on the Stream or recreate around it. *Id.* at 7. CSP has not alleged any facts to show that it engages in substantial or legitimate business activities apart from this litigation. It cannot prove that it or its

members have suffered or are suffering any environmental injury; the only conclusion then, is that CSP formed solely to challenge Highpeak and the WTR. CSP has not shown anything beyond a mere interest in environmental protection, and thus is unable to prove that it or its members have been adversely affected or aggrieved within the meaning of the APA. *Sierra Club*, 405 U.S. at 738-739. As *Sierra Club* stated, granting CSP's challenge to the WTR based on its alleged "special interest" would allow similar suits by any other organization claiming to have a bona fide "special interest," which would greatly diminish this Court's judicial efficiency. *Id.* at 739-740. Therefore, this Court should hold that CSP has not adequately alleged injury in fact under the APA and thus does not have standing to bring the challenge against the WTR.

## III. The EPA validly promulgated the WTR under *stare decisis* and *Skidmore* because a mere change in interpretive methodology does not give rise to a special justification for overturning precedent and the persuasive weight afforded EPA's interpretation of the CWA is sufficient to withstand judicial review.

The District Court properly held that the WTR was validly promulgated by the EPA. The Rule was promulgated pursuant to the Congressional grant of authority expressed in the CWA, and *stare decisis* protects the judicial determinations of the Rule's validity even though those determinations were decided under the *Chevron* framework. As provided by 33 U.S.C. § 1361(a), the "Administrator [of the EPA] is authorized to prescribe such regulations as are necessary to carry out the functions under this act." 33 U.S.C. § 1361(a). The CWA also creates the NPDES, by which the EPA may permit the discharge of pollutants otherwise in violation of the CWA. 33 U.S.C. § 1342.

A. *Stare decisis* protects *Chevron*-based holdings because mere reliance on flawed interpretive methodology is insufficient to create a special justification for overturning long-standing precedent.

*Stare decisis* is "the idea that today's Court should stand by yesterday's decisions." *Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446, 455 (2015). The doctrine is "not an inexorable command," but is the "preferred course because it 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, 827-28 (1991). *Stare decisis* "also reduces incentives for challenging settled precedents, saving parties and courts the expenses of endless relitigation." *Kimble*, 576 U.S. at 455. This is true even when "*stare decisis* means sticking to some wrong decisions." *Id.* The reason is because "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

Logically, *stare decisis* is not important in the context of a decision made correctly, and "[a]ccordingly, an argument that [the Court] got something wrong . . . cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S. at 455. In order to overcome the hurdle of *stare decisis* and overturn long-settled precedent, the Court requires "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

The party seeking "abandonment of an established precedent" has a greater burden "where the Court is asked to overrule a point of statutory construction," because "[c]onsiderations of *stare decisis* have special force in the area of statutory construction." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Where statutory precedents have been overturned, "the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by

Congress." *Id.* at 173. This occurs when "such changes have removed or weakened the conceptual underpinnings from the prior decision or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." *Id.* (internal citations omitted).

In *Halliburton*, the appellant company urged the Supreme Court of the United States to overrule the *Basic* rule, arguing that the decision was inconsistent with congressional intent and modern economic theory. *Halliburton*, 573 U.S. at 265, 269. The *Basic* rule created a rebuttable presumption in securities fraud cases that plaintiffs in such cases relied upon material misrepresentations. *Id*. at 268. The *Halliburton* Court declined to overrule *Basic*, stating that "Halliburton's criticisms fail to take *Basic* on its own terms." *Id.* at 271. The court then explained:

> Halliburton focuses on the debate among economists about the degree to which the market price of a company's stock reflects public information about the company . . . . That debate is not new. Indeed, the *Basic* Court acknowledged it and declined to enter the fray, declaring that "[w]e need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory."

*Id.* The *Halliburton* Court concluded that the company had failed to identify "the kind of fundamental shift in economic theory that could justify the overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities." *Id*. at 272.

CSP's argument is similarly flawed. As Justice Roberts explained in *Loper Bright*, "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." 144 S. Ct. at 2273. In *Halliburton*, the *Basic* presumption may have been based on flawed or outdated economic theory, but the underlying

justifications the *Basic* court used to arrive at the presumption did not change. Similarly, the *Chevron* framework has been renounced as being inconsistent with the law. *Id.* at 2272. However, the statutory interpretation performed by the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited Inc v. EPA*, 846 F.3d 492 (2d Cir. 2017) ("*Catskill III*") and the Eleventh Circuit in *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) has not.

The statutory language of the CWA was found to be ambiguous on the issue of whether a water transfer requires a NPDES permit. *Catskill III*, 846 F.3d at 508. Although previous cases in the Second Circuit disavowed the "unitary waters" theory by the EPA in favor of the simpler plain meaning of the phrase "addition . . . to navigable waters," the *Catskill III* court nevertheless found the relevant section to be ambiguous because "navigable waters" could mean "any navigable waters" to "navigable waters" as a collective entity. *Id*. at 511. While the *Catskill III* court may have ultimately accepted the EPA's unitary waters interpretation under the *Chevron* framework, the finding of an ambiguity does not change. From there, the *Catskill III* court used the same interpretive tools as it would use under *Skidmore*. The underlying reasoning by the *Catskill III* court has thus not been so eroded away as to inhibit the court's statutory interpretation from the protections of *stare decisis*. Regardless of whether the *Catskill III* court used *Chevron* or *Skidmore* deference in making the ultimate decision on the validity of the WTR, the analysis of the statutory language was just as valid under each framework.

B. The WTR is valid under *Skidmore* because it is entitled to great deference due to the thoroughness of its consideration and the consistency with which it has held to that interpretation.

The WTR survives *Skidmore* analysis because *Skidmore* deference still gives the interpretation sufficient persuasive weight to survive judicial scrutiny. The APA provides, in relevant part, that the reviewing court shall "hold unlawful and set aside agency action . . . found

to be–(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;" or "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. A final rule promulgated by an administrative agency is an "agency action" subject to review by the courts. 5 U.S.C. § 551(13) ("'agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent thereof, or failure to act;" "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .").

When determining the validity of an administrative rule,[1] courts must look to the statutory language and "independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 144 S. Ct. at 2263. Courts do so "by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries." *Id.* (quoting H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983); *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). Regardless of whether an express grant of congressional authority exists, the "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore*, 323 U.S. at 139-40). With the death of *Chevron* and the rise of *Loper Bright*, "an agency's interpretation 'cannot bind a court,'" though it may still sway judicial opinion because it still has "the power to persuade, if lacking power to control." *Loper Bright*, 144 S. Ct. at 2267 (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983); *Skidmore*, 323 U.S. at 140).

[1]Assuming there are no procedural defects in the promulgation of the rule. *See* 5 U.S.C. § 706(2)(D). CSP does not allege the EPA failed to follow the procedures outlined in CWA nor the APA in promulgating the WTR.

The weight given to administrative interpretations of statute "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." *Skidmore*, 323 U.S. at 140. Some powerful factors in determining the level of deference an agency interpretation is given include the consistency of its interpretation and whether the interpretation was contemporaneous with the creation of the act. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 167 n.31 (D.C. Cir. 1982).

In *Gorsuch*, the D.C. Circuit was called to determine whether the discharge of polluted water from a dam into a river downstream required the dam operators to obtain NPDES permits. *Id*. at 161. In that case, the dam water, by virtue of its stagnancy, became colder and more turbid than the water it drained into. *Id.* at 161-64. The court explained that the EPA should be accorded "increased deference," because its interpretation "was made contemporaneously with the passage of the Act, and has been consistently adhered to since." *Id.* at 167. The court concluded that, because several factors generally supported the EPA's construction of the CWA, the court below it should have afforded great deference to the EPA's interpretation. *Id.* at 169.

Here, the Federal Register regarding the final rule creating the WTR is particularly illuminating. The roughly eleven pages clearly contain a thorough consideration worthy of the respect afforded to it by *Skidmore.* In pertinent part, the EPA engages in interpreting the statute itself, taking into account the expressed will of Congress and the competing goals of the CWA, noting:

> [w]hile the statute does not define "addition," sections 101(g), 102(b), 303(f), and 510(2) provide a strong indication that the term "addition" should be interpreted in accordance with the text of the more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or

> circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not including the mere transfer of navigable waters.

NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701-02. The reasoning the EPA advances is based, in part, on the existence of State-run programs to allocate water already in existence within their borders. *Id.* at 33,701 ("[the Act] also recognizes that the States have primary responsibilities with respect to the 'development and use . . . of land and water resources.'") (*quoting* 33 U.S.C. § 1251)).

Additionally, great deference should be given to the EPA because of its long adherence to construction of the definition for "addition" in the CWA. The interpretive memorandum outlining the EPA's interpretation of the word "addition" was issued in 2005. 73 Fed. Reg. at 33,699. The EPA's stance there was that the mere transfer of waters (and pollutants contained therein) from one water of the United States to another did not require a NPDES permit under the CWA because such activity would generally be overseen by the States. *Id.* Subsequently, the EPA formally codified its interpretation following the proper notice and comment procedures. *See* 40 C.F.R. § 122.3(i). Since that time, the EPA has not discarded that rule in favor of another. Thus, it is clear that the EPA has long stuck to this interpretation of the CWA. In conclusion, the EPA's construction of the CWA may not be binding on the courts after the Supreme Court's decision in *Loper Bright*, but it nevertheless still deserves great deference under *Skidmore*. This is because the EPA's interpretation was thoroughly considered and has, since its creation, been adhered to for nearly twenty years.

### IV. The District Court erred when it held that Highpeak's discharges took it outside the scope of the WTR because trace amounts of pollutants are a natural consequence of water transfers.

Highpeak's discharge of *de minimis* amounts of pollutants does not take it outside the scope of the WTR. Because the WTR adopted the Unitary Waters approach, the only added pollutants to Crystal Stream in contention are those that were introduced during the transfer process itself. *See generally* 40 C.F.R § 122.3(i); *Catskill III*, 846 F.3d 492; *Friends of the Everglades*, 570 F. 3d 1210. The underlying policy and purpose of the WTR, as well as previously established case law, outlines that trace amounts of pollutants added via the transfer itself does not take the transfer outside the scope of the WTR, as "cooperative federalism" was the foundation for the framework and *laissez-faire* approach taken by the EPA in regards to water transfers. *See generally Catskill III*, 846 F.3d 492; *South Side Quarry v. Louisville & Jefferson Cnty. Metro. Sewer Dist*. 28 F. 4th 684 (2022). Thus, the EPA's position that pollutants introduced during the transfer itself takes the discharge out of the scope of the WTR is incorrect under an *Auer* analysis because there is a genuine ambiguity surrounding the rule itself and the EPA's interpretation of the ambiguity is unreasonable. *See generally Kisor*, 588 U.S. at 574.

#### A. According to the EPA and precedent, the Unitary Waters Theory is the proper framework for addressing pollutants under the CWA.

*Chevron* afforded great deference to an agency's interpretation of its own statute when silent or ambiguous to a specific issue, and greatly changed the framework under which ambiguities were decided or interpreted. *Chevron*, 467 U.S. at 843. Unless the interpretation was arbitrary, capricious, or contrary to the statute, the agency's interpretation of the ambiguity was deemed to be correct. *Id.* at 844. This was not a novel concept however, as deference was accorded to agencies since an agency's knowledge and expertise make it better suited to accurately interpret an ambiguity. *Id.* at 865. The court has since quashed *Chevron* deference by

overturning precedent in *Loper Bright*. *Loper Bright*, 144 S. Ct. at 2273. In *Loper Bright*, the court explained that although *Chevron* was overturned, "we do not call into question prior cases that relied on the *Chevron* framework . . . [m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.'" *Id.* (citing *Halliburton*, 573 U.S. at 266).

Under *Catskill III*, the court recognized a distinction between the conclusions of *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d. Cir. 2001) ("*Catskill I*") and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d. Cir. 2006) ("*Catskill II*"). *Catskill*, 846 F.3d 492 at 532-533. Primarily, the EPA in *Catskill III* had since promulgated the WTR, and the courts in the two prior cases had not conducted an analysis under the Unitary Waters theory. *Id.* at 528-529. The WTR, located within the text of the NPDES, lays out exclusions to discharges not requiring permits:

> The following discharges do not require NPDES permits: . . .(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R § 122.3(i). Water transfers that are not subjected to intervening use such as those outlined above are not subject to permitting requirements under the NPDES since the EPA has adopted the unitary waters theory. In *Friends of the Everglades*, the court noted how it had refused to adopt the unitary waters approach in its past decisions, and that it would have likely done so again if there had not been a change. *Friends of the Everglades*, 570 F.3d at 1227-1228. Yet, as *Friends* noted, "there has been a change. An important one. Under its regular authority,

the EPA has recently issued a regulation adopting a final rule specifically addressing this very question." *Id.* at 1218. *Friends* articulated the Supreme Court's explanation of the Unitary Waters Theory by analogizing transfers to pots of soup: "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id*. at 1217. In concluding that because the EPA's definition of unitary waters and point source pollution was not arbitrary or capricious and was based on an ambiguous provision, the court stated that "[t]he EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible construction of the language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." *Id*. at 1228. Because *Friends* used a *Chevron* analysis to reach their conclusion, *stare decisis* and *Loper Bright*'s express provision detailing enforcement of past precedent under *Chevron* solidifies and safeguards the court's reasoning in *Friends* and the EPA's underlying interpretation of the WTR: the pollutant of one body of water is the pollutant of every body of water, because all navigable bodies of water in the U.S. are "unified." Therefore, the only pollutants in the Stream that could possibly constitute a violation of the CWA would be the pollutants added to the water in the Stream itself, not the pollutants being carried from Cloudy Lake to Crystal Stream through the transfer process.

B. *De minimis* amounts of additional pollutants are a natural consequence of water transfers, and are permissible so as not to destroy the Rule itself.

During *Chevron*, there was also "*Auer*", or "*Seminole Rock*" deference. *Auer v. Robbins*, 519 U.S. 452, 462-464 (1997). The *Auer* court relied on *Bowles v. Seminole Rock & Sand Co.*, which stated that "the ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Addressing *Auer* in *Kisor*, the court declined to overturn such deference despite the appellant's argument that "*Auer* 'bestows on

agencies expansive, unreviewable' authority." *Kisor*, 588 U.S. at 574 (2019). *Kisor* clarified the scope of *Auer*, expressing that, while a potentially important component, agency interpretation is not the end of the analysis. *Id.* at 577. Instead, courts "presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. But when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade.'" *Id.* at 573 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012)). While *Auer* and *Chevron* deference were similar in nature and followed a similar analysis, *Auer* deference is given to agency interpretation of regulations that they themselves have put out and promulgated. *Auer*, 519 U.S. at 459-462. As *Kisor* stated, "we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that congress would have wanted us to." *Kisor*, 588 U.S. at 576. The court further stated that *Auer* deference "gives agencies their due, while also allowing–indeed, obligating–courts to perform their reviewing and restraining functions." *Id.* at 574. However, the mere existence of "agency expertise" and an agency's interpretation of a rule it has promulgated is not enough to warrant deference under *Auer*. *Id.* at 570. Under *Auer*, there must (1) be a genuine ambiguity surrounding the rule itself, and (2) the interpretation of the ambiguity by the agency must be reasonable. *Kisor*, 588 U.S. at 590.

1. There is a genuine ambiguity in 40 C.F.R. 122.3(i), and thus analysis of the "reasonableness" prong of *Auer* is necessary.

*Kisor* outlined the need for a true ambiguity before deference can be analyzed, noting that

> [i]f the law gives an answer–if there is only one reasonable construction of a regulation–then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would '"permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."

*Id.* at 575 (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). *Kisor* further noted that, "[i]f uncertainty does exist, there is no plausible reason for deference." *Id.* at 574-575. The portion of the WTR subject to ambiguity reads in relevant part that "this exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). Several readings of this provision could yield different results due to the specific facts surrounding this case. For example, when the regulation states "pollutants introduced," the intent may be to exclude a new source of pollution, or to prevent a source increase of an already existing pollutant. *Id*. Because the WTR permitting exclusion does not apply to transfers made for municipal, commercial or industrial use, the intention may have been to exclude pollutants that were naturally occurring and take pollutants introduced as a result of intervening use outside the scope of the exclusion. *Id*. According to the EPA, "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C.S. § 1362(12). However, this broad definition of "discharge of a pollutant" is enough to eviscerate the rule itself under the facts of the current case.

2. The EPA is not entitled to deference under *Auer* because its interpretation is unreasonable, as it leads to an absurd result

The next step in determining if *Auer* deference should be given, after finding that there is a genuine ambiguity, is to determine whether the agency's interpretation of the ambiguity is reasonable. *Kisor*, 588 U.S. at 587. As *Kisor* stated, "[u]nder *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' And let there be no

mistake: That is a requirement an agency can fail." *Id.* at 576 (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

In *United States v. Turkette*, the court stated that, when determining the meaning of text subject to differing interpretations, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." 452 U.S. 576, 580 (1981) (referencing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). In the concurring opinion for *Public Citizen v. United States Dep't of Justice*, Justice Kennedy discussed the reasoning for the doctrine and its legitimacy as a practical judicial tool for interpretation:

> Where the plain language of the statute would lead to "patently absurd consequences," *United States* v. *Brown*, 333 U.S. 18, 27 (1948), that "Congress could not *possibly* have intended," *FBI* v. *Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting) (emphasis added), we need not apply the language in such a fashion. When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.

491 U.S. 440, 470 (1989). The concurrence in *Public Citizen* reiterated examples of "absurdity" found in the *Holy Trinity* case:

> [s]uch as where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood in the streets was to be applied against a physician who came to the aid of a man who had fallen down in a fit.

*Id.* at 470 (referencing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460-461 (1892)). Here, the pollutants alleged as being illegally discharged are not only already present in Cloudy Lake, but the amount added to the Steam via the transfer is a *de minimis* amount:

> [a]dditional iron, manganese and TSS are introduced during the transfer process . . . the water discharged into Crystal Stream contained approximately 2-3% higher concentrations of these pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day.

R. at 5. Water transfers will *always* necessarily discharge additional pollutants, regardless of the method of the transfer; the material, the placement, or the construction does not matter, because by the EPA's own interpretation, *any* pollutant in *any* amount constitutes a discharge. 33 U.S.C. § 1362(12). If this Court were to use that broad definition in the interpretation of the WTR, the permit exclusion for water transfers that are not subject to intervening use for commercial, municipal, or industrial use would be eviscerated and would defeat the purpose of the rule itself. 40 C.F.R § 122.3(i). No reasonable agency would promulgate a valid exception. Holding otherwise would yield absurd results; accordingly, *Auer* deference should not be afforded. Furthermore, because *Auer* deference is not appropriate here, and because any interpretation other than that the EPA intended for some amount of *de minimis* pollutants to be discharged during the transfer would defeat the Rule, the trace amounts of pollutants introduced in the course of the water transfer from Cloudy Lake to Crystal Steam did not not take the discharge outside the scope of the WTR.

## CONCLUSION

For the foregoing reasons, this Court should uphold the District Court's grant of Highpeak's and the EPA's motion to dismiss the challenge to the WTR and should reverse the District Court's denial of Highpeak's motion to dismiss the citizen suit against Highpeak.