NON-MEASURING BRIEF TEAM 35

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

STANDARD OF REVIEW 7

ARGUMENT 7

I. CSP does not have standing to bring a citizen suit against Highpeak or regulatory challenge against EPA. 7

a. CSP's citizen suit against Highpeak fails because it does not meet Article III standing requirements under the heightened burden put onto organizations. 9

i. CSP does not suffer a true injury in fact. 9

ii. CSP's alleged injury cannot be traced to Highpeak's activity and is not redressable by this Court 12

b. CSP's regulatory challenge against EPA fails because it does not meet Article III standing requirements. 13

II. CSP's regulatory challenge to the Rule was not timely filed. 16

III. The Rule was validly promulgated. 18

a. The best reading of the CWA supports the promulgation of the Rule. 18

b. *Stare decisis* weighs in favor of respecting decisions that upheld the Rule. ... 21

IV. Highpeak's transfer is within the scope of the Rule. 23

a. EPA's interpretation of the Rule that includes Highpeak within its scope is inconsistent with how EPA has historically interpreted water transfers. 25

b. If accepted as true, EPA's interpretation of the Rule is overwhelmingly broad which would invalidate the purpose of the Rule as set out by EPA. 27

c. Even if this Court declines to extend *Loper Bright*, an analysis under *Kisor* would reach the same conclusion. 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Allen v. Wright,
468 U. S. 737 (1984)..7

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..7

Auer v. Robbins,
519 U.S. 452 (1997).. 23

Berkovitz v. United States,
486 U.S. 531 (1988)..6

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945).. 23

Burnette Foods, Inc. v. U.S. Dep't of Agriculture,
920 F.3d 461 (6th Cir. 2019). 27

Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York,
273 F.3d 481 (2nd Cir. 2001) 25

Catskill Mountains Ch. of Trout Unlimited, Inc. v. Env't Prot. Agency,
846 F.3d 492 (2nd Cir. 2017) 20, 21

Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984).. 22, 23

City of Arlington v. Fed. Commc'n Comm'n,
569 U. S. 290 (2013).. 23

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 5, 9, 14

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)..9, 12

Corner Post v. Bd. of Governors of Fed. Rsrv. Sys.,
114 S. Ct. 2440 (2024) 4, 5, 15

Crown Coat Front v. United States,
386 U.S. 503 (1967).. 16

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022)... 20

Env't Prot. Info. Ctr. v. Simpson Timber Co.,
255 F.3d 1073 (2001)... 7

Food and Drug Admin. v. All. for Hippocratic Med.,
602 U.S. 367 (2024).. 8, 11, 12, 13, 14

Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004) 25

Friends of the Earth v. Laidlaw,
528 U.S. 167 (2000)... 9

Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,
570 F.3d 1210 (11th Cir. 2009)... 20, 21

Gibbons v. Gibbs,
99 F.4th 211 (4th Cir. 2024).. 21

Gose v. United States Postal Service,
451 F.3d 831 (2006) 6, 24

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016).. 22

Harris v. McRae,
448 U.S. 297 (1980)...8, 14

Hunt v. Wash. State Apple Advert. Comm'n,
432 U.S. 333 (1977)..5, 7

Kisor v. Wilkie,
588 U.S. 588 (2019)... 23

Kent v. Principi,
389 F.3d 1380 (2004)... 6

Loper Bright v. Raimondo,
144 S. Ct. 2244 (2024) 4, 6, 17, 18, 20, 22

Lujan v. Def. of Wildlife,
504 U.S. 555 (1992)... 14

Marbury v. Madison,
1 Cranch 137 (1803) 6, 22

Michigan v. Env't Prot. Agency,
576 U.S. 743 (2015) 18

Nat'l Wildlife Fed'n v. Gorsuch,
693 F.2d 156 (D.C. Cir. 1982) 19, 25

Newark Cab Ass'n v. City of Newark,
901 F.3d 146 (3d Cir. 2018) 6

Ounjian v. Globoforce, Inc.,
89 F.4th 852 (11th Cir. 2023) 7

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 23

Sierra Club v. Morton,
405 U.S. 727 (1972) 9

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 18

Sprint Commc'ns Co., L.P. v. APCC Services,
554 U.S. 269 (2008) 11

Stoops v. Wells Fargo Bank,
197 F. Supp. 3d 782 (W.D. Pa. 2016) 9

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 5, 7, 9

United Food & Com. Workers,
517 U.S. 544 (1996) 8

United States v. Moriello,
980 F.3d 924 (4th Cir. 2020) 27

United States v. Texas,
599 U. S. 670 (2023) 7

Util. Air Regul. Grp. v. Env't Prot. Agency,
573 U.S. 302 (2014) 18

Warth v. Seldin,
422 U.S. 490 (1975) 8

West Virginia v. Env't Prot. Agency,
597 U.S. 697 (2022) 18, 19

Wisconsin v. Env't Prot. Agency,
266 F. 3d 741 (7th Cir. 2001) 18

CONSTITUTIONS

U.S. Const. art. III, § 2 ..... 7, 11

STATUTES

5 U.S.C. § 702 ..... 1, 15

5 U.S.C. § 704 15

5 U.S.C. § 706 ..... 7, 17, 20

28 U.S.C. § 1331 1

28 U.S.C. § 2401(a) 5, 15

33 U.S.C. § 1365(a) 1

33 U.S.C. § 1251(a) 1

33 U.S.C. § 1311(a) 2

33 U.S.C. § 1342 2

33 U.S.C. § 1342(a)(1) 2, 18

33 U.S.C. § 1342(b) 2

33 U.S.C. §§ 1342(b)(1)(A)–(D) 2

33 U.S.C. § 1362(6) 2

33 U.S.C. § 1362(12) 2

33 U.S.C. § 1362(14) 2

REGULATIONS

40 C.F.R. § 122.3(i) (2023) 13, 18, 26

73 Fed. Reg. 33697 (June 13, 2008) 2, 5, 19, 24, 25, 26

RULES

Fed. R. App. P. 5. 1

OTHER

Arturo Casadevall & Ferric C. Fang, *Reproducible Science*, Nat'l Libr. of Med. (Sept. 2010), https://pmc.ncbi.nlm.nih.gov/articles/PMC2981311/ 13

Bruce Dvorek & Becky Schuerman, *Drinking Water: Iron and Manganese*, Nebraska Extension (May 2021), https://extensionpubs.unl.edu/publication/g1714/na/html/view 13

Introduce, *Cambridge Dictionary* (2nd ed. 2007) 27

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union granted a partial dismissal of plaintiff's claims in case No. 24-CV-5678 on August 1, 2024. The district court dismissed Crystal Stream Preservationist's ("CSP") challenge to the Water Transfers Rule (the "Rule") but allowed their Clean Water Act ("CWA") citizen suit to proceed. The district court had subject-matter jurisdiction over these claims under 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question), and 33 U.S.C. § 1365(a) (citizen suits under the CWA). Highpeak Tubes, Inc. ("Highpeak"), the United States Environmental Protection Agency ("EPA"), and CSP all filed timely motions for leave to appeal under 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(b), which provides an appellate court jurisdiction if there is a "controlling question of law" at issue.

STATEMENT OF THE ISSUES

I. Does CSP have standing to bring a citizen suit against Highpeak and a regulatory challenge against EPA?

II. Did CSP timely file their challenge to the Rule?

III. Was the Rule validly promulgated?

IV. Was Highpeak's water transfer within the scope of the Rule?

STATEMENT OF THE CASE

I. The Clean Water Act

Congress enacted the CWA in light of growing public concerns about the nation's water quality. As set out by the statute, the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The statute provides several ways to achieve this goal, including an extensive permitting program. In

relevant part, § 301(a) of the CWA prohibits "the discharge of any pollutant" without first obtaining a permit. 33 U.S.C. § 1311(a).

The structure for permitting is found in § 402 of the statute. 33 U.S.C. § 1342. Under the CWA, the EPA has the authority to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). To discharge lawfully from a point source into navigable waters, individuals are required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342(b). NPDES permits set discharge limits, monitoring, and reporting requirements that can be in effect for five years before renewal. 33 U.S.C. §§ 1342(b)(1)(A)–(D).

There are a number of key definitions at issue in this case. The statute defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Pollutant" is defined broadly. *See* 33 U.S.C. § 1362(6) (including "chemical wastes, biological materials . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste."). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel. . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The CWA affords EPA with the authority to "prescribe such regulations as are necessary to carry out . . . [the] functions under this chapter." 33 U.S.C. § 1361(a). Under this authority, the EPA promulgated the Rule which excludes water transfers from requiring a NPDES permit where the transfer does not introduce pollutants to the receiving waters. 73 Fed. Reg. 33697, 33705 (June 13, 2008).

II. Statement of the Facts

For over thirty years, Highpeak has provided a family-owned, tubing recreation experience to the visitors and residents of Rexville, New Union. R. at 3–4. Highpeak's operations

run down Crystal Stream, located on the southern portion of Highpeak's property. *Id.* High water levels increase the velocity in the stream, providing customers with the most enjoyable tubing experience R. at 4. Highpeak's business has been hurt by periods of low water levels because it reduces the water flow in Crystal Stream. *Id.*

In 1992, Highpeak worked with New Union (the "State") to remedy Crystal Stream's fluctuating water levels. *Id.* As a result, Highpeak constructed a tunnel between Crystal Stream and the adjacent Cloudy Lake, a 274-acre lake bordering Highpeak's property. *Id.* The tunnel is partially carved from rock and has valves that can change the flow of water between the two water bodies. *Id.* Under the agreement with the State, Highpeak can only turn on the valves when the State determines that water levels are adequate. *Id.* For over thirty years, Highpeak has operated this system in accordance with the regulations set out by the State. *Id.*

Since this agreement, no one has challenged the tunnel or reported any alleged changes in water quality under any environmental laws, including the CWA. *Id.* That changed on December 1, 2023, when CSP was formed with the mission statement "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters." *Id*. at 6. Two weeks after its creation, CSP sent Highpeak a Notice of Intent to Sue ("NOIS") alleging that Highpeak's tunnel was a discharging point source under the CWA and therefore needed a permit. *Id*. at 4. The sole support CSP provided was sampling data from a single day, at a single site, that compared levels of iron, manganese, and total suspended solids ("TSS") on Cloudy Lake and an outfall into Crystal Stream. *Id. a*t 5. The sampling data showed a decimal change in iron, manganese, and TSS. *Id.*

On December 27, 2023, Highpeak sent a reply letter to CSP and noted that it did not need to reply to the NOIS on the merits. *Id.* Highpeak argued that the discharge did not need a NPDES

permit. *Id.* Further, the natural addition of pollutants during the transfer did not bring the discharge outside the scope of the Rule. *Id.* Two months later, CSP filed its complaint ("the Complaint"). *Id.* In addition to the allegations made in the NOIS, the Complaint made a claim against EPA under the Administrative Procedure Act ("APA") alleging that the Rule was invalidly promulgated and inconsistent with the CWA. *Id.* Attached to the Complaint were two declarations made by Jonathan Silver and Cynthia Jones, both members of CSP. *See* Jones Decl. Ex. A; Silver Decl. Ex. B.

Highpeak moved to dismiss the Complaint for lack of standing, untimely filing, and failing to state a cause of action. *Id.* EPA subsequently moved to dismiss CSP's challenges to the Rule and joined Highpeak in challenging CSP's standing and timeliness. *Id.* After briefing was completed, CSP requested that the district court refrain on making a ruling on the motions to dismiss until the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 114 S. Ct. 2440 (2024). *Id.* at 6.

On the standing issue, the district court found the issue to be a "close call" but ultimately found that CSP had standing. *Id.* at 8. The district court subsequently denied Highpeak and EPA's motions to dismiss on the issue of timeliness. *Id.* For the claim against EPA, the district court held that the Rule was validly promulgated and consistent with the CWA. *Id.* at 11. Finally, the district court held that EPA's interpretation of the Rule, which required Highpeak to obtain a NPDES permit, was entitled to respect. *Id.* This appeal followed.

<u>SUMMARY OF THE ARGUMENT</u>

The district court improperly denied Highpeak's motions to dismiss CSP's citizen suit claim and properly held that the Rule was validly promulgated.

To begin, the district court erred in holding that CSP met Article III and organizational standing requirements. Article III standing requires "concrete and particularized" harm to plaintiffs looking to bring suit, not mere "emotional consequences." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). Organizations are subject to stricter scrutiny than individual plaintiffs and must pass the *Hunt* test. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This test requires courts to consider "administrative convenience and efficiency" when determining if an organization has standing. *Id.* Because the harms of each plaintiff vary, it would be time-consuming for the court to search each plaintiff's mind to determine the validity of their injury. CSP fails both the constitutional and organizational standing requirements and must necessarily be barred from filing claims against Highpeak and EPA.

CSP's claims are further barred by the statute of limitations. The APA provides a six-year statute of limitations which begins when the rule is finalized. 28 U.S.C. § 2401(a). The Rule was finalized in 2008, sixteen years ago. 73 Fed. Reg. at 33697. All but one of the CSP members were living in Rexville at that time and had no barriers to bringing suit. R. at 4. The district court relies on *Corner Post* to argue that the statute of limitations began running when CSP was formed. *Corner Post,* 114 S. Ct. at 2440 (2024). But, this is not the same case as *Corner Post*; the plaintiffs in *Corner Post* are distinguishable from CSP because they were individually affected by the rule before they formed their organization. R. at 8. Therefore, CSP failed to bring a timely claim under the APA and their claim should be barred.

Next, the district court properly decided that Rule itself was validly promulgated. First, the Rule is supported by best reading of the CWA. *Loper Bright* states that an agency's decision should be upheld where it is supported by the best reading of the statute, and the agency acts

within that authority. *Loper Bright*, 144 S. Ct. at 2249 (2024). The CWA gives EPA the authority to issue permits for discharges of pollutants and the Rule is within the scope of that authority. To require a permit absent some discharge of a pollutant would contradict the purpose of the CWA. Second, *stare decisis* weighs in favor of respecting the decisions that upheld the Rule. *Loper Bright* directs courts to give deference to decisions made under *Chevron*, despite changes in interpretative methodology. *Id.* at 2273. This Court should respect the various decisions upholding the Rule and find that it was validly promulgated.

Finally, despite the fact that the Rule was validly promulgated, the district court erred in holding that Highpeak needed a NPDES permit. Instead, the court should have relied on its own judgment to make a determination of this question of law. Foundational to our legal system is the note that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Moreover, courts have consistently held that agency regulations are a question of law. *E.g.*, *Gose v. United States Postal Service*, 451 F.3d 831, 836 (2006); *Kent v. Principi*, 389 F.3d 1380, 1384 (2004). As such, EPA's interpretation—though given some weight—should not overpower this Court's judgment to determine the validity of the application of the Rule to Highpeak. When using tools of statutory interpretation, Highpeak falls within the scope of the Rule. The district court erred in denying Highpeak's motion to dismiss the citizen suit claim. This Court should apply *Skidmore* deference and find that Highpeak's discharges are within the scope of the Rule.

STANDARD OF REVIEW

A district court's ruling on a motion to dismiss is reviewed *de novo*. *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 151 (3d Cir. 2018). The reviewing court must accept the petitioner's factual allegations as true to determine whether dismissal is appropriate. *Berkovitz v.*

United States, 486 U.S. 531 (1988). The moving party must show that its factual matters, when accepted as true, are plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Review of decisions regarding agency actions is governed by the APA. Under this standard the Court must determine whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *Env't Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (2001). The reviewing court may make its decision on any basis that is supported by the record. *Ounjian v. Globoforce, Inc.*, 89 F.4th 852, 857 (11th Cir. 2023).

ARGUMENT

I. CSP does not have standing to bring a citizen suit against Highpeak or regulatory challenge against EPA.

Article III standing is a "bedrock constitutional requirement" where the judiciary's jurisdiction under the Constitution is confined to "Cases" and "Controversies." *United States v. Texas*, 599 U. S. 670, 675 (2023); U.S. Const. art. III, § 2. Limiting access to the courts prevents citizens from "press[ing] general complaints about the way in which government goes about its business." *Allen v. Wright*, 468 U. S. 737, 760 (1984). To establish Article III standing, a plaintiff must demonstrate that they have (1) suffered, or will likely suffer, a "concrete and particularized . . . not conjectural or hypothetical" injury; (2) that the injury was caused, or likely caused, by the defendant; and (3) that this injury will be redressed by the relief sought. *Summers*, 555 U.S. at 493.

In addition to the Article III requirements, an organization bringing suit must pass the *Hunt* test, which asks that "neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Courts have found that an organization lacks standing if determining injury or causation would require the court to

look into each individual member's views or harms. *See United Food & Com. Workers*, 517 U.S. 544, 557 (1996) (explaining that this third prong focuses on "administrative convenience and efficiency"). For example, the Supreme Court held that the standing inquiry into each member's views on abortion is an impermissible administrative burden. *Harris v. McRae*, 448 U.S. 297, 321 (1980). Additionally, the Court has found that organizations lack standing when the injury suffered "is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (finding an association of construction businesses did not have standing to sue over lost profits).

CSP did not suffer a cognizable, concrete, and particularized injury sufficient to meet this heightened organizational standard for either their claim against Highpeak or their challenge to the Rule. First, CSP's citizen suit must fail because the organization does not suffer a true injury in fact. Even further, its injury is impossible to trace to Highpeak's activity which is not redressable by this Court. Second, CSP's regulatory challenge fails to meet the constitutional requirement because the causal link is attenuated. This Court should reverse the district court's decision that CSP had standing.

A. CSP's citizen suit against Highpeak fails because it does not meet Article III standing requirements under the heightened burden put onto organizations.

CSP does not have standing to bring a citizen suit against Highpeak because they cannot pass the more stringent standing inquiry required for organizations. CSP fails to demonstrate an actual injury in fact, its alleged injury cannot be linked to Highpeak, and this Court cannot redress the issue.

(i) CSP does not suffer a true injury in fact.

Article III standing requires finding a "real and not abstract" injury that affects "the plaintiff in a personal and individual way." *Food and Drug Admin. v. All. for Hippocratic Med.*,

602 U.S. 367, 560 (2024). This injury in fact requirement ensures that the plaintiff is among those directly affected by the defendant's actions, opposed to a simply having a "special interest in the subject." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). In cases where plaintiffs claimed to have been harmed by an environmental pollutant, courts have deemed their injuries to be "concrete and particularized" when a member of a community has acted in response to the pollutant. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180 (2000) (where plaintiffs bringing a citizen suit against a private corporation were found to have standing when they translated their concern into a concrete action by stopping fishing or wading in the river); *cf. Summers*, 555 U.S. at 495 (finding an environmental group did not have standing when they claimed that regulation affected their future interest in visiting unnamed national parks).

However, the Supreme Court has held that, "[t]he emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant." *City of Los Angeles*, 461 U.S. at 107 n.8 (1983). Additionally, plaintiffs "cannot manufacture standing." *Stoops v. Wells Fargo Bank*, 197 F. Supp. 3d 782, 789 (W.D. Pa. 2016) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). In *Stoops*, a plaintiff lacked standing when they bought thirty-five phones to bring a complaint against a company for making unsolicited calls, a violation under the Telephone Consumer Protection Act. *Id.*

Here, CSP's members do not suffer a true injury in fact. There is no dispute that Highpeak has operated along the stream and used the tunnel for over thirty years, both before and after the promulgation of the Rule. R. at 6. The thirteen members of CSP live in Rexville, but only two own land along Crystal Stream, miles away from Highpeak's tunnel. R. at 4. Both CSP members in the submitted declarations noted that they did not recognize a change in the water quality until it had been brought to their attention by an outside party. *See* Jones Decl. Ex.

A, at par. 10 (noting she first learned about "the pollutants introduced by Highpeak's discharge . . . in 2020"), Silver Decl. Ex. B, at par. 6 ("I learned through members of CSP that this cloudiness is due to a discharge from Cloudy Lake. I also learned that Highpeak causes this discharge."). Notably, CSP's mission statement directly focuses on the "illegal transfers of polluted waters." Jones Decl. Ex. A, at par. 4. The plaintiffs were not aware of any change in water quality until the creation of CSP's which specifically targeted Highpeak's operations. An established organization who hiked along the Stream and filed suit after discovering a change in water quality would more likely satisfy this standing inquiry. CSP's short timeline, from being formed to sending a NOIS to Highpeak within 15 days, suggests that their claims should be subject to a more stringent standard of review. R. at 4. The district court agrees here, "an organization formed primarily to mount a legal challenge warrants additional scrutiny in determining standing." R. at 7.

For Cynthia Jones, who has lived near the stream for over twenty years, any change in the quality of water from one year to the next was not significant enough for her to recognize something was wrong until "recently." Jones Decl. Ex. A, at par. 8. Jonathan Silver notes that he only learned of Highpeak's alleged role "[i]n the days leading up to this Complaint being filed . . . through the members of CSP." Silver Decl. Ex. B, at par. 6. Highpeak's alleged discharges, therefore, were only noticed after they were brought to the plaintiffs' attention by an outside party. Mr. Silver noted that he learned of the alleged discharge, "[i]n the days leading up to this Complaint being filed . . . through the members of CSP", an organization designed for the sole purpose of suing Highpeak. Jones Decl. Ex. A, at par. 4–6. Mr. Silver joined CSP soon after learning of this. Silver Decl. Ex. B, at par. 8. Mr. Silver is "*now* hesitant to allow his dogs to drink from the Stream." Jones Decl. Ex. B, at par. 7 (emphasis added). Mr. Silver was not

concerned about his dogs until CSP told him, days before filing this complaint, of alleged pollution occurring. Jones Decl. Ex. B, at par. 6. Given Ms. Jones' extensive history living near the alleged discharge and that Mr. Silver had no concern over the water quality until approached by an organization solely designed for litigating this issue, CSP is more in line with the *Stoops* plaintiff. Without the presence of CSP, Ms. Jones and Mr. Silver would have never claimed injury.

A change in behavior may qualify under the injury in fact requirements, but under the heightened standard put onto organizations, a change in behavior specifically done in anticipation of litigation should not qualify as an injury in fact. Even if CSP's injury is determined to meet this standard, it cannot be traced to Highpeak or redressed by this Court.

(ii) CSP's alleged injury cannot be traced to Highpeak's activity and is not redressable by this Court.

Plaintiffs must prove that their injury "was caused or likely will be caused by the defendant's conduct." *Food and Drug Admin.,* 602 U.S. at 368. There are no bright line rules defining causation; it is a fact-dependent exercise and "a question of degree." *Id.* at 384. This Court has the power to weigh the facts and determine whether a group has a true "Case" or "Controversy." U.S. Const. art. III, § 2. Additionally, "causation and redressability" are often "flip sides of the same coin." *Food and Drug Admin.,* 602 U.S. at 380 (quoting *Sprint Commc'ns Co., L.P. v. APCC Serv.*, 554 U.S. 269, 288 (2008)). If an action can be sufficiently linked to a defendant, then a court enjoining the action will be able to redress the problem. *Id.* at 381.

Here, CSP's alleged injury is not traceable to Highpeak's activities and is thus not redressable. CSP relies on a "highly speculative" attenuation that the decimal change in iron, manganese, and TSS levels in Cloudy Lake on a single day, at a single location equates to Highpeak violating the Rule. *Food and Drug Admin.,* 602 U.S. at 390. Even if CSP was able to

demonstrate that Highpeak's use of the tunnel affected the levels of these substances in the water, it has no way to differentiate those inputs from the natural erosion of the rocks that the water runs through. CSP has never asked Highpeak to stop using the tunnel so they could gain an accurate sample of the water quality, nor did they reference any samples taken before Highpeak came into existence. CSP does not acknowledge the changing weather patterns or any abnormalities that may have altered the water quality over the course of a day; for example, a simple rainstorm could lead to increased levels of TSS in the water. Even if it is determined that CSP has suffered an injury in fact, it is impossible to differentiate the change in water quality from any of Highpeak's uses compared to any natural weather patterns or erosion of rocks. Because it cannot be established that stopping Highpeak's use would lead to improved water quality, any action this Court takes to enjoin their use would not sufficiently redress the issue at hand.

CSP cannot meet the Article III standards to bring a citizen suit as they rely on speculative evidence and attenuated claims that do not sufficiently address its alleged injury.

B. CSP's regulatory challenge against EPA fails because it does not meet Article III standing requirements.

CSP does not have standing to challenge EPA's promulgation of the Rule because the causal link between their alleged injury and Highpeak's activity is attenuated.

Federal regulations often satisfy the Article III standing test because they require plaintiffs to act in certain ways. *Id.* at 382. Causation is difficult to establish where the government's action or inaction does not regulate the specific plaintiff. *See Clapper*, 568 U.S. at 416 (holding that incurring costs without demonstrating that future injury is certainly impending is disallowed, manufactured standing); *Food and Drug Admin.,* 602 U.S. at 394 (holding that plaintiffs who did not use or prescribe a drug did not have standing to challenge its availability).

Unregulated parties bear the burden of showing a "predictable chain of events" from the government's action to their asserted harm. *Food and Drug Admin.,* 602 U.S. at 385. They cannot rely on speculative claims. *Id.*

Here, CSP's standing challenge fails because they cannot establish a causal connection with the evidence provided and thus this Court cannot redress their alleged injury.

CSP brings no concrete evidence about how the promulgation of the Rule is invalid. Plaintiffs bring a speculative claim that EPA's invalid promulgation of the Rule led to their injury at the hands of Highpeak. They offer no evidence about EPA's process or reasoned decisionmaking. Instead, they chose to rely on sampling from an undisclosed party done on a single day at a single site to claim that Highpeak is causing an addition of iron, manganese, and TSS to Crystal Stream. They ignore the most basic principle of scientific testing, reproducibility, and they also fail to acknowledge any of the other possible causes of increased iron, manganese, or TSS–which notably includes natural erosion from rocks. Arturo Casadevall & Ferric C. Fang, *Reproducible Science*, Nat'l Libr. of Med. (Sept. 2010), https://pmc.ncbi.nlm.nih.gov/articles/PMC2981311/; Bruce Dvorek & Becky Schuerman, *Drinking Water: Iron and Manganese*, Nebraska Extension (May 2021), https://extensionpubs.unl.edu/publication/g1714/na/html/view. They claim that this must be Highpeak's doing yet provide no tangible evidence about Highpeak's actions or the relationship between Highpeak and EPA.

CSP fails to show that this evidence sufficiently connects themselves to EPA's regulation of Highpeak. EPA's regulations apply to water transfers that "convey[] or connect[] waters of the United States without subjecting the waters to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (2023). Highpeak, the owner of the water transfer tunnel, is the

“(reguable) third party” under the Rule. *Food and Drug Admin.,* 602 U.S. at 383 (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 562 (1992)). The plaintiffs believe that the proximity is a sufficient connection to claim standing against EPA’s promulgation because Highpeak’s operations are along Crystal Stream. Again, the argument arrives at CSP’s alleged injury.

CSP provides insufficient evidence to prove that it is, in fact, Highpeak’s actions that have led to changes in the stream’s chemical content. Instead, they rely on conjectures made by a group that was formed with the purpose of suing Highpeak. *See* R. at 6 (noting CSP’s mission is “to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters,” which uses language from the regulation at issue in its mission statement). Mr. Silver claims that he is “hesitant to allow [his] dogs to drink from the Stream” and that he is “concerned with pollutants entering the Stream.” Silver Decl. Ex. B, at par. 7. Ms. Jones is “upset[]” by the discharge and “very concerned.” Jones Decl. Ex. A, at par. 8. Both note that they would recreate more frequently on the Stream “if not for Highpeak’s discharge.” Jones Decl. Ex. A, at par. 12; Silver Decl. Ex. B, at par. 9. However, there is no claim of injury or future injury and, most clearly, there is no support for the fact that their injury was due solely to Highpeak’s activity. Both continue to recreate and enjoy the stream; there has been no major change in their activities. These “emotional consequences” do not suffice for Article III standing, particularly not given the heightened scrutiny that CSP faces as a group formed primarily for litigation. *City of Los Angeles,* 461 U.S. at 107 n.8.

CSP fails to meet the requisite standing requirements because its members do not suffer concrete and particularized injuries. As an organization, it is subject to more stringent standing requirements to safeguard the court’s administrative resources. Like in *Harris*, this Court would have to parse through the minds of each member to determine the extent of their injury. 448 U.S.

at 321. Deciding which plaintiffs actually changed their behavior in response to the change in water quality, and not in anticipation of litigation, would be an immense burden to put onto this Court. Therefore, this Court should reverse the district court's decision.

II. CSP's regulatory challenge to the Rule was not timely filed.

CSP challenged the Rule after their individual members' statute of limitations had expired and they formed a nonprofit organization to effectively restart the clock. This Court should reverse the district court's holding that CSP's challenge was filed within their statute of limitations.

A person harmed by agency action can challenge that action under the APA once it is final. 5 U.S.C. §§ 702, 704. A plaintiff may challenge a regulation six years "after the right of first action first accrues." 28 U.S.C. § 2401(a). This accrual of time begins when the plaintiff is injured by the regulation. *Corner Post*, 114 S. Ct. at 2450. In *Corner Post*, the Court held that an organization formed after the promulgation of a final agency action was able to bring suit after they were formed, as their formation was the beginning of their injury. *Id.* at 2460. The regulation at issue in *Corner Post* was a banking fee charged to merchants who sell to customers using debit cards. *Id.* at 2447. The *Corner Post* convenience store could not have been harmed before their formation, as they were not conducting business that would have subjected them to the interchange fee. Unlike the *Corner Post* plaintiff's, CSP's members were injured at the time the rule was promulgated. Corner Post was a for-profit entity founded in 2018; seven years after the regulation at issue was finalized. *Id.* at 2448.

Here, CSP did not timely file. Given that Highpeak's tunnel was in operation before many members of CSP moved to the area, their alleged injury would have occurred over their entire residence. They had ample opportunity to challenge Highpeak's activity after the Rule was

promulgated, given their long-standing residence. Instead, CSP seeks to re-start the clock on their statute of limitations by forming a non-profit entity that was "injured" on the date of formation, while each of the individual members have been able to bring suit before that time period.

CSP is representative of the interests of the Crystal Stream neighbors, almost all of whom were around and were affected by the Rule when it was finalized. R. at 4. Each of the members had the capacity to bring the suit during the relevant statute of limitations–from the time of their injury, which would have begun to run after the final agency action was promulgated, and through the following six years. Forming the non-profit entity CSP was merely a way to extend the statute of limitations, effectively restarting the clock, for a group of people who had the ability to bring suit when they were initially injured. Unlike the district court's analysis, the issue is not the fact that the *Corner Post* plaintiff was a for-profit and that CSP is a non-profit, but that the individuals who make up CSP were harmed at the time the agency action was finalized, and the *Corner Post* plaintiff could not have been.

All but one of CSP's members have lived near the Crystal Stream for over 15 years. R. at 4. Highpeak's tunnel was in operation throughout their entire residence. In that time frame, the Rule was promulgated in 2008, which is now over 16 years ago. There is no question that the agency's action was final at that point in time. *See Crown Coat Front v. United States,* 386 U.S. 503, 517–19 (1967) (holding that a statute of limitations accrues at time of final administrative action, because a plaintiff cannot sue until administrative rule was final). If, as these plaintiffs contend, their injury is due to Highpeak's discharge, then they would have been injured from the time that that rule was made final and through the following six years. Several of the members of

CSP, therefore, were able to bring suit until 2014. There was nothing to bar the members of CSP who resided in the area before 2008 from filing suit between 2008 and 2014.

Only one member of CSP has not outrun this time frame, Mr. Silver. However, Mr. Silver does not have standing as he does not meet the Article III standing requirements. His alleged injuries cannot be traced to Highpeak's actions, and those injuries would not be redressed by any solution the court could put forth because CSP has failed to parse out the exact number of particles that can be attributed to Highpeak compared to natural processes, like storms or erosion. Even if the court determines that he has suffered an injury in fact, separating him from the group that initiated this litigation would pose a large burden on the court system.

Therefore, this Court should reverse the decision of the district court and hold that CSP's challenge was not timely.

III. The Rule was validly promulgated.

Despite its attempt to manufacture standing, CSP goes on to allege that the Rule was not validly promulgated. Here, the Rule is supported by the best reading of the CWA and *stare decisis* weighs in favor of respecting prior decisions upholding the Rule. This Court should affirm the district court's ruling.

A. The best reading of the CWA supports the promulgation of the Rule.

This Court must exercise its independent judgment to decide whether EPA's actions exceed its statutory authority. 5 U.S.C. § 706. Review of an agency action requires the court to determine whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* Under *Loper Bright*, the reviewing court must evaluate whether the best reading of the statute supports delegated authority to the agency and ensure that the agency "has engaged in 'reasoned decisionmaking'" within those bounds. *Loper Bright*, 144 S. Ct. at

2263 (quoting *Michigan v. Env't Prot. Agency*, 576 U.S. 743, 750 (2015)). Agencies are limited to the power delegated to them by Congress, particularly when the issue is of "vast political and economic significance." *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 717 (2022) (quoting *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)).

The reviewing court may rely on an agency's interpretation of a statute for guidance to determine whether the agency has met this standard. *Loper Bright*, 144 S. Ct. at 2259. EPA may be afforded some level of deference dependent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Here, the best reading of the CWA supports the promulgation of the Rule because the statute gives the EPA clear authority to regulate this area. Congress speaks clearly to an agency's jurisdiction, particularly if the issues are of "vast economic and political significance." *West Virginia*, 597 U.S. at 716. Congress has made EPA's jurisdiction related to water quality abundantly clear. *See Wisconsin v. Env't Prot. Agency*, 266 F. 3d 741, 747 (7th Cir. 2001) (stating that "the ultimate authority for the water quality standards lies with the federal EPA."). Under the CWA, the EPA has the authority to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). The language of the statute provides no indication that Congress intended the EPA to provide permits where there is no discharge.

Further, the promulgation of the Rule is within EPA's authority. A water transfer is defined 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). The Rule only applies where there is no introduction, or addition, of any pollutant. A

water transfer merely conveys water from one waterbody to another and is not a "discharge" within the definition of the CWA. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171–72 (D.C. Cir. 1982) (explaining that there is no discharge unless the transfer apparatus itself puts a pollutant into the passing water). This Rule is wholly within the scope of authority that the CWA delegates, CSP's reading of the Rule is not. CSP's reading would require NPDES permits to be given for hurricanes that displace waters, or for a person who, while still wet, jumps into a lake after spending the day in the ocean. Such a reading would hold transferers of polluted waters to double liability, both for the initial introduction of the pollutant and the movement of the waters.

This reading would further raise questions of such political and economic significance, triggering the major questions doctrine. *See West Virginia*, 597 U.S. at 716 (noting that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."). The EPA would thus require explicit Congressional delegation to promulgate the rule that CSP is suggesting here. These movement activities should not require a permit and requiring a permit would directly contradict the CWA's permitting scheme. Therefore, the EPA acted within the scope of its authority in promulgating the Rule because it does not exceed its delegated authority.

Further, the *Skidmore* factors weigh in favor of giving deference to the EPA. The Rule reflects EPA's thorough consideration and knowledge of the nation's water infrastructure system, protecting it from requiring NPDES permits. Water transfers allow the nation to meet drinking water demands and are used for agricultural uses, power generation, and flood control. 73 Fed. Reg. at 33698–99. Further, EPA historically declined to impose NPDES permits on the movements of waters. Although not formalized until the promulgation of the 2008 Rule, the Rule reflects a consistent position of the EPA. The EPA first detailed its stance that water transfers are

not applicable to the permitting scheme in a 2005 interpretive memorandum. *Id.* at 33699. In 2006, EPA proposed a regulation which stated that water transfers would not be subject to NPDES permits. *Id.* Two years later the EPA promulgated the Rule in question. EPA has now implemented the Rule for nearly two decades. Imposing the NPDES scheme for water transfers would be against long-standing public policy and impose administrative burdens while simultaneously failing to achieve the goals of the CWA. This consistency and the validity of EPA's reasoning weigh in favor of granting *Skidmore* deference.

Therefore, the Rule was validly promulgated because it is supported by the best reading of the CWA. EPA's promulgation of the Rule is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The rule of *stare decisis* further weighs in favor of upholding the Rule.

B. ***Stare decisis*** **weighs in favor of respecting decisions that upheld the Rule.**

Stare decisis is a long-held rule of law where courts "let stand" the decisions of earlier courts. The *Loper Bright* court urges lower courts to apply statutory *stare decisis* to decisions made under *Chevron*. *Loper Bright*, 144 S. Ct. at 2273 (stating that "[t]he holdings of those cases that specific agency actions are lawful. . . are still subject to statutory *stare decisis* despite our change in interpretive methodology"). Courts may also consider five factors in deciding whether precedent should be overruled: the nature of the error, the quality of the reasoning, workability, effect on other areas of law, and reliance interest. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 267 (2022).

Several courts have already upheld this Rule with the Supreme Court denying certiorari on the issue. *Catskill Mountains Ch. of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492 (2nd Cir. 2017)(*Catskill III*), *cert. denied*; *Friends of the Everglades v. S. Fla. Water Mgmt.*

Dist., 570 F.3d 1210 (11th Cir. 2009), *cert. denied.* In *Friends of the Everglades*, the Eleventh Circuit upheld EPA's promulgation of the Rule. 570 F.3d at 1228. Similarly, in *Catskill III*, the Second Circuit held that the Rule was both reasonable and consistent with the overall goal of the CWA. 846 F.3d at 520. The Supreme Court denied certiorari on this decision, reinstating both courts' decisions to uphold the Rule. The *Loper Bright* decision aligns with a longstanding rule that changes in interpretative methodology does not require overturning decisions made under the old methodology. *See Gibbons v. Gibbs*, 99 F.4th 211, 215 (4th Cir. 2024) (stating that "if stare decisis means anything, it means a future court lacks the authority to say a previous court was wrong about how it resolved the actual legal issue before it."). Because the decisions of the Second and Eleventh Circuit were based on valid law and rationale legal reasoning at the time of their adoption, this Court should apply *stare decisis* and uphold the validity of the Rule.

Further, applying the *Dobbs* factors also supports respecting these decisions. Even without precedent in this Circuit, this Court should consider how the *Dobbs* factors influence the *stare decisis* analysis. As discussed earlier, the alleged "error" in the Rule is consistent with the larger CWA framework and is based on logical reasoning. Its longstanding nature has led to immense reliance within the NPDES permitting scheme and the nation's water infrastructure system. CSP's reading of the rule would disastrously rework the entirety of the NPDES scheme to the detriment of the EPA and the people who rely on our current water infrastructure system.

Therefore, this Court should give due respect to the decisions of the courts which have already taken a stance on this issue under *stare decisis* and find that the rule is a valid promulgation of the CWA.

IV. Highpeak's transfer is within the scope of the Rule.

Despite the fact that the Rule was validly promulgated, the district court erred in holding that Highpeak needed a NPDES permit because Highpeak falls within the scope of the Rule. EPA's interpretation of the regulation should not be afforded controlling weight. Instead, the Court should have relied on its own judgment to make a determination of this question of law. Therefore, this Court should reverse the district court's granting of the motion to dismiss the citizen suit claim.

Foundational to our legal system is the note that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. However, in the last half century, this unique power of the courts has been progressively diminished when it came to agency decision-making. *Chevron* deference asked courts to defer to an agency's "permissible construction of a statute" where the statute was "silent or ambiguous" to an issue. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The scope of deference afforded to agencies was massive, seeming "to have added prodigious new powers to an already titanic administrative state." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J. concurring). In effect, *Chevron* deference "foster[ed] unwarranted instability in the law" by giving agencies massive amounts of discretion, even allowing agencies to "change course" without clear authorization from Congress. *Loper Bright*, 144 S. Ct. at 2272.

Now enters *Loper Bright*. Under *Loper Bright*, *Chevron* was overruled and with it the overwhelming tendency courts had to defer to agency interpretations of statutes. *Loper Bright,* 144 S. Ct at 2272–73. In its place, the Supreme Court returned to *Skidmore* deference. The Supreme Court's holding in *Loper Bright* was focused on an agency's interpretation of a statute. However, a more ubiquitous part of the administrative state is the prevalence of agency regulations which function to implement the laws passed by Congress. Historically, courts

afforded an agency's interpretation of its own regulation a great degree of deference, arguably more so than *Chevron*. *Auer v. Robbins* provided that in situations where a court must consider a question of an agency's interpretation of a regulation, the agency's interpretation must be given "controlling [weight] unless it is plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

In recent years, the strength of *Auer* deference has been diminished. In *Kisor*, the Supreme Court narrowly decided to maintain *Auer* deference on the basis of *stare decisis*. *Kisor v. Wilkie*, 588 U.S. 588, 592 (2019) (Gorsuch, J., concurring) ("Instead, a majority retains *Auer* only because of *stare decisis*."). Under *Kisor*, an agency's interpretation of its regulations is only afforded deference "if a regulation is genuinely ambiguous." *Kisor*, 588 U.S. at 573. To be genuinely ambiguous, a court must first have "resorted to all the standard tools of interpretation." *Id.* These tools of interpretation include, but are not limited to, the analysis of the text itself and the structure, history, and purpose of the regulation. *Id.* at 575 (quoting *Chevron*, 467 U.S. at 843 n.9). "[O]nly when the legal toolkit is empty and the interpretative question still has no single right answer can a judge conclude that is 'more [one] of policy than of law.'" *Id.* (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). Only once a court concludes that a regulation is itself genuinely ambiguous may the court defer to an agency's reasonable interpretation. *City of Arlington v. Fed. Commc'n Comm'n*, 569 U. S. 290, 296 (2013) (finding that the phrase "reasonable period of time" was sufficiently ambiguous to afford the agency deference). An agency's interpretation is reasonable only if the regulation comes within the "zone of ambiguity the court has identified." *Kisor*, 588 U.S. at 576.

Despite this narrowing of *Auer* deference, *Kisor* did not go far enough in giving courts the power to determine what the law is. In the face of a massive administrative state, the rationale provided for in *Loper Bright*—that questions of law should remain with the judiciary—should apply equally to agency interpretations of regulations as it does to agency interpretations of statutes. In looking at the Rule, this Court should apply the *Skidmore* factors to EPA's interpretation of its regulation.

In addition, this Court should use its own judgment to find that EPA's interpretation of the Rule is invalid. First, EPA's interpretation of the Rule is inconsistent with how the agency has historically interpreted water transfers. Second, EPA's interpretation is overwhelmingly broad, invalidating the Rule's purpose. In the alternative, if this Court seeks to apply the *Kisor* test, the analysis would reach the same conclusion. This Court should apply *Skidmore* deference and find that Highpeak's discharges are within the scope of the Rule.

A. EPA's interpretation of the Rule that does not include Highpeak within its scope is inconsistent with how EPA has historically interpreted water transfers.

Skidmore deference should be applied to EPA's interpretation of its own rules. Courts have consistently held that interpretations of an agency's regulations are a question of law. *See Gose*, 451 F.3d at 836 (concluding that the construction of a United States Post Office regulation governing postal employees drinking in a public place was a question of law). EPA's interpretation should not overpower this Court's judgment to determine the validity of the Rule's application to Highpeak. This does not foreclose EPA's interpretation of the Rule. However, applying the *Skidmore* factors illustrates that the Rule is inconsistent with years of agency action that weighs against EPA's interpretation.

The Rule was promulgated under the authority granted to EPA under Section 402. 73 Fed. Reg. at 33698. EPA's rationale was to "defer[] to congressional concerns that the statute not

unnecessarily burden water quantity management activities and exclude water transfers from the NPDES program." *Id.* at 33700. In drafting the rule, EPA focused on the statute's use of the term "addition." *Id.* EPA concluded that "addition" should be limited to situations where "the point source itself physically introduced a pollutant into a water from the outside world." *Id.* (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). The "outside world" has been interpreted as "anywhere outside the particular waterbody receiving the pollutant." 73 Fed. Reg. at 33701 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001)(*Catskill I*)). This interpretation of the CWA has been consistently accepted by the EPA and courts. *See, e.g.*, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Perhaps the most famous metaphor for the "unitary waters theory" compares jurisdictional waters to a pot 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." *Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) (quoting *Catskill I*, 273 F.3d at 492).

Here, EPA's interpretation of the Rule requiring Highpeak to obtain a NPDES permit, is inconsistent with years of agency action. Since the Rule was promulgated (and even before), EPA has consistently interpreted the rule in accordance with the unitary waters theory. Put simply, Highpeak's tunnel is merely a ladle of soup lifting the contents of the same pot. The water that flowed through the tunnel did transfer the water between Cloudy Lake and Crystal Stream, but did not itself "add" any pollutants as required by the NPDES permitting scheme. In the single set of samples taken by CSP, taken on a single day, the levels of iron, manganese, and TSS were slightly elevated. R. at 5. This decimal change could have been caused by a plethora of natural processes. As such, Highpeak's tunnel is a paragon of the unitary waters theory under the

Rule as EPA has historically interpreted it. As such, applying *Skidmore* reveals an interpretation that is inconsistent with years of agency action that weighs against EPA's interpretation.

B. If accepted as true, EPA's interpretation of the Rule is overwhelmingly broad which would invalidate the purpose of the Rule as set out by EPA.

In addition to being inconsistent with years of agency action, EPA's interpretation of the Rule's is overwhelmingly broad in direct contradiction to the purpose of the Rule which weighs against the agency's interpretation.

In the publication of the final Rule, the EPA explicitly noted that the Rule was to address whether NPDES permits would be required for "discharges from water transfers that do not subject the water to an intervening industrial, municipal, or commercial use." 73 Fed. Reg. at 33700. EPA's final rule determined that when water was transferred during one of these uses, and pollutants were introduced "by the water transfer activity itself," a permit is required. *Id.* To "introduce" a pollutant required the addition of a pollutant from "the outside world." *Id.* at 33701. EPA and CSP focus on the exception language in the rule: "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). If EPA and CSP's interpretation are to be taken as valid, the Rule would be so broad as to invalidate the original purpose of the rule.

Here, EPA's reasoning for applying the Rule is that the connection between Crystal Stream and Cloudy Lake introduced pollutants to the water and would require a NPDES permit. However, as stated in the record, Cloudy Lake's natural condition simply has higher concentrations of iron, manganese, and TSS than Crystal Stream. R. at 5. Just because Highpeak's tunnel mingles connected water bodies together does not mean it "introduces" pollutants and therefore needs a permit. If we are to take EPA's logic as valid, any structure that happens to pass through waters and picks up natural pollutants along the way would need a

NPDES permit. This would not only raise administrative costs to an absurd level but would also be inconsistent with the regulations set out by EPA. As such, EPA's reasoning for its interpretation of the Rule is invalid, thus this Court should not give deference to EPA.

Therefore, in considering whether EPA's interpretation of the Rule was appropriate, this Court should rely on its own judgment and limit the deference it affords to EPA. Even so, EPA's interpretation is inconsistent with agency action and overwhelmingly broad that weighs against the agency's interpretation.

C. Even if this Court declines to extend *Loper Bright*, an analysis under *Kisor* would reach the same conclusion.

Even if this Court declines to extend *Loper Bright* to an agency's interpretation of its regulations, the test laid out in *Kisor* would come to the same conclusion. For purposes of analysis, courts may construe a regulation using the same rules that apply to statutory interpretation. *United States v. Moriello*, 980 F.3d 924, 934 (4th Cir. 2020).

Here, the plain language of the Rule is not ambiguous. Since the word "introduce" is not defined by the regulation, this Court may look to a dictionary to discern its plain meaning. *Burnette Foods, Inc. v. U.S. Dep't of Agriculture*, 920 F.3d 461, 467–68 (6th Cir. 2019). "Introduce" is commonly defined as the action of putting something in place for the first time. *Introduce*, *Cambridge Dictionary* (2nd ed. 2007). If put in the context of the Rule, the structure the water passes through must itself have inserted pollutants into the water that was not there before. As such, the Rule is itself very clear on what types of transfers are and are not exempt from the permitting requirements. Highpeak is excluded because it is not clear that Highpeak introduced pollutants via the tunnel. Rather, it could have been many other natural processes that caused a negligible increase in iron, manganese, and TSS between Cloudy Lake and Crystal

Stream. As such, the Rule is not ambiguous under *Kisor,* and this Court should use its own judgment in determining the reasonableness of EPA's application of the Rule to Highpeak.

Therefore, this Court should apply *Skidmore* deference and find that Highpeak's discharges are within the scope of the Rule.

CONCLUSION

For the foregoing reasons Highpeak respectfully requests that this Court reverse the district court's denial of the motion to dismiss for CSP's citizen suit claim and affirm the district Court's grant of the motion to dismiss on the Rule's validity.