Team 23

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 in Case No.24-CV-5678, Judge T. Douglas Bowman.

Brief of Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

This case comes to this Court on appeal following the issuance of a Decision and Order of the United States District Court for the District of New Union, dated August 1, 2024. Because this action arises under the Clean Water Act (CWA), the district court had subject-matter jurisdiction pursuant to 33 U.S.C. § 1365, which states that district courts shall have jurisdiction of citizen suits which enforce standards of the CWA. The United States Environmental Protection Agency ("EPA"), Crystal Stream Preservationists, Inc. ("CSP") and Highpeak Tubes, Inc. ("Highpeak") all filed timely Notices of Appeal pursuant to 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. § 1291, which provides appellate courts jurisdiction over appeals from final decisions of the district courts.

STATEMENT OF THE CASE

A. Factual Background

Highpeak Tubes, Inc. is a recreational company that owns a 42-acre parcel of land in Rexville, New Union.[1] Highpeak's property touches two bodies of water; Cloudy Lake, which covers 274 acres, is located along the northern border of the property, while Crystal Stream runs through the southern portion of the parcel of land.[2]

Since 1992, Highpeak has operated a recreational tubing business on their property in Rexville, giving customers the opportunity to rent innertubes and be launched onto Crystal Stream.[3] During its inaugural year, Highpeak constructed a tunnel that connected Cloudy Lake to

[1] R. at 3, 4.
[2] R. at 4.
[3] R. at 4.

Crystal Stream.[4] The tunnel, which stretches 100 yards and has a diameter of four feet, is partially carved through rock and partially constructed with iron pipe installed by Highpeak.[5] Valves are located at both ends of the tunnel, providing Highpeak employees the ability to adjust the flow of water from Cloudy Lake to Crystal Stream.[6]

Highpeak utilizes the tunnel to release water from Cloudy Lake into the stream, for the purpose of increasing the stream's velocity and volume to create a more enjoyable experience for customers.[7] Per Highpeak's agreement with New Union, however, the company can release water from Cloudy Lake to the stream only when the state deems the water levels of Cloudy Lake to be adequate (water levels are adequate typically from spring to late summer).[8]

Because New Union does not operate its own CWA permitting program, it is the EPA that issues CWA permits in New Union per the National Pollution Discharge Elimination System ("NPDES").[9] At the time this lawsuit was initiated, Highpeak has never held or applied for an NPDES permit for discharges of waters from Cloudy Lake into Crystal Stream.[10]

On December 1, 2023, a group of Rexville, New Union residents formed the not-for-profit corporation, CSP.[11] Upon its formation, the organization consisted of 13 members, all of whom reside in Rexville; two members of CSP own property along the Stream.[12] With the exception of one member,[13] CSP's members have resided in Rexville for over 15 years. Its

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[4] R. at 4.
[5] R. at 4.
[6] R. at 4.
[7] R. at 4.
[8] R. at 4.
[9] R. at 4.
[10] R. at 4.
[11] R. at 4.
[12] R. at 4.
[13] R. at 16.

members formed CSP to protect the Stream; particularly, CSP seeks to "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters."[14]

B. Procedural History

This appeal follows a final decision by the U.S. District Court for the District of New Union.[15] Because Highpeak's discharge into Crystal Stream contained pollutants, CSP sent a CWA notice of intent to sue letter to Highpeak, with copies sent to state and federal agencies, as required by regulation.[16] Following the 60-day appeal period, CSP filed a citizen suit against Highpeak and a claim against the EPA on February 15, 2024.[17] The suit alleged Highpeak was discharging pollutants into Crystal Stream without a permit, violating § 402 of the CWA.[18] CSP also challenged the validity of the EPA's Water Transfers Rule ("WTR") under the Administrative Procedure Act ("APA"), which Highpeak claimed exempted its discharge.[19] Highpeak and the EPA then filed motions to dismiss.[20] Highpeak argued that CSP lacked standing, the challenge to the WTR was untimely, and the WTR validly exempted its discharge.[21] The EPA joined Highpeak's arguments on standing and timeliness; however, the agency argued that Highpeak's discharge was not exempt under the WTR because pollutants were introduced during the transfer.[22] The district court delayed ruling on the motions until after

[14] R. at 14.
[15] R. at 2.
[16] R. at 4.
[17] R. at 5.
[18] R. at 4-5.
[19] R. at 5.
[20] R. at 5-6.
[21] R. at 5.
[22] R. at 6.

the Supreme Court ruled on two relevant cases,[23] which were decided in July 2024.[24] The district court issued its decision on August 1, 2024, denying the motion to dismiss the citizen suit against Highpeak but granting the motions to dismiss the challenge to the WTR.[25] The court found that CSP had standing to bring both claims and that its challenge to the WTR was timely.[26] Further, the district court upheld the validity of the WTR but found that Highpeak still needed a permit under the CWA.[27]

STATEMENT OF ISSUES PRESENTED

I. Did the District Court Err When it Found That CSP Had Standing to Challenge Highpeak's Discharge and the Validity of the Water Transfers Rule?

II. Did the District Court Err When it Held That CSP Timely Filed the Challenge to the Water Transfers Rule?

III. Did the District Court Err When it Determined That the Water Transfers Rule Was a Valid Regulation Promulgation?

IV. Did the District Court Err When it Determined That Highpeak's Water Transfer Requires an NPDES Permit Because the Transfer Activity Introduces Pollutants, Causing the Discharge to Fall Outside the Scope of the Water Transfers Rule?

SUMMARY OF THE ARGUMENT

The district court erred in holding that CSP had constitutional standing to challenge Highpeak's discharge and the Water Transfers Rule because CSP had not suffered a real, cognizable injury. While the organization may have met the other two prongs required to

[23] *See Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024); *see also Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024).
[24] R. at 6.
[25] R. at 2.
[26] R. at 2.
[27] R. at 2.

demonstrate standing in federal court, CSP failed to show a legitimate, tangible injury. Thus, CSP lacked the necessary standing to bring a lawsuit challenging Highpeak's discharge and the WTR.

The district court further erred in holding that CSP timely filed its challenge to the WTR. The EPA promulgated this rule in 2008, and the EPA contends that the six-year statute of limitations that applies to claims brought under the APA started accruing that year; thus, the plaintiff's claim is time-barred. Despite recent Supreme Court precedent that suggests the statute of limitations only begins to accrue when the plaintiff suffers injury, the EPA urges this Court to recognize a reasonable, narrow exception to the new rule regarding when a right of action starts to accrue, under 28 U.S.C. § 2401.

The district court did not err in finding that the WTR was a valid rule promulgation. The EPA has been consistent in its position, that water transfers do not require a NPDES permit, long before the rule was promulgated. By going through the notice and comment process, and formally promulgating the WTR, the EPA went through the necessary avenues required by the APA to promulgate a rule.

Additionally, though the promulgation of the WTR took place under the now overturned *Chevron* doctrine, this does not invalidate the WTR's validity. The Supreme Court in *Loper Bright v. Raimondo*[28] stated that cases decided under the *Chevron* doctrine are still valid rules. Since its formal promulgation, the WTR has been upheld by two circuit courts and the district court in this case. This jurisprudential support, along with what the district court noted as "agency expertise," should be respected according to the *Loper Bright* decision. If this Court interprets the *Loper Bright* case differently, the EPA's position is that the WTR satisfies the test

[28] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

articulated in *Skidmore v. Swift & Co.*[29] under the same analysis. For these reasons, the WTR should be upheld as a valid rule promulgation.

Highpeak's water transfer requires a NPDES permit because the transfer introduces pollutants, making it fall outside the WTR exception under the CWA. The district court found that Highpeak's man-made tunnel adds pollutants like iron, manganese, and total suspended solids (TSS) to the transferred water. The addition of such pollutants disqualifies it from the WTR's exemption, which only applies if no pollutants are introduced during transfer. The CWA defines discharge as an addition of pollutants from a point source to navigable waters, and Highpeak's operation meets this criterion. Furthermore, prior rulings, such as *Na Kia'i Kai v. Nakatani*, established that pollutants introduced through erosion or structural choices in the transfer process, like unlined canals or tunnels, require NPDES permitting. The district court correctly determined that Highpeak's choice of tunnel construction contributed to the pollutant discharge, affirming the necessity for an NPDES permit.

The EPA's interpretation of the WTR supports the district court's ruling. The WTR explicitly states that its exclusion does not apply to pollutants introduced during transfer, regardless of what causes the presence of pollutants. The EPA's interpretation aligns with the regulation's plain language, broader context, and the goals of the CWA. Courts generally defer to agencies' regulatory interpretations under *Auer v. Robbins*[30] and *Kisor v. Wilkie*[31] when the interpretation reflects expertise, authoritative judgment, and reasonable analysis. Although Highpeak cited the recent *Loper Bright* decision to challenge agency deference, the ruling

[29] *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).
[30] *Auer v. Robbins*, 519 U.S. 452 (1997).
[31] *Kisor v. Wilkie*, 588 U.S. 558 (2019).

pertains to statutory—not regulatory—interpretations, leaving *Auer* intact. Therefore, the EPA's interpretation remains valid, affirming the need for Highpeak's NPDES permit.

STANDARD OF REVIEW

For purposes of ruling on a motion to dismiss, both the trial and reviewing courts review the case de novo. On a motion to dismiss, the court must accept the "factual allegations ... as true,"[32] and "construe the complaint 'in favor of [the plaintiff] who must be granted the benefit of all inferences that can be derived from the facts alleged,'"[33]

[32] *Harris v. D.C. Water & Sewer Auth*., 791 F.3d 65, 67 (D.C. Cir. 2015).
[33] *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

ARGUMENT

I. The District Court Erred in Holding That CSP Had Standing to Challenge Highpeak's Discharge and the Water Transfers Rule.

A. CSP's alleged injuries are not sufficient to establish Article III Standing.

The EPA contends that CSP lacks standing to bring suit, as CSP has not suffered a real, cognizable injury. The EPA further asserts that residents of Rexville, New Union formed CSP as a means to manufacture a claim to challenging the WTR, rather than a means to redress some cognizable harm suffered by the organization.

A plaintiff must show that he has constitutional standing when filing suit in a federal court. To demonstrate Article III standing,[34] a plaintiff must be able to show he has suffered an actual injury, that is "concrete in both a qualitative and temporal sense;" the injury must be actual or imminent, rather than conjectural or hypothetical.[35] A plaintiff must also show causation and redressability, the other two prongs of asserting constitutional standing. The causation prong serves to ensure that there is a nexus between the injury and the challenged action, while the redressability prong ensures that the plaintiff's injury can be addressed through a judicial decision.[36]

In its opinion, the district court did not address any issues concerning causation or redressability, but it did harbor questions as to whether or not CSP suffered injury or actual harm.[37] Federal courts have held that an organization can assert the injuries suffered by its members as its own injuries to demonstrate Article III standing; the EPA concedes this much. However, the EPA contends that the injuries allegedly suffered by CSP's members are not

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[34] U.S. CONST. art. III.
[35] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).
[36] *Id.* at 155.
[37] R. at 7.

sufficiently particularized or cognizable for CSP to meet the thresholds of constitutional standing.

In *Lujan v. National Wildlife Federation*, an environmental organization filed suit against the Bureau of Land Management after the agency initiated a program that allowed mining activities on public land.[38] In this case, the plaintiff alleged that mining operations caused harm to the organization's members, due to the adverse effects mining had on the recreational and aesthetic qualities of the land[39] (much like the alleged harm asserted by CSP and its members).[40] However, the defendant moved for summary judgment, asserting that the environmental organization lacked sufficient injury to have standing to bring suit, and the Supreme Court agreed. The Supreme Court held that the plaintiff lacked standing because its complaint demonstrated that only "one of [the plaintiff's] members uses unspecified portions of an immense tract of territory."[41]

The Court held that a sole member's injury, which was general and not specific in its nature, was not enough to establish a real, cognizable injury. Furthermore, in *Lujan v. Defenders of Wildlife*, the Supreme Court held that the injury must be particularized; specifically, the injury must affect the plaintiff in a personal and individual manner.[42]

Likewise, according to the allegations presented by CSP, the EPA argues that the supposed harm suffered by CSP and its members is vague and unspecific, and it does not meet

[38] *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990).
[39] *Id.* at 879.
[40] R. at 14-16.
[41] *Id*. at 889.
[42] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

the necessary threshold for demonstrating an environmental-related injury as articulated by the Supreme Court in *Lujan.*[43]

The record includes the declarations of two members of CSP, Jonathan Silver and Cynthia Jones, which serve as the basis for CSP's claims for injury. Silver's declaration asserts that he has suffered harm because Crystal Stream's water "occasionally appears cloudy" to him, along a two-mile trail that runs alongside the stream; Silver further states that he is hesitant to let his dogs drink from Crystal Stream.[44] In a similar vein to the Court's reasoning in *Lujan*, the EPA argues that Silver's supposed injury is not specific or particularized; he merely states that he notices a difference in the water's quality occasionally. He does not demonstrate any sort of specific, personal harm in choosing to keep his dogs from drinking from Crystal Stream.

The EPA asserts a similar argument upon reviewing Cynthia Jones's declaration.[45] Jones states that she is concerned with contamination of Crystal Stream. According to her statement, Jones has suffered injury because her "ability to enjoy the Stream has significantly diminished since learning about the pollutants."[46] The EPA emphasizes the fact that Jones' alleged injury appears to surface only after learning information about Highpeak's discharges in 2020, rather than after her use of the stream or observation of the stream's water. As the Supreme Court articulates in *Whitmore*, a plaintiff's injury may not be conjectural or hypothetical, but concrete and real;[47] yet, according to Jones' declaration, her injury is conjectural in nature.

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[43] *Id.* at 561.
[44] R. at 16.
[45] R. at 14.
[46] R. at 15.
[47] *Whitmore*, 149 U.S. at 154.

Given that the alleged injuries of these two individuals is the basis for CSP's injury, the EPA asserts that CSP has not demonstrated that it has suffered a real, cognizable injury; thus, CSP has not met the requirements for demonstrating standing as set forth by Article III of the Constitution.

B. The district court should have applied additional scrutiny in determining CSP's standing.

As the district court opinion notes, courts may apply greater scrutiny when determining the standing of "an organization formed primarily to mount a legal challenge."[48] Specifically, a court may look at the intent of an organization's formation;[49] if a plaintiff takes certain actions for the sole purpose of manufacturing standing for a lawsuit, a court "need not find a constitutional injury."[50] The EPA contends that CSP was formed to serve as a vehicle for litigation brought against the EPA and its promulgation of the WTR.

CSP was formed as an entity on December 1, 2023, 15 years after the EPA promulgated the WTR, despite the fact that 12 of CSP's 13 members have resided in Rexville, near or along Crystal Stream Park, prior to the promulgation of the WTR in 2008.[51] Pointedly, as the district court points out, the organization's mission statement directly refers to language found in the Water Transfers Rule;[52] CSP has made a mission to protect Crystal Stream from "contamination resulting from the industrial uses and illegal transfers of polluted waters."[53] The reference to "illegal transfers" of waters strikes the EPA as a clear indication that CSP was formed by its

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[48] R. at 7.
[49] R. at 7.
[50] *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 801 (W.D. Pa. 2016).
[51] R. at 4.
[52] NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).
[53] R. at 14.

members to file suit against the Highpeak and the EPA in light of recent litigation that reached the Supreme Court in 2024.[54]

Beyond the actions taken by CSP related to the filing of this lawsuit, there is nothing in the record to suggest that CSP has taken any other actions that serve a legitimate, environmental purpose related to Crystal Stream. There is no indication that CSP or its members have made any legitimate efforts or commenced some sort of operation to address the environmental concerns CSP purportedly has concerning Crystal Stream. In fact, the only actions taken by CSP since its formation concerned this lawsuit; CSP issued Highpeak its CWA notice of intent to sue letter just two weeks after its formation.[55]

Given that CSP's actions since its formation have been solely tied to the filing of this lawsuit against the EPA and Highpeak, the EPA argues that the district court should have held CSP to a greater level of scrutiny in its determination of CSP's standing. As the district court notes in its opinion, an organization's standing may be questionable, and its claim to injury may be weakened, if its formation is for the sole purpose of creating an avenue for litigation.[56]

The EPA asserts, and the facts in the record indicate, that CSP was formed only to challenge the WTR in federal court; thus, the district court should have applied additional scrutiny in its determination of CSP's standing and, ultimately, found that CSP failed to demonstrate a real, cognizable injury.

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[54] *See Corner Post, Inc. v. Board of Governors of Federal Reserve System,* 144 S. Ct. 2440 (2024); *see also Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 224 (2024).
[55] R. at 4.
[56] R. at 7.

II. The District Court Erred in Holding That CSP Timely Filed the Challenge to the Water Transfers Rule.

The EPA further contends that CSP did not timely file its lawsuit challenging the WTR, even if this Court finds CSP sufficiently demonstrates constitutional standing. CSP brought suit against the EPA under the APA.[57] Per the APA, plaintiffs may challenge a promulgated federal regulation for up to six years after the plaintiff's "right of action first accrues."[58] For decades, the Supreme Court has treated the promulgation of a regulation as the point at which a right of action begins its accrual. On its face, then, when CSP filed suit in February 2024, it appeared that their claim against the EPA was time-barred; the WTR was promulgated by the EPA in 2008, so any claim made 2014 would prove fruitless.

However, the Supreme Court reversed course in 2024, holding that the statute of limitations for claims brought under the APA does not begin to accrue until the plaintiff suffers an injury from the regulation.[59] In *Corner Post, Inc, v. Bd. Of Governors of the Fed. Rsrv. Sys.*, a North Dakota truck stop and convenience store, among other plaintiffs, filed suit against the Federal Reserve Board, alleging financial injury after the Federal Reserve promulgated a regulation that raised fees for debit card transactions, thus incurring greater costs among entities like Corner Post.[60] Notably, the Federal Reserve promulgated the rule in 2011; Corner Post was only incorporated in 2017.[61]

Initially, as this case made its way to the Supreme Court, lower courts held that the statute of limitations had indeed expired, given that the rule in question had been promulgated

[57] 5 U.S.C. § 551 *et seq.*
[58] 28 U.S.C. § 2401(a).
[59] *Corner Post, Inc, v. Bd. Of Governors of the Fed. Rsrv. Sys.* 144 S. Ct. 2440 (2024).
[60] *Id*. at 2448.
[61] *Id*. at 2448.

over a decade prior to the suit being brought.[62] However, the Supreme Court disagreed, and the majority in *Corner Post* adopted a new interpretation of the 28 U.S.C. § 2401(a) as it applies to the APA. The Court's majority opinion, penned by Justice Barrett, contends that the right of action is personal to the plaintiff; that is, the claim starts to accrue only after the plaintiff has suffered injury.[63] Now, the time at which a rule was promulgated by a federal agency is apparently deemed irrelevant.

As Justice Jackson points out in her dissent in *Corner Post,* the effects of the new precedent will be far-reaching for federal agencies and the rules they promulgate.[64] Plaintiffs are free to challenge rules and policies of federal agencies, no matter when they were promulgated, so long as the plaintiff suffers an injury within six years of the filing of the lawsuit; this is despite the notion that "a plaintiff's injury is utterly irrelevant to a facial APA claim."[65] In effect, the new logic presented by the Supreme Court in *Corner Post* opens the floodgates for individual plaintiffs and entities to bring "fresh" litigation challenging federal agencies' rules, regardless of when that rule was promulgated.

Given the recency of the *Corner Post* decision, however, the new rule regarding the application of the statute of limitations within 28 U.S.C. § 2401(a) has been sparsely applied in district courts. Given the infancy of this precedent, no court has set forth any exceptions to the Supreme Court's broad interpretation of 28 U.S.C. § 2401(a); however, the EPA urges this Court to examine the facts of this particular case and consider the possibility of a narrow, but appropriate, exception under 28 U.S.C. § 2401(a).

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[62] *N.D. Retail Ass'n v. Bd. Of Governors,* 113 F.4th 1027 (2024).
[63] *Corner Post, Inc,* 144 S. Ct. at 2451.
[64] *Corner Post, Inc,* 144 S. Ct. at 2470 (Jackson, K., dissenting).
[65] *Id*. at 2470.

The EPA contends that an exception to the *Corner Post* interpretation of 28 U.S.C. § 2401(a) can and should exist. The facts of this case are distinct from those of *Corner Post*, and the district court erred in applying the precedent established in *Corner Post* to the facts at hand.

The EPA argues that a non-profit, environmental organization, such as CSP, should not stand to benefit from the Supreme Court's new interpretation of 28 U.S.C. § 2401(a) in the same way a for-profit entity benefits, such as the business entity in *Corner Post.* As a for-profit entity, the truck stop/convenience store at the center of *Corner Post* could have suffered harm only after it was formed; the store could not operate business until it actually existed, and it could not be subject to fees associated with debit card transactions until its formation. Thus, the plaintiff's cause of action could not come into existence until the entity came into existence. Further, the injury suffered by the truck stop was a clear, concrete detriment to the business's purpose—making a profit.

Conversely, CSP's lawsuit asserts the injuries of its members (namely that of Jonathan Silver). While it is reasonable for an organization to utilize its members' alleged injuries, the members suffered those alleged injuries as early as 2008 (with the exception of Silver), when the WTR was promulgated by the EPA. Since those injuries were suffered in 2008, the EPA argues that, per 28 U.S.C. § 2401(a) and its interpretation under *Corner Post*, the rights of action for those injuries began their accrual in 2008 and are time-barred as of 2014. Essentially, although CSP was formed in 2023, it does not automatically mean that its injuries were suffered at the time of formation, as was the case in *Corner Post.* Rather, the EPA points to the underlying subtext, or source, of CSP's alleged injuries: they are mostly injuries suffered by its members at the time the EPA promulgated the WTR.

The lone exception to the EPA's argument here is the claim of injury of Jonathan Silver. Both CSP and the district court for the District of New Union are of the opinion that Silver's right of action came into existence in 2019, because that was the year Silver moved to Rexville.[66] While Silver's claim is brought, through CSP, within the six-year statute of limitations, the EPA urges that permitting this claim could have dangerous effects. By allowing a newly-formed organization to assert just one claim that falls within the statute of limitations, while ushering in claims that would otherwise be time-barred (as is the case according to the record), any number of organizations could follow a similar process to revive other claims that would be time-barred by 28 U.S.C. § 2401(a), further opening the "floodgates" for time-barred claims to challenge the promulgated rules.

For these reasons, the EPA asserts that the CSP did not timely file its lawsuit challenging the WTR, even in light of new precedent handed down by the Supreme Court in *Corner Post.*

III. The District Court was Correct in Holding that the Water Transfers Rule was a Valid Regulation Promulgation Under the Clean Water Act.

The WTR was validly promulgated by the EPA under the CWA. The CWA states, "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful."[67] Discharges of pollutants from a water transfer do not require NPDES permits.[68] 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

[66] R. at 8.
[67] 33 U.S.C. § 1311.
[68] 40 C.F.R. § 122.3.

commercial use.[69] The "discharge of pollutants" has been defined as "any addition of any pollutant to navigable waters from any point source."[70] Courts have previously sided with the EPA in determining that the WTR is a valid interpretation of the CWA due to the ambiguity of the statute, and specifically, the word "addition" [emphasis added] when defining the discharge of pollutants.[71]

A. The Water Transfers Rule is a valid interpretation of the Clean Water Act.

The WTR was a valid interpretation of the CWA by the EPA. The WTR states, "that water transfers are not subject to regulation under the NPDES permitting program."[72] The Second Circuit addressed the promulgation of the WTR in *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA* ("*Catskill III*")and stated that "the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers."[73] While addressing the validity of the WTR, the *Catskill III* court found that, "the Water Transfers Rule is a reasonable interpretation of the Clean Water Act."[74] *Catskill III* came after cases where the courts did not find in favor of the EPA due to the WTR not being promulgated at the time. As will be discussed later, though this rule came under *Chevron*, the *Loper Bright* case upheld the validity of such rules.[75]

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[69] *Id.*
[70] Appellate court affirmed district court's finding that discharge of turbid water from Shandaken Tunnel into creek qualified as "discharge of any pollutant" under 33 U.S.C. § 1311(a) which was defined as "any addition of any pollutant to navigable waters from any point source" 33 U.S.C. § 1311.
[71] *See Friends of the Everglades v. United States EPA*, 699 F.3d 1280 (11th Cir. 2012).
[72]NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).
[73] *Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492 (2d Cir. 2017).
[74] *Id.* at 506.
[75] *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

The *Catskill III* court came to this decision by looking at the history of previous WTR decisions, as well as observing what changed after the EPA formally promulgated the WTR. Prior to the promulgation of the WTR, the EPA's position was routinely challenged, but the EPA found that none of these cases sufficiently captured their view on water transfers.[76] The EPA began taking steps towards promulgation in 2005, and then, following a notice-and-comment period, the water transfers rule was adopted in 2008.[77]

The present case questions whether the WTR was correctly promulgated. As was discussed in the *Catskill III* case, the EPA took formal steps of rulemaking, and even after being challenged, was still able to promulgate the WTR. It is the EPA's view in this case, that although the WTR was promulgated under the *Chevron* doctrine, that in itself does not invalidate the correctness of the WTR's promulgation. Instead, this Court should uphold the correctness of the rule's promulgation; similarly to the views of the Supreme Court in *Loper Bright.*[78]

B. The *Loper Bright* Decision Does Not Invalidate the District Court's Holding.

The Supreme Court's decision in *Loper Bright* should not invalidate the district court's holding in the present Case. Per § 706 of the APA, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[79] In *Loper Bright*, as part of the decision to overturn the *Chevron* doctrine, the Supreme Court stated that "[c]ourts, not agencies, will decide all relevant questions of law

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[76] *See Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 504 (2d Cir. 2017).
[77] *Id.* at 504.
[78] "By doing so, however, the Supreme Court does not call into question prior cases that relied on the Chevron framework." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2247 (2024).
[79] 5 U.S.C. § 706.

arising on review of agency action, 5 U.S.C. § 706—even those involving ambiguous laws."[80] However, the *Loper Bright* court also clarified that decisions made under *Chevron* are still lawful and are still subject to statutory *stare decisis*.[81] Additionally, the Supreme Court stated that reliance upon *Chevron* itself is not in itself justification for grounds overruling precedent decisions.[82]

Along with statements regarding *stare decisis*, the *Loper Bright* case also speaks to respecting the executive branch's interpretation of statutes. While not explicitly deference in the *Chevron* context,[83] the Supreme Court in *Loper Bright* wrote,"[t]he Court also gave [the most respectful] consideration to Executive Branch interpretations simply because '[t]he officers concerned [were] usually able men, and masters of the subject, who may well have drafted the laws at issue.'"[84]

By applying the two principles of *stare decisis* and respect to this Case, it can be inferred that with proper jurisprudential support and respect for the EPA's interpretation of the CWA, the *Loper Bright* decision should not invalidate the EPA's argument.

a. Jurisprudence warrants finding that the Water Transfers Rule be upheld.

Jurisprudence warrants finding that *stare decisis* supports the WTR and the EPA's interpretation of the CWA being upheld. The record in this case supports this finding by showing that after the promulgation of the WTR, in the *Catskill III* and *Friends of The Everglades* cases, the courts sided with the EPA.[85] Both cases came soon after the rule was formally promulgated

[80] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024).
[81] *Id.* at 2273.
[82] *Id.* at 2273.
[83] *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).
[84] *United States v. Moore*, 95 U. S. 760, 763 (1878), as cited in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2248 (2024).
[85] R. at 9.

and should suffice to show that the current WTR is one favored by courts while also showing a successful jurisprudential record.

b. The EPA's statutory interpretation should be respected.

Even without explicit agency deference, the EPA's statutory interpretation should be respected and upheld. The footnotes on page 10 of the record give a clear description of why the EPA's interpretation in this matter should be respected. The footnotes point to "[the] EPA's expertise in water transfers, along with the reasoning behind exempting certain transfers from CWA permitting requirements, reflects agency expertise."[86] Additionally, the district court stated, "[the] EPA has also been consistent in its defense of the WTR across four subsequent administrations."[87]

C. Even If *Loper Bright* applies, the Water Transfers Rule satisfies the *Skidmore* test.

Even if *Loper Bright* applies, the WTR satisfies the *Skidmore* test for agency deference. The Supreme Court has previously spoken about deference to agency decisions using the following standard: "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[88] The Supreme Court has stated that "courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court."[89] While these statements may not insinuate the same level of agency deference

[86] R. at 10.
[87] R. at 10.
[88] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[89] *Bittner v. United States*, 598 U.S. 85, 97 (2023).

as was found in *Chevron*, the Supreme Court still acknowledges that certain factors, if found to be prevalent, can still give power and persuasion to an agency's viewpoint.

In the present case, the EPA satisfies many of the factors listed in *Skidmore*. The record in this case reflects the EPA's contention that water transfers under the WTR have never been subject to a NPDES permit.[90] The district court shared this sentiment when speaking about how the EPA has held the same views for four subsequent administrations.[91] This consistent view was acknowledged by various courts after the WTR was promulgated as a regulation.[92] The record also shows that jurisprudence in the *Catskill III* case as well as the *Friends of the Everglades* case upheld the EPA's interpretation of 33 U.S.C. § 1311.[93] While these cases took place during the *Chevron* doctrine era, that should not negate the persuasive power of the EPA's view, nor should it make the outcome of these cases null.[94] This is stated within the record by quoting *Loper Bright's* "special justification" language which states: "*Loper Bright* emphasized that regulations upheld under the *Chevron* framework remain valid . . . unless there is a 'special justification' for revisiting those prior rulings."[95] Therefore, since the EPA has long held the view that water transfers under the WTR do not require a NPDES permit, and since jurisprudence warrants a finding that the EPA's view is reasonable, then the EPA's Water Transfers Rule satisfies the *Skidmore* test.

[90] R. at 9.
[91] R. at10.
[92] R. at 9.
[93] *Friends of the Everglades v. United States EPA*, 699 F. 3d 1280 (11th Cir. 2012).
[94] R. at 9.
[95] R. at 10.

IV. Highpeak's Water Transfer Requires a NPDES Permit Because the Transfer Activity Introduces Pollutants, Causing the Discharge to Fall Outside the Scope of the Water Transfers Rule.

The district court was correct in finding that Highpeak's water transfer required an NPDES permit. As discussed above, the CWA generally bans the discharge of any pollutant except as authorized by an NPDES permit.[96] The NPDES permit program, which is primarily articulated in 33 U.S.C. § 1342, allows the EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants."[97,98] Because the CWA defines a discharge subject to NPDES permitting as "any addition of any pollutant to navigable waters from any point source," Highpeak's discharge must have: (1) an addition, (2) of any pollutant, (3) through a point source, (4) into navigable waters.[99]

Highpeak's operation discharges water through their man-made tunnel from Cloudy Lake to Crystal Stream, introducing pollutants, including iron, manganese, and TSS. While "pollutant" is broadly defined in § 502 of the CWA, § 304(a)(4) of the Clean Water Act specifically designates TSS as conventional pollutants. Additionally, a point source, as defined by § 502(14) of the CWA, includes tunnels, pipes, or channels in which pollutants may be discharged. Finally, all parties have agreed that these two bodies of water are considered waters of the United States.[100] Therefore, this Court should affirm the district court's determination that Highpeak's discharge falls under the CWA, not the WTR, and thus is subject to NPDES permitting regulations.

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[96] 33 U.S.C. §§ 1311, 1342(a)(1), 1362(12).
[97] 33 U.S.C. § 1342(a)(1).
[98] *Nat'l Pork Producers Council, et al v. U.S. E.P.A., et al*., 635 F.3d 738, 743 (5th Cir. 2011).
[99] 33 U.S.C. § 502(12).
[100] R. at 4, 5.

A. The district court was correct in finding that Highpeak's discharge fell outside the scope of the Water Transfers Rule.

The WTR creates an exception from NPDES permitting requirements where a water transfer activity "conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use."[101] As explained when the rule was promulgated, even where pollutants are present in the conveyed water, as will typically be the case given the broad definition of the word "pollutant,"[102] water transfers do not effect an "addition" to the waters of the United States "because the pollutant at issue is already part of 'the waters of the United States' to begin with."[103] This rule generally exempts water transfers from NPDES permitting under the CWA.[104]

Despite this general exemption, Highpeak's transfer is not exempt from NPDES under the WTR because pollutants are added during the transfer. As the District Court noted, the rule further states that "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred."[105] The data collected by CSP shows a clear introduction of iron, manganese, and TSS from the original intake site at Cloudy Lake to the outfall site at Crystal Stream.[106] This discharge is not an incidental consequence of natural hydrology; instead, it results directly from the water transfer mechanism itself, which alters the water's composition and adds pollutants. Since the discharge from Highpeak's man-made tunnel introduces the contaminants at issue to the water being transferred, it exceeds the scope of the WTR and, therefore, requires a NPDES permit.

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[101] 40 C.F.R. § 122.3(i).
[102] See 33 U.S.C. § 1362(6); 73 Fed. Reg. at 33,699.
[103] NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701.
[104] *Id.*
[105] 40 C.F.R. § 122.3(i).
[106] R. at 5.

In *Na Kia'i Kai v. Nakatani*, a system of unlined canals and drainage ditches that transferred water was found to fall outside the scope of the WTR because pollutants, including TSS, were added during the transfer due to the flow of the water passing through them.[107] The court found that, "because these miles of 'unlined, earthen canals' ... and the 'unvegetated and unstable banks are sources of detached sediment'" the system was not an exempt water transfer activity because it added pollutants to the water being transferred.[108]

Here, it is Highpeak's contention that for a water transfer activity to fall outside of the scope of the WTR, the pollutants must be introduced as a result of human activity and not natural processes like erosion. The district court rejected this argument and found that it was Highpeak's choice to construct the tunnel partially through rock and soil, rather than using an impermeable conduit. Similarly to *Na Kia'i Kai*, the construction method of the transferring instrument contributed to the introduction of pollutants. Therefore, this Court should reject Highpeak's position and find that the pollutants introduced during the water transfer, regardless of whether they result from natural processes or human activity, place the transfer outside the scope of the WTR exemption, affirming the requirement for an NPDES permit.

B. EPA's interpretation is correct based on the plain reading of the Water Transfers Rule.

The final sentence of the WTR states, "This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred."[109] According to the Supreme Court in *Kisor*, "A court should not afford *Auer* deference unless, after exhausting all the "traditional tools" of construction, the regulation is genuinely ambiguous. A court must

[107] *Na Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Haw. 2019).
[108] *Id*. at 1108.
[109] 40 C.F.R. § 122.3(i) (2023).

carefully consider the text, structure, history, and purpose of a regulation before resorting to deference. If genuine ambiguity remains, the agency's reading must still fall "within the bounds of reasonable interpretation."[110] The ambiguity centers on the term "introduced," which Highpeak incorrectly argues should only cover pollutants added through intentional, man-made processes rather than through natural processes such as erosion.

The ordinary meaning of "introduced" provides a starting point for textual interpretation. Webster's Dictionary defines "introduce" as "to lead, bring, conduct, or usher in especially for the first time" or "to cause to take part or be involved by introducing."[111] This language suggests that "introducing" something does not require a deliberate human act. The phrase "pollutants introduced by the water transfer activity itself to the water being transferred," is broad enough to encompass pollutants added indirectly through a natural process, such as the erosion of materials from tunnel walls, and not just man-made processes.

Additionally, the structure of the rule does not specify a limiting qualifier for "introduced," suggesting that it should be read inclusively. Had the EPA intended to limit the introduction to only those pollutants added by man-made processes, the agency could have used narrower language such as, "pollutants added directly by the transfer activity." Instead, the broader wordage used implies that the EPA intended for the exception to apply to all pollutant additions resulting from the operation of the water transfer, whether directly caused by man-made processes or indirectly caused via environmental effects such as erosion within the transfer mechanism.

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[110] *Arlington v. FCC*, 569 U.S. 290, 296 (2013).
[111] *Introduce*, Webster's Third New International Dictionary (1986).

When promulgating the WTR, the EPA specifically distinguished water transfers that merely convey water from those which introduce pollutants.[112] As was stated in the Notice of Proposed Rulemaking ("Notice"), the EPA clarified, "Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required".[113]

C. Alternatively, the EPA's interpretation of the Water Transfers Rule, that any introduction of pollutants during transfer requires a permit, is reasonable and is entitled to *Auer* deference by the Court.

Should the Court find that the WTR is ambiguous, the EPA's interpretation of its WTR warrants deference under *Auer v. Robbins* and *Kisor v. Wilkie*, despite Highpeak's challenge invoking the Supreme Court's recent decision in *Loper Bright*. Instead, the decision explicitly preserves agencies' discretion to clarify their regulations through reasoned decision-making. Accordingly, the EPA's interpretation is entitled to controlling weight, and the district court's decision affirming the agency's authority under the CWA should be upheld.

a. The EPA's interpretation satisfies the requirements needed to apply *Auer*.

Highpeak believes that the EPA is incorrectly interpreting their own regulation, taking the position that when pollutants are introduced through a "natural" process, like erosion, the discharge is exempt from NPDES permitting under the WTR. When interpreting one's own regulations, an agency is generally given controlling deference unless plainly erroneous.[114] This test was originally established by *Auer v. Robbins*, but the recent *Kisor v. Wilkie* decision

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[112] NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).
[113] *Id*. (citing *Nat. Wildlife Federation v. Consumers Power*, 862 F.2d 580, 588 (6th Cir. 1988); *Nat. Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)
[114] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

narrowed the original test.[115,116] This deference is warranted when (1) the rule is ambiguous, (2) the character and context of the action/interpretation are its authoritative and official position based on substantive expertise and fair and considered judgment, and (3) the interpretation is reasonable.[117]

i. The character and context of the interpretation are the EPA's authoritative and official position based on substantive expertise and fair and considered judgment.

The EPA's interpretation of the WTR in this instance accurately represents the agency's official position on this regulatory provision. When the WTR was finalized, the EPA explicitly stated that its purpose was to exempt only water transfers that do not alter the water's pollutant profile through the transfer process itself.[118] The EPA's Notice clarifies that the WTR was not intended to apply where the water transfer activity introduces pollutants to the water passing through the structure.[119] This interpretive guidance, made during the rulemaking process, constitutes an authoritative expression of the agency's view and aligns with the principle that an agency's interpretation is authoritative when issued in an official context, such as the Notice.

The permitting of pollutants introduced during the water transfer activity is part of a complex regulatory program that Congress has place squarely within EPA's "substantive expertise."[120] This is not an instance in which Congress has "divided regulatory power between two entities," or in which any agency reached to address matters "distant" from its ordinary

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[115] *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
[116] *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019).
[117] *Kisor*, 588 U.S. at 577-579.
[118] NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).
[119] *Id*. at 33,705.
[120] *Kisor*, 588 U.S. at 584.

duties.[121] EPA's interpretation of the WTR falls within the scope of the health of the water body, a concern that lies at the heart of the EPA's expertise.[122]

Third, EPA's interpretation represents a "fair and considered judgment."[123] In making the assertion that Highpeak's water transfer requires a NPDES permit, EPA followed its official and carefully reasoned explanations of the rule, which were issued at the time of the rule's promulgation, in the preamble to the rule, and in response to public comments. This is not a case where EPA adopted its present position as a "convenient litigation position" or "post hoc" rationalization.[124]

ii. The EPA's interpretation is reasonable.

The agency's interpretation must be reasonable, "within the zone of ambiguity the court has identified after employing all its interpretive tools," and the agency's interpretation of "the character and context" must entitle the interpretation "controlling weight."[125] The WTR provides that only water transfers which do not introduce pollutants through the transfer activity are exempt from requiring a NPDES permit.[126] This direction is consistent with the regulatory definition of a water transfer,[127] the overall guidelines of the WTR,[128] and the objectives of the CWA.[129]

As the district court noted, the EPA's interpretation must be reasonable, "within the zone of ambiguity the court has identified" following the extensive analysis of the preceding *Kisor*

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[121] *Id*. at 578.
[122] See 33 U.S.C. §§ 1313(c)(2)-(4).
[123] *Kisor*, 588 U.S. at 579 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).
[124] *Id*. at 579 (quoting *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012)).
[125] *Id*. at 575-576.
[126] 40 C.F.R. § 122.3.
[127] *Id*.
[128] NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).
[129] 33 U.S.C. § 1251(a).

factors.[130] Here, EPA's reading is reasonable in light of the fact that, while the regulation sets a framework for establishing standards for mere water transfers[131], the CWA and NPDES, expressly provides that any discharge of pollutants from a point source into the waters of the United States requires a permit under NPDES, administered by the EPA.[132] Therefore, the "character and context of [EPA's] interpretation entitle it to controlling weight,"[133] and EPA's interpretation should be affirmed.

b. Highpeak's challenge, based on *Loper Bright*, which addressed deference to agency interpretations of statutes, not regulations, is not applicable here.

In the recent *Loper Bright* case, the Supreme Court ruled that § 706 of the Administrative Procedure Act (APA) prohibits courts from deferring under *Chevron* to agency interpretations of statutes. While on its face, the *Loper Bright* case seemed to cause *Auer* to no longer be good law, a more technical reading of the Court's opinion may suggest otherwise. This other reading requires a look at *Kisor*, which concluded that *Auer* was consistent with a part of § 706—a conclusion that *Loper Bright* (which focused on other parts of § 706) does not clearly disturb.

While *Loper Bright* requires courts to exercise their "independent judgment" on statutory interpretations under § 706,[134] it seems that some, including Highpeak, have taken a broad application of this opinion to also extend to regulation interpretation. However, a narrower, more technical reading of *Loper Bright* might distinguish between the specific parts of § 706 emphasized by *Kisor* and *Loper Bright*. Consider the text of § 706, which states in part (with emphasis and numbering added for clarity): "To the extent necessary to decision and when

[130] *Kisor*, 588 U.S. at 575-576.
[131] NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).
[132] 33 U.S.C. § 1342.
[133] *Kisor*, 588 U.S. at 576.
[134] *Loper Bright Enters.*, 144 S. Ct. at 2262.

presented, the reviewing court shall **[1]** decide all relevant questions of law, **[2]** interpret constitutional and statutory provisions, and **[3]** determine the meaning or applicability of the terms of an agency action."[135]

Though the entirety of the rule was quoted by the majority in more of an introductory manner, *Loper Bright* primarily focused on [1] and [2]. It concluded that because § 706 requires courts to [1] "decide all questions of law" and [2] "interpret . . . statutory provisions," it precludes courts from deferring to agencies under *Chevron*.

In contrast, the *Kisor* plurality's analysis emphasized part [3]. The plurality maintained that *Auer* deference is a valid approach for [3] "determining the meaning" of a regulation.[136] As the District Court reasonably interpreted, *Loper Bright* did not disturb the legality of *Auer* deference, since it pertains to part [3] of § 706, whereas *Loper Bright* addressed parts [1] and [2].[137] What's more, the principles of *stare decisis* are thoroughly emphasized in both *Loper Bright* and *Kisor*.

In Kisor, Chief Justice Roberts, in casting the final, decisive vote to uphold *Auer*, emphasized that the question of *Auer*'s validity was "distinct" from whether *Chevron* should be overruled.[138] Building on this distinction, the majority opinion in *Loper Bright* overruled *Chevron* on the basis of key *stare decisis* factors that do not directly undermine *Auer*, leaving it as still-valid precedent.[139]

Finally, *Loper Bright* explicitly upheld Congress's authority to grant agencies discretion to interpret statutory terms, provided the agency engages in "reasoned decisionmaking" within

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[135] 5 U.S.C. § 706.
[136] *Kisor*, 588 U.S. at 582.
[137] R. at 11.
[138] *Kisor*, 588 U.S. at 591. (Roberts, J., concurring).
[139] *Loper Bright Enters.*, 144 S. Ct. at 2270-2273.

the statute's limits.[140] Following this logic, if an agency has the discretion to interpret a statute initially, it should also have the ability to clarify its interpretation later, as long as the clarification reflects the same standard of "reasoned decisionmaking." This discretion is given to the administrator of the EPA in § 402 of the CWA, stating that the administrator has the power to make issuance decisions, impose conditions, and approve state water pollution permitting programs. With this, Congress has clearly chosen to allow the EPA the room to interpret the CWA, which, in turn, resulted in the promulgation of the WTR. Because the EPA engaged in "reasoned decisionmaking" when the rule was originally promulgated in 2008, it is reasonable to assume the agency has the power to clarify its interpretation now.

Viewed in this light, *Auer* remains intact and poised to endure, meaning that this case, concerning the EPA's interpretation of their own WTR, is not affected by the recent Supreme Court Case, *Loper Bright*, and is entitled to the deference set out by *Auer*.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's finding that CSP has standing to bring this suit and determine that their challenge to the WTR was not timely filed. Furthermore, the EPA respectfully requests that this Court affirm the district court's decision that the WTR was validly promulgated. Finally, the EPA asks this Court to uphold the district court's determination that Highpeak's discharge does not qualify for the WTR exemption and therefore requires an NPDES permit.

[140] *Loper Bright Enters.*, 144 S. Ct. at 2263.