NON-MEASURING BRIEF
TEAM 9

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,
Defendants-Appellees-Cross-Appellants,

-and-

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

On Appeal from the United States District Court for the District of New Union,

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

Brief of Defendants-Appellees, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union issued a Decision and Order in case 24-CV-5678 on August 1, 2024. The District Court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action) with regards to the promulgation of the Water Transfer Rule, and 28 U.S.C. 1331 (federal question) for the citizen suit against Highpeak pursuant to 33 U.S.C. § 1365. Environmental Protection Agency (EPA), Crystal Stream Preservationists (CSP), and Highpeak all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. In the United States Court of Appeals for the Twelfth Circuit, which has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. This is an appeal from a final decision disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err in holding that CSP had standing to challenge Highpeak's discharge and the Water Transfers Rule?

II. Did the District Court err in holding that CSP timely filed the challenge to the Water Transfers Rule?

III. Did the District Court err in holding that the Water Transfers Rule was a valid regulation promulgated pursuant to the Clean Water Act?

IV. Did the District Court err in holding that pollutants introduced in the course of the water transfer took the discharge out of the scope of the Water Transfers Rule, thus making Highpeak's discharge subject to permitting under the Clean Water Act?

STATEMENT OF THE CASE

I. Factual Background on the Crystal Stream.

Respondent Highpeak has owned and operated a recreational tubing business in Rexville, New Union for the past 32 years. Highpeak owns a 42-acre parcel of land, abutting Cloudy Lake (274-acre lake in the Awandack mountain range) on the northern border of the property, and on the south portion of which flows Crystal Stream ("the Stream" or "Crystal Stream"), from which the company launches customers in rental innertubes.

Highpeak sought and obtained permission from the State of New Union to construct a tunnel connecting Cloudy Lake to the Stream in 1992, and the tunnel is equipped with valves at the northern and southern ends so that Highpeak employees can regulate the flow of water from Cloudy Lake to Crystal Stream. While the tunnel (approximately 4 feet in diameter and 100 yards long) is partially carved with rock, a substantial portion of the tunnel consists of iron pipes installed by Highpeak in 1992. Under agreement with the State of New Union, Highpeak is prohibited from activating the tunnel absent a determination from the State that water levels in Cloudy Lake are adequate for releasing water, which typically corresponds to the seasonal rains from spring through late summer.

New Union at present does not have a delegated Clear Water Act (CWA) permitting program, meaning that the EPA, rather than an agency in New Union, issues CWA permits in the State under the National Pollution Discharge Elimination System (NPDES). Highpeak (even presently) has not, and never has, sought an NPDES permit for the discharge of water from Cloudy Lake into Crystal Stream, and the discharge has not been challenged until the case is filed by the CSP in the District Court.

II. Clear Stream Preservation Files Suit in the U.S. District Court for the District of New Union

Clear Stream Preservationists, Inc., (CSP) first sent a CWA Notice of Intent to Sue (NOIS) letter to Highpeak on December 15th, 2023, with copies forwarded to the New Union Department of Environmental Quality (DEQ) and the EPA in compliance with U.S.C §1365(b)(1)(A). *See also* 40 C.F.R §135.3 (2023). In the NOIS, CSP alleges that Highpeak's tunnel constitutes a point source under the CWA, and regularly and continuously discharges pollutants into the Stream without a permit under the CWA. CSP supported this claim with material evidence and sampling data showing high levels of iron and manganese in Cloudy Lake with high concentrations of total suspended solids (TSS) compared to the Crystal Stream. Concurrent to CSP's notice to Highpeak, CSP further alleged in the NOIS that the WTR was not a valid statutory interpretation promulgated by the EPA, and alternatively argued that additional iron, manganese, and TSS are introduced during the transfer, thereby removing the exemption provided by the WTR.

On February 15th, 2024, following Highpeak's answer to the NOIS stating its intention to not respond on the merits, CSP filed its Complaint, after the required 60-day period. The Complaint included a citizen suit against Highpeak on the same allegations as the NOIS, and a claim under the Administrative Procedure Act (APA) challenging the WTR as invalidly promulgated as a statutory interpretation of the CWA. CSP further argues that even if the WTR were valid, Highpeak would still be required to seek a permit under NPDES for pollutants introduced during the transfer.

Highpeak moved to dismiss, first arguing that the challenge to the WTR be dismissed for lack of standing and timeliness; additionally, Highpeak alleged that the citizen suit should be

dismissed because the CSP was created for the purpose of litigation against Highpeak, thereby lacking injury-in-fact or a cause of action.

III. The EPA Takes Action

The EPA joined Highpeak in challenging CSP's standing and timeliness and defended the WTR as a valid promulgation of statutory interpretation under the CWA. The EPA furthermore agreed with CSP that Highpeak nevertheless needs to obtain a permit for pollutants introduced to the water during the discharge. The District Court's decisions were postponed temporarily pending the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024). In the aftermath of the Supreme Court's rulings, the District Court granted the motions to dismiss the challenge to the WTR and denied the motion to dismiss the citizen suit against Highpeak.

IV. Current Litigation

The District Court denied Highpeak and the EPA's motion to dismiss on standing grounds, finding that the harms allegedly suffered by CSP members were analogous to Supreme Court precedent holding that recreational and aesthetic harms were sufficient for environmental standing. The District Court also dismissed the EPA and Highpeak's motions to dismiss on timeliness grounds. Regarding the WTR and its valid promulgation, the District Court largely recognized the force of *stare decisis* in *Loper Bright* and upheld the WTR as a valid exercise of the EPA's authority under the CWA. Finally, the District Court denied Highpeak's motion to dismiss the citizen suit claim.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that CSP has standing to challenge Highpeak's discharge under the WTR. CSP's claims fail to meet the constitutional requirements for standing under Article III, as its alleged injuries from the WTR remain speculative and hypothetical, lacking the necessary concrete and imminent harm. CSP cannot establish a direct causal link between its claimed injuries and either the WTR or Highpeak's actions, given the rule's merely indirect impact on Highpeak's practices. Without meeting the fundamental criteria of actual injury or causation, CSP's case fails to establish standing and should be dismissed.

Additionally, the District Court's decision that CSP timely filed its challenge to the WTR should be reversed. The District Court's holding that the challenge was timely under *Corner Post* fails to recognize that Section 1369(b) is a statute of repose, not a statute of limitations. Since CSP did not file within the 120-day statute of repose established by the CWA, its claim should be barred. Moreover, even if this statute does not apply, allowing challenges to regulations long after their implementation would undermine regulatory certainty and create an unstable environment for enforcing critical environmental protections like the WTR. Therefore, CSP's claim should be dismissed as untimely.

The District Court's decision with regards to the valid promulgation of the WTR should be upheld because CSP failed to demonstrate that a "special justification" exists for the Court to overturn prior *stare decisis* establishing that the EPA validly promulgated the WTR. Additionally, CSP failed to demonstrate that the WTR was validly promulgated under the less deferential standard of *Skidmore*. Under *Loper Bright*, the District Court, like any other court, would return to the less deferential standard under *Skidmore v. Swift*, 323 U.S. 134 (1944). As the Supreme Court noted in *Loper Bright*, regulations upheld under *Chevron* maintain the force of

statutory *stare decisis* absent a "special justification" for overruling the holding - "special justification" which CSP failed to provide. Even assessed under the less deferential standard of *Skidmore*, the EPA's interpretation should also be upheld. *Skidmore* draws on factors such as "thoroughness evident in consideration, the validity of reasoning, consistency with earlier and later pronouncements, and such factors that give the agency power to persuade if not to control." In these circumstances, the EPA has demonstrated all of the above factors, consistently defended the valid promulgation of the rule across several administrations, and continues to demonstrate its understating of the WTR in the context of the CWA.

The District Court's decision that Highpeak is required to obtain a permit for its water transfers should be upheld. A plain reading of the water transfer regulation reveals that where new pollutants are added to water during the water transfer process the WTR exemption does not apply and therefore a permit is required. Furthermore, even if the WTR is determined to be ambiguous, the EPA's interpretation, which concludes Highpeak is required to get a permit, is subject to an Auer deference analysis. The Supreme Court's overturning of Chevron deference in *Loper Bright* has no impact on the distinct separate doctrine of Auer deference, and therefore the court must continue to apply an Auer deference analysis. The EPA's interpretation of the WTR meets the requirements to receive Auer deference. Accordingly, Highpeak must receive a permit to continue its water transfers.

STANDARD OF REVIEW

A District Court's denominated question of law is reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552 at 558 (1988). In reviewing issues of law, the appellate court gives no explicit deference to the work of the trial court, even in instances of "mixed questions of fact and law." *Ornelas v. United States*, 517 U.S. 690 at 697. Judicial review of Agency Action is under

the "arbitrary and capricious" standard, wherein "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, at 42 (1983).

ARGUMENT

I. CSP Lacks Standing to Bring Its Claims Against Highpeak and to Challenge the EPA's WTR Due to Failure to Satisfy Constitutional Requirements for Standing

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Marbury v. Madison*, 5 U.S. 137 (1803); *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). To establish standing under Article III, a plaintiff must demonstrate (1) a concrete and particularized injury-in-fact that is actual or imminent; (2) a direct causal link between the injury and the defendant's conduct; and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Supreme Court has held that the "cases and controversies" language of Article III prevents the conversion of courts of the United States into a "vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473.

Associations, such as CSP, can sue on behalf of their members if certain criteria are met. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024). To establish associational standing under Article III, an association must demonstrate: (1) that its members would otherwise have standing

to sue in their own right; (2) that the interests at stake are germane to the association's purpose; and (3) that neither the claims asserted nor the relief requested require the individual participation of its members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181 (2000); *Students for Fair Admissions*, 600 U.S. at 199. This standard ensures that associations are only granted standing where they seek to advance the collective interests of their members without relying on individualized claims that may demand unique factual inquiries. *Laidlaw*, 528 U.S. at 181.

While CSP's claims satisfy the second and third prongs of the associational standing test, it fails to meet the individual standing requirements of Article III. CSP cannot establish that its members have suffered a concrete injury directly traceable to the WTR, and as a result, CSP lacks associational standing because its members do not individually possess standing to sue.

A. CSP's Alleged Harms Related to the WTR Are Speculative and Fail to Satisfy the Injury-in-Fact Requirement

Under Article III, an injury-in-fact must be "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. In *Laidlaw*, the Supreme Court held that aesthetic and recreational injuries can satisfy the standing requirements if plaintiffs demonstrate a concrete, particularized injury that is actual or imminent, rather than hypothetical. 528 U.S. 167. In *Laidlaw*, the Supreme Court found that the affidavits and testimony from members of Friends of the Earth (FOE) demonstrated that Laidlaw's pollutant discharges directly affected their recreational and aesthetic interests. *Id.* at 182. Specifically, members testified that they curtailed activities such as fishing, camping, swimming, and picnicking in the North Tyger River due to concerns about pollution from Laidlaw's discharges. *Id.* The Supreme Court emphasized that the relevant injury for standing purposes is not harm to the environment itself, but rather the injury to the plaintiff. *Id.* at 181. This injury can be

established by showing that the plaintiff's use and enjoyment of the affected area are diminished due to reasonable concerns about pollution, so long as those concerns are supported by credible evidence of environmental harm that affects the plaintiffs' use of the area. *Id.* Plaintiffs are not required to prove that they personally suffered physical or economic harm, but they must demonstrate a direct, observable impact on their recreational or aesthetic experience due to the challenged conduct. *Id.* The Supreme Court noted that such concerns must be based on a demonstrable record of regularly utilizing the affected area and a desire to continue doing so in the future. *Id.* at 208.

While CSP's concerns regarding Highpeak's discharges into Crystal Stream may meet the injury-in-fact standard articulated in *Laidlaw*, CSP's alleged injuries arising from the WTR itself remain too speculative to satisfy this requirement. CSP contends that the WTR indirectly facilitates Highpeak's pollution by exempting water transfers from federal permitting. However, CSP fails to provide concrete, measurable evidence that the WTR itself directly impacts Crystal Stream's water quality or that the rule's mere existence produces an actual injury to CSP's members. Unlike in *Laidlaw*, where plaintiffs demonstrated specific impacts on water quality that limited their recreational use, CSP's injuries attributed to the WTR are based solely on hypothetical concerns about potential regulatory gaps rather than observable harm. CSP's claims regarding the WTR rely on generalized assertions without substantiating a direct link between the rule and the alleged injuries to recreational or aesthetic harms.

Similarly, in *Am. Forest & Paper Ass'n v. EPA*, the Tenth Circuit held that an association lacked standing to pursue the action because it failed to demonstrate that its members were among the injured. 154 F.3d 1155 (10th Cir. 1998). The court emphasized that for an injury to be sufficiently concrete to establish standing, the party seeking review must show that its members

are directly affected by the alleged harm. *Id.* The court referenced precedent set in *Sierra Club v. Morton*, where it was held that an environmental group lacked standing because it did not state that its members used the affected area for any purpose. 405 U.S. 727 (1972). The court reflects the sentiment that, "In order to demonstrate injury, 'petitioner[] must show that there is a substantial probability that [EPA's Final Rule] will harm the concrete and particularized interests of at least one of [its] members.'" *Nat'l Ass'n of Clean Air Agencies v. E.P.A.*, 489 F.3d 1221 (D.C. Cir. 2007)(quoting *Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)). Therefore, the association's failure to demonstrate that the EPA's actions directly impacted its members resulted in the dismissal of their claims for lack of standing. *Am. Forest*, 154 F.3d at 1157. Like the plaintiffs in *Am. Forest*, CSP fails to demonstrate that its members were directly impacted or injured by the EPA's action in promulgating the WTR, and therefore, the claim should be dismissed for lack of standing.

While the CWA permits citizen suits for injuries based on aesthetic or recreational interests, even if those injuries are influenced by subjective concerns, *Laidlaw* requires a concrete, credible basis for those concerns. 528 U.S. at 181. CSP's alleged injuries from the WTR lack such a basis because the WTR simply exempts certain water transfers from the National Pollutant Discharge Elimination System (NPDES) permitting requirements; it does not authorize, mandate, or otherwise promote pollution. In fact, the language of the statute creating the NPDES permitting requirements dictates the bill's purpose to be "assur[ing]the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife and other aquatic organisms, and to allow recreational activities in and on the water." 128 Cong. Rec. 25958 (bound ed. Sept. 29, 1982) (passed House), available at ProQuest Legislative Insight. CSP provides no evidence that the WTR itself harms Crystal

Stream's quality or affects its members' ability to enjoy the stream. This Court has consistently required injury-in-fact to be rooted in concrete, observable harm, not in speculative fears or hypothetical regulatory consequences. *Laidlaw*, 528 U.S. at 181; *Lujan*, 504 U.S. at 560.

Additionally, the WTR's exemption is too indirect to constitute a concrete injury to CSP. Highpeak's discharges into Crystal Stream predate the WTR by sixteen years and remain regulated by state agreements, showing that CSP's alleged harm stems from longstanding state-regulated practices unrelated to the federal exemption provided by the WTR. See R.4 ("In 1992, Highpeak sought and obtained permission from the State of New Union to construct a tunnel connecting Cloudy Lake to Crystal Stream … Under an agreement with the State of New Union, Highpeak is prohibited from using the tunnel unless the State determines that water levels in Cloudy Lake are adequate to allow the release of water").

By attempting to attribute harm to the WTR, CSP asserts a generalized grievance rather than a particularized injury-in-fact. In *Am. Legion v. Am. Humanist Ass'n,*, the Supreme Court ruled, as it has "consistently," that "'generalized grievances' about the conduct of Government" are insufficient to confer standing to sue. 588 U.S. 19 (2019); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208 (1974); *Valley Forge Christian College*, 454 U.S. at 473(holding that federal courts are not forums for airing "generalized grievances"). CSP's concerns that the WTR might create a regulatory gap allowing potential future pollution do not amount to an actual or imminent injury as required by Article III.

Courts have routinely required that injuries be "certainly impending" in order to have standing. *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013); *Whitmore v. Arkansas*, 495 U.S. 148, 158 (1990). CSP's allegations about the WTR lack immediacy and substance; they rely on hypothetical regulatory effects without providing specific evidence of

actual harm to its members' use of Crystal Stream. By arguing an indirect injury rooted in general concerns over regulatory standards, CSP fails to demonstrate a concrete and particularized injury-in-fact required for standing under Article III.

Even though a hypothetical risk of pollution warrants precautionary relief under certain circumstances, courts have recognized that a "substantial risk" of harm is required to establish such standing. *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 498 F.3d 1279, 1298 (2007). CSP's speculative concerns about hypothetical future pollution caused by the WTR and general fears fail to meet this "substantial risk" standard.

Allowing CSP to claim injury based solely on abstract concerns regarding the WTR would expand standing beyond Article III's limits and open the judiciary to cases based on speculative impacts rather than direct, concrete injuries. If upheld, CSP's claim against the WTR risks converting the judiciary into a venue for policy disagreements rather than disputes involving personal, tangible injuries. CSP's reliance on the WTR to establish standing contradicts Article III's requirement for injuries to be concrete and imminent, not speculative; and therefore, CSP's claim should be dismissed for lack of standing.

B. CSP Fails to Establish a Causal Link Between Highpeak's Activities, the WTR, and the Alleged Injuries

Article III's causation requirement mandates that the injury must be "fairly traceable" to the defendant's conduct, not based on speculative connections or indirect factors. *Allen*, 468 U.S. at 751. Highpeak's discharges have been regulated under state oversight since 1992, yet CSP offers no direct evidence that these discharges specifically impact Crystal Stream's water quality in a way that harms its members. CSP's claims rely on speculative links between Highpeak's conduct and any alleged diminishment of Crystal Stream's recreational or aesthetic value.

Additionally, CSP claims that the WTR facilitates Highpeak's discharges by exempting water transfers from federal permitting. However, the WTR neither mandates pollution nor compels Highpeak's conduct. Highpeak's practices are governed by state regulations that predate the WTR, meaning that CSP's alleged injuries do not directly result from the EPA's rule. *Warth v. Seldin*, 422 U.S. 490, 504 (1975)(holding that the facts alleged failed to support an actionable causal relationship between respondents' zoning practices and petitioners' asserted injury). While CSP contends that the WTR indirectly creates regulatory gaps, potentially leading to harm; nevertheless, speculative assertions about regulatory effects do not satisfy the causation requirement. *Clapper* 568 U.S. 398(holding that speculative harm does not fulfill Article III's causation threshold). CSP's hypothetical injury would persist irrespective of the WTR's existence, failing to establish a clear causal link.

C. Conclusion

CSP's claims fail to meet the constitutional requirements for standing under Article III, as its alleged injuries from the WTR remain speculative and hypothetical, lacking the necessary concrete and imminent harm. CSP cannot establish a direct causal link between its claimed injuries and either the WTR or Highpeak's actions, given the rule's merely indirect impact on Highpeak's practices. Without meeting the fundamental criteria of concrete injury and causation, CSP's case fails to establish standing and should be dismissed.

II. CSP Failed to File a Timely Challenge to the WTR Because It Did Not Meet the 120-Day Statute of Repose in CWA Section 1369(b)

The lower court erred in holding that CSP's challenge to the Water Transfer Rule (WTR) under the Administrative Procedures Act (APA) was timely based on the six-year period following the plaintiff's injury. However, the Clean Water Act (CWA) Section 1369(b) establishes a statute of repose (SOR), enacted by Congress, that strictly limits challenges to the WTR to a 120-day period following the regulation's promulgation. 33 U.S.C. § 1369(b)(1).

Section 1369(b) provides that any challenge to "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title… shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Because Highpeak has been discharging from Cloudy Lake for over 30 years, and the WTR was promulgated in 2008, the "based solely on grounds which arose after such 120th day" exception does not apply, and this statutory deadline precludes CSP's claim. The court's reliance on *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024), to find the claim timely is misplaced for several reasons. First, the CWA contains a statute of response, which is differentiated from a statute of limitations by *Corner Post*; second, the lower court incorrectly applied *Corner Post*; and third, upholding the majority's ruling in *Corner Post* would result in serious policy concerns for the judiciary.

A. Section 1369(b) Contains a Statute of Repose Which is Distinguished from a Statute of Limitations

The lower court's reliance on *Corner Post* to support the timeliness of the plaintiff's APA challenge is erroneous. While *Corner Post* dealt with 28 U.S.C. § 2401(a), a general statute of limitations, it specifically emphasized that this section governs when claims accrue and when plaintiffs must file. In contrast, the 120-day filing period under § 1369(b) operates as a statute of repose, commencing from the date of the agency's action rather than from the discovery of the plaintiff's injury.

First, the *Corner Post* majority clarified that the statute of limitations under 28 U.S.C. § 2401(a) is plaintiff-centered and begins to run when the plaintiff experiences an injury. However, the Court distinguished between statutes of limitations and statutes of repose. The latter, as recognized by the Court, "places an outer limit on the right to bring a civil action" based on the

defendant's act, regardless of when the injury occurred. *Corner Post,* 144 S. Ct. 2440 (2024)(quoting *CTS Corp v. Waldburger*, 573 U. S. 1, 7-8 (2014)). A statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted … even if this period ends before the plaintiff has suffered a resulting injury." *CTS Corp*, 573 U.S. at 7-8; *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008); See Black's Law Dictionary (10th ed. 2014)(defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued," and defining "statute of repose" as "[a] statute barring any suit that is brought after a specified time since the defendant acted"). A statute of repose "is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered." *CTS Corp.*, 573 U.S. at 8; *Sec'y, United States DOL v. Preston*, 873 F.3d 877 (11th Cir. 2017)(statute of repose bars "any suit that is brought after a specified time since the defendant acted, without regard to any later accrual"). The Supreme Court has "repeatedly … stated in broad terms that statutes of repose are not subject to equitable tolling." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497 (2017).

The *Corner Post* majority clarifies that this definition of a statute of repose applies directly to statutes such as the Hobbs Act, which governs judicial review of agency actions and imposes a 60-day filing deadline from the "entry" of the agency order. *Corner Post*, 144 S. Ct. 2440. Congress designed this period as a departure from traditional statutes of limitations, tying it to the defendant's action rather than the plaintiff's injury. *Id.* Similarly, the Clean Water Act contains its own statute of repose in 33 U.S.C. § 1369(b)(1), which limits challenges to certain EPA actions, such as the promulgation of the WTR, to within 120 days of the action. 33 U.S.C. § 1369(b)(1).

The majority opinion in *Corner Post* emphasized that Congress can explicitly create statutes of repose when it wishes to do so, as it did in the Hobbs Act. *Id.* Importantly, this approach contrasts with the statute of limitations in § 2401(a), which is linked to a plaintiff's injury. The lower court's reliance on the six-year statute of limitations under § 2401(a) is misguided because it fails to account for the clear Congressional intent behind the Clean Water Act's 120-day repose period.

Despite the conclusion of the majority in *Corner Post*, there remains a possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit," *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 200 (1997). *Corner Post* suggests that the Supreme Court can reach "such a conclusion" when confronted with any such indication in the text of the limitations period. 144 S. Ct. at 2452 (quoting *Green v. Brennan*, 578 U.S. 547, 554 (2016)). The majority opinion in *Corner Post* clarifies that judicial review is available only for final agency action, "unless another statute makes the agency's action reviewable." 144 S. Ct. at 2450. This important exception outlines the fact that the CWA's 120-day limit from promulgation is *not* superseded by the majority ruling in *Corner Post*.

Just as the Hobbs Act provides the exclusive mechanism for reviewing executive actions, the Clean Water Act's enforcement provision in 33 U.S.C. § 1369(b)(1) functions in a similar capacity. This provision unequivocally states that challenges to EPA actions, such as the promulgation of standards or the issuance of permits, must be filed within 120 days of the agency's action unless the challenge is based solely on grounds that arose after the 120-day period.

Furthermore, well-established principles of statutory construction dictate that specific statutes, such as § 1369(b), override general limitations periods like § 2401(a). The Supreme Court has repeatedly held that where Congress has explicitly provided a limitations period in the text of the statute, that period is definitive and supersedes more general statutory provisions. *Howard v. Pritzker*, 775 F.3d 430, 432 (2015)(holding that specific statutory periods trump general limitations in cases of conflicting timelines); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)(holding that the "specific governs the general"). The specificity of § 1369(b)'s 120-day limit, as part of the CWA's comprehensive regulatory scheme, governs over the general six-year SOL under § 2401(a).

Courts have consistently ruled that challenges to EPA rulemaking, including the WTR, must be filed within the 120-day SOR, barring any delayed filings. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* (Catskill III), 846 F.3d 492 (2d Cir. 2017)(recognition that challenges to EPA rulemaking, like the WTR, fall under the 120-day limitation in § 1369(b)(1) of the CWA); *Friends of Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009)(holding that although the Water Transfer Rule was not an "effluent limitation," the court still upheld that the CWA imposes a strict 120-day timeframe on challenges to other types of EPA actions).

WTR issued under 33 USC 1342

B. The WTR is Subject to the 120-Day Statute of Repose in CWA Section 1369(b)

There is a circuit split over whether the Water Transfer Rule (WTR) can be interpreted to be an "effluent limitation" under 33 U.S.C. § 1369(b)(1)(E). The CWA defines an "effluent limitation" as any restriction on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources. 33 U.S.C.S. § 1362(11). For instance, in *Friends of the Everglades v. United States EPA*, the Eleventh Circuit

interpreted § 1369(b) to exclude the NPDES WTR from its purview, stating, "Because the water-transfer rule is neither an effluent limitation nor a limitation promulgated under sections 1311, 1312, 1316, or 1345, section 1369(b)(1)(E) cannot be the basis for our jurisdiction in this action." 699 F.3d 1280 (11th Cir. 2012).

However, this interpretation is overly restrictive and does not align with the interpretations of other circuits. The Clean Water Act (CWA) is broad, and the rulemaking provisions in § 1369(b) are not limited to effluent limitations alone. The Second Circuit held in *Catskill III* that challenges to the WTR should fall within the CWA's rulemaking framework and be subject to the 120-day statute of repose, indicating that the scope of § 1369(b)(1) encompasses significant regulatory actions, regardless of their classification. 846 F.3d 492. Additionally, the Ninth Circuit determined that the NPDES is the only appropriate permitting mechanism for discharges subject to an effluent limitation. *Se. Alaska Conservation Council v. United States Army Corps of Eng'rs*, 486 F.3d 638 (9th Cir. 2007)(holding that when a discharge is subject to an effluent limitation or performance standard, that discharge must comply with the NPDES program). See also *S. Cal. All. of Publicly Owned Treatment Works v. United States EPA*, 853 F.3d 1076 (9th Cir. 2017)(holding that a final EPA NPDES permit is "subject to review in an appropriate circuit court of appeals" citing U.S.C. § 1369(b)(1)(F)); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988)(holding that a state water quality standard can constitute an effluent standard or limitation enforceable under § 505 of the Clean Water Act, only if it has been incorporated into an NPDES permit).

Moreover, the Supreme Court has interpreted § 1369(b)(1)(F) to extend jurisdiction to actions that have "the precise effect" of issuing or denying a permit. In *Crown Simpson Pulp Co. v. Costle*, the Supreme Court emphasized that when the action of the Administrator is

"functionally similar to the denial or issuance of a permit," the courts of appeals have original subject matter jurisdiction under § 1369(b)(1)(F). 445 U.S. 193, 196 (1980). While the Eleventh Circuit argued in *Friends of the Everglades* that the WTR's permanent exemption differs from permit issuance, it is essential to recognize that a permanent exemption is fundamentally a general rule, freeing discharging entities from monitoring, compliance, or renewal procedures. Other courts have echoed this sentiment, finding that it would be perverse that the Courts of Appeals would have original subject matter jurisdiction to "review numerous individual actions issuing or denying permits ... but would have no power of direct review of the basic regulations governing those individual actions." *Nat. Res. Def. Council. Inc. v. EPA*, 673 F.2d 400 (D.C. Cir. 1982)(citing *E.I, du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977))(holding confirming jurisdiction to review an EPA rule exempting uncontaminated stormwater discharges from permitting regulations). Additionally, other courts have found jurisdiction to review EPA actions that regulate permitting procedures. For instance, in *American Mining Congress v. United States EPA*, the court held that jurisdiction exists under § 1369(b)(1)(F) to review regulations governing the issuance of permits under § 1342 of the CWA. 965 F.2d 759 (D.C. Cir. 1992).

Thus, while *Friends of the Everglades* interpreted "effluent limitation" narrowly, the broader context of the CWA and legal precedent affirm the application of § 1369(b)(1)'s statute of repose to significant EPA rulemaking actions like the WTR.

C. Policy Implications of Upholding the Lower Court's Interpretation of Corner Post

Even if this Court determines that the 120-day limitation under the CWA does not apply, the lower court's reliance on *Corner Post* raises significant policy concerns. In *Corner Post*, the majority extended the general six-year statute of limitations (SOL) under 28 U.S.C. § 2401(a) to challenges under the Administrative Procedure Act (APA). 144 S. Ct. 2440. However, the dissent authored by Justice Jackson and joined by Justices Sotomayor and Kagan highlights the dangers

of allowing such a long limitations period for regulatory challenges, arguing that it undermines the principle of regulatory finality, critical for maintaining stability in administrative governance. *Id.* at 2470.

As Justice Jackson notes, statutes of repose—such as the 120-day limit under § 1369(b) of the CWA—serve an essential function in regulatory schemes. *Id.* at 2475. They prevent indefinite legal exposure for agencies and regulated entities, ensuring that rules do not face constant legal challenges long after implementation. *Id.* Allowing claims to be brought years after a regulation has been promulgated, as the majority opinion suggests, could create ongoing legal uncertainty and disrupt the finality needed for effective governance. *Id.* at 2480.

Extending the period for legal challenges could encourage a flood of litigation that disrupts the stability agencies rely on to enforce long-standing rules. Nancy Anderson et al., *What's Next for the Regulatory Landscape Post-Chevron?*, Holland & Knight (July 2, 2024). This, in turn, risks creating "regulatory paralysis," where agencies hesitate to act due to the fear of protracted legal disputes. *Id.* The result could significantly hinder the development and enforcement of environmental protections, as regulated entities and municipalities would no longer have confidence in the finality of rules that have been in place for years. *Id*.

Justice Jackson's dissent, combined with these policy insights, strongly suggests that a longer SOL for APA challenges contradicts the intent behind statutes of repose *and* statutes of limitation. By ignoring this, the majority in *Corner Post* risks destabilizing the regulatory landscape, hindering both administrative agencies and the industries they regulate.

D. Conclusion

In conclusion, the lower court's decision that the plaintiffs timely filed their challenge to the Water Transfer Rule should be reversed. The court's holding that the challenge was timely under *Corner Post* fails to recognize that Section 1369(b) is a statute of repose, not a statute of

limitations. Since CSP did not file within the 120-day SOR established by the CWA, its claim should be barred. Moreover, even if this statute does not apply, allowing challenges to regulations long after their implementation would undermine regulatory certainty and create an unstable environment for enforcing critical environmental protections like the Water Transfer Rule. Therefore, CSP's claim should be dismissed as untimely.

III. The District Court did not err in holding that the WTR was validly promulgated by the EPA because CSP has not established that there exists "special justification" for overruling previously established *stare decisis* upholding the WTR; moreover, the WTR is also validly promulgated when placed under the scrutiny of a less deferential standard

As the District Court observed, decisions upholding the WTR, promulgated in the context of *Chevron* have been called into question by the Supreme Court's decision in *Loper Bright v. Raimondo*, 144 S.Ct. 2244 at 2273 (2023), returning agency deference to the standard in *Skidmore v. Swift & Co.,* 323 U.S. 134. Concurrently, the Court also held that *Loper Bright* does not overturn prior cases relying on the *Chevron* framework, and consequently, that holdings of these cases stating specific agency action to be lawful are still subject to statutory *stare decisis. Loper Bright* at 2273. As established under *Loper Bright*, to prevail under judicial review for agency action affirmed through *stare decisis,* and to overturn *stare decisis* upheld under *Chevron* generally, the appellant-plaintiff must produce "special justification" beyond the fact that prior precedent relied on *Chevron* deference. 144 S.Ct. 2244 at 2273; citing *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258 at 266 (2014). In this case, cross-appellant CSP has not provided any other rational or special justification, other than the argument that the Second and Eleventh Circuit decisions upholding the WTR in *Catskill III* and *Friends I* were decided under *Chevron*, which would not constitute the "special justification" necessary to overturn *stare decisis.*

Additionally, as the District Court noted in footnote 2 of its holding, the EPA validly argued that even under the less deferential standard, the WTR should nevertheless be upheld. As prior case law and the fact pattern can both demonstrate, the EPA will be able to validly sustain an argument for its rule interpretation to be entitled to respect on the basis of factors delineated under *Skidmore.* 23 U.S. 134 at 140.

A. CSP Has Not Demonstrated That a "Special Justification" Exists to Overturn *stare decisis* Upholding the WTR as a Valid Rule under the CWA

The Supreme Court's decision in *Loper Bright* held that while agency statutory interpretation will no longer be accorded binding deference per its previous decision in *Chevron*, the Court does not call into question prior cases reliant upon the *Chevron* framework. 144 S.Ct. 2244 at 2273. Where the holdings of such cases stipulate that specific agency actions are lawful, including the holding for *Chevron* itself, such determinations will still be subject to statutory *stare decisis* despite the change in interpretive methodology. *Id.,* at 2273. To overcome *stare decisis*, the appellant must demonstrate that "special justification" exists for overruling the holding beyond the fact that the precedent relied upon the deferential standard described in *Chevron*. As the Supreme Court noted in *Loper Bright* at 2273, quoting *Halliburton Co. v. Erica P. John Fund, Inc.,* to urge an overruling on the basis that a precedent relied on *Chevron* is at best, "Just an argument that the precedent was wrongly decided" 573 U.S. 258, 266 (2014).

As the District Court recognized, the Supreme Court's affirmation of decisions under *Chevron* are stated as a matter of dicta. However, a breadth of jurisprudence in the Supreme Court demonstrates a general trend towards the insularity of *stare decisis* from being overturned absent extraordinary circumstances. As the District Court observed, the dicta in *Loper Bright* is consistent with several cases that demonstrate the court's awareness of *Loper Bright*'s wider impact in the context of administrative proceedings. R. 10.

As the Supreme Court notes in *CBOCS West, Inc v. Humphries*, even if the Court were to accept "for argument's sake" that changes in interpretive methodology occur from time to time, it would nevertheless *not* constitute sufficient justification to re-examine well-established prior law. 553 U.S. 442 at 457 (2008). Accordingly, the dicta of *Loper Bright* at 2273 is in accordance with established jurisprudence on the treatment of *stare decisis* in the context of changing interpretive methodology. The mere fact that agencies are no longer accorded binding deference under *Chevron* will not undo the force of well-established prior law. As the Supreme Court notes in *Dickerson v. United States*, while *stare decisis* is not an inexorable command, even when the court is interpreting constitutional cases, the doctrine is persuasive to the point that the Court has always required departure from precedent to be supported by some form of "special justification." 530 U.S. 428 at 443 (2000). In *Halliburton*, Respondents' primary argument relied on the principle that the prior decision rested on two premises that can no longer withstand scrutiny. *Id.* at 270. However, as the Court notes, merely observing changing premises is not sufficient to constitute "special justification" namely because *stare decisis* has 'special force' "in respect to statutory interpretation." *Id.* at 274.

In challenging the decisions of the Second and Eleventh Circuits upholding the WTR, CSP provided no additional justification beyond stating the fact that prior to *Catskill III* and *Friends I*, other Circuit Courts and Courts of Appeals held to some effect that the EPA's interpretation of the WTR was inconsistent with the CWA. The essence of CSP's claim rests on the principle that agency interpretation is no longer due binding deference after *Loper Bright*, and that consequently, the District Court should return to (now overruled) cases evaluated under the *Skidmore* framework. As the District Court correctly held, while the Court may be sympathetic to the aims of the CSP, R. 10, the dicta of *Loper Bright* nevertheless emphasized that

regulations under *Chevron* remain valid under *stare decisis.* The persuasive authority on point comes from parallel appellate circuits in *Catskill III* and *Friends I*, which both uphold the validity of the EPA's promulgation of the WTR. CSP presents no further arguments on the issue, beyond the principle that deferential standards have changed once more. At its core, this argument is no different than the argument presented by the respondent in *Halliburton*. In both *Haliburton* and *CBOCS West, Inc.,* the Supreme Court held that changes in the methodology of statutory interpretation, were it to happen, do not constitute sufficient cause for "special justification".

The mere fact that some prior judicial decisions ruled against Agency interpretation is moot in the context of more salient, recent, and persuasive *stare decisis*. Additionally, a number of the cases cited by CSP, such as *Miccosukee Tribe of Indians v. S. Fla Water Mgmt Dist.,* 280 F.3d 1364 (11th. Cir. 2002), were vacated by higher judicial authority, such as the Supreme Court in *S.Fla Water Mgmt Dist., v. Miccosukee Tribe of Indians,* 541 U.S. 95, 112 (2004). The conjunction of prior cases and the importance of respecting consistent *stare decisis* absent extraordinary circumstances, in the dicta and cited cases of *Loper Bright*, indicate a valid promulgation of the WTR on the basis of well-established case law from parallel appellate circuits.

B. The WTR Should Be Upheld Even Under the Less Deferential Standard of Agency Deference Outlined in *Skidmore*.

In *Skidmore,* the Supreme Court held that while the interpretations and opinions of the Administrator may not be controlling upon courts by reason of their authority, it nevertheless constitutes a body of experience and judgment upon which courts and litigants may rely for guidance. 323 U.S. 134 at 140. To that point, the weight of agency judgment on a particular case will depend upon factors such as the thoroughness evident in its consideration, the validity of its

reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Id.* at 140. In the absence of *Chevron* deference, *Skidmore* factors examine the depth of agency expertise on point with regard to the interpretation of specific statutory elements.

As recognized by the Supreme Court in *US v. Mead Corp*, the *Skidmore* factors are a concise re-working of the criteria considered in a range of cases that accorded in some instances significant deference, while in others, almost none. 533 U.S. 218 at 228; *see Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 389–390 (1984)(giving substantial deference to agency construction); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212–213, (1988)(affording little deference to agency interpretation). The Court in *US v. Mead* found that *Skidmore* factors were defined by other courts through factors such as the degree of the agency's care, its consistency, formality, and relative expertness, and the persuasiveness of the agency's position. 533 U.S. 218 at 228.

1. The EPA Demonstrated Thoroughness Evident in its Consideration in Implementing the WTR Through an Exacting Process of Notice-and-Comment Rulemaking

The Supreme Court in *US v. Mead* recognized some factors that contribute to a finding of agency demonstrating thoroughness evident in its consideration through factors such as "the degree of agency care" and "formality." *Id.* at 228 citing *Reno v. Koray*, 515 U.S. 50, at 61, (1995). In *Reno*, the Court concluded that internal agency guidelines not subject to the APA, including public notice-and-comment, are only entitled to some deference. The importance of notice-and-comment rulemaking in validating statutory interpretation and rule promulgation is further reinforced by the Supreme Court's decision in *Vermont Yankee Nuclear Power v. Natural Resource Defense Council*, which outlines the three elements necessary for legislative enactment by federal agencies; these include notice, opportunity for comment, and a concise general

statement, with the prerogative falling to the agency to implement more procedure as necessary. 435 U.S. 519 (1978).

In the case of the WTR, the EPA published a general statement in Vol. 73, No. 115 of the Federal Register on Friday, June 13th of 2008 under the chapter Rules and Regulations. Fed. Reg at 33697. Within the promulgation subtitled 40 C.F.R. Part 122, the EPA gave a concise general statement which promulgated the text of the rule, the various predicted ways in which the rule may impact concerned individuals, the agency's rationale for promulgating the rule, and how comment can be made to the agency. Constructive notice was also given by a chart which indicated a hypothetical count of parties that may be affected by the promulgation of the WTR. Concurrently, as part of the publication in the Federal Register, the EPA provided background research at length on the specific implication of a water transfer rule. *Id,* at 33699.

2. The EPA Exhibited Validity of its Reasoning by Virtue of its Expertise in Interpreting the CWA

In *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* the Supreme Court outlined special deference to agency interpretation of the Regional Act as given "great weight" on account of the BPA's long-standing expertise in the area. 467 U.S. 380 at 390 (1984). This contributes to the criteria of "agency expertise" in *Mead*, wherein the Supreme Court re-affirms the importance of agency deference in statutory interpretation as it pertains to certain subjects that are regularly administered by the agency. Agency rules are given greater consideration when the agency can demonstrate long-standing expertise in a specific area, and indirectly demonstrate the consideration taken in implementing the rule.

As part of promulgating WTR in the Federal Register, the EPA devotes significant analysis in the general statement on the history of water transfer rules as part of the NPDES and provides a substantiated rationale for the agency's interpretation of the rule. The statement

published in the Federal Register includes in-depth studies, references to past jurisprudence such as *Catskill I*, and scientific analysis that all go to demonstrate subject-specific expertise that the EPA draws on in promulgating the rule. The EPA also draws on statutory construction principles outlined in *United States v. Boisdore's Heirs.,* 49 U.S. 113, at 122 (1850), to support its interpretation of the NPDES as a whole.

3. The EPA Maintained its Consistency with Earlier and Later Pronouncements in its Defense of the WTR Before and After *Chevron* deference.

The Supreme Court in *Skidmore* outlines special deference for agency rule interpretation consistent with earlier pronouncements. 323 U.S. 134 at 140. As the court also observed in *Good Samaritan Hospital v. Shalala.,* the consistency of an agency's position is a factor in assessing the weight that position is due. 508 U.S. 402, at 417, (1993). To that point, an agency interpretation of relevant provisions that conflict with earlier interpretation is accorded considerably less deference than a consistently held agency view. *Id.* at 417. The overall question of how much an agency can change its position without affecting deference will necessarily be qualified by judicial review, but the essence of agency consistency will still have an impact on deference given to agency interpretation.

As seen in the breadth of cases ranging from *Catskill I* (2001) to *Catskill III* (2017), *Friends I* (2009), and *Miccosukee* (2002), the EPA has maintained the position that the WTR is a valid interpretation of the NPDES. As the District Court observed on R. 10, footnote 2, the EPA has consistently defended its position of the WTR across four subsequent administrations, undoubtedly crediting the consistent interpretation of the rule.

Conclusion

In conclusion, the District Court holding that the Water Transfers Rule was validly promulgated by the EPA should be upheld, because appellant CSP failed to meet their burden in

demonstrating that special justifications exist to overcome well-established *stare decisis* from the Second and Eleventh appellate circuits. To merely assert that a case should be disregarded because of its framework under *Chevron* only calls into question the means of judicial interpretation, which is not in itself sufficient to challenge well-established law. Furthermore, even under the less deferential standard of *Skidmore*, the EPA can affirmatively argue that it has met the factors therein outlined to be entitled deference that while may not be binding, would nevertheless serve to persuade.

IV. Highpeak is required to obtain a permit for its water transfers because those transfers introduce pollutants; the WTR is unambiguous that such actions are not exempt; and even if there is ambiguity, the EPA's interpretation is in agreement which is entitled to auer deference

1. The WTR is clear that pollutants introduced during the course of a water transfer are not exempt from needing a permit under the WTR

Deference is not assured, but rather conditional. *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019). When confronted with a question as to the meaning of a law, a court must first analyze a statute or regulation itself, applying all traditional tools of statutory interpretation, before pursuing any inquiry into deference or respect for an agency's interpretation. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Kisor v. Wilkie*, 588 U.S. 558 (2019); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The CWA generally prohibits discharging pollutants into waters of the U.S. unless it meets one of the prescribed exemptions within the act or receives an agency issued permit. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004); 33 U.S.C. § 1311(a). The party seeking an exception bears the burden of proving they meet the exceptions criteria. *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967). Courts must narrowly construe any exemptions to the permitting process to prevent frustration of

the CWA's intentions. *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007). The WTR, promulgated in 40 C.F.R. § 122.3(i), under Exclusions, categorically excludes water transfers from the NPDES, a regulatory system intended to limit and monitor the discharge of pollutants into bodies of water in the United States. 33 U.S.C. § 1342 (2006). Per the statute, water transfer refers to any activity that conveys or connects waters of the U.S. without subjecting the transferred water to intervening use, be it industrial, municipal, or commercial. *Id.*

Where a water transfer introduces new pollutants during the transfer process, a permit is required. *NA KIA'I KAI v. Nakatani*, 401 F. Supp. 3d 1097, 1110 (D. Haw. 2019). The WTR states in plain text "this exclusion does not apply to pollutants introduced by water transfer activity itself to the water being transferred". 40 C.F.R. §122.3(i). For example, in *NA KIA'I KAI*, a water transfer system deposited water into the Pacific Ocean, a protected water of the U.S. under the CWA. *NA KIA'I KAI*, 401 F. Supp. 3d at 1101. The water transfer system was a man-made system of unlined earthen ditches, which during the water transfer activity would add sediments and pesticides into the water from the soil through erosion. *NA KIA'I KAI*, 401 F. Supp. 3d at 1108. The court held that given the plain meaning of the statute and so as to avoid absurdity, the WTR did not exempt the state from needing a permit where pollutants were added during the water transfer. *Id.* at 1110.

Where pre-existing pollution is merely transferred from one water of the U.S. to another, through a water transfer, the WTR applies and the individual need not get a permit. *Friends of the Everglades*, 570 F.3d 1210 (11th Cir. 2009). For example, in *Friends of the Everglades*, a water transfer system deposited water into Lake Okeechobee, which is a protected navigable water. *Id.* The system took water from canals, which received water polluted through runoff and

deposited it through a water transfer system into the less polluted Lake Okeechobee. *Id.* at 1214. The transfer system itself involved pumps and pipes that did not add anything to the water; instead, it simply moved the water some sixty feet. *Id.* The court held that even though the lake was gaining pollution, the transfer was covered under the WTR and did not need a permit because there was no net increase of pollution between the two waters as the transfer activity (the pipes and pumps) did not add additional pollutants. *Id.*

Highpeak's water transfer activity requires an EPA issued permit as it is in direct violation of the WTR by adding pollutants to water during the transfer process. Both parties agree that Cloudy Lake and Crystal Stream are waters of the U.S. R. 4-5. Highpeak admits that water during the transfer process picks up new pollutants through erosion of the tunnel walls when moving through the tunnel. R. 9. A report confirmed the tunnel was adding pollutants: water samples taken at the end of the transfer process compared to water samples before the transfer had increases of .2 mg/L if Iron, .003 mg/L of manganese, and 2 mg/L of total suspended solids. R. 5. In *NA KIA'I KAI*, the District Court in Hawaii held that where additional pollutants were added by erosion of the dirt enforced water channels, a permit was required. *Id*. Analogously, the additional pollutants added by the partly non-reinforced tunnel in the water transfer system adds pollutants to water through erosion, thus a permit is required. R. 5, 9. Furthermore, the required permit for Highpeak's pollution added during the water transfer process is distinguishable from the *Friends of the Everglades* holding that pollution already existing from a natural process in one water of the U.S. and being transferred to another water did not need a permit where the water transfer system, pipe and pumps, did not add any additional pollutants. *Friends of the Everglades*, 570 F.3d at 1214. In Highpeak's case, the level of pollution is imbalanced; Highpeak admits there is additional pollution caused by erosion from

the tunnel, as a result of the water transfer process. For Highpeak, the erosion occurs in the water transfer system. Highpeak has failed to meet its burden to show otherwise.

2. Even if the regulation is ambiguous, Highpeak would be required to obtain a permit under the EPA's interpretation which is entitled to *Auer* deference which is controlling precedent

    a. ***Auer* deference has not been overturned or altered by the Supreme Courts decision in *Loper Bright*, as they are judicially distinct doctrines**

The Supreme Court establishes precedents that are binding to all lower courts. *Loper Bright Enters.*, 144 S. Ct. at 2252. Only the Supreme Court can overturn or modify one of its own precedents, a decision exclusively left to their judgment. *United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Lower courts are not to be predictors or guessers as to where Supreme Court jurisprudence is heading, and thus cannot "conclude that its more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 208 (1997). Instead, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overhauling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This applies to even the Supreme Court's most "crumbling precedents". *Loper Bright Enters.*, 144 S. Ct. 2244, 2252 (2024). Given its authoritative position and binding impact, "Overruling precedent is never a small matter." *Kisor v. Wilkie*, 588 U.S. 558, 586, 139 S. Ct. 2400, 2422 (2019); *Kimble v. Marvel Entertainment, LLC*, 576 U. S. 446, 454 (2015). Hence, the Supreme Court is intentional when it considers a precedent and "each precedent is subject to its own stare decisis analysis." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 295 (2022).

Where an agency is interpreting a regulation is genuinely ambiguous, courts must perform an *Auer* deference analysis. Kisor, 588 U.S. at 564-65. For example, in *Kisor*, an agency was interpreting its own regulation, which was challenged by an individual whom the interpretation sided against. *Id.* The Court focused on considering whether *Auer* deference still existed in 2019, considering inter alia, if stare decisis warranted an overturning. *Id.* The Court held that *Auer* deference to agency interpretations still existed where a situation warranted it and remanded for further proceedings to determine if it applied in the specific case. *Id.* The Supreme Court dozens of Supreme Court cases and thousands of lower cases rely on the doctrine, with the precedent existing for 75 or more years. *Id.* at 587. Justice Roberts, who later wrote for the majority in *Loper Bright*, in his concurrence noted "issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." *Id.* at 591.

In contrast, where an agency is interpreting a statute, courts must perform a *Loper Bright* analysis. *Loper Bright Enters*., 144 S. Ct. at 2273. For example in *Loper Bright*, where an agency's rulemaking based on its interpretation of a statute was challenged by individuals and companies impacted by the regulation. *Id.* The Court considered overruling *Chevron* by inter alia, analyzing if *stare decisis* protected the doctrine. *Id.* The Court overturned *Chevron* deference, holding that there was no longer deference to agencies in statutory interpretation and that *stare decisis* did not warrant the keeping of *Chevron* deference. *Id.* Chief Justice Roberts noted that the court had not deferred to an agency interpretation under *Chevron* since 2016. *Id.* at 2252.

The EPA's interpretation of its regulation is entitled to an *Auer* deference analysis, and not impacted by *Loper Bright*. The EPA interprets the WTR, a regulation, as applying to any

pollution which enters the water during the water transfer process, which includes the erosion cause introduction of TSS, manganese, and iron. R. 11. Highpeak claims such an interpretation would make compliance impossible, and instead interprets the regulation as only applying to natural processes like "erosion" R. 11. Just as the Supreme Court in *Kisor* required for an *Auer* deference analysis where an agency was interpreting a genuinely ambiguous regulation, *Kisor*, 588 U.S. at 564-65., if the WTR is genuinely ambiguous the EPA's interpretation of the WTR is owed an *Auer* deference analysis. Deference for agency interpretation of a regulation is distinguishable from *Loper Bright*, which ended deference for agency interpretation of a statute, as they are two distinctive precedents, and two separate *stare decisis* analyses were applied to them. Furthermore, Highpeak requests this Court act outside of its purview. District and appeals courts are not to assume the Supreme Court inadvertently implied the overturning of an existing precedent through a separate line of cases. *Rodriguez.* Regardless, it would be absurd to assume *Loper Bright* has overturned or weakened *Auer* deference *sub silentio*, in a case where the Court made no reference to such deference, had no facts implicating such an analysis, and where the Supreme Court did not present a separate *stare decisis* analysis given the thousands of cases which rely on it. Hence, *Kisor* as the last applicable case on *Auer* deference in which considered the doctrine and applied a stare decisis analysis applies, and thus an *Auer* deference analysis must be performed where the regulation is deemed to be ambiguous.

b. The EPA's interpretation is owed *Auer* deference if the regulation is ambiguous, as its interpretation is authoritative with subject matter expertise and without surprise or unjust burden to those affected

The Court presumes that Congress with a presumption that congress intended for the agency to have power over its interpretation. *Kisor*, 588 U.S. at 573. Justice Kagan, referencing the standard of deference in *Chevron*, outlines a three part reframing of the doctrine of deference

in *Auer*. *Id.,* at 573. Analysis for *Auer* deference begins with analyzing whether the regulation is genuinely ambiguous, the conclusion of which requires the reviewing court to exhaust all "traditional tools" of construction. *Id.,* at 573-575; secondly, the agency's interpretation of that regulation is given deference if the interpretation of ambiguity is "reasonable." *Id.,* at 575. Thirdly, if the agency regulatory interpretation passes steps one and two, the reviewing court must also make an independent inquiry into whether "the character and context of the agency interpretation entitles it to controlling weight." *Id.,* at 559. While not exhaustive, there are three primary "markers" that distinguish the court's independent inquiry: (1) the agency's regulatory interpretation is the agency's "authoritative" or "official position" rather than an ad hoc statement not reflective of agency views; (2) the agency's interpretation must implicate in some way its substantive expertise; and (3) the agency's regulatory interpretation must reflect "fair and considered judgment." *Id.,* at 559. The EPA meets all of these criteria and is therefore qualified for *Auer* deference. The interpretation comes from the EPA as a whole and is therefore authoritative, the EPA offers regulatory and scientific expertise over the CWA and therefore over the WTR, and the interpretation has remained the same since the regulations creation, leaving no room for surprise. R. 3, 4, and 11. Accordingly, *Auer* deference affords the EPA's interpretation that Highpeak needs to obtain a permit as true.

CONCLUSION

For the reasons set forth above, Defendants-Appellees-Cross-Appellants, the United States Environmental Protection Agency respectfully asks this Court to reverse the District Court's ruling on issues I and II and uphold the District Court's ruling on issues III and IV.

We hereby certify that the brief is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

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__November 21, 2024___ Date