Team 36

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 Appellant, CRYSTAL STREAM PRESERVATIONISTS, INC.

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered a Decision and Order on August 1, 2024. The district court had subject jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331. Crystal Stream Preservationists, Inc. ("CSP"), the United States Environmental Protection Agency (the "EPA"), and Highpeak Tubes, Inc. ("Highpeak"), each filed timely motions for leave to file interlocutory appeal of the district court's Decision and Order in Case No. 24-CV-5678. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over these motions pursuant to 28 U.S.C. § 1291, which provides the federal courts of appeals jurisdiction over appeals from final decisions of the district courts.

STATEMENT OF ISSUES PRESENTED

I. Was the district court proper in holding that CSP had standing to challenge the Water Transfers Rule and to raise a citizen suit against Highpeak?

II. Was the district court proper in holding that CSP timely filed its challenge to the Water Transfers Rule?

III. Was the district court proper in holding that the Water Transfers Rule was validly promulgated under the Clean Water Act by the EPA?

IV. Was the district court proper in holding that the pollutants introduced in the water transfer is beyond the scope of exemption under the Water Transfers Rule, making Highpeak's discharge subject to permitting requirements under the Clean Water Act?

STATEMENT OF THE CASE

I. Crystal Stream Preservationists, Inc.

Crystal Stream Preservationists, Inc. ("CSP") is a non-for-profit corporation formed on December 1, 2023. CSP invites individuals interested in "the preservation of Crystal Stream in

its natural state for environmental and aesthetic reasons." CSP's mission is "to protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters. The Stream must be preserved and maintained for all future generations." CSP has thirteen members living in Rexville, New Union. All but one of the members have lived in Rexville for over fifteen years. Jonathan Silver moved to Reville in 2019. Two of CPS's members own land along Crystal Stream and reside approximately one mile south of the end of Highpeak's tube run and five miles south of the discharge point. Both members moved to their current homes prior to 2008.

II. Highpeak's Tunnel

Highpeak Tubes, Inc. ("Highpeak") owns and operates a recreational tubing operation in Rexville, New Union. Highpeak owns a 42-acre parcel of land in Rexville. The northern border of the property contains Cloudy Lake, a 274-acre lake in the Awandack mountain range. The southern portion of the property runs Crystal Stream, where Highpeak operates its recreational tubing operation.

In 1992, Highpeak obtained permission from the State of New Union to build a tunnel connecting Cloudy Lake and Crystal Stream. That same year, Highpeak installed a pipe of 4 feet in diameter and approximately 100 yards in length that was carved through rock and partially constructed with iron pipe. Highpeak's employees can control valves in the northern and southern ends of the tunnel to regulate flow of water from Cloudy Lake into Crystal Stream. However, under an agreement with the State of New Union, Highpeak is prohibited from using the tunnel unless New Union finds water levels in Cloudy Lake adequate for the release of water, usually during spring through late summer because of seasonal rains. Highpeak believes that these releases increase volume and velocity of Crystal Stream and enhance tubing recreation.

Because New Union does not have a delegated Clean Water Act permitting program, the EPA issues permits within the state under the National Pollution Discharge Elimination System

(“NPDES”). Highpeak has neither sought nor obtained a permit for its discharges from Cloudy Lake into Crystal Stream over the last 32 years.

III. Notice of Intent to Sue Letter

On December 15, 2023, CSP sent a notice of intent to sue letter (“Letter”) to Highpeak, and, as required by the Clean Water Act, sent copies to the New Union Department of Environmental Quality and to the EPA. In the letter, CPS alleged that Highpeak’s tunnel is a “point source” under the Clean Water Act and has regularly and continuously discharged pollutants into the Crystal Stream without a NPDES permit. The Letter specifically alleged that Highpeak’s discharge contains multiple pollutants based on sampling results showing that the water in Cloudy Lake has significantly higher levels of minerals like iron and manganese. Cloudy Lake also has a significantly higher concentration of total suspended solids compared to the water in Crystal Steam. The Letter contended that while Crystal Stream is fed primarily by natural groundwater springs and is less burdened by these pollutants, nevertheless, each time Highpeak opens its tunnel, Highpeak violates the Clean Water Act by allowing discharged pollutants to enter the Stream.

In the Letter, CSP further alleged that the Water Transfers Rule was not validly promulgated by the EPA. Alternatively, CSP argues that the additional iron, manganese, and total suspended solids introduced during the transfer process takes the discharge out of the exemption provided by the Water Transfers Rule. CSP supported this claim with data showing that the water discharged into Crystal Stream contained 2 to 3% higher concentrations of these pollutants than water samples taken directly from the water intake in Cloudy Lake on the same day.

On December 27, 2023, Highpeak sent a reply letter to CSP, denying by responding on the merits and insisting that Highpeak did need a permit under the Water Transfers Rule.

Highpeak also argued that the "natural" addition of pollutants during the transfer did not bring the discharge outside the scope of the Water Transfers Rule.

IV. Proceedings

After waiting the required sixty days, CSP filed its Complaint on February 15, 2024, reiterating the allegations from the Letter. The Complaint included the citizen suit claims against Highpeak and a claim under the APA against the EPA challenging the Water Transfers Rule as invalidity promulgated and inconsistent with the statutory language of the Clean Water Act. In the alternative, CSP argued that even if the Water Transfers Rule were valid, Highpeak would require a permit for the pollutants allegedly introduced during the water transfer between Cloudy Lake and Crystal Stream. Because the Complaint repeats all allegations from the Letter, for the purposes of the motions to dismiss, the Court treats all allegations as true. CSP also provided two declarations of support from its members, Cynthia Jones and Jonathan Silver, who reside along the Stream.

Highpeak moved to dismiss CSP's challenge to the Water Transfers Rule for lack of standing and timeliness. Highpeak also moved to dismiss CSP's citizen suit against Highpeak, arguing that CSP was created for the sole purpose of challenging Highpeak's discharges and therefore suffers no actual injury. Finally, Highpeak argues that the Complaint fails to state a cause of action because the Water Transfers Rule was validity promulgated and no permit was required for the tunnel discharge.

The EPA also moved to dismiss CSP's challenge to the Water Transfers Rule and joined Highpeak in challenging CSP's standing and timeliness. The EPA also defended that the Water Transfers Rule was a valid promulgation under the Clean Water Act. On the other hand, the EPA agreed with CSP that, even if this Court should uphold the Water Transfers Rule, Highpeak requires a permit for the pollutants discharged to Cloudy Lake and Crystal Stream.

After motions were fully briefed by both parties in April 2024, the district court refrained from ruling on the pending motions given two cases pending before the Supreme Court, which, CSP argued, could provide additional legal foundation for CSP's claims. Now that the Supreme Court has issued those rulings, the district court grants the motions to dismiss the challenge to the Water Transfers Rule, but denies the motion to dismiss the citizen suit against Highpeak.

SUMMARY OF THE ARGUMENT

The district court properly held that CSP has standing to challenge the Water Transfers Rule and to raise a citizen suit against Highpeak under the Clean Water Act. An environmental organization has standing when there is actual, concrete harm to its aesthetic and environmental interests and institutional goals. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). An environmental organization also has standing when representing its members who suffer actual, concrete harm to their aesthetic, recreational, and environmental interests. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004).

Highpeak's discharge harmed the environmental, aesthetic, and organizational goals of CSP, including its interest in preserving the Crystal Stream and mission to protect Crystal Stream from contamination during impermissible transfers of polluted waters. Highpeak's discharge also harmed CSP's members' ability to enjoy the aesthetics of the affected area and recreational activities. Therefore, Highpeak has standing to sue on its own and on behalf of its members.

The district court properly held that CSP timely filed its challenge to the Water Transfers Rule. A civil action must be filed within six years after accrual of the right of action. 28 U.S.C. §

2401(a); *see also Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2447-48 (2024). A right under the Administrative Procedure Act ("APA") accrues when the plaintiff suffers an actual injury resulting from the regulation. *Id.* at 2451. The accrual is specific to each plaintiff and not the context. *Id.* at 2455-56.

CSP was formed on December 1, 2023, and thereafter, the organization and its members could suffer an actual, concrete injury and file a complaint. CSP also timely filed its challenge to the regulation on February 15, 2024. Even though CSP is an environmental nonprofit, the accrual rule under *Corner Post* is not limited to a business-specific context. Therefore, CSP's nonprofit status does not time-bar its challenge to the Water Transfers Rule.

The district court improperly held that the Water Transfers Rule was validly promulgated under the Clean Water Act. The APA provides that courts must apply independent judgment when reviewing an agency action. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024). Courts must reject agency actions inconsistent with their interpretation of the law. *Id.*; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Courts may also revisit and overrule prior rulings on agency action when there is a basis for special justification, such as poor reasoning, unworkability, and inconsistency. *Knick v. Twp. Of Scott*, 588 U.S. 180, 203 (2019).

The EPA's promulgation of the Water Transfers Rule is inconsistent with the Clean Water Act. There is a transfer of water through Highpeak's tunnel between two distinct bodies of water, Cloudy Lake and Crystal Stream, that causes the movement of pollutants like iron, manganese, and total suspended solids. While the Water Transfers Rule creates an exception for transfers of water so long as the party doing the transfer did not introduce those pollutants, the statute plainly provides that the transfer of any polluted water between two distinct bodies of water is an illegal discharge of pollutants. The Water Transfers Rule and the Clean Water Act are

therefore inconsistent. Furthermore, the inconsistencies between precedent assessing the validity of the Water Transfers Rule also give rise to a special justification under the basis of poor reasoning, unworkability, and inconsistency.

Alternatively, the district court properly found that Highpeak is required to obtain a permit under the Clean Water Act for its discharge from Cloudy Lake to Crystal Stream because the discharge falls outside the exception provided under the Water Transfers Rule. The court should follow an unambiguous regulation when there is one reasonable construction. *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). However, if the regulation is genuinely ambiguous, *Auer* deference applies when the agency's interpretation is reasonable, and the character and context entitle the agency to a greater level of deference. *Id.* at 576 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). The context and character warrant agency deference when the agency's interpretation represents the agency's authoritative, expertise-based, and fair judgement of the regulation. *Id.* at 579.

The Water Transfers Rule unambiguously provides that Highpeak does not fall within the regulation's exception based on its comprehensive list of activities and definition of terms outlined by the EPA in the Federal Register. Should the court find genuine ambiguity, the court should grant *Auer* deference because the EPA's interpretation is reasonable based on prior practices under the Clean Water Act. The EPA's interpretation also reflects the agency's authoritative, expertise-based, and fair judgement of the Water Transfers Rule based on the Clean Water Act and related litigation.

STANDARD OF REVIEW

Under Fed. R. Civ. Pro. 12(b), an appellate court reviews a district court's granting of a motion to dismiss a complaint based on lack of standing de novo. To survive a Rule 12(b)(6)

motion, the alleged facts must sufficiently raise a right to relief beyond speculation and state a claim to relief plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). The court need not accept the plaintiff's legal conclusions drawn from the facts, nor accept as true unwarranted inferences, unreasonable conclusions, or arguments. *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019).

An appellate court also reviews a district court's decisions of APA claims de novo with the same deferential standard to agency decisions as the district court. *Defs. of Wildlife v. United States Forest Serv.*, 94 F.4th 1210, 1220 (10th Cir. 2024). The petitioner must show that the agency action is arbitrary and capricious and overcome the "presumption of validity." *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793 (10th Cir. 2010).

ARGUMENT

I. CSP IS A LEGITIMATE NONPROFIT CORPORATION WITH STANDING TO CHALLENGE THE WATER TRANSFERS RULE AND TO BRING A CITIZEN SUIT AGAINST HIGHPEAK FOR DISCHARGES ALLEGEDLY IN VIOLATION OF THE CLEAN WATER ACT.

CSP is a legitimate nonprofit corporation that has standing – on behalf of itself and its members – to challenge the Water Transfers Rule and to raise a citizen suit against Highpeak under the Clean Water Act. To bring and maintain a case in a federal court, plaintiffs must establish standing for each claim by proving an "injury-in-fact" that has a "causal connection" to the complained conduct and shall "likely . . . be redressed by a favorable decision.". *See* U.S. CONST. art. III; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). An injury-in-fact constitutes an invasion of a legally protected interest that is concrete, particularized, and actual or imminent. *Id*. The party seeking review must be among the injured. *Id.* at 563.

A. CSP has organizational standing to challenge the Water Transfers Rule and raise a citizen suit against Highpeak because Highpeak's discharge created actual, concrete harm to CSP's aesthetic and environmental interests and affects CSP's institutional goals.

An association may have standing in its own right to assert an injury-in-fact to itself. *See Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). The U.S. Supreme Court has recognized standing for challenges by organizations with aesthetic, recreational, and environmental interests and suffer injuries that affect daily operations and institutional goals. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing aesthetic and environmental interests are "deserving of legal protection" for environmental organizations); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992) (noting that a wildlife conservation group's "desire to use or observe an animal species, even for purely [a]esthetic purposes, is undeniably a cognizable interest for purposes of standing"); *see Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004) (finding injury that affects a nonprofit's day-to-day operations and institutional goals). However, an entity formed solely to sue and without an injury-in-fact has no standing when creating expenditures based on a speculative harm. *See e.g. Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (a coalition of media, labor, human rights, and legal organizations lacked standing to challenge a statute because the alleged inconvenience and costs for secure, overseas communications was speculative); *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016) (plaintiff lacked standing to challenge a statute because she purchased prepaid phones and chose out-of-state area codes for the sole purpose of filing lawsuits); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024) (medical organizations cannot create standing by spending money for information and advocacy against an agency's action.).

In *Duke Power*, the United States Supreme Court found that appellees had standing for a constitutional challenge against the Price-Anderson Act, which imposed a cap on liabilities for

nuclear accidents from private nuclear power plants operated by the federal government. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 62-63 (1978). There, plaintiffs, including an environmental nonprofit based near a planned nuclear power facility, would suffer injuries from the thermal pollution of lakes and the emission of radiation into the environment. *Id.* at 73-74. Thus, the *Duke Power* court found these environmental and aesthetic consequences sufficient for standing in a challenge against the statute. *Id.* at 73-74, 81.

Likewise, in *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, the Sixth Circuit held that environmental nonprofit organizations had standing to sue defendants in a citizen suit for discharging effluents in violation of the NPDES permit required under the Clean Water Act. *See Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004). Both nonprofits had organizational standing because the defendants' failure to follow reporting and monitoring obligations and to provide information essential to the nonprofits' daily activities and institutional goals concretely harmed the nonprofits' organizational interests. *Id.* at 546. ("Although these organizations devote themselves to the protection and preservation of the environment, their claims are not based upon a purely ideological or societal interest.").

Here, CSP is a legitimate environmental nonprofit with organizational standing to challenge the EPA's Water Transfers Rule and assert a citizen suit against Highpeak because CSP suffered an actual, concrete injury-in-fact to CSP's environmental and aesthetic interests and organizational operations. CSP has alleged that Highpeak's discharge violates its fundamental interest in "the preservation of the Crystal Steam in its natural state for environmental and aesthetic reasons" and its institutional mission to "preserve," "maintain," and "protect the Stream from contamination resulting from industrial uses and illegal transfers of polluted waters" Order at 5-6. By opening the valves of its tunnel, Highpeak releases discharge

carrying several pollutants into Crystal Stream, causing significantly higher concentrations of certain metals, like iron and manganese, and total suspended solids in both bodies. Order at 5. Furthermore, CSP offers sampling that demonstrated an addition of pollutants during the water transfer process – an unpermitted 2 to 3% increase in concentration of pollutants between the intake at Cloudy Lake to the outfall into Crystal Stream. Order at 5. Therefore, Highpeak's discharge affects CSP's legitimate environmental, aesthetic, and organizational goals, forming the requisite injury for standing to challenge the Water Transfers Rule and to raise a citizen suit against Highpeak for its pollution in violation of the Clean Water Act.

B. <u>CSP also has representational standing to sue on behalf of its members in a challenge against the Water Transfers Rule and a citizen suit against Highpeak because Highpeak's discharge caused actual, concrete harm to CSP's members' aesthetic, recreational, and environmental interests.</u>

An entity may also assert standing on behalf of its members who have suffered a concrete injury-in-fact. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). Harm to the recreational or aesthetic interests of members allows organizations to assert representational standing on behalf of its members. *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004).

In *Lujan*, wildlife conservation and environmental organizations representing two members challenged a revised regulation promulgated by the Secretary of the Interior under the Endangered Species Act. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 558-59 (1992). There, the United States Supreme Court held that the organizations failed to establish the requisite concrete and imminent injury for standing. *Id.* at 562. Had the organizations provided evidence, like affidavits, demonstrating continuing or present adverse effects that affect members directly, the *Lujan* court could find standing. *Id.* at 563-64.

In contrast, in *Laidlaw*, the United States Supreme Court held that members of three environmental organizations had standing in a citizen suit under the Clean Water Act for discharge of multiple pollutants, including excessive levels of mercury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 173 (2000). There, the respondent's discharge into a river – without a NPDES permit – directly affected the recreational, aesthetic, and economic interests of members who lived by the river. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182 (2000). Several members provided in sworn statements that discharge created concern about the harmful pollutants in the water and caused the river to look and smell polluted. *Id.* at 182. This halted recreational activities near the river, such as fishing, camping, swimming, picnicking, birdwatching, boating, hiking, and driving. *Id.*

Similarly, in *Am. Canoe Ass'n*, the Sixth Circuit held that an environmental nonprofit had standing to organizations had standing to sue defendants in a citizen suit for violating the NPDES permit under the Clean Water Act. *See Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 544 (6th Cir. 2004). There, one nonprofit had representational standing to sue on behalf of its member who had shared in an affidavit his aesthetic, environmental, and informational harm resulting from the defendants' discharge of effluents into a river. *Id.* at 541-42. Aesthetic and environmental harm included his concern for harmful pollutants in the affected area that harmed his interest in canoeing and fishing. *Id.* Likewise, the defendant's failure to comply with monitoring and reporting obligation created informational injury because the member could not make choices on where to safely engage in recreational activities. *Id.* at 542.

Finally, in *Ecological Rights Found*, the Ninth Circuit held that an environmental organization had standing to sue on behalf of two members in a citizen suit under the Clean

Water Act on behalf because of the "longstanding recreational and aesthetic interests" harmed by the defendant's discharge of contaminated stormwater adjacent to the creek. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000). Its members expressed concerns over the polluted water and refraining from fishing, swimming, snorkeling, and viewing the wildfire and beauty of the creek. *Id.* at 1144-45.

Here, CSP has standing to sue on behalf of its members whose aesthetic, recreational, and environmental interests have been harmed by Highpeak's discharge. Unlike *Lujan* and like *Laidlaw*, *Am. Canoe Ass'n* , and *Ecological Rights*, CSP provides two declarations addressing these harms. Cynthia Jones submitted a declaration stating that she "regularly walk[s] along the Stream and enjoy[s] its crystal clear color and purity." *See* Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7. Jones further states that "the suspended solids and metals in the Stream are upsetting to [her], as they make the otherwise clear water cloudy," and she is "very concerned about contamination from toxins and metals, including iron and manganese." *See* Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 7-9. Similarly, Jonathan Silver submitted a declaration stating that he "regularly walks [his] dogs along" Crystal Stream and is "deeply concerned about the presence of toxic chemicals polluting the water." *See* Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 5. He stated that he is "hesitant to allow [his] dogs to drink from the Stream due to the pollutants" he believes are present. *See* Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 7. Both members shared that they would enjoy the Stream more regularly but for the pollution from Highpeak's discharge." *See* Exhibit A to Complaint (Decl. of Cynthia Jones) at Par. 12 *and* Exhibit B to Complaint (Decl. of Jonathan Silver) at Par. 9. Therefore, CSP has standing to represents its member in a challenge against the Water Transfers Rule and a citizen suit against Highpeak because CSP's members' aesthetic,

recreational, and environmental interests suffered an actual, concrete injury-of-fact resulting from Highpeak's discharge.

II. CSP TIMELY FILED ITS CHALLENGE TO THE WATER TRANSFERS RULE BECAUSE THE ACCRUAL OF THE STATUTE OF LIMITATIONS UNDER §2401(a) IS SPECIFIC TO WHEN A PLAINTIFF IS INJURED BY THE REGULATION, NOT SPECIFIC TO THE BUSINESS CONTEXT.

CSP timely filed its challenge to the Water Transfers Rule. Generally, a civil action must be filed within six years after accrual of the right of action. 28 U.S.C. § 2401(a); *see also Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2447-48 (2024). The statute of limitations for a claim brought under the Administrative Procedures Act (the "APA") does not accrue when only the agency action is final. *Id.* at 2450. Instead, an APA claim accrues when the plaintiff has a "complete and present cause of action" after suffering an actual injury because of the regulation. *Id.* at 2451. Notably, when a plaintiff's right of action starts accruing is plaintiff specific, not context specific. *Id.* at 2455-56 (finding that the accrual of the right of action shares <u>one meaning</u> under §2401(a) OF and not "different meanings in different contexts") (emphasis added).

In *Corner Post*, the United States Supreme Court denied a motion to dismiss a complaint by businesses challenging to a regulation promulgated by the Board of Governors of the Federal Reserve System in 2011. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2449 (2024). The plaintiffs later amended their complaint to add plaintiff Corner Post, a business incorporated in 2017 and operated a truck stop and convenience store in 2018. *Id.* at 2448. The *Corner Post* court found that the statute of limitations under 28 U.S.C. § 2401(a) accrued when Corner Post was injured in 2018 and not when the final regulation was published in 2011. *See id.* at 2460.

While Highpeak argues that the *Corner Post* holding does not apply to CSP because CSP is an environmental nonprofit group, the United States Supreme Court has clarified that the accrual of the statutory period under §2401(a) is not limited to a business-specific context. Order at 8. Rather, the *Corner Post* holding is specific to each plaintiff who suffers an injury giving rise to a cause of action. Here, like *Corner Post*, CSP is a plaintiff that – after its formation on December 1, 2023 – suffered actual and concrete injury in both its representative and organizational capacity because of the Water Transfers Rule. Order at 8. Furthermore, CSP specifically filed its challenge to the regulation two months later on February 15, 2024. Order at 8. Therefore, CSP timely filed its challenge to the Water Transfers Rule.

III. THE WATER TRANSFERS RULE WAS IMPROPERLY PROMULGATED BY THE EPA BECAUSE IT IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE CLEAN WATER ACT.

The Water Transfers Rule was improperly promulgated by the EPA because the regulation contradicts the plain language and congressional intent of the Clean Water Act. The Administrative Procedure Act ("APA") provides that the courts must apply independent judgment when reviewing whether an agency has acted within the scope of its statutory authority. *See* 5 U.S.C. § 701; *see also Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024). Courts also must reject agency actions <u>inconsistent</u> with the court's interpretation of the law. *Id.*; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (emphasis added). Since the overturning of the *Chevron* doctrine, courts now choose whether to defer to an agency's reading of a statute, even when the statutory language is ambiguous**.** *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)). While *Chevron* deference is overruled, previous cases decided under the *Chevron* framework are not voided automatically. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024).

A. The EPA's promulgation of the Water Transfers Rule is inconsistent with the Clean Water Act because the statute plainly provides that the transfer of polluted water between two distinct bodies of water constitutes an illegal discharge of pollutants.

The Clean Water Act was enacted in 1972 for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Generally, any discharge of pollutants is prohibited without the issuance of a permit. *See* 33 U.S.C. § 1311(a) (The Clean Water Act expressly prohibits "the discharge of any pollutant by any person unless done in compliance with some provision of the Act."); *see also* 33 U.S.C.S. § 1342 (establishing the NPDES permitting system). A discharge includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A point source includes a pipe. *See* 33 U.S.C. § 1362(12)(A), (14); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004) (The point sources enumerated in the Clean Water Act include "pipes, ditches, tunnels and other objects that do not themselves generate pollution but merely transport them."). A discharge also includes point sources that merely transfer, and do not generate, the pollutants. See 33 U.S.C. § 1362(12); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105, 105 (2004).

In *Miccosukee Tribe*, a tribe sued the Water Management District, which operates water pump stations used to address drainage and flood control issues. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004). The pumps had discharged phosphorus pollutant when transferring water from a canal to the water conservation area in the Everglades. *Id.* The United States Supreme Court found that the NPDES permitting requirements under the Clean Water Act expressly cover point sources even when pollutants merely pass through, and not originate from, the point source. *Id.* at 105. While the *Miccosukee* court declined to address the "unitary waters" theory and found factual issues regarding whether the canal and the water conservation area are "meaningfully distinct" bodies of water, the Court nevertheless concluded

that the District needed a permit for point sources, like pipes or tunnels, to comply with the Clean Water Act. *Id.* at 109, 112.

In *Catskill I,* the Second Circuit determined that New York City's discharge of turbid water resulting from its operation of the Schoharie Reservoir and Shandaken Tunnel resulted in pollutants entering Esopus Creek in violation of the Clean Water Act. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 488 (2d Cir. 2001) (*Catskill I*). There, the City transferred water through the Shandaken Tunnel from the Schoharie Reservoir to Esopus Creek, which emptied the water with suspended solids into Ashokan Reservoir to provide drinking water for City residents. *Id.* at 484. The Second Circuit held that the Shandaken Tunnel qualified as a point source, and that the discharged water and suspended solids constituted an addition of pollutants from a point source to a navigable water. *Id.* at 493. The Second Circuit also rejected the City's argument that its operation of the tunnel was not in violation of the Clean Water Act under the theory that all navigable waters of the United States comprise "a singular entity" such that a transfer of pollutants between waters does not constitute an unpermitted addition. *Id.* The *Catskill I* court concluded that the discharge was "artificially diverted from its natural course" to an "utterly unrelated" body of water; thus, transfers between two distinct bodies of water was an addition violative of the Clean Water Act. *Id.* at 492. After remand, the City appealed in *Catskill II*. There, the Second Circuit reiterated its position that the City's argument overlooked the plain language of the Clean Water Act, which expressly provides that permits are required for the discharge of pollutants. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 84 (2d Cir. 2006) (*Catskill II*).

Highpeak asserts a unitary waters theory that its discharge complies with the Clean Water Act because the Water Transfers Rule creates an exception for pollutants transferred from one

body of water to another, so long as the party doing the transfer did not themselves introduce those pollutants. Order at 5; *see also* NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). However, the Water Transfers Rule is clearly inconsistent with the Clean Water Act because the transfer of water from one source to another constitutes an addition of pollutants. 33 U.S.C. § 1362(12)(A) (The Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source."). Concisely, any transfer of pollutants is an "addition" whether newly introduced or transferred from one body of water to another. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 486 (2d. Cir. 2001) (*Catskill I*). Like *Catskill I* and *Miccosukee*, there is a transfer of water through the iron pipe and rock of Highpeak's tunnel between two distinct bodies of water, Cloudy Lake and Crystal Stream, causing the movement of pollutants like iron, manganese, and total suspended solids. Order at 5. Pursuant to the precedent set by *Catskill I* and *Catskill II*, Highpeak's tunnel violates the Clean Water Act because it transfers polluted water, without a permit, into the Stream. Order at 4. While Highpeak argues that these pollutants are merely trace pollutants gathered during the transfer through the iron pipe and rock, like *Miccosukee*, Highpeak's tunnel itself does not need to generate the pollutants in Crystal Stream to qualify as a point source subject to permitting requirements. Order at 4, 11;. The tunnel is still a point source for discharge under the Clean Water Act. *See* 33 U.S.C. § 1362(12)(A), (14). Therefore, the Water Transfers Rule is inconsistent with the Clean Water Act because the statute plainly expresses that any transfer of polluted water between two distinct bodies of water constitutes an illegal discharge of pollutants.

B. <u>There is a basis for special justification that warrants overruling prior decisions on the Water Transfers Rule.</u>

Regulations upheld under the *Chevron* framework remain valid under the doctrine of *stare decisis* principles unless there is a special justification for revisiting those prior rulings.

Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). Special justification for overturning a long-settled precedent requires more than an argument that the precedent was wrongly decided. *See e.g. Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (holding that appellant lacked special justification for overturning precedent allowing a presumption of reliance in a private securities fraud action because the presumption was rebuttable and thus not in conflict with the Securities Exchange Act); *see also Ramos v. Louisiana,* 590 U.S. 83 (2020) (finding special justification for overruling precedent exempting states from the Sixth Amendment's requirement of a unanimous jury for a conviction because it was based on erroneous interpretation of the Constitution). The United States Supreme Court identifies several factors when considering whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Knick v. Twp. Of Scott*, 588 U.S. 180, 203 (2019) (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018)).

In *Knick*, the plaintiff challenged a township's ordinance requiring the cemetery she operated to be open to the public during the daytime. *Knick v. Twp. Of Scott*, 588 U.S. 180, 186 (2019). The plaintiff filed a federal claim, alleging that the ordinance violated her Fifth Amendment rights by taking her property. *Id.* at 187. However, the plaintiff's suit was dismissed based on the *Williamson County* precedent that property owners must seek compensation under state law before bringing federal takings claims. *Id.* (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)). The United States Supreme Court overruled *Williamson County*, finding that the decision was poorly reasoned, unworkable, and inconsistent because of multiple, conflicting, and related holdings assessing whether property owner acquires

a Fifth Amendment right to compensation at the time of taking. *Id.* at 203. The *Knick* court also found no reliance interest in *Williamson County*, determining that overturning the ruling would not expose governments to new liability. *Id.* at 205.

Here, the *Knick* factors apply and warrant overturning precedent upholding the Water Transfers Rule. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protection Agency*, 846 F.3d 492 (2d Cir. 2017) (upholding the Water Transfers Rule as a valid interpretation of the Clean Water Act). First, the *Catskill III* decision was poorly reasoned and inconsistent because the decision requires the courts to comply with a regulation contradictory to the plain language of the Clean Water Act. Like how *Williamson County* conflicted with the Fifth Amendment, *Catskill III*'s holding simply cannot coexist with the Clean Water Act, which plainly prohibits any discharge of pollutants without an NPDES permit and offers no exception suggested by the Water Transfers Rule. *Compare* NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,708 (June 13, 2008) (The Water Transfers Rule creates an exemption from NDPES permitting requirements for water transfers "that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.") *with* 33 U.S.C. § 1362(12) (The Clean Water Act prohibits "<u>any addition</u> of any pollutant to navigable waters from any point source" without a permit) (emphasis added) *and* § 1311(a) (The Clean Water Act expressly prohibits "the discharge of <u>any pollutant</u> by any person <u>unless done in compliance</u> with some provision of the Act.") (emphasis added). Furthermore, under the Clean Water Act, Highpeak's tunnel is still a point source for discharge subject to permitting requirements under the Clean Water Act, even if it did not introduce the pollutants. *See* 33 U.S.C. § 1362(12)(A) (A point source includes "any pipe, ditch, channel, tunnel, [or] conduit[.]").

Second, *Catskill III* is completely unworkable. Courts have a duty to set aside inconsistent with the court's interpretation of the law. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024). Because the Water Transfers Rule contradicts the Clean Water Act, lower courts would have difficulty and confusion applying the *Catskill III* precedent that the Water Transfers Rule was a valid regulation and to uphold the duty to cast aside decisions inconsistent with the plain language of the statute.

Finally, there is no reliance interest in *Catskill III*. Any harm that would be caused to parties that rely on its holding pales in comparison to the effects of continuing to uphold a rule that so blatantly conflicts with the Clean Water Act. U.S.C. § 1362(12)(A) (The Clean Water Act prohibits "any addition of any pollutant to navigable from any point source.") Overturning the precedent that upheld the Water Transfers Rule is the best course of action to meet the Clean Water Act's goal of preserving the quality of this nation's waters and ensure the courts are consistent in doing so. 33 U.S.C. § 1251 (The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

Due to factors like poor reasoning, unworkability, and inconsistency with related decisions, *Catskill III* should be overturned. Overturning the *Catskill III* precedent would not cause significant harm to those relying on its ruling; rather, doing so would be consistent with the court's duty to set aside contradictory agency action under the APA. *See* 5 U.S.C. § 706. Instead, the courts should follow *Catskill I and II* precedents, which remain consistent with the statutory language of the Clean Water Act. Thus, this Court should overrule prior rulings on the Water Transfers Rule because there is a basis for special justification.

IV. EVEN IF THIS COURT UPHOLDS THE WATER TRANSFERS RULE, HIGHPEAK'S DISCHARGE WAS SUBJECT TO PERMITTING REQUIREMENTS UNDER THE CLEAN WATER ACT.

The district court properly found that Highpeak is clearly required to obtain a permit under the Clean Water Act for its discharge from Cloudy Lake to Crystal Stream because the discharge falls outside the exception provided under the Water Transfers Rule. Furthermore, even if the Water Transfers Rule is ambiguous, the EPA's interpretation of a requisite permit is entitled to a greater level of respect. When an agency's regulation is unambiguous, the court uses the one reasonable construction of the regulation. *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). However, should uncertainty remain, then the regulation is genuinely ambiguous and allows for agency deference when the agency's interpretation is reasonable, and the character and context entitles the agency to a greater level of deference. *Id.* at 573.

A. The Water Transfers Rule unambiguously provides that Highpeak does not fall within the exception and requires a permit for its discharge required under the Clean Water Act.

An agency's regulation is unambiguous when there is a single reasonable construction of a regulation. *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019). When determining whether a regulation is ambiguous, the court must exhaust the standard tools of statutory interpretation, including consideration of the "text, structure, history, and purpose" of the regulation. *Id.* at 575.

The Water Transfers Rule is comprehensive and covers a litany of scenarios in detail. *See* NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). The Water Transfers Rule expressly lists precise activities with discharges that do not fall under its exception to the Clean Water Act:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008) (codified in 40 C.F.R. 122.3(i)) (emphasis added). The language in the Water Transfers Rule is clear when identifying the action that falls under this section, the harm that rule addresses, and an exception that would

render this section inapplicable. *See id.* In addition, when formalizing the Water Transfers Rule, the EPA also published a comprehensive explanation of the regulation in the Federal Register. *Id.* There, the EPA directly defined how to "introduce" pollutants to a water source:

> [The] EPA believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred. . .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."

Id. (emphasis added). The EPA thus intended for *any* introduction of pollution to require a permit. The EPA also expressly defines an "addition" of pollutants to include events where a point source physically introduces a pollutant into another body of water. *Id.* ("Specifically, the Court of Appeals for the D.C. Circuit agreed with EPA that the term 'addition' may reasonably be limited to situations in which 'the point source itself physically introduces a pollutant into a water from the outside world.'"). Furthermore, the Water Transfers Rule expressly provides that a pollutant must be introduced by a "point source," which expressly includes pipes and tunnels under the Clean Water Act. *See* 33 U.S.C. § 1362(14).

For further clarification, the EPA also drafted a hypothetical discussing the transfer of water from one reservoir to another. *See* NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). The hypothetical entails a dam released water from one reservoir to another, and the water traveled down a river and entered into a new river through a tunnel. *Id.* The water, once through the tunnel and into a second river, eventually flowed to the other reservoir. *Id.* In particular, the EPA highlighted that the passing of water through the tunnel constituted an introduction of pollutants that required a permit. *Id.*

While Highpeak argues that "introduction" within the Water Transfers Rule solely means "the 'introduction' of pollutant must result from human activity and not natural processes like

erosion," here, such a contention is unsupported. *See* Order at 11; *see also* NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). Highpeak cannot claim that the EPA had only intended for human introductions of added pollutants to require a permit because the Water Transfers Rule provides that introduction of any pollution, not just human introduced pollution, falls outside the exemption. See Order at 5. The plain language of the Water Transfers Rule unambiguously requires permits for Highpeak's discharge based on the comprehensive definitions on the introduction and addition of pollutants. *See* NPDES Water Transfers Rule, 73 Fed Reg. 33,697 (June 13, 2008). With this level of detail in the definitions of terms under the Water Transfers Rule, in tandem with a similar hypothetical, this regulation unambiguously expresses permitting requirements. The EPA's hypothetical parallels Highpeak's tunnel, which moves water from Cloudy Lake to Crystal Stream through an iron pipe underground that introduces 2 to 3% more pollutants, including iron, manganese, and total suspended solids. Order at 5. Therefore, the Water Transfers Rule unambiguously provides that Highpeak requires a permit for its discharge.

B. Even if the Water Transfers Rule is genuinely ambiguous, the EPA's interpretation is afforded greater deference under *Auer* Deference.

When interpreting a regulation, courts generally defer to an agency's reasonable interpretations of its own ambiguous regulations under *Auer* deference, which was first articulated as *Seminole Rock* deference. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (finding that the Secretary of Labor can resolve ambiguities of the Secretary's own regulations, including an exemption from the Federal Labor Standards Act); *see also Bowles v. Seminole Rock*, 325 U.S. 410, 413-14 (1945) ("Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."). While the *Loper Bright* holding has overturned the *Chevron*

doctrine, which allows courts to defer to an agency's reasonable interpretation of an ambiguous statute, the decision has not overturned *Auer* deference, which allows courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)) (emphasis added).

To apply *Auer* Deference, (1) the regulation must be genuinely ambiguous, (2) the agency's interpretation must be reasonable, and (3) the character and context of the agency's interpretation must entitle the agency to controlling weight. *See Kisor v. Wilkie*, 588 U.S. 558, 576 (2019). Courts generally grant deference to an agency's interpretation of the regulation so long as that interpretation is not "plainly erroneous or inconsistent with the regulation." *Id.* at 574. Here, all parties concede that the language of the Water Transfers Rule is genuinely ambiguous. Rather, at issue is whether *Auer* deference applies to this case.

1. *Auer Deference applies because the EPA's interpretation of the Water Transfers Rule is reasonable because it is consistent with the Clean Water Act.*

Auer deference requires an agency's interpretation to be reasonable. *See Kisor v. Wilkie*, 588 U.S. 558, 576 (2019). An agency's interpretation is reasonable when it falls within the "bounds of reasonable interpretation" determined by consideration of the "text, structure, history, and purpose" of the regulation during the genuine ambiguity analysis. *Id.* at 575.

In *Decker*, the United States Supreme Court exercised *Auer* deference when holding that the Industrial Stormwater Rule was properly construed by the EPA. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 601 (2013) (The Industrial Stormwater Rule, codified under 40 C.F.R. § 122.26, exempts certain point-source discharges from the NPDES permitting requirements.). There, the plaintiff organization raised a citizen suit against a logging and paper products company and other federal and corporate organizations for failure to obtain an NPDES permit for

discharges of channeled stormwater runoff from logging roads. *Id.* at 606. After finding the regulation ambiguous, the Court determined that the EPA's interpretation of a requisite permit for the discharges was a reasonable and consistent based on a history of similar state regulation, including the development of and investment toward "comprehensive set of best practices" for the management of stormwater runoff from logging roads. *Id.* at 605. The Clean Water Act also expressly authorizes the EPA to work with state and local officials to manage stormwater pollution. *Id.* (citing 33 U.S.C. §1342(p)(6)).Thus, the *Decker* court afforded *Auer* deference to the EPA's interpretation of the regulation.

Similarly, in *Coeur Alaska*, the United States Supreme Court found language in the Water Transfers Rule ambiguous and afforded deference to the EPA's interpretation of the regulation. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 291 (2009). A company sought to reopen a gold mine and use "froth flotation" to extract gold from the mine. *Id.* at 261. The mining company proposed to discharge fill material ("slurry") made of rock and water in a small lake that would result in raising the lake bed and expanding the lake's surface area. *Id.* at 269. To contain the lake's surface area, the mining company would dam the lake and direct runoff around the lake and the damn. *Id.* at 267. The Court reviewed the EPA's interpretation of an ambiguous regulation, 40 C.F.R. § 122.3, and found the EPA's interpretation reasonable based on a memorandum outlining prior practices and clarifying the regulation. *Id.* at 284. Thus, the Court deferred to the EPA's interpretation that the U.S. Army Corps of Engineers, not the EPA, had the statutory authority to issue permits for the discharge of fill material. *Id.* at 286.

Here, *Auer* Deference applies because the EPA's interpretation of the Water Transfers Rule is reasonable because it is consistent with prior practices under the Clean Water Act. Like

regulations in *Decker* and *Coeur Alaska*, the Water Transfers Rule creates an exemption for NPDES permitting requirements for certain discharge from point sources. Nevertheless, the EPA's final rule and hypotheticals comprehensively support that water transfers should not "add pollutants to the water being transferred" and that NPDES permits are mandated for water transfers introducing pollutants. NPDES Water Transfers Rule, 73 Fed Reg. 33,697, 33,705 (June 13, 2008). CSP's sampling demonstrates that Highpeak's tunnel has allowed significant amounts of pollutants – including iron, manganese, and total suspended solids – through the "poor construction and maintenance" of its metal tunnel carved in rock. Order at 12. Therefore, the EPA's interpretation of the Water Transfers Rule is reasonable for purposes of *Auer* deference.

2. *Auer Deference also applies because the character and context of the EPA's interpretation entitles controlling weight because the EPA's interpretation reflects the agency's authoritative, expertise-based, and fair judgement of the Water Transfers Rule.*

Finally, *Kisor* outlines three markers when independently inquiring into the character and context of the agency's interpretation. *Kisor v. Wilkie*, 588 U.S. 558, 559 (2019). The agency's interpretation must also (1) be the official or authoritative position of the agency, (2) implicate the agency's substantive expertise, and (3) represent the agency's "fair and considered judgment." *Id.* To establish an agency's official or authoritative position, courts can refer to official staff memoranda in the Federal Register even if approval by the agency head is absent. *Id.* at 577. To implicate substantive expertise, an agency must have the administrative knowledge and substantive expertise to resolve regulatory ambiguity. *Id.* at 577-78; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (an agency's interpretation is entitled to deference based on ""the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if

lacking power to control."). Finally, an agency's judgement must be fair and consider declining to defer to a "merely convenient litigating position" or to a "new interpretation that creates unfair surprise to regulated parties." *Id.* at 559 (internal quotations omitted). While these three markers are not an exhaustive list, they are important for establishing a general distinction between interpretations that are and are not within the character and context necessary for agency deference. *See e.g. Walker v. BOKF, Nat'l Ass'n,* 30 F.4th 994 (10th Cir. 2022) (finding that a bank's reference to an interpretative letter penned by the Office of the Comptroller of Currency demonstrates the authoritative position of the agency that initial and extended overdraft fees feel within the scope of 12 C.F.R. § 7.4002(a)).

Here, the Water Transfers Rule implicates both the EPA's authority and subject matter expertise under the Clean Water Act because the Water Transfers Rule lies within Title 40 of the Code of Federal Regulation, which governs protection of the environment and ascribes to the EPA's authority to the Clean Water Act and knowledge of the protection of the Nation's waters. 33 U.S.C. 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter."). In addition, the district court noted that the EPA's expertise is supported by its consideration of environmental and statutory factors and robust rulemaking process. Order at 10. Lastly, the EPA's interpretation represents the fair and considered judgment of the Water Transfers Rule. The Water Transfers Rule has undergone extensive litigation, which was initially prompted by the Agency's historical "hands-off" approach to water transfers, leading to a series of cases that resulted in the EPA formalizing the Water Transfers Rule in 2008. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*,, 846 F.3d 492, 500-501(2nd Cir. 2017). The formalization of the EPA's current, official stance on the Water

Transfers Rule demonstrates that this interpretation stems from the fair and considered judgement of the EPA, not Highpeak, to craft a clear explanation of the Water Transfers Rule. In summation, because the EPA's interpretation reflects the agency's authoritative, expertise-based, and fair judgement of the Water Transfers Rule, the EPA's interpretation should be treated with a greater level of respect.

CONCLUSION

For the foregoing reasons, CPS respectfully requests that this Court reverse the district court's third holding in its Decision and Order.