TEAM 12

C.A. No. 21-000123

CONSOLIDATED WITH

C.A. No. 21-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

-and-

THE STATE OF NEW UNION,
Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

On Appeal from the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

Brief of Plaintiff-Appellant-Cross Appellee, CHESAPLAIN LAKE WATCH

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JURISDICTIONAL STATEMENT

Environmental organization Chesaplain Lake Watch, Inc. (CLW) appeals from the Decision and Order granting partial summary judgment for defendant Environmental Protection Agency (EPA) and State of New Union (New Union), entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, consolidated cases No. 66-CV-2020 and 73-CV-2020. CLW, EPA, and New Union all filed timely Notices of Appeal pursuant to Fed. R. App. R. at 3-4. This action is brought pursuant to the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 702 and the United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 575 U.S. 469, 506 (2015).

STATEMENT OF ISSUES PRESENTED

I. Whether EPA's determination to reject New Union's TMDL is ripe for judicial review when EPA's decision was final and the parties would face hardship if review is delayed.

II. Whether EPA's decision to reject New Union's TMDL was valid where it did not abide by EPA's unambiguous regulation requiring individual WLA and LA among nonpoint and point sources.

III. Whether EPA's adoption of a TMDL expressed as an annual pollution loading reduction instead of daily and that will not be fully implemented until it is phased in over five years violates the CWA sec. 303(d) as being an invalid TMDL.

IV. Whether EPA's adoption of a credit for anticipated BMP pollution reductions and reduction in the stringency of wasteload allocation limits for point source polluters was arbitrary and capricious under 40 C.F.R. § 130.2(i).

STATEMENT OF THE CASE

A. The Clean Water Act

In 1972 Congress created the framework that became The Clean Water Act (CWA) to create a framework to improve the declining water quality in water bodies throughout the country. R. at 5. The CWA establishes a system of permitting and regulation for dischargers of pollutants. *See* 33 U.S.C. § 1362(14). This regulatory program is based on "cooperative federalism," under which EPA establishes national standards and states adhere to them when administering permits and processes to improve water quality as well as establishing water quality standards. A state's failure to do so results in EPA administration of these programs. R. at 5.

The CWA defines point and nonpoint sources and the process for regulating them. *Id.* Point sources generally include pollution discharge pipes and specifically include concentrated animal feeding operations (CAFOs) that discharge to waters. *Id.* Numerical permit limits are created to limit the amount of pollution from point sources from technology-based standards set by EPA industry by industry and standards designed to achieve desired levels of water quality. Pollution from nonpoint sources, largely consisting of agricultural runoff and unchanneled pollution, is not subject to direct regulation under the CWA permitting program. *Id.*

Under the CWA, states must adopt water quality standards (WQS) for its waters and review and revise them at least once every three years. 33 U.S.C. § 1313(a), (c). WQS create different water quality criteria depending on the designated uses of a water body. *Id.* at (c)(2)(A). Criteria

may be numerical limits on pollutant concentrations in the water body or may describe aesthetic qualities and non-specific pollutants. 33 U.S.C. § 1313(c)(2)(B).

Every two years, states review whether water bodies are meeting WQS and if not, are included on a list provided to EPA. 40 C.F.R. § 130.7(d). When an impaired water body is discovered, they must identify the offending pollutant and create a "total maximum daily load" (TMDL) plan to submit to EPA. 33 U.S.C. § 1313(d)(1)(C). The TMDL must ensure the water body meets the state's water quality standards by defining maximum pollutant loads among point sources in the watershed. A state must decide which point sources polluters will have to reduce their discharges beyond existing permit limits and by how much. Alternatively, EPA regulation allows a state to create limits for nonpoint source pollution and take credit for those reductions when creating wasteload allocations (WLA) for point sources. 40 C.F.R. sec. 130.2(i). This trade-off system is known as Best Management Practices (BMPs). *Id.*

EPA has authority to review and approve or reject each step of the water quality standards (WQS) process—including establishment of TMDLs for impaired waters. 33 U.S.C. § 1313(c)(3), (d)(2). If EPA Administrator disapproves of the proposed TMDLs, then EPA is directed to establish its own TMDL. *Id.*

B. Lake Chesaplain's Declining Water Quality

Lake Chesaplain, located entirely within the State of New Union, used to attract people from all over the northern region of New Union for its clear waters and vacation communities. R. at 7. Lake Chesaplain spans fifty-five miles by five miles and is surrounded by forest, beach, agricultural lands, and lakefront vacation communities. *Id.* The City of Chesaplain Mills is to the north where Union River flows in the lake and Lake Chesaplain lets out to the Chesaplain River, a navigable-in-fact interstate body of water. *Id.*

Starting in the 1990s, the water quality began to decline after rapid development. *Id.* Ten CAFOs were developed in the Union River watershed, a large-scale slaughterhouse was built in Chesaplain Mills to service the CAFOs, and second home construction on the eastern lake shore boomed. *Id.* The wastewater from these operations made its way into Lake Chesaplain. *Id.*

Some of these operations have permits to discharge pollution into Lake Chesaplain. *Id.* The slaughterhouse has a NPDES permit issued by the State of New Union for direct discharge into the Union River. *Id.* The sewage treatment plant (STP), which discharges directly into Lake Chesaplain, is regulated by a CWA point source permit. *Id.* However, the homes along Lake Chesaplain serviced by septic systems and the hog CAFOs are not subject to CWA permits and discharge directly into Lake Chesaplain. *Id.* The hog CAFOs are regulated and subjected to permits under a New Union statute providing for New Union Agricultural Commission review and approval of site-specific nutrient management plans for the application of liquid manure wastes to fields. *Id.*

Lake Chesaplain is designated as Class AA pursuant to the New Union WQS—the highest quality ranking. R. at 8. However, after years of industrial and commercial development thick layers of algae formed that clouded the water, produced odors and made it unsuitable for swimming. R. at 7. Almost twenty years after its water quality began to decline, New Union finally created the Chesaplain Commission in 2008 which published a report in 2012 revealing that excessive amounts of the nutrient phosphorus was causing the excess algae growth. R. at 8. The report also revealed that dissolved oxygen levels had decreased to three milligrams per litre (mg/l), two mg/l below the Class AA standard and the levels needed for a healthy fishery. *Id.* The report determined that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l throughout the lake. *Id.* However, the current measured

phosphorus levels in the lake varied from 0.020 to 0.034 mg/l and also violated the state's WQS for odor and water clarity. *Id.*

Still, it was not until two years later during the next triennial WQS review that the New Union Division of Fisheries and Environmental Control (DOFEC) declared the water quality criteria for Class AA waters as 0.014 mg/l. *Id.* Thus, officially violating of Lake Chesaplain's WQS leading to its inclusion on DOFEC's impaired waters list submitted to EPA in 2014. *Id.*

DOFEC did not submit the required TMDL for Lake Chesaplain at that time, however EPA did not object to the section 303(d) submission. *Id.* It was not until CLW served a notice letter threatening to sue both the State of New Union and EPA for failure of either agency to establish a TMDL for Lake Chesaplain. *Id.* This finally motivated The Chesaplain Commission to issue a supplemental report in July 2016 calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard as 120 metric tons (mt) annually. *Id.* The existing sources of phosphorus inputs were calculated, totaling 180 mt annually. *Id.* The point sources' phosphorus loadings included the Chesaplain Mills STP at 23.4 mt, and the Chesaplain Slaughterhouse at 38.5 mt. *Id.* The natural sources only accounted for 32.3 mt. R. at 9. The highest phosphorus inputs came from the nonpoint source, CAFO Manure Spreading, at 54.9 mt. *Id.* Other nonpoint sources included the septic tank inputs, 11.6 mt, and other agricultural sources, 19.3 mt. *Id.*

The report shed light on concerning realities. First, the only two regulated point sources had no permit limits for phosphorus, the most prevalent pollutant in Lake Chesaplain, because EPA did not require phosphorus limits in its technology-based effluent limitations guidelines. *Id.* Second, the greatest amount of phosphorus came from nonpoint sources. R. at 8-9. The hog CAFOs, to which the greatest amount of phosphorus pollution is attributed, are exempt from

permit limits because they discharge into groundwater and as stormwater runoff and thus are considered "non-discharging" and fall within a CWA exemption. *Id.* The septic systems also discharge into groundwater and are exempt from CWA permitting. *Id.*

A year later in October 2017, DOFEC began the public notice process to implement the TMDL through an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources. *Id.* The proposed phased reduction would occur over five years and is framed as a percentage reduction from the baseline, 180 mt, each year in increasing increments of seven percent. *Id.* The first year would be a seven percent reduction and by the fifth year would be a thirty-five percent reduction bringing the annual amount to 117 mt, under the 120 mt annual requirement to make the waters of Lake Chesaplain safe again. *Id.* The TMDL included permit limits for point sources and BMP programs for nonpoint sources such as modified feeds for animal production facilities, physical and chemical treatment of manure streams, and increased septic tank inspection and pumping schedules. *Id.* A thirty-five percent annual reduction among nonpoint and point sources proved highly controversial even though the Chesaplain Commission's findings were not challenged. *Id.* The nonpoint source polluters complained that the modifications were too expensive. *Id.* CLW argued that the proposed BMPs were not only insufficient to achieve a thirty-five percent reduction but impossible to enforce since New Union lacked the requisite statutory authority. R. at 9, 10. To ensure the needed phosphorus reduction, CLW demanded EPA impose a limit of zero phosphorus discharges from the point sources. R. at 10. CLW also argued a thirty-five percent phased annual reduction needed to be a daily limit based on the scientific calculation to be a valid TMDL under CWA. *Id.*

In July 2018, DOFEC adopted the position taken by nonpoint source polluters and modified the TMDL, establishing a 120 mt annual maximum with no WLA or load allocations

(LA). *Id.* EPA rejected this TMDL pursuant to CWA section 303(d)(2) and, after notice and comment, adopted the original DOFEC TMDL in May 2019 without specifying how the proposed BMP measures would be enforced and incorporated the entire record of scientific reports and public comments before DOFEC into its own record. *Id.* This plan was called the "Chesaplain Watershed Implementation Plan" (CWIP). *Id.* Undisputed extra-record evidence shows that since adoption of the TMDL, New Union has taken no actions to implement the BMPs contemplated by the CWIP. R. at 10.

C. Procedural History

CLW commenced this lawsuit on February 15, 2020 challenging EPA's rejection of New Union's TMDL and substituted EPA's TMDL under CWA section 303(d). 33 U.S.C. § 1313(d). *Id*. Further, CLW sought a declaration that the substantive provisions of the Lake Chesaplain phosphorus TMDL accepted by EPA were insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. R. at 5. CLW's action was consolidated with New Union's on March 22, 2020. R. at 10. EPA subsequently lodged the administrative record with the Court on July 1, 2020. *Id.* Chesaplain Lake Watch established that its membership includes residents near Lake Chesaplain who use Lake Chesaplain for recreational purposes. R. at 11. These affidavits further establish that these members' enjoyment of these activities has been diminished by the decline in Lake Chesaplain water quality. *Id.* Cross-motions for summary judgement were briefed and the Court granted EPA's motion for summary judgment in part, grants CLW's motion for summary judgment in part, and grants New Union's motion for summary judgment. R. at 5. The Court below was satisfied that CLW met "the requirements for standing under Article III of the Constitution, having established injury in fact, causation, and redressability." R. at 11. That Court was

satisfied that the State of New Union had "standing to challenge EPA's rejection of its Lake Chesaplain TMDL and substitution of EPA's own TMDL, as EPA's action will require implementation by New Union in the form of state-issued NPDES permits as well as affecting New Union's eligibility for federal water quality planning funds under 33 U.S.C section 1288, as well as its eligibility to maintain its delegated NPDES permitting program pursuant to 33 U.S.C. section 1313(e)(2)." *Id.*

SUMMARY OF THE ARGUMENT

The challenge to EPA's decision to reject New Union's TMDL is ripe because this issue is fit for judicial review and delayed review would cause hardship to the parties. EPA's decision to reject New Union's TMDL constitutes final agency action and delayed review will cause further economic and environmental hardship.

EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL for not allocating WLA and LA among point and nonpoint sources was not arbitrary nor capricious. Under *Chevron* analysis, a TMDL must include WLA and LA allocated among point and nonpoint sources. EPA's decision to accept DOFEC's proposed TMDL violated the CWA. EPA cannot accept a TMDL that violates the CWA by expressing WLA and LA in annual terms and as being phased in over five years because it will not achieve New Union's WQS. Under *Chevron,* a "total maximum daily load" must be expressed as a daily discharge load. EPA's approval of New Union's TMDL including BMPs was arbitrary and capricious. EPA guidance expressly mandates that reasonable assurances must be secured before states can take credit for reductions in LAs from nonpoint sources to reduce the stringency of point source pollution controls. Guidance documents are not subject to the APA's notice and comment requirements. The lower court erred in rejecting the reasonable assurance standard.

STANDARD OF REVIEW

Whether EPA's decision is final and this case is ripe for judicial review is a question of subject matter jurisdiction. *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001). The correct standard of review in performing this analysis is *de novo. Id.* A court of appeals reviews a district court's grant or denial of summary judgment using the de novo standard. *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1326 (11th Cir. 1998). Summary judgement is appropriate where there is "...no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

ARGUMENT

I. THE CHALLENGE TO EPA'S DECISION TO REJECT AND REPLACE NEW UNION'S TMDL IS RIPE BECAUSE THIS ISSUE IS FIT FOR JUDICIAL REVIEW AND DELAYED REVIEW WOULD CAUSE HARDSHIP TO THE PARTIES.

"Before judicial review may be obtained by an agency's order, the issues must be ripe." *Placid Oil Co. v. Fed. Energy Regulatory Com.*, 666 F.2d 976, 981 (5th Cir. 1982). "To determine ripeness, a court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* These elements should be "weighed on a sliding scale." *City of Kennett, MO v. Env't Prot. Agency*, 887 F.3d 424, 432 (8th Cir. 2018). If a Court finds an issue fit for judicial review, it does not necessarily need to consider the hardship prong. *Spirit of Sage Council v. Norton*, 294 F. Supp. 2d 67, 55 (D.D.C. 2003).

"The degree of finality of agency action is the key consideration in evaluating 'fitness for judicial review' under the ripeness doctrine. *Bravos v. Green*, 306 F. Supp. 2d 48, 50 (D.D.C. 2004). The key factors in the finality analysis are whether a case would benefit from further factual development and whether the decision represents a final action by the agency. *City of*

Kennett, 887 F.3d 424 at 433; *Id.* at 55 (D.D.C. 2004). Courts have found that EPA approval and or replacement of TMDLs represent final agency action and do not benefit from further factual development. *See Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 293 (3d Cir. 2015) (recognizing that a TMDL which is not yet implemented in a state plan is still a final agency action). EPA decisions principally rely on the administrative record when deciding whether to approve or disapprove a TMDL. *Id.* at 443. These are not "situation[s] where further factual development regarding the agency's application of the TMDL would aid [the] decision." *Id.* Accordingly, there is no benefit from any additional factual development in such cases. Courts have also found that an agency decision is final when it has been promulgated in a formal manner after notice and comment consistent with APA requirements. *Toilet Good Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162-63 (1967). *Contra Bravos*, 306 F. Supp. 2d 48 at 56 (recognizing that EPA letter approving TMDL which did not undergo notice and comment was not a final action.) Here, EPA published its replacement TMDL in the Federal Register subject to notice and comment. R. at 10.

EPA, however, contests the assertion that EPA approval of a TMDL represents a final agency action. In doing so, EPA relies on *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1156-59 (N.D. Cal. 2003). EPA's reliance is, however, misguided as the TMDL was conditional. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1158-59 (N.D. Cal. 2003). The approval required that monitoring requirement which then triggered a revision to the current TMDL which EPA had to review and approve once again. *Id.* Accordingly, the Court in that case found that judicial review would interfere with the administrative process. *Id.* Here, there are no such conditions on the TMDL nor any future revision and review requirements by EPA. As a result, EPA's decision is final and fit for review.

"The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review." *City of Kennett*, 887 F.3d 424 at 432. Courts have recognized that even a "threatened" or "speculative" harm could qualify as such a hardship. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 868 (8th Cir. 2013). A decision by EPA that impacts State decision-making can be such a harm. *Id*. (recognizing that EPA's decision forces municipal owners of sewage treatment to either change their behavior or "an expensive game of Russian roulette" after EPA's decision).

Specifically, for TMDLs, courts have found that the issuance of a TMDL requires that States undergo planning decisions, which will not only burden the State in terms of the work that goes into such plans, but such plans, even when not implemented may impact business decisions that entities may undergo in anticipation of such a plan. *See City of Kennett*, 887 F.3d 424 at 433.

Similarly, in this case the State of New Union would be required to spend taxpayer money to come up with an implementation plan, and owners of commercial or residential properties will need to invest in technological solutions to reduce their nonpoint source pollution loads. Moreover, CLW members would suffer economic hardship if judicial review is delayed. Such members are residents of the greater Lake Chesaplain region. R. at 11. Already, property values have declined in the vicinity of the lake. R. at 7. A delay in review would subject the lake to continued impairment resulting from insufficiently stringent TMDLs continuing to harm their financial interests. Indeed, if there is something wrong with the TMDL—it is better to know now. The waters of Lake Chesaplain are already seriously impaired, and resulting damage to health, environment, property values, and industry are looming just on the horizon. The Court should not "wait-and-see" what happens if judicial review is delayed and implementation is

allowed to go unenforced for another five years. Accordingly, the issues are fit for review and delay would cause undue hardship. This case is ripe for review.

II. EPA'S REJECTION OF NEW UNION'S LAKE CHESAPLAIN PHOSPHORUS TMDL WAS NOT ARBITRARY NOR CAPRICIOUS.

The district court erred in granting summary judgement for New Union and overturning EPA's rejection of New Union's TMDL. EPA's rejection of New Union's TMDL was due to it lacking individual point and nonpoint source allocations – only calculating a single load limit – in contravention of CWA regulations. The district court, however, erroneously concluded that the CWA regulation defining a TMDL as the sum of WLAs and LAs was an unlawful interpretation of the CWA and therefore could not be relied on when rejecting New Union's TMDL. Ultimately, the district court held that EPA's decision to reject New Union's TMDL was arbitrary and capricious because there was no regulation requiring a TMDL to include individual loads. The district court's principal error occurred when it attempted to discern whether EPA's regulation was a lawful interpretation of the CWA under *Chevron*'s two-step analysis. At Step One, the Court failed to read the phrase "total maximum daily load" in context of the entire statute and failed to consider relevant legislative history. At Step Two, the Court inappropriately analogized the holding from *Utility Air Regulatory Group. v. E.P.A.*, 573 U.S. 302, 314 (2014). If the district court had appropriately applied *Chevron* analysis it would have found that the CWA phrase "total maximum daily load" unambiguously requires individual WLAs and LAs and that EPA's regulation defining a TMDL as "the sum of the individual WLAs for point sources and LAs for nonpoint sources," 40 C.F.R. § 130.2(i), was a consistent and reasonable interpretation of the statute. Establishing this, summary judgement should be granted in favor of CLW and EPA's rejection of New Union's TMDL should be upheld.

When Courts review agency interpretations carrying the force of law (such as agency regulations) this "question of law is for the agency to decide so long as it is reasonable." *City of St. Louis v. Dep't of Transp.*, 936 F.2d 1528, 1533 (8th Cir. 1991). To determine whether the agency interpretation is reasonable, courts must engage in a two-part test first devised in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 144 (D.C. Cir. 2006) (applying Chevron analysis to interpret "total maximum daily load"). Under Step One, the Court must determine if Congress has spoken directly to the interpretation in question, by looking at the statutory language, legislative history, and structure of the act. *Chevron*, 467 U.S. 837 at 842–43. Under Step Two, if the court finds that Congress has spoken, and if the agency's interpretation is consistent with Congress's intention, the Court must yield to the agency's interpretation. *Id.* If, however, the meaning of the statute is not altogether clear, or Congressional intent is ambiguous, the Court must inquire as to whether the agency's interpretation is a reasonable one. *Id*. If the interpretation is reasonable, the court must defer to the agency interpretation if there is a reasoned explanation. *Id*. at 865.

First, "[w]e begin, as always, with the statute's language," *Friends of Earth*, 446 F.3d 140 at 144. Section 303(d)(2) of the CWA directs States to, "establish…the total maximum daily load." 33 U.S.C. § 1313(d)(1)(C). The common understanding of total is that it is the sum of individual constituent parts. A customer at a restaurant expects to see individual dishes along with the amount due in order to verify the total. *See Total, Black's Law Dictionary* (10th ed. 2014) ("a product of addition"; "an entire quantity"). With this reading in mind, the logical meaning of "total maximum daily load" is a load which includes individual allocations to ensure that the total, is in fact, total.

This reading is supported by CWA section 303(d)'s requirement that a TMDL be calculated to include "a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C § 1313(d)(1)(D). The CWA defines effluent limitations as "quantities, rates, and concentrations" of "constituents which are discharged from point sources." 33 U.S.C §1362(11). A TMDL is to faithfully include a "margin of safety which takes into account any lack of knowledge concerning the relationship between," 33 U.S.C section 1313(d)(1)(D), "quantities…of constituents which are discharged from point sources." 33 U.S.C §1362(11). A TMDL, therefore, must evaluate individual point sources and discuss their impact on water quality.

When relevant and available, legislative history must be considered during *Chevron* Step One. *E.g., Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 648–50 (1990) (analyzing legislative history at step one); *See also Succar v. Ashcroft*, 394 F.3d 8, 30 (1st Cir. 2005) ("the Supreme Court has often referred to legislative history at stage one."). Several Circuits have affirmed this approach. *See e.g., Coke v. Long Island Health Care at Home, Ltd.,* 376 F.3d 118, 127 (2d Cir. 2004); *Am. Rivers v. F.E.R.C.,* 201 F.3d 1186, 1196 (9th Cir. 2000). Where the inquiry is delayed until Step Two, the purpose of *Chevron* analysis – which is to determine whether a regulation is aligned with Congress' intention – may be undermined. Accordingly, we look to the legislative history at Step One.

The legislative history reveals that Congress incorporated EPA's regulatory definition of TMDL when promulgating the 1987 amendments to the CWA. "[W]hen Congress 're-enacts a statute without change," such as it did with regard to CWA section 303 in adopting the 1987 Water Quality Act, "it is presumed that Congress was aware of the interpretations and applications of the law and intended not to disturb it." *M. Fortunoff of Westbury Corp. v.*

Peerless Ins. Co., 432 F.3d 127, 137 (2d Cir. 2005). *See also,* 100 Pub. L. No. 4, 101 Stat. 7 (specifying the Water Quality Act of 1987, re-adopts the entire section 303 Water Quality Standards program). Two years prior to the 1987 amendments, EPA promulgated its definition of a TMDL in the Federal Register. Water Quality Planning and Management, 50 Fed. Reg. 1774-01 (1985). In so doing, EPA wrote "[a]lthough section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated." *Id.* The additions to section 303(d)(4) from the 1987 Amendments also contain express references to "wasteload allocations," strengthening the assertion that Congress accepted EPA's definition that a TMDL includes individual allocations. *See* 33 U.S.C. § 1313(d)(4).

Nowhere in the legislative history of the Act is there an intent to abrogate EPA's 1985 definition of TMDL, and recent attempts by Congress to claw back EPA's authority over TMDLs has been met with little support. *See* Clean Water Cooperative Federalism Act of 2011 H.R. 2018, 112th Congress, 1st Session (2011) (quoting the dissenting views to the proposed bill, "I am also concerned that any action to allow for less protective water quality standards will have an equivalent negative impact on…establishing and implementing of Total Maximum Daily Load (TMDL) allocations.").

The structure of the TMDL process also provides insight into the meaning of a TMDL. A TMDL is but "one step in a process with several layers." *American Farm Bureau*, 792 F.3d 281 at 289. Under the CWA, EPA must review State submissions and either approve or disapprove. 33 U.S.C. 1313(d). Approved TMDLs are incorporated into a state plan. *Id.* Disapproved TMDLs are rewritten by EPA and then incorporated into a state plan. *Id*. Absent a list of

individual allocations, it is altogether unclear what EPA would in fact review or for that matter, what justification they would use for denial. EPA would have no way of checking if the total was calculated accurately or if sources were missing. Accordingly, Congress' intent is clear, a TMDL is a metric which must include individual allocations from discharging sources.

As Congress clearly contemplated that a TMDL includes individual allocations, the question at Step Two is, whether EPA's definition of a TMDL is a permissible construction of the statute. *Chevron*, 467 U.S. 837 at 842-43. "Review at this stage is 'highly deferential'" and "[c]ourts must defer to the agency's permissible interpretation if the agency has offered a reasoned explanation for why it chose that interpretation." *See Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). EPA explains its reason for adopting the rule in 1985 Federal Register, stating that "[a]lthough section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated." Water Quality Planning and Management, 50 Fed. Reg. 1774-01 (1985). EPA's explanation is related to its mandate to assure the quality of the nation's waters, and which it contends further assists in its role as a technical, expert agency.

Many courts have expressly or impliedly affirmed the permissibility of EPA's definition of a TMDL as one that includes individual WLAs and LAs. *See American Farm Bureau,* 792 F.3d 281 at 309 (holding EPA's definition of a TMDL "represents a reasonable policy choice at Chevron 's second step."); and *see e.g., Upper Blackstone Water Pollution Abatement Dist. v. EPA,* 690 F.3d 9 (1st Cir. 2012); *Thomas v. Jackson,* 581 F.3d 658, 662 (8th Cir. 2009); *Friends of Earth v. EPA,* 333 F.3d 184, 186 n. 5 (D.C.Cir. 2003); *Sierra Club v. Meiburg,* 296 F.3d 1021,

1025 (11th Cir.2002); *Hayes v. Whitman*, 264 F.3d 1017, 1021 n. 2 (10th Cir. 2001); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995).

Nevertheless, the district court mistakenly concluded that EPA's definition was impermissible because in its estimate it represented a "dramatic expansion of EPA's regulatory jurisdiction." R. at 14. The Court's reasoning relies on the holding from *Utility Air*, 573 U.S. 302 (2014). *Utility Air*, 573 U.S. 302 (2014), stands for the proposition that where an agency interpretation "dramatically expands" the authority granted to it by Congress it is "inconsistent with the design and structure of the statute as a whole" and therefore impermissible. *Id*. at 332 (internal citations omitted). In the case, the Court was tasked with determining whether EPA's proposed stationary source rule was consistent with the Clean Air Act ("CAA"). The EPA rule was promulgated following the decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which found that under the CAA, EPA must regulate greenhouse gas pollution.

The Court found the rule created two situations. *Utility Air*, 573 U.S. 302 at 314. First, where an individual source is already subject to CAA permitting requirements under the Act, the source would have the additional burden of limiting greenhouse gas pollution. *Id.* Second, where an individual source is *not* subject to the Act, the source would have the new burden of becoming subsumed by EPA's regulatory jurisdiction. *Id*. at 315. Of these two situations, it was only in the latter where the Court found a "dramatic expansion of agency authority." *Id*. at 324. In this situation the Court finds such a "dramatic expansion" in EPA's freshly established "power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide." *Id.* In contrast, sources which were already subject to CAA permits, "need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable." *Id.* at 332.

The district court's comparison of the facts of *Util. Air Regul. Grp. v. E.P.A.* to the instant matter are misguided. EPA's interpretation that a TMDL must include individual allocations, does not newly conscript unregulated sources into the CWA's jurisdiction, nor does a burden befall individual entities. *See* Water Quality Planning and Management, 50 Fed. Reg. 1774-01 ("EPA's water quality planning and management program deals primarily with State water quality agencies, it does not have a direct effect on small entities."). The CWA is clear that all discharges of pollutants into the nation's waters are already subject to the Act. 33 U.S.C § 1313. *See also* 33 U.S.C § 1251. Moreover, as applied to this case, all discharging sources may likely be subject to federal NPDES permitting requirements under 33 U.S.C. § 1311. *See Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011) (recognizing discharging CAFOs as point sources and thus subject to NPDES permitting), *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 630 (D.R.I. 1990) (finding thirty-three homes connected to a "communal septic tank" "depositing into leach field" a "privately owned treatment works" and required to obtain an NPDES permit), and *United States v. Lucas*, 516 F.3d 316, 333 (5th Cir. 2008) (holding discharges from failed septic systems…are point sources"). The district court therefore misapplies the law, and *Utility Air* is inapplicable to this matter.

EPA offers a reasonable explanation for its interpretation and there is nothing impermissible about the regulation. Accordingly, the Court should grant summary judgement in favor of CLW upholding EPA's rejection of New Union's TMDL for its failure to include individual WLAs and LAs.

III. A TMDL MUST BE EXPRESSED AS A DAILY DISCHARGE LIMIT THAT MEETS WATER QUALITY STANDARDS.

The issue before the Court is whether the CWA allows for a reading that TMDLs can be calculated in annual terms and whether the TMDLs can be phased in over several years. The district court correctly held that a TMDL which limits loads on an annual basis is contrary to plain meaning of the CWA and thus contrary to Congressional intent. Similarly, a TMDL which will only meet WQS after five years frustrates the purpose of the CWA and undermines EPA's permissible interpretation of TMDL. Accordingly, summary judgment must be granted in favor of CLW and remanded for EPA to create a valid TMDL.

A. Under *Chevron*, a "total maximum daily load" must be expressed as a daily discharge load.

The CWA unambiguously requires a TMDL to be expressed as a daily load limit. This issue is analyzed under *Chevron* two-step analysis, as described above. According to the plain meaning of the language in the statute, the time frame "daily" is unambiguous. Section 303(d) of the CWA states in pertinent part that, "States shall establish. . .the total maximum *daily* load….Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C § 1313(d)(1)(C) (emphasis added).

First, the word daily only has one meaning: something that happens once a day; and not something that happens once a year or once a season. *Friends of Earth,* 446 F.3d 140 at 144; ("And no one thinks of "[g]ive us this day our daily bread" as a prayer for sustenance on a seasonal or annual basis." quoting Matthew 6:11 (King James).) Congress could have easily included a more flexible time limit if that was their intent. *See Id.* ("If Congress wanted seasonal

or annual loads, it could easily have authorized them by calling for "total maximum daily, seasonal, or annual loads.")

Nothing in the meaning of the words "total" "maximum" and "load" could divert from the plain meaning of the word "daily." Maximum is defined as "[t]he highest or greatest amount, quality, value, or degree[,], or "an upper limit allowed by law or other authority." *Maximum*, *Black's Law Dictionary* (6th ed. 1990) and *Gulf Power v. FCC*, 669 F.3d 320, 322 (D.C. Cir. 2012) ("maximum rate [is] the ceiling for what the utility may charge as the word maximum implies"). While load is defined as "the quantity that can be…carried at one time by an often-specified means of conveyance" or "a measured quantity of a commodity fixed for each type of carrier[.]" *Load*, *Webster's Third New International Dictionary* (3d ed. 2002). Accordingly, "stringing them together" does not "create an ambiguity that warrants departure" from the plain meaning of daily. *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 172 (D.D.C. 2019).

While the Court in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) found that the phrase TMDL was ambiguous and could contemplate annual loads, it did so by substituting its own as well as EPA's "reasonable interpretation" of TMDL in place of the plain meaning. There, the court erroneously used its own judgement as to what is a reasonable interpretation before engaging in proper Step One analysis to determine if the phrase TMDL was ambiguous. *Id.* at 97-99. If the Court had engaged in the proper analysis, it is likely that they would have come to the opposite conclusion. Accordingly, under Step One, the CWA is unambiguous: a "total maximum daily load" is a load calculated for *only* daily discharges.

Under *Chevron* Step Two, and as discussed above, courts must determine if an agency's interpretation of an ambiguous statute is reasonable in light of the language, policies, and

legislative history of the Act." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). As we have established that a "total maximum daily load" unambiguously requires that daily loads be calculated as daily discharges, EPA's interpretation that a daily load could also be an annual load runs afoul of the unambiguous meaning of TMDL.

Even though an annual or monthly load could be "reverse engineered" to become a daily load by dividing the load up by the number of days, this would still violate the common understanding of the word "maximum." *Anacostia Riverkeeper, Inc. v. Wheeler* at 178. The Court in *Anacostia Riverkeeper, Inc. v. Wheeler*, held that such a load would "represent an average of the daily maximum loadings expected to occur" which "is not the same as a daily maximum loading." *Id.* Thus, this "average of the daily maximum loading" would be contrary to meaning of "maximum." *Compare Maximum, Black's Law Dictionary* (6th ed. 1990) with *Average, Black's Law Dictionary* (6th ed. 1990) ("A single value that represents the midpoint of a broad sample of subjects," or "[t]he ordinary or typical level; the norm"). As an average cannot be a maximum, and a maximum cannot be an average, an annual load, despite the capacity to be "reverse engineered" as a daily load is not a "total maximum daily load" per the CWA.

EPA's interpretation of TMDL also violates its own internal agency guidance. *See* EPA, Memorandum Subject: Establishing TMDL "Daily" Loads in Light of the decision by the us court of appeals for the DC Cir. In Friends of the Earth, Inc. v. EPA, et al., and implications for NPDES Permits (Nov. 15, 2006) at 1 ("EPA recommends that all future TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments."). EPA provides no other justification for its interpretation to allocate loads in such a manner, and therefore we are left to conclude that EPA's interpretation runs afoul of *Chevron,* and accordingly the Court must grant summary judgement in favor of CLW on the matter.

B. Under *Chevron*, a phased TMDL over five years violates the CWA because it does not achieve WQS.

Under *Chevron* Step One, the CWA is unambiguous: a TMDL is to be applied in full in the present and not at some later date. *See NRDC, Inc. v. EPA*, 301 F.Supp.3d 133, 138 (D.D.C. 2018). As a result, under Step Two, EPA's interpretation that a TMDL phased in over five years is unreasonable in contravention of the unambiguous meaning of TMDL.

Section 303(d) of the CWA states that a TMDL must be calculated to meet the "level necessary to implement the applicable water quality standards." Necessary means something that "is needed for some purpose or reason; essential." *Necessary, Black's Law Dictionary* (11th ed. 2019). Moreover, the applicable WQS are calculated in the present tense. There are no provisions in section 303 that articulate future WQS.

The plain meaning of the statute is also reinforced by the structure of the CWA. The TMDL calculation is meant to form the basis of section 301(b)(1)(C) which sets the deadline for implementing effluent limitations on point sources as July 1, 1977. 33 U.S.C. 1311(b)(1)(C) ("there shall be achieved. . .not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations."). In *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661, 663 (3d Cir. 1976), the court held this deadline is a "rigid guidepost" that EPA did not have authority to grant an extension for NPDES permits. Accordingly, the CWA is unambiguous that at TMDL must meet current WQS.

EPA's interpretation which permits a TMDL to be phased in over a five-year period, where initially WQS will not be met, is an impermissible interpretation as it is inconsistent with the unambiguous meaning that TMDL must be set at a level necessary to meet water quality standards, and in so doing, violates the goals of the CWA. A TMDL which is implemented at a

percentage of the applicable WQS does not meet the WQS, even if that will occur years later. Courts have similarly found that the CWA does not support such a reading. *See Minnesota Ctr. for Env't Advoc. v. U.S. Env't Prot. Agency*, No. CIV03-5450(DWF/SRN), 2005 WL 1490331, at *5 (D. Minn. June 23, 2005) (holding a phased approach that would not meet water quality standards until ten years later invalid and in violation of 33 U.S.C. § 1313(d)(1)(C)).

EPA's interpretation of a "phased TMDL" is contrary to its own guidance documents. EPA, Memorandum Clarification Regarding "Phased" Total Maximum Daily Loads 2 (Aug. 2, 2006). While EPA allows for a "phased" approach to TMDLs, EPA's guidance puts forward an approach markedly different from the one suggested in this litigation. *Id.* EPA's definition of "phased" in this guidance allows a state to create an interim TMDL, while additional scientific research is conducted and allows states to later revise that TMDL based on new data. *Id.* The purpose of this guidance was to encourage States to expeditiously prepare TMDLs and set implementation. *Id.* EPA's interpretation frustrates this purpose and allows States to cut away the heart of the WQS section of the CWA, further delaying achievement of the goals of the CWA.

In light of EPA's long held concern for phosphorus pollution in the nation's waters, *See* 1972 U.S.C.C.A.N. 3668, 3710 ("Since initial approval of standards, the need to control phosphate discharges to prevent eutrophication has been established."), recognizing that nutrients pollution, including phosphorus, is the leading cause of lake and coastal water impairment with over two million acres of lakes and reservoirs in the nation not meeting water quality standards, *See* EPA, National Strategy for the Development of Regional Nutrient Criteria (June 1998); *See also* EPA, Nutrient Innovations Task Group Report (August 2009), EPA's interpretation reads like a complete abandonment of its responsibility. EPA offers no other justification for its interpretation and therefore cannot rationalize its departure from the statute and from the goals of

the CWA. Accordingly, EPA's interpretation is impermissible and the Court should uphold summary judgment finding EPA's adoption of a phased TMDL invalid under the CWA.

IV. EPA'S APPROVAL OF NEW UNION'S TMDL WAS ARBITRARY AND CAPRICIOUS.

The district court erred in concluding that EPA's decision to adopt New Union's TMDL with WLAs set well below WQS, without reasonable assurances that BMPs would result in nonpoint source reductions, was not arbitrary and capricious. The district court incorrectly held that "reasonable assurance" was not a standard that EPA was required to use to review TMDLs, and that any such standard must be promulgated via notice and comment or otherwise receive no deference at all.

A. EPA guidance expressly mandates that reasonable assurances must be secured before states can take credit for reductions in LAs from nonpoint sources to reduce the stringency of point source pollution controls.

The district court erred in concluding that EPA's guidance document clarifying that the CWA required TMDLs to include a reasonable assurances was entitled to "no deference." R. at 16. EPA's 1991 guidance ("1991 Guidance") articulating that a TMDL must include reasonable assurances should be given significant deference due to its persuasiveness.

While agency guidance documents do not carry the force of law, they deserve deference; known as *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The amount of deference that a guidance document receives will vary depending on the document's "persuasiveness, as evidenced by the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Buffalo Transportation, Inc. v. United States*, 844 F.3d 381, 385 (2d Cir. 2016) (internal citations omitted). *See also*, *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 304 (3d Cir. 2012) (noting that the *Skidmore test* is a "sliding-scale test in which

the level of weight afforded to an interpretation varies depending on our analysis of the enumerated factors."). The factors that courts use to determine the amount of deference include: (1) thoroughness of agency consideration, (2) validity behind the reasoning, (3) consistency with both earlier and later pronouncements, (4) implication of agency expertise, (5) contemporaneous articulation with the regulation and (6) the longevity of the guidance. *See De La Mota v. United States Dep't of Educ.*, 412 F.3d 71, 78 (2d Cir. 2005), *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933), *Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

Applying the *Skidmore* deference factors to EPA's guidance document, suggests that this guidance document and the reasonable assurance standard articulated within should be given significant deference. EPA publicly articulated the reasonable assurance standard in EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991), which aimed to help states develop their WQS program including TMDLs to comply with the CWA statute and related regulations. There, EPA states:

> "In order to allocate loads among both nonpoint and point sources, there must be *reasonable assurances* that nonpoint source reduction will in fact be achieved. Where there are not reasonable assurances, under the CWA, the entire load reduction must be assigned to point sources." *Id.* at 15.

First, EPA thoroughly considered how the agency uses its discretion to approve or reject TMDL submissions. Courts have found that an agency has considered an issue thoroughly when it represents the "macro perspective" of the agency and is not the isolated position of a lone staff member. *De La Mota* at 80. This macro perspective has been found where the drafter either reports to the administrator, bears lawmaking authority, or is otherwise constrained by political accountability. *Id.* The interpretation does not need to include any analysis and can be brief if it

references the legal basis for the interpretation, is not labeled "tentative" nor adopted for the exclusive purpose of litigation. *Id.* at 80-82. EPA's 1991 Guidance on the TMDL process was drafted by EPA's Office of Water, packaged as a formal guidance document titled "Guidance for Water Quality-based Decisions: The TMDL process," and signed by EPA's Director of the Office of Water Regulations and Standards. *1991 Guidance* at i. A current organization chart of EPA demonstrates that the Office of Water directly reports to the EPA administrator. EPA, *EPA Organization Chart*, https://www.epa.gov/aboutepa/epa-organization-chart (last visited Nov. 22, 2021). In addition, the guidance document provides the legal basis for EPA's interpretation that a TMDL must provide reasonable assurances before taking credit for LA reductions, citing section 303(d) of the Clean Water Act as well as regulations including 40 C.F.R. § 130.2(i) which provides the definition of a TMDL. *1991 Guidance* at 6.

Second, courts have found that an agency provides valid reasoning for their interpretation where it is "well-reasoned, substantiated and logical." *De La Mota* at 80. Conversely, where an agency interpretation offers "virtually no explanation" for the policy the Court will not find the agency reasoning valid. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 at 134. Here, the agency interprets "reasonable assurances" for BMP credits in light of the entire statutory scheme, as well as considering the relationship between the oversight role of EPA and the implementation role of the States. *1991 Guidance* at 24. *See also Id.* at 9 (Chapter 2 Water Quality Based Approach to Pollution Control), 27 (Chapter 4: EPA and State Responsibilities). In doing so the agency provides due consideration to the governing law and processes, and the logic of effective implementation. Moreover, the Third Circuit recently found that the "reasonable assurance" standard is a valid interpretation of the CWA and the phrase "total maximum daily load." *American Farm Bureau*, 792 F.3d 281 at 300–01 (noting that the phrase "total maximum daily

load" has enough play in the joints to allow the EPA to consider [reasonable assurances] in its final action.").

Third, courts have found that guidance is consistent with earlier pronouncements when general guidance has been issued on the matter (and not an individual adjudication) according to the reasoning in *Hall v. U.S. E.P.A.*, 273 F.3d 1146, 1156 (9th Cir. 2001), and where an agency's position is the same as in prior court cases per the reasoning in *Cathedral Candle Co. v. U.S. International Trade Commission*, 400 F.3d 1352, 1367 (Fed. Cir. 2005). Here, the guidance is a general guidance document prescribing EPA's policy to all States, and is not the byproduct of an individual adjudication. Moreover, EPA has a long history of requiring reasonable assurance for BMPs.

The EPA has frequently and consistently issued guidance requiring a reasonable assurance that a TMDL is "properly calibrated to meet the applicable water quality standards" for waters that are impaired by both point and nonpoint sources. EPA, Supplemental Information for TMDL Reasonable Assurance Reviews (Feb. 2012). This guidance letter further details how reasonable assurance has been required for TMDLs that contemplate restrictions on both point source and nonpoint source polluters in the 1991 Guidance as well as in EPA, Memorandum New Policies for Establishing and Implementing Total Maximum Daily Loads, from then Assistant Administrator for Water, Robert Perciasepe (1997) and EPA, Guidelines for Reviewing TMDLs Under Existing Regulations (2002). The 2012 guidance letter brought the reasonable assurance requirement into yet another decade and has yet to be abrogated. Reasonable assurances have been consistently required for the approval of TMDLs for over thirty years as a condition of EPA approval.

EPA's long history of requiring reasonable assurance also enjoys a long history of approval from Courts across the country. *See e.g.*, *Bravos v. Green*, 306 F. Supp. 2d 48, 53–54 (D.D.C. 2004) ("EPA guidance calls for reasonable assurance when TMDLs are developed for waters impaired by both point and nonpoint sources"); *Friends of the Earth v. U.S. E.P.A.*, 346 F. Supp. 2d 182, 200 (D.D.C. 2004) (reversed on other grounds) (stating that BMPs will "significantly reduce the number of [downstream] low dissolved oxygen events," and, thus, reasonably assure achievement of WQSs."); *American Farm Bureau,* 792 F.3d 281 at 304 ("EPA conducted a "reasonable assurances" evaluation on the states' draft Phase I WIPs to see if they met expectations, in terms of (1) meeting the state's numeric target loads, and (2) providing reasonable assurance that the state's proposed source and sector allocations would be met."). EPA's 1991 Guidance requiring reasonable assurances evinces total consistency with subsequent agency guidance.

Fourth, courts look at whether the guidance implicates the expertise of the agency. An agency's expertise is implicated where the guidance is a reflection of the law that the agency must administer, reflecting views of "different circumstances." *Skidmore,* 323 U.S. 134 at 137–38. An agency's expertise can be expressly mentioned in the guidance itself according to the reasoning in *Hall v. U.S. E.P.A.*, or understood through the mandate that Congress has given the agency in the organic statute as seen in *Cathedral Candle*. *Hall v. U.S. E.P.A.*, 273 F.3d 1146 at 1156 and *Cathedral Candle*, 400 F.3d at 1367. As discussed above, the 1991 Guidance engages in a lengthy discussion of the law and regulations which govern EPA on matters of water quality management. Moreover, the guidance document includes charts illustrating the technical review process, *see, e.g.*, 1991 Guidance at 10, and also provides past examples of how BMP credit reallocation has been implemented in the past. *See* 1991 Guidance at 10.

Fifth, Courts look at whether the interpretation was made contemporaneously with the statute or regulation. An interpretation is contemporaneous with the statute's adoption when used for the purpose of "making the parts [of the statute] work efficiently and smoothly while they are yet untried and new." *Adamo Wrecking Co. v. U.S.,* 434 U.S. 275, 302 (1978). The 1991 Guidance was issued only four years after the 1987 CWA amendments which implicitly adopted EPA's regulation permitting reductions in point source stringency where reductions from nonpoint sources secured through BMPs occur. *See* 40 C.F.R. § 130.2(i). As the foreword to the 1991 Guidance states, "[t]this document…is intended to define and clarify the requirements under section 303(d) of the Clean Water Act…[and] reduce the uncertainties associated with TMDLs and to establish the TMDL process as an effective water quality management tool." 1991 Guidance at i.

Lastly, Courts look to the longevity of the interpretation's use and accord "particular deference to an agency interpretation of longstanding duration." *Barnhart v. Walton,* 535 U.S. 212 at 220, 122. The U.S. Supreme Court has opined on the deference given to longstanding administrative interpretations of a statute, and especially so where "Congress has re-enacted the statute without pertinent change." *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974). "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Id.*

Here, Congress could have easily chosen to abrogate EPA's guidance requiring reasonable assurances, but it has not done so in the more than thirty years that this guidance has been promulgated. The statute has been re-enacted without pertinent change – in fact, the CWA still says that the national goal is to eliminate discharge of pollutants into the navigable waters by

1985. Congress' silence speaks volumes. They have chosen not to alter this extremely longstanding agency interpretation, and EPA continues to apply it with regular frequency.

Courts have not addressed what period of time constitutes "longevity" in this situation, but have stated that an interpretation is not long-standing where the matter at issue involves new technology that was not available or considered at the time of the interpretation. *See OfficeMax, Inc. v. United States*, 428 F.3d 583, 598 (6th Cir. 2005) (noting that a 1979 interpretation on "toll telephone service" does not attach to cellular phones because they did not yet exist at the time). The matter of approving TMDLs and BMPs does not involve any novel matter which was not considered at the time that the interpretation was made. EPA's 1991 Guidance, therefore, ticks off every factor that other courts have considered when evaluating the degree of persuasiveness which should be afforded to a guidance document. Accordingly, the guidance should be given significant deference in determining whether EPA acted in an arbitrary and capricious manner when approving New Unions' TMDL without reasonable assurances.

B. Guidance documents are not subject to the APA's notice and comment requirements.

Not all agency pronouncements must be published via notice and comment. Under the APA as codified at 5 U.S.C section 553, only legislative rules must be promulgated via notice and comment. "Interpretative rules" and "policy statements" on the other hand, "may be rules within the meaning of the APA…although neither type of "rule" has to be promulgated through notice and comment rulemaking." *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (noting that these statements are "non-legislative rules"). A non-legislative rule is one that "first, does not have a present-day binding effect, that is, it does not impose any rights and obligations, and second, genuinely leaves the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)

(internal citations omitted). *See also Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 273 (E.D.N.Y. 2018) (reversed in part on other grounds); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (holding that an agency memo which eliminates agency discretion is a legislative rule).

The 1991 Guidance stating that "there must be *reasonable assurances* that nonpoint source reduction will in fact occur", does not add any obligations beyond those that are in the CWA. 1991 Guidance at 2. Reasonable assurances are the logical outgrowth of the discretion that Congress granted to EPA so as to properly use its scientific and technical expertise to judge whether a TMDL complies with the purpose of section 303 ("Water Quality Standards and Implementation Plans") and the CWA as a whole. As discussed above, the Third Circuit found that "[p]reventing the EPA from …obtaining reasonable assurances from affected states appears to frustrate [the CWA's] goals." *American Farm Bureau*, 792 F.3d 281 at 301. EPA's "reasonable assurance" standard, therefore, does not add any obligations to the States beyond those which Congress passed into law, and those articulated in regulations promulgated via notice and comment.

Additionally, the guidance does not eliminate EPA's discretion. EPA maintains a substantial amount of discretion as to what might constitute a reasonable assurance. Reasonable assurances merely narrow the requirement under the APA that agency decisions cannot be arbitrary or capricious. 5 U.S. Code § 706(2)(A). Even if the court were to find that EPA's discretion was substantially reduced, where a policy eliminated agency discretion but "did so to ensure proper application of the statute," Courts will not consider such a consideration a legislative rule. *Fed. L. Enf't Officers Ass'n v. Rigas*, No. CV 19-735 (CKK), 2020 WL 4903843, at *5 (D.D.C. Aug. 20, 2020). EPA's guidance prescribing "reasonable assurances" is, therefore, a non-legislative

policy statement and does not require notice and comment rulemaking. Accordingly, "reasonable assurances" are a valid standard and as discussed above must be afforded substantial deference.

C. EPA did not receive reasonable assurances.

Courts have the authority to overturn agency actions where they are found to be arbitrary and capricious or an abuse of discretion. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Id*. at 416. As we have established that "reasonable assurances" are the standard for EPA TMDL review, a TMDL approved without "reasonable assurances" must be arbitrary and capricious.

The district court conceded as much, holding that if EPA's TMDL review standard was "reasonable assurance" that EPA's decision to approve New Union's TMDL would have been arbitrary and capricious. R. at 16. This concession is due to the court finding nothing in the record that indicates New Union had any intention to require implementation of the BMPs. R. at 16. If this Court accepts the factual findings of the district court that New Unions' TMDL did not secure reasonable assurances that BMPs would result in sufficient it must also find that New Union's decision was arbitrary and capricious.

While there is no single formula for determining when reasonable assurances have been secured, EPA's 1991 Guidance provides some suggestions. It states that "[a]ssurances may include the application or utilization of local ordinances, grant conditions, or other enforcement authorities. 1991 Guidance at 24. As the record states, "[t]he CWIP did not specify whether or how the proposed BMP measures would be enforced." R. at 10. There is nothing in the record indicating the application or utilization of local ordinances, grant conditions, or other enforcement authorities. Accordingly, there is no indication of how the reductions will occur.

The Court may also consider extra-record evidence in this matter. Such evidence is reviewable, either "(1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior." *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012). Here, EPA did not examine all relevant factors – namely the likelihood their TMDL had of achieving the required WQS, and did not adequately explain the grounds of its decision, arguably acting in bad faith.

Accordingly, the extra-record evidence further demonstrates that appropriate nonpoint source reductions are not "reasonably assured." The evidence shows that "political opposition to the implementation of BMPs prompted New Union to abandon its efforts to develop its own watershed implementation plan including BMPs…without any attempt to allocate the loading among sources" and that "in the two years since the adoption of the TMDL, New Union has in fact taken no action to implement the BMPs contemplated by the CWIP." R. at 16. This suggests that New Union is captive to industry and does not seem at all motivated to institute the types of programs needed to reduce pollution from nonpoint sources.

It also appears that EPA did not even check whether the thirty five percent asserted reductions in nonpoint source pollution in the BMPs would be sufficient to cover the cuts in stringency that are proposed for point sources. The target water quality criteria for Class AA waters requires a phosphorus level of .014 ml/g of phosphorous. Lake Chesaplain's "impairment" of phosphorous, however, ranges from .02 ml/g to .034 ml/g. A thirty five percent reduction from .02 ml/g levels is .013 ml/g, which is below the target criteria of .014 ml/g. But, where the impairment is at .034 ml/g levels, a thirty five percent reduction yields a phosphorous level of .0221 ml/g, which exceeds the acceptable and legally mandated limits by a staggering

fifty eight percent. EPA does not provide anywhere near the appropriate margin of safety to meet the water quality of Lake Chesaplain for the times or places where the phosphorus pollution was measured at .034 ml/g. Therefore, even assuming that BMPs did actually occur, the TMDL, as formulated with thirty five percent nonpoint source reductions, would never "reasonably assure" that BMPs would result in sufficient reductions to allow point sources to be any less stringent. Accordingly, EPA's approval was arbitrary and capricious the Court must disallow any credit to be taken towards reducing point source stringency.

CONCLUSION

For the forementioned reasons this case is ripe for review, and the Court should grant summary judgement in favor of EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL for failing to identify individual WLAs and LAs. The Court should also vacate the district court's decision upholding the validity of the CWIP despite its failure to secure reasonable assurances that the BMPs presented will result in sufficient reductions of LAs to reduce the stringency of WLAs and because it calculated loads in annual terms and phased over five years in contravention of the CWA.