C.A. No. 21-000123
CONSOLIDATED WITH
C.A. No. 21-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

v.

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

-and-

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

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 Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated cases No. 66-CV-2020 and No. 73-CV-2020 on August 15, 2021. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). EPA, New Union, and Chesaplain Lake Watch all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015). This is an appeal from a final decision disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED

I. Is EPA's determination to reject the New Union Lake Chesaplain TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed ripe for judicial review?

II. Is EPA's determination to reject the New Union Lake Chesaplain TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations contrary to law, as an incorrect interpretation of the term "total maximum daily load" in section 303(d) of the Clean Water Act?

III. Is EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years in violation of section 303(d) of the Clean Water Act requirements for a valid TMDL?

IV. Is EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake

Chesaplain TMDL arbitrary and capricious or an abuse of discretion due to the lack of assurance of Best Management Practices implementation?

STATEMENT OF THE CASE

A. Clean Water Act

Congress passed the Federal Water Pollution Control Act Amendments of 1972, known as the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1251-1387, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251. In pursuit of that goal, the Act follows a "cooperative federalism" model in which EPA and the states work together to achieve water quality. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 288 (3d Cir. 2015). Under this structure, EPA administers the Act, 33 U.S.C. § 1251(d), and has broad oversight authority and discretion to define its requirements, while states are charged with implementing and achieving those requirements. *See id.* §§ 1251(b), 1288, 1311-1313, 1329, 1342(b)-(c), 1362(1), (11). The cooperative federalism model thus reflects Congress's additional objective to "recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources." *Id.* § 1251(b).

The CWA utilizes two primary approaches to address water pollution. Brief for Defendants-Appellees at 4, *NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001) (No. 00-6232). First, the National Pollutant Discharge Elimination System (NPDES) creates a comprehensive scheme to regulate discharges from point sources, which the Act defines to include any "discrete conveyance." 33 U.S.C. § 1362(14). Discharges from point sources are prohibited unless permitted under the NPDES program, and EPA is responsible for setting technology-based effluent limits on permitted discharges. *Id.* § 1311. While EPA sets effluent limits, states administer the NPDES program, subject to EPA approval. *Id.* § 1342(b)-(c). The States therefore

exercise primary regulatory authority over point sources. Nonpoint sources, which are not defined in the Act but generally include pollution sources other than point sources, are not subject to NPDES permitting or other direct federal regulation under the CWA. Record at 5. Nonpoint source pollution control is largely left to the states, with some federal oversight and funding. *See Cnty of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1472 (2020); 33 U.S.C. §§ 1288, 1329.

Second, the CWA provides for water quality-based pollution regulation under section 303. 33 U.S.C. § 1313. This program is the subject of the current action. Under section 303, a state must adopt water quality standards (WQS) for each water body in its jurisdiction, including designated uses and water quality criteria, expressed as numerical limits or narrative standards, necessary to support those uses. *Id.* § 1313(a), (c); 40 C.F.R. § 131.3(b) (2021). After establishing WQS, the state must prepare a section 303(d) list of impaired waters, identifying those waters that cannot meet the WQS through implementation of effluent limitations under the NPDES program. 33 U.S.C. § 1313(d)(1)(A). Both WQS and impaired waters lists are subject to EPA approval. *See id.* § 1313(c); 40 C.F.R. § 130.7(d).

Next, a state must develop a "total maximum daily load" (TMDL) for listed waters for each pollutant not meeting the WQS that is "suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C). The TMDL must "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." *Id.* TMDLs must be submitted to EPA for approval, and if EPA disapproves of a state submission, it must establish a replacement TMDL. *Id.* § 1313(d)(2).

While the Act does not define "total maximum daily load," EPA regulation defines the

phrase as "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background . . . expressed in terms of either mass per time, toxicity or other appropriate measure." 40 C.F.R. § 130.2(i). This regulation has been in effect for thirty-six years. *See* Water Quality Planning and Management, 50 Fed. Reg. 1429, 1774 (Jan. 11, 1985) (codified at 40 C.F.R. pt. 130). Thus, the TMDL must allocate pollution loads between point sources, governed by the NPDES program, and nonpoint sources, subject to no direct federal control. When a water is polluted by both point and nonpoint sources, "the TMDL process provides for nonpoint source control tradeoffs" by allowing wasteload allocations to be made less stringent "[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable." 40 C.F.R. § 130.2(i).

Finally, once a TMDL is established, the state must develop a continuing planning process that incorporates the TMDL, providing a plan for "effluent limitations and schedules of compliance" and "adequate implementation, including schedules of compliance, for . . . water quality standards." 33 U.S.C. § 1313(e)(3). Like WQS, impaired waters lists, and TMDLs, continuing planning processes are subject to EPA approval. *Id.*

Thus, the TMDL process embodies the CWA's cooperative federalism model. EPA is first responsible for establishing the effluent limits governing point source pollutant discharges. The program then relies primarily on states to develop adequate WQS, allocated pollution loads in the TMDL to achieve those standards, and a continuing planning process for compliance. EPA retains discretion at each stage to disapprove a state program that is insufficient to meet the objectives of the CWA. In this way, EPA and the states work together to attain water quality, while preserving the traditional responsibility of the states to regulate land and water resources.

B. Lake Chesaplain Water Quality and TMDL

Lake Chesaplain is a large, natural lake located entirely within New Union. Record at 7. The lake discharges into the navigable-in-fact Chesaplain River, and the surrounding area is home to recreational sites, agricultural lands, and residential communities. *Id.*

The New Union WQS designate Lake Chesaplain as Class AA, the highest water-quality classification, and designated uses range from drinking water to fish propagation. *Id.* at 8. The Lake, however, suffers from excessive nutrient pollution, particularly from phosphorus, that has caused a significant decline in water quality since economic development in the 1990s. *Id.* at 7-8. Beginning in 2008, New Union undertook studies to address Lake Chesaplain's nutrient pollution and in 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) set water quality criteria for Class AA waters of 0.014 milligrams per liter (mg/L) phosphorus. *Id.* at 8. Based on measured phosphorus levels in excess of this concentration, DOFEC added Lake Chesaplain to its section 303(d) impaired waters list. *Id.*

In 2015, DOFEC began rulemaking to establish a phosphorus TMDL for Lake Chesaplain. *Id.* DOFEC determined that the maximum phosphorus loading necessary to achieve the water quality criteria was 120 metric tons (mt) annually, and current loading was 180 mt annually. *Id.* Studies found that, aside from natural background, nonpoint sources not subject to direct federal regulation were the primary contributors of phosphorus in the Lake Chesaplain watershed. *Id.* Specifically, manure spreading at ten hog CAFOs, other agricultural sources, and residential septic systems accounted for 48% of phosphorus loading, with CAFOs contributing the highest loading. *Id.* at 7, 9. In contrast, the Chesaplain Mills sewage treatment plant (STP) and the Chesaplain slaughterhouse, accounted for 34% of total loading. *Id.* at 8-9. These sources are not subject to direct federal regulation, but all are subject to regulation by New Union.

Although CAFOs typically qualify as point source discharges under the CWA, the hog CAFOs in the Lake Chesaplain watershed are specifically exempted from CWA permitting as "non-discharging" CAFOs under 40 C.F.R § 122.23. *Id.* at 7. However, CAFO manure spreading that reaches Lake Chesaplain through groundwater and runoff is directly subject to regulation and permitting by the New Union Agricultural Commission, which has authority to review and approve nutrient management plans for land application of manure at the CAFOs. *Id.* at 7. Similarly, septic systems are exempt from CWA permitting as groundwater discharges, but are subject to New Union's broad authority to regulate land and water use. *Id.* at 7, 9. While the two point sources at issue are subject to NPDES permits, they are not subject to permit limits for phosphorus, as EPA has not set an effluent limit for that pollutant. *Id.* New Union, however, has discretion to impose permit limits more stringent than EPA-established effluent limits where necessary to achieve WQS. 33 U.S.C. § 1311(b)(1)(C).

Based on these findings, DOFEC publicly noticed a proposed valid TMDL that would reduce phosphorus loading by 35% over five years, with phased annual 7% reductions from both point sources, through permit limits, and nonpoint sources, through BMPs. Record at 9. The TMDL properly allocated load reductions among point and nonpoint sources, and proposed practicable BMPs specific to each nonpoint source contributor enforceable by New Union, including modified feeds and manure spreading restrictions for CAFOs and other agricultural sources, and increased septic tank inspection and pumping. *Id.*

Homeowners, hog CAFOs, and Plaintiff Chesaplain Lake Watch (CLW), whose members use Lake Chesaplain for recreational purposes, raised objections to the proposal. *Id.* at 9-10. In response, DOFEC ultimately adopted an invalid TMDL that merely set a maximum annual load of 120 mt, without required point source wasteload allocations and nonpoint source

load allocations. *Id.* at 10. Because it did not comply with longstanding EPA regulations, EPA rejected New Union's TMDL in 2018. *Id.*

As required by statute, EPA then established a replacement TMDL through notice and comment rulemaking, entitled the Chesaplain Watershed Implementation Plan (CWIP). *Id.* This plan did not specify whether or how proposed BMPs or NPDES permits would be implemented to achieve the TMDL, or set forth schedules of compliance. *Id.* Based on the entire scientific record and comments before DOFEC, EPA adopted DOFEC's original proposed TMDL. *Id.* The Lake Chesaplain TMDL includes required allocations of a TMDL and properly takes credit for reduced wasteload allocation stringency through practicable BMPs to reduce nonpoint source allocations—the largest contributor to Lake Chesaplain phosphorus loading.

Consistent with the requirements for a TMDL and the role of the state to incorporate the TMDL into an adequate continuing planning process, EPA did not include directives on how New Union would implement permit limits or proposed BMPs, leaving that responsibility to New Union. *Id.* At the time of this action, New Union had not yet modified nutrient management permits for hog CAFOs or required phosphorus reduction BMPs for other nonpoint sources. *Id.* In February 2019, Chesaplain Mills and the Chesaplain STP timely applied for permit renewal, 40 C.F.R. § 122.6, administratively extending their prior permits containing no phosphorus limits. Record at 10. DOFEC has proposed modifications to those permits consistent with the TMDL, but both facilities have sought administrative hearings regarding the proposed modifications. *Id.* Thus, New Union is engaged in ongoing administrative adjudication and processes for implementation of the Lake Chesaplain TMDL.

C. Proceedings Below

Plaintiffs New Union and CLW both filed actions, which were consolidated by the

district court. New Union challenged EPA's decision to disapprove its TMDL, alleging that its 120 mt limit without wasteload and load allocations constituted a valid TMDL despite failing to comply with longstanding EPA regulations. *Id.* at 11.

Plaintiff CLW alleges that its members' enjoyment of recreational activities has been diminished by the decline in Lake Chesaplain water quality. *Id.* CLW challenged EPA's adoption of the Lake Chesaplain TMDL on two bases. First, despite EPA regulations stating that a TMDL may be expressed "in terms of either mass per time . . . or other appropriate measure," 40 C.F.R. § 130.2(i), CLW claimed that EPA's TMDL must be stated in terms of a daily load, Record at 11; and that a TMDL phased in over five years is unlawful because a TMDL must ensure that water quality standards are achieved on the date of adoption. *Id.* Second, CLW claimed that EPA's adoption of less stringent wasteload allocations based on proposed BMPs without reasonable assurance that New Union would implement BMPs was arbitrary and capricious, although there is no legal requirement for such assurances. *Id.* at 11, 16.

All three parties filed timely motions for summary judgment. *Id.* at 11. Based on the administrative record filed by EPA, the district court granted summary judgment to New Union, vacated EPA's determination to reject the New Union Lake Chesaplain TMDL, and directed the EPA to approve the New Union Lake Chesaplain TMDL. *Id.* at 14. The court granted summary judgment to CLW on its annualized, phased TMDL claim, *id.* at 15, and granted EPA summary judgment dismissing CLW's reasonable assurance claim, *id.* at 16. This appeal followed.

SUMMARY OF THE ARGUMENT

While these claims are not ripe for review, EPA properly rejected the New Union Lake Chesaplain TMDL and adopted a permissible phased TMDL including wasteload and load allocations. Similarly, EPA's adoption of credits for point source wasteload allocations based on

BMPs for nonpoint source load allocation reductions without reasonable assurance of BMP implementation was not arbitrary and capricious.

The district court erred in holding that EPA's determination to reject the New Union Lake Chesaplain TMDL and adopt its own TMDL is ripe for judicial review. A dispute is not ripe for judicial review unless all necessary administrative actions giving the challenged agency action concrete effect have already been taken. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). Pursuant to the Administrative Procedures Act, judicial review is appropriate only for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Therefore, this action is not ripe for judicial review because the TMDL only "serve[s] as a link in [the] implementation chain," *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002), and "is not subject to challenge under the APA . . . because it is not final agency action within the meaning of [the] statute[]." *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1154 (N.D. Cal. 2003).

Next, New Union and CLW both challenge EPA's interpretation of section 303(d), though neither agrees with the other's preferred interpretation. These claims are reviewed under the two-part *Chevron* framework, in which a court first determines whether "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). If so, "the unambiguously expressed intent of Congress" controls, and the inquiry ends there. *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue," the court proceeds to *Chevron* Step Two, where it defers to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.*

While section 303(d) unambiguously directs EPA to review and, if necessary, to establish TMDLs, 33 U.S.C. § 1313(d)(2), it nowhere defines "total maximum daily load," or specifies

what they must include. Because of this ambiguity, EPA's rejection and establishment of a TMDL, and its specific provisions, should be reviewed with *Chevron* Step Two deference.

New Union argues that EPA's decision to reject its proposed TMDL for failure to account for wasteload and load allocations as required by EPA rule was unambiguously prohibited by the statute. But EPA's determination was based on its rule defining "total maximum daily load" as the sum of wasteload and load allocations. 40 C.F.R. § 130.2(i) (2021). This valid rule gives effect to the clear language, structure, and purpose of section 303(d).

CLW protests that EPA's TMDL is impermissibly expressed as a declining annual load amount. However, the statute does not prohibit TMDLs expressed "in terms of either mass per time . . . other appropriate measure" as 40 C.F.R. § 130.2(i) allows, and requires only that they be set for appropriate pollutants "at a level necessary to implement the applicable water quality standards with seasonal variations," 33 U.S.C. § 1313(d)(1)(C). Here, the declining annual load amount was necessary, so EPA's decision was based on a permissible construction of the statute.

Finally, EPA's adoption of proposed nonpoint source BMPs to offset point source reductions without reasonable assurance that New Union would implement the BMPs was not arbitrary and capricious. Arbitrary and capricious review is narrow, and a reviewing court must uphold an agency decision that is based on reasoned decisionmaking. Under this standard, CLW's claim that EPA must include reasonable assurance of implementation when adopting BMPs is meritless.

While EPA may seek reasonable assurance that states will implement BMPs proposed in a TMDL, it is not required to do so for every TMDL. EPA's discretion to regulate nonpoint source pollution under the CWA is limited by the Act's objective to preserve traditional state authority over land and water uses. 33 U.S.C. § 1251(b). A blanket reasonable assurance

requirement would significantly diminish state authority and contravene that objective. Moreover, EPA Guidance cited by CLW in support of its argument does not create a reasonable assurance requirement. EPA guidance has shifted from framing reasonable assurance as mandatory to discretionary, including withdrawing a rule that would have codified such a requirement. Because the persuasiveness of agency guidance depends on its consistency, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the 1991 Guidance does not control. Under the CWA and regulatory standards, EPA has express authority to reduce the stringency of wasteload allocations based on BMPs for practicable load allocation reductions.

Because EPA need not require reasonable assurance for every TMDL, its action here was not arbitrary and capricious. EPA has express authority under 40 C.F.R. § 130.2(i) to offset wasteload allocations through practicable BMPs. Because DOFEC originally proposed the BMPs, it was reasonable for EPA to believe New Union would implement those measures to achieve claimed reductions. The decision was therefore the product of reasoned decisionmaking based on the facts before EPA.

Even if this Court finds these claims ripe for review, it should reverse the district court's grants of summary judgment in favor of New Union and CLW and enter summary judgment in favor of EPA; and affirm the district court's grant of summary judgment in favor of EPA.

STANDARD OF REVIEW

Review of a "ripeness determination[] is de novo." *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 52 (D.C. Cir. 2015). Review of grants of summary judgment on APA claims is also de novo, and the court "review[s] the administrative record directly, according no particular deference to the judgment of the [d]istrict [c]ourt.'" *Roberts v. United States*, 741 F.3d 152, 157-58 (D.C. Cir. 2014) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir.

2002)); *see also Supreme Oil Co. v. Metro. Transp. Auth.*, 157 F.3d 148, 151 (2d Cir. 1998). "[W]hen an agency action is challenged[,] [t]he entire case on review is a question of law," *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993), and the typical summary judgment standard, Fed. R. Civ. P. 56(a), "does not apply." *Resolute Forest Prods., Inc. v. USDA*, 130 F. Supp. 3d 81, 89 (D.D.C. 2015). Instead, a court must grant summary judgment to an agency when its "action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.*

ARGUMENT

I. EPA's adoption of a phosphorus TMDL for the Lake Chesaplain Watershed does not directly or immediately impact CLW and New Union unless and until it is incorporated into specific permits or other regulatory actions and therefore is not ripe for judicial review.

A dispute is not ripe for review unless all necessary administrative actions giving the challenged agency action concrete effect have already been taken. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). The basic rationale of the ripeness doctrine "is to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. When determining whether a dispute is ripe, a court must consider (1) the fitness of the issue for judicial review, and (2) the possible hardship that would be caused to the parties if judicial review is delayed. *Id.*

A. New Union's and CLW's challenges are not ripe because EPA's adoption of a phosphorus TMDL for the Lake Chesaplain Watershed is not a final agency action fit for judicial review.

"The degree of finality of agency action is the key consideration in evaluating its 'fitness for judicial review.'" *Transp. Robert (1973) Ltée v. INS*, 940 F. Supp. 338, 340 (D.D.C. 1996)

(citing *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986)). Pursuant to the Administrative Procedures Act, judicial review is appropriate only for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The final agency action requirement "recognizes that courts must not interfere with the executive function . . . by entertaining a lawsuit that challenges an action that is not final." *Transp. Robert (1973) Ltée*, 940 F. Supp. at 340 (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971)).

An agency action is considered final if two conditions are met. *Bravos v. Green*, 306 F. Supp. 2d 48, 55 (D.D.C. 2004). "First, the action must mark the 'consummation' of the agency's decision making process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) (citations omitted). In determining finality of an agency action, the court must look "primarily to whether the agency's position is 'definitive' and whether it has a 'direct and immediate . . . effect on the day-to-day business' of the parties challenging the action." *Ciba-Geigy Corp.*, 801 F.2d at 435-36 (citations omitted). In the present case, no "direct and immediate effects" will be felt by either CLW or New Union as a result of EPA merely adopting the Lake Chesaplain TMDL.

A TMDL is an "informational tool used in connection with a *state's* efforts to regulate water pollution," *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 303 (3d Cir. 2015) (emphasis in original), but it has no direct and immediate effects until the state incorporates the TMDL into a continuing process plan, 33 U.S.C. § 1313(e). That plan must achieve "adequate implementation," and is also subject to EPA approval. *Id.* Thus, a TMDL merely "serve[s] as a

link in [the] implementation chain," *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002), that "forms the basis for further administrative actions," *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1145 (N.D. Cal. 2003). It does not, itself, impose any enforcement action. *Id.* Instead, further administrative actions of the state "may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies." *Id.* And it is from these further administrative actions of the state that legal consequences will flow.

Although EPA called its TMDL the "Chesaplain Watershed Implementation Plan" (CWIP), it is an "implementation plan" in name only because it lacks any specific directives. The TMDL did not specify whether or how the proposed BMP measures would be enforced, and did not identify how New Union should implement the TMDLs through its NPDES permitting program—those are further administrative actions specifically left to the states to determine.

In short, the only action that has yet been taken is EPA's adoption of a phosphorus TMDL. Therefore, this action is not ripe for judicial review because only the first link in the implementation chain has occurred. Until New Union develops, and EPA approves, adequate implementation under a continuing planning process, the action "is not subject to challenge under the APA . . . because it is not final agency action within the meaning of [the] statute[]." *City of Arcadia*, 265 F. Supp. 2d at 1154.

Additionally, the STP and the slaughterhouse NPDES permits have both expired and been administratively extended by the state based on their timely application for permit renewal. *See* 40 C.F.R. § 122.6 (2021). Therefore, neither plant is currently subject to any limit on phosphorus discharges. While DOFEC has proposed to modify the permits to reflect the phosphorus TMDL, both facilities have sought administrative hearings on those proposed requirements based on the cost of compliance. Accordingly, no direct or immediate effects have

yet been felt by the point source dischargers, and there are administrative proceedings currently pending that would be interrupted by a decision on the merits of this case.

Further, New Union has not taken any steps to require the adoption of phosphorus reduction BMPs by nonpoint sources, and the nutrient management permits for the hog CAFOs have not been modified to incorporate any phosphorus reduction measures—again, no direct and immediate effects have yet been felt. Therefore, this action is not ripe for judicial review because no final agency action giving EPA's establishment of the TMDL concrete effect has been taken.

Moreover, neither CLW nor New Union will suffer hardship if judicial review is delayed until final agency action in furtherance of the TMDL has occurred.

B. New Union's and CLW's challenges are not ripe for judicial review because no hardship will be caused to either party if judicial review is delayed.

Although CLW's membership complains that their enjoyment of recreational activities is diminished by the decline in Lake Chesaplain water quality, judicial review of this challenge will not lead to immediate improvements in water quality. The burden to implement the TMDL to achieve WQS rests with New Union. Even if CLW's requested relief were granted, New Union would be responsible for implementing a new TMDL. No immediate improvement in Lake Chesaplain water quality would occur. CLW members' enjoyment of recreational activities will remain impaired whether or not judicial review is delayed until New Union implements a TMDL to achieve WQS. Therefore, CLW will suffer no hardship as a result of delayed judicial review.

New Union, on the other hand, may allege that they will suffer hardship because they are immediately required to expend more resources to develop an implementation plan. *See Am. Farm Bureau Fed'n*, 792 F.3d at 293 (holding that, because EPA and seven states were "poised to spend more time, energy, and money" to develop a collaborative implementation plan, challenges to the TMDL were ripe for review prior to states' incorporation of the TMDL into

continuing planning processes). Although New Union may rely on the holding in *American Farm Bureau Federation* for support, that case is inapposite. That TMDL involved multiple decades of multi-jurisdictional coordination. *Id.* at 287. Here, the hardship is slight because Lake Chesaplain falls entirely within New Union's borders and no multi-jurisdictional coordination is necessary. Further, judicial review will either require New Union to continue the current administrative process to implement the EPA-established TMDL—the same result as delayed review—or it will require them to expend additional time, energy, and money to implement a new TMDL. Thus, delay of judicial review will not cause hardship to New Union.

Even if this Court finds New Union's and CLW's challenges to be ripe for judicial review, EPA prevails on the merits of the substantive issues raised on appeal.

II. This Court must defer to EPA's reasonable decisions to reject the proposed New Union TMDL for failure to include the required wasteload and load allocations, and to establish a TMDL expressed as a declining annual load amount, because those decisions fall within EPA's statutory authority and were based on a permissible construction of ambiguous language in CWA section 303(d).

CLW and New Union both allege that the Lake Chesaplain TMDL relies on an improper construction of section 303(d). But EPA's interpretation of that section is entitled to deference.

The two-step *Chevron* test guides judicial review of an agency's exercise of statutory interpretation. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). In *Chevron* Step One, the court determines whether "Congress has directly spoken to the precise question at issue." *Id.* at 843. If so, "the unambiguously expressed intent of Congress" controls, and the inquiry ends there. *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue," the court proceeds to *Chevron* Step Two, deferring to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.*

While section 303(d) expressly grants EPA authority to establish TMDLs, it does not define "total maximum daily load" or indicate what provisions a TMDL must contain. Given this

ambiguity, EPA's interpretation of "total maximum daily load" and exercise of authority to establish a TMDL should be reviewed under the deferential *Chevron* Step Two standard.

New Union argues that the statute does not allow EPA to require that TMDLs include a breakdown between wasteload and load allocations. This argument fails, however, because EPA's regulatory requirement is grounded in the text, structure, and purpose of the Clean Water Act. Moreover, this breakdown is necessary to implement EPA's water quality objectives.

CLW, on the other hand, agrees with EPA that the wasteload and load allocation breakdown is lawful, but argues that EPA improperly expressed the Lake Chesaplain TMDL as an annual load amount that gradually declines over five years. This argument also fails, because EPA properly exercised its statutory authority in making this practical and effective policy decision.

A. This Court must review EPA's decision to disapprove New Union's TMDL and establish its own under the deferential *Chevron* Step Two standard, because EPA was acting within its expressly-delegated authority and based on its interpretation of ambiguous provisions of CWA section 303(d).

Under *Chevron* Step One, a court determines if the statute speaks directly to the "precise question at issue," *Chevron*, 467 U.S. at 843, by reviewing the plain meaning of "the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The court may set aside an agency's interpretation in Step One only if the statute "unambiguously forbids" that interpretation. *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). If, on the other hand, a statute is "silent or ambiguous with respect to the specific issue," Congress "left a gap for the agency to fill," thereby delegating "authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44.

The Clean Water Act expressly delegates authority to EPA to both carry out its provisions in general, 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the [EPA] . . . shall administer this chapter."), and specifically to approve, or disapprove and establish, TMDLs, *id.* § 1313(d)(2) ("If the Administrator disapproves . . . [a TMDL], [they] shall not later than thirty days after the date of such disapproval . . . [establish a TMDL]."). The statute does not, however, define the term "total maximum daily load," and requires only that a TMDL be set "for those pollutants which the Administrator identifies . . . as suitable for such calculation . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." *Id.* § 1313(d)(1)(C). Instead, TMDL is defined by a longstanding EPA regulation as "[t]he sum of the individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background."[1] 40 C.F.R. § 130.2(i) (2021). This regulation allows TMDLs to be expressed "in terms of either mass per time, toxicity, or other appropriate measure." *Id.*

A majority of the circuits that have reviewed EPA's interpretation of section 303(d) have done so under the deferential *Chevron* Step Two standard. *See Am. Farm Bureau Fed'n*, 792 F.3d at 306; *NRDC v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001); *Pronsolino v. Nastri*, 291 F.3d 1123, 1133 (9th Cir. 2002) ("In light of the current regulations and the agency's understanding of those regulations, as well as the delegated authority of the EPA to interpret the CWA, the EPA's interpretation [of section 303(d)] is entitled to *Chevron* deference."). *But see Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). For example, the Third

[1] In 1987, after EPA had issued this rule, Congress amended the Clean Water Act to add 33 U.S.C. § 1313(d)(4) which "govern[s] the revision of effluent limitations 'based on a total maximum daily load or *other waste load allocation* established under this section.'" *Am. Farm Bureau Fed'n*, 792 F.3d at 308 (emphasis in original) (citing P.L. 100–4 § 404(b) (Feb. 4, 1987)). Section 303 does not otherwise provide for the establishment of wasteload allocations, suggesting Congress considered and approved of EPA's rule when it added this provision. *See id.*

Circuit held that "the phrase 'total maximum daily load' is ambiguous enough to allow the EPA to include the [challenged] elements of the TMDL," including allocations of pollution levels among different sources and a timeframe for complying with the TMDL's requirements, and assurance that affected states will implement the TMDL. *Am. Farm Bureau Fed'n*, 792 F.3d at 294, 306. The court reasoned that *Chevron* deference was appropriate because, "although Congress explicitly required the EPA to establish [TMDLs], it nowhere prescribed *how* the EPA is to do so." *Id.* at 298 (emphasis in original).

Here, New Union and CLW erroneously challenge EPA's construction of ambiguous provisions of section 303(d) and seek to second-guess the reasonable policy decisions EPA made when exercising its expressly-delegated authority under that provision. The CWA does not define the phrase "total maximum daily load," so Congress has not "directly spoken to the precise question[s]" raised by CLW and New Union about its meaning. This statutory ambiguity indicates that Congress intended for EPA—the agency it expressly tasked with administering the CWA—to further define that phrase by rule. That implicit delegation of authority is underscored by EPA's explicitly-delegated authority in section 303(d) to review and, at its discretion, disapprove and establish individual TMDLs. Therefore, EPA's regulation defining "total maximum daily load" should be reviewed with deference.

EPA's determinations are also not "unambiguously forbid[den]" by other parts of section 303(d). The statute requires only that a TMDL be set for appropriate pollutants "at a level necessary to implement applicable water quality standards," taking into account seasonal variations and a margin of safety. This language grants significant discretion to EPA when it reviews and establishes a TMDL. It is ultimately up to the agency to determine what "a level necessary to implement the applicable water quality standards" is, and how to properly account

for seasonal variations. EPA's general rulemaking authority under the CWA, and its authority to disapprove and establish TMDLs, indicates Congress's intent for EPA to use its extensive expertise to fill these gaps.[2] While EPA's exercise of discretion in this realm is not unfettered, its reasonable exercise is entitled to deference.

Therefore, EPA's definition of "total maximum daily load" in 40 C.F.R. § 130.2(i), and its exercise of statutory discretion to review and establish TMDLs as necessary to achieve WQS should be reviewed under *Chevron* Step Two. In Step Two a reviewing court affords "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer," and seeks only to determine whether the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 844-45 (citations omitted). Under this standard, New Union's and CLW's challenges to EPA's interpretation of section 303(d) both fail.

B. EPA's rejection of New Union's proposed TMDL for failure to account for wasteload allocations and load allocations is consistent with EPA regulations, grounded in the text and structure of the CWA, and necessary to implement its provisions.

New Union challenges EPA's rejection of their proposed TMDL for failure to provide the required accounting of wasteload allocations and load allocations as relying on an improper interpretation of the term "total maximum daily load." EPA's decision was based on the explicit terms of a valid agency rule defining "total maximum daily load," which rests on a permissible construction of the language, structure, and purpose of section 303(d) of the Clean Water Act.

[2] The Supreme Court has held that *Chevron* deference is particularly appropriate where, as here, the subject matter at issue is "technical, complex, and dynamic." *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 1002-03 (2005).

More than half the circuits "have defined TMDLs to accord with EPA's regulations" which define a TMDL as the sum of wasteload and load allocations. *Am. Farm Bureau Fed'n*, 792 F.3d at 295-96 (citing *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 n.8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Friends of the 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)). The Third Circuit specifically reviewed a challenge to the validity of EPA's requirement that TMDLs account for wasteload allocations and load allocations, and ultimately upheld the rule. *Id.* at 308. The court reasoned that the text of section 303(d) supported the rule's required breakdown between wasteload and load allocations because "a plausible understanding of the word 'total' is the sum of the constituent parts of the load," and that an alternative construction requiring that a "total" be a single figure would give the term "total maximum daily load" the same meaning as "maximum daily load," rendering the word "total" mere surplusage. *Id.* at 297. The court also noted that "[i]nterpreting 'total maximum daily load' as requiring one number and nothing more is in tight tension with the Clean Water Act's goal of providing a cooperative framework for states and the federal government to work together to eliminate water pollution." *Id.* at 306; *see also Meiburg*, 296 F.3d at 1025 (citations omitted) ("TMDLs are central to the Clean Water Act's water-quality scheme because . . . they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.").

Here, New Union's challenge to the rejection of their TMDL for failure to include a breakdown between wasteload allocations and load allocations is directly addressed by EPA rule, defining a "total maximum daily load" as the sum of wasteload allocations and load allocations.

As a lawful rule promulgated under EPA's grant of authority to implement the CWA, it is entitled to deference.

Furthermore, the allocation requirement is clearly based on a permissible construction of the CWA, in accord with its text, structure, and purpose. The CWA adopts the "cooperative federalism" model of regulation, in which states and EPA share responsibility for carrying out its various regulatory programs, each with its own area of jurisdiction. States take the lead in the process of implementing WQS for bodies of water within their boundaries, including establishing TMDLs, but each step in that process is subject to EPA approval. *See* 33 U.S.C. § 1313. In general, states maintain jurisdiction over nonpoint sources of pollution, *see id.* § 1329, while EPA has jurisdiction over discharges from point sources into navigable waters, which, as is the case here, it may delegate to the states, *see id.* §§ 1312, 1342(b)-(c). The breakdown between wasteload allocations and load allocations reflects this division of jurisdiction by indicating the amount of pollution coming from point source discharges that fall under EPA jurisdiction, and the amount of pollution coming from nonpoint source discharges that fall under state jurisdiction.

To understand why this distinction matters, it's important to consider TMDLs in their proper statutory context. A TMDL is created when a water body has not achieved WQS, and existing point source effluent limitations are insufficient on their own to do so. *See id.* § 1313(d)(1)(A), (C); *Muszynski*, 268 F.3d at 97. The TMDL must be set "at a level necessary to implement" WQS in that water body. 33 U.S.C. § 1313(d)(1)(C). The TMDL is then approved, or disapproved and established, by EPA, and incorporated into a "continuing planning process," including "effluent limitations and schedules of compliance." *Id.* § 1313(d)(2), (e)(1), (e)(3)(A).

Because the TMDL must be set "at a level necessary to implement the applicable water quality standards" in a water body not currently achieving those standards, it must contemplate

additional pollution reductions. These reductions can only possibly come from (1) more stringent controls on point sources under EPA jurisdiction, (2) more stringent controls on nonpoint sources under state jurisdiction, or (3) some combination of the two. If a TMDL were a single topline number, as New Union incorrectly insists it should be, it would not indicate what actual pollution reductions were "necessary to implement the applicable water quality standards," nor would it indicate which pollution reductions fall under which governmental entity's jurisdiction. Such a figure would therefore be of little use in the "ongoing planning process" that the state must create. By instead requiring that the Lake Chesaplain phosphorus TMDL include a breakdown of wasteload allocations from point sources, and load allocations from nonpoint sources, EPA gave effect not only to applicable regulations, but also to the clear directives of section 303 and the CWA as a whole.

New Union may argue that the word "total" means a single number, not several smaller numbers, and that EPA's interpretation is in direct conflict with the plain language of the statute, but this would directly conflict with relevant precedent. As previously mentioned, not only has the Third Circuit explicitly rejected this argument as inconsistent with the text and structure of the statute, but EPA regulations also explicitly reject this interpretation. In addition to these inconsistencies, a requirement that a TMDL be expressed as a single number does not constitute a clear prohibition against accounting for the different pollution sources that make up the topline "total." It would still be well within EPA's oversight authority to require such an accounting, in consideration of the water quality process as a whole.

Finally, overturning a thirty-six-year-old rule that has been used to establish or approve thousands of TMDLs,[3] and which has been upheld by every circuit that has taken it under consideration, would be an absurd and illogical result. Such a result would undermine cooperative state and federal efforts to improve water quality through point and nonpoint source reductions, and reduce publicly-available information about the sources of water pollution. It would also fly in the face of the clearly stated intent of Congress when they passed the CWA nearly fifty years ago—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In addition to the overwhelming legal deficiencies with New Union's argument, these practical considerations should weigh against adopting their position.

Instead, this Court should defer to EPA's reasonable interpretation of the CWA. Because New Union's TMDL failed to account for wasteload allocations from point sources and load allocations from nonpoint sources as required by valid EPA rule, EPA properly rejected it.

C. EPA's decision to express the Lake Chesaplain TMDL as an annual load phased in over five years rested on a permissible construction of the CWA and constituted a reasonable policy choice within EPA's discretion.

CLW challenges the Lake Chesaplain TMDL on the grounds that its expression as an annual load phased in over five years is based on an improper interpretation of section 303(d). However, EPA's decision is supported by a valid agency rule, is not "unambiguously foreclosed" by the text of the CWA, and constitutes a reasonable policy choice in furtherance of the objectives of the Act.

1. EPA's decision to express the Lake Chesaplain TMDL as an annual load was not prohibited by the language of CWA section 303(d), and was necessary to implement Lake Chesaplain water quality standards.

[3]A full list of approved and established TMDLs is available on EPA's website. *Approved or Established TMDLs*, U.S. Envt'l Prot. Agency, https://www.epa.gov/npdes/approved-or-established-tmdls (last visited Nov. 21, 2021).

EPA regulations allow a TMDL to be expressed "in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). Despite owing deference to EPA's longstanding regulations interpreting section 303(d), courts are split on whether a TMDL may be expressed as an annual load. *Compare Friends of the Earth, Inc.*, 446 F.3d at 144 (holding that a TMDL may only be expressed as a daily amount) *with Muszynski*, 268 F.3d at 98-99 (holding that "a 'total maximum daily load' may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies," and noting that phosphorus loads in particular could be effectively expressed in seasonal or annual terms). However, as the Third Circuit noted in *American Farm Bureau Federation*, "even after *Friends of Earth* [sic] the District of D.C. has allowed the EPA to issue total maximum annual or seasonal loads in addition to daily loads because," the statute "is silent on whether another timeframe may be used when that would be more appropriate for the particular pollutant at issue." *Am. Farm Bureau Fed'n*, 792 F.3d at 296 (citing *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 245 (D.D.C. 2011)).

The D.C. Circuit precedent established in *Friends of the Earth, Inc.* is unworkable, and this Court should decline to follow it. While the term "total maximum daily load," taken in isolation and read in the most literal sense, seems to require that a TMDL be expressed as a daily load, this is not the only permissible construction of section 303(d), nor is it the construction most consistent with the CWA's structure and purpose. Whether a TMDL is expressed as a literal "daily" load or as an annual load is largely a question of semantics: an annual load is merely the aggregate of 365 daily loads. In fact, a TMDL expressed as any measure of "mass per time," 40 C.F.R. § 130.2(i), can be easily translated into a "daily load" figure. The inclusion of

the word "daily" in "total maximum daily load" should not be read to unambiguously foreclose the use of any other measurable unit of time to express a TMDL.

The strict literal interpretation advocated by CLW is even less plausible when the phrase "total maximum daily load" is considered in context. Section 303(d) requires that TMDLs be set for "those pollutants which the Administrator identifies . . . as suitable for such calculation . . . at a level necessary to implement the applicable water quality standards with seasonal variations." As such, TMDLs are issued for a wide range of pollutants, and those pollutants may have varied effects on different water bodies, depending on numerous factors. Furthermore WQS, which are established by states, can be expressed in either narrative or numerical form, *see* 40 C.F.R. § 131.11(b), and can vary in other respects as well. Thus, while there may be instances where a daily limit is the "level necessary to implement the applicable water quality standards," a seasonal or annual limit may be better suited to the task in other instances, such as when cumulative or longer-term effects of pollution bear more directly on water quality.[4] The overriding concern is that the TMDL be set at a "level necessary to implement the applicable water quality standards."

Here, DOFEC determined that a maximum annual phosphorus load was required to achieve WQS in Lake Chesaplain. That determination reflects the agency's informed judgment as the primary entity regulating water quality in Lake Chesaplain. The Second Circuit noted that

[4] EPA has long identified chronically-high phosphorus levels as a particularly significant water quality challenge. *See, e.g.*, U.S. Envt'l Prot. Agency, EPA-822-B00-001, Nutrient Criteria Technical Guidance Manual, Lakes and Reservoirs viii (2000). The agency's most recent guidance to states emphasizes that, in contrast to toxic pollutants "for which the length of time and frequency of exposure to the pollutant can be directly linked to effects on different organisms," increased phosphorus loads indirectly affect water quality by increasing the growth of phytoplankton which, over time, can reduce dissolved oxygen in the water. U.S. Envt'l Prot. Agency, EPA-822-R-21-005, Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs 63 (2021).

this approach may be particularly appropriate for phosphorus pollution, *Muszynski*, 268 F.3d at 98, and EPA has adopted it for phosphorus in other settings. *See, e.g.*, U.S. Envt'l Prot. Agency, Phosphorus TMDLs for Vermont Segments of Lake Champlain 25 (2016).

Simply put, the statute's use of the word "daily" is not a strict prohibition against using an annual load figure. Other measures of "mass per time" are permissible, provided they facilitate the implementation of WQS, as the Lake Chesaplain TMDL does.

2. EPA's decision to phase in the Lake Chesaplain TMDL over five years was a valid exercise of EPA's authority to establish TMDLs under CWA section 303(d).

Similarly, the statute does not prohibit the adoption of a phased-in TMDL. While section 303(d) requires that TMDLs be set "at a level necessary to implement the applicable water quality standards," that is not the same as requiring immediate parity with WQS. The plain language of the statute clearly indicates that implementation is the overriding concern, and it does not dictate how that implementation should be accomplished.

As noted above, Congress gave EPA discretion when establishing a TMDL. The Lake Chesaplain TMDL is an exercise of that discretion. It is the culmination of more than a decade of efforts—marked by disagreement between environmental activists, industry, homeowner groups, and DOFEC—to address the declining water quality in Lake Chesaplain. While this approach may not be as aggressive as CLW would like, it is the approach most consistent with EPA's statutory directive to establish a TMDL at "a level necessary to implement the applicable water quality standard." Under the Clean Water Act, that determination is ultimately EPA's to make.

In conclusion, EPA's decision to express the Lake Chesaplain TMDL as a phased-in annual limit was a reasonable policy choice that was not unambiguously foreclosed by the CWA. Therefore, this court should reverse the district court, and hold that EPA properly rejected New

Union's proposed TMDL and established the Lake Chesaplain TMDL, including its phased-in annual limit, "based on a permissible construction" of the Clean Water Act.

III. EPA's adoption of load allocation reductions achieved through BMPs to reduce the stringency of wasteload allocations is not arbitrary or capricious because EPA is not required to obtain "reasonable assurance" that BMPs will be implemented, and EPA's adoption of credits was rational based on the record before the agency.

"The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court may invalidate a notice and comment agency rule only if "the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (citation omitted); 5 U.S.C. § 706(2)(A). When an agency action was "the product of reasoned decisionmaking," and "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," the court must uphold the rule. *State Farm*, 463 U.S. at 42, 52.

CLW contends that EPA's adoption of load allocation reductions through BMPs is arbitrary and capricious solely on the basis that the TMDL lacked "reasonable assurance" that the reductions would in fact be achieved. But EPA was not required to obtain reasonable assurance that the claimed reductions would be achieved. Further, EPA's adoption of proposed BMPs for load allocation reductions was within its delegated authority and based on reasoned decisionmaking. Therefore, this Court should affirm the district court's determination that EPA's wasteload allocation based on nonpoint source BMPs was not arbitrary or capricious.

A. Neither the text of the CWA nor EPA guidance impose a requirement upon EPA to obtain "reasonable assurance" that states will implement proposed BMPs.

1. The CWA preserves traditional state responsibility to regulate nonpoint source pollution and EPA cannot significantly diminish that state authority through a blanket reasonable assurance requirement.

Congress passed the Clean Water Act with the dual objective to achieve clean water and to "recognize, preserve, and protect the primary responsibilities and rights of the States to . . . plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b); *see also Rapanos v. United States*, 547 U.S. 715, 755-56 (2006). Accordingly, the Supreme Court and a majority of circuit courts have held that EPA lacks direct regulatory authority over nonpoint source pollution. *See, e.g.*, *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020) (concluding that Congress left "substantial responsibility and autonomy to the States" over nonpoint source control, and did not give EPA discretion to substantially diminish that responsibility); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002) (citations omitted); *Am. Farm Bureau Fed'n*, 792 F.3d at 289; *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009); *see also Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) (concluding that nonpoint sources are excluded from direct federal regulation because "uniform federal regulation was virtually impossible").

The text, context, and structure of the Clean Water Act further affirm that EPA may not impose requirements regarding nonpoint source controls that "diminish[] state authority in a significant way." *Am. Farm Bureau Fed'n*, 792 F.3d at 302; *see also Cordiano*, 575 F.3d at 218-19. For example, while the Act defines "point source," "nonpoint source" is defined only by exclusion. *Nat'l Wildlife Fed'n*, 693 F.2d at 166. If Congress intended to largely displace state authority over nonpoint source pollution, it would have said so—Congress "does not . . . hide

elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Moreover, where the CWA does provide federal discretion over nonpoint sources, it does so only indirectly, limiting EPA's role to oversight and funding of state nonpoint source programs. *See* 33 U.S.C. §§ 1288, 1329; *Or. Nat. Res. Council v. USFS*, 834 F.2d 842, 849 (9th Cir. 1987); *Cnty. of Maui*, 140 S. Ct. at 1480 (Thomas, J., dissenting).

Thus, while "the phrase 'total maximum daily load' has enough play in the joints to *allow* EPA to consider" a "reasonable assurance" requirement in some instances, *Am. Farm Bureau Fed'n*, 792 F.3d at 301 (emphasis added), the CWA does not *require* that EPA do so for every TMDL. Such a requirement would force states to adopt specific nonpoint source management practices even where the state is independently capable of implementing nonpoint source controls to achieve WQS. Nothing in the text of the CWA suggests that EPA may usurp state authority to regulate nonpoint sources. Indeed, a stated objective of the CWA is to preserve state responsibility over land and water uses. The statute is structured to facilitate a cooperative process in which states develop their own nonpoint source controls while providing sufficient leeway for EPA to intervene only to the extent necessary to achieve WQS. A blanket reasonable assurance requirement would significantly diminish state authority and contravene a key objective of the CWA.

2. EPA has express authority to offset wasteload allocations through BMPs for load allocation reductions, but need not obtain reasonable assurance that BMPs will be implemented.

A TMDL issued for a water body polluted by both point and nonpoint sources may provide for less stringent wasteload allocations "[i]f [BMPs] or other nonpoint source pollution controls make more stringent load allocations practicable." 40 C.F.R. § 130.2(i) (2021). Because state implementation of BMPs is important to achieve WQS, EPA guidance recommends that

states provide "reasonable assurances that nonpoint source reduction will in fact be achieved." U.S. Envt'l Prot. Agency, EPA 440/4-91-001, Guidance for Water Quality Based Decisions: The TMDL Process 15 (1991) [hereinafter 1991 Guidance]. However, because this guidance does not carry the force of law and does not receive controlling deference,[5] it does not mandate EPA to obtain reasonable assurances.

"The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances . . . ." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Agency guidance does not carry "the force of law." *See id.* at 233. While courts may give persuasive deference to guidance, the weight afforded depends on, *inter alia*, "its consistency with earlier and later pronouncements." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

EPA has not maintained a consistent position with regard to a reasonable assurance requirement since release of the 1991 Guidance. *Compare* 1991 Guidance at 15 (stating that "there *must* be reasonable assurances") (emphasis added) *with* U.S. Envt'l Prot. Agency, Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992 at 4 (2002) (stating that TMDLs "*should* provide reasonable assurances") (emphasis added). Although reasonable assurance was framed as mandatory under the 1991 Guidance, it is instead discretionary under more recent guidance. *See Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) ("The use of language like 'may' and 'should' instead of 'shall' or 'must' suggests that the provisions that follow are meant to be 'precatory, not mandatory.'")

Further, EPA withdrew a final rule in 2003 that would have codified reasonable assurance of nonpoint source controls as an element of a TMDL because of Congressional

[5] The 1991 Guidance is not entitled to heightened *Auer* deference because 40 C.F.R. § 130.2(i) is not genuinely ambiguous, and the limitations the CWA imposes on EPA's discretion to regulate nonpoint sources clearly show that Congress did not intend for EPA's reasonable assurance guidance to carry "controlling weight." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019).

opposition and widespread controversy over whether the rule "exceeded the Agency's authority under the CWA" or would in fact provide "an efficient and effective TMDL program." Withdrawal of Revisions to the Water Quality Planning and Management Regulations, 68 Fed. Reg. 13,608, 13,608-09 (Mar. 19, 2003); *see also* Revisions to the Water Quality Planning and Management Regulations, 65 Fed. Reg. 43,586, 43,699 (July 13, 2000) (to be codified at 40 C.F.R. pt.130) (requiring reasonable assurance in a TMDL).

EPA recognizes the importance of ensuring that states implement nonpoint source controls in a TMDL. But EPA's strategy has varied over time in search of an effective and permissible means to that end. Due to the inconsistency of EPA's pronouncements on reasonable assurance, this Court should not afford controlling weight to the 1991 Guidance purportedly requiring reasonable assurance of nonpoint source pollution reductions. And because neither the CWA nor regulations require EPA to obtain reasonable assurance of nonpoint source load reductions, the decision not to obtain such assurance does not render the TMDL arbitrary, capricious, or otherwise not in accordance with the law.

B. EPA's adoption of wasteload allocation offsets without obtaining "reasonable assurance" from New Union that it would implement proposed BMPs was the product of reasoned decisionmaking.

Review under the arbitrary and capricious standard is narrow, and agency decisions must be upheld if they are "the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 43, 52 (citations omitted). Therefore, EPA's decision to take credit for nonpoint source BMP load reductions must be upheld because it was within EPA's delegated authority, based on the factors Congress intended EPA to consider, and supported by the facts before the agency.

First, EPA must establish its own TMDL when it disapproves of a state submission. 33 U.S.C. § 1313(d)(2). Moreover, EPA regulations expressly permit a TMDL to offset wasteload

allocations through BMPs that make load allocation reductions "practicable." 40 C.F.R. § 130.2(i). Neither the CWA nor EPA regulations require reasonable assurance that load reductions will occur. Thus, EPA's adoption of the TMDL was within its delegated authority.

Second, EPA based its decision on the relevant factors. The CWA requires TMDL load allocations sufficient to "implement the [applicable] water quality standards." 33 U.S.C. § 1313(d)(2). To determine the sufficiency of allocations, EPA must consider whether proposed BMPs "make more stringent load allocations practicable." 40 C.F.R. § 130.2(i). While not defined in the rule, "practicable" means "reasonably capable of being achieved" or "feasible in a particular situation." *Practicable*, Black's Law Dictionary (5th pocket ed. 2016); *see also Practicable*, Merriam-Webster, https://www.merriam-webster.com/dictionary/practicable (last visited Nov. 21, 2021) ("practicable" means "capable of being put into practice").

To determine that load reductions are capable of being achieved, reasonable assurance that BMPs will be implemented may be helpful in some instances, like multi-jurisdictional TMDLs. *See Am. Farm Bureau Fed'n*, 792 F.3d at 291-92 (upholding EPA's decision to require reasonable assurances of load allocation reductions "in all respects save two sources of pollution" where success of the TMDL depended on seven states achieving pollution targets); U.S. Envt'l Prot. Agency, Lake Champlain TMDL Disapproval Decision (Jan. 24, 2011) (withdrawing approval of Vermont portion of Lake Champlain TMDL for failure to provide reasonable assurance where Vermont portion addressed nine of thirteen segments of the Lake Champlain TMDL). But reasonable assurance of implementation is not always necessary to demonstrate that BMPs are practicable. *See Meiburg*, 296 F.3d at 1034 n.10 (reversing district court order requiring implementation plans and reasonable assurances); Brief for Defendant-Appellants at 24-25, *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002) (No. 01-14587-G).

Unlike Chesapeake Bay and Lake Champlain, Lake Chesaplain is located entirely within New Union, and the feasibility of nonpoint source pollution reductions does not depend on commitments from other states that BMPs will be implemented to achieve load reductions. Instead, the reductions here are capable of being achieved through New Union's comprehensive authority to implement BMPs for all nonpoint polluters contemplated in the TMDL. Moreover, the TMDL proposed feasible measures specific to each nonpoint source sector and enforceable by New Union—for example, the State Agricultural Commission has authority to review and approve plans for land application of manure, and the TMDL proposes restricting the scope of manure spreading plans. Thus, the claimed reductions are practicable without an additional reasonable assurance requirement.

Finally, EPA's decision to establish the TMDL without requiring reasonable assurance from New Union that proposed BMPs would achieve load reductions was rational based on the facts before EPA. CLW claims that New Union's failure to implement the BMPs following adoption of the TMDL is evidence that EPA was required to obtain reasonable assurances. That is immaterial here. It was not in the record before EPA, and review "is limited to the administrative record." *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995).

On the contrary, the facts before EPA when it adopted the TMDL support its decision. DOFEC originally proposed the BMPs contemplated in the Lake Chesaplain TMDL, suggesting that DOFEC wanted to implement those measures, and believed the measures would achieve the claimed load reductions. This previously manifested intent gave EPA confidence that New Union would implement the BMPs. Additionally, despite opposition from hog CAFOs and homeowners, New Union has authority to impose the BMPs and avenues to reduce the financial burden on homeowners of septic system BMPs. New Union has direct statutory authority to

implement BMPs on the hog CAFOs regarding manure spreading, and can seek EPA funding under CWA sections 1288 and 1329 to reduce the cost of septic system BMPs on homeowners. Further, these measures are critical to the health of Lake Chesaplain, and public opposition is not a compelling reason to abandon practicable means of achieving WQS.

In sum, EPA is not required to obtain reasonable assurance from states that proposed BMPs will in fact be implemented, and EPA's decision not to obtain assurances from New Union was reasonably based on DOFEC's desire to implement practicable BMPs. Because EPA's adoption of credits for load allocation reductions based on BMPs was the product of reasoned decisionmaking, this court should affirm the district court's finding that adoption of wasteload allocation credits was not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that this case is ripe for review. In the alternative, this Court should reverse the district court's grants of summary judgment in favor of New Union and CLW and enter summary judgment in favor of EPA; and affirm the district court's grant of summary judgment in favor of EPA.