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

In The
United States Court of Appeals
For the Twelfth Circuit

The State of New Union,
Plaintiff-Appellant-Cross Appellee,

and

Chesaplain Lake Watch,
Plaintiff-Appellant-Cross Appellee

v.

United States Environmental Protection Agency,
*Defendant-Appellan*t

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

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Brief for Appellant
The State of New Union

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STATEMENT OF JURISDICTION

New Union appeals from an Opinion and Order granting partial summary for intervenor Chesaplain Lake Watch (CLW), entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, No. 21-000123, consolidated with No. 21-000124. The district court had jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331 because the cause of action is provided by federal law. The district court's grant of summary judgment is a final decision because it determined the rights and obligations of the parties and therefore, is appealable. New Union, defendant Environmental Protection Agency (EPA), and CLW 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 that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States."

STATEMENT OF THE ISSUES

I. Whether the district court correctly found that EPA's determination to reject New Union's Chesaplain Watershed phosphorus TMDL and instead, impose its own TMDL and implementation plan, is ripe for review.

II. Whether the district court correctly determined that EPA's rejection of New Union's Chesaplain Watershed phosphorus TMDL is an incorrect interpretation of "total maximum daily load" under the Clean Water Act because it included one loading number rather than both wasteload and load allocations.

III. Whether EPA's adoption of a TMDL that consists of an annual pollution loading reduction to be phased in over five years violates the Clean Water Act.

IV. Whether EPA's adoption of a credit for anticipated best management practice pollution reductions was arbitrary and capricious or an abuse of discretion due to the lack of assurance of New Union implementing best management practices.

STATEMENT OF THE CASE

I. The Clean Water Act

In enacting the Clean Water Act, Congress aimed to restore and maintain the "chemical, physical and biological integrity of [the] Nation's waters" through a cooperative federalism framework. 33 U.S.C. § 1251. States must identify waters that do not meet water quality standards (WQS). 33 U.S.C. § 1313. The Clean Water Act then directs states to establish a TMDL for these impaired waters at a level necessary to implement WQS. 33 U.S.C. § 1313(d)(1)(C).

The water quality standard (WQS) program allows EPA and the states to work together to achieve the Clean Water Act's goals through permitting and implementation plans. *See* 33 U.S.C. § 1342(b) (EPA's point source permitting structure); 33 U.S.C. § 1288 (development of a Best Management Practices program); 33 U.S.C. § 1313 (state establishment of WQS). Federal involvement is extremely limited and only allows EPA to act directly by disapproving or objecting to a state's action or inaction. 33 U.S.C. § 1313(b)(1). EPA does not have authority to develop a state's implementation plan. 33 U.S.C. § 1251(b). Additionally, EPA does not have authority to regulate nonpoint sources of pollution in a state. *See* 33 U.S.C. § 1311.

Under this cooperative program, each state is required to adopt WQS for waters within its borders. 33 U.S.C. § 1313(a). A WQS details the designated uses for each body of water and the water quality criteria that must be met to support those uses. 33 U.S.C. § 1313(c)(2)(A). This is accomplished through numerical limits on pollutant concentrations in the water. *Id.* States must

then identify waters that do not meet its WQS and calculate a "total maximum daily load" (TMDL) for such waters. 33 U.S.C. § 1313(d). When setting the TMDL, the Clean Water Act directs states to account for "seasonal variation 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).

According to an EPA regulation, the portion of a surface water's loading capacity that is allocated to existing and future point source discharges is referred to as the "wasteload allocation." 40 C.F.R. § 130.2(h). The portion of a receiving water's loading capacity that is attributed to either existing or future nonpoint sources of pollution is referred to as the "load allocation." 40 C.F.R. § 130.2 (g). EPA defines TMDL as the "greatest amount of [a pollutant] that a water can receive without violating water quality standards." 40 C.F.R. § 130.2(f). EPA further states TMDLs are the "sum of the individual [wasteload allocations] for point sources and [load] allocations for nonpoint sources a natural background." 40 C.F.R. § 130.2(i).

II. Lake Chesaplain

Water quality has been declining in New Union's Lake Chesaplain for the past 20 years. Record at 7. Lake Chesaplain is designated as Class AA, which is New Union's highest quality water. *Id.* at 8. Class AA waters have designated uses including drinking water source, primary contact recreation, and fish propagation survival. *Id*

Water quality began declining at the turn of the twenty-first century due to growing industry in New Union. *Id.* at 7. Ten large-scale concentrated animal feeding operations (CAFOs) were built in the northern Union River watershed, along with a slaughterhouse in Chesaplain Mills to service the CAFOs. *Id.* Additionally, Chesaplain Mills has a publicly owned sewage treatment plant (STP), which discharges directly into Lake Chesaplain. *Id.* These

industries release phosphorous into the watershed, resulting in rapidly declining water quality. *Id.* The impact to water quality affects the tourism, recreation, and property values of the surrounding area. *Id.*

Water quality is important to the areas surrounding Lake Chesaplain. The Chesaplain National Forest and State Park border Chesaplain Lake on the west, which hosts recreational activities through public beaches, campgrounds, and hiking trails. *Id.* On Lake Chesaplain's eastern border sit several growing lakefront vacation communities and agricultural fields that depend on the Lake's water. *Id.* The City of Chesaplain Mills sits on the Lake's northern shore and is home to many citizens and industrial facilities. *Id.*

III. New Union's TMDL Process

In response to Lake Chesaplain's declining water quality, New Union formed the Lake Chesaplain Study Commission in 2008 and determined that the excess algae growth in Lake Chesaplain was due to elevated levels of phosphorus. Record at 8. Currently, measured phosphorus levels in the lake vary from 0.20 mg/l to 0.034 mg/l. *Id.* Accordingly, New Union adopted the DOFEC's water quality criteria for Class AA waters of 0.014 mg/l. *Id.*

In complying with the Clean Water Act and developing a TMDL, New Union found that the desired maximum loading for Lake Chesaplain is 120 metric tons (mt) annually. *Id.* In 2015, Lake Chesaplain saw an annual total of 180 mt of phosphorus, broken down as follows:

Point Sources:	
Chesaplain Mills STP	23.4
Chesaplain Slaughterhouse	39.5
Nonpoint sources	
CAFO Manure Spreading	54.9
Other agriculture sources	19.3
Septic tank inputs	11.6
Natural sources	32.3
Total	180 mt

Id. at 8–9.

In October 2017, DOFEC published notice of a proposed TMDL through an equal phased reduction of both point sources and nonpoint sources. *Id.* at 9. The phased reduction in phosphorous would take place over a period of five years. *Id.* Phosphorus levels would be reduced 7% from the 180 mt baseline in the first year, with a goal of 35% reduction from the baseline in five years. *Id.* Point source reductions would be accomplished through permitting, while nonpoint source reductions were to be achieved through a series of Best Management Practices (BMPs). *Id.* The BMPs were designed to encourage the hog CAFOs and other agricultural sources to reduce phosphorus output by introducing modified feeds for animal production facilities, physical and chemical treatment of manure streams, and restrictions on manure spreading. *Id.*

DOFEC received public comments on the proposal objecting to the phased TMDL and the BMPs. *Id.* In response, DOFEC adopted an annual TMDL of 180 mt in July 2018. *Id.* at 10. EPA rejected DOFEC's TMDL, and after a notice and comment period that included the information that was previously before DOFEC, EPA adopted the original phased TMDL with BMPs, called the "Chesaplain Watershed Implementation Plan" (CWIP).

IV. Procedural History

Plaintiff New Union brought suit against EPA on January 14, 2020, and plaintiff Chesaplain Lake Watch (CLW) brought suit against EPA on February 15, 2020. *Id.* at 10. Both actions were filed pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702. *Id.* The two cases were consolidated before the United States District Court for the district of New Union on March 22, 2020. *Id.*

New Union challenged EPA's rejection of its proposed 120 mt/year TMDL, including EPA's assertion that the load allocation must include both load and wasteload allocations. *Id.* at

11. CLW challenged EPA's adoption of the Chesaplain TMDL on the grounds that TMDLs must be set at "daily" limits and that a five-year phased implementation plan is contrary to the Clean Water Act. *Id.* CLW also asserted that EPA may include a credit for phosphorus load allocation reductions in the CWIP, where EPA has no authority to require implementation of BMPs and has no reasonable assurance that the reductions will be achieved. *Id.* EPA contested the claims of both plaintiffs and asserted that New Union and CLW's complaints should be dismissed because they are not ripe for judicial review. *Id.*

The district court found that both complaints were ripe and fit for adjudication, that EPA's regulation defining total to include both load and wasteload allocations is contrary to law, that TMDLs must be expressed in "daily" increments and a five-year phased reduction is contrary to the Clean Water Act, and that EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions was not arbitrary and capricious or an abuse of discretion. *Id.* at 12–16. The parties timely appealed to the United States Court of Appeals for the Twelfth Circuit.

SUMMARY OF THE ARGUMENT

EPA's determination to reject New Union's Chesaplain Watershed phosphorus TMDL is ripe for judicial review because first, the denial is a purely legal issue as it involves an agency interpreting a statute, the Clean Water Act. Second, the issue would not benefit from a more concrete setting because the longer this Court withholds its decision, the longer New Union will be uncertain if it should implement EPA's TMDL or its own TMDL. Third, EPA's action is final because it has gone through notice and comment rulemaking and has direct consequences on New Union, imposing a TMDL. Additionally, New Union will suffer hardship if this Court does

not review the district court's decision because without this Court's decision, Lake Chesaplain continues to be polluted with phosphorus, affecting New Union's citizens and economy.

This Court should uphold the district court's decision to reject EPA's TMDL because it is contrary to law as an incorrect interpretation of the term "total" in "total maximum daily load" under § 303(d) of the Clean Water Act. Under *Chevron*, Congress clearly expressed its intent that "total" means a single number and not two numbers, namely, load and wasteload allocations. Because Congress' intent is clear, this Court must rely on the explicit language of the statute and reject EPA's determination that New Union's TMDL was insufficient for failing to include separate load and wasteload allocations. Even if this Court finds that "total" is ambiguous, EPA's interpretation is unreasonable as it contradicts the plain meaning, ordinary public meaning, and purpose of the Clean Water Act. Additionally, EPA's interpretation raises Tenth Amendment and separation of powers concerns. Under *Chevron*, this Court must reject EPA's TMDL because it is an unreasonable interpretation of the Clean Water Act and raises constitutional issues of state's rights and separation of powers.

EPA's adoption of a phased annual pollution loading reduction is a reasonable interpretation of "total maximum daily load" under the Clean Water Act. The annual TMDL is reasonable because the meaning of "daily" in "total maximum daily load" is ambiguous in the context and surrounding language of the Clean Water Act. Even if this Court does not find the language ambiguous, interpreting "daily" as its plain meaning would produce an absurd result because of phosphorus's specific qualities, the facts in this case, and the context and purpose of the Clean Water Act's purpose. Additionally, EPA's interpretation is reasonable because of the uncertainty surrounding phosphorus pollution in Lake Chesaplain. Because the language's plain

meaning produces an absurd result and EPA's interpretation is reasonable, this Court must rely on EPA's interpretation of "total maximum daily load" as to allow for an annual limit

Further, if this Court correctly decides that EPA improperly rejected New Union's TMDL, the issue of whether EPA's phased implementation approach is valid under the Clean Water Act is moot because there will be no case or controversy for this Court to grant relief for. If this Court decides this issue is not moot, EPA's phased implementation plan for Lake Chesaplain is still valid under the Clean Water Act because EPA's interpretation is reasonable and necessary to achieve WQS. The Clean Water Act prescribes no timeframe for achievement of WQS and a phased implementation plan is reasonable under the "one step" doctrine while respecting New Union's autonomy to implement and evaluate the best way to eliminate pollution in its waters.

Lastly, EPA's adoption of a nonpoint source credit trading program is not arbitrary and capricious or an abuse of discretion because first, the agency has not relied on factors which Congress did not intend it to consider when adopting a flexible BMP credit incentive, aligning with the Clean Water Act's goal of restoring and maintaining the Nation's waters. Second, EPA did not fail to consider an important aspect of the problem because EPA considered the entire record and set an overarching BMP credit incentive that allows for New Union to implement based on its knowledge of its unique waters and industries. Third, EPA has not offered an explanation that runs counter to the evidence before it because its TMDL incorporates the BMP credit incentive in light of information detailing the large amount of nonpoint source pollution that contributes to the rising phosphorus levels in Lake Chesaplain. Lastly, EPA's action in not implausible. EPA has acted within its expertise and experience in creating CWIP. Because EPA

came to a reasonable decision considering the scientific reports and comments before it, this Court should uphold the credit trading program in EPA's TMDL.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, applying the standard of review for agency action. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000); *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). Because Appellant's challenge is based on an issue of statutory construction, that standard of review is established by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The reviewing court's scope of review is narrow, and it cannot substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court may only set aside an agency action if the action is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706.

ARGUMENT

I. EPA'S DETERMINATION TO REJECT NEW UNION'S CHESAPLAIN WATERSHED PHOSPHORUS TMDL AND ADOPT ITS OWN TMDL IS RIPE FOR JUDICIAL REVIEW.

EPA rejecting the New Union Chesaplain Watershed phosphorus TMDL is ripe for judicial review because the denial is a purely legal issue, it would not benefit from a more concrete setting, and EPA's action is final, making it fit for review. Additionally, New Union will suffer hardship while this Court decides whether to affirm the district court.

To determine if a case is ripe for review, it is well established that a court must determine: (1) the fitness of the issue for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). Fitness is a measure of the interests of the court and agency in postponing review, while hardship is a measure of the challenging

party's countervailing interest in securing immediate judicial review. *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (citing *Cont'l Air Lines, Inc. v. C.A.B.*, 522 F.2d 107, 125 (D.C. Cir. 1974). The final ripeness determination depends on the balancing of these two variables. *Id.*

Whether an issue is fit for review encompasses several factors, including whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final. *Abbott Lab'ys*, 387 U.S. at 149–52; *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967). Issues of statutory interpretation are purely legal questions. *Ciba-Geigy Corp.*, 901 F.2d at 435. In this case, the issues presented are ones of statutory interpretation, namely, whether EPA properly construed the Clean Water Act to allow it to reject New Union's TMDL and impose its own.

Next, consideration of the issue will not benefit from a more concrete setting. The longer this Court delays its ruling, the longer New Union will be uncertain if it should start implementing EPA's TMDL or its own TMDL. Time will not improve New Union's situation because it will only draw out New Union's uncertainty and prolong the pollution problem in New Union's waters, contrary to the goal of the Clean Water Act.

Lastly, the agency action is sufficiently final. "Agency action" encompasses an agency's interpretation of the law. *Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 443 F.2d 689, 698 (D.C. Cir. 1971). Courts look at 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. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Lab'ys*, 387 U.S. at 151–52) (internal quotations omitted). Courts have held that "an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this

interpretation, is final agency action fit for judicial review." *Indep. Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929 (D.C. Cir. 1976).

Here, EPA has interpreted the Clean Water Act through its regulation. EPA went through notice and comment to adopt its TMDL and gave no indication that its decision was subject to further agency consideration or modification. *Abbott Lab'ys*, 387 U.S. at 149. Similar to *Abbott Laboratories*, the procedures enacted to establish this TMDL show EPA's decision is final because the agency would not waste time and resources conducting notice and comment rulemaking if it did not intend the decision to be final. *Id.* at 151 (Justice Harlan explaining that the regulation at issue was promulgated in a formal manner and in consideration of comments and thus is sufficiently final). Additionally, there is a direct and immediate legal effect on New Union because EPA's denial of New Union's TMDL requires New Union to begin implementing EPA's TMDL instead of its own. The TMDL has not been incorporated into New Union's planning process, nor enforced against any individual; however, farmers, homeowners, and industries will have reason to start limiting their phosphorus discharges in anticipation of the TMDL's implementation. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293 (3d Cir. 2015). Preparing for implementation will cost New Union's homeowners and businesses money and other resources. *Id.* Thus, this decision has a direct and immediate legal effect on New Union and its residents.

Because the three factors for fitness are satisfied, the issues before this Court are fit for review under the first ripeness prong.

Under the second ripeness prong, if judicial review is further postponed, New Union and EPA will suffer hardships because the state needs to develop an implementation plan which costs time, energy, and money. *Id.* It would be a waste of state resources to begin implementing its

own TMDL only for this Court to decide months down the road that New Union needs to implement EPA's TMDL. Additionally, it is impossible for New Union to assess how to grant permits to its residents and businesses because New Union is unsure which TMDL to follow. While New Union awaits this Court's decision, Lake Chesaplain continues to be pumped full of phosphorus because New Union is unsure whether it should implement its own TMDL or wait and implement EPA's. The longer this decision is delayed, the longer New Union's residents and tourism will suffer because of water pollution issues such as impacts to drinking water, impacts to fish and wildlife, and impacts to recreational activities.

This Court's delay also has a significant impact on New Union's businesses and industries because these entities will begin spending money and resources to implement best management practices under a possibly incorrect TMDL. The Third Circuit noted in *Farm Bureau* that if there is something wrong with a TMDL, it is better to know now rather than later. *Id.* at 293–94 (holding review of EPA TMDL was ripe for review); *See also City of Kennett, Missouri v. EPA*, 887 F.3d 424, 433 (8th Cir. 2018). New Union is better off knowing whether it should implement its own TMDL or EPA's TMDL now so that it can start effectively protecting its waters and its people.

Because the issues that follow are fit for review, and New Union will suffer hardship without this Court's definitive answer, this case is ripe for review.

II. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION TO REJECT EPA'S TMDL BECAUSE IT IS CONTRARY TO LAW AS AN INCORRECT INTERPRETATION OF THE TERM "TOTAL" IN "TOTAL MAXIMUM DAILY LOAD" UNDER § 303(d) OF THE CLEAN WATER ACT.

Although EPA's regulation defining TMDL has been in place for a significant time, when an agency applies a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority. *See* 5 U.S.C. § 704; *Dunn-*

McCampbell Royalty Int., Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997). Thus, New Union may properly bring its challenge as an "as applied" challenged because EPA improperly rejected New Union's TMDL based on the fact that it did not specify load and wasteload allocations. *See* 5 U.S.C. § 704.

The Clean Water Act states that "[e]ach State shall establish for the waters identified … the *total* maximum daily load, for those pollutants which the Administrator identifies …." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Under *Chevron*, an agency's interpretation of a statute will only be granted deference if: (1) Congress has not directly spoken to the precise question at issue; and (2) the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 842–43. If the intent of Congress is clear, the analysis ends because the court must give deference to the unambiguously expressed intent of Congress. *Id.* If the language is ambiguous then courts proceed to step two of the *Chevron* analysis and grant deference to an agency's statutory interpretation, unless the interpretation is arbitrary and capricious. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

A. Congress clearly expressed its intent in the Clean Water Act by using the word "total" in "total maximum daily load" and therefore, under step one of *Chevron*, EPA should not be granted deference.

EPA's interpretation of the Clean Water Act is not entitled to deference because the language of the statute clearly shows that Congress never authorized EPA to establish different pollutant loading allocations.

Congress authorized EPA to establish a "*total* maximum daily load" for impaired state waters under the Clean Water Act. 33 U.S.C. § 1313(d)(2) (emphasis added). Applying *noscitur a sociis* canon, the neighboring words further support that total means a single number because Congress used other singular words to describe the TMDL. *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 409 (2011) (applying *noscitur a sociis* to interpret "report"). Congress

clearly defined TMDL when it stated, "*such load* shall be established at *a level* necessary to implement . . . water quality standards." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). The language in the statute is clear and unambiguous. Using singular words like "such load," "a level," and "total" all indicate that New Union correctly established one single number in its TMDL, and EPA's imposition of different load allocations is contrary to Congress' clear intent. If Congress had considered anything other than a single number, it would have used plural words like "loads" and "levels" to mean multiple components. Instead, Congress chose the singular words which clearly shows it intended a state to establish a single number for a pollutant.

Circuit Courts have also found that a TMDL means one single value. In *Pronsolino*, the Ninth Circuit stated that a "TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue *from all combined sources*." *Pronsolino v. Nastri*, 291 F.3d 1123, 1127–28 (2002) (quoting *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995)) (emphasis added). In *Anacostia Riverkeeper*, the D.C. Circuit stated that TMDLs "specify *the absolute amount* of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 213 (D.C. Cir. 2010) (emphasis added).

EPA's rejection of New Union's TMDL because it failed to specify load and wasteload allocations is in clear violation of the explicit language of the Clean Water Act because New Union provided a singular load, level, or a total, as required by the Clean Water Act, and EPA cannot reject a state's TMDL unless it is insufficient. *See* 33 U.S.C. § 1313. Because Congress has clearly spoken, "that is the end of the matter." *Chevron*, 467 U.S. at 842–43. This Court "must give effect to the unambiguously expressed intent of Congress." *Id.* Therefore, this Court

should uphold the district court's decision to reject EPA's TMDL requirement of both load and wasteload allocations because it is contrary to Congress' explicit intent.

B. Even if this Court finds that the statute's language is ambiguous, EPA's interpretation is unreasonable, arbitrary, and capricious, and therefore fails *Chevron* step two.

If this Court finds "total" ambiguous, EPA's TMDL still fails the *Chevron* analysis because it is an unreasonable interpretation of the Clean Water Act and contradicts the plain meaning of "total," the ordinary meaning of "total," and the purpose of the Clean Water Act.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 175 (2009). As the Supreme Court recently recognized in *Bostock*, "only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms . . . we would risk amending statutes outside the legislative process reserved for the people's representatives." *Id.*

1. EPA's interpretation of "total maximum daily load" contradicts the phrase's plain meaning.

When analyzing an ambiguous statute, courts must first look to the plain meaning of the ambiguous language at the time the statute was enacted. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020). The Supreme Court has stated that dictionary definitions are useful aids to determine what an ambiguous word means. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–554 (2014).

Merriam Webster Dictionary defines "total" as "compromising or constituting a whole; absolute, utter; involving a complete and unified effort especially to achieve a desired effect." *Total*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-

webster.com/dictionary/total (last visited Nov. 13, 2021). Black's Law Dictionary defines "total" as, "1. Whole; not divided; full; complete. 2. Utter; absolute." *Total*, BLACK'S LAW DICTIONARY (2nd ed. 2001). It is clear from dictionary definitions that total is a single number constituting a whole, not a divided number. "Total" does not ordinarily mean divided parts of a whole. EPA's interpretation that "total" means both a load allocation number and a wasteload allocation number is unreasonable because it is contrary to the word's plain meaning. Because EPA's interpretation is contrary to the plain meaning of total, this Court should uphold the district court's rejection of EPA's TMDL.

2. EPA's interpretation of "total maximum daily load" contradicts the phrase's ordinary public meaning.

Courts interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment. *Bostock*, 140 S. Ct. at 1738 (2020). To interpret a statute any other way than the ordinary public meaning would be to deny the people the right to continue relying on the original meaning of the law that they have counted on to settle their rights and obligations. *Id.* (citing *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019)).

If you asked an individual coming out of a grocery store, "what is the *total* you spent on groceries today?" every individual would reply with the sum of all their groceries. No person would think to specify the cost of each item they purchased. If you asked someone with two dogs how many *total* dogs they have, they would respond and say, "two dogs." It would be unreasonable for someone to respond and say the total dogs they have are "one Labrador and one poodle." Lastly, if you asked someone at a cocktail party, "how many *total* drinks have you had tonight?" that individual would respond with a single number that represents the sum of all their drinks that night. No reasonable person would respond by listing each individual drink they consumed. An average and reasonable individual would understand the term "total" to mean a

single number that is the sum of individual components. It is unreasonable to interpret "total" as multiple components instead of one single value, its ordinary meaning.

Additionally, the Fifth and Ninth Circuits observe that "total" is a single number. In *Saratoga Resources, Inc.*, the Fifth Circuit held that "total" within the meaning "5% of Total Insurable Values" unambiguously meant the "aggregate sum" of insured value of the damaged properties and not the "total" of each individual property. *Saratoga Res., Inc. v. Lexington Ins. Co.*, 642 Fed.Appx. 359, 362 (5th Cir. 2016). In *Haggerty*, the Ninth Circuit upheld the district court's determination that "total assets" is unambiguous and means what the ordinary and plain meanings suggest and not that one type of intangible asset should be subtracted from the sum total. *Haggerty v. Fed. Ins. Co.*, 32 Fed.Appx. 251, 254 (9th Cir. 2002). Similarly, "total" in this case means the sum of all phosphorus polluter loads and both point and nonpoint sources.

Because there is only one plausible meaning of total and EPA's interpretation of total requires New Union to list out both wasteload allocations and load allocations, EPA's TMDL is contrary to the ordinary meaning of total. This Court should uphold the district court's decision to reject EPA's TMDL as it contradicts the ordinary meaning of total and is therefore, unreasonable.

3. <u>EPA's interpretation contradicts the purpose of the Clean Water Act's cooperative federalism provision.</u>

EPA's interpretation of the Clean Water Act offends the cooperative federalism structure of the Clean Water Act by undermining the state's power to determine how to achieve WQS and allowing EPA to regulate nonpoint sources, thus stripping New Union of its traditional and its statutorily mandated power. *See* 33 U.S.C. § 1251(b).

The Clean Water Act establishes a system known as cooperative federalism, where states and the federal government work in tandem to protect the country's waters. *Nat. Res. Council,*

Inc. v. EPA, 490 F.Supp.3d 190, 192 (D.C. Cir. 2020). However, in enacting the Clean Water Act, Congress was clear that states should maintain control over their waterways. Specifically, the Clean Water Act states that nothing in the statute shall "be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to [their] waters." 33 U.S.C. § 1370. Congress explicitly declared its policy to "recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

Under the Clean Water Act, states have the exclusive authority to regulate nonpoint sources. *Pronsolino*, 291 F.3d at 1128. States have this authority because nonpoint sources are related to land use activities, which traditionally, states have had the exclusive authority to oversee. *FERC v. Mississippi*, 456 U.S. 742, 768 n. 30 (1982). Nonpoint sources can include agricultural fields, construction activities, and timber harvesting and are regulated through zoning regulations and state permits, or land use regulations. Thus, nonpoint source regulation is essentially land use regulations because nonpoint sources include runoff from agricultural fields, construction, erosion, and timber harvesting. *Defs. of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005); *Pronsolino*, 291 F.3d at 1126.

EPA has interfered with New Union's right to regulate its land use by requiring New Union to set load allocations rather than a total maximum daily load for phosphorus. This TMDL will rob New Union of its meaningful participation in regulating its waters. *See* 33 U.S.C. § 1251. This is a slippery slope from EPA's allocation requirement to EPA requiring state and local governments to limit certain land uses, like agriculture and construction, to limit pollution. Allowing EPA to set New Union's allocations opens the gate for EPA to further restrict the states' control over their waters. The Ninth Circuit recognized this in *Pronsolino*, where the court

noted that there are federalism concerns when a TMDL specifies "the load of pollutants that may be received from particular parcels of land or describe what measures the state should take to implement the TMDL." *Pronsolino,* 291 F.3d at 1140. EPA is approaching this red flag with its rejection of New Union's TMDL and EPA's wasteload allocation requirement regulating nonpoint sources, or land use activities. EPA's TMDL is an attack on New Union's sovereignty and is a clear violation of Congress' expressed intent that states should maintain control over their waterways. *See* 33 U.S.C. § 1251(b); 33 U.S.C. § 1313.

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). If Congress had wished to override the cooperative federalism framework, Congress would have clearly stated that EPA must develop TMDL's for states. Instead, Congress directed states to establish TMDLs and authorized EPA to fill in the gaps when a state TMDL is inadequate. EPA has not provided an adequate reason for rejecting New Union's TMDL.

Additionally, cooperative federalism recognizes that states are in the better position to evaluate the best way to protect its waters, not EPA. New Union has first-hand knowledge of what pollutants discharge into Lake Chesaplain and from what sources, what its rivers are used for, whether fishing or recreation, and what industries are essential to New Union's economy. Allowing EPA to tell a state how to regulate their waters when New Union submitted a sufficient TMDL is unreasonable because the state is in a better position to evaluate their waters.

The District Court correctly found that EPA should not receive deference because EPA's interpretation of the Clean Water Act disregards Congress' grant of primary state responsibility over its water quality issues. Because EPA's interpretation of "total" to require New Union to list

out both wasteload allocations and load allocations is contrary to the delicate balance of cooperative federalism under the Clean Water Act, this Court should uphold the district court's decision and overturn EPA's TMDL.

4. EPA's interpretation is unreasonable because it raises constitutional concerns.

When a court is presented with two statutory interpretations, one of which would raise a constitutional concern, the court must adopt the interpretation that does not raise a constitutional concern. *Gomez v. United States*, 490 U.S. 858, 864 (1989).

EPA imposing its TMDL on New Union is a violation of the Tenth Amendment of our Constitution because it impedes on a right reserved solely for the states, land use regulations. U.S. CONST. amend. 10 (stating any power not delegated to the United States by the Constitution is reserved for the states). As discussed above, the states have the sole power to regulate land use within its borders. Thus, EPA imposing nonpoint source controls on New Union intrudes on New Union's land use power and violates the Tenth Amendment.

Additionally, EPA's interpretation raises separation of powers concerns, a cornerstone of our country. The United States was founded on the principle that the executive, legislative, and judicial branches must be separated to avoid an overly powerful federal government. THE FEDERALIST NO. 48 (James Madison). Congress created the Clean Water Act under its legislative power. EPA imposing a TMDL so contrary to Congress' clear intent is essentially the executive branch acting with legislative powers. This is unconstitutional. This Court must interpret the Clean Water Act to avoid constitutional problems. *See id.* Therefore, this Court should uphold the district court's decision to reject EPA's TMDL because it raises Tenth Amendment and separation of power concerns.

III. THIS COURT SHOULD UPHOLD EPA'S ADOPTION OF A PHASED ANNUAL POLLUTION LOADING REDUCTION BECAUSE IT IS A REASONABLE INTERPRETATION OF THE PHRASE "TOTAL MAXIMUM DAILY LOAD."

The Clean Water Act prescribes no timeframe to implement TMDLs, only that they must be expressed as a "total maximum daily load," while considering factors such as seasonal variation, flow rates, and water temperature. 33 U.S.C. §1313(d)(1)(C). EPA is tasked with overseeing the TMDL program and establishing basic guidelines surrounding the formulation of TMDLs. 33 U.S.C. § 1251(d). In its role of aiding states in implementing the Clean Water Act, EPA's regulations state that a TMDL may "be expressed in terms of either mass per time, toxicity, or other appropriate measure." 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. §130.2(i).

When an agency interprets a statute, a court must apply *Chevron* to determine if the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 843. An agency's interpretation of the language will only be given deference if: (1) Congress has not spoken directly to the precise question at issue; and (2) the agency's interpretation is reasonable. *Id.* at 842–43. If the court finds that the intent of Congress was unambiguously clear, the analysis ends, and the agency interpretation receives no deference. *Id.* If the court finds that the language is ambiguous, it will defer to the agency's interpretation unless it is arbitrary, capricious, unreasonable, or manifestly contrary to the statute. *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001).

A. EPA's interpretation of "total maximum daily load" as allowing an annual load is reasonable in light of the specific facts, context, and purpose of the Clean Water Act.

Two canonic rules should be applied when interpreting language in the context of a larger regulatory framework. First, when the court is determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure. *Nat'l Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001). Second, the statute must be

interpreted in a way that avoids absurd results. *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000).

1. The meaning of the phrase "total maximum daily load" is ambiguous in the context of the Clean Water Act's surrounding language and interpreting "daily" as its plain meaning, would produce absurd results.

The language of the Clean Water Act, specifically "daily" in "total maximum daily load," is ambiguous within the context of the statute under *Chevron* step one. The language of the Clean Water Act must be interpreted within the context of the entire statutory text and while keeping the statute's purpose in mind. *Muszynski*, 268 F.3d at 98. When "total maximum daily load" is interpreted in the context of the Clean Water Act, it is clear Congress left a gap and intended EPA to fill it. *Farm Bureau,* 792 at 295. Because "total maximum daily load" is not defined in the Clean Water Act, its meaning must be determined through statutory interpretation. *Muszynski*, 268 F.3d at 97.

In *Muszynski*, the Second Circuit found that "total maximum daily load" was susceptible to a broader range of meanings. *Id.* at 98. As the Second Circuit noted, Congress specifically wanted the states and EPA to consider "normal water temperatures, flow rates, seasonal variations, . . . and the dissipative capacity of the identified waters or parts thereof." 33 U.S.C. § 1313(d)(1)(D). It would be unreasonable for Congress to require EPA to consider all these factors yet only allow EPA to establish a daily number to encompass these factors. *Muszynski*, 268 F.3d at 99. Additionally, if "total maximum daily load" was interpreted to require states to set a daily limit for phosphorus, there would be absurd results.

Effective regulation of TMDL pollutants requires EPA to determine how the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody. *Id.* For example, highly toxic pollutants may require a daily limit because of harmful impacts. Conversely, phosphorus lends itself to a different limit because the amounts a

waterbody can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately. *Id.*

Here, a daily measure of phosphorus would be inappropriate because phosphorus concentrations vary both seasonally and annually. Lei Huang et al., *Effects of Internal Loading on Phosphorus Distribution in the Taihu Lake Driven by Wind Waves and Lake Currents*, 219 ENV'T POLLUTION 760, 760 (2016). Phosphorus is particularly affected by seasonal temperatures and wind. *Id.* Because seasonal differences exist, phosphorus must be regulated in a broader manner to account for these differences, like an annual loading allowance. It would be absurd to use a daily rate for phosphorus because the daily amount of phosphorus entering the water between summer, fall, winter, and spring varies greatly.

The Clean Water Act recognizes that EPA has a particular expertise and requires EPA to analyze each pollutant and work with states to achieve WQS. 33 U.S.C. § 1313(d)(1)(D). EPA has extensively studied phosphorus and based on its expertise, determined the best way to regulate the pollutant, due to seasonal changes, is through an annual limit rather than a daily limit. *Id.*; EPA, *The Issue*, https://www.epa.gov/nutrientpollution/issue (last updated Aug. 31, 2021) [hereinafter EPA, *The Issue*]. If a pollutant lends itself to regulation on an annual and seasonal basis, EPA should be afforded the discretion to set effluent limits as appropriate for that pollutant. If this court required New Union and EPA to express its phosphorus TMDL in terms of "daily" loading, it would fly in the face of the purpose and structure of the Clean Water Act, which requires the implementing body to consider each pollutant on an individual basis and consider specific factors.

Accordingly, reading "daily" in its plain language produces an absurd result, contrary to the purpose and structure of the Clean Water Act. Because the plain meaning of "total maximum

daily load" would yield absurd results, this Court must uphold EPA's interpretation if it is reasonable.

2. The Lake Chesaplain annual loading TMDL is reasonable, under *Chevron* step two, considering the uncertainty surrounding phosphorus pollution.

In response to the D.C. Circuit's decision in *Friends II*, holding that "total maximum daily load" allowed only TMDL levels to be set at daily limits, EPA released its own guidance document on establishing TMDLs. EPA, ESTABLISHING TMDL "DAILY" LOADS IN LIGHT OF THE DECISION BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT IN *FRIENDS OF THE EARTH, INC. V. EPA, ET AL.*, NO. 05-5015, (APRIL 25, 2006) AND IMPLICATIONS FOR NPDES PERMITS (2006) [hereinafter EPA, ESTABLISHING TMDL "DAILY" LOADS]; *Friends of the Earth, Inc. v. EPA* (*Friends II*), 446 F.3d 140 (D.C. Cir. 2006). The purpose of this guidance memorandum was "to clarify EPA's expectations concerning the appropriate time increment used to express" TMDLs. EPA, ESTABLISHING TMDL "DAILY" LOADS. Though "EPA *recommends* that all future TMDLs . . . be expressed in terms of daily time increments," the agency states that it does not find the phrase "total maximum daily load" unambiguous and that it "believes that there is some flexibility in how the daily time increments may be expressed." *Id.* (emphasis added). Further, EPA advises that states may submit non-daily loading totals if they provide a reasoned explanation as to why that loading total is preferred. *Id.*

Since EPA released the guidance document merely as a recommendation and not as a binding rule, and clearly grants the states deference to determine whether a TMDL is best expressed in daily or annual increments, given the particular circumstances of the state's affected water body and specific pollutants, it is reasonable for New Union's TMDL to be expressed as an annual load.

Algae blooms and phosphorus levels in Lake Chesaplain are highest during the summer months because algae thrive in warmer temperatures. EPA, *The Issue*. Additionally, warmer temperatures during the summer also cause agricultural crops to flourish. Farmers use fertilizers containing phosphorus to help their crops prosper, thus, warmer seasons typically have an uptick in phosphorus loading, unlike colder months. *Id.* Because phosphorus can vary greatly from a winter day to a summer day, it does not make sense to calculate phosphorus on a daily basis. Rather, phosphorus is best calculated annually so that a state, working with EPA, can properly account for seasonal variations in loading. EPA reasonably concluded that phosphorus is best calculated annually for the Lake Chesaplain Watershed, and this Court must defer to the agency's interpretation and expertise.

B. "Phased" implementation of the Lake Chesaplain TMDL is valid under the Clean Water Act as EPA's interpretation is reasonable and "phased" implementation is necessary to achieve water quality standards in the face of uncertainty.

1. The issue of whether EPA's phased approach is valid under the Clean Water Act is moot because EPA abused its discretion in finding New Union's TMDL insufficient based on New Union's use of a single numbered TMDL.

Under Article III of the Constitution federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). If it becomes impossible for a court to grant effective relief to a prevailing party, a "case or controversy," for purposes of Article III, no longer exists and the court lacks subject matter jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

If this Court upholds the district court's rejection of EPA's TMDL because the load and wasteload allocations requirement is contrary to the Clean Water Act, the issue of whether a phased TMDL is a valid interpretation of the Clean Water Act will be moot. This Court will not be able to grant CLW relief because the phased approach will not exist and New Union will have

the opportunity to implement its own TMDL of 120 mt annual maximum of phosphorus, without a phased approach. *See* Record at 10. Therefore, if this Court correctly determines EPA's load and wasteload allocations contradict the "total" language in "total maximum daily load," this Court should dismiss CLW's phased TMDL issue as moot.

2. If the issue is not moot, EPA should be afforded deference as EPA's interpretation of the Clean Water Act is reasonable under the "one-step" doctrine.

Under the "one step" doctrine, an agency can postpone regulation to give it more time to study the science underlying its action and determine the best regulatory approach. *City of Las Vegas v. Lujan,* 891 F.2d 927, 935 (D.C. Cir. 1989). Since agencies have great discretion to treat a problem partially, a court should not strike down a regulation if it is a first step towards a complete solution. *Id.* Incremental regulation is especially appropriate in response to evolving economic and technological conditions. *Nat'l Ass'n of Broads. v. FCC*, 740 F.2d 1190, 1210–11 (D.C. Cir. 1984). At a minimum, the agency must articulate: (1) what it believes the statute requires; and (2) how it intends to achieve that goal. *Lujan,* 891 F.2d at 935.

According to EPA guidance, a "phased" TMDL is a TMDL "that for scheduling reasons need[s] to be established despite significant data uncertainty and where the state expects that the loading capacity and allocation scheme will be revised in the near future as additional information is collected." EPA, MEMORANDUM: CLARIFICATION REGARDING "PHASED" TOTAL MAXIMUM DAILY LOADS (2006). EPA states that in implementing phased TMDLs, "the time frame in which WQS will be achieved is based on a planned staged implementation of controls" and the appropriateness of the timeframe is made on a *case-by-case basis*. *Id.*(emphasis added).

In its guidance, EPA gives the example of a phased TMDL being utilized "for phosphorus in a lake watershed where there are uncertain loadings from major land uses," much akin to the ongoing issues with phosphorus pollution in Lake Chesaplain. *Id.* There are several

evolving economic and technological conditions in the Chesaplain Watershed. Specifically, EPA and New Union do not know what BMP will be the most successful at reducing nonpoint source phosphorus pollution. Additionally, there are uncertain economic concerns from the nonpoint source polluters. Thus, a phased approach accounts for this lack of "knowledge concerning the relationship between effluent limitations and water quality," and will require ever-evolving BMP requirements as sources evolve. 33 U.S.C. § 1313(d)(1)(C).

In this case, EPA recognizes that the Clean Water Act requires that Lake Chesaplain achieve WQS, or 0.014 mg/l of phosphorus per year. Record at 8. EPA then spelled out its plan of meeting this water quality standard by a 35% reduction of phosphorus discharges phased in over five years. Record at 10. The use of the "one step" doctrine in this situation is especially beneficial because as discussed above, there are many unknowns about BMPs and New Union needs to assess the precise regulatory approach to meet this water quality standard.

Because EPA explained what the Clean Water Act requires and EPA has a clear plan to achieve that goal, EPA using the "one-step" doctrine is valid and this Court should not strike down the TMDL just because it is a first step towards a complete solution.

IV. EPA'S ADOPTION OF A NONPOINT SOURCE POLLUTION REDUCTION CREDIT PROGRAM IS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION BECAUSE THE AGENCY CONSIDERED ALL RELEVANT INFORMATION AND CAME TO A REASONABLE CONCLUSION THAT ALLOWS NEW UNION THE FLEXIBILITY TO DETERMINE WHAT PROGRAMS WILL WORK BEST TO REDUCE POLLUTION AND ACCOMPLISH THE GOALS OF THE CLEAN WATER ACT.

Because EPA is applying its regulatory standards to the record before the agency, the "arbitrary and capricious" standard of review applies. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). A court reviewing the meaning or applicability of the terms of an agency action shall hold unlawful or set aside the agency action, findings, and conclusions if the action is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law. 5 U.S.C. § 706. The reviewing court's scope of review is narrow, and it cannot substitute its judgment for that of the agency. *State Farm*, 463 U.S. at 43.

Judicial review under this standard is deferential and a court must simply ensure that the agency has acted within a zone of reasonableness, specifically that the agency has reasonably considered the relevant issues and has reasonably explained its decision. *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009)). To satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

In evaluating whether an agency action is arbitrary and capricious, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). Thus, a court may only set aside an agency action if the agency: (1) has relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

A. EPA's credit program is not arbitrary and capricious or an abuse of discretion because EPA has not relied on factors which Congress has not intended it to consider, EPA has not failed to consider an important aspect of the problem, EPA has not offered an explanation for its decision that runs counter to the evidence before the agency, nor is its action implausible.

1. EPA did not rely on factors that Congress had not intended the agency to consider because the TMDL aligns with Congress' cooperative federalism goals while protecting the Nation's waters in a cost-effective way.

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's water." 33 U.S.C. § 1251. Congress emphasized the best way to achieve this goal is through a cooperative federalism framework, stating that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). Further, to accomplish this goal, the Clean Water Act grants EPA the authority to regulate point sources through National Pollutant Discharge Elimination System (NPDES) permitting and grants states the right to regulate their nonpoint sources. 33 U.S.C. §§ 1311(a); *Pronsolino*, 291 F.3d at 1128.

In carrying out the goals of the Clean Water Act, EPA developed a policy on pollution credit trading to accelerate and "incentivize implementation of technologies and land use practices that reduce nonpoint pollution in our Nation's water." EPA, UPDATING THE ENVIRONMENTAL PROTECTION AGENCY'S (EPA) WATER QUALITY TRADING POLICY TO PROMOTE MARKET-BASED MECHANISMS FOR IMPROVING WATER QUALITY (2019). EPA strongly favors trading programs, as it is a cost-effective way to give flexibility to the states in achieving WQS and environmental benefits. *Id.* The credit trading program provides states an incentive to regulate their nonpoint sources, a pollution source solely in the wheelhouse of the states. *See* 33 U.S.C. § 1329. Without this approach, EPA can only limit point source pollutants while nonpoint sources can freely pollute unless a state steps in. States are often resistant to implement BMPs

for nonpoint sources because there is usually political opposition due to the costs. *See* Record at 9. The credit trading program is in line with the Clean Water Act's goals because it gives states and businesses an incentive to reduce their nonpoint sources, thus, ensuring the integrity of a state's water quality.

Additionally, this flexibility that is given to the states to implement their own credit trading program is necessary to maintain the balanced, cooperative federalism structure that the Clean Water Act requires. In developing its credit trading policy, EPA has ensured that the states have the flexibility needed to implement the TMDL program in a way that benefits the unique and distinct integrity of each state's waters. In this case, EPA's TMDL provides New Union with information concerning possible BMPs for nonpoint sources that might be used to achieve compliance with WQS. EPA, in acting within its long-standing policy, allowed New Union to implement the trading program in a way that would benefit from New Union's specialized knowledge of its own waters and economy. The TMDL, allowing credit trading for point sources and nonpoint sources, fits squarely in what Congress intended EPA to do, as EPA supplied New Union with the information that would allow for cost-effective and flexible options to restore and maintain the chemical, physical, and biological integrity of the Nation's water.

2. EPA did not fail to consider an important aspect of the problem because in considering the entire record before it, EPA set overarching guidance principles for New Union to implement.

In adopting the nonpoint source credit program, EPA considered the entire record that was before DOFEC, including scientific reports and public comments. Record at 10. In coming to its decision, EPA reviewed: the Chesaplain Commission's report detailing that the maximum phosphorus levels in the water for a healthy lake ecosystem would be 0.014 mg/l; the Chesaplain Supplemental Report, detailing that the hog CAFOs contributed substantial phosphorous levels to the watershed; DOFEC's TMDL implementation process including nonpoint source

reductions through BMP programs; and public comments from New Union citizens regarding the required nonpoint source reductions. *Id.* 8–9. Lastly, in front of EPA was the public comments from EPA's notice and comment procedure in promulgating the TMDL at issue. *Id.* Additionally, EPA conducted its own notice and comment procedure in promulgating its TMDL. *Id.* at 9.

The substantial amount of information that EPA reviewed in the record shows that EPA's action was thoughtful and based on complete and adequate information. Additional information in the form of affidavits that New Union has taken no steps to implement the credit trading program was not in the record before EPA and therefore, this Court may not consider this new information. *Dep't of Com. v. New York*, 139 S.Ct. 2551, 2573 (2019) (citing *Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (explaining that courts are bound to the information on the existing administrative record when evaluating an agency decision).

Moreover, even if this information was in front of EPA during its decision-making process, the Clean Water Act clearly states that EPA is responsible for equipping the states with a planning and information program, not with an implementation program. 33 U.S.C. § 1313. Implementing and enforcing nonpoint source reductions are purely a state's right. *City of Arcadia v. EPA*, 265 F.Supp.2d 1142, 1145 (N.D. Cal. 2003). In reviewing the supporting documentation in the record and allowing for a credit trading program, EPA's actions fall directly in line with the Clean Water Act; namely, EPA evaluated the information in front of it, came up with a TMDL that allows for flexible and cost-effective methods of reducing both point source and nonpoint source pollution, and left it up to New Union to implement the credit trading program within its borders.

3. EPA has not offered an explanation that runs counter to the evidence before it because EPA's conclusion is well reasoned and supported by the evidence.

EPA has not offered an explanation that runs counter to the evidence before it because the evidence before EPA shows that nonpoint sources cause serious impacts to Lake Chesaplain and are difficult to regulate. Nonpoint sources contribute about 24 mt of phosphorus more than point sources. *See* Record at 8–9. Moreover, major sources of phosphorous pollution, such as hog CAFOs and septic systems, are exempt from the Clean Water Act permitting requirements. 33 U.S.C. § 1362(14); Record at 7. These major phosphorus polluters are not regulated by the usual NPDES permits under the Clean Water Act and will continue to pollute the waters of Lake Chesaplain unless the state decides to implement BMPs. By applying the flexible and cost-effective incentives through the credit trading program, EPA allows New Union to implement the TMDL program to best address its phosphorous problem. New Union can use the credit program to incentivize nonpoint source polluters to reduce the amount of phosphorous they discharge because they can receive money from point sources. The credit program allows for more ways for New Union to reduce its total phosphorous pollution outside of just point sources.

Additionally, EPA had in front of it the public comments from the DOFEC rulemaking process, including comments from lakefront homeowners, the point source facilities, and CAFOs complaining that New Union could not force them to reduce their pollution. *See* Record at 9–10. EPA considered these comments and reasoned that a more flexible credit approach would be more successful in reducing New Union's phosphorus pollution. EPA used all the information in front of it to conclude that the credit incentive program is the best way for New Union to reduce its phosphorus pollution.

4. EPA's BMP credit program is not implausible and is a clear application of EPA's expertise.

As discussed previously, Congress has given EPA the authority to prescribe TMDLs for a state, when the state's is insufficient, based on its expertise. 33 U.S.C. § 1313(e). EPA's TMDL for New Union supports the goals of the Clean Water Act and is not implausible because EPA understands phosphorus pollution and New Union's need for a more flexible approach to ensure its phosphorous levels will meet the required 0.014 mg/l level. Additionally, EPA' decision to apply the BMP credit program was made from the administrative record, which included public comments objecting to DOFEC's requirement of nonpoint source reduction in its original proposed TMDL. EPA's TMDL took those comments into consideration and made a more flexible approach by giving New Union and its polluters incentives to reduce their phosphorous levels, which could not have been done through the normal TMDL process. Overall, this program will help reduce phosphorus pollution to Lake Chesaplain.

B. EPA's 1991 guidance document is not law because it has not gone through the notice and comment rulemaking process and thus, EPA did not need New Union's reasonable assurance.

Although EPA has a guidance document that recommends EPA determine that there is a "reasonable assurance" from a state that reductions will be achieved before adopting a nonpoint source BMP pollutant credit program, this guidance document is not controlling. *See* EPA, GUIDANCE FOR WATER QUALITY BASED DECISIONS: THE TMDL PROCESS (1991). This guidance document has never gone through the notice and comment process. Record at 16. There is nothing in the regulatory definition of "TMDL" that requires EPA to have "reasonable assurance" that the reductions will be achieved. *See* 40 C.F.R. § 130.2(i). Because the document has gone through no formal rulemaking procedures, it is not law and should not be controlling on EPA or New Union. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002).

Additionally, EPA adopted notice and comment procedures when promulgating the regulation authorizing credit BMPs for nonpoint source pollution reductions. Record at 10. If EPA wanted to make the "reasonable assurance" standard a requirement, it would have also gone through the formal notice and commenting process to amend its regulation to include this standard. *Id.* Because the guidance document is not law, and EPA acted reasonably and within the goals and text of the Clean Water Act, EPA's decision to include BMP credits in New Union's TMDL was not arbitrary and capricious or an abuse of discretion.

CONCLUSION

New Union respectfully requests that this Court affirm the district court's grant of summary judgment in favor of New Union and vacate EPA's determination to reject the New Union Lake Chesaplain TMDL.