TEAM #23

Non-Measuring Brief

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,
and
THE STATE OF NEW UNION,
Plaintiff-Appellee-Cross Appellee
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

ON APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had jurisdiction to review this case under 28 U.S.C. § 1331 because the actions brought by New Union and Chesaplain Lake Watch related to a federal question under the judicial review provisions of Administrative Procedure Act Section 702.

After the District Court's Summary Judgment Order, New Union, Chesaplain Lake Watch, and EPA filed timely appeals pursuant to Fed. R. App. P. 4. This Court has appellate jurisdiction over this case under 28 U.S.C. § 1291, which states that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The District Court's grant of summary judgment, see R. at 16, is a final decision reviewable by this Court on appeal. *See, e.g.*, *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

STATEMENT OF THE ISSUES

I. Courts must dismiss a case for a lack of ripeness when dismissal would allow for needed factual development and cause no hardship to the parties. The Chesaplain total maximum daily load ("TMDL") remains unimplemented by New Union, and two polluters seek administrative hearings to receive an exception from compliance. Are the following issues ripe when the TMDL remains unimplemented and could soon be rendered moot?

II. The Supreme Court's decision in *Chevron* requires federal courts defer to reasonable interpretations of ambiguous statutes. Because the Clean Water Act did not explicitly forbid EPA interpretation of the term "total" within the TMDL definition, EPA promulgated a regulation that defined "total" as the sum of allowable point and nonpoint

source pollution. Does EPA's interpretation of "total" contravene the high deference established by *Chevron*?

III. *Chevron* also requires federal courts defer to permissible constructions of statutes silent on particular issues. EPA framed the Chesaplain TMDL as a phased annual percentage reduction in phosphorous loadings. Did EPA permissibly construct the Clean Water Act when establishing the Chesaplain TMDL?

IV. Guidance documents without the force of law do not bind agency decision-making. EPA looks to "reasonable assurance" that a state's Best Management Practice ("BMP") will reduce nonpoint source pollution. Did EPA act arbitrary and capricious when it took credit of New Union's BMP without "reasonable assurance"?

STATEMENT OF THE CASE

I. Statement of Facts

The Clean Water Act. The issues presented concern the Clean Water Act ("CWA"). The overarching goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The CWA pursues this goal by delegating certain responsibilities to the states and certain roles to EPA.

Per Clean Water Act Section 303, states are required to establish their own water quality standards ("WQS") and submit to EPA an impaired waters list when waterbodies fail to meet those standards. *See* CWA § 303(a), 33 U.S.C. § 1313(a). If a waterbody is deemed impaired, Clean Water Act Section 303(d) mandates the state submit to EPA a TMDL for pollutants in the water "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety . . . ." CWA § 303(d), 33 U.S.C. § 1313(d). Under Clean Water Act Section 303(d)(2), EPA can reject a state's proposed TMDL and establish its own to meet

the WQS. *See* CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). But even if EPA does so, the states are the only party with the power to implement a TMDL. *See id.*

Lake Chesaplain's Water Quality. Lake Chesaplain, the impaired waterbody at issue, enjoyed serene water quality prior to the turn of the 21st century. R. at 7. Fishers and boaters enjoyed the clear and fruitful waters, outdoorsmen blazed the many trails of Chesaplain State Park, and homeowners and vacationers alike sought refuge in the lakefront communities. *Id.* The 1990s, however, brought economic pressures that impacted the lake. *Id.*

Between 1990 and 2000, ten concentrated animal feeding operations ("CAFOs") established business in the watershed. *Id*. A large slaughterhouse followed suit, constructing a facility north of Lake Chesaplain in the city of Chesaplain Mills. *Id.* Due to the recreation activities Lake Chesaplain supported, "second home" construction increased in the vacation communities on the lake's east shore. *Id.* Alongside the residential and industrial developments, Chesaplain Mill's sewage treatment plant ("STP") unloads directly into the lake. *Id.*

As a result of the increased economic and physical pressures, Lake Chesaplain's water quality and clarity have markedly decreased. Algae mats line the surface of the water, giving off an offensive odor. *Id.* Fish are less plentiful, and the beaches are no longer safe for swimming and recreation. *Id.* Property values in the once-prominent vacation communities have since dwindled. *Id.*

Though Lake Chesaplain once enjoyed a classification fit only for New Union's cleanest waterbodies, in 2008 New Union created the Lake Chesaplain Study Commission ("the Chesaplain Commission") to analyze the water. R. at 8. In 2012, the Chesaplain Commission released a report, explaining that the excess algae growth on Lake Chesaplain's surface was indicative of eutrophication. *Id.* The Chesaplain Commission discovered that excess phosphorous

in the lake caused the algae growth. *Id*. Subsequently, the Chesaplain Commission determined that a proper amount of phosphorous in a healthy Lake Chesaplain could not exceed 0.014 milligrams per litre ("mg/l"), while the current levels of phosphorous in the lake were between 0.020 mg/l and 0.034 mg/l. *Id.*

New Union's Response to Lake Chesaplain's Impaired Water. In 2014, the New Union Department of Fisheries and Environmental Control ("DOFEC") included Lake Chesaplain on its impaired waters list sent to EPA, noting that the level of phosphorous was substantially higher than the water quality criteria of 0.014 mg/l of phosphorous. *Id.* DOFEC, however, did not submit a TMDL for Lake Chesaplain along with the impaired waters list. *Id.* Chesaplain Lake Watch ("CLW"), an environmental organization and Plaintiff-Appellee in this matter, threatened to sue both EPA and New Union for this failure. *Id.* CLW, however, agreed to abstain from filing suit if New Union established a TMDL. *Id.*

In 2016, the Chesaplain Commission reported that Lake Chesaplain could withstand up to 120 metric tons ("mt") of phosphorous loadings per year. *Id.* The Chesaplain Commission determined that phosphorous loadings in 2015 totaled 180 mt from the following sources:

Point Sources:
- Chesaplain Mills STP: 23.4 mt
- Chesaplain Slaughterhouse: 38.5 mt

Nonpoint Sources:
- CAFO Manure Spreading: 54.9 mt
- Other agricultural sources: 19.3 mt
- Septic tank inputs: 11.6 mt

Natural sources:
- 32.3 mt

R. at 8-9.

In 2017, DOFEC publicly noticed a proposed TMDL ("DOFEC TMDL") to phase in over a period of five years. R. at 9. The reduction in phosphorous discharges would apply to both point and nonpoint sources as a phased percentage load reduction from the 180 mt baseline in

2015. *Id.* As such, the DOFEC TMDL proposed a 7% reduction for the first year, 14% for the second, 21% for the third, 28% for the fourth, and 35% for the fifth. *Id.* Along with the TMDL, DOFEC proposed BMPs for nonpoint source discharge reductions. *Id.*

EPA Involvement. Members of the community objected to the DOFEC TMDL. *Id.* Homeowners, the Hog CAFOs, the slaughterhouse, and Chesaplain Mills objected to increased costs associated with the load reductions. R. at 9-10. Thus, in 2018, DOFEC abandoned the DOFEC TMDL and adopted a TMDL ("CAFO TMDL") with only a 120 mt annual limit on phosphorous loadings. R. at 10. EPA, pursuant to Clean Water Act Section 303(d)(2), rejected the CAFO TMDL and adopted the 2017 DOFEC TMDL (henceforth "Chesaplain TMDL"). *Id.*

II. Nature of the Proceedings

In early 2019, CLW and New Union filed separate actions against EPA, challenging various aspects of EPA's rejection of the 2018 CAFO TMDL and subsequent adoption of the Chesaplain TMDL. R. at 4, 11. New Union sought a declaration that EPA's rejection of the CAFO TMDL was invalid. *Id.* CLW sought a declaration that the Chesaplain TMDL did not sufficiently protect Lake Chesaplain and was subject to nullification under the Administrative Procedure Act ("APA"). R. at 5. The District Court consolidated the actions in March of 2020. R. at 10.

The Ripeness Dispute. Before the District Court, EPA argued that the challenges mounted against the Chesaplain TMDL were not ripe for judicial review. R. at 11. Finding the claims ripe, the District Court emphasized that the Chesaplain TMDL "contemplates specific NPDES permit limits for the point source discharges, which . . . New Union will be required to implement." R. at 12. The District Court additionally noted it did not need further factual

development to adjudicate the challenges lodged by New Union and CLW. *Id.* Finally, the court held that both New Union and CLW would incur hardship without prompt adjudication. *Id.*

The "Total" Dispute. New Union challenged EPA's rejection of the CAFO TMDL for failure to include wasteload allocations ("WLAs") and load allocations ("LAs") that allocated the phosphorous reductions between point and nonpoint sources. *Id.* The District Court analyzed EPA's actions under *Chevron.* Under *Chevron* Step One, which requires courts to look to the plain meaning of a statute in assessing an agency's interpretation, the District Court found that EPA's interpretation of "total" was contrary to law. The court held that the CWA "does not admit of a construction that would require the total to include a specification of proposed (not existing) components of the total." R. at 13. Thus, the District Court granted summary judgment to New Union, finding EPA's rejection of the CAFO TMDL because of a lack of specified WLAs and LAs contrary to law. The District Court subsequently found 40 C.F.R. § 130.2(i), EPA's regulation requiring a state's TMDL to allocate the maximum daily load between point, nonpoint, and natural sources, contrary to law. R. at 14.

The Phased Annual Percentage Reduction Dispute. CLW challenged EPA's framing of the Chesaplain TMDL as a phased annual percentage reduction in phosphorous loadings. R. at 11, 14. Particularly, CLW asserted that (1) expressing phosphorous loading limits in annual rather than daily terms violated Clean Water Act Section 303(d), and (2) EPA did not adopt a TMDL at the level needed to achieve WQS due to the phased nature of the Chesaplain TMDL. R. at 14. Again, the court analyzed EPA's actions under *Chevron*, and again concluded that Step One rendered EPA's actions contrary to law. *First*, the court found that "an annual limit is not a daily limit, and an annual limit does not allow for seasonal variations." R. at 14-15. *Second*, the District Court agreed with the D.C. Circuit that TMDLs cannot be expressed in percentage

reductions. R. at 15 (citing *NRDC v. EPA*, 301 F. Supp. 3d 133 (D.D.C. 2018)). Thus, the District Court granted summary judgment to CLW regarding its framing challenge to the Chesaplain TMDL. R. at 15.

The "Reasonable Assurance" Dispute. CLW asserts that EPA cannot take credit for nonpoint source BMP reductions because "there must be a 'reasonable assurance' that the reductions will in fact be achieved." *Id.* CLW argued that New Union has taken no concrete steps to require BMP implementation. R. at 16. The court agreed with CLW but held that because EPA never adopted the "reasonable assurance" standard as a rule, EPA was not bound by the standard. *Id.* The District Court also noted that the Chesaplain TMDL solely provided guidance for New Union to ultimately implement the TMDL. *Id.* Thus, the District Court granted summary judgment to EPA. *Id.*

Issues on Appeal. All parties appealed from the District Court's Order. In sum, the District Court found the issues ripe for review, granted summary judgment to CLW on the "total" and phased annual percentage reduction disputes, and granted summary judgment to EPA on the "reasonable assurance" dispute.

STANDARD OF REVIEW

This Court must review a ripeness issue within a subject-matter jurisdiction determination under a *de novo* standard. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013). The TMDL issues on which the District Court granted summary judgment should also be reviewed *de novo*, applying the deference standard established by *Chevron* because CLW and New Union's TMDL challenges are based on statutory construction. *See Del. Dep't of Nat. Res. v. U.S. Army Corp of Eng'rs*, 685 F.3d 259, 269 (3d. Cir. 2012). This

Court must then review the agency's "reasonable assurance" determination under the arbitrary and capricious standard. *See United States v. Bean*, 537 U.S. 71, 77 (2002).

SUMMARY OF THE ARGUMENT

The District Court incorrectly held that: (1) New Union and CLW's claims were ripe for judicial review; (2) EPA's interpretation of "total" in TMDL violated Clean Water Act Section 303(d)(2); and (3) EPA's construction of the Chesaplain TMDL as a phased annual percentage reduction violated Clean Water Act Section 303(d)(2). The District Court, however, correctly held that EPA did not act arbitrary and capricious in adopting a credit for New Union's anticipated BMPs despite a lack of "reasonable assurance."

First, the claims brought by New Union and CLW are not ripe for judicial review. When addressing ripeness, courts first consider whether dismissal would cause hardship to the parties. Dismissing this case would cause no hardship to New Union or CLW because EPA cannot implement the Chesaplain TMDL, meaning EPA can impose no obligation or penalties to either party as a result of dismissal. Courts also address the fitness of the issues for judicial review, asking whether pending administrative action interferes with the issues presented and whether the court would benefit from additional factual development. Both factors cut against ripeness in this case because ongoing administrative action could except two main polluters from the Chesaplain TMDL, and New Union implementation would better allow this Court to consider the legal claims presented. While courts do also consider the finality of agency action (which is present here), the lack of hardship and lack of the issues' fitness for review mandates this Court dismiss the matter under the ripeness doctrine.

Second, EPA's interpretation of "total" in TMDL demands deference under the *Chevron* standard. At *Chevron* Step One, courts must ask whether the plain language of a statute expressly

forbids agency interpretation. Clean Water Act Section 303(d)(2) uses the term "total" but neither explains its meaning nor forecloses further agency development. Rather, the term is a proto-typical example of a word Congress expected the agency to flesh out. And at *Chevron* Step Two, which the District Court failed to consider, courts must ask whether the agency's interpretation was a reasonable construction of the statute. EPA interpreted "total" to include point and nonpoint source pollutants within a TMDL, which is a natural progression of the Clean Water Act to fill a void that would otherwise exist because TMDLs are only necessary once other point source controls failed.

Third, EPA's construction of the Chesaplain TMDL as a phased annual percentage reduction in phosphorous loading also demands deference under *Chevron*. Again, the District Court erred in failing to reach *Chevron* Step Two because the Clean Water Act does not explicitly foreclose EPA from framing the Chesaplain TMDL as a phased annual reduction scheme. Under Step Two, the Chesaplain TMDL's framework is a permissible construction of Clean Water Act Section 303(d) because the load reductions can be transformed into daily limits using simple arithmetic. Further, the Chesaplain TMDL promotes the goals and purposes of the Clean Water Act because annual framing is best suited to address unique properties.

Fourth, and finally, EPA did not act arbitrary and capricious because it need not require "reasonable assurance" before adopting a credit for New Union's proposed BMPs. While legislative rules bind administrative agencies, the "reasonable assurance" standard is an interpretive rule that does not bind EPA. Courts ask whether an administrative rule is binding on its face or in its effect when determining whether it is interpretative or legislative. The "reasonable assurance" standard is not binding in its effect because EPA cannot force New Union to adjust its implementation plan even if it finds a lack of "reasonable assurance."

Moreover, the binding nature of the "reasonable assurance" standard on its face is not determinative of its designation as interpretative or legislative. But even if this Court deems the "reasonable assurance" standard a legislative rule, EPA did not act arbitrary and capricious in the standard's application.

ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER NEW UNION AND CLW'S CLAIMS BECAUSE THEY ARE NOT RIPE FOR JUDICIAL REVIEW.

Ripeness requires that administrative action results in concrete effect. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The ripeness doctrine prevents courts from deciding "abstract disagreements" better left for academics. *Id.*; *see* David Floren, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 Or. L. Rev. 1107, 1118 (2001) (defining abstract disagreements as "theoretical debates" stripped of facts). Courts generally analyze ripeness by looking to the degree of hardship parties will incur by a court refusing to a hear a case, and how fit the issues are for judicial review. *Abbott Labs.*, 387 U.S. at 149. When analyzing the fitness of issues for judicial review, courts consult whether judicial intervention would inappropriately interfere with administrative action, and whether more factual development would help a court's resolution of the issues. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Some courts also consider whether an issue concerns final agency action. *See, e.g.*, *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986).[1]

The issues presented today are not ripe for this Court to review. *First*, EPA's actions have no effect on New Union or CLW because EPA's adoption of a TMDL cannot have impact

[1] Note that EPA does not dispute that Appellees have standing, including injury-in-fact. Ripeness, however, is a separate inquiry. *See City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1157 n.17 (N.D. Cal. 2003) ("Injury-in-fact is a concept that relates to the issue of standing, not ripeness.") (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

without state implementation. And because New Union has not implemented the Chesaplain TMDL, this Court's dismissal would cause no hardship to either party. *Second*, the issues are not fit for judicial review because:

1. Judicial review interferes with pending administrative action since the slaughterhouse and STP seek an administrative hearing for a compliance exception;
2. Dismissal allows further factual development for this Court to better consider the matters at hand; and
3. Final agency action does not outweigh administrative interference and the need for further factual development.

A. Delayed Review Would Cause No Hardship to New Union and CLW Because EPA Cannot Implement the TMDL.

Hardship exists when a party must decide between regulatory compliance or penalty. *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 80 (D.D.C. 2013) (citing *NRDC v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1998)). But ripeness requires more than a showing of "hardship" due to regulatory uncertainty or costs associated with future regulatory actions. *Food & Water Watch*, 5 F. Supp. 3d at 80. Here, New Union and CLW cannot claim hardship when the Chesaplain TMDL imposes neither a legally binding obligation nor penalties for non-compliance.

The CWA provides EPA with supervisory powers regarding water quality management but makes clear that EPA cannot ultimately implement a TMDL. EPA, in illustration, can supersede certain water standards proposed by the states. *See, e.g.*, CWA § 303(b)(1), 33 U.S.C. § 1313(b)(1) (WQS); CWA § 303(b)(2), 33 U.S.C. § 1313(b)(2) (revised or new WQS); CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2) (TMDLs). But once EPA accepts or establishes a TMDL, the CWA leaves implementation up to New Union through the continuing planning process ("CPP"). The CPP provision—CWA § 303(e), 33 U.S.C. § 1313(e)—only gives EPA the power to assess New Union's CPP but not implement its own. The delegation of implementation to the states coincides with the wider idea of cooperative federalism, which mandates states serve as the

acting party with EPA as supervisor. *Cf.* 40 C.F.R. § 131.4(a) (describing states as the "*establishing*" party) (emphasis added), 40 C.F.R. § 131.5(a) (describing EPA as the "*reviewing*" party) (emphasis added).

Other courts find that TMDLs are not ripe for review until state implementation. *See Mo. Soybean Ass'n v. EPA*, 289 F.3d 509, 513 (8th Cir. 2002) (finding a suit regarding an EPA TMDL not ripe until actually "developed and *implemented*") (emphasis added); *Food & Water Watch*, 5 F. Supp. 3d at 80 (finding a dispute about a TMDL not ripe because no hardship exists as an EPA TMDL "impose[s] no legal obligation on the plaintiffs—or any other actor for that matter"); *City of Arcadia*, 265 F. Supp. 2d at 1156-57 (rejecting ripeness because a TMDL does not "impose any obligations"); *San Joaquin River Grp. Auth. v. EPA*, No. 2:11-CV-03243-JAM-KJN, 2012 WL 7809066, at *1 (E.D. Cal. May 29, 2012) (questioning, and rejecting, ripeness because "the State will choose 'both *if* and *how*'" it will implement the TMDL) (emphasis added) (quoting *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002)).

The other federal court decisions reflect the Supreme Court's cautiousness against advisory opinions that rule on issues not actually ripe for adjudication. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[F]ederal courts will not give advisory opinions.") (internal quotation marks and citation omitted). The District Court violated that principle. As stated by the Eight Circuit—which held that until a TMDL was "implemented" it was not ripe—the mere possibility that a state might implement EPA's TMDL "highlights the speculative nature of any future regulation." *Mo. Soybean Ass'n*, 289 F.3d at 513. Here, EPA's TMDL is purely "speculative" until this Court can see how New Union conducts implementation. In sum, until New Union takes this matter from an academic exercise to reality, this Court should find the matter not ripe because neither party will incur hardship as a result of dismissal.

B. Issues Regarding the Chesaplain TMDL Are Not Fit for Judicial Review.

An issue's judicial fitness turns on whether a decision from this Court would interfere with ongoing administrative action or interrupt needed factual development. *Ohio Forestry Ass'n*, 523 U.S. at 733. And in the context of an administrative agency, courts also assess whether final agency action exists under the APA. *See* 5 U.S.C. § 704 (providing that "final agency action" is "subject to judicial review"); *see also Bravos v. Green*, 306 F. Supp. 2d 48, 55 (D.D.C. 2004) (analyzing final agency action in a ripeness dispute). While final agency action exists here under the APA, the issues are nonetheless not ripe for judicial review due to intervening administrative hearings and a need for further factual development.

First, pending administrative action makes the Chesaplain TMDL dependent on future events, requiring this Court to abstain from decision as a matter of judicial economy. Two main Lake Chesaplain polluters—the STP and slaughterhouse—both "sought administrative hearings on [the TMDL's potential requirements] based on the cost of compliance." R. at 10. If the administrative judge ultimately excepts both polluters from compliance with the Chesaplain TMDL, the TMDL will need immediate and severe modification. Until this Court knows the Chesaplain TMDL could be implemented against those two polluters, a decision from this Court would be premature.

In *City of Arcadia*, a district court held under similar circumstances that pending administrative action made a TMDL dispute not ripe for adjudication. 265 F. Supp. 2d at 1142. In that case, a California city sued EPA regarding a TMDL notwithstanding a pending state board decision concerning the TMDL's abolishment. *Id.* at 1158-59. Under those circumstances, the court held that "it is certainly possible that the State Board will approve additional regulations that alleviate much of the burden on Plaintiffs." *Id.* at 1160. Just the same, this Court

considers a TMDL that might look completely different in a matter of months because the pending administrative hearings could render the Chesaplain TMDL null and void.

Second, further factual development will help this Court resolve the dispute. This Court must consider whether it will "benefit from further factual development of the issues presented." *Ohio Forestry Ass'n,* 523 U.S. at 733. Allowing for sufficient factual development "significantly advance[s] our ability to deal with the legal issues presented . . . ." *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 82 (1978). The Supreme Court in fact held that factual development can be necessary even when a court considers a purely legal issue. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (stating that while the Plaintiff brought a facial challenge to a regulation the claim rested on "specific characteristics" of the issue to support their position).

This Court should wait until New Union implements the Chesaplain TMDL because the claims presented in this case relate in part to successful implementation. In illustration, the second issue—the interpretation of "total" in TMDL to include point and nonpoint source polluters—must be analyzed under *Chevron*.[2] *Chevron* Step Two, in turn, requires some consideration into the policy and purpose of the underlying statute in deciding whether an agency's interpretation is reasonable. *See, e.g.*, *Am. Farm Bureau Fed'n v. EPA,* 792 F.3d 281, 307 (3d Cir. 2015). How can this Court analyze whether an agency's interpretation is reasonable as applied to the purpose of the CWA without seeing whether its implementation works? It cannot. Holding otherwise incentivizes states to handicap courts by refusing to apply agency's interpretations in good faith.

[2] *See infra* p. 16 and note 4.

Third, and finally, the fact that EPA promulgated a final agency action does not *necessarily* render this case ripe. Courts do consider whether an agency action is "final" within purview of 5 U.S.C. § 704. *See, e.g.*, *Bravos*, 306 F. Supp. 2d at 55. Final agency action, however, is not determinative of ripeness. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (stating although there was final agency action, "further factual development" would advance understanding the legal issues presented). In fact, then-Chief Judge Wald for the D.C. Circuit even commented that "[t]his finality requirement is generally viewed as separate from ripeness doctrine because it is based on the language of APA section 704 . . . ." Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 Tulsa L.J. 221, 252 (1996). In sum, final agency action does not outweigh the lack of hardship, the presence of intervening administrative hearings, and the need for further factual development. Thus, this Court should find the issues not ripe for judicial review.

II. *CHEVRON* REQUIRES THIS COURT DEFER TO EPA'S INTERPRETATION THAT "TOTAL" IN "TOTAL MAXIMUM DAILY LOAD" INCLUDES POINT & NONPOINT SOURCE POLLUTION.

The District Court's rejection of EPA's definition of "total" cuts against precedent and notions of administrative deference. At bottom, the issue is whether EPA's definition of "total" in 40 C.F.R. § 130.2(i), which defines "total" in TMDL as allocations of point and nonpoint source pollutants, stands under judicial scrutiny.[3] This Court, in review, must apply *Chevron* to the appellee's as-applied administrative challenge. *See* 5 U.S.C. § 704 (allowing as-applied challenges); *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th

[3] Note that the technical definition of TMDL uses "LAs" and "WLAs." *See* 40 CFR § 130.2(i). The regulations in turn define LA and WLAs as pollution allocated to nonpoint and point sources, respectively. *See* 40 CFR § 130.2(g) (LA definition); 40 CFR § 130.2(h) (WLA definition). For clarity, in place of LAs and WLAs, this Brief instead uses the terms point and nonpoint sources pollution in reference to allocations made in the Chesaplain TMDL.

Cir. 1997) (explaining that long time periods do not bar suit to an as-applied challenge). But this Court, too, must understand the context of the issue—New Union objects to a TMDL that New Union itself proposed and only reneged on account of intensive lobbying from impacted polluters. *See* R. at 10 (explaining how New Union rejected its own TMDL and "adopted the Hog CAFO's position").

But aside from New Union's own hypocrisy, this Court must apply *Chevron* when deciding whether EPA appropriately defined "total" in its definition of TMDL.[4] Because *Chevron* applies, this Court must first analyze the regulation under *Chevron* Step One. Step One requires this Court ask whether Congress explicitly defined "total" in TMDL, or foreclosed EPA from further defining that term. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If this Court finds that Congress ambiguously defined "total" and left room for EPA interpretation, *Chevron* Step Two applies. *Chevron* Step Two requires this Court ask whether EPA's interpretation of TMDL is reasonable. *Id.* This Court should find that Congress expected EPA to further explain the meaning of "total" and that EPA's interpretation is entirely consistent with the CWA.[5]

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[4] *Chevron* deference applies when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). *First*, Congress expressly gave EPA the responsibility to administer the CWA. *See* CWA § 101(d), 33 U.S.C. § 1251(d). *Second*, EPA passed the regulation here concerning the definition of TMDL through final agency action. R. at 10. *Chevron* therefore applies. *Accord Am. Farm Bureau Fed'n*, 792 F.3d at 296-97 (applying *Chevron* to the same issue to the same regulation at question).

[5] Giving deference to EPA regarding its TMDL regulations will also maintain consistency with other federal courts. *See, e.g.*, *Am. Farm Bureau*, 792 F.3d at 285-86 (stating that "many circuit and district courts have defined TMDLs to accord with EPA's regulation") (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 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.*

A. The Clean Water Act Does Not Foreclose EPA's Interpretation of "Total" Under *Chevron* Step One.

Congress has not spoken to the issue at question. In a *Chevron* Step One analysis, this Court must ask whether the language of the CWA foreclosed agency interpretation. *Chevron*, 467 U.S. at 842-43. Courts must in turn analyze the plain language and basic purposes of the CWA when asking whether Congress foreclosed agency interpretation. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."). Regarding EPA's definition of TMDLs, Congress expected EPA to promulgate regulations smoothing out the rough edges of the CWA.

First, Congress expected EPA to further define the parameters of the CWA. The CWA expressly gives EPA the right to promulgate regulations as needed to carry out the purposes of the CWA. *See* CWA § 501(a), 33 U.S.C. § 1361(a). Congress explained that the purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). EPA carries out that charge. In fact, unless "expressly provided" otherwise, Congress mandated EPA to "*administer* [the CWA]." CWA § 101(d), 12 U.S.C. § 1251(d) (emphasis added). In other words, the CWA is a proto-typical example of Congress laying out guideposts, and an administrative agency defining what everything actually means. *See generally Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (stating *Chevron* reflects the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency").

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

Second, the District Court's interpretation of the "plain language" of the CWA does violence to its purposeful ambiguity. The District Court cursorily held that "Congress meant total when it said total," and that "total" would not require any specification of "components of the total." R. at 13. But the District Court's circular reasoning that "total means total" conflicts with the Supreme Court's statements that administrative agencies must ultimately interpret legislation passed by Congress. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (stating that agencies are "the authoritative interpreter" of relevant statutes). And here, the context of "total" shows how Congress expected EPA to further define the term in its duty as "authoritative interpreter."

The statutory context of "total" proves its ambiguity. Nothing in the CWA explains how "total" relates to "total maximum daily load," and without EPA's interpretation, "total" would be surplusage due to the lack of any definition elsewhere in the CWA. Addressing this exact issue, the Third Circuit held that "[a]pplying the canon against surplusage, a plausible understanding of 'total' is that it means the sum of constituent parts of the load." *Am. Farm Bureau Fed'n*, 792 F.3d at 297. And because the CWA does not define those constituent parts, and does not foreclose EPA definition, EPA rightly promulgated regulations to that effect.[6] The District Court correctly noted that EPA merely has supervisory powers over implementation, which is in contrast to the Clean Air Act ("CAA"). *Compare* CWA § 303(e), 33 U.S.C. § 1313(e) (limiting EPA implementation powers to that of supervision), *with* CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1) (allowing EPA implementation). But that comparison does not cut against EPA

[6] Note the Third Circuit addressed a second reason why Congress would expect EPA to treat "total" as a term of art because other areas of environmental regulation use "total" as a modifier to a statutory scheme. *See Am. Farm Bureau*, 792 F.3d at 297-98 (explaining that in 33 U.S.C. § 2238(d)(1)(C)(i), EPA must consider the "total quantity of commerce" which in context requires "EPA to consider and express a complex mix of activities that affect its judgment").

interpreting "total" to include point and nonpoint source pollutants because that power stems from EPA's TMDL, not implementation, power. *See* CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2).

Third, Congress explicitly adopted EPA's definition in later amendments to the CWA. After EPA promulgated its regulation defining "total" in TMDL, Congress added CWA § 303(d)(4), 33 U.S.C. § 1313(d)(4), which specifically refers to a "total maximum daily load or other waste load allocation." The Third Circuit in *American Farm Bureau Federation*, held that the new provision supports a "strong argument that Congress not only agreed to its definition of TMDL as the sum of load and waste load allocations, but also affirmatively incorporated the EPA's rule in an addition to the statute." 792 F.3d at 308; *see also* Michael M. Wenig, *How "Total" Are "Total Maximum Daily Loads"? —Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act*, 12 Tul. Env't L.J. 87, 179 (1998) ("Congress impliedly accepted [the TMDL definition] in the 1987 Clean Water Act Amendments, which contain an express reference to 'waste load allocations' adopted under section 303(d)."). Thus, against the Appellee's argument that EPA's interpretation is "contrary to the plain meaning of the term 'total,'" Congress explicitly adopted by reference EPA's interpretation of "total" set forth in 40 C.F.R. § 130.2(i). And even more, the District Court's cursory note that EPA's definition "violat[es] the presumption against . . . regulatory [expansion]" cannot hold water if Congress adopted such interpretation. R. at 14 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014)).

B. EPA's Interpretation of "Total" is a Permissible and Reasonable Construction of the Clean Water Act Under *Chevron* Step Two.

Chevron Step Two requires this Court ask whether EPA made a reasonable interpretation of the CWA. *See Chevron*, 467 U.S. at 843. This Court can in turn consider the legislative history of the CWA to understand whether EPA's interpretation was reasonable. *See Coyomani-*

Cielo v. Holder, 758 F.3d 908, 914 (7th Cir. 2014) (stating courts may look to legislative history during *Chevron* Step Two). The standard and deference given is high, prohibiting this Court from deciding against EPA unless its interpretation is manifestly contrary to the CWA. *See Chevron*, 467 U.S. at 843 n.11 (stating a "reasonable choice" is not necessarily one the court would make); *see also Mead*, 533 U.S. at 227 (stating unreasonable interpretations must be "manifestly contrary" to the statute). Regarding TMDLs, the statutory scheme shows not only that EPA's definition is reasonable, but also that EPA's definition supports the policy of the CWA by mitigating Lake Chesaplain's poor water quality.

The CWA makes clear that TMDLs are only necessary once point sources cannot fix the problem, meaning that EPA's determination to include nonpoint sources as a part of "total" is a reasonable interpretation of the CWA. In illustration, a state must only propose a TMDL once certain waters cannot reach adequate water quality with only point source pollution controls. *See Sierra Club*, 296 F.3d at 1025 ("If the regulation of point source discharges does not achieve the necessary level of water quality, [TMDLs] come into play."). TMDLs would serve no purpose if EPA could only include maximum daily loads for point source polluters given that the CWA only requires TMDLs after point source pollution control is deemed inadequate. *See Pronsolino*, 291 F.3d at 1139 (explaining how "TMDLs must be calculated with regard to nonpoint sources of pollution" because it would be otherwise "impossible" to reach adequate water quality). EPA's interpretation that TMDLs include both point and nonpoint source allocations under the definition of "total" is therefore a natural progression of the CWA.

In addition to the interpretation's reasonableness, EPA's definition of "total" furthers the policy of the CWA. Congress made clear that the CWA's purpose is to maintain our Nation's water. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (explaining how the CWA is

"animated by a shared objective" to restore and protect our Nation's waters) (citing CWA § 101(a), 33 U.S.C. § 1251(a)). TMDLs serve that purpose. As explained, TMDLs only become necessary when EPA cannot adequately control water quality through point source pollution measures. TMDLs therefore aid in combating polluted bodies of water once EPA and states have already taken other measures to no avail. *See Sierra Club*, 296 F.3d at 1025 (stating that EPA's definition of TMDL "tie[s]" together all sources of pollution to effectuate water change). *See generally Am. Farm Bureau*, 792 F.3d at 309 ("The EPA has carried out [the goal of the CWA] by publishing approximately 61,000 TMDLs with a level of detail commensurate with the challenge of cleaning and maintaining our waters.").

And the necessity of TMDLs towards furthering the purpose of the CWA is present in this case. Lake Chesaplain used to enjoy "excellent" waters that "attracted recreational boaters and fishers" in addition to supporting "vacation communities" around the lake. R. at 7. Today, however, algae forms in mats; fish populations decline; swimming holes are blacklisted; and property owners watch home values plummet. *See id.* Without the Chesaplain TMDL that includes nonpoint source polluters like CAFO manure spreaders, there is *zero* possibility the water will return to its former glory. EPA has always recognized and communicated this reality—that TMDLs are not administrative surplusage but rather required to combat pollution. *See* Water Quality Planning and Management, 50 Fed. Reg. 1,774 (Jan. 11, 1985) ("[I]t is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated.") With Lake Chesaplain and the purpose of the CWA in mind, EPA's interpretation of the CWA is more than reasonable. It is *necessary*.

III. *Chevron* Also Requires This Court Defer to EPA's Framing of the Chesaplain TMDL as a Phased Annual Percentage Reduction.

The District Court erred in determining the Chesaplain TMDL is invalid under Clean Water Act Section 303(d). The court erroneously granted summary judgment to CLW, crediting its argument that the Chesaplain TMDL is invalid because it is expressed in annual terms and does not reflect an adoption of a TMDL at the level necessary to immediately assure achievement of water quality standards. R. at 14-15. The lower court's ruling erred in two respects. *First*, the plain meaning of Clean Water Act Section 303(d) does not bar EPA's framing of the Chesaplain TMDL as a phased annual percentage reduction. *Second*, EPA's interpretation of Section 303(d) was a reasonable and permissible construction of the CWA. As such, the District Court erred in not evaluating the Chesaplain TMDL under a complete *Chevron* analysis and subsequently by not deferring to EPA's interpretation of the statute.[7]

A. The Clean Water Act Does Not Foreclose Framing TMDLs as Phased Annual Percentage Reductions Under *Chevron* Step One.

The District Court erroneously determined that the Chesaplain TMDL is invalidated by the plain meaning and structure of the CWA. After reciting the text of Section 303(d)(1)(C), the District Court dismissed any ambiguities in one sentence, stating "[a]n annual limit is not a daily limit, and an annual limit does not allow for seasonal variations." R. at 14-15 (citing *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006)). The District Court erred in determining that the language of Section 303(d) resolves, without further analysis, the issues CLW took with the Chesaplain TMDL.

Under *Chevron*, when "the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction

[7] *See supra* note 3 (explaining the mechanics of a *Chevron* analysis).

of the statute." 467 U.S. at 843. *First*, there is no debate that Section 303(d) is silent on the particular issues CLW points to regarding the Chesaplain TMDL, as the statute defines a TMDL as a load "necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). *Second*, the language of Section 303 as a whole supports the contention that EPA plays a vital role in interpreting the statute. *See e.g.*, *id.* (stating that the TMDL shall be established "for those pollutants which the *Administrator* identifies") (emphasis added); 40 C.F.R. § 131.5 (explaining EPA's authority under the CWA generally). Thus, built into the statute is a recognition of EPA's expertise in interpreting statutes governing its regulation of TMDLs. As such, the District Court erred in completing their *Chevron* analysis after Step One.

Other federal courts have recently held that the definition of TMDL in Section 303(d) is ambiguous, deferring to EPA's interpretation as a result.[8] In *American Farm Bureau Federation v. EPA*, the district court found that "EPA's interpretation [of Section 303(d)] is entitled to *Chevron* deference, because the *CWA does not precisely define a TMDL*, the definition of which is complex and technical." 984 F. Supp. 2d at 320 (emphasis added). The Third Circuit affirmed the district court's determination that the statutory definition was ambiguous and warranted a full *Chevron* analysis. *See Am. Farm Bureau Fed'n*, 792 F.3d at 298. Thus, as courts have found in various respects, the definition of a valid TMDL in Section 303(d) is far from precise.

B. EPA's Framing of the Chesaplain TMDL Is a Permissible and Reasonable Construction of the Clean Water Act Under *Chevron* Step Two.

Under *Chevron* Step Two, this Court must analyze whether EPA's interpretation of Section 303(d) constitutes a permissible construction of the CWA. *See Chevron*, 467 U.S. at 843.

[8] *See supra* note 4 (listing cases in which Section 303(d)'s definition of TMDL was found to be imprecise).

This Court must "defer to [EPA's] interpretation as long as it is reasonably consistent with [Section 303(d)]." *Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289, 310 (M.D. Pa. 2013) (citing *Mead*, 533 U.S. at 229). As previously noted, this Court should only find that the Chesaplain TMDL is impermissible if it is "manifestly contrary" to the CWA. *See Mead*, 533 U.S. at 227. Furthermore, when analyzing EPA's interpretation of the TMDL requirements under *Chevron* Step Two, this Court should "refrain from substituting [EPA's] interpretation with its own." Ryan S. Anderson, Note, Anacostia Riverkeeper, Inc. v. Wheeler*: The D.C. District Court Deepens the Split over Whether the Term "Total Maximum Daily Load" Is Ambiguous*, 34 Tul. Env't L.J. 371, 374 (2021) (citing *Chevron*, 467 U.S. at 840-43).

The Chesaplain TMDL reflects a permissible construction of the CWA as it is not "manifestly contrary" to Section 303(d). Historically, courts have been more willing to find EPA interpretations permissible when the issue is "highly technical and complex." *Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 282 (3d Cir. 2002); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703-04 (1995). Crafting a valid TMDL is exactly the sort of "highly technical . . . matter that Congress does not often decide itself, but delegates to specialized agencies to decide." *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 90 (2007); *see also Del. Dep't of Nat. Res. v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 283-84 (3d Cir. 2012) (discussing the CWA's complexity and technicality generally). As explained below, both components of CLW's arguments fail under the CWA and supporting case law. *First*, expressing the Chesaplain TMDL as a phased annual percentage reduction is permissible. *Second*, EPA's framing of the Chesaplain TMDL serves the goals and purposes of the CWA.

Under the CWA, EPA's interpretation of the Chesaplain TMDL was reasonable and permissible. The Chesaplain TMDL specifies the annual percentage reduction from the 180 mt

baseline over the next five years: 7%, 14%, 21%, 28%, and 35% respectively. R. at 9. The District Court took issue with the annual percentage reductions, noting that a TMDL "does not mean a *percentage* reduction in loadings," rather a maximum daily discharge. R. at 15 (emphasis added) (citing *NRDC v. EPA*, 301 F. Supp. 3d 133 (D.D.C. 2018)). Yet, simple arithmetic allows for the phased annual percentage load reductions to be expressed in *daily* terms rather than *annual* terms. For example, the 7% reduction for the first of the five-year structure from the 180 mt baseline would mean a limit of 167.4 mt of phosphorous next year. Expressed daily, this would mean a daily average maximum load of roughly 0.46 mt of phosphorous. As this 0.46 mt is merely a daily *average*, it would be entirely possible for New Union "to implement the applicable water quality standards with seasonal variations." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (requiring the TMDL to allow for "seasonal variations"); *see* CWA § 303(e)(3)(F), 33 U.S.C. § 1313(e)(3)(F) (relegating implementation of TMDL implementation to the states). This rudimentary mathematic formula can be applied to each of the five years' percentage reductions. Repetition is not necessary.

Further, in *NRDC v. Muszynski*, the Second Circuit agreed with EPA that "a daily measure of *phosphorus* would be inappropriate given that *phosphorus* concentrations vary seasonally and annually." 268 F.3d 91, 99 (2d Cir. 2001) (emphasis added); *see also* 40 C.F.R. § 130.2(i) (explaining that "TMDLs can be expressed in terms of either *mass per time*, toxicity *or other appropriate measure*") (emphasis added). The Second Circuit not only found that construing the TMDL as an annual load reduction is a permissible construction of Section 303(d), but also that it was a *more appropriate* framing than a daily limit, as it better appeased the requirement of seasonal variation. *See id*. (noting that phosphorous concentrations in waterbodies are seasonally affected by temperature, density, and wind). The Second Circuit thus

addressed both issues that the District Court in this case found with the Chesaplain TMDL. First, the Second Circuit explained that expressing the TMDL in annual rather than daily terms is a permissible construction of the CWA. And second, the Second Circuit emphasized that annual terms are better suited given phosphorus's properties. This Court should follow the logic of the Second Circuit on this issue.

Nevertheless, CLW contends, and the District Court held, that a five-year phased annual percentage reduction is invalid under the CWA as "section 303(d)'s direction . . . does not admit a loading standard that will not achieve water quality standards until five years hence." R. at 15. The District Court opined that under *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976), EPA essentially "grant[ed] a five-year extension [to New Union] for achievement of water quality standards when the statutory deadline has long since passed." R. at 15. The statutory deadline the District Court discussed stems from Clean Water Act Section 301, which states that limitations needed to meet water quality standards must have been achieved by July 1, 1977. *See* CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). The District Court's reliance on the statutory deadline is flawed in one major respect. Even if EPA were to have established a TMDL expressed in daily terms, the limitation necessary to meet water quality standards would have nevertheless been established long past the 1977 statutory deadline. Thus, given that the statutory deadline was decades prior to the adoption of a TMDL for Lake Chesaplain, *any* TMDL would be an "extension for the achievement of water quality standards." R. at 15.

Other circuits recognize the inherent fallacy associated with CLW's argument. For example, in *American Farm Bureau Federation*, the Third Circuit credited EPA's construction of a TMDL with an "anticipat[ion] that 60% of its proposed actions will be complete by 2017, with all pollution measures in place by 2025." 792 F.3d at 292. The Third Circuit thus approved of a

TMDL that would not achieve water quality standards immediately, but rather in multiple years' time. Further, the District Court in this case referenced no case law dated after 1976 in support of its position that the July 1977 statutory deadline is to be rigidly enforced against TMDLs that may not immediately meet water quality standards.

The Chesaplain TMDL comports to the CWA's established purpose and goal of promoting long-term solutions to water pollution. In *Muszynski*, the Second Circuit explained that ambiguous text "should be placed in the context of the entire statutory structure." 268 F.3d at 98 (citing *United States v. Dauray*, 215 F.3d 257, 262 (2d Cir. 2000)). Here, the Chesaplain TMDL's phased annual percentage reduction is in-line with Congress's objective of establishing an "all-encompassing program of water pollution regulation" by creating a "*comprehensive long-range policy*." *Arkansas v. Oklahoma*, 503 U.S. 91, 107 n.12 (1992) (emphasis added) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)); *see also Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1527-28 (9th Cir. 1995) (noting that EPA has "broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution"). Further, by establishing the Chesaplain TMDL, EPA promulgates Congress's goal that EPA "shall administer" the CWA. CWA § 101(d), 33 U.S.C. § 1251(d). Thus, both Congress and the judiciary have recognized the importance of EPA establishing long-term pollution reduction plans.

At bottom, the District Court erred in finding the CWA's plain language adequate to address the technical and complex nature of the TMDL challenges in this case. Thus, the District Court erred in concluding their *Chevron* analysis with Step One. Under *Chevron* Step Two, an annual phased percentage reduction scheme is a permissible construction of the CWA and furthers the goals of the statute. Therefore, this Court should defer to EPA's annual framing of

the Chesaplain TMDL and reverse the District Court's grant of summary judgment to CLW on this issue.

IV. EPA DID NOT ACT ARBITRARY OR CAPRICIOUS BECAUSE THE "REASONABLE ASSURANCE" STANDARD IS A NON-BINDING INTERPRETATIVE RULE.

Legislative rules bind administrative agencies like EPA because they determine people's rights and obligations. *Chamber of Com. v. DOL*, 174 F.3d 206, 212 (D.C. Cir. 1999) (quoting *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)). Courts must vacate rules that fail to follow proper notice and comment requirements. *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003); *see Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (stating that agencies must include public notice and comment to pass legislative rules). But the APA makes clear that agencies are allowed to create non-binding interpretative rules, or guidance documents, without notice or comment. *See* 5 U.S.C. § 553(b)(A) (stating that "interpretive rules" and "general statements of policy" do not require notice and comment); *see also Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015).

Courts ask if a rule has the effect of the "force of law" when determining whether it is legislative or interpretative. *See GE v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002). Rules have the "force of law" when the text "appears on its face binding," or "is applied by the agency in a way that indicates it is binding." *Id.* (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988)); *see* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1355 (1992) ("If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may

not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures.").

The CWA provides that a TMDL must be "established at a level necessary to implement the applicable water quality standards." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). When considering whether a TMDL can establish sufficient water quality, EPA looks to "reasonable assurance" that the BMPs or other nonpoint source reduction plans will effectively reduce LAs to the level necessary to achieve the desired water quality standards. *See Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 326. In turn, WLA sources and NPDES permits rely upon the "reasonable assurance" of BMP's or a proposed implementation plan's effectiveness. *Id.* "Reasonable assurance," however, is merely an interpretive rule used to evaluate New Union's proposed implementation plans. The District Court, therefore, did not err when it held that EPA did not need "reasonable assurance" to take credit because the standard does not have the "force of law" and thus is not binding on New Union or EPA. R. at 16. And if this Court finds that "reasonable assurance" is a binding legislative rule, it must find that EPA, nevertheless, did not act arbitrary or capricious.

A. "REASONABLE ASSURANCE" IS A NON-BINDING INTERPRETIVE RULE BECAUSE IT HAS NO BINDING EFFECT.

CLW argues that EPA has the obligation of determining if New Union's BMPs provide "reasonable assurance" of effectiveness. This contention, however, is necessarily in contradiction with New Union's statutory authority. Denying New Union's implementation plan for lack of "reasonable assurance" would impose a burden on the state to change its implementation plans. But EPA does not have control over how a state chooses to implement after a TMDL has been established, and thus has no statutory authority to make judgment calls on the sufficiency of New Union's implementation plans. *See* CWA § 303(e)(3)(F), 33 U.S.C. § 1313(e)(3)(F). EPA does

not require "reasonable assurance" in New Union's plan to reduce nonpoint source pollution, but merely uses the assurance to evaluate New Union's proposed plans. *See Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 326 (stating that the "reasonable assurance" standard is merely a mechanism for determining WLAs and LAs, not a metric for approving or disapproving proposed implementation plans). Because "reasonable assurance" is not necessary for a plan to be implemented, the standard does not bind EPA. *See* U.S. Dep't Just., Attorney General's Manual on the Administrative Procedure Act (1947), at 30 n.3 (explaining that interpretative rules or policy statements are "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.").

The CWA confirms that "reasonable assurances" are merely another form of EPA supervision. States are responsible for establishing an impaired waters list and setting TMDLs for those waters. *See* CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (impaired waters list); CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (TMDLs). But EPA has discretion to disapprove and establish its own impaired waters list or TMDL. *See* CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3); CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). When considering whether a TMDL can establish sufficient water quality, EPA looks to "reasonable assurance" that the BMPs will effectively reduce LAs to the level necessary to achieve the desired WQS. *See Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 326. In *City of Arcadia*, the court noted that a "TMDL does not, by itself, prohibit any conduct or require any actions [but rather] each TMDL represents a goal that may be implemented by adjusting discharge requirements." 265 F. Supp. 2d at 1144. Accordingly, while EPA can supervise a TMDL, it does not have control over implementation. *See Sierra Club*, 296 F.3d at 1030 ("The consent decree clearly and explicitly places a number of duties on EPA, including the requirement to establish TMDLs on a basin approach if Georgia

fails to do so, but it just as clearly does not require EPA to develop implementation plans for those TMDLs once they are established."); *see also Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 326 (stating that the "reasonable assurance" standard helps "a TMDL writer to decide *how* to apportion loadings between point and nonpoint sources under the TMDL cap") (emphasis added).

The application of the "reasonable assurance" standard differs in many respects from legislative rules. In *GE v. EPA,* the D.C. Circuit vacated a legislative rule because it failed to meet public notice and comment requirements. 290 F.3d at 377. The rule at issue required applicants to conform with one of two approaches prescribed by an EPA "interpretive" rule. *Id.* at 384. The court reasoned that because the rule had the effect of imposing an obligation on the applicants, it had the "force of law," making it a legislative, not interpretive, rule. *Id.* at 385. Unlike the rule in that case, EPA cannot require New Union to adjust its implementation plan if it finds that "reasonable assurance" is not met, making the standard not "determinative" of New Union's "rights." *Pac. Gas & Elec. Co.* 506 F.2d at 38. In practice the "reasonable assurance" rule cannot bind New Union and therefore is not a legislative rule, and thus EPA need not have "reasonable assurance" before adopting a credit.

Concededly, the 1991 EPA guidance document asserts on its face that in order to take credit for nonpoint source BMP pollutant reduction, there must be a "reasonable assurance" that the reduction will in fact be achieved. *See* U.S. Env't Prot. Admin., Guidance for Water Quality Based Decisions: The TMDL Process (1991), at 15 (stating that "[w]here there are not reasonable assurances, under the CWA, the entire load reduction must be assigned to point sources."). The guidance document appears to impose a duty on New Union to either ensure that its implementation plan has a "reasonable assurance" of effectiveness or adjust accordingly. The

language of a rule, however, is not determinative of its designation as an interpretative or legislative rule. *See* Lindsay J. Nichols, *D.C. Circuit Invalidates EPA Document as "Binding on its Face"*, 30 Ecology L.Q. 793, 796 (2003) (noting that "whether a particular agency [rule] was binding frequently depended not on the document's language, but on whether the agency had relied on the document in enforcement actions."); *see also Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-21 (D.C. Cir. 1998) (reasoning that EPA had not relied on preamble statements in its enforcement actions despite the preamble statements appearing to bind EPA and relevant parties).

Rendering a rule binding based solely on its language "undermines [EPA's] ability to use guidelines and similar documents to explain environmental regulations in precise, practical terms." Nichols, *supra* at 796; *see also* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263, 295-96 (2018) ("If [the Court] take[s] to firm a stand against language that states a view confidently, agencies might respond by equivocating or hedging too much in their policy statements, a result that could impair their capacity to use [rules] to communicate their expectations and give useful advice . . . ."). Furthermore, courts tend to focus on the effect of the rule, rather than what the rule purports to require, when determining if it is interpretative or legislative. *See generally Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995) (focusing primarily on a rule's binding effect when determining if the rule is interpretative or legislative). Thus, despite what the 1991 EPA guidance document asserts, the "reasonable assurance" standard's non-binding effect is more crucial in determining whether it is interpretative.

B. THIS COURT SHOULD REGARDLESS AFFIRM THE DISTRICT COURT BECAUSE EPA DID NOT ACT ARBITRARY OR CAPRICIOUS.

EPA did not act arbitrary and capricious if this Court deems the "reasonable assurance" standard a legislative rule for two reasons. *First*, if this Court finds that "reasonable assurance" is a binding legislative rule, it must vacate the rule for failure to meet notice and comment. *Hoctor,* 82 F.3d at 165. Failure to go through notice and comment requires the rule to be vacated. *Id.* If this Court were to adopt CLW's view of the standard, then it must vacate the "reasonable assurance" standard because, as the District Court notes, the "reasonable assurance" standard has never officially been adopted by EPA through notice and comment. R. at 16. EPA, therefore, cannot act arbitrary and capricious if the rule itself is invalid.

Second, if this Court does not vacate the "reasonable assurance" rule, EPA did not act arbitrary and capricious when it adopted a credit for New Union's proposed BMPs. This court must assess the agency's decision under the arbitrary and capricious standard of review. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Courts are not allowed to substitute their own judgements for that of the agency. *See id.* ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."); *see also City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994) ("In reviewing the agency's explanation of its actions, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"). Under this standard, EPA's decision was not arbitrary and capricious because scientific evidence supported EPA's decision to adopt a credit under EPA's rational belief that New Union's BMPs would be effective. When DOFEC publicly noticed a proposal for reduction of nonpoint sources, the scientific conclusions were not subject to any *substantive* challenges. R. at 9. EPA incorporated these very scientific

conclusions into its own record when establishing the Chesaplain TMDL, signifying that EPA believed New Union's science was a reasonable approach to attack nonpoint source pollution in Lake Chesaplain. R. at 10. It is not "so implausible" for EPA to have reasonably believed that the undisputed scientific conclusions of the state supported adopting a credit. *Mia. Tribe of Okla. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011). Despite the lack of actual implementation by New Union, EPA reasonably "trusted the science" when making its decision to adopt a credit. Thus, EPA did not act arbitrary and capricious when adopting a credit.

CONCLUSION

Upon the foregoing, EPA requests this Court affirm the District Court's ruling that the "reasonable assurance" standard is not binding on EPA. EPA further requests this Court reverse the District Court's ruling on ripeness and both issues concerning the Chesaplain TMDL. This Court should remand for further proceedings consistent with such decision.