
IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

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

BRIEF OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union exercised jurisdiction over these consolidated claims pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. On August 15, 2021, the District Court granted summary judgment in favor of Plaintiff New Union in No. 66-CV-2020, and against Plaintiff Chesaplain Lake Watch, dismissing the complaint in No. 73-CV-2020. Plaintiffs and Defendant filed a timely Notice of Appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Are New Union’s and CLW’s challenges to the Lake Chesaplain TMDL ripe for review?
- II. Was EPA’s determination that the Lake Chesaplain TMDL was insufficient absent load allocations and wasteload allocations contrary to the law under § 303(d) of the Clean Water Act?
- III. Was EPA’s decision to promulgate the staged and annualized Lake Chesaplain TMDL consistent with § 303(d) of the Clean Water Act?
- IV. Was it arbitrary and capricious or an abuse of discretion for EPA to adopt wasteload allocation credits for implementation of the Lake Chesaplain TMDL without reasonable assurance that Best Management Practices would be implemented by nonpoint sources?

STATEMENT OF THE CASE

Introduction

In passing the Clean Water Act (CWA), Congress established a complex statutory system “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). At its core, the CWA “anticipates a partnership between the States and the Federal Government.” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). To accomplish this purpose, Congress tasked the Environmental Protection Agency (EPA) with implementing the technically and scientifically sophisticated programs that the CWA outlines.

This case concerns the pollution limits that EPA established to restore the waters of Lake Chesaplain. To set these limits, EPA relied upon longstanding regulatory interpretations of the CWA as well as its own unique expertise and data from New Union. The limits provide an informational tool for New Union and the federal government to work together to save the Lake. To pursue their own private goals, the plaintiffs in this case attempt to atomize the CWA down to restrictive readings of its text that contravene the purpose of the Act. In accordance with the authority Congress delegated to EPA, this court should defer to EPA's expertise and grant summary judgment to EPA. Doing so is crucial both to restore Lake Chesaplain and respect the principle of cooperative federalism under the CWA.

Overview of Relevant Clean Water Act Provisions

The Clean Water Act (CWA) is a comprehensive system for regulating the discharge of pollutants into the waters of the United States from point sources. R. at 5. The CWA defines a point source as a "discernible, confined and discrete conveyance" such as a pipe, ditch, or channel. 33 U.S.C. § 1362. Under the principle of cooperative federalism, EPA establishes national standards for regulating point sources that states are expected to implement through a permitting system. *See id.* § 1342(b). The CWA also directs states to adopt water quality standards for waters within each state. *Id.* § 33 U.S.C. 1313(a). States must regularly assess the quality of each waterbody and identify those impaired waterbodies for which the national point source limitations are not sufficient to achieve the water quality standards. *See* 33 U.S.C. § 1313(d).

Once a state lists a waterbody as impaired, CWA section 303(d) directs the state to submit to EPA a total maximum daily load (TMDL) for each pollutant contributing to impairment. *See id.* A TMDL is the total amount of a given pollutant that can be added to a

waterbody without the water body exceeding the relevant water quality standard. *Id.* In setting a TMDL, a state must consider “seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” *Id.* at § 1313(d)(1)(C). In 1985, EPA promulgated a regulation defining TMDL as “the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.” 40 C.F.R. § 130.2(i). This regulation requires states to allocate the total pollution loading to point sources, nonpoint sources, and natural background sources. *See id.* Until the District Court vacated the regulation, this definition of TMDL stood for over 36 years. *See id.*

A state may take credit for nonpoint source pollution reductions and make wasteload allocations less stringent “[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make stringent load applications practicable.” 40 C.F.R. § 130.2(i). The CWA provides EPA the authority to approve or reject each step of the water quality standards process including the establishment of TMDLs. *See* 33 U.S.C. § 1313(c)(3), (d)(2). If EPA rejects a state TMDL, EPA must establish its own. *Id.*

The Lake Chesaplain TMDL

This litigation concerns the establishment a phosphorus TMDL for Lake Chesaplain. R. at 7. Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located in New Union. *Id.* The Lake flows into a navigable-in-fact river at its southern boundary. *Id.* Beginning in the 1990s, development surrounding the Lake began to impair its water quality. *Id.* By the 2010s, the water quality of the Lake was significantly impaired. *Id.*

In 2012, New Union issued a report concluding that excess phosphorus levels were driving the impairment. R. at 8. In 2014, New Union included Lake Chesaplain on its list of

impaired waters it submitted to EPA. *Id.* In 2016, New Union commenced a state rulemaking process to establish a phosphorus TMDL for the Lake. *Id.* To meet water quality standards, New Union calculated that the maximum loading of phosphorus would have to reduce to 120 metric tons (mt) annually. *Id.* New Union calculated that the existing phosphorus loading as of 2015 was 180 mt. *Id.* New Union also identified the existing annual contributions of phosphorus from different types of sources:

Point Sources (61.9 mt): Chesaplain Mills Sewage Treatment Plant (23.4 mt);
Chesaplain Slaughterhouse (38.5 mt)

Nonpoint Sources (85.6 mt): Hog farm manure spreading (54.9 mt); Other agricultural sources (19.3 mt); Residential septic tank inputs (11.6 mt)

Natural sources (32.3 mt)

R. at 8–9. New Union highlighted that the hog farms and septic systems contributed substantial phosphorus loadings to the Lake despite their status as nonpoint sources under the CWA. R. at 9. The report also noted that neither of the point sources had permit limits for phosphorus because EPA does not provide for phosphorus standards. *Id.*

In 2017, New Union publicly noticed a proposal to implement a TMDL by reducing phosphorus discharges from the point sources and nonpoint sources each by 35%. *Id.* New Union proposed implementing the reductions by 7% a year over a five year period. *Id.* New Union also proposed achieving point source reductions through permit limits and nonpoint source reductions through BMP programs for the hog farms and residential septic tanks. *Id.*

Stakeholders responsible for the point sources and nonpoint sources objected to the restrictions on their activities in the proposed TMDL. R. at 9–10. Chesaplain Lake Watch (CLW) objected that the BMPs for the nonpoint sources would be insufficient and that New Union lacked the statutory authority to enforce them. R. at 10. Additionally, CLW argued that the staged annual reduction contravened the statutory definition of a TMDL as a daily limit that a

state must impose all at once. *Id.*¹ Further, the hog farmers claimed that EPA lacked the statutory authority to require allocations to nonpoint sources. *Id.*

In 2018, conceding to the pressure from the hog farmers, New Union ultimately adopted a reduced TMDL that consisted solely of a 120 mt annual maximum without any allocations to point sources or nonpoint sources. *Id.* EPA rejected the reduced TMDL and, after notice and comment rulemaking, promulgated the original TMDL. *Id.* EPA named the combination of staged point source limits and BMP measures the “Chesaplain Watershed Implementation Plan” (CWIP). *Id.* However, the CWIP did not specify whether or how the proposed BMP measures would be enforced. *Id.* Since EPA’s adoption of the TMDL, New Union has taken no steps to implement any phosphorus reduction measures. *Id.*

Procedural History

Both New Union and CLW challenged EPA’s promulgation of the original TMDL under the Administrative Procedure Act. *Id.* New Union claimed that EPA’s rejection of the reduced TMDL on the grounds that it failed to include allocations was contrary to law. R. at 11. New Union argued that EPA’s regulatory definition of TMDL requiring allocations is an incorrect interpretation of the CWA. *Id.* CLW claimed that EPA’s TMDL violated the CWA because the pollution loading reduction would be measured annually and staged over time. *Id.* Additionally, CLW claimed that the EPA’s decision to reduce the stringency of allocations for point sources by crediting anticipated pollution reductions from BMPs was arbitrary and capricious or an abuse of discretion. *Id.* EPA opposed these claims and argued that the controversy over the TMDL was not ripe. *Id.*

¹ The District characterizes the implementation of the TMDL as “phased.” R. at 10. However, the implementation of reductions each year by a set percentage is more accurately characterized as “staged.” See BENITA BEST-WONG, CLARIFICATION REGARDING ‘PHASED’ TOTAL MAXIMUM DAILY LOADS (EPA 2006).

First, the District Court determined that the issues were ripe for adjudication. R. at 12. Second, the Court held that EPA’s rejection of the reduced TMDL submitted by New Union was contrary to law because the CWA unambiguously forbids EPA’s longstanding regulatory definition of TMDL as including allocations. R. at 12–14. Accordingly, the Court granted summary judgment to New Union on this issue and vacated the rejection as well as the regulatory definition of TMDL. *Id.* Third, the Court granted summary judgment to CLW on its challenge to the TMDL’s annualized limit staged over time. R. at 14–15. The Court similarly held that the CWA forbids an annualized and staged TMDL. *Id.* Fourth, the Court granted summary judgment to EPA on CLW’s challenge to the TMDL crediting the pollution reductions from BMPs. R. at 15–16. The Court held that EPA’s decision was a valid application of a regulation and gave no deference to a guidance document that required a “reasonable assurance: that BMPs will achieve the proposed reductions. R. at 15.

SUMMARY OF THE ARGUMENT

The ripeness doctrine prevents pre-enforcement review of issues unless they are fit for judicial consideration and hardship to the plaintiffs will result in postponing review. *See Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Neither plaintiff will face legal hardship if this court delays review of this challenge to EPA’s actions. Further, adjudicating Appellants’ claims now would inappropriately interfere with further administrative action by EPA and New Union. If this court intervenes now, the parties will be deprived of the TMDL program’s full process. At this stage, the court can only review abstract plan details, and would benefit from further factual development of the issues.

If this court determines the issues are ripe, it should nonetheless uphold EPA’s interpretation of the statute under the *Chevron* framework. Appellants challenge EPA’s interpretation of CWA § 303(d) on the theory that the word “total” forecloses the agency from

requiring load and wasteload allocations in a TMDL. The text does not forbid EPA's interpretation—it is ambiguous as to the correct manner of expressing a TMDL, meeting “Step One” of *Chevron*. Far from foreclosing EPA's approach, the Act's structure requires EPA to account for point and nonpoint sources but does not prescribe a manner of doing so. Facing this ambiguity, EPA made a reasonable policy choice that furthered both of the CWA's goals.

Similarly, this court should defer to EPA's reasonable interpretation of the CWA as permitting a TMDL to be expressed in terms of an annual load. To read “daily” literally would obtain an absurd result, limiting EPA authority to *only* those pollutants suitable for daily calculation, thereby exempting all other pollutants from TMDL regulations. As the Act fails to define TMDL, it is a “term of art” to be elucidated by further EPA regulation. *Am. Farm Bureau*, 792 F.3d at 298. Here, EPA's TMDL regulations reasonably interpret the CWA's gaps and effectuate its Congressional intent. The five-year staged TMDL stands as well. The Act's text requires only that TMDLs be set “at a level necessary to implement applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). It specifies no timeframe for implementation. The staged TMDL comports with the dual goals of the CWA and was a reasonable policy choice.

Lastly, EPA did not act arbitrarily or capriciously in approving allocation “credits” without “reasonable assurance” from New Union. Whether “reasonable assurance” is needed is a matter of EPA interpreting its own regulations. Those regulations are clear—wasteload allocation credits must simply be “practicable[.]” *See* 40 C.F.R. § 130.2(i). EPA's 1991 guidance does not rescue Appellants' argument; it does not constitute a binding “rule” that limits EPA's discretion. EPA properly based its judgment on the scientific record before it, which suggested a credit was practicable given the circumstances in the Lake Chesaplain watershed.

STANDARD OF REVIEW

Appellate courts review matters of law de novo. *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020). A district court’s grant or denial of summary judgment is a matter of law that appellate courts review under the de novo standard. *See, e.g., Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998); *Gasner v. Bd. of Supervisors of the City of Dinwiddie, Va.*, 103 F.3d 351, 356 (4th Cir. 1996); *Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994). As all the issues in this case are matters of law, this court should review the District Court’s decision de novo. Summary judgment is appropriate if the pleadings and discovery record reveal no genuine dispute with regard to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

ARGUMENT

I. BOTH NEW UNION’S AND CLW’S CHALLENGES TO THE PRE-IMPLEMENTATION TMDL ARE NOT RIPE.

The ripeness doctrine “prevent[s] the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967). To determine whether an issue is ripe, courts evaluate “the fitness of the issues for judicial decision,” and “the hardship to the parties in withholding court consideration.” *Id.* at 149. The Supreme Court has identified three factors to evaluate ripeness in the context of agency planning: “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues.” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Ohio Forestry is illustrative of how ripeness should be evaluated for planning documents. There, the Forest Service adopted a Forest Plan that opened much of a forest to logging, but only allowed a small amount of logging to be conducted over the next decade; environmental groups challenged the Plan. *Id.* at 729, 731. While the Court acknowledged that “in [the Plan’s] absence logging could not take place,” it held that the dispute was not ripe. *Id.* at 730, 732. First, the Plan did not cause hardship because it did “not create adverse effects of a strictly legal kind . . . [and] create[d] no legal rights or obligations.” *Id.* at 733. Similarly, since the Plan was to be incorporated into individual permits, the plaintiffs could challenge the Plan and permits at a time when their injury was more definite. *Id.* at 734. Second, “immediate judicial review . . . could hinder agency efforts to refine its policies” through a revision of the Plan or application of the Plan to permits *Id.* at 735. Finally, the Court held that it would benefit from additional factual development; review of an abstract plan prior to its implementation into a particular permit was improper. *Id.* at 736.

Lower courts differ in their treatment of challenges to TMDLs. At one end of the spectrum, courts have held that challenges to the impaired waters list were not ripe. *Mo. Soybean Ass’n v. U.S. EPA*, 289 F.3d 509, 512 (8th Cir. 2002); *City of Dover v. U.S. EPA*, 36 F. Supp. 3d 103, 119–20 (D.D.C. 2014). At the other end, courts have split over whether challenges to TMDLs that have not yet been implemented into permits are ripe: Where it is clear that plaintiffs face imminent enforcement of a TMDL via permits, the case is ripe. *See City of Kennett v. EPA*, 887 F.3d 424, 428–29, 432–34 (8th Cir. 2018) (holding a challenge to a TMDL by a City who owned a Wastewater Treatment Plant that would be regulated was ripe); *Am. Farm Bureau Fed’n v. U.S. EPA*, 792 F.3d 281, 293 (3d Cir. 2015) (holding pre-implementation review was proper since “members of the trade associations will have reason to limit their discharge of

pollutants in anticipation of the TMDL's implementation"). When, however, there is no imminent threat of enforcement against the plaintiff, a challenge to a TMDL is unripe. *See City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156–59 (N.D. Cal. 2003), *aff'd mem.*, 2005 WL 1403006 (2005) (holding TMDL challenge was unripe because “[p]laintiffs cannot point to a single future event or condition that is fairly certain to occur and will adversely impact *Plaintiffs* themselves”). Applying the *Ohio Forestry* factors to each challenge reveals that none is ripe; the court should dismiss each challenge.

New Union brings an as-applied challenge to EPA regulations defining TMDL. *See* 40 C.F.R. § 130.2(i). Yet, it is undisputed that the TMDL has not yet been implemented into permits or BMPs. R. at . Similarly, as in *City of Arcadia*, there is no pending threat of enforcement against the State. While a delay in review until New Union has taken some steps to implement the TMDL into its continuing planning process would not be insubstantial, it would not cause hardship of a strictly legal kind to the State. The CWA envisions that states implement TMDLs into its continuing planning process under section 303(e). There is, however, no legal consequence for a failure to do so. Similarly, judicial intervention at this stage would interfere with administrative action, as it would hinder agency efforts to refine its policies through revision or application. Finally, this as-applied dispute is currently abstract, and would benefit from further factual development. Contrary to the district court's conclusion, EPA's TMDL does not contemplate any NPDES permit limits; it merely requires a 35% staged reduction to both point sources and nonpoint sources. It is unclear which sources will be required to reduce their phosphorus discharges and by how much. Further factual development is necessary before the State can bring an as-applied challenge to the regulation. Thus, the dispute is not yet ripe.

Similarly, CLW challenges EPA regulations and its interpretation of those regulations. Neither challenge is ripe for the same reasons as above. Like *City of Arcadia*, there is no threat of enforcement against CLW, and it will suffer no hardship from delay; the TMDL does not create adverse effects of a strictly legal kind as to CLW. On the other hand, a delay in review until New Union has taken some steps to implement the TMDL into permits and BMPs would provide for additional factual development crucial to the resolution of these challenges. At this stage, the State could fully implement a 35% reduction of overall load, phrased in terms of daily discharge. Likewise, the State could implement BMPs such that it is clear that nonpoint sources will reduce their phosphorus load. Without specific permits or BMP requirements, the court does not have sufficient facts to resolve this as-applied challenge. As above, judicial interference now could interfere with EPA's and New Union's efforts to refine the general TMDL into State planning and individual permits. Thus, CLW's challenges are not yet ripe.

II. EPA'S INTERPRETATION OF "TOTAL MAXIMUM DAILY LOAD" IS ENTITLED TO DEFERENCE AND SHOULD BE UPHELD.

Where "Congress delegated authority to [an] agency generally to make rules carrying the force of law, and [where] the agency interpretation claiming deference was promulgated in exercise of that authority," an agency's interpretation of a statute qualifies for *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). This inquiry is referred to as *Chevron* "Step Zero." See, e.g., *Martin v. Social Security Administration*, 903 F.3d 1154, 1159 (11th Cir. 2018). At "Step One," courts look to "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). At "Step Two," "if the statute is silent or ambiguous with respect to the specific issue, the question for the

court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. Here, courts must give agency interpretations “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. *Chevron* deference is particularly appropriate where Congress charges an agency with administering a complex statutory scheme requiring technical or scientific sophistication. *Nat’l Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).²

There is no question that EPA passes Step Zero on the issues that are directly governed by EPA regulations defining “TMDL.” As the Ninth Circuit has recognized, “EPA has the delegated authority to enact regulations carrying the force of law regarding . . . TMDLs.” *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). The statute expressly delegates EPA authority to administer the CWA and to regulate and define the scope of TMDLs, *see* 33 U.S.C. § 1251(d); *id.* § 1313(b); *id.* § 1313(d)(1)(C); *id.* § 1313(d)(2), and EPA regulations were promulgated in exercise of that delegated authority.

Since it is not embodied in regulations, it is less clear whether the issue of whether EPA could stage its TMDL over five years deserves *Chevron* deference or a lower form of administrative deference. At Step Zero, courts consider a variety of factors; including, but not limited to, the “nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.” *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Courts have applied *Chevron* deference to agency

² The policy reasons behind *Chevron* are important to this case. The Court has recognized that “*Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute . . . understood that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (internal quotations omitted).

interpretations inherent in agency planning actions. *See American Farm Bureau*, 792 F.3d 281, 300 (3d Cir. 2015) (applying *Chevron* deference to interpretations of the CWA not contained in regulations); *Grunewald v. Jarvis*, 776 F.3d 893, 898–99 (D.C. Cir. 2015) (holding National Park Service’s interpretation of Rock Creek Park Enabling Act included in its Deer Management Plan was entitled to *Chevron* deference). It is clear that EPA has substantial expertise when it comes to the administration of the CWA and the TMDL program. Likewise, this is the kind of complex administrative program to which courts grant deference. Additionally, EPA’s TMDL was promulgated via notice and comment rulemaking, which demonstrates that EPA has carefully considered the issue. R. at 10. Finally, EPA has given due consideration to the question of staged implementation of TMDLs since at least the 1990s. *See* BENITA BEST-WONG, CLARIFICATION REGARDING ‘PHASED’ TOTAL MAXIMUM DAILY LOADS (EPA 2006). Thus, *Chevron* is the appropriate framework for each of the following issues.

EPA’s interpretations should be upheld, and this court should grant EPA summary judgement because: (A) EPA’s interpretation of “TMDL” as including allocations is entitled to *Chevron* deference; (B) EPA’s interpretation of “TMDL” as allowing for annualized regulation of pollutant loads is entitled to *Chevron* deference; and (C) EPA’s interpretation of “TMDL” as allowing for staged implementation is entitled to *Chevron* deference, or, in the alternative, *Skidmore* deference.

A. EPA’s rejection of New Union’s TMDL for failure to include allocations is entitled to *Chevron* deference and should be upheld.

1. Under *Chevron* Step One, the CWA is ambiguous as to whether TMDL may include allocations.

To determine Congressional intent and the issue of “whether Congress has directly spoken to the precise question at issue,” courts must apply “traditional tools of statutory

construction.” *Chevron*, 467 U.S. at 842–843 n.9. These tools include analysis of the text, purpose, structure, and history of a statute. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Likewise, courts’ interpretation of the text of a statute is guided by the canons of construction. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (applying the canons of construction at *Chevron* Step One).

Only one other circuit court has considered this issue. In *American Farm Bureau*, the Third Circuit held that “total” in the phrase “total maximum daily load” was ambiguous. 792 F.3d at 297. In analyzing the text, the court applied the canon against surplusage to hold that a restrictive reading would render “total” redundant to the word “maximum.” *Id.* Further, it highlighted that other uses of “total” in the CWA support a broad reading. *Id.* (referring to 33 U.S.C. § 1284(b)(1)). Finally, the court concluded that textual requirements for TMDLs found in section 303(d)(1)(C) “suggest that ‘total maximum daily load’ is a term of art meant to be fleshed out by regulation, and certainly something more than a number.” *Id.*

Likewise, the court held that the structure of the Act supported a broad reading of “total.” *Id.* at 298–99. Here, the court concluded that because TMDLs are set only for waters “for which point source effluent limitations alone are insufficient,” “in drafting a TMDL the [CWA] unambiguously *requires* the author (here, the EPA) to take into account nonpoint sources.” *Id.* at 299. In this way, TMDLs are vehicles of federal and state partnership that “tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.” *Id.* at 299 (quoting *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002)).

Finally, the Third Circuit provided an extensive analysis of legislative history. *See id.* at 307–308. It noted that the 1987 amendments to the CWA added sections 303(d)(4)(A) and (B), which regard the revision of effluent limitations “based on a total maximum daily load or *other*

waste load allocation established under this section.” *Id.* at 308 (citing P.L. 100–4§404(b) (Feb. 4, 1987)). Prior to 1987, section 303 did not use the language “waste load allocation.” That language had only appeared in the regulatory definition of TMDL that EPA promulgated in 1985. *See* 40 C.F.R. § 130.2(i). The Third Circuit concluded that the revision implied that TMDLs include WLAs and that “EPA therefore has 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.” *Id.*

In sum the Third Circuit held that “congressional silence on how to promulgate a TMDL and the congressional command that a TMDL be established” for impaired waters “combine to authorize the EPA to express load and waste load allocations.” *Id.* This court should adopt the Third Circuit’s reasoning as its own.

First, as *American Farm Bureau* recognized, the text of the statute is ambiguous. The District Court’s reasoning for vacating the regulatory definition of TMDL relies on precisely the argument that the Third Circuit rejected. The District Court focused solely on the word “total” without considering the rest of the clause or the canon against surplusage. Under that canon, courts must “give effect, if possible, to every clause and word of a statute” so that no word “is rendered superfluous, void, or insignificant.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Here, “total” must have a distinct meaning from “maximum.” Further, the word “total” on its face does not unambiguously forbid allocations. *See Total*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/total> (last visited Nov. 10, 2021) (defining total as “comprising or constituting a whole”). There is nothing inherent in the word “total” that prevents EPA from, in effect, requiring that it or the State show its work to provide guidance for planners and potentially regulated entities.

Second, as the Third Circuit recognized, the structure of the statute does not resolve the textual ambiguity. In its own structural analysis, the District Court assumed that allocations are an implementation tool under section 303(e), rather than an information gathering tool under section 303(d). This led it to erroneously conclude that the regulatory definition providing for allocations conflicts with the structure of the statute. R. at 12. This is not the case. Allocations assist in both information gathering and provide the necessary information for a state to then implement the TMDL into permits and BMPs to achieve the overall goal of protecting water quality. This is reinforced by the reference to allocations in section 303(d)(4). 33 U.S.C. § 1313(d)(4). Thus, that section 303(e) is concerned with implementation is irrelevant to the issue of allocations. Further, as *American Farm Bureau* recognized, the structure of the statute requires EPA to account for both point and nonpoint sources but is silent on how EPA is to do so. *See Am. Farm Bureau*, 792 F.3d at 299–300. If anything, the structure of the statute—by mandating water quality standards, impaired water lists, and TMDLs, all subject to EPA approval but without substantive guidelines for making judgements—renders the statute more ambiguous.

Finally, the District Court failed to consider how the legislative history (detailed in *American Farm Bureau*) implies that Congress adopted the regulatory definition of “TMDL,” which includes allocations, into the CWA through the 1987 amendments. At the very least, this legislative history reinforces the ambiguity inherent in the text. Thus, this court should adopt the Third Circuit’s reasoning and hold that the CWA is ambiguous as to whether a TMDL may include allocations.

2. Under *Chevron* Step Two, EPA made a reasonable policy choice by including allocations in the regulatory definition of “TMDL.”

An agency’s reading of a statute is permissible if it “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.”

Chevron, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 691, 699–700 (1984)). Courts again look to the text, purpose, structure, and history of the statute (considered at Step One) to determine whether the ambiguities found were resolved “within the bounds of reasonable interpretation.” *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). An interpretation of an ambiguous statute is unreasonable if it would “radically transform” the regulatory programs at issue and “render them unworkable as written.” *Util. Air Regul. Grp. v. EPA (UARG)*, 573 U.S. 302, 320 (2014). In addition, courts “normally accord particular deference to an agency interpretation of ‘longstanding’ duration.” *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quoting *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982)).

As demonstrated above, the word “total” in “total maximum daily load” is ambiguous as to the process by which EPA or states must calculate the TMDL. Textually, it is reasonable to interpret “total” to include allocations, as, for example, does an itemized receipt. Likewise, the structure of the statute suggests that EPA or states must consider nonpoint source pollution, but there are no clues exactly how it must do so. Thus, allocations are a reasonable interpretation of this ambiguity. Further, this court should accord particular deference to this interpretation because it has stood for over 35 years. Finally, as will be demonstrated below, this interpretation is consistent with the purpose of the CWA because it respects the principle of cooperative federalism and does not dramatically expand the regulatory authority of EPA.

First, allocations further the CWA’s dual purpose of protecting water quality and respecting cooperative federalism. The CWA “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). This is particularly the case in section 303: States

must promulgate water quality standards, impaired waters lists, TMDLs, and continuing planning processes, while EPA has only an oversight role. *See* 33 U.S.C. § 1313. Likewise, EPA has primary responsibility over point sources, while states have primary authority over nonpoint sources. *See Am. Farm Bureau*, 792 F.3d at 289.

In rejecting the EPA regulatory definition of TMDL, the District Court was concerned that requiring allocations would violate the principle of cooperative federalism and allow EPA to encroach into “the primary role of states in protecting water quality and making local land use and agricultural decisions.” R. at 13. This conclusion is flawed. As the Third Circuit explained: “the TMDL’s provisions that could be read to affect land use are either explicitly allowed by federal law or too generalized to supplant state zoning powers in any extraordinary way.” *Am. Farm Bureau*, 792 F.3d at 302. The CWA expressly provides for federal authority over point sources and provides for only federal oversight over nonpoint sources via TMDLs. *See* 33 U.S.C. § 1311(a); *id.* § 1342; *id.* § 1313(d). Once promulgated by a state or EPA, a TMDL must be implemented into that state’s planning process and into permits and BMPs. *Id.* § 1313(e). Yet, EPA has no authority to require specific permits for any point or nonpoint source (so long as the state has authority to promulgate NPDES permits). *See Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). In other words, a TMDL that includes allocations is nothing more than an “informational tool” for states to use when making decisions to regulate water pollution. *Am. Farm Bureau*, 792 F.3d at 303. In sum, the division of authority in the TMDL process reinforces cooperative federalism. EPA’s provision of allocations does not encroach on this cooperative effort.

Second, interpreting “total” to include allocations does not significantly expand EPA regulatory authority. Citing *UARG*, the District Court held the opposite. R. at 14. This was

incorrect. In *UARG*, the Court held EPA’s regulation of greenhouse gas emissions coming from buildings emitting over 100 tons of air pollutants per year was a dramatic expansion of EPA authority, given that such regulation would “have a profound effect on virtually every sector of the economy and touch every household in the land.” *UARG*, 573 U.S. at 310–11. Thus, an interpretation of the Clean Air Act to allow for such an expansion was unreasonable under *Chevron*. *Id.* at 328. This was especially the case since the court was skeptical of “newfound authority” to regulate a particularly important aspect of the economy. *Id.* at 324, 328. Allocations within TMDLs are entirely distinguishable from the regulation of greenhouse gas emissions at issue in *UARG*.

Unlike EPA’s rule in *UARG*, EPA has required allocations in TMDLs for 35 years; there is no issue of EPA “finding” dormant authority within the CWA. Additionally, the impact of requiring allocations in a TMDL pales in comparison to the unprecedented expansion of authority that concerned the Court in *UARG*. While allocations certainly have some impact, they do not touch every sector of the economy and nearly every household. As noted above, allocations give EPA some influence over nonpoint sources; however, this influence is minor given that it remains several steps removed from any direct state program or permitting process. Allocations simply do not significantly expand EPA authority such that its interpretation of a statutory ambiguity is unreasonable.

In sum, EPA’s longstanding regulatory definition of TMDL that requires allocations is a reasonable interpretation of an ambiguous and complex statute. This definition carefully navigates the textual and structural ambiguities and gives effect to the dual purposes of the CWA. EPA’s interpretation is entitled to *Chevron* deference and thus its rejection of New

Union’s TMDL was authorized by the statute. This court should grant summary judgement to EPA on this issue.

B. EPA’s implementation of an annualized phosphorus TMDL is entitled to *Chevron* deference and should be upheld.

1. Under *Chevron* Step One, Congressional intent as to the timeframe of TMDL regulation is ambiguous.

As above, to determine Congressional intent at Step One, courts look to “the text, structure, history, and purpose” of a statute. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019); *Chevron*, 467 U.S. at 843 n.9.

Circuits are split on whether “total maximum *daily* load” is ambiguous. The Second Circuit has held that “TMDL” was “susceptible to a broader range of meanings” and was thus ambiguous because the Act itself establishes an “open-ended range of pollutants that are susceptible to effective regulation” by TMDLs. *Nat. Res. Def. Council v. Musynski*, 268 F.3d 91, 98 (2d Cir. 2001).³ The court applied two canons of construction: the rule that the text must be understood in light of the Act’s structure and the rule against absurd results. *Id.* It held that the structure of the Act suggested that Congress sought effective enforcement of water pollution via agency expertise and that it would be “absurd” to read “daily” literally. *Id.* at 98–99. Conversely, the D.C. Circuit held that there was “nothing ambiguous” about the term “daily” and ended the analysis at *Chevron* Step One. *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144–46 (D.C. Cir. 2006).

Like the Second Circuit, this court should hold that the phrase “total maximum daily load” is not determinative of Congress’ intent for the timeline for the regulation of pollutants

³ Although this decision does not apply the *Chevron* framework per se (though, citing *Mead*, it references the deference the judiciary owes to the executive department), its analysis as to the plain meaning of the statute is directly relevant to *Chevron* step one.

given that the text, purpose, and structure of the statute are ambiguous. First, the statute does not define “total maximum daily load” and uses it only as a cursory phrase within a larger section concerning water quality. *See* 33 U.S.C. § 1313. The statute itself vests EPA with discretion to determine which pollutants are subject to TMDLs. *See* 33 U.S.C. § 1313(d)(1)(C). The Act requires TMDLs only “for those pollutants which the Administrator identifies . . . as suitable for such calculation” and requires only that “[s]uch load . . . be established at a level necessary to implement the applicable water quality standards.” *Id.* Here, the D.C. Circuit makes a mistaken point worth addressing. It claims that EPA’s 1978 rule that “[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads” suggests that EPA cannot reasonably argue that certain pollutants are not susceptible to daily regulation. *Friends of the Earth*, 446 F.3d at 146 (citing 43 Fed. Reg. 60662, 665 (1978)). This conclusion ignores that EPA uses “TMDL” as a term of art: “TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.” 40 C.F.R. § 130.2(i). Thus, when EPA stated that “all pollutants . . . are suitable for the calculation of [TMDLs],” EPA does not necessarily suggest, as the D.C. Circuit believes, that all pollutants are suitable to *daily* regulation.

Further, while the term “daily” plainly appears in the text, it would be absurd to read this literally. Generally, “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.’” *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (second alteration in original). “Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply ‘has no

plain meaning . . . and is the proper subject of construction by the EPA and the courts.” *Am. Water Works v. EPA*, 40 F.3d 1266, 1271 (quoting *Chemical Manufacturers Ass’n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985)) (alteration in original). As will be demonstrated below, to read “daily” literally would conflict with the Congressional intent evidenced by the purpose and structure of the statute; thus, “total maximum daily load” has no plain meaning.

The purpose and structure of the statute demonstrate that “total maximum daily load” is ambiguous. The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). As such, the CWA prohibits unpermitted discharges, *see* 33 U.S.C. § 1311(a), and allows permitted discharges so long as the receiving waterbody is not unduly polluted, *see* 33 U.S.C. § 1313(a)–(c). TMDLs are meant as an additional regulatory measure that states must take when “effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). In other words, Congress’ intent for the regulation of pollutants via TMDLs is focused not on the time-frame of their regulation, but on the actual quality of water. The statute notes that only pollutants identified as “suitable for such calculation” are regulated by TMDLs but is silent as to how states are to reach applicable water quality standards in lieu of a TMDL. 33 U.S.C. § 1313(d)(1)(C). Read literally, “total maximum *daily* load” would then include only those pollutants suitable for daily regulation and would exempt (as not “suitable”) all others from regulation beyond standard effluent limitations. This could not have been Congress’ intent given its concern with water quality in this section and the CWA overall. As the Third Circuit recognized, the structure of the Act “suggest[s] that ‘[TMDL]’ is a term of art meant to be fleshed out by regulation.” *Am. Farm Bureau*, 792 F.3d at 298. Thus, this court should proceed to *Chevron* Step Two and grant EPA deference.

2. Under *Chevron* Step Two, annualized regulation of a pollutant not susceptible to daily regulation is a reasonable interpretation of the statute.

As above, an agency's reading of a statute is a permissible construction if it reasonably accommodates the conflicting policies of the statute. *See Chevron*, 467 U.S. at 845. Likewise, courts look to whether the ambiguities resolved by the agency are "within the bounds of reasonable interpretation." *City of Arlington*, 569 U.S. at 296. Likewise, courts should accord deference to longstanding interpretations. *See Barnhart*, 535 U.S. at 220 (2002).

As illustrated by the analysis above, Congress' primary concern in section 303 was the attainment of water quality standards. TMDLs are the tool Congress created to achieve that purpose and EPA's regulations give effect to that purpose. The regulatory definition of "TMDL," notes that "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2. Indeed, the final rule establishing the regulatory definition of "TMDL" focuses on how EPA's definition protects water quality. *Water Quality Planning and Management*, 50 Fed. Reg. 1774-01 (Jan. 11, 1985) (codified at 40 C.F.R. 130). Likewise, EPA regulations require states to focus on water quality when establishing TMDLs; this includes consideration of "stream flow, loading, and water quality parameters." 40 C.F.R. § 130.7(c)(1). This regulatory structure has been in place for over three decades and is a longstanding agency interpretation worthy of particular deference by this court. Even following *Friends of the Earth*, EPA maintained its interpretation. *See EPA's Expectations Regarding "Daily" Loads in TMDLs*, at 1 (Nov. 15, 2006). In sum, EPA's regulations concerning TMDLs are primarily concerned with the protection of water quality and thus plainly give effect to Congressional intent and are a reasonable interpretation of the statute.

Here, EPA adopted New Union's original TMDL proposal and incorporated the original scientific record and public comments into its own record. R. at 10. While EPA's factual

determination is not challenged,⁴ EPA could have reasonably determined that annual regulation of phosphorus is the best method of regulation, as it has done so elsewhere. *See Musynski*, 268 F.3d at 99 (noting that annual phosphorus regulation was the best method); EPA, PHOSPHORUS TMDLS FOR VERMONT SEGMENTS OF LAKE CHAMPLAIN 28 (2016) (“In evaluating the best expression of loading, EPA determined that an annual load allocation was the most appropriate measure of how phosphorus affects Lake Champlain. Neither daily nor seasonal loads as accurately represent the effect of phosphorus loading to the lake.”). Adoption of the State’s original proposal, so long as scientifically sound, plainly gives effect to the purpose of the CWA to further cooperative federalism.

In sum, “total maximum daily load” is an undefined and ambiguous statutory term, which EPA reasonably interpreted in its regulations. Thus, EPA’s interpretation in its regulations is entitled to *Chevron* deference and its promulgation of the Lake Chesaplain TMDL was within its statutory authority. This court should grant summary judgement to EPA on this issue.

C. EPA’s implementation of a staged phosphorus TMDL is entitled to either *Chevron* or *Skidmore* deference and should be upheld.

1. Under *Chevron* Step One, Congress is silent as to the timeline for the implementation of individual TMDLs.

Courts determine ambiguity at *Chevron* Step One by considering the text, structure, purpose, and history of a statute. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019); *Chevron*, 467 U.S. at 843 n.9.

⁴ The Court has suggested that the factors relevant to the resolution of a claim under the APA are relevant to *Chevron* Step Two. *See Michigan v. EPA*, 576 U.S. 743, 750–52 (2015) (citing *Motor Vehicle Mfrs. Assn, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) at *Chevron* step two); *see also Nat. Res. Def. Council, Inc. v. U.S. EPA*, 961 F.3d 160, 169–70 (2d Cir. 2020) (noting that *Chevron* and *State Farm* are distinct doctrines, but that the standards occasionally take into consideration the same factors). According to *State Farm*, a decision is arbitrary and capricious if: “The agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be . . . the product of agency expertise.” *State Farm*, 463 U.S. at 43. None of the *State Farm* factors are relevant here, however.

First, the text of the statute does not explicitly speak to whether EPA may stage a TMDL over several years. The CWA simply directs that TMDLs “shall be established at a level necessary to implement the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). It does not speak to *when* those standards must be achieved. The Act, however, allows for states to prioritize achievement of water quality standards in some waters, *see* 33 U.S.C. § 1313(d)(1)(A), which suggests that it may leave full achievement of water quality standards in some impaired waters for a later date.

Second, the structure of the statute is likewise ambiguous. The district court erroneously concluded that Congressional silence in section 303(d) demonstrated a clear Congressional intent to require immediate achievement of water quality standards at the date of TMDL implementation. R. at 15. It reasoned that the continuing planning process contained in section 303(e)(3)(A) cross references to section 301(b), which establishes a timeline for implementation of effluent limitations; this, it held, suggests TMDL implementation must follow the timeline in section 301(b). R. at 15. The District Court misread the statute. Section 303(e)(3)(A) refers to the schedules of compliance for *effluent limitations* stated in section 301(b)(1), not all provisions of section 301(b)(1). 33 U.S.C. § 1313(e)(3)(A). Indeed, section 303(e)(3) contains a separate bullet point for the inclusion of TMDLs in continuing planning but does not establish a timeline for such TMDL planning. *See id.* § 1313(e)(3)(C). Further, section 301 itself is cabined to effluent limitations. *Id.* § 1311. Thus, when section 301(b)(1)(C) states that “not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards” shall be achieved, the Act references only effluent limitations, not TMDLs. *Id.* § 1311(b)(1)(C). Indeed, section 302 governs water quality related effluent limitations, *id.* § 1312, and is likely the

“more stringent limitation” referred to by section 301(b)(1)(C). The Act does not establish a timeline for the implementation or achievement of TMDLs.

Third, the purpose of the statute is equally ambiguous on this issue. Congress demonstrated a clear intent to protect water quality, *see id.* § 1251(a); *id.* § 1313, but also demonstrated an intent to maintain a federalist balance in the implementation of the act, *see id.* § 1251(b); *id.* § 1313. There is nothing in the Act to suggest that the concern for water quality overrides the policy of federalism to such a degree that it requires TMDLs to ensure the achievement of water quality standards on the day of implementation. Rather, as will be demonstrated below, it is entirely reasonable for EPA to allow for staged reduction out of respect for states and the regulated entities within states

2. Under *Chevron* Step Two, it is reasonable for EPA to allow for a staged reduction in phosphorus load over five years.

At *Chevron* Step Two, courts look to whether the agency’s reading of the statute is reasonable, and whether it represents a reasonable policy decision. *Chevron*, 467 U.S. at 845. Deference is particularly appropriate, where, as above, the statute is silent as to a particular issue. *See id.* at 843–44; *National Cable & Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980, 997 (2005).

The Third Circuit has considered a similar issue to that presented here: In *American Farm Bureau*, the EPA set target dates for each stage of completion of the TMDL. 792 F.3d at 292. In 2010, EPA promulgated the TMDL, which set a target “that 60% of its proposed actions [would] be complete by 2017, with all pollution control measures in place by 2025.” *Id.* The court held that “it is common sense that a timeline complements the [CWA’s] requirement that all impaired waters achieve applicable water quality standards. The amount of acceptable pollution in a body of water is necessarily tied to the date at which the EPA and the states believe the water should

meet its quality standard.” *Id.* at 300. Thus, “promulgating an accurate TMDL . . . requires consideration of a timeline and changes over time” and “it is more consistent with the purpose of the [CWA] to express the deadline that the EPA relied on in calculating the TMDL than to make the states and the public guess what it is.” *Id.*

Like the Third Circuit, this court should hold that EPA’s staged TMDL is a reasonable interpretation of the statute and a reasonable navigation of the conflicting policies of the CWA. First, EPA has long maintained that it need not immediately implement a TMDL at full force. *See* BENITA BEST-WONG, CLARIFICATION REGARDING ‘PHASED’ TOTAL MAXIMUM DAILY LOADS (EPA 2006). Second, the purpose of the Act does not suggest that EPA should “pursue [water quality] at all costs.” *Rapanos v. United States*, 547 U.S. 715, 752 (2006). Rather, the conflicting purposes of the Act suggest that EPA must pursue water quality while engaging in meaningful consultation and negotiation with states. Since states are primarily responsible for water quality standards, TMDLs, and BMPs, it would violate the federalist balance the Act seeks to achieve to require a state to immediately implement a TMDL at full force. Further, as articulated by the Third Circuit, it is “common sense” that TMDLs may follow a timeline. *American Farm Bureau*, 792 F.3d at 292. Even if all phosphorus loading ceased the day the TMDL was implemented, water quality would take some time to improve to a level necessary to meet the applicable water quality standard. Thus, it makes more sense to stage a TMDL over several years and to allow regulated entities some time to develop the technology and practices that will allow them to comply with the ultimate TMDL requirements.

Thus, given the textual and structural ambiguity on the timeline for TMDL implementation, this court should defer to EPA’s reasonable policy decision to permit staged implementation TMDLs.

3. In the alternative, the court should apply *Skidmore* and uphold EPA’s interpretation.

In *United States v. Mead Corp.*, the Supreme Court held that an agency interpretation that does not qualify for *Chevron* deference nonetheless can qualify for *Skidmore* deference. 533 U.S. 218, 234 (2001). “The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” *Id.* at 228. Thus, “[t]he weight [accorded to an administrative] judgement in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (second alteration in original). The Third Circuit has held that “the most important considerations are whether the agency’s interpretation ‘is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act.’” *Delaware Dept. of Natural Resources and Environmental Control v. U.S. Army Corps of Engineers*, 685 F.3d 259, 285 (3d Cir. 2012) (quoting *Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir. 1999)).

Thus, the inquiry in *Skidmore* resembles that of *Chevron* Step Two. As explained above, the statute simply requires that TMDLs be incorporated into a state’s continuing planning process, *see* 33 U.S.C. § 1313(e)(3)(C), but does not establish a timeline for the implementation of TMDLs. This silence should be resolved by the agency charged with implementing the statute rather than the courts, particularly, as here, where EPA has substantial expertise with these kinds of planning tools. Further, it is more in keeping with the dual purposes of the CWA (water quality and federalism) to give states time to gradually implement TMDL limits than to require immediate implementation at full force. Finally, EPA has consistently allowed for phased and

staged TMDLs, despite not officially adopting this position via rulemaking. *See* BENITA BEST-WONG, CLARIFICATION REGARDING ‘PHASED’ TOTAL MAXIMUM DAILY LOADS (EPA 2006). Thus, this court should grant *Skidmore* deference to EPA’s interpretation of section 303(d) if *Chevron* deference is inappropriate.

In sum, EPA’s interpretation of “total maximum daily load” as permitting staged reductions in phosphorus over five years is entitled to either *Chevron* or *Skidmore* deference. EPA was statutorily authorized to promulgate a staged TMDL. This court should uphold EPA’s interpretation and grant summary judgement to EPA on this issue.

III. UNDER EPA’S TMDL REGULATION, EPA DID NOT ACT ARBITRARILY AND CAPRICIOUSLY BY PROMULGATING THE TMDL WITHOUT “REASONABLE ASSURANCE.”

EPA regulations defining “TMDL” note that “[i]f [BMPs] or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.” 40 C.F.R. § 130.2(i). (A) On their face, EPA regulations allow a state or EPA to offset point source controls with nonpoint source controls when promulgating a TMDL. Even if this court finds EPA regulations to be ambiguous, core principles of administrative law demand that this court afford significant deference to EPA’s interpretation of its own regulations. Further, (B) EPA did not act arbitrarily or capriciously when it promulgated the Lake Chesaplain TMDL and took credit for anticipated reductions stemming from nonpoint source controls.

A. EPA’s TMDL regulations allow EPA to offset point source controls with nonpoint source controls.

Where Congress has delegated rulemaking authority to an agency, a reviewing court must accept the agency’s reasonable interpretations of its own regulations promulgated in exercise of that authority. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer* deference stems from “a

presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.” *Kisor v. Wilkie*, 139 S.Ct. 2400, 2412 (2019). Thus, *Auer* deference applies where (1) an agency reasonably interprets a “genuinely ambiguous” regulation, (2) “the agency’s reading [is] ‘reasonable,’” and (3) “the character and context of the agency interpretation entitles it to controlling weight.” *Id.* at 2415–16.

1. EPA’s TMDL regulations unambiguously allow EPA to substitute nonpoint source controls for point source controls where practicable.

To determine whether ambiguity exists “a court must exhaust all the ‘traditional tools’ of construction” by carefully considering “the text, structure, history, and purpose of a regulation.” *Id.* (quoting *Chevron*, 467 U.S. at 843). At this stage, however, courts may find a regulation to be clear and may avoid the question of deference altogether. *See id.* (“If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law.”).

On its face, the regulatory definition of TMDL clearly allows for EPA to offset WLAs with LAs and simply requires that the offsets be “practicable.” 40 C.F.R. § 130.2(i). Thus, the regulation gives discretion to the state or EPA to determine whether, for a particular impaired segment, point source controls can be made more stringent due to the availability of nonpoint source controls. To read any additional standard into an otherwise discretionary regulation would be improper. *See Sierra Club v. Martin*, 46 F.3d 606, 619–624 (7th Cir. 1994) (holding regulations governing forest diversity did not “dictate that [USFS] analyze diversity in any specific way” and that the conservation biology approach advocated for by the Sierra Club was not legally required). Thus, this court should give effect to the clear language of the regulation and end its analysis on the meaning of the regulation here.

2. In the alternative, under *Auer*, EPA’s interpretation of its regulations is reasonable and should be upheld.

If this court determines EPA’s regulations are ambiguous on this issue, EPA’s interpretation is nonetheless reasonable under *Auer*. At this step of *Auer*, courts look to whether the agency’s interpretation “come[s] within the zone of ambiguity the court has defined” at the first step. *Kisor*, 139 S. Ct. at 2416. The interpretation must be “within the bounds of reasonable interpretation.” *Id.* (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

The text, structure, purpose, and history support EPA’s interpretation that section 130.2(i) does not impose any substantive requirement on planners before planners can consider nonpoint source control tradeoffs. The text of the regulation explicitly allows for tradeoffs and imposes only a “practicability” standard to make such a determination. *See* 40 C.F.R. §130.2(i). It is thus within EPA’s or the state’s reasoned discretion whether to grant such tradeoffs. This reading of agency discretion is reinforced by section 130.7(d); there, EPA regulations parrot the statute, and allow for EPA, at its discretion, to disapprove of a state TMDL and promulgate its own, subject to public notice and comment. *See* 40 C.F.R. § 130.7(d)(2).

Likewise, the purpose and history of the regulations support the reasonableness of EPA’s interpretation. Both the statute and regulations make clear that TMDLs are meant to ensure the water quality of a particular impaired segment. *See* 33 U.S.C. §1313(d); 40 C.F.R. § 130.7(c). Discretion in the planners on how best to achieve this purpose is fully consistent with the statute and regulations. Further, a brief history of the regulation supports EPA’s reading. EPA’s 1985 rule defining “TMDL” requires WLAs and LAs but does not establish any standard by which EPA must evaluate their likelihood of implementation. *See* 50 Fed. Reg. 1774, 1774–75 (Jan. 11, 1985) (codified at 40 C.F.R. 130). In 2000, EPA promulgated a Final Rule which required that “States ... provide reasonable assurance that the wasteload and load allocations reflected in

TMDLs would be implemented.” Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,591 (Jul. 13, 2000) (codified at 40 C.F.R. pts. 9, 122, 123, 124, 130). In 2003, however, EPA eliminated the 2000 rule. *See* Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608 (Mar 19, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, 124, 130). The “reasonable assurance” standard is not law and was expressly rejected by the executive branch. Thus, the text, purpose, and history of the regulation reinforce EPA’s interpretation that no additional standard is applicable and that the regulation is discretionary.

3. The character and context of EPA’s interpretation entitles it to controlling weight.

At this stage, courts look to whether the agency’s interpretation claiming deference was “one actually made by the agency . . . it must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views.” *Kisor*, 139 S. Ct. at 2416. “Next, the agency’s interpretation must in some way implicate its substantive expertise.” *Id.* at 2417. “Finally, an agency’s reading of a rule must reflect ‘fair and considered judgement’ to receive *Auer* deference.” *Id.*

These steps are easily satisfied. EPA promulgated the Lake Chesaplain TMDL via notice and comment rulemaking; its interpretation of its regulations as allowing for tradeoffs without reasonable assurance was not an ad hoc position nor a post hoc rationalization convenient for litigation. Likewise, this interpretation implicates EPA’s substantive expertise given that it was exercised in a TMDL—an action that goes to the heart of EPA expertise given the blend of policy, science, and technical know-how required for such a document.

CLW argues that a 1991 EPA guidance document requires that EPA must have “reasonable assurances that nonpoint source reduction will in fact be achieved.” GUIDANCE FOR

WATER QUALITY BASED DECISIONS: THE TMDL PROCESS 15 (EPA 1991). This misapprehends the nature of guidance documents. As later EPA guidelines make clear, “[t]hese TMDL review guidelines are not themselves regulations. They are an attempt to summarize and provide guidance regarding currently effective statutory and regulatory requirements relating to TMDLs.” GUIDELINES FOR REVIEWING TMDLS UNDER EXISTING REGULATIONS ISSUED IN 1992 1 (EPA 2002). As this document makes clear via its use of “should,” “reasonable assurances” are not mandated by the regulations. *See id.* at 1, 4. Thus, the reasonable assurance standard is a general statement of policy, rather than a binding rule. *See National Mining Ass’n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (“An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad . . . permitting discretion under some extant statute or rule—is a general statement of policy.”). As such, EPA’s interpretation embodied in the TMDL that was subject to notice and comment rulemaking bears more weight than guidance which was not.

In sum, this court should defer to EPA’s interpretation that no “reasonable assurance” was required by the regulations, and that only a factual determination of whether nonpoint source controls were practicable was necessary.

B. EPA did not act arbitrarily or capriciously under the APA when it offset WLAs with anticipated reductions to LAs.

The Administrative Procedure Act provides that final agency actions can be set aside if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.

§ 706(2)(A). The Supreme Court has made clear that:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Arbitrary and capricious review is “highly deferential” and “presumes the validity of the agency’s action ... [if] a rational basis exists for its decision.” *Natural Resources Defense Council v. EPA*, 16 F.3d 1395, 1400-01 (4th Cir. 1993). Because EPA actions taken pursuant to the Clean Water Act “often require the evaluation of sophisticated data[,]” the reviewing court’s role is not to “sit as a scientific body,” but to ensure that EPA “show[s] that a rational connection exists between its decision-making process and its ultimate decision.” *Id.* at 1401.

CLW anchors its challenge in EPA’s departure from its 1991 guidance document and lack of evidence that New Union would implement BMPs. Thus, the only *State Farm* factor implicated is the question of whether EPA failed to consider an important aspect of the problem. Yet even this is insufficient. First, guidance documents are not binding law and an agency may depart from them without acting arbitrarily. *See Southern Forest Watch v. Jewell*, 817 F.3d 965, 972–74 (6th Cir. 2016) (holding that an operating manual was not binding law and that the Park Service did not act arbitrarily or capriciously by departing from the steps for public comment detailed in its manual).

Second, CLW relies on the political pressure that led New Union to change its original proposal and history subsequent to EPA’s adoption of the TMDL to suggest that EPA acted arbitrarily. Yet, the subsequent history is irrelevant to determining whether EPA acted arbitrarily at the time it promulgated the TMDL. Further, EPA, in reviewing the scientific record before it, could reasonably determine that nonpoint source controls were practicable. The record shows that both CAFO’s and septic systems contributed a “substantial amount” of phosphorus to Lake Chesaplain, despite exemptions for each under traditional CWA permitting. R. at 8. EPA could reasonably determine that elimination or mitigation of those exemptions for certain nonpoint

sources could make less stringent point source controls practicable under the regulation. In other words, the presence of political pressure does not necessarily influence EPA's decision on whether nonpoint source controls were practicable. That EPA conducted additional notice and comment on the original TMDL proposal suggests that it did fully consider the problem and did not act arbitrarily and capriciously.

In sum, EPA did not act arbitrarily or capriciously under the APA when it promulgated the Lake Chesaplain TMDL without "reasonable assurance" that New Union would implement BMPs. Under the facts available to EPA at the time, it reasonably determined that no "reasonable assurance" was necessary and that nonpoint source controls were practicable and would achieve sufficient reductions to make point source controls less stringent. This court should grant summary judgement to EPA on this issue.

CONCLUSION

Pursuant to the delegation of Congressional authority, EPA promulgated an effective TMDL that is consistent with the CWA and respects the principle of cooperative federalism. Accordingly, this court should afford deference to EPA's TMDL. This court should vacate the District Court's grant of summary judgment to New Union and partial grant of summary judgment to CLW. It should then grant summary judgment to EPA and hold that neither New Union's nor CLW's claims were ripe, as they present no legal hardship to either entity. In the alternative, this court should grant summary judgment on the merits of each of the above issues, as each of EPA's interpretations of the CWA and its own regulations warrant deference, and the decisions made by EPA in promulgating this TMDL were not arbitrary or capricious.