TEAM 2

No. 21-000123
Consolidated With
No. 21-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Chesaplain Lake Watch,
Plaintiff-Appellant-Cross Appellee

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

v.

United States Environmental Protection Agency,
Defendant-Appellant

Appeal From The United States District Court
For The District of New Union,
Consolidated case nos. 66-CV-2020 and 73-CV-2020
The Honorable Judge Romulus N. Remus

BRIEF OF PLAINTIFF-APPELLANT-CROSS APPELLEE CHESAPLAIN LAKE WATCH

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JURISDICTION

The United States District Court for the District of New Union has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Since the present action arises under Clean Water Act (CWA) § 303(d), a federal statute, the district court properly exercised jurisdiction in this case. The courts of appeals have jurisdiction over all final decisions of the district courts. 28 U.S.C. § 1291. The district court's grant of summary judgment was final, so this Court has jurisdiction to hear this case. Following the issuance of an Order of the district court dated August 15, 2021, Chesaplain Lake Watch (CLW) filed a timely notice of appeal.

ISSUES PRESENTED

I. Whether EPA's adoption of the 2019 EPA total maximum daily load (EPA's TMDL) and watershed improvement plan (WIP) for the Lake Chesaplain Watershed is ripe for judicial review.

II. Whether EPA's requirement at 40 C.F.R. § 130.2(i) that TMDLs include wasteload and load allocations is a permissible construction of CWA § 303(d).

III. Whether § 303(d) requires pollutant loading in total maximum daily loads to be measured on a daily basis, and whether TMDLs must be set at a level that attains water quality standards at the outset.

IV. Whether EPA's approval of a TMDL and WIP lacking reasonable assurances that nonpoint source reductions forming the basis for an increase in point source pollution will actually be achieved was arbitrary and capricious.

STATEMENT OF THE CASE

I. Procedural History

Plaintiff State of New Union (New Union) filed suit on January 14, 2020 and Plaintiff CLW filed a separate action on February 15, 2020. Record p. 10. Both New Union's and CLW's challenges were brought pursuant to § 702 of the Administrative Procedure Act. Record p. 10. Both New Union and CLW challenged EPA's rejection of the 2018 New Union Chesaplain Watershed phosphorous TMDL (New Union's TMDL) and EPA's subsequent adoption its own TMDL for the Chesaplain Watershed under CWA § 303(d). Record p. 4. The district court granted unopposed motions to consolidate CLW's and New Union's actions on March 22, 2020. Record p. 10. On July 1, 2020, EPA submitted the administrative record to the district court. Record p. 10.

CLW, New Union, and EPA filed and fully briefed cross-motions for summary judgment on all four issues presented. Record p. 5. On August 15, 2021, the district court issued an order that (1) denied the motion for summary judgment on EPA's claim that its determination to reject New Union's TMDL and adopt its own TMDL and WIP for the Lake Chesaplain Watershed is ripe for judicial review, (2) granted the motion for summary judgment on New Union's claim that § 303(d) does not require total maximum daily loads to include wasteload allocations and load allocations, (3) granted the motion for summary judgment on CLW's claim that phased-in annual TMDLs are contrary to CWA § 303(d), and (4) denied the motion for summary judgment on CLW's claim that EPA's issuance of wasteload allocation credits without reasonable assurances that nonpoint source BMPs will actually be implemented is arbitrary and capricious. Record pp. 12, 14, 15, 16.

CLW filed a timely notice of appeal seeking to reverse the district court's determination that (1) EPA's interpretation of the term total maximum daily load to include wasteload allocations and load allocations violated CWA § 303(d), and (2) EPA's credit for nonpoint pollution reductions to be achieved through implementation of BMPs to make point source pollution reductions less stringent was not arbitrary or capricious based on the record before EPA. Record p. 2.

II. Facts

A. The Degradation of Water Quality in Lake Chesaplain

Lake Chesaplain is a fifty-five mile long, five mile wide natural lake in New Union. Record p. 7. The scenic Chesaplain National Forest is located on the Lake's western shore. Record p. 7. The national forest has a public beach where tourists and local residents swim in Lake Chesaplain. Record p. 7. The national forest is also used for other forms of recreation, as well as timber production. Record p. 7. At the northern end of the Lake, in the city of Chesaplain Mills, the Union River flows into Lake Chesaplain. Record p. 7.

Before the turn of the twenty-first century, Lake Chesaplain was known for its first-rate water quality. Record p. 7. Its pristine waters attracted recreational boaters and fishermen from around the country, sustained abundant and diverse populations of aquatic species, and supported vacation communities and traditional agricultural practices around the Lake. Record p. 7. Unfortunately, water quality in Lake Chesaplain has declined significantly over the past several decades, largely due to nonpoint source pollution stemming from industrial agriculture and human waste. Record p. 7.

In the 1990s, ten large-scale concentrated animal feeding operations (CAFOs) were developed in the Lake Chesaplain watershed. Record p. 7. An enormous slaughterhouse, processing more than fifty million pounds of meat per year was also built in Chesaplain Mills to

maintain the hog CAFOs. Record p. 7. Around the same time, another vacation community was built along the eastern shore of Lake Chesaplain. Record p. 7. These industrial agriculture and vacation home developments polluted the once-pristine Lake and caused a precipitous decline in water quality. Record p. 7. As early as 2012, the Lake Chesaplain Study Commission, created by New Union, warned that phosphorus pollution was causing eutrophication, a process that makes water bodies less ecologically productive. Record p. 8. The phosphorus loading was also contributing to algae growth, creating a horrific odor, destroying the clarity of the water, and decreasing the amount of dissolved oxygen available for the Lake's aquatic life. Record p. 7. In recent years, Lake Chesaplain's water quality has continued to deteriorate. Record p. 7. The impacts of this pollution have caused a decline in tourism revenue. Record p. 7. Thick mats of algae on the surface of the Lake obscure its once crystal-clear waters, produce repulsive odors, and render the public beach unsuitable for swimming. Record p. 7. This decline in water quality has diminished CLW members' enjoyment of recreational activities like fishing, boating and swimming. Record p. 11.

B. The Polluters of Lake Chesaplain

The point source polluters of Lake Chesaplain include the slaughterhouse and the sewage treatment plant of Chesaplain Mills. Record p. 7. New Union has issued National Pollutant Discharge Elimination System (NPDES) permits under CWA § 402 to the slaughterhouse and the sewage treatment plant. Record p. 7. The nonpoint sources whose discharges cannot be controlled by NPDES permits include the septic tanks of vacation homes along the Lake's shore, the agricultural sources on the eastern shore of the Lake, and the hog CAFOs. Record p. 7.

C. The History of Water Quality Regulation in Lake Chesaplain

Under New Union's water quality standards, Lake Chesaplain is designated as a Class AA water. Record p. 8. Class AA waters are intended to support drinking water sources, primary contact recreation, and fish propagation and survival. Record p. 8. In 2008 New Union established the Lake Chesaplain Study Commission. After four years of study, the Commission released a report that found the Lake was suffering from eutrophication, a lack of dissolved oxygen, and excessive algae growth, all traceable to levels of phosphorus which consistently exceeded limits that would allow for a healthy lake ecosystem. Record p. 8. None of the scientific conclusions of the Commission were disputed, and its report was included in the record before EPA. Record p. 8 n.1.

In the following triennial review, New Union Division of Fisheries and Environmental Control (DOFEC) adopted water quality criteria for Class AA waters of 0.014 mg/l of phosphorus. Record p. 8. Because Lake Chesaplain failed to meet this criteria, it was included in DOFEC's § 303(d) list of impaired waters submitted to EPA. Record p. 8. However DOFEC failed to submit a TMDL for the Lake as required. Record p. 8. Despite this, EPA accepted the list of impaired waters. Record p. 8. In 2015, CLW threatened to sue both EPA and DOFEC for the failure to establish the required TMDL for Lake Chesaplain. Record p. 8. CLW agreed to dismiss its lawsuit after DOFEC agreed to establish a TMDL through a state rulemaking process. Record p. 8. In 2016 as part of this process, the Lake Chesaplain Study Commission issued a supplemental report, calculating the maximum annual loading that would result in attainment of the 0.014 mg/l phosphorus standard as 120 metric tons (mt). Record p. 8. The supplemental report showed that actual phosphorus loadings were 180 mt, 61.9 of which came from point sources, 85.8 from nonpoint sources, and 32.3 from natural background sources. Record pp. 8-9.

The Commission's supplemental report laid much of the blame for the phosphorus loading at the feet of the hog CAFOs and private septic systems. Record p. 9. Even though the CAFOs were categorized as non-discharging, large quantities of hog manure reached Lake Chesaplain through runoff and groundwater flows. Record p. 9. Substantial amounts of phosphorus also reached the Lake. Record p. 9. The supplemental report also noted that none of the point sources in the watershed had effluent limitations for phosphorus in their NPDES permits. Record p. 9.

In 2017, DOFEC issued public notice of their proposed implementation of the TMDL through a reduction in phosphorus loading that would be phased in over time and shared equally among point and nonpoint sources. Record p. 9. This proposal would not reach 120 mt loading until the fifth year of the TMDL, when the full 35% reduction in phosphorus loading necessary to meet Class AA water standards would occur. Record p. 9. The plan provided that point source reductions would be incorporated into NPDES permits, while nonpoint reductions would come from various BMP programs DOFEC planned to implement. Record p. 9.

This plan proved highly controversial. Record p. 9. Lakefront residents complained about increased maintenance expenses for their septic systems. Record p. 9. Point sources were worried about the cost of installing phosphorus treatment systems. Record p. 9. CLW argued that the required reduction must be achieved by requiring zero phosphorus loading from the two identified point sources. Record p. 9. The hog CAFOs objected to the imposition of any BMPs and argued that EPA has no authority to impose any loading limits on any nonpoint sources. Record p. 10.

Bowed by the hog CAFOs, DOFEC adopted their position in 2018. Record p. 10. A new TMDL, lacking any wasteload allocations for point sources or load allocations, was submitted to

EPA and rejected. Record p. 10. After notice and comment, EPA adopted the original DOFEC proposal, including the phased reduction in phosphorus loading for both point and nonpoint sources. Record p. 10. EPA called the phased point source reductions and BMP measures the Chesaplain Watershed Improvement Plan (CWIP). Record p. 10. In doing so, EPA incorporated the record of scientific reports and public comments before DOFEC into its own record. Record p. 10. The adopted CWIP lacks any enforcement mechanisms for BMPs and does not address whether EPA or DOFEC will attempt to enforce BMPs at all. Record p. 10.

D. Information from CLW Affidavits

Both the slaughterhouse and the sewage treatment plant are operating under expired NPDES permits and are not subject to any limitations on phosphorus discharges. Record p. 10. Each timely applied for permit renewal but challenged DOFEC's proposed 35% phosphorus loading reduction. Record p. 10. These point sources have sought a hearing on this element of their permits based on compliance costs. Record p. 10. After EPA's adoption of the TMDL, New Union has taken no steps to enforce phosphorus reduction BMPs for the nonpoint source polluters. Record p. 10. Nor have the state-issued nutrient management permits been modified to incorporate phosphorus reductions. Record p. 10. While the state sits on its hands, the once-pristine waters of Lake Chesaplain continue to violate water quality standards. Record p. 10.

SUMMARY OF THE ARGUMENT

I. EPA's decision to reject New Union's 2018 TMDL and adopt its own is ripe for review. An agency action is ripe for review if it causes hardship to the parties, does not interfere with further administrative action, and does not require further factual development. First, EPA's TMDL is insufficiently protective of water quality in Lake Chesaplain. EPA's TMDL provides an annual phased-in approach to achieving water quality standards and lacks reasonable

assurances that BMPs will be implemented so that pollution credits can actually be shifted to the wasteload allocation. Second, judicial review will not interfere with further administrative action because EPA's TMDL is definitive regarding the load allocation, the wasteload allocation, and the exact limits of discharges point source polluters. EPA's TMDL is a final agency action because it was adopted after notice and comment and determines the rights and obligations of point source polluters by specifying NPDES permit limits. Third, no further factual development is needed because all three challenges to EPA's TMDL are purely legal issues about congressional intent or EPA's interpretation of its own regulation. Though New Union still must incorporate EPA's TMDL into its § 303(e) planning process and incorporate the point source limits into NPDES permits, New Union is required to take these actions. The remaining administrative actions are mandatory, certain, and specific, so CLW has been harmed by New Union's expected conformity with the TMDL and judicial review will not interfere with the remaining administrative actions. EPA's adoption of its own TMDL is ripe for review.

II. EPA's interpretation of the word "total" as "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background" in 40 C.F.R. §130.2(i) is a permissible construction that is entitled to *Chevron* deference. An interpretation of a term by the agency administering the statute receives *Chevron* deference if it is ambiguous, and if the interpretation is a permissible construction of the ambiguous term. The word "total" in "total maximum daily load" is ambiguous. "Total" is not defined in CWA, and it is capable of more than one reasonable definition, including a definition that suggests a sum of constituent parts. CWA uses "total" to mean a sum of constituent parts in another section of the Act, confirming that this is a reasonable definition of the term in Act-specific contexts. Congress intentionally left the term "total" ambiguous for EPA to define, because CWA is a comprehensive, technical

statute, and there are complexities and costs associated with establishing TMDLs under CWA § 303(d)'s statutory framework. The delegation of authority to EPA to fill statutory gaps regarding TMDLs in CWA has been recognized by other courts. EPA has interpreted the ambiguous term "total" in a way that furthers CWA's broader purpose of achieving fishable and swimmable waters nationwide. TMDLs must consider point and nonpoint source pollution to compute load allocations, and EPA's requiring the breakdown of wasteload allocations and load allocations in a TMDL effectuates the purpose of a TMDL as a planning document meant to address the water quality of an entire water body. EPA's interpretation of the word "total" is a plausible reading that promotes the broader purpose of CWA and the informational purpose of a TMDL. Thus, EPA's interpretation is a permissible construction of an ambiguous term, and it should receive *Chevron* deference and be given controlling weight.

III. A phased annual TMDL is contrary to CWA § 303(d). Two requirements of TMDLs under § 303(d) are: (1) total maximum daily loads must be expressed in quantity per day, and (2) TMDLs must be set at a level necessary to implement the applicable water quality standards. First, EPA's interpretation of § 303(d) to allow total maximum daily loads to be expressed in mass per time, toxicity, or other appropriate measure is contrary to the plain meaning of the word daily. Applying the *Chevron* analysis, the plain meaning of "daily" is unambiguous. "Daily" means every day. Moreover, CWA's purpose and structure confirm that a total maximum daily load is the greatest amount of a pollutant that can pass into a water body each day without causing a violation of water quality standards. If "daily" can mean any other appropriate time frame, then a total maximum daily load would permit periodic violations of water quality standards, contrary to CWA. Because "daily" is unambiguous, Congress did not delegate authority to EPA to define the loading period. Even if "daily" was ambiguous, it is unreasonable

for EPA to interpret "daily" as annual because total maximum daily loads must account for seasonal variations under § 303(d). "Daily" means every day, so total maximum daily loads must be expressed in quantity per day.

CWA § 303(d) mandates that TMDLs be set at a level necessary to achieve water quality standards at the outset. A percentage reduction in loading necessarily permits a violation of water quality standards because it does not ensure attainment of water quality standards at the time the TMDL is adopted. In this case, a five-year percentage reduction in loading allows for violation of water quality standards for the next five years. EPA's own TMDL regulations confirm that TMDLs that permit violations of water quality standards, as is the case with EPA's TMDL, are contrary to CWA. Additionally, TMDLs form the basis of effluent limitations necessary to achieve water quality standards under § 301, which were supposed to be achieved by July 1, 1977. EPA may not extend the deadline set by Congress to achieve effluent limitations that meet water quality standards. Therefore, annual percentage reductions in loading are contrary to CWA.

IV. Approval of the EPA TMDL lacking reasonable assurances was arbitrary and capricious because it was a departure from long-standing agency policy and interpretation. EPA's own requirement of reasonable assurances has been consistently applied since originally announced in a 1991 guidance document. EPA provided no reason for its failure to include these assurances in its Lake Chesaplain TMDL and WIP. This departure from consistent agency policy without explanation renders the agency's approval of the EPA TMDL arbitrary and capricious.

Moreover, the long-standing interpretation of 40 C.F.R. § 130.2(i) to require reasonable assurances of load allocation reductions when granting point source pollution credits is also due *Auer* deference, underscoring the arbitrary and capricious nature of EPA's actions. *Auer* applies

to agency interpretations of ambiguous regulations. Interpretations due *Auer* deference must be reasonable, actually made by the agency, and represent its fair and considered judgment. Here, EPA's long-standing interpretation of 40 C.F.R. § 130.2(i) requires reasonable assurances of load allocation reductions, in accord with one of two competing definitions of "practicable." This interpretation of ambiguous regulatory text also furthers the purposes of the act. Finally, the interpretation originated in a guidance document intended to establish policies for multiple aspects of EPA's TMDL program. As such, it clearly represents an interpretation which was the product of deliberation and considered judgment, rather than a mere litigation position or *post hoc* rationalization. Having fulfilled all the elements of *Auer* deference, EPA's long-standing interpretation of 40 C.F.R. § 130.2(i) should be given deference over its litigation position attempting to rationalize the agency's failure to include reasonable assurances in its Lake Chesaplain TMDL and the CWIP.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 292 (3d Cir. 2015).

ARGUMENT

I. EPA'S ADOPTION OF ITS OWN TMDL AND WIP IS RIPE FOR REVIEW.

The three factors to consider when determining if an administrative action is ripe for judicial review are: "(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 presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967) (holding that courts must examine the fitness of

the issue for judicial review and examine the prejudice to the plaintiffs if judicial review is denied at the present stage).

First, EPA's TMDL causes hardship to CLW because it adversely affects water quality in Lake Chesaplain. Agency action causes hardship to the plaintiffs if it has an immediate, day-to-day effect on the parties and an adverse legal effect. *Abbott Lab'ys*, 387 U.S. at 152; *Ohio Forestry Ass'n*, 523 U.S. at 733 (explaining that harm can occur from modifying a formal legal license). EPA's TMDL specifies annual percentage reductions in load allocations and wasteload allocations rather than set daily allocations with immediate effect. Record p. 10. The wasteload allocation is implemented through NPDES permits, which authorize discharges by point sources. 40 C.F.R. § 122.44(d)(1)(vii)(B); 33 U.S.C. § 1342. EPA's TMDL also lacks reasonable assurances that nonpoint source polluters will implement BMPs so that pollution credits can be shifted to the wasteload allocation. Record p. 10. Because of these shortcomings, EPA's TMDL is insufficiently protective of water quality in Lake Chesaplain. Thus, EPA's TMDL creates hardship for CLW.

While New Union has not yet incorporated EPA's TMDL into its continuing planning process under § 303(e) or incorporated the point source limits into NPDES permits, EPA's TMDL still adversely affects Lake Chesaplain's water quality. "[E]xpected conformity to [regulations] causes injury cognizable by a court of equity." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 419 (1942); *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1156-57 (N.D. Cal. 2003) (holding a TMDL did not create hardship to parties because plaintiffs could "not point to a single future event or condition that is fairly certain to occur and [would] adversely impact *Plaintiffs* themselves") (italics in original). If EPA disapproves a state's TMDL, the state "*shall* incorporate [EPA's specified loads for impaired waters] into its current plan under [§ 303(e)]."

33 U.S.C. § 1313(d)(2) (emphasis added). Thus, New Union is required to incorporate EPA's TMDL into its continuing planning process under § 303(e). Similarly, New Union, as the issuer of NPDES permits in the state, is required to incorporate the effluent limitations specified in EPA's TMDL into the NPDES permits. Record p. 12. Therefore, New Union is not only expected but is required to conform to EPA's TMDL, which is insufficiently protective of water quality in Lake Chesaplain.

Second, judicial review of EPA's TMDL will not interfere with further administrative action. Judicial review interferes with further administrative action when the action can be altered, undone, or it is uncertain whether the action will occur. *See City of Arcadia*, 265 F. Supp. 2d at 1158-59 (explaining that judicial intervention would interfere with further administrative action because a regional board was planning on revisiting the TMDL and it could be altered or rescinded); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (holding an action unfit for judicial resolution because it was unknown whether the Commissioner of Food and Drugs would even order an inspection). New Union must incorporate EPA's TMDL into its § 303(e) planning process and issue NPDES permits with the specified effluent limitations. Because EPA's TMDL specifies the load allocation, the wasteload allocation, and the exact limits for the NPDES permits, there is no uncertainty as to the results of New Union's remaining actions. Therefore, "if there is something wrong with the TMDL," it is better to determine that now, rather than after New Union incorporates the effluent limitations in the TMDL into its planning process and implements NPDES permits that are insufficiently protective of water quality standards. *See Am. Farm Bureau Fed'n*, 782 F.3d at 294.

Moreover, EPA's decision to reject New Union's TMDL and adopt its own TMDL and WIP is a final agency action. A final agency action "mark[s] the consummation of the agency's

decisionmaking [sic] process" and results in legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178-79 (1997). An agency's decision-making process is complete if the action has been subject to notice and comment and if the agency makes definitive findings regarding the challenged action. *Toilet Goods Ass'n*, 387 U.S. at 162; *see Bravos v. Green*, 306 F. Supp. 2d 48, 56 (D.C. Cir. 2004) (explaining that the plaintiffs challenged EPA's approval of an implementation plan when EPA approved a TMDL and made no definitive findings regarding the implementation plan). Here, EPA adopted both its TMDL and the CWIP after notice and comment and EPA's actions regarding its TMDL and the CWIP are absolute. Record p. 10. Thus, EPA's decision to reject New Union's proposed TMDL and subsequently adopt its own TMDL and the CWIP is complete.

Next, legal consequences flow from EPA's TMDL. A TMDL by itself does not require any action, but TMDLs inform the creation of implementation plans. *City of Arcadia*, 265 F. Supp. 2d at 1144-45. An implementation plan explains how a pollutant level will actually be reduced through point source and nonpoint source reductions so a water body can attain applicable water quality standards. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002). In the instant case, EPA adopted both a WIP and TMDL together. Record p. 10. The WIP in this case details a combination of specific phased point source limits and BMP measures New Union must implement to reduce phosphorous in Lake Chesaplain. Record p. 10. Though the CWIP does not explain how the BMP measures will be enforced, New Union must incorporate the specified point source limits into NPDES permits to meet the wasteload allocation. Record p. 12. Therefore, the CWIP will have legal consequences because it ultimately authorizes point source discharges in specified amounts.

Third, no further factual development is needed to review CLW's challenges to the Chesaplain Watershed TMDL. The first two challenges to the TMDL are purely legal issues about congressional intent: (1) whether EPA's decision to reject a TMDL because it failed to include wasteload and load allocations is contrary to law as an incorrect interpretation of CWA § 303(d), and (2) whether EPA's adoption of a TMDL consisting of annual pollution loading reductions to be phased in over five years violates CWA § 303(d) requirements. The third challenge—whether EPA's failure to include reasonable assurances that New Union will implement the proposed BMPs contemplated in the CWIP was arbitrary and capricious or an abuse of discretion—is also a purely legal question because it addresses EPA's application of its own regulations.

Therefore, EPA's adoption of its own TMDL causes hardship to CLW, does not interfere with further administrative action, and does not require further factual development. Though New Union still must incorporate EPA's TMDL into its § 303(e) planning process and incorporate effluent limitations NPDES permits, the remaining administrative actions are mandatory, certain, and specific, causing cognizable injury to CLW. EPA's adoption of its own TMDL is ripe for review.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S HOLDING THAT EPA'S REJECTION OF NEW UNION'S TMDL FOR FAILING TO INCLUDE WASTELOAD ALLOCATIONS AND LOAD ALLOCATIONS IS CONTRARY TO § 303(d).

EPA's interpretation of "total maximum daily load" as requiring wasteload and load allocations is entitled to *Chevron* deference. EPA defines "total maximum daily load" as "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). Because EPA's interpretation of "total maximum daily load" has been promulgated in a regulation issued by the agency tasked with administering the relevant

statute, the interpretation is analyzed under *Chevron*'s two-step framework. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). Under *Chevron*, first, the court must determine whether the term at issue is ambiguous or whether Congress has directly spoken on the issue. *Id.* Unambiguous congressional intent overcomes a competing interpretation issued by the administering agency. *Id*. However, if the court finds the statute ambiguous, it will proceed to *Chevron* step two. *Id.* at 843. In step two, interpretations by the administering agency are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. An agency's interpretation of an ambiguous element in a statute is entitled to deference if it is a permissible construction of the term. *Id.*

The word "total" in "total maximum daily load" is ambiguous. To determine whether a term is ambiguous, first the court must look to the statutory text. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002). Here, "total maximum daily load" is not defined in CWA. *See* 33 U.S.C. § 1362. Because the term is not defined in the statute, the court may look to the dictionary definition of the word "total" to determine its meaning. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.,* 572 U.S. 545, 545 (2014). A term is ambiguous if it is susceptible to two or more reasonable definitions or meanings. *Chickasaw Nation v. United States,* 534 U.S. 84, 90 (2001). The lower court erred when it stated that "total" cannot be defined in a way that requires it to include specified components of a whole. Rather, the word "total" is ambiguous, and it can refer to a total number composed of specified parts. *See* Total, Merriam-Webster, https://www.merriam-webster.com/dictionary/total (last visited Nov. 19, 2021) (defining "total" as "comprising or constituting a whole"). Because "total" can reasonably mean "the sum of constituent parts of the load" in addition to "just a number," the term is ambiguous. *Am. Farm Bureau Fed'n*, 792 F.3d at 297.

The term "total" is used to suggest a "sum of constituent parts" elsewhere in CWA. When EPA considers the "total cost" of operating and maintaining publicly owned treatment works for the purposes of granting funds, it must look at the "total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors." 33 U.S.C. § 1284(b)(1). The listed factors show that the "total cost" was intended to include component parts. *Am. Farm Bureau Fed'n*, 792 F.3d at 297. The ambiguous term "total" can be reasonably defined as including component parts both under its ordinary meaning and in the context of CWA.

Ambiguity in a statute suggests that Congress intended to delegate authority to the administering agency. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (stating that *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"); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (stating that *Chevron* "held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion"). The delegation of authority to EPA to fill statutory gaps regarding TMDLs in CWA has been recognized by other courts. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002) (acknowledging EPA's authority to enact regulations regarding waters that require a TMDL); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 245 (D.D.C. 2011) (looking to whether EPA determined if water quality criteria could be occasionally violated). Additionally, deference to an administering agency's interpretations is appropriate when the interpretation concerns a complex statute involving technical or scientific subject matter. *Brand X*, 545 U.S. at 1002-03; *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 329 (2002). The Clean Water Act is a comprehensive statute, the

administration of which requires technical and scientific analysis. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132-33 (1985). Section 303(d), under which TMDLs are established, has been recognized itself as a "complex statutory scheme." *Pronsolino*, 291 F.3d at 1133; *see also Am. Farm Bureau Fed'n*, 792 F.3d at 305 (describing the "complexities, costs, [and] scientific uncertainties associated with identifying impaired waters and determining TMDLs for those water bodies"). Finally, Congress's intent to delegate broad authority to EPA is clear from the text of the Act. 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this Act, the Administrator of the [EPA] . . . shall administer this Act.").

EPA's interpretation of "total" is an interpretation which furthers the broader purpose of CWA. CWA's purpose is to achieve fishable and swimmable waters nationwide. 33 U.S.C. § 1251(a). In impaired waters, effluent limitations for point sources do not reduce pollution enough to meet the applicable water quality standards, so nonpoint source pollution must be addressed. *Id.* § 1313(d). *Am. Farm Bureau Fed'n*, 792 F.3d at 299. Evaluation of nonpoint source pollution is essential in computing the load allocations and wasteload allocations in TMDLs. *See Anacostia Riverkeeper,* 798 F. Supp. 2d at 248-49 ("A core requirement of any TMDL is to divide sources of contamination along the water body by specifying load allocations, or LAs, to predict inflows of pollution from particular non-point sources; and to then setting wasteload allocations, or WLAs, to allocate daily caps among each point source of pollution."); *Meiburg*, 296 F.3d at 1025 ("TMDLs are central to the Clean Water Act's water-quality scheme" because they address the effects of both point and nonpoint source pollution). Under CWA, a drafter of a TMDL *must* evaluate both point and nonpoint source pollution through wasteload and load allocations to meet the required water quality standard.

Although CWA does not require that the TMDL include a breakdown of load allocations and wasteload allocations, including such an allocation best effectuates the purpose of a TMDL. TMDLs are informational documents that are useful in planning implementation of pollution controls. *Am. Farm Bureau Fed'n*, 792 F.3d at 291. Given this informational purpose, it is useful to include as much relevant information as possible in the document, such as a breakdown of pollution loading from point and nonpoint sources. The author of a TMDL must consider and account for loading from nonpoint sources to meet water quality standards. *Id.* at 299. The author must also consider seasonal variations and a margin of safety in setting the TMDL. *Id.* at 298. Including all of these components in a TMDL is necessary to adequately address water quality impairment and ensure the "health of an entire water body." *Anacostia Riverkeeper,* 798 F. Supp. 2d at 250.

The word "total" is susceptible to multiple meanings, other uses of "total" in CWA suggest that a "total" may include component parts, Congress left ambiguity in CWA to allow EPA to fill the gaps with regulations, and CWA's purpose suggests that both load and wasteload allocations should be considered and communicated. Thus, the phrase "total maximum daily load" is ambiguous, and EPA's interpretation should receive deference under *Chevron* step two as long as it is a permissible construction. A permissible construction need not be "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. A permissible construction must only be a "plausible" reading of the text of the statute that "does not otherwise conflict with Congress's intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). EPA's interpretation is permissible because it is a plausible reading of the word "total," and the interpretation promotes CWA's goal of meeting water quality standards by including more specific information in TMDLs. Thus, EPA's interpretation of "total" is

entitled to deference, because it is found in a regulation issued by the administering agency, and it is a permissible construction that furthers the purpose of the statute. *See Chevron*, 467 U.S. at 843.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S HOLDING THAT AN ANNUAL TOTAL MAXIMUM DAILY LOAD CONSISTING OF A PERCENTAGE REDUCTION IN LOADING, PHASED IN OVER FIVE YEARS IS CONTRARY TO CWA § 303(d).

Section 303(d)'s full text describing total maximum daily loads provides:

> "Each State shall establish for the waters identified in paragraph (1)(A) of this section, and in accordance with the priority ranking, the total maximum *daily* load, for those pollutants which the Administrator identifies under section [304(a)(2)] of this title as suitable for such calculation. Such load *shall be established at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

33 U.S.C. § 1313(d)(1)(C) (emphases added).

Circuits are split on the proper way to interpret "daily" in § 303(d). The D.C. Circuit disagrees with EPA's interpretation that total maximum daily loads can be conveyed in terms other than daily loads and holds that the plain text of § 303(d) clearly indicates that total maximum daily loads must be expressed in quantity per day. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (stating that "daily" means every day and that the term is unambiguous). The Second Circuit holds that total maximum daily loads may be expressed in other appropriate measures like mass per time if that measure best serves the purpose of effective regulation of pollutant levels in a water body. *NRDC, Inc. v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001). To reach the conclusion that "daily" does not necessarily mean every day, the Second Circuit relies on the broader context of CWA that addresses a wide variety of pollutants and the deference afforded to EPA's construction of a statute that Congress designated it to implement. *Id.*

This Court should adopt the D.C. Circuit's holding in *Friends of the Earth*—that total maximum daily loads must be expressed in daily terms. The plain text of § 303(d) unambiguously requires total maximum daily loads to be expressed in daily limits. The context and purpose of CWA confirm that "daily" in total maximum daily load means every day. Not only does the statutory text mandate that total maximum daily loads be expressed in quantity per day, but § 303(d) also requires TMDLs to be established at a level necessary to implement water quality standards. Because TMDLs must be established at a level necessary to implement water quality standards, TMDLs cannot be expressed as a percentage reduction in load with a goal to attain the water quality standards five years later. First, total maximum daily loads must be expressed in a quantity per day, and second, a percentage reduction in pollutant loading is contrary to CWA.

A. CWA § 303(d) Unambiguously Requires Total Maximum Daily Loads to be Expressed as *Daily* Limits on Pollutant Loadings.

EPA provides that "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). When an agency's interpretation of a statute is challenged, as is the case with EPA's interpretation of the word "daily," courts apply *Chevron* deference. *Chevron,* 467 U.S. at 843-44. First, *Chevron* requires determining if the statute is ambiguous. *Id.* at 842-43. If the statute is not ambiguous and the plain text is clear, then the court must give effect to the unambiguously expressed intent of Congress. *Id.* If the statute is ambiguous and Congress has given an agency space to regulate, then the court must defer to the agency's interpretation so long as it is a permissible construction. *Id.*

When analyzing a statute, courts begin the text. *Muszynski*, 268 F.3d at 98. Section 303(d) clearly indicates that "daily" means every day. *Friends of the Earth*, 446 F.3d at 144. Merriam-Webster's online dictionary defines "daily" as "of or providing for every day" and

provides an example of "a *daily* schedule." Daily, Merriam-Webster, https://www.merriam-webster.com/dictionary/daily (last visited Nov. 3, 2021). A daily load, like a daily schedule, is something that occurs every day. Thus, according to the plain language of CWA § 303(d), total maximum daily loads must be expressed in daily terms.

Moreover, Congress does not "alter fundamental details of a regulatory scheme in vague terms" or "hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). "Daily" is a narrow term with only one meaning, so it is impossible that Congress meant anything other than every day. Further, the likelihood that Congress would leave a significant portion of a regulatory scheme unaddressed is a factor to consider when determining if a provision is ambiguous. *Id.* (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 590 (2000)). Total maximum daily loads are central to CWA's regulatory scheme because they address the whole health of a water body by regulating both nonpoint sources and point sources. *Meiburg*, 296 F.3d at 1025. Because ensuring consistent attainment of water quality standards is crucial to improving the nation's water quality, Congress did not give EPA broad discretion to determine the pollutant loading timeframe. Congress clearly meant for a total maximum daily load to be expressed in quantity per day. *See Friends of the Earth*, 446 F.3d at 144.

CWA's purpose and structure confirm that "daily" must mean every day. CWA's goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do this, CWA requires that water bodies have designated uses that have corresponding numerical water quality standards. 40 C.F.R. § 131.6. If a water body is not meeting its numerical water quality standards, then the water body is impaired and receives a total maximum daily load so that the water body can achieve its water quality standards. *Id.* § 1313(d). A total maximum daily load, therefore, is "the maximum amount of a pollutant which

can be contributed to a stream segment without causing a violation of the water quality standards." *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981).

If "daily" can be read as annual, or any other time frame, then a total maximum daily load would permit periodic violations of the water quality standards and water quality degradation, which is contrary to the purpose of CWA and § 303(d). *See* 33 U.S.C. § 1251(a) (setting a national goal of fishable, swimmable waters); *id.* § 1313(d) (regulating both point sources and nonpoint sources to improve water quality). Reading daily load as an annual pollution allotment allows large pollution events to violate water quality standards one day, but not technically violate the total maximum daily load because the one day of excessive pollution does not violate the annual load. *See Friends of the Earth*, 446 F. 3d at 145. Setting a daily limit on pollution is a necessary component of a TMDL but is not by itself sufficient to attain the applicable water quality standards as required by § 303(d). Rather, § 303(d) requires a maximum pollutant load to be expressed in daily terms and that the daily load must be at a level necessary to implement applicable water quality standards. Therefore, the purpose and structure of CWA and § 303(d) confirm that "daily" in total maximum daily load must mean quantity per day.

Therefore, because "daily" clearly and unambiguously means each and every day, Congress left no gap for EPA to fill with regulations defining the total loading period. The *Chevron* analysis ends here, and this Court should give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43; *see also Friends of the Earth*, 446 F.3d. at 144. This Court should hold unlawful EPA's interpretation that total maximum daily loads can be expressed in "mass per time, toxicity, or other appropriate measure" in 40 C.F.R. § 130.2(i) and hold that total maximum daily loads must be expressed in quantity per day.

Even if daily were ambiguous, interpreting "daily" to mean anything other than every day is unreasonable and deserves no deference under *Chevron* step two. In no other context does the word daily mean annual, weekly, monthly, or any other time frame. It is clearly unreasonable for EPA to interpret daily as anything other than every day.

Moreover, total maximum daily loads must account for seasonal variations. 33 U.S.C. § 1313(d). An annual load, like the load in EPA's TMDL, cannot account for seasonal variations. *See Muszynski*, 268 F.3d at 99. Because phosphorous levels in a water body in one season can impact algal growth in the next season, setting a maximum annual load does not account for seasonal variations. *See id.* Phosphorous loading levels can also vary seasonally based on precipitation and other natural factors. *Id.* For a total maximum daily load to adequately account for seasonal and natural variations, total maximum daily loads must be expressed in quantity per day.

To reach the conclusion that "daily" must be subject to a broader range of meanings, the Second Circuit points out that CWA is set up to address a wide range of pollutants that interact with water quality in a variety of ways. *Muszynski,* 268 F.3d at 98. However, EPA identifies all pollutants as suitable for a total maximum daily load calculation. 43 Fed. Reg. 60665 (Dec. 28, 1978). Even if EPA claims a rare pollutant is not suitable for a daily load calculation, that pollutant's daily load can be set to zero so that water body can achieve water quality standards. *Friends of the Earth*, 446 F.3d at 145. Therefore, EPA's determination that daily can mean "mass per time, toxicity, or any other appropriate measure" is unreasonable.

Critically, the Second Circuit only reached the conclusion that daily can mean "mass per time, toxicity, or any other appropriate measure" by ignoring the plain text of § 303(d). *Muszynski*, 268 F.3d at 98. The Second Circuit reasons that regulating a wide range of pollutants

under CWA implicates EPA's expertise and that Congress surely would not have intended to confine EPA's expertise narrowly. *Id.* at 98-99. However, *Chevron* step one requires courts to analyze the plain text of a statute to determine if it is ambiguous. *Chevron*, 467 U.S. at 842-43. Only if the statute is ambiguous can the court defer to an agency's reasonable reading of a statute. *Id*. Because the Second Circuit never determined whether daily was ambiguous and proceeded into analyzing the reasonableness of EPA's interpretation without addressing step one of *Chevron*, the Second Circuit's decision to defer to EPA's interpretation of § 303(d) is improper. This Court should reject the reasoning and holding of the Second Circuit and hold that the word daily unambiguously means every day.

In conclusion, the plain text of § 303(d) shows that "daily" means every day. The structure and purpose of CWA confirm that daily loadings must be measured in quantity per day. This Court should join the D.C. Circuit in holding that total maximum daily loads must be expressed in quantity of pollutant per day.

B. CWA § 303(d) does not Permit a Percentage Reduction in Loading to Meet Applicable Water Quality Standards.

Section 303(d) states that total maximum daily loads "shall be established at a level necessary to implement applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). In other words, a total maximum daily load must be set at a level necessary to achieve water quality standards at the outset. *See NRDC, Inc. v. EPA,* 301 F. Supp. 3d 133, 140-42 (D.D.C. 2018) (holding a TMDL that set a minimum load was contrary to § 303(d) because TMDLs must be a maximum load necessary to implement applicable water quality standards). A percentage reduction in loading necessarily permits a violation of water quality standards because it does not ensure attainment of water quality standards at the time the TMDL is adopted. In this case, the percentage reduction in loading is only at a level necessary to attain water quality standards after

a five-year period. This percentage reduction in loading allows for violation of water quality standards for the next five years. Because § 303(d) clearly and unambiguously requires total maximum daily loads to be set at a level to attain water quality standards at the outset, a percentage reduction in loading that allows for violation of water quality standards is contrary to CWA § 303(d).

EPA's total maximum daily load regulations confirm that a percentage reduction in loading is contrary to the plain language of CWA § 303(d). EPA defines loading capacity as "the greatest amount of loading that a water can receive without violating its water quality standards." 40 C.F.R. § 130.2(f). Assessing the loading capacity of the water body necessary to attain the applicable water quality standards is the first step in the TMDL process. *NRDC,* 301 F. Supp. 3d at 137. Once the loading capacity is determined, it is split into its two component parts: the wasteload and load allocations, which determine how much pollutant loading is permitted for point and non-point sources respectively. 40 C.F.R. § 130.2(h), (i). Just like the statute, the regulatory language requires total maximum daily loads to be set at a level that ensures attainment of water quality standards. *NRDC,* 301 F. Supp 3d at 142. Thus, total maximum daily loads that permit violations of water quality standards, as is the case with a five-year, percentage reduction in loading, are contrary to CWA regulations. Total maximum daily loads must be set at a level which attains water quality standards at the outset, not a level that attains water quality standards five years from now.

Additionally, total maximum daily loads form the basis of effluent limitations under § 301. 33 U.S.C. § 1311; *id.* § 1313(e)(3)(a) (stating that effluent limitations under § 301 are included in each state's TMDL planning and implementation process). Section 301 states that effluent limitations for point sources that are necessary to achieve applicable water quality

standards must be achieved before July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). Administrative action cannot extend deadlines set by Congress. *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 662 (3d Cir. 1976) (stating that Congress viewed the July 1, 1977 deadline as an inflexible target). Because the statutory deadline for achieving effluent limitations for point sources that ensure attainment of water quality standards has passed, EPA cannot effectively extend the deadline with a five-year, percentage reduction in loading in Lake Chesaplain.

So-called "phased TMDLs" are allowable under certain circumstances but do not allow a phased-in reduction in the wasteload or load allocations. These "phased TMDLs" are implemented in cases where existing data is insufficient to assess pollutant loading or the achievement of water quality standards. U.S. Env't Prot. Agency, EPA 440/4-91-001, Guidance for Water Quality-Based Decisions: The TMDL Process 15 (1991) [hereinafter 1991 Guidance]; *Muszynski,* 268 F.3d at 95. In this case, the scientific conclusions of the Chesaplain Commission are not disputed. Record p. 9. Any difficulty in assessing how water quality standards can be achieved in Lake Chesaplain comes from disputes among polluters over who will be forced to bear the burden of the necessary pollutant loading reductions, not a deficiency in the scientific data regarding wasteload and load allocations. Additionally, even under the phased approach, TMDLs must be calculated at levels protective of water quality standards based on estimated wasteload and load allocations. 1991 Guidance, p. 22. The "phased TMDL" process is inapplicable here because sufficient data exists to identify how water quality standards can be achieved. Even if such data did not exist, any "phased TMDL" would still have to meet applicable water quality standards.

In conclusion, CWA § 303(d) requires EPA to set total maximum daily loads at a level that meets water quality standards at the outset. EPA's definition of loading capacity as the

maximum amount of pollution that a water body can receive without violating water quality standards confirms that percentage reductions in loading are contrary to CWA. Percentage reductions in loading, like the five-year reduction in the present case, are contrary to CWA's plain language, its purpose, and its deadlines for achievement of water quality standards. EPA's approval of this TMDL including percentage reductions in pollutant loading was contrary to law and should be vacated.

IV. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S HOLDING THAT EPA'S FAILURE TO INCLUDE REASONABLE ASSURANCES IN THE TMDL IS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION.

A. EPA's Adoption of its TMDL was Arbitrary and Capricious Because the Agency Departed from its own Long-standing Policy of Requiring Reasonable Assurances.

The calculation of wasteload and load allocations involves the application of EPA's regulatory standards to the record before the agency and is reviewed under the arbitrary and capricious standard. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-414 (1971). An action is arbitrary and capricious if an agency changes its position, through rulemaking or otherwise, without explanation for the reasons for its departure. *Grace v. Barr,* 965 F.3d 883, 900 (D.C. Cir. 2020) (holding a departure from policy contained in U.S. Customs and Immigration Service lesson plan was arbitrary and capricious). An agency cannot simply gloss over or ignore prior policy without discussion. *Southwest Airlines Co. v. FERC,* 926 F.3d 851, 856 (D.C. Cir. 2019). In ignoring, without explanation, the reasonable assurances requirement for BMP credits contained in its own guidance documents, policy memoranda, and compliance manuals, EPA has acted arbitrarily and capriciously.

EPA has consistently required reasonable assurances that BMPs will be implemented before providing wasteload allocation credits. EPA first adopted the reasonable assurance

requirement for TMDLs in a 1991 guidance document. *See* 1991 Guidance. This guidance established a policy that "there must be assurances that nonpoint source control measures will achieve expected load reductions" before pollutant loads can be allocated between point and nonpoint sources. *Id.* at 15, 22. A 2002 guidance document reiterated the requirement, stating that in order for a TMDL to be approvable, it must contain "reasonable assurances that nonpoint source control methods will achieve expected load reductions." U.S. Env't Prot. Agency, Guidelines for Reviewing TMDLs Under Existing Regulations issued in 1992, at 4 (2002) [hereinafter 2002 Guidance].

EPA has continued to abide by its own reasonable assurance requirement first established in the 1991 Guidance and confirmed in the 2002 Guidance. EPA has consistently included the reasonable assurances requirement in compliance manuals and policy memoranda. *See* U.S. Env't Prot. Agency, EPA 841-B-99-007, Protocol for Developing Nutrient TMDLs 7-3 (1999) (including reasonable assurances as one of the "minimum elements of an approvable TMDL implementation plan"); U.S. Env't Prot. Agency, Chesapeake Bay TMDL 7-1 (2010) (including reasonable assurances in the TMDL and stating that "without a demonstration of reasonable assurance … the Bay TMDL would have to assign commensurate reductions to the point sources"); U.S. Env't Prot. Agency, Off. of Water, New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs) 5-7 (2013) [hereinafter 2013 New Policies].

EPA has also explained that to demonstrate the existence of reasonable assurances, EPA staff were to ensure that non-point source BMPs are designed and implemented adequately and adopted by enough non-point sources to ensure they would actually result in the anticipated reduction in pollution. *See* U.S. Env't Prot, Agency, Supplemental Information for TMDL

Reasonable Assurance Reviews (2012) [hereinafter 2012 Supplemental Information]. Consistent policy and guidance demonstrates that prior to this litigation, if reductions in nonpoint source pollutant loading formed the basis for an increase in a TMDL's wasteload allocation, EPA required reasonable assurances that these nonpoint source reductions would be achieved in the real world.

In approving the Lake Chesaplain TMDL and WIP and their wasteload allocation credits without such assurances, EPA has acted contrary to decades of its own consistent policy and guidance and has offered no explanation why it has done so. As such, its actions were arbitrary and capricious. EPA's adoption of the TMDL and WIP lacking these assurances should be vacated.

B. EPA's Reasonable Assurances Requirement is not only a Consistent Policy Position, but also it is an Interpretation of 40 C.F.R. § 130.2(i) Entitled to *Auer* Deference.

Federal courts give *Auer* deference to agency regulatory interpretation, guidance, and policies that have not gone through notice and comment rulemaking. *See Kisor v. Wilkie,* 139 S. Ct. 2400 (2019); *Auer v. Robbins,* 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945). This deference is "rooted in a presumption about Congressional intent – a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." *Kisor,* 139 S. Ct. at 2412. This deference is most warranted when the interpretation implicates agency expertise. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994).

Determining whether an agency interpretation of a regulation deserves *Auer* deference relies on a test similar to *Chevron* deference: first, the regulation must be ambiguous. *Kisor,* 139 S. Ct. at 2414. Second, the agency's interpretation must be reasonable. *Id.* at 2415. The regulatory interpretation must also be one "actually made by the agency," emanating from

policy-making actors and documents, and it must in some way implicate the agency's subject-matter expertise. *Id.* at 2416. Finally, it must represent the "fair and considered judgment" of the agency. *Id*. at 2417 (quoting *Auer,* 519 U.S. at 462).

The regulation at issue here is ambiguous. The portion of the TMDL regulations pertaining to BMP credits reads: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i). The word practicable is ambiguous. Language is ambiguous if it is "susceptible to more than one interpretation." *Chickasaw Nation,* 534 U.S. at 90. Black's Law Dictionary defines practicable as meaning either "reasonably capable of being accomplished" or "capable of being used." *Practicable*, *Black's Law Dictionary* (10th ed. 2014). Webster's defines practicable as "that [which] can be done or put into practice." *Practicable*, *Webster's New World College Dictionary* (4th ed. 2010). The requirement that more stringent load allocations be practicable could mean that EPA's TMDL can include credits to wasteload allocations as long as proposed BMPs are technically feasible—capable of being used, even if they will never be implemented. Alternatively, it could mean that there must be some sort of assurances that BMPs will actually be implemented—can be put into practice.

EPA's long-standing requirement that reasonable assurances are necessary to issue BMP credits is a reasonable interpretation of 40 C.F.R. § 130.2(i). EPA guidance and policy memoranda demonstrate that EPA's interpretation of "practicable" in 40 C.F.R. § 130.2(i) requires that there must be reasonable assurances that load reductions from BMPs are capable of being accomplished in the real world, not merely technically feasible. *See* 2002 Guidance; 2013 New Polices; 2012 Supplemental Information. This construction clearly falls within the bounds

of a reasonable interpretation because it clarifies the meaning of "practicable" in accord with an established definition.

This interpretation is not only facially reasonable based on the text of the regulation, but is reasonable in the context of the broader statutory and regulatory scheme of CWA. Reasonable assurances that BMPs will be implemented further the purpose of CWA, as well as the mandatory requirements that TMDLs be set at levels which will attain applicable water quality standards. 33 U.S.C. § 1251(a); *id.* § 1313(d)(1)(C). TMDLs are information-forcing documents and "the cornerstones for pollution-reduction plans" that create enforceable obligations and rights. *Am. Farm Bureau Fed'n,* 792 F.3d at 291. Reasonable assurances help ensure that the wasteload allocation and load allocation are each set at a level which is protective of water quality in the real world. Without such assurances, the TMDL document could become untethered from the TMDL value, showing reductions in loading that cannot be accomplished in the real world. The purpose of CWA is to protect water quality and eliminate the discharges of pollutants. Wasteload and load allocations that do not reflect the actual pollutant loading into a water body do not further this purpose. Indeed, wasteload and load allocations that do not bear a substantial relationship to real-world pollutant loadings hinder this purpose by showing pollutant reductions which cannot actually be achieved and will not protect water quality.

The requirement of reasonable assurances was an authoritative interpretation issued by the agency in a guidance document. Authoritative agency action does not require that a regulatory interpretation come from or bear the name of the agency head. *Kisor,* 139 S. Ct. at 2416. But it must "at least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.* Interpretations announced in letters, policy memos, compliance manuals, and guidance documents satisfy this element of *Auer* deference.

*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,*557 U.S. 261 (2009) (EPA internal policy memo authored by Director of the Office of Wetlands); *Ohio Valley Env't. Coal. v. Aracoma Coal Co.,* 556 F.3d 177 (4th Cir. 2009) (EPA guidance document authored by Assistant Administrator for Water). The reasonable assurances requirement was first announced in the 1991 Guidance published by the Office of Water. Subsequent documents were authored by the Assistant Administrator for Water and the Director of EPA's Office of Wetlands. *See* 2013 New Policies; 2012 Supplemental Information. These guidance and policy documents authored by policy-making agency staff are clearly authoritative agency interpretations of 40 C.F.R. § 130.2(i).

EPA's reasonable assurances requirement also represents the fair and considered judgment of the agency. This requirement "protects reliance interests associated with long-standing agency practices or interpretations." *Goffney v. Becerra,* 995 F.3d 737, 745 (9th Cir. 2021). Courts may not defer to an interpretation which would create an unfair surprise or is merely a "convenient litigating position." *Id.* at 746. EPA has consistently required reasonable assurances as components of a TMDL since 1991. As a long-standing interpretation of 40 C.F.R. § 130.2(i), as well as its incorporation into EPA's TMDL approval policy, the reasonable assurances requirement would create no such surprise. In fact, its abandonment for a *post hoc* rationalization that dispenses with EPA's own reasonable assurance requirement has created just such an unexpected outcome.

EPA's approval of the TMDL lacking reasonable assurances that load allocation reductions could be achieved was arbitrary and capricious. The agency departed from its own policy and guidance without explanation. Not only did the agency provide no rationale for its actions, EPA's guidance establishing the requirement was due *Auer* deference. This Court should

defer to EPA's long-standing interpretation of 40 C.F.R. § 130.2(i) as well as its consistent requirement of reasonable assurances and reject the agency's litigation position and its unlawful approval of this TMDL.

CONCLUSION

Therefore, CLW respectfully requests that this Court (1) affirm the district court's holding that EPA's adoption of its own TMDL and WIP is ripe for review, (2) reverse the district court's grant of summary judgment that EPA's rejection of New Union's TMDL for failure to include wasteload and load allocations is contrary to CWA § 303(d), (3) affirm the district court's grant of summary judgment that an annual total maximum daily load consisting of a percentage reduction in loading, phased in over five years is contrary to CWA § 303(d), and (4) reverse the district court's grant of summary judgment that EPA's failure to include reasonable assurances that proposed BMPs included in its TMDL would be put into practice is not arbitrary and capricious.