

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

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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 CASES NOS. 66-CV-2020 AND 73-CV-2020

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**BRIEF FOR DEFENDANT-APPELLANT,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**

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## STATEMENT OF JURISDICTION

In the consolidated proceedings below, the United States District Court for the District of New Union entered a final order (1) granting summary judgment in favor of Plaintiff-Appellee-Cross Appellee, the State of New Union (“**New Union**” or “**the State**”), in No. 66-CV-2020 and (2) granting in part and denying in part the summary judgment motions of Plaintiff-Appellant-Cross Appellee, Chesaplain Lake Watch (“**CLW**”), and Defendant-Appellant, United States Environmental Protection Agency (“**EPA**”), in No. 73-CV-2020. R. at 5, 15, 16. The district court had subject-matter jurisdiction pursuant to 18 U.S.C. § 1331 because the consolidated actions sought judicial review of federal agency action under 5 U.S.C. §§ 702, 706. R. at 10. The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction under 28 U.S.C. § 1291 because each party filed a timely notice of appeal from a final order of the district court below. R. at 2.

## STATEMENT OF THE ISSUES

EPA rejected New Union’s proposed total maximum daily load (“**TMDL**”) for the Chesaplain Watershed due to the State’s failure to provide annual allocations among the various point and non-point sources contributing to the pollution of Lake Chesaplain. Following the rejection of the State TMDL, EPA promulgated its own TMDL for the Chesaplain Watershed which included the required annual allocations, provided for a five-year schedule of compliance, and utilized a credit for implementation of best management practices (“**BMPs**”) among non-point sources.

- I. Is EPA’s rejection of the New Union TMDL and promulgation of its own TMDL ripe for judicial review when New Union maintains primary implementation authority and neither New Union nor CLW face any immediate costs of compliance?

- II. Does *Chevron* require this Court to defer to EPA’s determination that TMDLs must provide allocations among both point and non-point sources contributing to the overall pollutant load borne by a body of water?
- III. Does *Chevron* require this Court to defer to EPA’s determination that TMDLs may be expressed in terms of an annual load to account for seasonal variations and provide for phased implementation as part of the CWA’s continuing planning process?
- IV. Was EPA’s decision to adopt a credit for BMP implementation by non-point sources without reasonable assurances of state compliance arbitrary and capricious when neither Congress nor EPA has promulgated the reasonable assurance standard and BMP implementation is the primary responsibility of the states?

### **STATEMENT OF THE CASE**

This case centers on EPA’s ability to enforce longstanding regulations crucial to protecting and restoring our nation’s waters. Based on EPA’s expertise in this highly technical area, it established a TMDL for Lake Chesaplain necessary to restore the lake to its formerly pristine condition. R. at 10. The district court, however, declared that action unlawful and took the unprecedented step of vacating an EPA regulation that had stood for nearly forty years. *See* R. at 12. This case therefore has massive implications for EPA’s authority to oversee the TMDL process and goes to the very heart and soul of the Clean Water Act (“CWA”).

#### **A. The Clean Water Act TMDL Framework**

The CWA put in place a comprehensive system of regulation designed to bring the nation’s waters into conformity with acceptable standards of quality and safety through a process of cooperative federalism. *See* 33 U.S.C. §§ 1251(a)–(b). Under that framework, EPA works closely with the states to control pollution discharges from point sources—those entities which release pollutants into the water from discrete points such as pipes, ditches, channels, and wells. 33 U.S.C.

§ 1362(14). Specifically, EPA sets effluent limitations for each category and class of point source through technology-based standards, which are then enforced by the states under the National Pollution Discharge Elimination System (“NPDES”) permitting process. *See* 33 U.S.C. § 1311(b); 33 U.S.C. § 1342(a)–(b). In contrast, the states take primary authority in regulating non-point sources—that is, the originators of pollution discharge from non-discrete locations—due to traditional state primacy in this area. *See* R. at 5.

In addition to NPDES permitting and state non-point source regulation, the CWA directs states to implement, reassess, and improve water quality standards (“WQS”) for specific bodies of water within their respective jurisdictions. 33 U.S.C. § 1313(a), (c). WQS must designate the value and use of each body of water and identify the water quality criteria necessary to support those uses. 33 U.S.C. § 1313(c)(2)(A). Once WQS are set, each state must assess the ability of each body of water within its borders to satisfy the established standards through NPDES enforcement of effluent limitations. 33 U.S.C. § 1313(d)(1)(A). If effluent limitations would be insufficient to meet the WQS for a particular body of water, then the state must list that water as impaired. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7.

The impairment listing then triggers the state’s duty to promulgate a TMDL at a level “necessary to implement the applicable water quality standards with seasonal variations and a margin of safety” that accounts for residual uncertainty about the effect of effluent limitations on water quality. 33 U.S.C. § 1313(d)(1)(C). TMDLs must include load allocations for point sources and wasteload allocations for non-point sources contributing to the total pollutant load borne by the body of water. 40 C.F.R. § 130.2(i). By allocating the burden of necessary discharge reductions in this manner, TMDLs can ease the administrative burden on point sources using BMPs or other controls on non-point sources. *Id.*

Further typifying this flexible approach, the TMDL process carefully maintains the balance of power between EPA and the states. On the front end, if a state's submission is inadequate, then EPA has authority to reject the state TMDL and promulgate its own standard. 33 U.S.C. § 1313(d)(2). The states, however, possess the primary authority to implement TMDLs as part of their responsibility to submit and develop water quality management plans under the CWA's continuing planning process. *See* 33 U.S.C. § 1313(e); 40 C.F.R. § 130.5; 40 C.F.R. § 130.6. With respect to non-point sources, the states maintain control over implementation, subject to EPA's funding authority over state non-point source management programs. *See* 33 U.S.C. § 1329(b).

### **B. The Decline of Lake Chesaplain**

Lake Chesaplain is a fifty-five-mile-long natural lake located entirely within the borders of New Union. R. at 7. It is surrounded by the Chesaplain National Forest and Chesaplain State Park to the west and vacation communities and agricultural operations to the east. R. at 7. The City of Chesaplain Mills is located to the north, at the juncture where the Union River flows into Lake Chesaplain. R. at 7. To the south, Lake Chesaplain empties into the Chesaplain River. R. at 7.

Traditionally, Lake Chesaplain enjoyed superb water quality and supported a variety of recreational activities such as hiking, boating, swimming, and fishing. R. at 7. Regional development, however, began to change the status quo. R. at 7. In the 1990s, ten large-scale hog production facilities—otherwise known as concentrated animal feeding operations (“CAFOs”)—and a corresponding slaughterhouse were built in the Chesaplain Mills area. R. at 7. At the same time, the popularity of Lake Chesaplain resulted in an explosion of vacation home construction necessarily involving an expansion of private septic systems. R. at 7. These developments quickly deteriorated Lake Chesaplain's water quality. R. at 7.

Certainly, some efforts were taken to stave off Lake Chesaplain's impending decline. As point sources, both the Chesaplain Slaughterhouse—which discharges directly into the Union River—and the Chesaplain Mills Sewage Treatment Plant—which discharges directly into Lake Chesaplain—were required to obtain NPDES permits. R. at 7. Those controls, however, proved ineffectual and Lake Chesaplain's water quality experienced a sharp decline. R. at 7. Layers of algae formed in the summer months and produced foul odors, fish productivity decreased, and the local beach became unsuitable for swimming. R. at 7. As property values and tourism revenue plummeted, it became clear that Lake Chesaplain needed a significant overhaul. R. at 7.

### **C. Development of the Chesaplain Watershed TMDL**

Due to the precipitous decline in Lake Chesaplain's water quality, New Union created the Lake Chesaplain Study Commission (the "**Commission**"). R. at 8. In 2012, the Commission issued an influential report detailing the issues confronting Lake Chesaplain. R. at 8. Specifically, the Commission identified eutrophication—the process of decreasing biological production due to excess algae growth—as the primary obstacle. R. at 8. The Commission determined that the algae growth caused a host of problems including unsightliness, decreased water clarity, offensive odors, and insufficient levels of dissolved oxygen ("**DO**") to support the lake's fish population. R. at 8. In fact, summertime DO levels were found to be well below the five milligrams per litre ("**mg/l**") standard for Class AA waters such as Lake Chesaplain. R. at 8.

In addition to identifying the eutrophication problem, the 2012 Commission report also pinpointed the cause: phosphorus levels. R. at 8. The Commission found Lake Chesaplain's phosphorus levels to significantly exceed the maximum sustainable level of 0.014 mg/l. R. at 8. Indeed, Lake Chesaplain's phosphorus concentration ranged from 0.020 mg/l to 0.034 mg/l, nearly two-and-a-half times the acceptable level. R. at 8. Pursuant to those findings, the New Union

Department of Fisheries and Environmental Control (“**DOFEC**”) promulgated water quality criteria for Class AA waters consisting of an 0.014 mg/l phosphorus concentration limit in 2014. R. at 8. Since Lake Chesaplain could not meet that standard, it was listed on New Union’s impaired waters list that same year. R. at 8.

Under pressure from CLW—who threatened to file suit to compel action—New Union commenced a rulemaking proceeding to promulgate a TMDL for Lake Chesaplain. R. at 8. In 2016, the Commission issued a supplemental report to guide the TMDL rulemaking. R. at 8. The report identified the existing phosphorus loadings affecting Lake Chesaplain and calculated the maximum allowable load to consist of 120 annual metric tons of phosphorus. R. at 8. The share of existing loadings, cumulatively equaling 180 annual metric tons, broke down as follows:

**Point Sources**

Chesaplain Mills Sewage Treatment Plant: 23.4 annual metric tons

Chesaplain Slaughterhouse: 38.5 annual metric tons

**Non-Point Sources**

Hog CAFOs Manure Spreading: 54.9 annual metric tons

Other Agricultural Sources: 19.3 annual metric tons

Septic Tank Inputs: 11.6 annual metric tons

**Natural Sources**

Various: 32.3 annual metric tons

R. at 8–9.

In October 2017, DOFEC issued public notice of a TMDL proposal whereby discharge reductions would be achieved through equal phased restrictions on both point and non-point sources. R. at 9. Specifically, such reductions would take the form of a phased five-year schedule

of compliance culminating in a 35% reduction from the 180 annual metric ton baseline. R. at 9. The phased reductions contemplated a 7% reduction from the baseline each year—that is, a 7% reduction by year one, 14% by year two, 21% by year three, 28% by year four, and 35% by year five. R. at 9. Reductions by point sources were to be implemented through additional NPDES permit restrictions while reductions by non-point sources were to be enforced through BMP requirements. R. at 9. For the hog CAFOs, proposed BMPs included modified animal feeds, treatment of manure streams, and seasonal restrictions on manure spreading. R. at 9. For the private septic systems, proposed BMPs consisted of increased inspection and pumping. R. at 9.

The 2017 DOFEC proposal quickly encountered widespread opposition from industry and residential groups due to the costs of compliance. R. at 9–10. CLW likewise objected to the proposal and demanded a complete shutdown of point source phosphorus discharges into the Chesaplain watershed. R. at 10. Swayed by industry advocacy, DOFEC abandoned the proposal and adopted a final TMDL consisting solely of a 120 annual metric ton phosphorus limit in violation of 40 C.F.R. § 130.2(i). R. at 10. In July 2018, EPA rejected the proposed TMDL due to its failure to provide load and wasteload allocations as required by § 130.2(i). R. at 10. In its place, EPA adopted the original DOFEC proposal—that is, the 35% phased annual reduction of phosphorus discharges from point and non-point sources. R. at 10.

Following EPA’s promulgation of the Chesaplain Watershed TMDL, the NPDES permits for the Chesaplain Slaughterhouse and Chesaplain Mills sewage treatment plant expired. R. at 10. Both facilities are currently operating under their expired permits due to administrative extensions permitted by their timely applications for renewal. R. at 10. Additionally, both facilities have requested administrative hearings on the costs of compliance implicated by DOFEC’s proposal to implement the phased TMDL reductions. R. at 10.

#### **D. The Proceedings Below**

New Union, in action No. 66-CV-2020, and CLW, in action No. 73-CV-2020, each filed suit against EPA in the United States District Court for the District of New Union challenging the validity of the Chesaplain Watershed TMDL. R. at 10. The district court granted unopposed motions to consolidate the two actions. R. at 10. After EPA filed the administrative record with the district court, each party filed motions for summary judgment. R. at 10–11. On August 15, 2021, the district court entered a final order resolving those motions. R. at 5, 16.

As an initial matter, the district court found that the parties’ claims were ripe for judicial review. R. at 10–12. In analyzing ripeness, the court held that the Chesaplain Watershed TMDL was ripe for pre-enforcement review because it contemplated specific NPDES permit discharge limits and the plaintiffs could suffer prejudice without immediate judicial review. R. at 12. Accordingly, the court found the present case distinguishable from prior TMDL cases where courts had found a lack of ripeness due to the necessity of “further implementation actions by the states involved.” R. at 12.

In No. 66-CV-2020, the district court granted summary judgment in favor of New Union, finding EPA’s rejection of the New Union TMDL to be contrary to law and vacating EPA’s longstanding interpretation of that term under 40 C.F.R. § 130.2(i). R. at 14. The court, applying the *Chevron* framework, found EPA’s interpretation of TMDLs to be unambiguously foreclosed by Congressional intent under *Chevron* step one. R. at 13.

In No. 73-CV-2020, the district court granted in part and denied in part the summary judgment motions of EPA and CLW. R. at 5; 14–16. With respect to CLW’s first challenge, the court held that EPA’s interpretation of TMDLs as allowing for annual loads and phased implementation was contrary to law. R. at 14–15. On CLW’s second challenge, the court held in

EPA's favor and deferred to EPA's decision to adopt a credit for expected BMP implementation by non-point sources, reasoning that EPA was owed a significant amount of deference under the exceedingly narrow arbitrary and capricious standard of review. R. at 15–16.

Pursuant to those findings, the district court (1) ordered EPA to approve the New Union TMDL and (2) dismissed the CLW complaint. R. at 16. This appeal followed as each party filed a timely Notice of Appeal with the district court. R. at 2.

### **SUMMARY OF THE ARGUMENT**

This Court should vacate the district court's decision in its entirety due to lack of ripeness. Alternatively, if this Court reaches the merits of the parties' substantive challenges, this Court should reverse the district court's grant of summary judgment in favor of New Union and reinstate EPA's TMDL. Next, this Court should find in favor of EPA by reversing the district court's grant of summary judgment which vacated EPA's phased annual load allocations. Lastly, this Court should affirm the district court's grant of summary judgment in favor of EPA regarding its decision to adopt BMP implementation credits.

As an initial matter, this Court lacks Article III jurisdiction because New Union's and CLW's claims are unripe for judicial review. To establish ripeness, a party seeking pre-implementation review of agency action must demonstrate that (1) the issues raised by the parties are fit for judicial resolution and (2) the parties would experience significant hardship if judicial relief were denied. Neither showing is made here. First, the issues raised are not currently fit for judicial review because EPA's Chesaplain Watershed TMDL is primarily an informational tool without concrete binding effect. Second, even if the issues were appropriate for judicial resolution, neither CLW nor New Union will face any appreciable hardship if judicial review were denied at this stage of the proceedings. This Court therefore lacks subject matter jurisdiction and should vacate the district court's decision in its entirety.

Nonetheless, if this Court does reach the merits of the parties' substantive challenges, this Court should reverse the district court's grant of summary judgment in favor of New Union and reinstate EPA's TMDL. EPA's rejection of New Union's TMDL was lawful because the New Union TMDL violated EPA's TMDL regulation. The CWA mandates states to promulgate and achieve water quality standards through the use of TMDLs, the standards for which Congress left undefined. EPA's subsequent regulation supplements the ambiguous text of the CWA by defining the statutory term "total maximum daily load." EPA's interpretation, as codified through notice-and-comment rulemaking, was made pursuant to EPA's authority to promulgate rules carrying the force of law to administer the CWA. As an authoritative interpretation of the CWA, EPA's TMDL regulation warrants the highly deferential standard under *Chevron* because TMDL is an ambiguous statutory term and EPA's interpretation of it is reasonable. This Court should defer to EPA's reasonable interpretation, reverse summary judgment for New Union, and reinstate EPA's TMDL.

Next, this Court should find in favor of EPA by reversing the district court's grant of summary judgment for CLW on its challenge to EPA's annual phased load allocations. Since Section 303(d) of the CWA does not express Congress's intent to restrict EPA to setting TMDLs through "daily" loads as opposed to "annual" loads, Section 303(d) is ambiguous. Reading the TMDL rules (1) in context with the CWA's statutory structure and (2) in a manner that would not lead to absurd results indicates Congress's intent to leave the exact details of TMDL adoption to EPA. Based on that implicit delegation, the agency may consider a range of factors about the specific pollutant and provide a TMDL necessary to meet applicable water quality standards. Since Section 303(d) is ambiguous, this Court should defer to EPA's reasonable interpretation pursuant to *Chevron*. A phased annual load is a reasonable approach to setting a phosphorous TMDL because phosphorous is impacted by seasonal and annual variations, not daily variations. Setting

a daily limit would not amount to a meaningful inquiry as to the actual water quality standards in Lake Chesaplain. This Court should defer to EPA's reasonable approach and reverse the district court's grant of summary judgment in favor of CLW.

Finally, this Court should affirm the district court's grant of summary judgment in favor of EPA regarding its authority to adopt BMP implementation credits. Nothing in the CWA, EPA regulations, or current EPA guidance requires EPA to wait for reasonable assurances from a state that non-point sources will implement BMPs. In suggesting a credit for non-point source BMPs, EPA merely sets a goal for New Union on how to balance the tradeoff between point source NPDES permits and non-point source BMPs. EPA does not need to wait for state assurances prior to setting this goal. New Union, and not EPA, is the primary entity responsible for implementing the BMPs and the TMDL overall. Thus, EPA did not act arbitrarily or capriciously in suggesting a BMP credit for non-point sources and this Court should affirm the district court's grant of summary judgment in EPA's favor.

### **STANDARD OF REVIEW**

This Court reviews the district court's grant of summary judgment *de novo* and applies the same standard of review as the district court in assessing the substantive law. *See Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). Accordingly, when reviewing federal agency action, this Court applies the deferential *Chevron* standard of review to an agency's legal interpretation of a statute which it authoritatively administers. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Similarly, when reviewing agency policy determinations, this Court applies the arbitrary and capricious standard of review and must uphold agency action if there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Finally, since ripeness is an essential part of Article III jurisdiction, this Court reviews the district

court's legal conclusion as to the existence of ripeness *de novo*. *Connecticut v. Duncan*, 612 F.3d 107, 112 (2d Cir. 2010).

## ARGUMENT

### **I. EPA's Promulgation of the Chesaplain Watershed TMDL Is Not Ripe for Pre-Implementation Review.**

Both New Union's and CLW's challenges to EPA's Chesaplain Watershed TMDL are not properly before this Court due to lack of ripeness. Primarily a question of timing, ripeness doctrine serves to "protect the agencies from judicial interference until an administrative decision has been formalized and its *effects felt in a concrete way*." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (emphasis added). Especially where no enforcement action has taken place, ripeness may be demonstrated only where (1) the issues raised by the parties are fit for judicial resolution and (2) the parties would experience significant hardship if judicial relief were denied. *See id.* at 148–49; *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162 (1967). Here, the challenges raised by CLW and New Union fail to satisfy both of those irreducible requirements. This Court therefore lacks jurisdiction under Article III because there is no current case or controversy and should vacate the district court's decision in total.

#### **A. The Chesaplain Watershed TMDL Is Not Final Agency Action and Depends on Further State Implementation Measures.**

The issues raised by New Union and CLW are not fit for judicial resolution because they involve premature challenges to a preliminary agency proposal. To be reviewable under the Administrative Procedure Act, agency action must be final, a determination which "is intimately bound up with the 'fitness' prong of the ripeness inquiry." *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984); 5 U.S.C. § 704. Agency action is only final when the action (1) marks the conclusion of the agency decision-making process and is not of a tentative nature and (2) determines legal rights or obligations directly affecting the "day-

to-day business of the complaining parties.” *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 239 (1980). That is not the case here.

In the present context, several courts have recognized that TMDLs have tentative immediate effects due to their largely informational purposes. For example, in *City of Arcadia v. EPA*, the United States District Court for the Northern District of California dismissed the plaintiffs’ claims for lack of ripeness because the TMDLs at issue did not “presently impose any obligations on Plaintiffs” and were “subject to revision before such obligations will be imposed.” *City of Arcadia v. EPA* 265 F. Supp. 2d 1142, 1157 (N.D. Cal. 2003). Similarly, in *Pronsolino v. Nastri*, the Ninth Circuit recognized that “TMDLs are primarily informational tools that allow the states to proceed” with implementation through the CWA’s continuing planning process. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002); 33 U.S.C. § 1313(e). In this way, EPA’s decision to promulgate the Chesaplain Watershed TMDL effectively functioned as an initial proposal entirely dependent on further implementation measures by the State. That is not final agency action, particularly where no direct and immediate effect on the day-to-day business of the challenging parties has been demonstrated. Indeed, the lack of immediate effect is apparent here since New Union has delayed actions consistent with the Chesaplain Watershed TMDL for several years. *See* R. at 10.

Nonetheless, the district court found otherwise, pointing to the fact that the TMDL conceived of load allocations which the State would presumably have to implement into the NPDES permits of regulated point source operators. R. at 12. That characterization overlooks the fact that load allocations are not truly binding. Load allocations “are not permit limits *per se*; rather they still require translation into permit limits” which merely necessitates “*consistency*, not require that permit limitations that will finally be adopted by a final NPDES permit be *identical*” to TMDL

allocations. *Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289, 328 (M.D. Pa. 2013), *aff'd*, 792 F.3d 281 (3d Cir. 2015). This flexible framework thus authorizes substantial deviations from the initial TMDL proposal and highlights its lack of finality with respect to NPDES permit limits.

In fact, TMDL load allocations are never fully binding unless EPA reassumes control over the relevant NPDES regime and implements the TMDL limits itself, a drastic step which could only be taken (1) due to a complete lack of action by the State in seeking to achieve water quality standards and (2) after public hearing and a ninety-day cure period. *See* 33 U.S.C. § 1342(c). At that point, judicial review would certainly be warranted. But that is not the situation presented here. Quite to the contrary, New Union will be hearing administrative challenges from the relevant point source operators objecting to the costs of compliance implicated by proposed NPDES permit limits. R. at 10. Depending on the result of those hearings, the State may pursue necessary adjustments from the original TMDL proposal. Given these potential developments, this Court could benefit from further factual development clarifying how the State intends to implement the load allocations contained in the Chesaplain Watershed TMDL. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (providing that a need for further factual development renders a claim unripe). Delaying review would therefore provide this Court with a more complete factual record.

In summary, EPA's TMDL is not final agency action because it is a tentative, informational proposal that has no immediate binding effect and is subject to revision. As such, the issues raised by the parties' challenges to the TMDL are not fit for judicial resolution at this time and the district court's decision should be vacated due to lack of ripeness.

**B. Neither New Union nor CLW Will Face Undue Hardship Without Pre-Implementation Review.**

Even if EPA’s TMDL constituted final agency action, denying judicial relief at this stage would not subject New Union or CLW to any significant hardship. To demonstrate hardship, the challenging parties must show that the disputed rule has some immediate adverse effect on their interests, such as where “agency regulations . . . force immediate compliance through fear of future sanctions.” *Ohio Forestry Ass’n*, 523 U.S. at 734. In the pre-implementation context, ripeness therefore exists only if the “regulation requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance.” *Abbott Laboratories*, 387 U.S. at 153.

The availability of pre-implementation review was plainly intended to mitigate the potential for regulated parties to face an impossible choice: either comply with a new rule and incur significant added costs or flout the rule and risk punitive sanctions. For example, in *Abbott Laboratories*, the Supreme Court emphasized that the drug company petitioners faced a stark dilemma in navigating whether to incur heavy compliance costs by re-labeling their products or continue with their normal affairs and risk disastrous criminal and civil penalties. *Abbott Laboratories*, 387 U.S. at 152–53. For this reason, the threat of harm to the *Abbott Laboratories* petitioners was “sufficiently direct and immediate as to render the issue appropriate for judicial review.” *Id.* at 153. Comparatively, in *Toilet Goods Ass’n*, pre-implementation review was inappropriate because the complaining parties experienced a minimal burden from additional administrative inspections. *Toilet Goods Ass’n*, 387 U.S. at 164–65. Since the parties were already subject to frequent inspections under the regulatory scheme, no adverse consequences would have resulted from delaying judicial review until a manufacturer actually objected to an attempted inspection. *Id.*

Here, unlike the situation in *Abbott Laboratories*, EPA's TMDL does not subject the challenging parties to immediate adverse consequences. At most, New Union can point to the possibility that a total lack of action with respect to the TMDL's load allocations and BMPs might lead EPA to reassume control over the State's NPDES system, 33 U.S.C. § 1342(c), and revoke its non-point source management funding at some point in the future, 33 U.S.C. § 1329. Even still, as in *Toilet Goods Ass'n*, the State is not exposed to substantial compliance costs or compelled to take any action *not already required* by the statutory scheme to avoid those possibilities. In the absence of EPA's TMDL, New Union would still be required to implement NPDES permit limits necessary to meet water quality standards because of Lake Chesaplain's presence on the State's impaired waters list. *See* 33 U.S.C. § 1313(d)(1)(C) (requiring promulgation of TMDLs for impaired waters); 33 U.S.C. § 1311(b)(1)(C) (requiring implementation of permit limits needed to meet WQS). Likewise, to receive non-point source management funding, the State would need to identify BMPs for each class and category of non-point sources, provide a schedule for implementation of those BMPs, and demonstrate satisfactory progress. 33 U.S.C. §§ 1329(b)(2), 1329(h)(8). In short, even if New Union can point to some potential penalties, it cannot identify any substantial and immediate costs of compliance which would necessitate judicial review at this stage. The required actions flowing from EPA's TMDL would necessarily occur anyway and impose no added costs of compliance.

Moreover, as applied to CLW, that same analysis is even more straightforward. Indeed, CLW faces *precisely zero* added compliance costs or potential penalties because it is not commanded to take any action by the TMDL. As the Supreme Court has explained, ripeness usually does not exist where the disputed regulation does not require the challenging party "to do anything or to refrain from doing anything." *Ohio Forestry Ass'n*, 523 U.S. at 733. Likewise, in a

similar challenge by an environmental interest group to the Chesapeake Bay TMDL, the United States District Court for the District of Columbia emphasized that the organization’s claims were unripe since the TMDL “impose[d] no legal obligation on the plaintiffs—or any other actor for that matter—and therefore, there is no risk that plaintiffs will have to expend resources in order to comply.” *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 80 (D.D.C. 2013). That logic should control here. CLW will face no appreciable hardship if judicial review were denied at this stage because the TMDL simply is not directed to its conduct in any meaningful way.

In summary, neither New Union nor CLW will experience significant hardship if this Court delays judicial review until the TMDL’s load allocations and BMPs have been fully implemented and their “effects felt in a concrete way.” *Abbott Laboratories*, 387 U.S. at 148. Until such time, however, the parties’ claims are unripe and the district court’s decision should therefore be vacated in its entirety.

## **II. *Chevron* requires Deference to EPA’s Interpretation of TMDL Requirements which was the basis of EPA’s Rejection of New Union’s TMDL.**

EPA’s interpretation of CWA Section 303(d)’s phrase “total maximum daily load” is entitled to the highly deferential standard of review pursuant to *Chevron*. If “Congress delegated the authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority,” the agency’s interpretation is entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); see *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007) (“[T]he ultimate question is whether Congress would have intended” courts to defer the agency’s interpretation). One of the ways in which Congress demonstrates its intent to delegate to an agency the authority to make rules with the force of law is by granting an agency the “power to engage in . . . notice-and-comment rulemaking.” *Mead Corp.*, 533 U.S. at 220–21. Congress delegated to

EPA the power to promulgate regulations to implement the CWA. *Pronsolino*, 291 F.3d at 1131 (“The CWA delegates to EPA the general rule-making authority necessary for the agency to carry out its functions under the Act.”). This delegation includes the specific authority to issue regulations regarding the development of TMDLs to achieve WQS pursuant to Section 303. *Id.* (“The EPA has the delegated authority to enact regulations carrying the force of law regarding . . . TMDLs.”).

In 1985, EPA promulgated regulations that require a TMDL to include waste load allocations (“WLAs”) and load allocations (“LAs”) for point sources and non-point sources, respectively. 50 Fed. Reg. 1774 (Jan. 11, 1985). These regulations were made through notice-and-comment rulemaking and are codified at 40 C.F.R. § 130.2(f)–(h) and 130.7(a). In considering these TMDL regulations, courts have routinely accorded EPA *Chevron* deference. See *Pronsolino* 291 F.3d at 1132–33; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 245 (D.D.C. 2011); *Natural Resources Defense Council, Inc., v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). In the thirty-five years since Section 130.2 was enacted, the district court is the only court to have found Section 130.2 unlawful. R. at 14.

**A. The CWA Does Not Unambiguously Prohibit the Requirement That TMDLs Include Load Allocation Specifications.**

Under *Chevron*, this Court must determine “whether the statute unambiguously forbids the Agency’s interpretation.” *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). To assess ambiguity, courts use “traditional tools of statutory construction to determine whether congress had an intention on the precise question at issue.” *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 (1987).

The CWA requires states to promulgate TMDLs for pollutants identified by EPA. 33 U.S.C. § 1313(d)(1)(c). If a state fails to do so, EPA may promulgate a TMDL list necessary to achieve water quality standards. *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1528 (9th

Cir. 1992) (“§ 1313(d) allows EPA to establish TMDLs.”); see *Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981 (9th Cir. 1994); *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). The TMDL requirement applies in a wide range of circumstances. The CWA provides that a TMDL “be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety.” 33 U.S.C. § 1313(d). The CWA does not define “TMDL” or further provide any of the necessary components of a TMDL. *Id.* As such, the text of the CWA does not indicate how EPA is to assess whether a TMDL can achieve water quality standards as required by Section 303(d)(1)(C).

Because the CWA does not define TMDL and lacks specific guidance as to how to carry out Section 303(d)’s requirements, Congress relied on EPA to fill in those gaps. See *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). EPA has the “authority to fill the Clean Water Act’s considerable gaps on how to promulgate a ‘total maximum daily load,’” particularly in light of the complex statutory scheme at issue. *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 296 (3d Cir. 2015) (citing *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1002–1003 (2005)).

The CWA does not unambiguously foreclose EPA’s interpretation of “total maximum daily load.” If Congress had wanted a TMDL to consist of only a single number, the phrase “maximum daily load” alone could have sufficed. See *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). Instead, Congress included the word “total,” which lends itself to multiple interpretations. “Total” is ambiguous in that it can mean “complete in all details,” “a result of addition,” or “a summation of factors.” “Total,” *Webster’s Third New International Dictionary*, at 2414 (1993). “Total,” in its verb form, meaning “to add up,” *id.*, refers to the combining of subsidiary parts. EPA’s interpretation that “total” refers to a sum of constituent parts is consistent with Section

303(d)(1)(C), which indicates that a TMDL is subject to “calculation.” EPA has defined “total maximum daily load” to include the components of that calculation. 40 C.F.R. § 130.2(i).

The district court court’s *Chevron* assessment was contrary to administrative law precedent. In its decision, the district court reasoned that “the lack of specific direction to states to perform the pollution reduction allocation” is an “omission by Congress,” and it ruled in favor of New Union. R. at 14. The district court’s ruling undermines the basis on which 61,000 TMDLs have been approved, *Am. Farm Bureau*, 792 F.3d at 309, and runs counter to half a century of precedent in administrative law. When Congress omits details from a highly technical statute, it intends the agency empowered to administer the statute, not courts, to fill in the gaps. *Brand X Internet Servs.*, 545 U.S. 967 at 1002–1003; *Chevron*, 467 U.S. 837, 843 (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute.”); *see also Chemical Mfrs. Ass’n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985).

**B. EPA’s Interpretation of “TMDL” as Codified in Section 130.2(i) Through Notice-and-Comment Rulemaking is Reasonable.**

If the agency interpretation of an ambiguous statutory term is reasonable, it warrants *Chevron* deference. *Chevron*, 467 U.S. at 843. Here, the second inquiry under *Chevron* is satisfied because EPA’s regulation defining the phrase “total maximum daily load” is a permissible construction of the statute. If the interpretation is not unambiguously foreclosed by the statute’s text, and it comports with the purpose of the statute, then it is reasonable. *Id.*; *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 82 (2007). EPA’s TMDL regulation furthers the purpose of the CWA. *Am. Farm Bureau*, 792 F.3d at 306. Congress entrusted EPA to implement the highly technical statute and, in so doing, EPA determined that WLAs and LAs are necessary to evaluate whether TMDLs will achieve water quality standards:

Although section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated. Thus, it is necessary for EPA to review and approve or disapprove a TMDL in conjunction with component WLAs and LAs.

50 Fed. Reg. at 1775.

The TMDL process, including the determination of WLAs and LAs, “provides crucial information for federal, state, and local actors in furtherance of the cooperative efforts to improve water quality envisioned in the CWA.” *Anacostia Riverkeeper*, 798 F.Supp.2d at 216–17. Section 130.2(i) satisfies the *Chevron* step two requirement because EPA’s “understanding of this very ‘complex statute’ is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.” *Chemical Mfrs. Ass’n*, 470 U.S. at 125 (applying *Chevron* to other sections of the CWA) (citation omitted).

EPA’s interpretation of “total” is reasonable because it is not unambiguously foreclosed by the statute and furthers the purpose of the CWA. EPA’s definition of “total” as including the sum of different load allocations and wasteload allocations is the most natural reading of the term “total” in the context of the CWA. EPA’s construction “furthers the Act’s requirement that the TMDL account for both point and non-point sources” to meet water quality standards. *Am. Farm Bureau*, 792 F.3d at 306. Congress implicitly recognized this interpretation as reasonable by affirmatively incorporating EPA’s rule in a subsequent amendment to the statute. *Id.* at 307. Two years after Code Section 130.2(i) was promulgated, Congress amended Section 303 by adding Subsection 303(d)(4). Pub. L. No. 100-4 § 404(b) (Feb. 4, 1987). That amendment refers to “a total maximum daily load *or other waste load allocation* established under this section.” 33 U.S.C. 1313(d)(4)(A) and (B) (emphasis added). Read in context, the word “other” in Section 303(d)(4) indicates that TMDLs contain a waste load allocation which necessarily references EPA’s

regulations because the term “wasteload allocation” does not appear anywhere else in Section 303 and only occurs in EPA’s regulations. Because EPA’s interpretation of TMDL is consistent with the language and purpose of the statute and was incorporated by Congress, it is reasonable.

EPA’s TMDL regulation, which clarifies the ambiguous provisions of CWA § 303(d), is (1) within EPA’s authority to regulate and (2) does not violate principles of federalism. Citing *Utility Air Regulatory Group (UARG) v. EPA*, the district court reasoned that EPA’s TMDL regulation was an unreasonable expansion EPA’s jurisdiction contrary to the CWA because EPA regulated matters typically reserved to states. R. at 14. The district court’s reliance on *UARG* is misplaced. There, EPA promulgated a regulation that invalidated its own “longstanding constructions” of the Clean Air Act and amounted to a course of regulation resulting in “the single largest expansion in the scope of the [Act] in its history.” *Utility Air Regulatory Group v. EPA*, 549 U.S. 302, 310 (2007) (citation omitted). Here, the longstanding TMDL regulation does not constitute “an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization,” *id.* at 324, because EPA has always had jurisdiction over the TMDL process pursuant to the CWA’s plain text. 33 U.S.C. 1313; *see also Am. Farm Bureau Fed’n*, 792 F.3d at 302 (“[T]he term ‘total maximum daily load’ exists within a cooperative federalism framework and the area being regulated is clearly within the agency’s jurisdiction.”).

Moreover, when an agency interpretation is codified through notice-and-comment rulemaking and left unrevised by Congress for decades, it is not an unauthorized, dramatic expansion of EPA’s regulatory jurisdiction. *See Zuni*, 550 U.S. at 90 (upholding the reasonableness of longstanding regulation in part because Congress had left it intact in the period of nearly thirty-years since it was first promulgated to when the Court considered it). Even if EPA’s interpretation did expand its jurisdiction, that would not preclude this Court from finding it reasonable under

*Chevron* step two. See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013) (a court must defer under *Chevron* to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority); see also *Rapanos v. United States*, 547 U.S. 715, 757–58 (2006) (Roberts, C.J., concurring) (indicating that had the Corps and EPA promulgated regulation via notice-and-comment rulemaking “developing some notion of an outer bound to the reach of their authority,” such regulation would be subject to *Chevron* deference, given the “broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act.”).

In addition, EPA’s TMDL regulation does not run counter to the CWA’s structure of cooperative federalism. States are primarily responsible for implementing TMDLs, while EPA shares responsibility in their development. See *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002). Here, because EPA has shared authority in the development process of TMDLs, EPA is not foreclosed from defining “total maximum daily load” as “allocated among different sources or expressed as a single number.” See *Shanty Town Ass’n v. EPA*, 843 F.2d 782, 791–92 (4th Cir. 1988). Section 303(d) “explicitly supplants state authority by requiring” states to participate in pollution-reduction programs, not by any means the state deems appropriate, but by the specific method of submitting a TMDL. *Shanty Town Ass’n*, 843 F.2d at 791–92; 33 U.S.C. § 1313.

Other provisions of the CWA likewise establish that EPA has always shared authority with the states to regulate point source and non-point source pollution via the TMDL and NPDES permitting processes. NPDES permits may be issued either by EPA, or by states with EPA’s approval. EPA retains the right to include additional limits in NPDES permits when necessary to ensure achievement of water quality standards. 33 U.S.C. § 1312(a), 1342(a). While it is true that non-point source regulation is generally left to the states, 33 U.S.C. § 1329, the CWA grants EPA

the authority to influence state implementation by providing grant money for state non-point source pollution management programs, 33 U.S.C. §§ 1311(b)(1)(C), 1342(d)(2). States have primary responsibility for establishing water quality standards, 303(d) lists, and TMDLs, but EPA is authorized to take over in the event of state inaction or insufficient action. *See* 33 U.S.C. § 1313(c) (authorizing EPA to establish water quality standards where it is determined that the state standards are inconsistent with the CWA); 33 U.S.C. § 1313(d) (authorizing EPA to establish TMDLs where it is determined that the proposed state TMDL will not achieve water quality standards); 33 U.S.C. § 1313(e) (authorizing EPA to review each state’s continuing planning process and disapprove of any state permit program for any state that does not have an approved continuing planning process).

Contrary to the district court’s assertion, R. at 13, Section 130.2(i) does not significantly affect the states authority to make land-use decisions. *Am. Farm Bureau Fed’n.*, 792 at 302; *see* 33 U.S.C. § 1251(b) (noting that within broad categories in the TMDL, such as “agriculture” and “forestry,” each State is free to determine how its sources will achieve the maximum permissible load and to choose its own suite of pollution-control measures or best practices). The TMDL regulation does not infringe the states’ primary ability to protect water quality and make local land use and agricultural practices decisions. Land-use decisions remain the prerogative of the states because the TMDL does not prescribe any specific method by which the State must implement it; rather, it is merely an informational tool to aid states in regulating water pollution pursuant to the CWA.

Section 130.2(i) is reasonable and clarifies the ambiguous terms of Section 303(d) in furtherance of the goals of the CWA and is consistent with the Act’s scheme of cooperative federalism. As such, the TMDL regulation warrants deference under *Chevron*. For the foregoing

reasons, this Court should reverse the grant of summary judgment below and reinstate EPA's TMDL.

### **III. *Chevron* Requires Deference to EPA's Determination That TMDLs May be Expressed by a Phased Annual Load Approach.**

This Court should defer to EPA's interpretation of Section 303(d). The type of deference granted to agencies lies on a spectrum, with full deference granted to agency interpretation under *Chevron* and persuasive deference granted to agencies under *Skidmore*. *Pronsolino*, 291 F.3d at 1131. Full *Chevron* deference is warranted here.

#### **A. The CWA Does Not Unambiguously Express Congressional Intent to Confine EPA or States to Only Establish a TMDL Conveyed in Daily Load Terms.**

Since Congress has not "directly addressed" whether EPA may adopt a TMDL set with a phased annual approach as opposed to a daily load approach, the statute is ambiguous as to this issue. *Chevron*, 467 U.S. at 842-43. Congress's delegation to EPA on this particular question may be "implicit rather than explicit." *Id.* Thus, this Court should not defer to its own interpretation over EPA's reasonable interpretation of Section 303(d). *See id.* *Chevron* step one requires this Court to first determine if the plain meaning of Section 303(d) "is susceptible to two or more reasonable meanings," and if so, to use canons of statutory construction to "narrow[] the possible meaning of the ambiguous text." *Muszynski*, 268 F.3d. at 98. Section 303(d) provides that states shall establish "the total maximum daily load" for pollutants, and that these loads "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). EPA's regulations further clarify that TMDLs "can be expressed in terms of either mass per time, toxicity,

or other appropriate measure.” 40 C.F.R. § 130.2(i). This regulation fills in the gaps left by Congress.

To start, the plain meaning of Section 303(d) is ambiguous about whether TMDL can be expressed in terms of a phased annual load approach. The term “daily” is susceptible to two or more reasonable meanings, as seen by the current circuit split in the Second Circuit and DC Circuit. See *Muszynski*, 268 F.3d. at 98 (finding that “daily” is susceptible to multiple meanings); *c.f. Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (finding the word “daily” was unambiguous”); *contra Anacostia Riverkeeper*, 798 F. Supp. 2d at 245 (“[A]lthough the statute is explicit about the requirement for a daily load, it is silent on whether another timeframe may be used when that would be more appropriate for the particular pollutant at issue.”).

Moreover, the traditional tools of statutory construction reinforce that Congress did not intend the term “daily” to exclude any EPA adoption of a TMDL prescribed in phased and annual terms. Consider first the bedrock canon of statutory construction to place the text “in the context of the entire statutory structure.” *Muszynski*, 268 F.3d. at 98. Under the whole statute canon, “[t]he term ‘total maximum daily load’ is susceptible to a broader range of meanings” than simply a load that must be calculated in days. *Id.* CLW’s “overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA.” *Id.* at 98; R. at 14. Section 304(a)(2) says that states must set a TMDL for pollutants that the Administrator deems “suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(c). The term “daily” read in conjunction with Section 304(a)(2) expresses how Congress left open for EPA to consider a range of information about a pollutant to calculate TMDLs. *Muszynski*, 268 F.3d. at 98. For example, the government may look at how “highly toxic pollutants” that have immediate effects on a waterbody at small percentages require “close regulation at a daily level.” *Id.* The government may effectively regulate less toxic pollutants like

phosphorus beyond a daily basis because phosphorus is more tolerable and has a less immediate effect on water bodies, even at a higher percentage. *Id.* at 98. Thus, EPA may express a TMDL using “another measure of mass per time, where such an alternative measure (alternative to diurnal) best serves the purpose of effective regulation of pollutant levels in waterbodies.” *Id.* at 99. Alternative measures of time therefore include “annually” or “seasonally.” *Id.*

Additionally, the canon requiring avoidance of absurd results and internal inconsistencies looms large here. *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981)). The CLW’s reading would be absurd because it would not permit EPA to effectively regulate pollutant loads in a manner “necessary to implement the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). An additional absurdity arises from CLW’s argument that Section 303(d) requires a hard deadline of July 1, 1977, for all TMDLs to achieve water quality standards, and that the phased TMDL would grant EPA and New Union a five-year extension. R. at 15. Such a reading is overly restrictive and absurd considering how implementation of a TMDL takes time, and how a lake with “objectionable odors, decreased water clarity, and a decreased in dissolved oxygen” will need more than a day, and even year to meet the applicable water quality standards. R. at 8.

In summary, since congress did not intend for Section 303(d) to be so restrictive on how EPA and states adopt TMDLs to meet the necessary water quality standards, the statute is ambiguous, and the Court should thus turn to step two of the *Chevron* analysis and defer to EPA’s reasonable interpretation of the statute.

**B. EPA’s Interpretation of the CWA Through Notice-and-Comment Rulemakings is Reasonable.**

This Court should not determine whether the agency’s interpretation “is the best possible” one, but whether the agency made “‘a reasonable policy’ choice in reaching its interpretation. *Am. Farm Bureau Fed’n*, 792 F.3d at 295 (citing *Brand X*, 545 U.S. at 986).

EPA has a reasonable basis for determining that the TMDL should include annual loads instead of daily loads. EPA is required under Section 303(d) to look at “seasonal variation” when setting a TMDL. 33 U.S.C. § 1313(d)(1)(C). Looking at seasonal variation requires an insight as to how phosphorus concentrations change as seasons change. Here, the phosphorus polluting Lake Chesaplain creates “[m]ats of algae . . . during the summer months” and the “[s]ummertime DO levels were found to be . . . well below the five mg/l DO standard designated for class AA waters.” *R.* at 7, 8. The eutrophication impacting Lake Chesaplain is exacerbated by the warmer summer months where “air and water temperatures and sunlight act to spur algal growth.” Vermont Agency of Natural Resources, *Phosphorous TMDL for Ticklenaked Pond* (2009) (approved by EPA). Since phosphorous is a less toxic pollutant and more tolerable to waterbodies, daily variations in phosphorus do not impact the lake as much as seasonal and even annual concentrations would. This is because the concentration of phosphorus in a waterbody is impacted by the “seasonal interplay of temperatures, density, and wind.” *Muszynski*, 268 F.3d. at 98.

Allowing the annual loading limit to be phased in over a period of five years is also reasonable because achievement of water quality standards in Lake Chesaplain cannot be completed in a day. Lakes “store phosphorus in the water column and sediment,” meaning that water quality responses are “related to the total nutrient loading occurring over a year.” New York State Department of Environmental Conservation, *TMDL for Phosphorus in Chautauqua Lake* (2012). A phased annual load best allows EPA to set a TMDL “at a level necessary to implement the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). Providing a five-year schedule of compliance also sets a basis for New Union’s implementation, monitoring, and general “continuing planning process” as the State gathers more information over the years and reevaluates how best to implement the TMDL. 33 U.S.C.S. § 1313.

Thus, EPA’s decision was reasonable and “a typical protocol when describing in-lake algal response to nutrient loading.” Vermont Agency of Natural Resources, *Phosphorous TMDL for Ticklenaked Pond* (2009). EPA made a “reasonable policy choice” in reaching its decision. See *Brand X*, 545 U.S. at 986.

**C. Alternatively, EPA’s Interpretation of the CWA in its Guidance Documents is Persuasive.**

Even if this Court determines that it should not grant *Chevron* deference to EPA’s Section 303(d) interpretation, this Court should nonetheless grant *Skidmore* deference to EPA. Under *Skidmore* deference, a court “defers to the agency’s position according to its persuasiveness.” *Pronsolino*, 291 F.3d at 1131 (9th Cir. 2002) (citing *Mead*, 533 U.S. at 221). When an agency does not invoke its authority to make rules with the force of law, this Court should grant deference because of (1) the agency’s specialized experience and access to broader information and (2) “the value of uniformity in the agency’s administrative and judicial understandings of what a national law requires.” *Mead*, 533 U.S. at 233, 237.

EPA is a specialized agency and Section 303(d) is “an intricate statutory scheme addressing technically complex environmental issues.” *Pronsolino*, 291 F.3d at 1133. Due to the “science-driven” nature of Section 303(d), the “EPA’s interpretation of the issue [is] informative.” *Id.* EPA specifically addressed the issue of when TMDLs may be prescribed in terms of phased annual load approach in a memorandum titled “Clarification Regarding ‘Phased’ Total Maximum Daily Loads” in 2006. In this document, EPA clarified that “phased TMDLs” are TMDLs that were established “despite significant data uncertainty and where the states expect that the loading capacity and allocation scheme will be revised in the near future as additional information is collected.” *Id.* at 2. In pertinent part, the document notes

An example of a phased TMDL could be a TMDL for phosphorous in a lake watershed where there are uncertain loadings from the major land uses and/or limited knowledge of in-lake processes.

*Id.* at 4. The phased annual load TMDL for New Union fits the phased TMDL contemplated by EPA in its guidance documents. The TMDL for phosphorus in the Lake Champlain watershed was based on “uncertain loadings from major land uses” such as the hog CAFOs and private septic systems which were noted as non-point source polluters of phosphorus. R. at 9–10. This uncertainty was exacerbated by the fact that the NPDES permits for the slaughterhouse and Champlain Mills sewage treatment plants were expected to expire and renew. R. at 10. Thus, EPA’s adoption of its TMDL is in line with its guidance.

The purpose of EPA’s clarification was to promote consistency and uniformity for states or EPA adopting phased TMDLs across the nation. *See Mead*, 533 U.S. at 233 (noting the “value of uniformity” when granting deference to agency interpretations and guidance documents). In fact, EPA has permitted the use of phased annual TMDLs and has provided other guidance documents since 1991 regarding the implementation of phased annual TMDLs. *See e.g.*, EPA, *Water Quality Guidance for the Great Lakes System: Supplementary Information Document* (1995). EPA has also consistently adopted state TMDLs for watersheds using annual phosphorus loads instead of daily loads. *See* EPA, *Phosphorus TMDLs for Vermont Segments of Lake Champlain* (2016) (“Neither daily nor seasonal loads . . . accurately represent the effect of phosphorus loading to the lake.”). Considering EPA’s guidance and consistent application of the technical statute, as well as the uncertainty surrounding load source allocations during the adoption of the phased TMDL, the Court should at least grant *Skidmore* deference to EPA’s interpretation and find the agency’s actions persuasive.

#### **IV. EPA's Decision to Adopt a Credit for BMP Implementation by Non-Point Sources Is Not Arbitrary and Capricious.**

EPA's decision to adopt a BMP credit without a "reasonable assurance" requirement for state implementation was not arbitrary and capricious. The arbitrary and capricious standard is narrow, and this Court should not substitute its own judgment for that of EPA's. *State Farm*, 463 U.S. at 43. An agency rule is arbitrary and capricious only "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." *Id.*

Under EPA's TMDL regulations, "if Best Management Practices (BMPs) or other non-point source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i). BMPs are the

Methods, measures or practices selected by an agency to meet its non-point source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

*Id.* § 130.2(m).

As the regulation states, BMPs are the methods *selected by an agency* that may be applied by a state before, during, and *after* pollution-producing activities. *Id.* Here, the two main non-point sources in the Chesaplain watershed are the hog CAFOs and the private septic systems. R. at 9. EPA's BMP selection for CAFOs included modified feeds, physical and chemical treatment of manure stream, and restriction of manure spreading to when soil is frozen or saturated. R. at 9. EPA also provided examples for BMPs for private septic systems, such as increased septic tank inspections and pumping schedules. R. at 9. EPA was wholly permitted to suggest these BMPs to

New Union without requiring the state to provide reasonable assurances. The CWA requires states, and not EPA, to implement non-point source controls using state assessment reports. 33 U.S.C. § 1329(a); *see Meiburg*, 296 F.3d at 1026 (noting that the CWA “leaves regulation of non-point source discharges through the implementation of TMDLs to the states.”). The state reports must “describe[] the process for identifying best management practices and measures to control each category and subcategory of non-point sources.” *Id.* § 1329(a)(1)(C). EPA’s responsibility under the act is solely to approve the state’s program, not dictate what the state program would be. *Meiburg*, 296 F.3d at 1026. While EPA initially suggested the balance between NPDES permits and non-point source controls, this suggestion was not a requirement but merely a goal. The actual implementation of the goal is achieved by “adjusting pollutant discharge requirements in individual NPDES permits or establishing non-point source controls.” *City of Arcadia*, 265 F. Supp. 2d at 1144. Since non-point sources are not subject to a federal permitting program, non-point source controls “can be enforced against [non-point source polluters] only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority.” *Id.* (citing *Pronsolino*, 91 F. Supp. 2d at 1355–56). In any case, EPA still maintains a reasonable level of control over state implementation through its power to revoke non-point source management funding. 33 U.S.C. § 1329. This authority vitiates the need for any reasonable assurances.

Although guidance documents can have persuasive force, the 1991 guidance that CLW relied on was outdated and does not reflect EPA’s current stance on the issue. The “currently-effective TMDL” guidance can be found in the “2002 Integrated Water Quality Monitoring and Assessment Report Guidance.” 68 Fed. Reg. 13608 (Mar. 19 , 2003). This guidance document does not mention a “reasonable assurances” requirement prior to adopting a TMDL. EPA, 2002

*Integrated Water Quality Monitoring and Assess* (2002); *see also* 68 Fed. Reg. 13608 (noting EPA's withdrawal from rulemaking on a rule that would have incorporated the 1991 guidance).

Thus, CLW's contention that EPA acted arbitrarily or capriciously by setting a goal for New Union about non-point source BMP credits without getting state assurance is untenable. EPA was wholly permitted to set the goal, and it was up to New Union on how to balance the tradeoff between non-point source and point source pollution control mechanisms.

### **CONCLUSION**

For the foregoing reasons, this Court lacks Article III jurisdiction and should vacate the district court's decision in its entirety due to lack of ripeness. Alternatively, if this Court reaches the merits of the parties' substantive challenges, this Court should (1) reverse the district court's grant of summary judgment in favor of New Union and reinstate EPA's TMDL; (2) reverse the district court's grant of summary judgment in favor of CLW on its challenge to EPA's phased annual load allocations; and (3) affirm the district court's grant of summary judgment in favor of EPA regarding its decision to adopt BMP implementation credits.

Respectfully Submitted,

Dated: November 20, 2021

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