Team # 32

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
*Plaintiff-Appellant-Cross Appellee*,

- and -

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Defendant-Appellant.*

On Appeal from the United States District Court for the District of New Union

# Brief of Plaintiff-Appellant-Cross Appellee, CHESAPLAIN LAKE WATCH

# Table of Contents

# Table of Authorities

Page(s)

**Cases**

**Constitutional Provisions**



**Legislative History**



**Statutes**



**Regulations**

**Other Authorities**

# Introduction

The shimmering waters of Lake Chesaplain are a ***source of life***. They provide abundant opportunity for recreation, relaxation, and inspiration to New Union residents and those who seek its exalted shores. Moreover, the waters of Lake Chesaplain are a ***nexus of commerce*** between the Lake's littoral residents and centers of commercial activity along the Chesaplain River. While Lake Chesaplain has traditionally enjoyed excellent water quality, recent watershed development has led to disastrous effect on the purity of its waters. Thus, heightened protection of Lake Chesaplain is warranted, to ensure that future generations may continue to seek inspiration from its waters.

Enter the federal Clean Water Act. When the 92nd Congress passed sweeping amendments to the Federal Water Pollution Control Act—better known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*—it did so with far-reaching, ambitious intent: "*to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.*"[1] 33 U.S.C § 1251 (emphasis added). Behind this noble goal, Congress erected the "modern framework" for controlling water pollution in the United States through a comprehensive scheme of cooperative federalism. Michael M. Wenig, *How "Total" Are "Total Maximum Daily Loads"? – Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act*, 12 Tul. Env't L.J. 87, 95 (1998).

However, a series of administrative failures by the State of New Union and the U.S. Environmental Protection Agency has delayed preservation of Lake Chesaplain's waters and caused unnecessary degradation due to harmful phosphorous accumulation. Water pollution

[1] The preeminent water scholar, Robert Adler, described the CWA's expansive purpose as "one of the best declarations ... in any federal environmental law." Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 Env't L. 973, 975-76 (1995).

impacts more than the purity of the Lake's waters, a common resource, it also harms watershed ecosystems, communities, and economies.

At stake is future generations' ability to use, enjoy, and make memories on Lake Chesaplain's waters, like the many generations before them. Accordingly, Chesaplain Lake Watch, an environmental organization with members across the Lake Chesaplain watershed, is committed to ensuring Lake Chesaplain returns to its former brilliance and that no future generation suffers from Government failure to preserve our valued natural environments.

## Jurisdictional Statement

Chesaplain Lake Watch (hereinafter, "CLW"), the State of New Union (hereinafter, "New Union"), and the United States Environmental Protection Agency (hereinafter, "EPA") each appeal an order granting motions for summary judgement in consolidated actions No. 66-CV-2020 and No. 73-CV-2020, entered on August 15, 2021, by the Honorable Judge Remus in the United States District Court for the District of New Union. Because "[a]n order granting a motion for summary judgment is final," the United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear these appeals pursuant to 28 U.S.C. § 1291. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

The consolidated actions were commenced under the Administrative Procedures Act. 5 U.S.C. § 702 ("a person suffering legal wrong because of agency action ... is entitled to judicial review"). The actions were in response to regulatory measures taken by New Union and EPA in relation to deteriorating water quality in Lake Chesaplain. The district court had subject matter jurisdiction to hear these matters pursuant to 28 U.S.C. § 1331, as both cases challenged interpretation and implementation of the Clean Water Act (hereinafter, "CWA" or "Act"), a federal statute.

# Statement of Issues

1. Whether EPA's decision to reject New Union's TMDL and adopt its own for the Lake Chesaplain Watershed is ripe for judicial review.
2. Whether EPA's longstanding interpretation of "total maximum daily load," as including wasteload allocations and load allocations, is a permissible interpretation of the term in § 303(d) of the CWA.
3. Whether EPA's Lake Chesaplain TMDL consisting of an annual pollution loading reduction to be phased in over five years is a permissible interpretation of the term "total maximum daily load" in § 303(d) of the CWA.
4. Whether EPA's adoption of a credit system for load allocation reductions through best management practices is arbitrary, capricious, and an abuse of discretion due to the lack of assurance of best management practice implementation.

# Statement of the Case

## I. Statement of Facts

Lake Chesaplain, located entirely within the State of New Union, has historically enjoyed excellent water quality. R. at 7. The Lake's pristine waters have attracted both residents and tourists, creating a robust outdoor recreation economy and popular vacation communities along its lakefront. *Id*. Furthermore, Lake Chesaplain is a nexus of commerce between the Lake's waterfront communities and commercial centers downstream along the Chesaplain River, which is a navigable-in-fact interstate body of water. *Id*.

Lake Chesaplain was originally designated as Class AA, which is reserved for highest quality waters of the state. R. at 8. This designation allows the use of Lake Chesaplain's waters for drinking water, primary contact recreation, and fish propagation and survival. *Id*.

Lake Chesaplain's water quality began diminishing in the 1990s when development throughout the watershed started polluting the water. R. at 7. The pollution includes discharges

from point sources, like the large-scale slaughterhouse and Chesaplain Mills sewage treatment plant, and nonpoint sources, like concentrated animal feeding operations (hereinafter, "CAFO") manure spreading, agricultural sources, and septic tanks from lakefront vacation communities along the Lake Chesaplain shoreline. R. at 8. The pollution caused a decline of water quality in Lake Chesaplain, leading to mats of algae during the summer months, reduced water clarity, and emission of offensive odors. R. at 7-8. This negatively impacts life as Lake Chesaplain's waters are wholly unsuitable for recreation and fishing. R. at 7. Commercial activities on Lake Chesaplain suffer from a decrease in tourist fishing and boating trips. *Id.*

In 2008, in response to declining water quality, New Union created the Lake Chesaplain Study Commission. R. at 8. In August 2012, the Commission issued a report stating Lake Chesaplain was suffering from excessive algae growth, thereby violating the state's water quality standards for odor and water clarity. *Id.* In 2014, the New Union Division of Fisheries and Environmental Control (hereinafter, "DOFEC") determined that the maximum phosphorous levels consistent with the Class AA designation is 0.014 mg/l; however, Lake Chesaplain's phosphorous levels varied from 0.020 to 0.034 mg/l. *Id.* Consequently, phosphorous levels in Lake Chesaplain violated the water quality standard and DOFEC included Lake Chesaplain on its impaired waters list submitted to EPA in 2014. *Id.*

After the listing, both DOFEC and EPA *failed* to promulgate a "total maximum daily load" (hereinafter, "TMDL") for phosphorous. *Id.* In 2015, CLW's threat to sue both New Union and EPA for failure to submit a TMDL provoked New Union to initiate a rulemaking proceeding to establish a TMDL. *Id.* In July 2016, as part of its rulemaking, the Chesaplain Commission issued a report calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard and identified existing sources of phosphorous inputs. *Id.* The report was calculated in annual terms with 120 metric tons (mt) being the final goal to achieve the phosphorus standard. *Id.*

In October 2017, DOFEC proposed to implement its Lake Chesaplain phosphorous TMDL (hereinafter, "2017 TMDL") through a phased reduction in phosphorus discharges from

both point sources and the nonpoint sources over a five-year period. R. at 9. The proposal suggested an annual seven percent reduction in phosphorus loadings, totaling an overall reduction of 35 percent after five years. *Id*. The 2017 TMDL contained point source reductions incorporated in discharge permits, while the nonpoint source reductions would be achieved by implementation of best management practices (hereinafter, "BMP") programs. *Id*. Suggested BMPs included modified feeds for animal production facilities, physical and chemical treatment of manure streams, restrictions of manure spreading when soil is frozen or saturated, and increased septic tank inspection and pumping schedules. *Id*. However, the hog CAFOs and New Union homeowners objected to the proposed BMPs. R. at 9-10.

In July 2018, DOFEC adopted a second Lake Chesaplain phosphorus TMDL (hereinafter, "2018 TMDL") consisting of a 120 mt annual loading, without allocating loads between point and nonpoint sources. R. at 10. EPA rejected DOFEC's 2018 TMDL because it failed to allocate discharges between point and nonpoint sources in accordance with an EPA interpretation of "total maximum daily load." *Id*. In May 2019, EPA adopted DOFEC's 2017 TMDL pursuant to authority under the CWA. *Id*. EPA called its combination of phased point source reductions and BMPs the "Chesaplain Watershed Implementation Plan" (hereinafter, "CWIP"). *Id*.

Today, New Union has taken no affirmative steps to implement EPA's Lake Chesaplain phosphorous TMDL. *Id*. New Union has ***failed*** to reissue discharge permits which incorporate phosphorous load reductions that reflect the requirements of the TMDL for the watershed's major point source polluters, the slaughterhouse and Chesaplain Mills sewage treatment plan. *Id*. Furthermore, phosphorous reductions from nonpoint sources through BMPs have not been realized because EPA, in its adopted TMDL, lacked assurance of their implementation and New Union has refused to require their implementation. *Id*. Accordingly, Lake Chesaplain's waters ***continue to violate*** applicable water quality standards. *Id*.

## II. Statutory Context

This litigation deals primarily with one of the CWA's most complex provisions:

§ 303(d).[2] The provision concerns the establishment of a TMDL for specific pollutants in waters which effluent limitations from point sources are "not stringent enough to implement any water quality standards applicable to such waters." 33 U.S.C. § 1313(d)(1)(A); *see generally* 33 U.S.C. § 1313. However, a brief overview of the CWA's thorough approach to controlling water pollution is required.

States must establish water quality standards (hereinafter, "WQS") for each waterbody within its borders. 33 U.S.C. § 1313(a). WQS must "protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." *§* (c)(2)(A). WQS consist of three core components: (1) the waterbody's designated uses; (2) water quality criteria to protect those designated uses; and (3) antidegradation requirements to protect existing uses and high quality waters. *§§* (c)(2)(A) & (d)(4)(B). While states have primary responsibility for establishing WQS, EPA has "backstop authority" to approve or disapprove the standards. 33 U.S.C. §§ 1313(a) & (b); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 298 (3d Cir. 2015) (hereinafter, "*Am. Farm Bureau Fed'n*"). When a state fails to submit a WQS or a WQS is not consistent with the requirements of the CWA, EPA must promulgate its own WQS. *Id.*

Once a WQS is in effect, EPA and states *share* responsibility for making sure those standards are not violated. The CWA gives EPA primary responsibility for regulating point sources, which are discharges of pollutants from any discernible, confined, and discrete conveyance (e.g., a pipe, tunnel, conduit). 33 U.S.C. § 1362(14). EPA regulates point source by establishing "effluent limitations," which are restrictions on discharges of pollutants from point sources. 33 U.S.C. § 1311(b). The CWA provides a comprehensive scheme of permitting—

[2] Attorneys specializing in the Clean Water Act often cite to the Act's more illustrious provisions by reference to the uncodified sections of the Statutes at Large. Unless otherwise noted, this brief cites to the U.S. Code.

called National Pollutant Discharge Elimination System (hereinafter, "NPDES")—whereby effluent limitations for a given polluter are prescribed. §§ 1311 & 1342. EPA may delegate permitting authority to states; however, EPA may disapprove of a state's permit program if it fails to adequately comply with the CWA. § 1342(b).

States, in turn, have primary authority to regulate nonpoint sources, which include any source of water pollution that does not meet the legal definition of "point source." *See Basic Information about Nonpoint Source (NPS) Pollution*, EPA, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Nov. 18, 2021). Archetypal nonpoint sources include stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14). States and local municipalities may develop comprehensive programs for preventing and mitigating the effects of nonpoint source pollution through land use designations, zoning laws, and growth controls. *See* EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas* EPA-841-B-05-004 (2005). A major strategy for controlling nonpoint source pollution is by reducing runoff at the source through BMP. *See* Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 Chi.-Kent L. Rev. 479 (1989). BMPs are "[m]ethods, measures or practices selected by a [state] to meet its nonpoint source control needs," including, but not limited to, "structural and nonstructural controls and operation and maintenance procedures." 40 C.F.R. § 130.2(m).

Effluent limitations on point sources are the "front line of defense against water pollution." *Am. Farm Bureau Fed'n*, 792 F.3d at 289. However, effluent limitations may not be enough to prevent water contamination. 33 U.S.C. § 1313(d). The CWA requires states to identify and create a listing of waters that do not meet applicable WQS with point source controls alone. § (d)(1)(A) (a "§ 303(d) list"). In addition to a § 303(d) list, the CWA requires

states to "establish ... the total maximum daily load [of pollutants not meeting an applicable WQS]... at a level necessary to implement the applicable [WQS] with seasonal variations and a margin of safety." § (d)(1)(C).

In essence, a TMDL is a "pollution diet"—it identifies the maximum amount of a pollutant a waterway can receive, from both point and nonpoint sources, and still meet applicable water quality standards. *Frequent Questions about the Chesapeake Bay TMDL*, EPA, https://www.epa.gov/chesapeake-bay-tmdl/frequent-questions-about-chesapeake-bay-tmdl (last visited on Nov. 18, 2021). Once more, EPA has backstop authority to approve or disapprove of a state's § 303(d) list or TMDL. 33 U.S.C. § 1313(d)(2). EPA may adopt its own § 303(d) or TMDL. *Id*. Upon EPA's approval or adoption of effluent limitations and TMDLs, states must adopt and maintain a continuing planning process (hereinafter, "CPP") to effectuate the goals of the CWA. § (e). EPA, of course, has backstop authority to approve or disapprove of such process. *Id*.

## III. Procedural History

Following EPA's rejection of its 2018 TMDL for the Lake Chesaplain Watershed, consisting *solely* of a 120 mt/year phosphorous loading, New Union filed action No. 66-CV-2020 on January 14, 2020. R. at 10. New Union argued that their 2018 TMDL satisfied the statutory requirements for a valid TMDL under the CWA. R. at 11. Further, New Union maintained that EPA's regulatory definition of "total maximum daily load," 40 C.F.R. § 130.2(i), requiring not only a single-figure TMDL, but allocation of the load among point and nonpoint sources in a watershed, is contrary to law. *Id*.

CLW filed action No. 73-CV-2020 on February 15, 2020. R. at 10. First, CLW asserted that EPA's adoption of the Lake Chesaplain TMDL (New Union's 2017 TMDL) with an annual

load reduction to be phased in over five years is contrary to CWA's requirement that a TMDL must be expressed as a "daily" limitation and that the TMDL must be adequate to ensure achievement of water quality standards on the date of its adoption. R. at 11. Second, CLW argued that EPA may not implement a credit system in its Lake Chesaplain TMDL because EPA lacks authority to regulate the implementation of BMPs and the CWIP does not contain reasonable assurances from New Union on their implementation. *Id*.

EPA refuted both plaintiffs' claims and argued that its Lake Chesaplain TMDL and CWIP are consistent with its statutory authority under the CWA. *Id*. EPA further asserted that plaintiffs' claims were not ripe for judicial review as its final TMDL would not have any immediate regulatory effect and its implementation would depend on subsequent administrative action. *Id*.

These actions were brought pursuant to the Administrative Procedure Act's "citizen suit" provision, entitling any "person suffering legal wrong because of agency action ... to judicial review." 5 U.S.C. § 702; *see also* 5 U.S.C. § 704 (requiring an agency action to be "final" before it may be challenged). The district court was satisfied with the parties' showing of injury, therefore, standing is not an issue on appeal. R. at 11. The actions were consolidated by uncontested motions on March 22, 2020. R. at 10. The administrative record was lodged with the Court on July 1, 2020. *Id*.

On cross-motions for summary judgement, the District Court for New Union:

(1) in action No. 66-CV-2020, granted summary judgement in favor of New Union and against EPA, vacating EPA's regulatory definition of the term "total maximum daily load," 40 C.F.R. § 130.2(i), vacating EPA's rejection of New Union's proposed TMDL, and ordering EPA to approve New Union's 2018 TMDL; and,

(2) in action No. 73-CV-2020, granted partial summary judgement in favor of CLW on the issue of EPA's phased annual TMDL and granted partial summary judgement in favor of EPA, dismissing CLW's challenge to EPA's wasteload credit system.

R. at 5.

Each party filed a timely Notice of Appeal, on the issues presented *supra*. CLW appeals the district court's determination that (1) EPA's interpretation of "total maximum daily load," 40 CFR § 130.2(i), as including wasteload and load allocations is contrary to law and (2) EPA's "credit system" for load allocation reductions was not arbitrary or capricious or an abuse of discretion. R. at 2. EPA appeals the district court's order (1) vacating its regulatory definition of the term "total maximum daily load," 40 C.F.R. § 130.2(i), (2) vacating its rejection of New Union's 2018 TMDL, and (3) determining that phased implementation of the TMDL was a violation of the CWA. 33 U.S.C. § 1313(d). *Id.* This Court ordered the parties to brief these issues on September 1, 2021. R. at 2-3.

## Summary of the Argument

On appeal, CLW makes four principal arguments: (1) EPA's determination to reject the 2018 TMDL and adopt its own plan is ripe for review; (2) EPA's longstanding interpretation of "total maximum daily load" deserves deference; (3) the terms "daily" and "maximum" in total maximum daily load are unambiguous; and, (4) EPA's adoption of credit for anticipated BMPs to reduce the stringency of point source discharges is arbitrary and capricious and an abuse of discretion.

When determining whether an issue is ripe for judicial review, the court must determine if the fitness of the issues for judicial decisions and the hardship to the parties for withholding court considerations. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Here, EPA's

decision to reject the 2018 TMDL is ripe for review because the issue is purely legal, will not benefit from a more concrete setting, and the agency's action is sufficiently final. Moreover, CLW will face hardship by wasting time, money, and energy if the issue is withheld from judicial review.

This Court must address "whether Congress has directly spoken to the precise question at issue" when reviewing an agency's interpretation of federal statute. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (hereinafter, "*Chevron*"). Where statutory language is ambiguous, this Court must decide whether the agency's construction of the statute is permissible. *Id.* at 843. Applying the relevant canons of statutory construction demonstrates that this Court should defer to EPA's longstanding interpretation of the phrase "total maximum daily load."

Under *Chevron*, if the intent of Congress is clear, then the agency must give effect to the unambiguous statutory language. 467 U.S. at 843. EPA's approval of a phased annual TMDL relies on impermissible interpretations of the individual terms of "daily" and "maximum" in TMDL. The term "daily" is unambiguous and, therefore, EPA's TMDL is impermissibly expressed as an annual load. The term "maximum" is also unambiguous and, thus, EPA's TMDL is impermissibly expressed as a phased implementation.

An agency action may be set aside if it is found to be arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). An agency acts arbitrarily and capriciously if the agency cannot articulate a satisfactory explanation for its actions. *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 222 (D.D.C. 2011). Here, EPA acted arbitrarily, capriciously, and abused its discretion because EPA lacks reasonable assurance that BMPs will be implement by nonpoint

source polluters and has not provided evidence or reason-based judgement as to its adoption to the credit system set forth in the CWIP.

## Standard of Review

This Court reviews grants of summary judgement *de novo. See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995); *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006). The standard of review is "informed by administrative law doctrines prescribing the degree of deference a reviewing court should apply to agency conduct." *Del. Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 269 (3d Cir. 2012). Accordingly, because this case involves an agency's construction of a federal statute, the standard of review is established by *Chevron*, detailed *infra*. 467 U.S. 837.

Agency action may be set aside only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). Agency action is arbitrary and capricious if the agency cannot articulate a satisfactory explanation for its action by providing a rational connection between the facts found and the choice made. *Motor Vehicle Mfr.'s Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## Argument

### I. EPA's determination to reject New Union's 2018 TMDL and to adopt its own TMDL is ripe for judicial review because the issue is fit for judicial decision and New Union and CLW would experience hardship if the issue was withheld from court consideration.

When determining whether a pre-enforcement challenge to an administrative action is ripe for judicial review, the court must evaluate (1) the fitness of the issues for judicial decisions and (2) the hardship to the parties for withholding court considerations. *Abbott Laboratories*, 387

U.S. at 149. These factors are weighed on a sliding scale, but each factor must be satisfied to at least a minimal degree. *City of Kennett, Mo. v. EPA*, 887 F.3d 424, 432 (8th Cir. 2018). Even if a TMDL has not yet been incorporated into a state's CPP, the issue is ripe for review because "if there is something wrong with the TMDL, it is better to know now than later." *Am. Farm Bureau Fed'n*, 792 F.3d at 293–294.

### A. *EPA's determination to reject New Union's 2018 TMDL is fit for judicial decision because the issue is purely legal, will not benefit from a more concrete setting, and the EPA's action is sufficiently final.*

To determine whether an issue is fit for judicial decisions, the court must establish (1) whether the issue is purely legal, (2) whether consideration of the issue would benefit from a more concrete setting, and (3) whether the agency's action is sufficiently final. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 463–464 (D.C. Cir. 2006). An issue is purely legal if it is focused solely on a legal question. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (1998). However, to the extent any factual questions exist, if they are overshadowed by the legal question then the first element is satisfied. *Id*. For example, in *Am. Farm Bureau Fed'n*, Chesapeake Bay watershed states submitted a "Phased Watershed Improvement Plan" for the estuary. 792 F.3d at 291. EPA developed a TMDL in reliance of the plans and ultimately published the final TMDL after a thorough rulemaking process. *Id*. at 291–292. Several trade organizations sued EPA asserting that EPA exceeded its statutory authority by including deadlines and load allocations in the TMDL. *Id*. at 292. The Third Circuit held that a dispute about a well-developed record of EPA's process of promulgating a TMDL is purely legal and, therefore, ripe for decision. *Id*. at 293.

To satisfy the second element, the court must determine whether the resolution of the issue would benefit from a more concrete factual setting. *Abbott Laboratories*, 387 U.S. at 149. For example, in *Nat'l Ass'n of Home Builders*, the industry-plaintiffs challenged a permit

authorized by EPA and U.S. Army Corps of Engineers. 440 F.3d at 461-462. The court held that the issues raised would not become clearer in a concrete setting, because the industry's claim is not intertwined with how EPA might exercise its discretion in the future. *Id*. at 464-465.

An issue is sufficiently final if the agency's process of rulemaking is complete. *Abbot Laboratories*, 387 U.S. at 151. For example, in *City of Kennett*, the City of Kennett, Missouri sued EPA claiming the agency exceeded its authority in approving a TMDL for Buffalo Ditch. 887 F.3d at 429. EPA proposed a delay in review until the TMDL was actually implemented. *Id*. at 432. However, the Eighth Circuit said that "[f]itness rests primarily on whether a case would benefit from further factual development." *Id*.at 433 (internal quotations omitted). Accordingly, the court held that waiting would not further factual development regarding the agency's application of the TMDL nor aid in the court's decision. *Id*. Therefore, the issue was determined ripe for judicial review. *Id*. at 434.

Here, like in *Am. Farm Bureau Fed'n,* the dispute over EPA's TMDL is purely legal because EPA has a well-developed record of its process promulgating the TMDL. Moreover, like in *Nat'l Ass'n of Homebuilders*, the issues here are not intertwined with how EPA might exercise its discretion in the future; therefore, these issues would not benefit from a more concrete setting. Finally, as in *City of Kennett*, waiting for EPA's TMDL to be implemented would not further factual development regarding EPA's application of the TMDL nor aid in the court's decision. Since all three elements are satisfied, the **issues before the court are fit for judicial decision**.

### *B. CLW will face hardship by wasting time, money, and energy if the issue is withheld from judicial review.*

To satisfy the second prong of the ripeness determination, courts consider "not whether [the parties] have suffered any 'direct hardship,' but rather whether *postposing* judicial review would impose an undue burden on them." *Nat'l Ass'n of Home Builders*, 440 F.3d at 464. An

undue burden includes any uncertainty-induced behavior modification, such as spending more time, energy, and money, in absence of judicial review. *Am. Farm Bureau Fed'n*, 792 F.3d at 293; *City of Kennett*, 887 F.3d at 433.

For example, in *Am. Farm Bureau Fed'n*, EPA argued that a pre-enforcement challenge to the Chesapeake Bay TMDL was not ripe because the TMDL had not yet been incorporated into the Bay states' CPPs and, therefore, the parties had not suffered any direct hardship. 792 F.3d at 293. However, the Third Circuit disagreed, stating that EPA and the Chesapeake Bay watershed states *would* face an undue burden if the dispute was not heard because the parties were poised to spend more time, energy, and money developing an implementation plan. *Id*. The court emphasized this point by declaring "if there is something wrong with the TMDL, *it is better to know now than later*." *Id*. at 294 (emphasis added).

Similarly, in *City of Kennett*, the Eighth Circuit said that, if harm is lurking, even on the distant horizon, the threatened harm is more immediate and is not speculative. 887 F.3d at 433 (*quoting Iowa League of Cities v. EPA*, 711 F.3d 844, 859 (8th Cir. 2013)). The City was already making planning decisions based on the TMDL's wasteload allocations, therefore, the City would face undue burden if the dispute was not heard. *Id*.

Here, EPA's TMDL requires New Union to revise existing effluent limitations in NPDES permits to achieve the Lake's phosphorous WQS. Therefore, as in *City of Kennett*, the immediacy of the need for NPDES permit revisions means undue burden to New Union is more than speculative, but immediate. Similarly, undue burden to CLW is immediate, because CLW represents the interest of its members throughout the Lake Chesaplain watershed. CLW will spend time, energy, and money ensuring New Union is implementing a plan to comply with

EPA's TMDL, as in *Am. Farm Bureau Fed'n*. Therefore, CLW will face hardship if this court's consideration is withheld.

Because the issues presented are fit for judicial decision and the parties involved will suffer hardship if the court's considerations are withheld, **this case is ripe for judicial review.**

## II. EPA's longstanding interpretation of the phrase "total maximum daily load" deserves deference because Congress intended for EPA to "fill the statutory gap" and EPA's interpretation was a "reasonable policy choice."

Courts review EPA's interpretation of federal statutes using the standard set forth in *Chevron*, a two-part test. 467 U.S. 837. At step one, the relevant inquiry is "whether Congress has *directly spoken* to the precise question at issue." 467 U.S. at 842-43 (emphasis added); *see Barnhardt v. Walton*, 535 U.S. 212, 217-18 (2002) ("whether the statute unambiguously forbids the Agency's interpretation"). "If the intent of Congress is clear ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. A court will employ the "traditional tools of statutory construction" to ascertain Congress' intent. *Chevron,* 467 U.S. at 843, n. 9. When congressional intent is ambiguous, courts must proceed to step two of *Chevron*.

At step two of *Chevron*, this Court must decide whether the agency's construction of the statute is *permissible*. *Chevron,* 467 U.S. at 843. Step two of *Chevron* recognizes that Congress sometimes uses statutory ambiguities as "delegations of authority to the agency to *fill the statutory gap* in reasonable fashion." *Nat'l Cable & Telecomm.'s Ass'n v. Brand X Internet Serv.'s*, 545 U.S. 967, 980 (2005) (emphasis added); *see City of Arlington, Tex. v. FCC,* 569 U.S. 290, 296 (2013) ("Congress knows to speak ... in capacious terms when it wishes to enlarge, agency discretion").

The agency's interpretation does not need to be the best possible interpretation of Congress' ambiguous language. *Am. Farm Bureau Fed'n*, 792 F.3d at 295. A court must "defer ... to the agency's interpretation so long as the construction is a *reasonable policy choice* for the agency to make." *Brand X Internet Serv.'s*, 545 U.S. at 986 (internal quotations omitted). *Chevron* deference is particularly appropriate when an agency is tasked with administering a scientifically or technically sophisticated statutory scheme. *Id*. at 1002-03.

### A. *Congress clearly intended for EPA to "fill the statutory gap," because the phrase "total maximum daily load" is susceptible to multiple meanings, it operates within the bounds of the CWA's background principle of cooperative federalism, and it does not disturb larger federalism principles.*

#### *1. Statutory Language*

EPA interprets the phrase "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) (emphasis added). A "wasteload allocation" (hereinafter, "WLAs") is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h). A "load allocation" (hereinafter, "LAs") is "[t]he portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 C.F.R. § 130.2(g). A "load" is "[a]n amount of matter ... that is introduced into a receiving water," and can be either man-caused or natural. 40 C.F.R. § 130.2(e).

New Union argues that EPA's interpretation of the term "total maximum daily load" as the sum of WLAs and LAs is contrary to the intent of Congress because the CWA only authorizes EPA to establish the *total* maximum daily load. A total load, as New Union would have this Court believe, is *a number*—a single figure representing the amount of a pollutant that can be discharged into a particular segment of water—nothing more, nothing less. In other

words, Congress, cloaked in institutional wisdom and delegative experience, trusted an expert agency like EPA only so much as to prescribe a single number for a highly complex determination—"like the 'total' at the bottom of the restaurant receipt." *Am. Farm Bureau Fed'n*, 792 F.3d at 297.

While New Union's argument that a TMDL is a single figure has "intuitive appeal," *Id.* at 297, it inevitably causes *significant textual issues*. First, the argument renders "total" in "total maximum daily load" redundant, which violates the canon against surplusage.[3] If a TMDL is a single figure, a "maximum daily load" and "total maximum daily load" would both mean the greatest amount of loading that a water can receive without violating applicable WQS. To avoid mere superfluity, a plausible meaning of "total" is "the sum of the constituent parts of the load." *Am. Farm Bureau Fed'n*, 792 F.3d at 297; *see total*, Merriam-Webster, https://www.merriam-webster.com/dictionary/total (last visited Nov. 18, 2021) ("a product of addition").

Second, the phrase "total maximum daily load" is expressed in the singular form (i.e., "load," not "loads"), suggests it refers to a *single* figure. However, the Dictionary Act provides that, when reading the U.S. Code, courts must assume "words importing the singular include and apply to several ... things," unless statutory context indicates otherwise. 1 U.S.C. § 1; *see Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021). Consequently, the phrase "total maximum daily load" may plausibly refer to a sum of *loads*.

Third, EPA's interpretation of "total maximum daily load," 40 C.F.R. § 130.2(i), is better adapted to § 303(d)'s requirement that a TMDL "be established at a level necessary to

[3] "[T]he canon against surplusage assists ... where a competing interpretation gives effect to every clause and word of a statute ... [It] is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

implement the applicable [WQS] 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) (emphasis added). Inclusion of seasonal variations and a margin of safety are clearly substantive requirements that expand the scope of a TMDL beyond a single-figure. As the Third Circuit in *Am. Farm Bureau Fed'n* identified, inclusion of these factors in the text of the CWA, taken together, "tend[s] to suggest that 'total maximum daily load' is a *term of art* meant to be fleshed out by regulation, and *certainly something more than a number*." 792 F.3d at 298 (emphasis added).

Finally, other uses of the term "total" in the CWA supports the conclusion that Congress used the word to mean something more than a single number. For example, when distributing certain grant funds, EPA must consider "the *total* cost of operation and maintenance of [publicly owned treatment works] ... taking into account total waste water loading of such works, the *constituent elements* of the wastes, and other appropriate factors." 33 U.S.C. § 1284(b)(1) (emphasis added). While § 303(d) does not explicitly list factors in calculating the "total" in "total maximum daily load," as in the grant funds provision, the term suggests that "Congress uses the word to mean something more than a single number." *Am. Farm Bureau Fed'n*, 792 F.3d at 297.

These factors indicate that the phrase "total maximum daily load" is susceptible to multiple meanings, leaving ample room for EPA to fill the statutory gap. In other words, "total maximum daily load" may be more like the *whole* restaurant receipt, showing the sum of its constituent parts (i.e., appetizer, main course, dessert), not only "the 'total' at the bottom of the restaurant receipt." *Id.*

*2. Statutory Context: CWA's Background Principle of Cooperative Federalism*

New Union argues that EPA's TMDL, segmented into WLAs and LAs and distributed among individual sources throughout Lake Chesaplain's watershed, amounts to a *de facto* federal implementation of the TMDL. Motivating New Union's argument is the idea that this practice oversteps the CWA's background principle of *cooperative federalism*,[4] as nonpoint source pollution control often involves complex policy choices concerning local land use and zoning, activities traditionally regulated by states.

New Union points to two provisions in the CWA to support its claim for the reservation of state authority. The CWA begins, in part, by declaring:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...

33 U.S.C. § 1251(b) (§ 101 of the CWA). Secondly, the CWA provides that:

> [N]othing in this chapter shall (1) preclude or deny the right of any State .... to adopt or enforce ... any standard or limitation respecting discharges of pollutants ... or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States.

§ 1370 (§ 510 of the CWA).

However, New Union reads too much into the reservation of state authority in these provisions. First, § 101 of the CWA expressly *balances* its recognition of state influence with the obligation of states "to consult with the Administrator [of EPA] in the *exercise of his authority under this chapter*." § 1251(b) (emphasis added). In other words, EPA's authority under the CWA operates as a check against state authority. Second, § 510 goes on to *limit* a state's exercise

[4] *See N.Y. v. U.S.*, 505 U.S. 144, 167 (1992) ("[U]nder the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation ... This arrangement ... has been termed "a program of cooperative federalism").

of authority to "effluent limitation[s] ... which [are] *less stringent* than the effluent limitation[s] ... under this chapter." § 1370 (emphasis added). This provision merely establishes a minimum floor of protection, marking the outer bounds of state authority to regulate water pollution. Furthermore, when read in conjunction with § 101(g),[5] § 510 preserves state authority to *allocate* water, but does not limit the scope of water pollution controls that may be imposed on users who have obtained a water allocation, pursuant to state law. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994).

Both provisions emphasize a *key* feature of the CWA: its background principle of cooperative federalism. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 502 (2d Cir. 2017) ("The [CWA] envisions 'cooperative federalism' in the management of the nation's water resources"). The CWA's backdrop of cooperative federalism are evident throughout the Act; however, the clearest enunciation is in the Act's allocation of authority to regulate point and nonpoint sources.

The CWA assigns to EPA primary responsibility for regulating point sources through administration of the NPDES. 33 U.S.C. § 1342(a). Congress chose not to address nonpoint sources through a federal regulatory scheme but opted instead to provide federal grants to states for developing and implementing § 319 nonpoint source management programs. *See* § 1329. As noted, states also have primary authority to promulgate WQS, to submit a § 303(d) list, and to establish a TMDL, where point source effluent limitations are "not stringent enough to implement any [WQS],". § 1313.

[5] "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g).

The CWA's background principle of cooperative federalism *undercuts* New Union's argument that EPA's TMDL is a *de facto* federal implementation, as Congress did not intend for the Federal Government to have *no* part in nonpoint source pollution management. EPA's prominent role in the TMDL process illustrates this point. First, EPA may promulgate a TMDL if a state's TMDL is not established at a level necessary to implement the applicable WQS. § 1313(d)(2). By definition, a TMDL is required whenever a WQS is *impossible* to meet by point source reductions alone. As such, the CWA "*requires* the drafter of a TMDL to consider non-point-source pollution." *Am. Farm Bureau Fed'n*, 792 F.3d at 299 (emphasis in original). Legislative history and the opening provisions of the CWA clearly indicate that Congress knew and, consequently, anticipated EPA's role in nonpoint source management. *See* H.R. Rep. No. 92–911, at 105–06 (1972) ("The Committee clearly recognize that non-point sources of pollution are *a major contribution to water quality problems*.") (emphasis added); 33 U.S.C. § 1251(a)(7) ("it is the national policy that programs for the control of nonpoint sources of pollution be developed ... so as to enable the goals of this chapter to be met through the control of *both* point and nonpoint sources of pollution.") (emphasis added).

Second, EPA exercises "supervisory authority" over nonpoint sources in other provisions of the CWA. For example, EPA retains backstop authority to review and, ultimately, approve or disapprove of a state's carrying out of the CWA. *See* 33 U.S.C. §§ 1313 & 1342. EPA has broad authority to withhold grant money for state nonpoint source pollution management programs. § 1342(d)(2); *see Pronsolino v. Nastri*, 291 F.3d 1123, 1141, n. 19 (9th Cir. 2002) (characterizing § 319 grant funding as the "carrot" to the "stick" in § 303(d)'s quantified pollution loading allocations in TMDLs).

Ultimately, as the Supreme Court announced, the CWA "anticipates a *partnership* between the States and the Federal Government," when it comes to nonpoint source pollution management. *Ark. v. Okla.*, 503 U.S. 91, 101 (1992) (emphasis added). EPA's authority over nonpoint sources of water pollution, however, "stops short of giving EPA authority to enact its *own* implementation plan where it has determined that the state's effort has fallen short." *Am. Farm Bureau Fed'n v. EPA*, 984 F.Supp.2d 289, 314 (M.D. Pa. 2013). Therefore, New Union's contention that EPA's adoption of the Lake Chesaplain TMDL is a *de facto* federal implementation is contrary to the CWA's background principles of cooperative federalism.

*3. "Federalism" Canon of Constitutional Avoidance*

New Union maintains that EPA's Lake Chesaplain TMDL, which is segmented into WLAs and LAs pursuant to EPA's interpretation of "total maximum daily load," intrudes on land use decisions traditionally made by states and, thereby, EPA's interpretation is invalid. As such, the "federalism" canon of constitutional avoidance is implicated.

The "federalism" canon of constitutional avoidance instructs courts that "Congress does not readily interfere" with states' "substantial sovereign powers under our constitutional scheme." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The federalism canon should be applied at step one of *Chevron*. *See Am. Farm Bureau Fed'n*, 792 F.3d at 301 (examining debate regarding application of federalism canon in *Chevron* analysis).

Congress has the power "to regulate commerce ... among the several states." U.S. CONST. art. 1, § 8, cl. 3. The Supreme Court, in *Gibbons v. Ogden*, early on recognized Congress' power to regulate interstate commerce on the "navigable waters of the United States" 22 U.S. 1, 89 (1824). While early decisions limited Congress' Commerce power to waterways that were "navigable-in-fact," *see The Daniel Ball*, 77 U.S. 557, 563 (1870), Congress expanded federal jurisdiction over "navigable waters" with the 1972 Amendments to the CWA.

Under the CWA, "navigable waters" means the "waters of the United States," or "WOTUS". § 1362(7). WOTUS is presently defined[6] as "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including ... intrastate lakes [and] rivers ... the use, degradation or destruction or which could affect interstate or foreign commerce." *1986/1988 Regulatory Definition of "Waters of the United States"*, EPA, https://www.epa.gov/wotus/19861988-regulatory-definition-waters-united-states (last visited on Nov. 18, 2021) (hereinafter, "pre-2015 WOTUS").

Lake Chesaplain attracts recreational boaters and fishermen and is connected to a navigable-in-fact stream, *see* R. at 7, therefore, it is most likely a navigable waterway under EPA's pre-2015 WOTUS definition. Thus, Congress' Commerce Clause jurisdiction extends to the Lake Chesaplain watershed,[7] and its exercise of jurisdiction is not constrained by federalism principles.

Accordingly, Congress' *true* intent on the precise question at issue was to let EPA **fill the statutory gap.**

### *B. EPA's interpretation of "total maximum daily load" demands deference because of the Act's highly complex subject matter and broad grant of authority to EPA.*

Where statutory language is ambiguous, *Chevron* deference is especially suitable where an agency is tasked with administering "subject matter [that] is technical, complex, and dynamic." *Nat'l Cable & Telecomm.'s Ass'n, Inc. v.* G*ulf Power*, 534 U.S. 327, 328 (2002). The

---

[6] An August 2021 order vacated EPA's "Navigable Waters Protection Rule." *Pascua Yaqui Tribe v EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021); s*ee The Navigable Waters Protection Rule: Definition of "Waters of the United States"*, 85 FR 22250-01.

[7] Congress' Commerce power exists throughout watersheds. *Okla. ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) ("There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries"); *U.S. v. Appalachian Power Co.*, 311 U.S. 377, 426 (1940) (... watershed development ... [is] likewise parts of commerce control).

CWA has long been recognized for its comprehensiveness. *See e.g., U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (calling the CWA a "comprehensive legislative attempt" to clean the Nation's waters); *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318-19 (1981) (characterizing the CWA as "a self-consciously comprehensive program"). Senator Randolph from West Virginia, who sponsored the 1972 Amendments to the CWA, considered the Act "the *most comprehensive legislation* that the Congress of the United States has ever developed" in the field of water pollution control. *See City of Milwaukee*, 451 U.S. at 318 (reviewing legislative history of the CWA) (emphasis added).

TMDLs are developed "using a range of techniques, from simple mass balance calculations to complex water quality modeling approaches," and the analysis depends on "a variety of factors including the waterbody type, complexity of flow conditions and pollutants causing the impairment." *Overview of Total Maximum Daily Loads (TMDLs)*, EPA, https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls (last visited Nov. 15, 2021); 40 C.F.R § 130.7(c)(b)(1). As such, computation of a TMDL is a "highly technical, specialized interstitial matter that Congress does not ... decide itself, but delegates to specialized agencies to decide." *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 90 (2007).

Due to the Act's highly scientific and technical subject matter, Congress granted EPA broad regulatory authority under the Act, stating that, "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] ... shall administer this chapter." 33 U.S.C. § 1251(d). In 1984 EPA, acting pursuant to this authority, promulgated its definition of "total maximum daily load." 40 C.F.R. § 130.2(i). Although the CWA "does not specifically mention either WLAs or LAs," EPA recognized that "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." 50 Fed. Reg. 1775 (Jan 11, 1985) (emphasis added). Accordingly, given the Act's highly complex subject matter and its broad grant of authority to EPA, the agency's definition of "total maximum daily load" is a **"reasonable policy choice for the agency to make."** *Brand X Internet Serv.'s*, 545 U.S. at 986.

### *C. The paucity of caselaw concerning EPA's interpretation of "total maximum daily load" supports the conclusion that the interpretation is a reasonable exercise of EPA's discretion and deserves deference.*

Before 2015, no federal circuit court had examined a challenge to EPA's longstanding interpretation of the term "total maximum daily load." 40 C.F.R. § 130.2(i). Courts have nevertheless cited to EPA's definition, which was adopted in 1985, "numerous times without issue." *Am. Farm Bureau Fed'n*, 984 F.Supp.2d 289, 318-320 (reporting that more than 47,000 TMDLs had been adopted throughout the United States by 2015); *see* 50 Fed. Reg. 1774. Several courts, more importantly, have affirmatively acknowledged EPA's definition. *See e.g., Jackson,* 798 F.Supp.2d 210 ("A core requirement of any TMDL is to divide sources of contamination ... by specifying load allocations, or LAs, ... and to then set wasteload allocations, WLAs, to allocate daily caps among each point source of pollution"); *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994) ("Congress and EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution").[8]

In 2015, the Third Circuit Court of Appeals heard *Am. Farm Bureau Fed'n*. 792 F.3d 281. The case, dealing with EPA's TMDL for the Nation's largest estuary, Chesapeake Bay,

[8] Other courts have defined TMDLs to accord with 40 C.F.R. § 130.2(i), seeming to indicate their approval of EPA's interpretation. *See e.g., Upper Blackstone Water Pollution Abatement Dist. v. EPA,* 690 F.3d 9, 14, n. 8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017, 1021, n.2 (10th Cir. 2001).

presented "a question of first impression whether a TMDL could include more than a quantity of a pollutant." *Id.* at 295. The Third Circuit, applying *Chevron* to EPA's interpretation of "total maximum daily load," concluded that the phrase was ambiguous and susceptible to multiple meanings. *Id.* at 307. The court also found EPA's interpretation did not take over traditional state power to regulate land use and fell within Congress' commerce power to regulate interstate waters. *Id.* Finally, the court looked to the Act's legislative history, finding little on TMDLs, but found "congressional acquiescence" to EPA's interpretation when it added a new provision to the CWA, dealing exclusively with the Chesapeake Bay. *Id.* at 308; *see* 33 U.S.C. § 1267. Accordingly, the Third Circuit held that EPA's interpretation of the phrase "total maximum daily load" was reasonable and reflected a legitimate policy choice by the agency. *Am. Farm Bureau Fed'n*, 792 F.3d at 309.

No other court has examined EPA's longstanding interpretation of "total maximum daily load" since *Am. Farm Bureau Fed'n*.[9] As such, this Court should join the Third Circuit Court of Appeals in **deferring to EPA's interpretation.**

[9] In *Nat. Res. Def. Council, Inc. v. EPA*, the district court rejected EPA's argument that "while individual words in the phrase 'total maximum daily load' may be unambiguous, the phrase as a whole is susceptible to a broader range of meanings," because "a court cannot 'set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications.'" 301 F.Supp.3d 133, 143 (D.D.C. 2018).

However, EPA has "considerable power under complex statutory regimes like the Clean Water Act," pursuant to longstanding principles of administrative law and *Chevron*. *Am. Farm Bureau Fed'n*, 792 F.3d at 297. Further, "no court has adverted to any problem with EPA's regulatory interpretation *of the phrase* ["total maximum daily load"]," since it was adopted by EPA in 1985. *Id.* at 297. Finally, the district court itself conceded that its ability to credit EPA's "pragmatic arguments" were constrained by the D.C. Circuit Court's strict adherence to plain meaning. *Nat. Res. Def. Council*, 301 F.Supp.3d at 143.

## III. EPA's TMDL relies on impermissible interpretations of the terms "daily" and "maximum" because TMDLs must be expressed as a *daily* load, rather than an annual load, and TMDLs must ensure achievement of WQS on the date of its adoption, not five years later.

### *A. The term "daily" in TMDL is unambiguous and EPA has not provided any adequate reason for a nondaily TMDL.*

In *Nat. Res. Def. Council, Inc. v. Muszynski*, EPA approved several TMDLs expressed in annual terms. 268 F.3d 91 (2d Cir. 2001). The Second Circuit Court of Appeals agreed with EPA that strict adherence to the term "daily" in TMDL would be "absurd" because, "for some combinations of pollutants and waterbodies, different expressions of the total maximum load of a pollutant are optimal." *Id.* at 96, 99. But the court only extended its *limited* exception[10] to occasions where there are adequate reasons in the record for a nondaily TMDL. *Id.* at 98. The court expressed doubt that "an annual measurement ... would ... be more appropriate," and remanded the issue because it "[did] not find adequate reasons in the record ... to explain why phosphorus is best regulated by TMDLs expressed in terms of annual loads." *Id.* at 99, 103.

Only five years later, the D.C. Circuit Court of Appeals in *Friends of Earth, Inc. v. EPA*, asserted that "agencies seeking to demonstrate absurdity have an *exceptionally high burden* [and] must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." 446 F.3d 140, 146 (D.C. Cir. 2006). In that case, the court reviewed EPA's interpretation of the term "daily" in TMDL under *Chevron*. *Id.* at 144. Beginning with the statute's language, the court reasoned that "*nothing* in this language [33 U.S.C § 1313(d)(1)(C)]

[10] The court's limited exception has narrow adoption. *See e.g., San Joaquin River Exch. Contractors Water Auth. v. State Water Res. Control Bd.*, 183 Cal. App. 4th 1110, 1124 (2010) (the California Court of Appeals recognized that "effective regulation may best occur by some other periodic measure than a diurnal one," but only if the agency provides a technical report explaining why the measurement was better suited than a daily load.).

even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads." *Id.* (emphasis added). The court stated, "the law says daily, we see nothing ambiguous about this command." *Id.* Accordingly, the court held that EPA's approval of nondaily TMDLs was unlawful.

Here, as in *Friends of Earth*, EPA approved a TDML expressed in annual terms. Applying *Chevron*, detailed *supra*, to the term "daily" in TMDL yields the inevitable conclusion that the term is *unambiguous*—"daily means daily, *nothing else*." *Friends of Earth*, 446 F.3d at 142 (emphasis added). Accordingly, this Court should follow the D.C. Circuit and hold that the EPA's TMDL must be expressed in daily terms.

Recognizing an ambiguity of law, this court should adopt the exceptionally high burden in *Friends of Earth* where an agency seeks to demonstrate absurdity in statutory language. Even if the Second Circuit's limited exception were to apply, EPA has not provided adequate reasons to meet this narrow exception, such as a scientific or technical report in the record.

Accordingly, EPA has not met this exceptionally high burden and this Court should follow the D.C. Circuit by holding that **EPA's TMDL must be expressed in daily terms.**

### B. *EPA's interpretation of the term "maximum" in TMDL is impermissible because phased implementation of EPA's TMDL fails to meet applicable WQS on the date of its adoption.*

In *Anacostia Riverkeeper, Inc. v. Wheeler*, the court held that EPA cannot approve TMDLs that do *not* establish daily maximum discharge limits. 404 F. Supp. 3d 160, 164 (D.D.C. 2019). EPA approved loadings in TMDLs expressed as "max daily," "avg daily," and "annual average" figures. *Id.* at 167. The court reviewed EPA's interpretation of the term "maximum" in TMDL under *Chevron*, and relied heavily on the D.C. Circuit's analysis of the term "daily" in *Friends of Earth*. *Id.* at 170-171. Ultimately, the court concluded that the term "maximum" is unambiguous because "each word has its ordinary, unambiguous meaning." *Id.* at 171.

Consequently, EPA must approve TMDLs "that represent *upper limits* of pollutants that can enter water bodies on any given day ... figures must be sufficiently low to ensure that, when complied with, the water quality standards are met." *Id.* at 175 (emphasis added); see *Nat. Res. Def. Council*, 301 F.Supp. 3d at 141 (the term "maximum" in "total maximum daily load" means "the greatest quantity of a pollutant that a waterbody can bear before the applicable water quality standards are violated").

Applying *Chevron*, detailed *supra*, to the term "maximum" in TMDL, in accordance with *Wheeler*, indisputably demonstrates that the term is unambiguous. A TMDL must reflect the "upper limit" of a pollutant that can be discharged into a waterbody to comply with applicable WQS. Here, phased implementation of EPA's TMDL does not meet the applicable phosphorous WQS on the *date of its adoption* and, therefore, **EPA's interpretation of the term "maximum" is impermissible**.

## IV. EPA's adoption of a credit for BMP pollution reductions from nonpoint sources is arbitrary, capricious, and an abuse of discretion due to the lack of assurances that BMPs will be implemented by polluters and New Union.

An agency action is unlawful and must be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706. An agency acts arbitrarily and capriciously if it approves a TMDL that a state is incapable of following. *Am. Farm Bureau Fed'n*, 792 F.3d at 307. Moreover, an agency acts arbitrarily, capriciously, and abuses its discretion by approving a TMDL that does not assure WQS. *Idaho Sportsmen's Coal. v. Browner*, 951 F.Supp 962, 966-967 (W.D. Wash. 1996).

### *A. EPA acted arbitrarily, capriciously, and abused its discretion when it adopted the CWIP because it offers no reasonable assurances that the BMPs for nonpoint source pollution reductions will be achieved.*

When WQS cannot be met by regulation of point sources alone, the state must assure that standards are achieved by reasonable BMPs for nonpoint source control. 40 C.F.R. § 131.12(a)(2). If the state *cannot* assure that BMPs are achievable, "the state may not permit the lowering of water quality from point sources." *Ohio Valley Envt'l Coal. v. Horinko*, 279 F.Supp.2d 732, 763(S.D. W. Va. 2003). Although the EPA has no authority under the CWA to regulate nonpoint sources directly, EPA regulations can indirectly place certain limits on nonpoint source pollution by requiring states *assure* that BMPs are *achieved. Id.*

For example, in *Ohio Valley Envt'l Coal.*, EPA approved an antidegradation policy which allowed for lower WQS if the state guaranteed *installation and maintenance* of reasonable BMPs for nonpoint sources. *Id*. at 740, 763. The policy also included provisions that a proposed or expanded discharge would be allowed where the applicant *agreed to* implement offsets so as to not impact WQS. *Id.* at 774. Therefore, EPA had reasonable assurance that the reductions in nonpoint source pollution would offset increases in effluent limitation standards in NPDES permits for point sources.

This is wholly different from the problem in front of the Court. Here, the CWIP *relies on* BMPs to reduce nonpoint source pollution by 35 percent. The anticipated reductions are to be achieved through BMPs, including: modified feeds for animal production facilities, physical and chemical treatment of manure streams, restrictions of manure spreading when soil is frozen or saturated, and increased septic tank inspection and pumping schedules. However, hog CAFOs have objected to the possible imposition of BMPs on their operations. Similarly, New Union homeowners have objected to additional septic tank maintenance. Unlike the BMPs in *Ohio Valley Envt'l Coal.*, where *proof of installation and maintenance* was required as reasonable

assurance of their implementation, **the CWIP offers no guarantee that BMPs will be implemented by watershed polluters**.

### *B. EPA acted arbitrarily, capriciously, and abused its discretion when it adopted the CWIP because the agency has not provided evidence or reason-based judgement that these BMPs will in fact reduce nonpoint source pollution.*

An agency's action is arbitrary and capricious if the agency cannot articulate a satisfactory explanation for its action by providing a rational connection between the facts found and the choice made. *Jackson*, 798 F.Supp.2d at 222. An agency's discretion, while broad, is not infinite, and the agency's choice of TMDL model will be rejected if it "bears no rational relationship to the reality it purports to represent." *Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 341.

For example, in *Jackson*, EPA approved TMDLs for the Anacostia River in the Mid-Atlantic region of the United States by "merely express[ing] hope" that the proposed load reductions would meet WQS. *Id*. at 244. EPA is obligated under the CWA and its implementing regulations to consider whether a TMDL will protect a waterbody's designated uses and meet all water quality criteria before granting its approval. *Id*. at 238; *see* 33 U.S.C. § 1313; 40 C.F.R. § 130.7. EPA did not provide evidence or reason-based judgement that the TMDL would protect the waterbody's designated uses or meet any water quality criteria. *Id*. at 244. The court held that EPA failed to shoulder its responsibility under the CWA, therefore, acting arbitrarily and capriciously by approving the TMDL. *Id*.

Here, EPA has similarly acted with *mere hope*, rather than based on evidence or reasoned judgement, by adopting the BMP credit system set forth in the CWIP. Although EPA provided examples of BMPs in the CWIP, EPA has not provided evidence or reason-based judgement that these BMPs *will*, if implemented, reduce nonpoint source pollution.

The credit system in EPA's TMDL is invalid because EPA lacks reasonable assurance that BMPs will be implemented by New Union and watershed polluters, and has no provided evidence or reason-based judgement as to its adoption. Therefore, EPA has **acted arbitrarily, capriciously, and abused its discretion.**

# Conclusion

For the foregoing reasons, these issues are **RIPE FOR JUDICIAL REVIEW** and this Court should:

**REVERSE** the district court's grant of summary judgement in action No. 66-CV-2020, thereby overturning the district court's decision to vacate EPA's determination to reject New Union's 2018 Lake Chesaplain TMDL and decision to vacate EPA's definition of "total maximum daily load" in 40 C.F.R. § 130.2(i);

**AFFIRM** the district court's grant of partial summary judgement in action No. 73-CV-2020 on the issue of the validity of the phased annual implementation of EPA's TMDL; and

**REVERSE** the district court's grant of partial summary judgement in action No. 73-CV-2020, on the issue of the validity of the credit system in EPA's TMDL.