TEAM 33

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

v.

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

-and-

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

Brief of Appellant, United States Environmental Protection Agency

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases

II. Statutes

III. Regulations

IV. Other Authorities

JURISDICTIONAL STATEMENT

In consolidated cases No. 73-CV-2020 and No. 66-CV-2020, the United States District Court for the Territory of New Union exercised federal question jurisdiction under 28 U.S.C § 1331 and the Administrative Procedure Act (APA) § 702, 5 U.S.C. § 702. The district court entered its judgment on August 15, 2021, granting partial summary judgement to New Union, Chesaplain Lake Watch, Inc. (CLW), and the Environmental Protection Agency (EPA). All three parties timely filed notices of appeal to the United States Court of Appeals for the Twelfth Circuit, which has jurisdiction under 28 U.S.C. § 1291 to review the district court's final order.

STATEMENT OF THE ISSUES

I. Whether this Court has jurisdiction to review EPA's adoption of the total maximum daily load (TMDL) as a final agency action and whether the issues are ripe for judicial review.

II. Whether EPA's determination to reject the Lake Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations (WLAs) and load allocations (LAs) is a reasonable interpretation of the term "total maximum daily load" in the Clean Water Act (CWA) § 303(d), 33 U.S.C. § 1313(d).

III. Whether EPA's adoption of an annual, staged-implementation TMDL for the Lake Chesaplain Watershed is a reasonable exercise of its authority under the CWA § 303(d).

IV. Whether EPA's inclusion in its TMDL of a credit for anticipated Best Management Practices (BMPs) adopted by nonpoint sources was arbitrary, capricious, or an abuse of discretion.

STATEMENT OF THE CASE

I. Facts

The CWA requires States to establish water quality standards (WQS) for its waterbodies and to create a list of "impaired" waterbodies that do not meet such WQS. CWA § 303, 33 U.S.C. § 1313. States must create a TMDL of regulated pollutants for each impaired waterbody

calculated to achieve WQS. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). EPA's regulation defines TMDLs as "the sum of individual [WLAs] for point sources and [LAs] for nonpoint sources and natural background." 40 C.F.R. 130.2(i). The CWA defines point sources as any "discernible, confined and discrete conveyance," in contrast to nonpoint sources, which the CWA does not define. CWA § 502(14), 33 U.S.C. § 1362(14).

In the 1990s, Lake Chesaplain's previously excellent water quality began to rapidly deteriorate due to pollutants emitted by new industrial developments. R. at 7. Chesaplain Mills' sewage treatment plant (the "STP") and a newly-built slaughterhouse discharged pollutants directly into the lake, while ten hog-production facilities, also known as concentrated animal feeding operations ("Hog CAFOs"), discharged into a watershed which flows into Lake Chesaplain. *Id*. Mats of algae accompanied by unpleasant odors began to appear on the lake in the early 2000s, depleting the fish population and damaging the local tourist economy.

New Union created the Lake Chesaplain Study Commission (the "Commission") to study the lake's decline in 2008. R. at 8. In 2012, the Commission issued its report, which found that the algae growth was caused by high amounts of phosphorus in the water.

The New Union Division of Fisheries and Environmental Control ("DOFEC") adopted the Commission's water quality criteria in 2014. *Id*. Because Lake Chesaplain violated this criteria, in addition to the criteria for DOs, odors, and water clarity, DOFEC added Lake Chesaplain to its impaired waters list. *Id*. Although required to do so by CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C), DOFEC failed to include a TMDL for Lake Chesaplain in its list of impaired waters. R. at 8.

Citing the TMDL's absence, CLW served a notice letter on both New Union and EPA in January of 2015, offering to refrain from suit if New Union established a TMDL. *Id*. In response,

DOFEC began a rulemaking process to establish a TMDL. *Id*. The Commission issued a supplemental report in July 2016 (the "Supplemental Report"), which calculated the phosphorus loadings as of 2015. *Id*. The total loadings were 60 metric tons (mt) higher than the level required for a healthy lake. R. at 8–9. The report also calculated the phosphorus loadings discharged by each source, finding that the Hog CAFOs alone contributed over 37% of the non-background phosphorus pollution. *Id*.

In October 2017, DOFEC proposed a TMDL consisting of an equal staged reduction of phosphorus discharges over five years. *Id*. Point sources would be required to reduce their phosphorus loadings through National Pollution Discharge Elimination System (NPDES) permits under CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2) R. at 10. Nonpoint sources would reduce their phosphorus loadings by implementing BMPs. *Id.* The BMPs for the Hog CAFOs included modified feeds which would result in lower phosphorus levels in manure, treatment of manure streams, and restrictions on when manure can be spread, while the BMPs for the lakefront home's septic tanks included more frequent inspection and pumping. *Id*.

DOFEC's original TMDL received pushback from private parties and CLW. *Id*. In response, DOFEC replaced its original submission with a TMDL consisting of an unallocated 120 mt annual maximum load in July 2018. R at 10. EPA rejected this TMDL, and after notice and comment adopted DOFEC's original TMDL proposal ("EPA's TMDL"), incorporating the record of scientific reports and public comments before DOFEC into its record. *Id*.

New Union has not implemented any aspect of EPA's TMDL to date. *Id*. The point and nonpoint sources continue to pollute Lake Chesaplain's waters. *Id*.

II. Procedural History

This appeal follows from a decision and order issued by the District Court for the District of New Union on August 15, 2021 in consolidated cases 66-CV-2020 and 73-CV-2020. R at 16.

Plaintiff New Union filed action No. 66-CV-2020 on January 14, 2020, alleging that its proposed TMDL was valid under the CWA and challenging EPA's regulation in 40 C.F.R. § 130.2(i) requiring that TMDLs include WLAs and LAs between point, nonpoint, and natural sources. R at 5, 10. Plaintiff CLW filed action No. 73-CV-2020 on February, 15, 2020. CLW sought a declaration that EPA's TMDL was insufficiently protective, contrary to law, arbitrary and capricious and unsupported by the record. *Id*. All three parties moved for summary judgment. R at 5. The district court granted New Union's motion for summary judgement in part, determining that the issues were ripe for adjudication and that EPA's regulation requiring WLAs and LAs within a State's TMDL was invalid under the CWA. R. at 12–14. The district court granted CLW's motion for summary judgment in part, ruling that EPA's staged implementation plan was invalid under the CWA. R. at 14–15. Finally, the district court granted EPA's motion for summary judgement in part, ruling that EPA's adoption of a credit for nonpoint source BMPs in its TMDL was valid and consistent with the CWA's definition of a TMDL. R. at 15–16. All three parties appealed to the United States Court of Appeals for the Twelfth Circuit in consolidated cases C.A. No. 21-000123 and C.A. No. 21-000124. R. at 2.

SUMMARY OF THE ARGUMENT

EPA's rejection of DOFEC's revised TMDL and establishment of its own TMDL is not ripe for judicial review because it is not final agency action under the APA and because the issues are not ripe. EPA's action is not final agency action because the decision-making process is still ongoing and because a TMDL is a recommendation and does not establish rights, obligations, or legal consequences. The issues are not ripe because there is less than minimal hardship to the plaintiffs, penalties can be promptly challenged, and judicial intervention would interfere with the statutory revision process.

EPA's decision to reject New Union's submitted TMDL on the grounds that it failed to include WLAs and LAs was a reasonable exercise of its discretion. EPA's decision relies on its interpretation of the term "total" as used in CWA § 303(d), 33 U.S.C. § 1313(d). EPA interpreted "total" to mean accounting for all constituent parts. An agency interpretation is entitled to deference if Congress has been ambiguous as to the issue at hand and the interpretation promulgated by the agency is reasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 842–43 (1984). Looking at the provision in context, Congress was ambiguous as to the meaning of "total," and EPA has reasonably explained its interpretation.

EPA's decision to adopt a staged annual TMDL was also a reasonable exercise of its discretion. First, "daily" in TMDL is a default rather than mandatory timeframe, and the CWA permits a TMDL based on an annual timeframe where appropriate. Second, the CWA permits staged-implementation TMDLs. In each case, the CWA was ambiguous and EPA's interpretation was reasonable. Under *Chevron*, both interpretations are entitled to deference from the courts.

EPA's adoption of a credit for anticipated nonpoint source pollution reduction through implementation of BMPs was not arbitrary, capricious, or an abuse of discretion. EPA meets the *State Farm* standard of review for arbitrary and capricious agency actions because it did not rely on factors that Congress did not intend for it to consider, it did not fail to consider an important aspect of the problem, and it did not offer an explanation that runs counter to the evidence or is implausible. Further, EPA is not subject to the "reasonable assurance" standard that CLW proposes. R. at 11.

ARGUMENT

I. EPA's Rejection of DOFEC's Revised TMDL and Adoption of DOFEC's Original TMDL Pursuant to CWA § 303(D)(2) Is Not Ripe for Judicial Review.

Federal courts may only review agency actions if they are authorized to do so by a statute. *Transport Robert 1973 LTEE v. US Immigration and Naturalization Service*, 940 F.Supp. 338, 340 (D.D.C. 1996). Here, the statute under which the plaintiffs seek judicial review is the APA, which only authorizes review of "final agency action." APA § 704, 5 U.S.C. § 704; *See also D'Imperio v. U.S.*, 575 F.Supp. 248, 252 (D. NJ 1983). EPA's action does not constitute final agency action because it is not the consummation of a decision-making process and does not establish rights, obligations, or legal consequences. Even if EPA's action were a final agency action, this challenge is not ripe because it does not cause hardship to the plaintiffs and judicial intervention would be preemptive. *Bravos v. Green*, 306 F.Supp.2d 48, 58 (D.D.C. 2004); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 738 (1998).

A. EPA's action does not constitute a "final agency action" under the APA.

Judicial review is not permitted for incomplete actions because it would interfere with executive function and curb the efficacy of administrative agencies. *Bravos*, 306 F.Supp.2d at 55. To decide whether an agency action is final, the Supreme Court looks to whether the agency's action is the consummation of a decision-making process and whether the action establishes rights and obligations. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

1. EPA's action was not the consummation of a decision-making process because the decision-making process is ongoing.

In *Cal. Communities Against Toxics v. EPA*, 934 F.3d 627, 631–632 (D.C. Cir. 2019), the D.C. Court of Appeals stated that courts should analyze an agency action's finality based on "the idiosyncratic regime of statutes and regulations that govern it," rather than on comparisons to

"superficially similar actions in caselaw." Looking to the statutes and regulations at issue in this case, it is clear that EPA's adoption of the TMDL is part of an ongoing decision-making process.

The CWA authorizes and encourages revisions. CWA § 303(e), 33 U.S.C. § 1313(e), titled "Continuing planning process," requires that a State and EPA review a TMDL. Specifically, it directs the State to submit "procedures for revision." CWA § 303(e)(3), 33 U.S.C. § 1313(e)(3). EPA regulations indicate that TMDLs can easily be revised. 40 C.F.R. § 123.62(a).

This case is distinct from *American Farm Bureau v. EPA*, 792 F.3d 281 (3rd Cir 2015), where the Third Circuit held that adoption of a TMDL was a final agency action. In that case, which is not binding precedent, EPA developed the TMDL in collaboration with six States and the District of Columbia over a matter of decades. *Id.* at 287. These parties participated in creating the TMDL because the goal of the TMDL was to improve the water quality of the entire Chesapeake Bay. *Id.* at 291. EPA did not challenge the finality of the TMDL or the ripeness of the issues. Brief for Respondent at 25, American Farm Bureau v. EPA, 278 F.R.D. 98 (2011) (No. 05-1631); EPA's Response Brief at 2, American Farm Bureau v. EPA, 792 F.3d 281 (3rd Cir 2015) (No. 003111577209). Here, by contrast, the TMDL involves only one State and a relatively small body of water. A change to the TMDL would require consent from only two parties, EPA and New Union. Because of these distinctions, and others discussed below, the question presented by *American Farm* regarding whether EPA's action is a final agency action and whether the issues were ripe for judicial review is not comparable to the question here. *See infra* Argument I(B)(1).

2. *EPA's action does not establish rights, obligations, or legal consequences because it is a recommendation, not a binding determination and it does not establish penalties.*

Even if EPA's action were the consummation of a decision-making process, it still is not final agency action because it does not establish rights, obligations, or legal consequences. *See*

Cal. Communities Against Toxics, 934 F.3d at 636. In *Dalton v. Specter*, 511 U.S. 462, 494 (1994), the Supreme Court held that a census report was not a final agency action because it was "more like a tentative recommendation than a final and binding determination." Additionally, the D.C. Court of Appeals found that an agency action was not final because it did not impose penalties or liability on a state authority that refused to comply. *Cal. Communities Against Toxics*, 934 F.3d at 637.

Likewise, EPA's adoption of the TMDL is a recommendation, not a binding determination because TMDLs established under CWA § 303(d)(1), 33 U.S.C. § 1313(d)(1) are only "informational tools." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 216 (D.D.C. 2011). *See also Alaska Ctr. For the Env't v. Browner,* 20 F.3d 981, 984–85 (9th Cir 1994); *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). State permitting agencies such as DOFEC can incorporate a TMDL into their continuing planning process in a variety of ways. Any continuing planning process which is adequate to meet the CWA requirements must be approved by EPA. CWA § 303(e)(3), 33 U.S.C. § 1313(e)(3) Since a TMDL sets a goal and leaves options open to the state for how the goal will be met, it is a recommendation.

Contrary to the district court's holding, EPA's TMDL would not require New Union to issue new NPDES permits to the point sources. R .at 12. Instead of New Union, EPA may implement the NPDES permits itself through a revision to a State program under 40 C.F.R. § 123.62(a). According to the regulation, "[e]ither EPA or the approved State may initiate program revision." *Id.* Revisions require public notice, the chance for a hearing, and final approval from EPA. 40 C.F.R. § 123.62(b). The revision process does not require EPA to revoke New Union's delegated program, or impose any other penalties or liabilities. 40 C.F.R. § 123.62(a).

Because it is a recommendation rather than a binding determination and because it would not impose penalties on New Union, EPA's adoption of the TMDL does not establish rights, obligations, or other legal consequences.

B. Even if EPA's action is a "final agency action" under the APA, the issue is not ripe for judicial review.

Even if CLW's and New Union's challenges to EPA's action were allowed by the APA, their claims should still be dismissed because the claims are not ripe. *See Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 159–162 (1967). Under the ripeness doctrine, courts refrain from adjudication of inchoate issues and protect agencies from interference until their actions are "felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967). This is true even if the issues are purely legal. *Toilet Goods*, 387 U.S. at 162–163.

The Supreme Court endorsed three factors to determine ripeness in the specific context of a challenge to an administrative action: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733. A California district court analyzed these factors as they related to the establishment of a TMDL in *City of Arcadia v. EPA*, 265 F.Supp.2d. 1142, 1159 (N.D. Cal. 2003). and found that the claims brought were not ripe for judicial review.

1. Delayed review would not cause hardship to the plaintiffs because they are not the ones bound by the NPDES permits, their hardships fall below a minimal level, and the penalties for noncompliance can be promptly challenged.

The municipalities in *Arcadia* asserted that delayed review would harm them because the TMDL was already implemented by language in a NPDES permit. *Id* at 1156. The court rejected

this argument because the municipalities were not bound by the NPDES permit in question. *Id*. at 1157. The municipalities also argued that delayed review would harm them because the TMDL was already forcing them to "begin employing strategies" to come into compliance. *Id.* at 1155. The court did not accept this argument because the hardship did not rise above a minimal level. *Id.* at 1157. In *Toilet Goods*, the Supreme Court ruled that a regulation with an immediate penalty for non-compliance did not cause hardship because penalty could be promptly challenged through an administrative procedure and reviewed by a court. 387 U.S. at 165.

Like in *Arcadia,* the NPDES permits in this case would not bind New Union or CLW. The permits would only bind the privately owned slaughterhouse and the STP owned by the City of Chesaplain Mills. R at 7. In this respect, *Arcadia* and the present case are both distinct from *American Farm*, where the agricultural trade associations would be bound by the permits. 792 F.3d at 293. Here, neither New Union nor CLW will ever be forced to limit its discharges by the TMDL, so delayed review will not harm the parties in this way.

New Union may argue that delayed review causes hardship because the TMDL requires New Union to implement NPDES permits to the point sources. However, EPA can administer the NPDES permits itself through a revision process, so this requirement does not exist. *See supra* Argument(I)(B). But even if this requirement did exist, it would still place less than minimal hardship on New Union. In fact, New Union has already largely complied with the requirement simply by proposing modifications to the NPDES permits. R at 10. The hardship in this case would be felt by the privately-owned slaughterhouse and Chesaplain Mills' STP, not New Union or CLW.

If we assume, on top of the assumption that New Union is required to administer the NPDES permits, that it fails to meet this requirement, the penalty for failure would be revocation

of New Union's delegated NPDES program. CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3). To revoke New Union's delegated NPDES program, EPA would notice New Union and hold a hearing. 40 C.F.R. § 123.64(b)(1). That hearing would be a forum for New Union to challenge the penalty. If EPA still revoked the NPDES program after the hearing, the revocation would be reviewable by a court as a final agency action under APA § 704, 5 U.S.C. § 704. *See also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990). Therefore, for the same reasons as in *Toilet Goods*, delayed review would not cause hardship to New Union.

2. Judicial intervention would interfere inappropriately with administrative action.

In *Ohio Forestry* , the Supreme Court held that a land resource management plan was not ripe for judicial review because immediate review would hinder the agency's efforts to revise its plan, a revision process was outlined in the Federal Register, and revisions could make judicial review unnecessary. 523 U.S. at 735–38.

As noted above, New Union and EPA can revise the TMDL under CWA § 303(d)(2), and the CWA actively encourages revision of a TMDL under CWA § 303(e), 33 U.S.C. § 1313(e). *See supra* Argument(I)(A)–(B) . This system of revisions is even more substantial than the discussion of revision cited in *Ohio Forestry* because it was created by Congress, not only the agency. EPA could revise the TMDL to eliminate some or all of the issues which New Union and CLW are asking the court to review, for instance by eliminating staged reduction. CWA § 303(d)(4), 33 U.S.C. § 1313(d)(4). For the same reason as the Supreme Court articulated in *Ohio Forestry,* interfering with EPA's TMDL would be inappropriate at this stage. 523 U.S. at 735–6.

3. The court would benefit from further factual development of the issue.

In *Ohio Forestry* the Supreme Court also found that until an actual logging proposal was presented the case was not ripe, because the agency action in question was too abstract. 523 U.S.

at 736. The court also noted that the plan in question was "programmatic in nature" and could not "foresee all effects." *Id*.

EPA's TMDL sets a goal but does not specify how the goal is to be achieved. *See supra* Argument(I)(A). EPA cannot foresee all of the TMDL's effects because it can be implemented in numerous ways by EPA or New Union. *See supra* Argument (I)(B). Furthermore, New Union's conduct following EPA's adoption of the TMDL may or may not force EPA to begin a revision process, which is subject to challenge *See supra* Argument (II)(A). Since EPA's action is more programmatic and its results cannot be foreseen, the court would benefit from allowing these uncertainties to resolve themselves.

II. EPA's Decision to Reject DOFEC's Revised TMDL on the Grounds that the TMDL Failed to Include WLAs and LAs Was a Reasonable Exercise of Its Discretion.

The appropriate framework for judicial review of an agency's construction of a statute was outlined in *Chevron*, 467 U.S. at 842–43. This framework proposes a two-part test. *Chevron* step one is to determine "whether Congress has spoken to the precise question at issue" or has left ambiguity. If Congress has, the inquiry ends there and Congress's "unambiguously expressed intent" must be followed. *Id.* at 842. If Congress is silent or ambiguous to the precise question at issue, then the inquiry continues to step two. *Id* at 843.

At *Chevron* step two, the question for the court to consider is whether the agency's construction of the statute is reasonable. *Id.* Deference is given to the agency at this step because a gap left by Congress is considered an express delegation to the agency. *Id.* The court need not find that the agency's interpretation is the best possible interpretation; so long as the agency's interpretation is reasonable, it is to be accepted by the court. *Id.*

United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) introduced a threshold test which restricts *Chevron* deference to agencies acting within their congressionally-delegated authority. To move forward with a *Chevron* analysis, the *Mead* test must first be satisfied.

A. EPA's interpretation of the CWA is entitled to Chevron deference.

According to the *Mead* test, a government agency is entitled to *Chevron* deference in its exercise of Congressionally-delegated authority "to make rules carrying the force of the law." *Id.* The Supreme Court has held that "[g]eneral conferral of rulemaking or adjudicative authority" is sufficient to support *Chevron* deference to the agency in its exercise of that authority. *City of Arlington v. FCC,* 569 U.S. 290, 291 (2013). Delegation of agency authority may be demonstrated by the agency's power to engage in notice-and-comment rulemaking or "by some other indication of a comparable congressional intent." *Mead*, 533 U.S. at 227.

Congress has clearly delegated authority to EPA generally to make rules carrying the force of the law in its interpretation of the CWA. In EPA's organic statute, Congress delegated to the agency all functions previously delegated by the Federal Water Pollution Act to other agencies "or by provisions of law amendatory or supplementary thereof." 5 U.S.C. § APP. 1 REORG. PLAN 3 1970. The Federal Water Pollution Act was amended in 1972 to create the CWA. CWA § 101, 33 U.S.C. § 1251 et. seq. states "Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter." CWA § 101(d), 33 U.S.C. § 1251(d).

The CWA delegated to EPA the power to add or remove any pollutant from the list of regulated toxic pollutants, set effluent limitations, review and set WQS for States, review State-identified impaired waters, and review TMDLs for such waters in order to meet water quality standards. CWA § 303, 33 U.S.C. § 1313 et seq. In exercise of such authority, EPA has

promulgated regulations through notice-and-comment rulemaking under CWA § 101(e), 33 U.S.C. § 1251(e). *See* Water Quality Planning and Management, 50 Fed. Reg. 1,774 (Jan. 11, 1985). These regulations, found in 40 C.F.R. § 130, *inter alia,* define TMDLs, clarify requirements of TMDLs, and describe the process of development by the States and approval by EPA. As an agency with rulemaking authority, exercising such authority through the promulgation of regulations subject to public notice-and-comment, EPA is entitled to *Chevron* deference in its construction of the CWA as it relates to TMDLs.

B. Chevron step one: Congress is ambiguous as to the meaning of the word "total" in the phrase "total maximum daily load" of the CWA.

Statutory text is ambiguous if Congress has not "directly spoken to the precise question at issue" and made its intent clear. *Chevron*, 467 U.S. at 842. To determine whether or not Congress has spoken to the question at issue, inquiry must begin with the language of the statute. *See, e.g*. *Friends of Earth,* 446 F.3d 140, 144 (D.C. Cir. 2006).

While considering the language, a court must consider a provision in the context of the statutory scheme as a whole, and "not confine itself to examining a particular statutory provision in isolation." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 666 (2007) (quoting *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S, 120, 132 (2000)). The term "total" means "an entire quantity". *Total,* Merriam-Webster, https://www.merriam-webster.com/dictionary/total (last visited Nov. 17, 2021). New Union would assert that Congress requires the TMDL to be represented by a single number equal to the sum of emissions necessary to meet WQS, with no additional information required. This interpretation would be based on a narrow, literal reading of the word out of context, which is contrary to established practices of statutory interpretation. EPA's interpretation takes "total" to be indicative of Congress's intention that the TMDL must account for all constituent parts of emissions necessary to meet

WQS. *See American Farm*, 792 F.3d at 297. Congress did not speak to the precise meaning of the word "total" in TMDL, but application of the harmonious reading canon and the canon against surplusage illustrates that EPA's interpretation is true to the statute and to the intention of Congress.

Looking at the term in context reveals that interpretation of "total" as limiting a TMDL to a single-number representation is contrary to the CWA. It is accepted that in statutory interpretation, courts must "fit, if possible, all parts into an [sic] harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). New Union's interpretation of "total" disregards the harmonious-reading canon by failing to consider the several requirements of a TMDL described in CWA § 303(d)(1)(C), 33 U.S.C. § 1313 (d)(1)(C). First, the TMDL must be "established at a level necessary to implement the applicable water quality standards." *Id.* Second, it must allow for "seasonal variations." *Id.* Third, it must have a "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." *Id.* A mere number will not satisfy all of these requirements and certainly could not provide enough information for EPA to evaluate whether or not the requirements are met. The court asserts in *American Farm,* 792 F.3d at 298, that the several requirements outlined in CWA § 303(d)(1)(C), "taken together, tend 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."

The CWA mandates that each State establish "the total maximum daily load…*at a level* necessary to implement the applicable water quality standards." *Id.* (emphasis added). A reading of the TMDL as a mere number necessary to meet WQS renders the term "level" superfluous. "Total" in this sense would always be "at a level," and so inclusion of the phrase "at a level"

adds no meaning to the statute. By contrast, a reading of the TMDL as an account of all constituent parts necessary to meet WQS does afford meaning to the term "level". The "level" is the sum of all emissions contributing to the TMDL. In other words, it is the number that New Union erroneously asserts that the entire TMDL ought to be. This textual concern is given weight by the court in *American Farm,* 792 F.3d at 297. The Supreme Court held that in statutory analysis, a reading of a statute which gives effect to a word or provision is preferable to a reading which causes a word or provision to be inconsequential. *United States v. Menasche*, 348 U.S. 513, 520 (1955); *See also City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 591 (2021). The fact that the redundancy occurs in the same provision further strengthens the canon against surplusage here. *See Yates v. United States*, 574 U.S. 528, 543 (2015).

Even if EPA's construction is not the one the Court would have put forth, evidence from the statute proves at the very least that Congress was ambiguous as to the meaning of "total" in TMDL. *Chevron* deference mandates that interpretation must therefore be left to EPA.

C. *Chevron* step two: EPA's interpretation of the term "total" in the phrase "total maximum daily load" of the CWA is reasonable.

An agency's interpretation of a statute is reasonable under *Chevron* step two if it is "rationally related to the goals of the act." *AT & T Corp. v. Iowa Utilities Bd*., 525 U.S. 366, 388 (1999) (holding that FCC had rulemaking authority to pass regulations related to the Telecommunications Act of 1996.) Numerous Courts of Appeals have held than *Chevron* step two is satisfied when an agency has "offered a reasoned explanation for why it chose that interpretation." *Vill. of Barrington, Ill. v. Surface Transp. Bd.,* 636 F.3d 650, 660 (D.C. Cir. 2011). *See also Good Fortune Shipping SA v. Comm'r of Internal Revenue Serv.*, 897 F.3d 256, 261 (D.C. Cir. 2018) *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency,* 846 F.3d 492, 525 (2d Cir. 2017); *Cal. Communities Against Toxics*, 928 F.3d at 1056. An

agency's interpretation of a statute may be reasonable whether or not it is the same one the court would have made. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005).

The Congressional declaration of goals and policy of the CWA state that its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" CWA § 101(a), 33 U.S.C. § 1251(a). To that end, Congress delegated to EPA the authority to approve or reject TMDLs. *Id.* § 1313(d)(2). ("The Administrator shall either approve or disapprove such identification and load…") *See supra* Argument II(A). EPA reasonably interpreted the statute as authorizing it to establish a TMDL framework that collected enough information to evaluate proposed TMDLs. The agency explained its framework in Water Quality Planning and Management, 50 Fed. Reg. 1,774 (Jan. 11, 1985):

> 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.

Not only is EPA's interpretation rationally related to the goals of the statute and supported by this reasoned explanation from the agency (which alone is sufficient to satisfy part two of the *Chevron* test), it has also been affirmed by legislation and adjudication in the intervening time.

Congress amended the CWA through P.L. 100-4 in 1987, two years after EPA adopted the above framework for TMDLs. The only change Congress made with regard to TMDLs was the addition of CWA § 303(d)(4)(A)–(B), 33 U.S.C. § 1313(d)(4)(A)–(B), limiting revisions states could make to their TMDLs. This amendment referred to TMDLs as "total maximum daily load or other waste load allocation" each of the three times it used the term "total maximum daily load". The term "waste load allocation" appears in EPA's regulation but did not appear in

the CWA prior to EPA's regulation. Congress affirmed EPA's interpretation of a TMDL as including a WLA by adopting this language. Usage of the word "other" also implies that a TMDL may be a WLA itself. *American Farm*, 792 F.3d at 308.

Previous courts' acceptance of EPA's interpretation of the CWA as permitting TMDLs to include WLAs also supports this construction. *American Farm* directly addresses the question of whether requiring WLAs in a TMDL is a reasonable interpretation of the CWA and the term "total" in TMDL. The court in that case ruled that it was a reasonable interpretation of an ambiguous statute. 792 F.3d at 306–7. Other courts have also acknowledged EPA's longstanding construction of TMDL as requiring WLAs. *See Anacostia,* 798 F.Supp.2d at 216 (holding that, "[i]n addition to setting a maximum daily level of pollution, EPA regulations require TMDLs to allocate contaminant loads among point and non-point sources of pollution"); *Nat. Res. Def. Council, Inc. v. EPA*, 301 F.Supp.3d 133, 137 (D.D.C. 2018) (holding, "[a] waterbody's TMDL for a particular pollutant is defined as the sum of the individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background.") (internal quotations and brackets omitted); *See also Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 n.9 (11th Cir. 2002).

The clear alignment of Congress's intents and EPA's regulations, EPA's reasoned explanation for its interpretation, Congress's affirmation of EPA's regulations in post-enactment legislation, and courts' general acceptance of EPA's interpretation in decisions regarding TMDLs together show that EPA's interpretation is reasonable. Thus, this Court must not substitute its own interpretation of the statute for EPA's.

III. EPA'S Adoption of a TMDL for the Lake Chesaplain Watershed Consisting of an Annual Pollution Reduction to Be Staged In Over Five Years Was Not Contrary to Law.

EPA's adoption of an annual, staged TMDL for the Lake Chesaplain Watershed relies on

the agency's interpretation of two aspects of a TMDL from the CWA. First is EPA's interpretation of the CWA as permitting TMDLs to be expressed over a time period other than daily. Second is EPA's interpretation of the CWA as permitting staged TMDLs. Once again, both of these interpretations are promulgated by an agency with congressionally-delegated rulemaking authority, exercising such authority. The *Chevron* deference regime is therefore still appropriate to analyze both interpretations *See supra* Argument II(A).

It is important to note a small but consequential inaccuracy in the terminology used by the district court. The court referred to the TMDL which EPA approved for New Union as a "phased" TMDL. R. at 14–15. However, this TMDL is more accurately described as "staged," based on descriptions put forth in a memorandum from EPA, entitled "Clarification Regarding 'Phased' Total Maximum Daily Load" to all regional Water Division Directors, 5 (Aug. 2, 2006) (on file with author)[hereinafter *Clarification Memo*]. A "staged" TMDL "anticipates implementation in several distinct stages." *Id.* A "phased" TMDL, on the other hand, is established with the intention to revise in the near future due to lack of adequate information at the time that the original TMDL is made. *Id.* at 3. The TMDL in question sets out an implementation plan where emissions are reduced in five stages. R. at 9. This TMDL falls into EPA's definition of a "staged" TMDL and should be referred to accordingly.

A. EPA's approval of a TMDL with an annual LA was a reasonable exercise of its discretion.

1. Chevron Part One: Congress was ambiguous as to the meaning of the term "daily" in the phrase "total maximum daily load" of the CWA.

As noted, statutory meaning is ambiguous under *Chevron* step one when Congress has not made its intent clear by addressing the precise issue at hand. *See supra* Argument II(B). To determine whether Congress has done so, the text of the statute must be examined in context and the canons of statutory interpretation must be applied.

Congress does not state that an allocation is mandatorily calculated on a daily basis anywhere in the CWA, and this silence is an ambiguity to be filled by EPA. "TMDL" is a term of art meant to be fleshed out by regulation rather than a finished, detailed framework. *See supra* Argument II(B). Of course, Congress's use of the term "daily" in TMDL cannot be ignored. *See Friends of Earth,* 446 F.3d at 144 (holding that the use of the term "daily" mandates that TMDLs may only use daily LAs). However, EPA interprets "daily" as the default timeframe, to be used except where inappropriate or impracticable.

CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C), and CWA § 303(d)(4)(A)–(B), 33 U.S.C. § 1313(d)(4)(A)–(B), together task EPA with oversight of TMDLs for "hundreds of pollutants in thousands of different waterbodies". *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001). A TMDL based on a daily load is suitable for control of many pollutants because conventional pollutants, such as toxic metals, cause dangerous effects when their levels are above a certain standard for even a very short period of time. Thus, those substances must be limited on a daily basis. Phosphorus, on the other hand, is regulated in order to prevent eutrophication. Memorandum from EPA on Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its tidal tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System to Region 3 Water Permits Division Director and all Water Management Division Directors, 4 (on file with Author)[hereinafter *Chesapeake Memo*].Eutrophication is caused by elevated levels of a nutrient over a period of many months to several years, and a momentary peak will have little impact on the trophic state. In fact, waterbodies show "little response to monthly variations [in response to phosphorus] within an annual load." *Id.* It is the long-term elevation of chemicals such as

phosphorus over the course of years that is of concern to EPA and Congress. *Id. See also Muszynski* at 98–99.

The amount of phosphorus entering a waterway is subject to huge variation based on weather patterns. High rainfall increases phosphorus loadings from nonpoint sources by washing organic matter into waterways and from point sources by causing wastewater to move faster into waterways. *See* N.Y. Dep't of Env't Conservation, Total Maximum Daily Load for Phosphorus in Chautauqua Lake (November 2012) ; EPA, Advanced Wastewater Treatment to Achieve Low Concentration of Phosphorus (April 2007). . This means that even if a polluter were to discharge phosphorus at a constant rate throughout the year, factors beyond human control would result in loadings that vary drastically by season. If a daily TMDL were calculated based on acceptable loadings in the springtime, when rainfall is high, and that load remained constant throughout the year, then phosphorus would reach harmful concentrations in the waterbody. If a daily TMDL were calculated based on a safe maximum annual load divided by 365, then violations would occur frequently and predictably.

A TMDL created to be broken is not a useful tool for States or EPA and is surely not what Congress intended. The district court asserted that an annual limit "does not allow for seasonal variations." R. 14–15. On the contrary, only a TMDL based on a longer measure of time would ensure that pollutants do not build up to a harmful level, but still accounts for storm events, biological activity, and events which naturally increase the level of phosphorus entering the waterbodies. *See Muszynski*, 268 F.3d at 99.

The court in *Friends of Earth,* 446 F.3d at 146, suggested that, since phosphorus is so poorly suited to TMDLs calculated on a daily basis, EPA could remove the pollutant from its list of toxic chemicals and forego a TMDL for it altogether. But phosphorus is harmful when it

accumulates over time, and the CWA contains no back-up framework for regulating chemicals in this situation. Congress almost surely could not have meant for TMDLs to be interpreted to simply exclude chemicals that are badly suited to daily load limits. Invoking the absurdity doctrine, an interpretation which leads to a reasonable outcome should be permitted even if it departs from the literal meaning of the statute, if the alternative would be a result that Congress almost certainly could not have meant. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The court in *Muszynski,* 268 F.3d at 98–99 concurs: "We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis. Such a reading strikes us as absurd…"

Congress left numerous gaps in its description of TMDLs and delegated to EPA the power to fill them. Acceptable timeframe allocation for TMDLs is one such gap. It is within the authority of EPA to use its scientific expertise to create guidelines for TMDLs that honor Congress's intent.

2. Chevron Part Two: EPA's interpretation of the term "daily" in the phrase "total maximum daily load" is reasonable.

An interpretation is to be considered reasonable if the agency has given a reasoned explanation for it and it is rationally related to the goals of the statute. *See supra* Argument I(C).

EPA's interpretation that "daily" refers to the standard measure of time for TMDLs, not the exclusive measure of time, enables EPA to remain true to the intention of Congress in enacting the CWA: to prevent harmful buildup of pollutants in waterways, even for pollutants not well-suited to a daily LA.

The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). In the case of pollutants such as phosphorus where daily allocations for TMDLs are unsuitable, Congress's intentions are

best served by using an alternate measure of time. EPA explained in its final rule following notice-and comment that since daily TMDLs are not feasible for all pollutants, "TMDLs and water quality-based effluent limitations may be expressed in terms of an appropriate averaging period. . ." 50 Fed. Reg. 1,774), 1,776). EPA has elaborated on the need for annual measurements for chemicals like phosphorus. *See supra* Argument II(B)(1). *See also Chesapeake Memo* at 5.

Once again, EPA's interpretation has been affirmed by Congress and the courts in the years since it set forth the above regulation and reasoning. Congress's amendments to the CWA in P.L. 100-4 affirm EPA's construction of the CWA. *See supra* Argument II(C). Congress had the opportunity to evaluate EPA's reasoning for permitting time measurements other than daily in TMDLs and chose not to fill this gap in its post-enactment legislation.

Several Federal Appellate Courts which have heard the issue of TMDLs based on a measurement other than daily approve of this interpretation as well. *See, e.g., Muszynski*, 268 F.3d at 99 ("… we agree with EPA that a 'total maximum daily load' may be expressed by another measure of mass per time"); *Anacostia*, 798 F.Supp.2d at 245 ("there is nothing incongruous about establishing daily pollutant load limits to meet water quality criteria expressed as another timeframe") (considering whether a TMDL may establish daily load limits, but require them to be met over a seasonal average); *San Joaquin River Exch. Contractors Water Auth.* v. *State Water Res. Control Bd.*, 183 Cal. App. 4th 1110,1123 (2010), as modified (May 5, 2010) ruling that a monthly mean load could be an appropriate substitute for daily load because technological limitations make daily measurements impractical).

Permitting a TMDL that uses an annual timeframe supports the stated objectives of the CWA. EPA has justified its interpretation in notice-and-comment rulemaking and memoranda.

Since the justification is reasonable and rationally related to the goals of the CWA, it is entitled to judicial deference.

B. EPA's approval of a staged implementation TMDL to achieve WQS was a reasonable exercise of its discretion.

1. *Chevron Part 1: Congress was ambiguous as to whether TMDLs must be sufficiently stringent so as to meet WQS immediately from the moment they are implemented.*

As already noted, *see supra* Section I(B), Congress is ambiguous if it has not "directly spoken to the specific question at issue." *Chevron,* 467 U.S at 842. Again, the analysis must begin with the plain text of the statute in context, applying canons of statutory interpretation where needed.

Congress addresses timetables for achievement of the CWA's objectives in CWA § 301(b), 33 U.S.C. § 1311(b)(1)(C) (emphasis added): "In order to carry out the objective of this chapter there shall be achieved…not later than July 1, 1977, *any more stringent limitation*, including those necessary to meet water quality standards, treatment standards, *or* schedules of compliance, established pursuant to any State law or regulations."

The district court held that the date indicated "is a hard deadline that may not be extended by administrative action." R. 15. The district court further contended that, since this deadline has passed, all TMDLs established must set limitations sufficient to meet WQS immediately. The court's interpretation, however, is far more restrictive than the plain text of the statute.

Assuming the court is justified in its assertion that EPA may not adapt the deadline to the needs of a given State or waterbody, EPA is still acting within its discretion by approving a staged-implementation TMDL. The statute does not say that WQS must be met by July 1, 1977; it says that "any more stringent limitation…necessary to meet water quality standards" must be achieved by that date. : The CWA's deadline is for achieving *more stringent limitations*, not for

achieving WQS. EPA's staged-implementation TMDL *is* a more stringent limitation, necessary to meet WQS; the standards will simply be met in five years, rather than immediately.

The CWA states, "there shall be achieved…not later than July 1, 1977, any more stringent limitation, including those necessary to meet arm." Congress did not say that more stringent limitations must be achieved necessary to *immediately* meet WQS. To construe the statute in this way is not only more restrictive than the statute, it is also impractical. TMDLs by nature cannot meet WQS immediately. Even if a TMDL reduced all emissions to zero for a given watershed, if one were to test the water immediately after its implementation, WQS would not yet be achieved because it takes time for the levels of a given pollutant to decrease after pollution is reduced.

As established by the surplusage canon, every word of a statute should be given meaning wherever possible. The CWA uses the disjunctive "or". *Id*. "Or" suggests that where one item of a list is inappropriate, a more appropriate item from the list should be applied instead. "[A]ny more stringent limitation necessary to meet water quality standards" is only one item on the list. Assuming *arguendo* that this Court finds that Congress unambiguously required TMDLs to include limitations which would meet WQS immediately, it is appropriate to turn to the other items on the list before declaring that EPA's TMDL fails on account of this provision.

The third item on the list is "schedules of compliance." EPA's TMDL outlines a decrease in phosphorus emissions by 7% in the first year, followed by an additional 7% reduction from the baseline in each subsequent year until it reaches a 35% total reduction. R at 9. EPA's TMDL would therefore immediately impose the more stringent limitations necessary to meet a schedule of compliance, satisfying one of the alternative elements in the disjunctive list.

The CWA does not preclude EPA from adopting staged TMDLs. The CWA's deadline is the date by which Congress intended more stringent limitations to be adopted, not the date by which Congress intended WQS to be met. Moreover, EPA's TMDL need not be a "more stringent limitation" because it satisfies the alternative requirement of the provision "schedule of compliance."

2. Chevron Part 2: EPA's interpretation of the CWA as permitting staged-implementation TMDLs was reasonable.

Once more, whether an agency's interpretation passes *Chevron* step two depends on whether the agency has set forth a reasoned explanation that shows how its interpretation is rationally related to the goals of the statute. *See supra* Argument I(C).

EPA did set forth such an explanation in a memorandum which recognized that "some TMDLs will require 'staged implementation' to a degree, particularly if they include nonpoint sources, and that in many of these cases the staging will be significant." *Clarification Memo* at 5. EPA has also published materials showing that "staged/phased implementation" is one of the most common positive factors contributing to success of a TMDL. Benham, Brian, et.al., *TMDL Implementation: Lessons Learned* (2007) (on file with EPA).

Case law is extremely limited on the subject of whether a staged TMDL, such as EPA's, reflects a reasonable interpretation of the CWA. However, several district courts have ruled that EPA's permitting *phased* TMDLs is a reasonable construction of the CWA. *See, e.g. Assateague Coastkeeper v. Maryland Dep't of Env't,* 200 Md. App. 665, 693 A.3d 178 (2011); *Minnesota Ctr. for Env't Advoc. v. EPA,* No. CIV03-5450(DWF/SRN), 2005 WL 1490331 (D. Minn. June 23, 2005); *S. Appalachian Mountain Stewards v. Red River Coal Co.,* No. 2:14CV00024, 2015 WL 1647965 (W.D. Va. Apr. 14, 2015). A staged TMDL is very similar in effect to a phased TMDL, in that they both meet WQS at a date later than when the TMDL is implemented and

allow for regulation of pollutants not well-suited for daily load limitation. They differ mainly in that a staged TMDL does not require subsequent revision and approval.

Given that the goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and EPA has released statements explaining that staged implementation is sometimes necessary and has a positive impact on success of a TMDL, EPA has satisfied the requirements of a reasonable interpretation of an ambiguous statute. CWA § 101(a), 33 U.S.C. § 1251(a).

IV. EPA'S DECISION TO ADOPT A CREDIT IN ITS TMDL FOR ANTICIPATED BMP POLLUTION REDUCTIONS BY NONPOINT SOURCES WAS NOT ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Courts must hold unlawful and set aside any final agency action found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." APA § 706(2)(a), 5 U.S.C. § 706(2)(a). Assuming *arguendo* that EPA's action is final, which EPA contests, *see supra* Argument I(A), EPA's action was not arbitrary, capricious, or an abuse of discretion. Additionally, EPA is not subject to the "reasonable assurance" standard that CLW proposes.

A. EPA's decision was not arbitrary, capricious, or an abuse of discretion under the relevant standard of judicial review.

The Supreme Court articulated the "arbitrary and capricious" standard of review in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Courts must examine whether an agency's decision considered "the relevant factors and whether there has been a clear error of judgment." *Id*. While this inquiry should be "searching and careful," the court may not "substitute its judgment" for the agency's. *Id*. The court's review may examine the "whole record" before the agency at the time of its decision. APA § 706, 5 U.S.C. § 706. As the district court noted below, this standard of review is "highly deferential." R. at 15.

In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43 (1983), the Supreme Court refined *Overton*'s framework, holding that courts may determine whether an agency's action is arbitrary or capricious by examining whether the agency: 1) relied on factors that Congress did not intend for it to consider; 2) failed to consider an important aspect of the problem; or 3) offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it cannot be the result of a different viewpoint or agency expertise in the area.

1. *EPA relied only on factors that Congress intended for it consider, including scientific data regarding point and nonpoint source pollution and information regarding how such pollution might be reduced.*

In CWA § 303(d), Congress identifies the factors that a State (and, in this case, EPA) should consider in identifying waterbodies with insufficient controls to meet WQS, including "the severity of the pollution" affecting an impaired waterbody. 33 U.S.C. § 1313(d)(1)(A)). This information provides a basis for the calculation of a TMDL, which must "be established at a level necessary" to implement WQS "with seasonal variations and a margin of safety" for any lack of knowledge regarding the effect of effluents on water quality. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). This evaluation obviously depends on scientific data regarding such pollutants; there is no other way to determine pollution severity or the maximum pollutant level to implement WQS.

In formulating its TMDL, EPA relied on DOFEC's original TMDL proposal and incorporated the record of scientific reports and public comments before DOFEC into EPA's own administrative record. R. at 10. In particular, the Commission's 2016 report, which formed the basis for EPA's TMDL, is clearly the type of scientific data that Congress intended to be considered by an agency under CWA § 303(d).

While EPA does not have authority to regulate nonpoint sources directly, it accounts for nonpoint source pollution in formulating a TMDL, an interpretation of the CWA which Congress

approved through its post-enactment legislation. *See supra* Argument II(C). The Court of Appeals for the Ninth Circuit has also repeatedly ruled that TMDLs may include nonpoint source allocations. *See, e.g., Pronsolino*, 291 F.3d at 1137 (finding that CWA § 303(d) applies to waters polluted *only* by nonpoint sources); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (finding that a TMDL includes allocations for nonpoint sources); *Alaska Ctr. for Env't*, 20 F.3d at 985 (finding that Congress and EPA have determined that a TMDL is "an effective tool for achieving water quality standards in waters impacted by non-point source pollution").

However, TMDLs do not regulate point or nonpoint sources directly. They are "not self-implementing instruments," but rather "informational tools utilized by EPA and the States to coordinate necessary responses to excessive pollution in order to meet water quality standards." *Anacostia*, 798 F.Supp.2d at 216.

The Commission's 2016 report recommended the BMP programs at issue. EPA's TMDL incorporates these nonpoint source BMPs because nonpoint sources contribute significant phosphorus pollution to Lake Chesaplain, and nonpoint source pollution control is critical to achieving WQS. Given EPA's inability to regulate nonpoint sources directly, nonpoint source BMPs may be New Union's best method of controlling nonpoint source pollution so that Lake Chesaplain meets its WQS. The credits for nonpoint source BMPs are based on information that increases the usefulness of EPA's TMDL to New Union as an informational tool.

EPA did not rely on factors that Congress did not intend for it to consider, because its TMDL is based on scientific data regarding point source and nonpoint source pollution and on relevant information regarding methods for achieving WQS.

2. EPA did not fail to consider an important aspect of the problem.

EPA considered all important aspects of the problem in reaching its decision, including

the likelihood of nonpoint source BMP implementation. CLW argues that the lack of assurance of BMP implementation should invalidate EPA's TMDL. However, the likelihood of implementation cannot be properly evaluated until New Union incorporates EPA's TMDL into its "continuing planning process" under CWA § 303(e), 33 U.S.C. § 1313(e). Further, implementation need not be absolutely assured for EPA to incorporate BMPs into its TMDL.

The CWA is based on the principle of "cooperative federalism." *See* R. at 5. Cooperative federalism is exhibited by any program in which Congress allows States to either regulate an activity under federal standards or else have "state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 145 (1992). *New York* explicitly names the CWA as a program that operates under cooperative federalism. *Id*. at 167. In keeping with this structure, CWA § 303(d)(2) provides that if a federal agency rejects a State's submitted identification and load, the agency may identify waters and establish loads, and "upon such identification and establishment *the State shall incorporate them into its current plan* under subsection (e) of this section." 33 U.S.C. § 1313(d)(2) (emphasis added). This language is mandatory: a State must incorporate the federal agency's TMDL into its continuing planning process.

CLW's argument misconstrues where the burden rests to determine how to implement nonpoint source BMPs. New Union, not EPA, is responsible for evaluating how nonpoint source BMPs might be implemented. EPA's TMDL is not a self-implementing instrument, but rather an informational tool to assist in the development of a continuing planning process under CWA § 303(e). *See Anacostia*, 798 F.Supp.2d at 216. In *Ohio Valley Env't Coal. v. Horinko*, 279 F.Supp.2d 732, 763 (S.D.W. Va. 2003) the court found that EPA's conclusion that if BMPs are "installed and maintained, then. . . [BMPs] will be achieved." However, in the case at hand the likelihood of nonpoint source BMP implementation cannot be determined until after New Union

incorporates EPA's TMDL into a continuing planning process under CWA § 303(e), as required by CWA § 303(d)(2).

There are a variety of ways New Union might cause nonpoint sources to adopt BMPs. The New Union Agricultural Commission could modify the Hog CAFOs' permits to require adoption of BMPs. *See* R. at 7. New Union could also offer nonpoint sources tax incentives to encourage BMP implementation. In fact, CWA § 319 provides a system through which States may apply to EPA for grants to assist in implementing "management programs," including BMPs, an opportunity which New Union has not taken advantage of according to the record. *See* 33 U.S.C. §§ 1329(b), 1329(h) . However, New Union, not EPA, is equipped to evaluate and determine through what method nonpoint source BMPs can most effectively be implemented.

Additionally, case law in other jurisdictions indicates that, on the path towards attaining WQS, neither gradual nor incomplete implementation of BMPs violates the CWA. *See, e.g., Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1333 (10th Cir. 2007) (holding that U.S. Forest Service did not act arbitrarily or capriciously in implementing State's nonpoint source BMPs, which State acknowledged might not prevent nonpoint sources from causing waterbody to fail to achieve WQS); *Oregon Wild v. U.S. Forest Serv.*, 193 F.Supp.3d 1156, 1170–71 (D. Or. 2016) (holding that U.S. Forest Service complied with CWA requirements by implementing State's BMPs for nonpoint sources, where State acknowledged "violations may occur while the Forest Service works to achieve long-term goals"). *Cf. Anacostia*, 798 F.Supp.2d at 246–47 (holding that EPA can reasonably assume periodic violations of WQS when creating a TMDL). If temporary violations of Lake Chesaplain's WQS occur due to delayed or ineffective implementation of the nonpoint source BMPs, EPA's TMDL is not automatically invalidated.

Finally, under 40 C.F.R. § 130.6(4)(i), "[e]conomic, institutional, and technical factors

shall be considered in a continuing process of identifying control needs and evaluating and modifying the BMPs as necessary to achieve water quality goals." This regulation ensures that the credit for nonpoint source BMPs remains responsive to developments, so that if implementation proves to be overly burdensome or otherwise impractical, the TMDL and continuing planning process can be revised in order to ensure that WQS are achieved.

EPA considered all the important aspects of the problem in reaching its decision to include a credit for nonpoint source BMPs, including the likelihood of BMP implementation.

3. EPA did not offer an explanation that runs counter to the evidence or is implausible.

Federal agencies must "articulate a satisfactory explanation" for their actions. *State Farm*, 463 U.S. at 30. However, courts will uphold an agency's decision of "less than ideal clarity" if the agency's "path" can be discerned. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, Inc., 419 U.S. 281, 286 (1974). Courts have repeatedly applied *Bowman* when reviewing EPA's actions under the "arbitrary and capricious" standard. *See, e.g., Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 497 (2004) (holding that although EPA's explanations were unclear, its path could be discerned); *Greenbaum v. U.S. E.P.A.*, 370 F.3d 527, 541–42 (6th Cir. 2004) (holding that EPA's path could be discerned based on the administrative record); *United States Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir.), *on reh'g en banc*, 671 F. App'x 822 (D.C. Cir. 2016), and *on reh'g en banc in part*, 671 F. App'x 824 (D.C. Cir. 2016) (finding that EPA's "lack of an explicit statement" did not invalidate its rule, where its justification could be discerned from the administrative record).

EPA's justification for its decision is clearly indicated by its incorporation of the scientific reports and public comments before DOFEC into its administrative record. R. at 10. While EPA did not offer an explicit explanation for its decision to include a credit for nonpoint

source BMPs in its TMDL, its rationale can be easily determined.

The Chesaplain Commission's 2016 Report determined that nonpoint sources contributed significant phosphorus loadings to Lake Chesaplain. R. at 8–9. Specifically, the Hog CAFOs were the most significant contributors of phosphorus pollution to Lake Chesaplain, in addition to smaller but significant phosphorus loadings from other agricultural sources and the lakefront homes' septic tanks. *Id*. EPA therefore concluded, as did DOFEC in its original TMDL, that it was crucial that nonpoint sources reduce their loadings in order for Lake Chesaplain to achieve its WQS. In creating its TMDL, EPA relied on New Union's ability to incentivize nonpoint sources to adopt BMPs, the same basis for the nonpoint source BMPs which DOFEC relied on in its original TMDL. While the clarity of EPA's expression of its rationale may be less than ideal, the justification for its decision is plainly evidenced by its administrative record.

EPA did not rely on factors Congress did not intend for it to consider, fail to consider an important aspect of the problem, or offer an explanation that runs counter to the evidence. Under the *State Farm* test, its action was therefore not arbitrary, capricious, or an abuse of its discretion.

B. EPA's decision is not subject to a "reasonable assurance" standard.

CLW erroneously assumes that EPA must meet a "reasonable assurance" standard, even though CLW's claims arise under the APA and are therefore subject to the more deferential "arbitrary and capricious" standard under APA § 706(2)(a), 5 U.S.C. § 706(2)(a). *See* R. at 15.

CLW argues that EPA's action should be held unlawful and set aside because "EPA has no authority to require implementation of these BMPs" and therefore there is "no reasonable assurance" that the BMPs will be implemented, citing an EPA document for support. R. at 15. The document cited states that "in order to allocate loads among both nonpoint and point sources, there must be reasonable assurances that nonpoint source reduction will in fact be achieved." EPA, Guidance for Water Quality Based Decisions: The TMDL Process (April 1991).

This document provides an interpretive rule, and EPA may change its interpretive rules without creating a new regulation. Generally, under APA § 553(b), agencies are required to publish notice of proposed rule making. 5 U.S.C. § 553(b). However, they are exempt from this requirement with respect to "interpretative rules." *Id.* § 553(b)(3)(A). In *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96–97 (2015), the Supreme Court held that agencies have no notice-and-comment obligations with respect to interpretative or "interpretive" rules, and that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 88 (1995)).]

EPA may therefore change its interpretive rules regarding its regulatory definitions without providing notice-and-comment, and these interpretive rules should not be accorded the weight of law with respect to judicial review. EPA's regulatory definition of TMDLs specifies that if nonpoint source BMPs "make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i). EPA defines BMPs themselves as "[m]ethods, measures or practices selected by an agency to meet its nonpoint source control needs," including but 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." 40 C.F.R. § 130.2(m).

Under APA § 553(b), 5 U.S.C. § 553(b), EPA may change its interpretation of these regulations without providing notice-and-comment. Therefore, EPA is not limited to the interpretation provided in the thirty-year-old document that CLW cites, and may interpret these regulations as permitting credits for nonpoint source BMPs with or without "reasonable assurance" of implementation.

CONCLUSION

For the reasons stated above, EPA requests that this Court reverse the district court's grant of summary judgment in part for New Union, reverse the district court's grant of summary judgment in part for CLW, affirm the district court's grant of summary judgment in part for EPA, and remand the case for further proceedings consistent with that decision.