TEAM 39

C.A. No. 21-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

-and-

THE STATE OF NEW UNION,
*Plaintiff-Appellant-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 Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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## INTRODUCTION

The Clean Water Act ("CWA") was passed in 1972 to protect America's waters through a national permitting system. Originally intended to solve American water pollution issues by 1985, the CWA created a broad and aggressive framework that allows the Environmental Protection Agency ("EPA") to protect navigable bodies of water from pollution.

Although the CWA has prevented many catastrophes, such as the Cuyahoga River fire, from reoccurring, the increasing threat of climate change compels us to effectuate the Act's mission by any means possible. Achieving this mission, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," is left to EPA's highly qualified staff—the nation's top experts in protecting American waterbodies. 33 U.S.C. § 1251. Water pollution damages aquatic habitats and human health, and the CWA provides EPA with a framework for protecting these valuable resources; climate change only exacerbates these issues. Thus, applying the CWA should be in line with the Act's purpose and the EPA should be able to protect the waterbodies within America's borders.

Here, the EPA's decisions regarding Total Maximum Daily Loads ("TMDLs") in the Lake Chesaplain Watershed should be upheld because choices about the complex nature of the CWA (and TMDLs in general) are best left to the agency's discretion. The Supreme Court has routinely recognized the benefits of giving deference to a trained agency's staff in their interpretation of broad, and highly technical, legislation. Therefore, the lower court erred when it ruled against the EPA's determinations about the Lake Chesaplain Watershed TMDL, and this court should overturn this ruling to prevent devasting environmental consequences.

Accordingly, EPA appeals the following two determinations: (1) the District Court's order vacating EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load

allocations, and (2) the District Court's determination that phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d).

## JURISDICTIONAL STATEMENT

EPA appeals from a Decision and Order granting partial summary judgment for Chesaplain Lake Watch ("CLW") and the State of New Union ("New Union"), entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, No. 66-CV-2020 and 73-CV-2020 (consolidated cases). Pursuant to 28 U.S.C. § 1331, the district court has subject-matter jurisdiction to hear the case because the causes of action are provided by federal law, specifically under the judicial review provisions of the Administrative Procedure Act. 6 U.S.C. § 702. EPA, CLW, and New Union all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which grants courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

## STATEMENT OF ISSUES PRESENTED

I. Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review.

II. Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

III. Whether EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of

an annual pollution loading reduction to be phased in over five years violates the CWA § 303(d) requirements for a valid TMDL.

IV. Whether EPA's adoption of a credit for anticipated best management practices pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL implementation.

## STATEMENT OF THE CASE

### I. The Clean Water Act and Regulatory Framework

The CWA provides a comprehensive system for permitting and regulating point source discharges of pollutants into the waters of the United States. Point sources are defined by CWA § 502(14), 33 U.S.C. § 1362(14), and include pollution discharge pipes and concentrated animal feeding operations ("CAFOs") that discharge into waters. The CWA regulatory framework is based on "cooperative federalism," *see generally NY v. U.S.*, 505 U.S. 144 (1992); *Hodel v. Va Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Under the CWA's cooperative federalism, the federal EPA establishes national standards, to which states are expected to adhere and implement through their own regulatory programs. States are expected to administer both the permitting aspects of the CWA, *see* CWA § 402(b), 33 U.S.C. § 1342(b), and the water quality improvement aspects of the CWA, *see* CWA §§ 208 (planning process for nonpoint sources), 303 (state establishment of water quality standards), 33 U.S.C. §§ 1288, 1313.

At issue here is the water quality-based regulation of water pollution. CWA § 303(a) directs each state to adopt water quality standards ("WQSs") for waters within their borders. 33 U.S.C. §1313(a). Section 303(c) directs states to review and revise these WQSs at least once every three years. 33 U.S.C. § 1313(c). These WQSs consist of designated uses for each waterbody and the water quality criteria necessary to support each designated use. 33 U.S.C. §1313(c)(2)(A). Moreover, water quality criteria may be established as both numerical limits on pollutant

concentrations in the waterbody and narrative standards for non-quantifiable factors such as aesthetic qualities. *See* CWA § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b).

Once a state has established a WQS for a water body, it must assess the watershed to ensure it meets the standards following the full implementation of technology-based point source controls. *See* CWA § 303(d), 33 U.S.C. § 1313(d). Moreover, when a waterbody fails to meet standards or is otherwise unhealthy, it is listed as impaired. Once a waterbody is listed, CWA § 303(d) directs the state to develop and submit a TMDL to EPA for the offending pollutants "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. §1313(d)(1)(C).

EPA defines a TMDL as "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural sources." 40 C.F.R. § 130.2(i). This regulation requires a state to, in its TMDL submission, establish both the total maximum level of a particular pollutant's loading for a water body *and* allocate that level of loading among CWA permitted point sources in the watershed, while also considering non-permitted nonpoint sources and natural sources. In considering these nonpoint source factors, a state may utilize best management practices ("BMPs") to make load allocations practicable and enforceable against nonpoint source polluters.

EPA has authority to review and approve or reject each step of the water quality standards process. *See* 33 U.S.C. § 1313(c)(3), (d)(2). Moreover, if EPA disapproves of a proposed WQS, list of impaired waters, or TMDL, EPA may establish its own WQS, list, or TMDL. *Id.*

## II. Lake Chesaplain Water Quality and Subsequent Action

Lake Chesaplain, a designated Class AA[1], is a fifty-five mile-long, five-mile-wide natural lake located entirely within the State of New Union. It is bound on the west by a national forest which is used for both timber and recreation. To the lake's east, there are vacation communities and agricultural lands. The Union River flows into Lake Chesaplain from the City of Chesaplain Mills ("Chesaplain Mills") in the North, and the Chesaplain River acts as the Lake's outlet to the South.

Since the 1990s, the Lake Chesaplain watershed has faced substantial economic development. The Chesaplain watershed acquired ten large-scale hog production facilities, which are classified as CAFOs, and a large-scale slaughterhouse, which processes more than fifty million pounds of pork per year. The lake's eastern shoreline has been greatly impacted by mass development resulting in added phosphorus emissions. The slaughterhouse is authorized to direct discharge pollutants into the Union River, which flows into Lake Chesaplain from the north, via a CWA National Pollutant Discharge Elimination System ("NPDES") permit, while a majority of the homes are serviced by septic systems not subject to CWA permits. Further, Chesaplain Mills has a public sewage treatment plant ("STP") which discharges directly into the lake with a CWA point source permit.

These agricultural and residential developments substantially diminished Lake Chesaplain's water quality. Not only was the lake aesthetically harmed, as mats of algae covered the lake and caused offensive odors during the summer, but the hypoxic water was unsuitable for aquatic life, killing fish populations. The poor water quality also had negative impacts on New Union's

[1] An AA classification is reserved for highest quality waters of New Union. Class AA waters' designated uses include drinking water sources, primary contacts for recreation (swimming), and fish propagation and survival. Record at 8.

economy. This wholly conflicts with Lake Chesaplain's designated uses as a fish habitat and recreational area.

In response to the water quality's regress, New Union established the Lake Chesaplain Study Commission in 2008 ("the Chesaplain Commission"). The Chesaplain Commission issued a report in August 2012 ("the 2012 Chesaplain Report") specifying that the lake was suffering from eutrophication, low levels of dissolved oxygen ("DO"), foul odors, and poor water clarity. These harms were caused by an influx of phosphorus into the ecosystem and the consequential algal bloom. The 2012 Chesaplain Report determined the maximum phosphorus level for a healthy lake ecosystem is 0.014 mg/l throughout the lake; the observed levels ranged from 0.020 to 0.034 mg/l, which is well above the desired limit. In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted water quality criteria for Class AA waters of 0.014 mg/l, DO, odors, and water clarity. DOFEC, the designated New Union Agency to deal with water quality issues listed Lake Chesaplain on its impaired waters list and submitted the list to the EPA under a CWA § 303(d) submission. In its submission to the EPA, DOFEC failed to submit a TMDL for Lake Chesaplain.

In 2015, Appellant, Chesaplain Lake Watch ("CLW"), served a notice letter to Appellant, New Union, and Appellee, EPA, threatening suit based on the failure of either agency to establish a TMDL for Lake Chesaplain. Then, DOFEC, to avoid suit, commenced a state rulemaking proceeding and issued a report in July 2016. The standards found by this report were consistent with those of the 2012 Report and expanded research to include maximum phosphorus input loads. The 2016 Report issued a maximum phosphorus load of 120 metric tons (mt); the measured load was at 180 mt, which is much higher than the maximum load for a healthy ecosystem.

The 2016 Report identified two point sources and three nonpoint sources responsible for the phosphorus loading surplus. Point sources include: Chesaplain Mills STP and the slaughterhouse.

Nonpoint sources include CAFO Manure Streams, other agricultural sources, and septic tanks. It noted the developed hog CAFOs contributed substantial phosphorus loads into the watershed from manure spreading, despite being classified as non-discharging. Likewise, private septic systems, despite being exempt from CWA permitting, contributed greatly to the phosphorus loading in the watershed.

In 2017, DOFEC publicly noticed a proposal to implement the phosphorus TMDL through a phased reduction plan to be implemented in five years to reduce phosphorus discharges by both point and nonpoint sources. The phased plan included an annual percentage reduction that changed every year. Point source reductions would be incorporated through permit limits, while nonpoint reductions were to be achieved through BMPs. Potential BMPs could include modifying feed for CAFOs, physical and chemical treatment of CAFO manure streams, septic tank inspections, and septic pumping schedules.

In July 2018, DOFEC adopted a new TMDL which consisted of a 120 mt annual maximum for phosphorus without any wasteload or load allocations for point and nonpoint sources, respectively. However, in May 2019, pursuant to CWA § 303(d)(2), EPA rejected the TMDL and, after public notice and comment, adopted the original DOFEC TMDL proposal to be phased in over five years. The EPA called this plan of point source permits and nonpoint source BMPs the "Chesaplain Watershed Implementation Plan" ("CWIP"). Moreover, the CWIP failed to mention how BMPs would be enforced for nonpoint source polluters. Since EPA adopted the CWIP, the slaughterhouse's and STP's NPDES permits have expired; however, both plants still operate under their expired permits, and neither is subject to phosphorus discharge limits.

## III. Procedural History

Shortly after EPA adopted the CWIP, Plaintiffs, New Union and CLW, filed action against EPA in federal court. The United States District Court for the District of New Union granted

unopposed motions to consolidate the two actions on March 22, 2020, and EPA lodged the administrative record with the court on July 1, 2020. The court ruled partially in favor of both Plaintiffs and Defendant. Pursuant to an Order by the District Court for the District of New Union dated August 15, 2021, CLW, the State of New Union, and EPA each filed a timely Notice of Appeal.

EPA appeals (1) from the District Court's order vacating EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and (2) from the District Court's determination that phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C. § 1313(d).

## SUMMARY OF THE ARGUMENT

The district court appropriately held EPA's decision to suggest nonpoint sources as an offset to point sources purely as a planning matter was not arbitrary and capricious or an abuse of discretion.

However, the court was incorrect in finding: (1) EPA's decision to implement its own TMDL is ripe for judicial review, (2) EPA's interpretation of "Total Maximum Daily Load" to include wasteload allocations and load allocations was contrary to law, and (3) EPA's inclusion of phased percentage reductions in phosphorus loadings violates the plain meaning of the CWA.

The district court incorrectly determined EPA's rejection of the New Union Chesaplain Watershed Phosphorus TMDL was ripe for review. For an administrative action to be ripe for review, courts evaluate (1) the fitness of issues for judicial decision and (2) the hardship parties will face without court consideration. *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). An issue is not fit for judicial decision unless it is an agency's final action. *Nat'l Automatic Laundry &*

*Cleaning Council v. Shultz*, 443 F.2d. 689, 698 (D.C. Cir. 1971). Determining whether hardship is substantial enough for review, courts consider the following three factors: (1) whether hardship would reasonably result from delayed review, (2) whether judicial review would interfere with future agency action, and (3) whether the courts would benefit from further findings of fact. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

Here, the EPA's decision to reject the state's TMDL and utilize its own policy is not a final action because it requires further agency and state action to be fully codified and implemented. Also, EPA's action does not warrant a substantial hardship for review. First, the plaintiffs failed to demonstrate any hardship that is certain to occur. Second, judicial intervention would inappropriately interfere with future administrative actions because any judicial ruling on the matter would likely disrupt the issuance of permits and other regulatory necessities. Lastly, the court would benefit from further factual development to gauge whether the EPA's adopted TMDL will be effective. Because the EPA's decision is not fit for judicial decision and substantial hardship is unlikely to occur to any party without adjudication, the action is not fit for judicial review.

Next, EPA's interpretation of TMDL to include wasteload allocations and load allocations was a reasonable interpretation of the ambiguous term "Total Maximum Daily Load" and passes *Chevron* review. The CWA did not give explicit instructions on how to construct a TMDL, so a *Chevron* analysis of the EPA's interpretation is apt. 33 U.S.C. § 1362; *Michigan v. EPA*, 576 U.S. 743, 751 (2015). *Chevron*'s two-step formula first asks "whether Congress has *directly* spoken to the *precise* question at issue." *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (emphasis added). If the statute is ambiguous, *Chevron*'s second step calls for deference to the agency's interpretation if it is *merely* reasonable. *Id.* at 843. Under step two of *Chevron*, the court must uphold a statutory interpretation that is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at

843. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ." under *Chevron* step two. *Id.* at 844.

Here, the lower court's decision to interpret the phosphorus TMDL as not allowing the inclusion of wasteload allocations and load allocations, against decades of precedent, inherently suggests ambiguity. Thus, it passes *Chevron* step one and must be analyzed under the deferential *Chevron* step two standard. The legislative history, the overall purpose of the CWA, and precedent all illustrate the reasonableness of the EPA's decision to include wasteload allocations and load allocations. First, Congressional endorsement of allocations in TMDLs is illustrated in the CWA's 1987 Amendments. *See generally Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289 (M.D. Pa. 2013) (noting that Congress signaled an approval of allocation inclusion in TMDL calculations).

Second, Section 303(d) is the most appropriate provision for regulating nonpoint sources, so holding that TMDL's may not include wasteload allocations and load allocations would go against the Clean Water Act's purpose of protecting the nation's waters. Lastly, more than 30,000 TDML's approved by the EPA have included wasteload allocations and load allocations; so, overturning the EPA's interpretation would have significant consequences for the administrative state. Response Brief of Defendant-Appellee at 42, *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015) (No. 13-4079). Because the EPA's interpretation of "Total Maximum Daily Load," here, complied with decades of precedent and achieved water quality standards through the best possible system, it was a reasonable interpretation of Section 303(d) and should be upheld.

EPA's interpretation of the CWA to allow TMDLs measured in annual limits, implemented with percentage reduction phases, is not contrary to law. Under *Chevron* Step One, a court reviewing an agency's statutory interpretation must first consider "whether Congress has *directly* spoken to the *precise* question at issue." *Chevron*, 467 U.S. at 843 (emphasis added). If there is any ambiguity in the meaning of the statute, courts move on to *Chevron* Step Two which

asks whether the agency's interpretation is permissible. *Chevron*, 467 U.S. at 843 Here, Congress has not directly spoken to the precise question of whether a TMDL expressed in an annual limit and implemented with percentage phased in reductions violates the CWA. Thus, neither the annual limit, nor the phased in percentage reductions are contrary to Section 303(d) under the CWA, as they are both reasonable interpretations.

Congress did not unambiguously intend for all TMDLs to be expressed in daily limits, and the EPA's interpretation of Total Maximum Daily Load here is reasonable—and even entirely accurate. A narrow interpretation of the term "daily," without considering its context, renders the CWA ineffective in fulfilling its purpose of implementing water quality standards. Additionally, other circuits have found that the meaning of "daily" in "total maximum daily load" is up for interpretation. *See, e.g., Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2001). Thus, EPA interpretation here passes *Chevron* step one. Pursuant to *Chevron* step two, EPA was reasonable to interpret Congress's silence on how to promulgate TMDLs as granting the EPA broad discretion in deciding what measurements would adequately regulate particular pollutants. A daily measurement of phosphorous would not adequately mitigate the impacts on Lake Chesaplain because, like in *Muszynski*, there are very large short-term yearly variations. Therefore, this interpretation passes *Chevron* review and is not contrary to law.

Congress did not unambiguously preempt TMDLs expressed in phased in percentage reductions, and the EPA's interpretation that such a TMDL is allowed is reasonable. The CWA was silent on whether TMDLs have to be achieved by a particular timeframe. When considered alongside the goal and context of the CWA, the phrase can be interpreted to require TMDLs *lead* to implementation of water quality standards. *See, e.g., Anacostia Riverkeeper v. Jackson*, 798 F. Supp. 2d 210, 240-41 (D.D.C. 2011). Thus, EPA's interpretation passes *Chevron* step one. Likewise, it passes *Chevron* Step Two as a reasonable interpretation of the CWA. Contrary to the

District Court's assertions, Congress did not explicitly state a deadline for when a TMDLs must achieve these reductions. Although Congress set a 1977 deadline for effluent limitations requiring point sources implement the best technology available at that time, that deadline does not apply to TMDLs.

As the District Court correctly concluded, the EPA's decision that nonpoint source best management practices may offset point source reductions was not arbitrary and capricious or an abuse of discretion. An agency interpretation of its own regulation must be overturned if the interpretation "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

The EPA's interpretation of 40 C.F.R. § 130.2(i) is not reviewed under the unfamiliar "reasonable assurance" standard, even though an old EPA guidance document may have advocated for this. As the District Court correctly concluded, this entirely unfamiliar standard is not codified in any statute or regulation and therefore should be ignored. Furthermore, TMDL's are not created for implementation purposes, and therefore a lack of specific plans to create offsets does not signal a disregard for an important aspect of this problem. Thus, the EPA's decisions regarding TMDL offsets should be upheld.

## STANDARD OF REVIEW

Appellate courts review a trial court's decision to grant a motion for summary judgment *de novo*. *Piercy v. Maketa*, 480 F.3d 1192, 1197 (10th Cir. 2007). Under *de novo* review, courts of appeal do not grant deference to trial court decisions when considering whether summary judgment is appropriate. *Metcalf v. Golden,* 488 F.3d 836, 839 (9th Cir. 2007). Summary judgment is appropriate where, upon viewing the entire factual record in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact that the moving party is entitled to

a judgment as a matter of law." Fed. R. Civ. P. 56(c).

## ARGUMENT

### I. The District Court Erred in Determining the EPA's Determination to Reject the New Union Chesaplain Watershed Phosphorus TMDL and Adopt its own TMDL and Implementation Plan for the Lake Chesaplain Watershed is Ripe for Judicial Review.

The EPA's determination to reject the New Union Chesaplain Watershed Phosphorus TMDL and adopt its own TMDL and implementation plan is not ripe for judicial review. "Ripeness is a justiciability doctrine designed to (1) prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies; and (2) protect administrative agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807-08. Further, for a dispute to be ripe—and thus, subject to adjudication—all necessary administrative actions giving the challenged agency action concrete effect must be exhausted. *See Abbott Lab'ys v. Gardner,* 387 U.S. 136, 148-49 (1967). "Determining whether an administrative action is ripe for judicial review requires a court to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties withholding court consideration." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808. "However, mere uncertainty as to the validity of a legal rule does not constitute a hardship for purposes of ripeness analysis." *Id.* at 811.

Here, the lower court erroneously held the EPA's rejection of the New Union Chesaplain Watershed Phosphorus TMDL was ripe for review. At issue is whether the EPA's action is (A) fit for judicial decision and (B) whether, given delayed review, the parties will face hardship.

#### A. The EPA's action is not fit for judicial decision.

An action is fit for judicial review under the ripeness doctrine so long as it is a "final agency action." *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d. 689, 698 (D.C. Cir. 1971).

In *Bravos v. Green*, the Federal District Court for the District of Columbia, held a claim relating to the EPA's approval of a TMDL was not ripe for review because it was not a final agency action. 306 F. Supp. 2d 48, 55 (D.D.C. 2004). Agency actions must satisfy two criteria to be considered final: (1) the agency's position must be "definitive" and (2) the agency's action must have a "direct and immediate effect on the day-to-day business' of the parties challenging the action." *Id.* At issue in *Bravos*, was a challenge to EPA's alleged approval of a state implementation plan for pollutants based on EPA's approval of a final TMDL's enumerated limitations on turbidity, silt, and phosphorus. *Id.* The plaintiff argued, EPA's approval can be inferred from a letter from EPA which "merely comments that the implementation plan was included with the" state's TMDL submission. *Id.* However, for the EPA's approval of the state implementation plan to be a final action, it must have expressly approved or denied the plan. *Id.* Moreover, the EPA's approval of the final TMDL did not have an immediate impact on Plaintiff because further agency action was needed for full implementation. *See id.* Because the plaintiff could not point to any evidence supporting a definitive approval or denial of the state implementation plan and it did not immediately affect the business, the court ruled the case was not ripe for judicial review. *Id.* at 58.

Here, the EPA's action is not a final agency action. The EPA's rejection of the phosphorus TMDL is "definitive," however, it will not have a "direct and immediate effect" on CLW's and New Union's regular activities. Like in *Bravos*, the regulatory effect of the TMDL requires further agency action and state implementation. For example, NPDES permits are required to be issued and New Union must institute the appropriate BMP requirements. Because the EPA's action will not have a direct or immediate effect on the Plaintiff, it is not final. Therefore, it is not subject for judicial decision.

**B. There is insufficient evidence of potential hardship withholding court consideration.**

In assessing hardship in the context of a challenge to the lawfulness of an EPA action,

courts must consider three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 733. Although no binding court has ruled on the ripeness of the EPA's approval of a state TMDL, the Federal District Court for Northern California has held a state-issued TMDL was not ripe for review. *See City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003).

In *City of Arcadia v. United States*, the court upheld a motion for summary judgment relating to the EPA's rejection of a state-sanctioned trash TMDL on the basis of inadequacy unripe for judicial review because it failed the three-prong test set forth in *Ohio Forestry Ass'n*. *Id.* First, the plaintiffs failed to demonstrate any hardship that was "certain to occur and [would] adversely impact *Plaintiffs* themselves." *Id.* at 1156-57 (emphasis added). Hardship, whether physical or economic, must burden the actual plaintiff rather than a permittee or any other party. *Id.* at 1157. Further, "minimal hardship" to a plaintiff because of delayed review is insufficient for ripeness. *Id.* Second, "judicial intervention would likely interfere with further administrative action on the part of the state." *Id. at 1158.* Because the state TMDL was subject to review by a board at the end of a specified time period and the state was still eligible to submit new TMDLs, judicial action would likely interfere with state agency and action; this weighed against the issue's ripeness for review. *Id.* at 1159. Lastly, the court held it would benefit from further fact finding related to the TMDL. *Id.* Because TMDLs are based on available sciences and are not "self-executing," they require further regulations for implementation, delayed judicial review will assist the Court in determining whether the trash TMDL was adequate for its goal. *Id.* In light of the three *Ohio Forestry Ass'n* factors balancing against ripeness, the United States District Court for Northern California determined the TMDL-rejection claim was not ripe for review. *Id.*

Here, there is insufficient evidence of potential hardship resulting from delayed review, given the three-factor test from *Ohio Forestry Ass'n*. First, unlike in *American Farm Bureau Federation*, there is no specific or general harm which could result from the delayed review of Plaintiff's claims. Furthermore, like the plaintiffs in *City of Arcadia*, neither New Union nor Chesaplain Lake Watch provided sufficient evidence of harm that is *certain* to occur to *themselves*. Currently, the EPA and state are no more likely to spend more time, energy, or money in developing the plan either now or in the future because the present TMDL already has been fully developed and approved. This lack of evidence suggests the claim is not ripe for review.

Second, analogous to the circumstances in *City of Arcadia*, judicial intervention would inappropriately interfere with further administrative action. The new TMDL, as adopted by the EPA, requires additional action including issuing permits, proposing BMPs, and further review. Any judicial interruption will interfere with the current TMDL. Lastly, this Court would benefit from further factual development. Just like the TMDL in *City of Arcadia*, this TMDL is not self-executing, and requires additional regulatory changes for full implementation, including those actions necessary for step two of this analysis. Because available sciences and environmental circumstances change, this Court would benefit from more time to determine whether the EPA's adopted TMDL are effective. The three *Ohio Forestry Ass'n* factors suggest this Court should not find sufficient hardship if review were delayed.

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Because the EPA's rejection of the state's TMDL is not fit for judicial decision and there is no hardship, CLW's and New Union's claim is not ripe for review.

## II. The EPA's Interpretation of the Ambiguous "Total Maximum Daily Load" was Reasonable, and thus Passes Chevron Review, as it was in Direct Alignment with Precedent, Legislative Intent, and Scientific Necessity to Control Water Pollution.

The EPA's interpretation of TMDL to include wasteload allocations and load allocations was a reasonable interpretation of the ambiguous term "Total Maximum Daily Load", as legislative history and countless precedent suggest. Thus, the lower court's denial of EPA's interpretation of TMDL under *Chevron* step one was misguided.

Section 303(d) of the CWA is silent with respect to administering TDMLs to achieve established water quality standards, so a *Chevron* analysis is needed to determine whether the EPA's interpretation of TMDL's in Section 303(d) was appropriate. 33 U.S.C. § 1362; *Michigan*, 576 U.S. at 751. *Chevron*'s two-step formula first considers "whether Congress has *directly* spoken to the *precise* question at issue." *Chevron*, 467 U.S. at 842 (emphasis added). This first step simply ensures the Court will "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If the statute is at least partially ambiguous, *Chevron* step two dictates that the agency's interpretation of the statute must be upheld if it is reasonable. *Id.* at 843.

Here, the lower court's departure from decades of precedent, when it held that TMDLs clearly must not include wasteload allocations and load allocations, suggests one of two things that both ultimately conclude the EPA's interpretation passes *Chevron* review. First, it could suggest that Section 303(d) was at least partially ambiguous regarding the meaning of "Total Maximum Daily Load," which would warrant a *Chevron* step two analysis. This seems likely, as legislative ambiguity suggests that Congress intended the agency to fill in the gaps, especially when the topic at issue does not concern great economic and political significance. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Additionally, the judicial disagreement here about the proper interpretation of this statute inherently suggests ambiguity, highlighting the appropriateness of *Chevron* step two review. The lower court's disagreement with decades of precedent in this

ruling also suggests that the lower court's holding is a fundamental misunderstanding of Section 303(d). *See Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002); *Am. Farm Bureau Fed'n*, 792 F.3d at 299. However, the lower court's argument rests on the alternative: that they stand alone, against countless judicial authority, as the one court that truly understands Section 303(d) as directly and unambiguously not including wasteload allocations and load allocations. As the following analysis of Section 303(d) shows, this argument falls flat. Under step two of *Chevron*, the court must decide if the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. This standard is extremely deferential, as "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Id.* at 844. Thus, this Court's analysis hinges on whether the EPA reasonably interpreted Section 303(d) when it included wasteload allocations and load allocations of point sources and nonpoint sources, respectively.

In order for a TDML to be approved, it must be "established at a level necessary to implement the applicable water quality standards . . . ." 33 USC § 1313(d)(1)(C). For water quality standards to be attained, consideration of pollution from point sources and nonpoint sources is necessary to regulate the total pollution entering a waterbody. *Pronsolino*, 291 F.3d at 1129 (holding that the Clean Water Act gave EPA authority to administer TMDL's when only nonpoint sources were polluting a waterbody).

Legislative history indicates that Congress at least intended TMDLs to include wasteload allocations for point sources. In 1987, after the EPA interpreted TDMLs to include wasteload allocations for point sources and load allocations for nonpoint sources, Congress amended 33 U.S.C. § 1313 by adding an additional subsection. This subsection, 33 U.S.C. § 1313(d)(4), now contained the phrase "any effluent limitation based on a total maximum daily load or other wasteload allocation." The "other" in this statute suggests that Congress recognized and endorsed

the EPA's inclusion of allocations in the TMDL calculation. *See also Am. Farm Bureau Fed'n*, 984 F. Supp. 2d 289 (specifying that Congress's inclusion of the term "other" signaled an approval of allocation inclusion in TMDL calculations).

Section 303(d) stands as the primary means under the CWA for regulating nonpoint sources, and therefore TMDLs must include point sources and nonpoint sources to effectuate the purposes of the CWA. "Section 303(d) has emerged as the most promising provision of the [Clean Water Act] for addressing the lingering problem of nonpoint source pollution." DANIEL A. FARBER, ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 654 (10th ed. 2019). Pursuant to the CWA, states must submit to EPA a list of waters for which point source pollution limits alone are insufficient to attain water quality standards; these waters require state submission of a TMDL that includes consideration of nonpoint source pollution. *Am. Farm Bureau Fed'n*, 792 F.3d at 299 ("the Clean Water Act *requires* the drafter of a TMDL to consider nonpoint source pollution"). Therefore, the CWA requires EPA to consider pollution from point sources and nonpoint sources to attain water quality standards.

Approval of the EPA's inclusion of wasteload allocations and load allocations in TMDL calculations spans many decades. In 1985, the EPA specified that "[a]lthough 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. Water Quality Planning and Management, 50 Fed. Reg. 1774, 1775 (Jan. 11, 1985).

Upwards of 30,000 TDMLs approved by EPA thus far have included wasteload allocations and load allocations, so holding that this interpretation of TMDL is improper would call thousands of TMDL's into question. Response Brief of Defendant-Appellee at 42, *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015) (No. 13-4079). This interpretation would be a potentially

devasting result for the regulatory administration of Section 303, and an argued expansion of administrative authority should not justify throwing the environmental administrative state into a tailspin. *Id.*; *see also Pronsolino*, 291 F.3d at 1140 (holding a "federalism basis for reading § 303 against its own words and structure is unfounded"). As in *Pronsolino*, forbidding nonpoint source load allocations from being included in TMDLs would present a substantial challenge when regulating waterbodies that are primarily polluted by nonpoint sources. *Id.*

Decades of legislative history and precedent suggest the lower court was incorrect in holding that Section 303(d) unambiguously did not permit TMDLs to include wasteload allocations and load allocations. Because the EPA's interpretation of "Total Maximum Daily Load" here complied with decades of precedent and achieved water quality standards through the best possible system, it was a reasonable interpretation of Section 303(d) and should be upheld.

## III. EPA's TMDL and CWIP is Consistent with the Requirements of the CWA and Adequately Supported by Scientific Evidence in the Record.

EPA's interpretation of the CWA to allow TMDLs measured in annual limits, implemented with percentage reduction phases, is not contrary to law. Under *Chevron*'s first step, a court reviewing an agency's statutory interpretation must first consider "whether Congress has *directly* spoken to the *precise* question at issue." *Chevron*, 467 U.S. at 843 (emphasis added). If Congress did speak directly to the precise issue, "the court, as well as the agency, must give effect to the *unambiguously* expressed intent of Congress." *Id.* (emphasis added). In considering whether Congress unambiguously expressed it intent, the court must remember "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson Tobacco Corp.,* 120 S. Ct. at 1300-01.

If there is any ambiguity in the meaning of the statute, courts move on to *Chevron* step two, which considers whether the agency's interpretation is permissible. *Chevron*, 467 U.S. at 843.

Courts must give considerable deference to the agency's statutory interpretation where "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* at 865. The Supreme Court has held that an agency is owed deference where "administering a complex statutory scheme requiring technical or scientific sophistication." *Am. Farm Bureau Fed'n* 782 F.3d at 296. In technical and complex matters, which "[t]here is no doubt that the Clean Water Act falls into," courts give deference to how EPA fills in gaps left by Congress. *Id.*

Here, Congress has not directly spoken to the precise question of whether a TMDL expressed in an annual limit and implemented with percentage phased in reductions violates the CWA. Moreover, EPA's interpretation of the CWA's TMDL requirement is permissible. When considered in context, neither the annual limit, nor the phased in percentage reductions are contrary to Section 303(d) under the CWA. Granting EPA the deference it is due, these interpretations certainly pass muster.

**A. Annual limitations do not violate the Clean Water Act.**

Congress did not unambiguously intend for all TMDLs to be expressed in daily limits because such an understanding stands in stark opposition to the purpose of the CWA. The CWA aims to implement water quality standards for a vast array of pollutants across numerous waterbodies. Thus, to effectively implement water quality standards, TMDLs must be appropriate for both the body of water and the pollutant at issue. A narrow interpretation of the term "daily," without considering its context, renders the CWA ineffective in fulfilling its purpose of implementing water quality standards.

Furthermore, the complex nature of the CWA indicates that Congress intended to give broad discretion to the EPA. The regulatory scheme "requires agencies to determine how the pollutant enters, interacts with, and . . . adversely impacts an affected waterbody." *Muszynski*, 268

F.3d at 98. Congress did not address TMDL at a high level of detail, leaving the definition and promulgation of TMDL open to interpretation, because it intended to defer to the EPA's evaluation of complex scientific and technical data. Since Congress was silent on the most appropriate measure for a TMDL, it left the EPA to fill in the gap and select a measurement "necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d).

CLW's claim that EPA's TMDL is insufficiently protective disregards the EPA's expertise and is based on a scientific misconception that all pollutants, regardless of their characteristics, cause harm based on their day-to-day discharges. Some pollutants, including phosphorus, are not adequately regulated by daily limits because their negative impacts become problematic after accumulating over time. According to CLW, the word "daily" carries so much weight it preempts the EPA from approving TMDLs based on time measurements on a non-daily basis, even when the science shows that a daily measurement will not effectively implement water quality standards for a certain pollutant. This narrow interpretation of the CWA would require all pollutants, even those that are not adequately regulated by daily limits, be expressed in daily limits. This runs counter to the purpose of the CWA to implement applicable water standards and would be far less protective of eutrophication in Lake Chesaplain.

Further ambiguity regarding Congress' intent arises from a thorough reading of the statutory language. The context surrounding the single word "daily" indicates Congress may have intended a "daily load" requirement apply only to "those pollutants which the Administrator identifies . . . as suitable for such calculation." § 1313(d)(1)(C). The District Court did not address this language and misplaced its analysis solely on the word "daily" without considering the word in its context. Moreover, Congress's direction that loads "take into account any lack of knowledge concerning the relationship between effluent limitations and water quality" supports the contention that the unit of time in the TMDL calculation should be flexible. *Id.* Congress's reference to

"seasonal variations" does not directly speak to the question of whether Congress intended TMDLs to solely be expressed in daily limits. The District Court gave no explanation for why an annual limit inherently disallows consideration of seasonal variations.

Other circuits have found the meaning of "daily" in "total maximum daily load" is up for interpretation. *See, e.g., Musyznski*, 268 F.3d at 98 ("[T]he term 'total maximum daily load' is susceptible to a broader range of meanings."). In *Musyznski*, Second Circuit held a TMDL could be expressed hourly, weekly, monthly, or annually because a narrow construction of the term would be "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Muszynski*, 268 F.3d at 99. EPA reasoned that phosphorus would not be adequately mitigated by a daily load because seasonal variations such as storm surges made the pollution vary throughout the year. *Id*. Because of this fluctuation, the Second Circuit agreed with the EPA that a TMDL "may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Id.* Essentially, if "daily" in TMDL preempted any other time measurement, it would have impaired CWA's effectiveness. *Id.* The Second Circuit ruled that Congress did not unambiguously intend for such a narrow meaning and absurd result. *Id.*

Despite the foregoing precedent, the District Court applied an unusual standard from the D.C. Circuit. This standard sets an "exceptionally high burden" for an agency to show that a particular statutory interpretation is absurd. *Friends of Earth, Inc. v. EPA*., 446 F.3d 140, 146 (D.C. Cir 2006). However, this exceptionally high standard is only necessary for demonstrations of "absurdity" in the D.C. Circuit. *Id.* Accordingly, the lower court's application of this standard here was incorrect, and the Second Circuit's *Chevron* analysis was the appropriate standard.

The phrases surrounding "daily" within the CWA, the context of how a narrow reading of "daily" harms the purpose of the CWA, and the inapplicability of a D.C. Circuit "absurdity" review

here, both show that Congress did not unambiguously speak to whether TMDLs must be expressed in "daily" terms. Thus, the inquiry turns to the second step of *Chevron*, where the Court must determine whether EPA's interpretation is reasonable and based on a permissible construction of the statute.

Under *Chevron* step two, wholistic analysis illustrates EPA's implementation of an annual plan is an acceptable, even entirely permissible, interpretation of TMDL in the CWA. EPA can reasonably interpret Congress's silence on how to promulgate TMDLs as granting broad discretion in deciding what measurements would adequately regulate a particular pollutant. The Supreme Court has held that an agency is owed deference where "administering a complex statutory scheme requiring technical or scientific sophistication." *Am. Farm Bureau Fed'n*, 782 F.3d at 296. "There is no doubt that the Clean Water Act falls into this category of legislation." *Id.* In such technical and complex matters, courts give deference to how EPA fills in gaps left by Congress. *Id.* For example, in *Muszynski* the Third Circuit held EPA was reasonable in determining that daily load would be inappropriate for phosphorus emissions. *Muszynski*, 268 F.3d at 98-99. The administrative record showed that "phosphorus concentrations in waterbodies are affected 'by the seasonal interplay of temperatures, density, and wind,' resulting in the frequent occurrence of 'very large short-term yearly variations which characterize the gradually increasing concentration.'" *Muszynski*, 268 F.3d at 99.

Similarly, here, EPA reasonably, based on its expertise of technical and scientific matters, decided a daily limit on phosphorus would be inappropriate. EPA engaged in a complex analysis, considering Lake Chesaplain's water quality was not sufficient for the lake's designated uses of drinking, primary contact recreation (swimming), and fish propagation. Chief amongst the EPA's analysis was the consideration that water clarity, odors, and oxygen levels were impaired by a process called eutrophication. Eutrophication occurs where excessive amounts of a nutrient called

phosphorus allow algae populations to grow to extreme levels. Thus, EPA reasoned that phosphorus emissions had to be regulated to protect the designated uses of the lake.

A daily measurement of phosphorous would not adequately mitigate the impacts on Lake Chesaplain because, like in *Muszynski*, there are very large short-term yearly variations. Seasonal interplay causes the lake's water quality to significantly vary throughout the year. During the summer, storm events spread phosphorus-containing liquid manure from ten large-scale hog production facilities through groundwater flows and surface runoff. Because this phosphorus is spread through agricultural stormwater runoff, it is exempted from CWA permit requirements pursuant to 33 U.S.C. § 1362(14). However, these hog production facilities are the primary polluter of phosphorus into Lake Chesaplain. Every summer, the lake's water quality suffers as storms bring in phosphorus. The lake experiences mats of algae *only* during the summer months, and DO levels are *especially* low during summer months. Thus, a daily limit could not account for these seasonal variations and would fail to implement the lake's water quality standards.

**B. Phased in percentages do not violate the Clean Water Act.**

The EPA's interpretation of the TMDL requirement to permit phased in percentage reductions passes *Chevron* Step One. 33 U.S.C. § 1313(d)(1)(C), which states TMDLs "shall be established at a level necessary to implement the applicable water quality standards," because it does not unambiguously show that Congress did not intend to allow TMDLs with phased in percentage reductions. Contrary to plaintiff's claims, TMDLs do not have to instantly restore water quality as soon as they are implemented. The CWA was silent on issues of time regarding TMDLs. First, TMDLs do not have to be implemented by a certain deadline, as the CWA does not specify any particular timeframe. TMDLs do not have to immediately restore water quality, as the CWA was silent on whether these standards had to be constantly achieved or, in the contrary, could be periodically violated.

Moreover, when the requirement that TMDLs be established "at a level necessary to implement the applicable water quality standards" is considered alongside the goal and context of the CWA, "Total Maximum Daily Load" is not unambiguous. First, it could mean TMDLs must immediately, upon implementation, instantly bring water quality up to standards. On the other hand, it could mean, as numerous circuit courts have held, that TMDLs must *lead* to implementation of water quality standards through. *See, e.g., Anacostia Riverkeeper*, 798 F. Supp. 2d at 240-41 (D.D.C. 2011) (stating that under the CWA, it is the State's and EPA's responsibility to show how an 85% reduction in pollution will *lead* to attainment). This understanding coincides with the CWA's purpose to create "a partnership between the States and the Federal Government, animate by a shared *objective*: 'to *restore* and *maintain* the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a)." *Ark. v. Okla.*, 503 U.S. 91, 101 (1992) (emphasis added).

The Third Circuit interpreted this purpose to mean that TMDL "is broad enough to include allocations, target dates, and reasonable assurance." *Am. Farm Bureau Federation*, 782 F.3d at 299. If plaintiffs were correct that the statute unambiguously preempts phased in percentage reductions, it would cast doubt upon the reasoning of many judges in the United States that affirmed such TMDLs. For example, in *American Farm Bureau Federation*, a TMDL promulgated in 2010 called for phased in percentage reductions over multiple years: the TMDL aimed for 60% implementation of pollution mechanisms by 2017 and 100% implementation by 2025. *Id.* at 292. The court upheld this TMDL because "it is common sense that a timeline complements the Clean Water Act's requirement that all impaired waters achieve applicable water quality standards." *Id.* at 300.

If anything, the statutory language of the CWA suggests that Congress could not have intended to require TMDLs must provide instant water quality restoration. Though the CWA

requires a TMDL be established "at a level necessary to implement *the applicable water quality standards* with seasonal variations and a margin of safety," 33 U.S.C. § 1313(d)(1)(C) (emphasis added), per the Act's regulations, each water quality standard "defines the water quality goals of a water body, or a portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 130.3. These two phrases can be read together to mean that a TMDL is meant to provide long-term protection and prevent levels of pollution that do not comply the designated used of the body of water. This suggests Congress did not expect for a TMDL to instantly remedy all previous and future pollution. Rather, the CWA can be interpreted to mean Congress intended for the TMDL to involve long-term strategy and planning for future discharges.

Since 33 U.S.C. § 1313(d)(1)(C) does not unambiguously address whether phased in percentage reductions violate the CWA, the analysis turns to *Chevron*'s second step. To pass this step, EPA's understanding that the CWA allows TMDLs with phased in percentage reductions merely must pass as a reasonable interpretation of the CWA. Upon analyzing 33 U.S.C. § 1313(d)(1)(C) within the context of the CWA's legislative history, and considering the ramifications of a contrary interpretation, the EPA's interpretation of the provision is reasonable. EPA reasonably determined that a TMDL can involve phased in percentage reductions and be "at a level necessary to implement the applicable water quality standards" because Congress did not explicitly state a deadline for when a TMDLs must achieve these reductions. The District Court claimed that the CWA requires the restoration of all U.S. navigable waters by 1977. In supporting that assertion, the Court relied upon *Bethlehem Steel Corp. v. Train,* a case from 1976, which held that the CWA's July 1, 1977, deadline for effluent limitations of *point sources* to achieve "the best practicable control technology currently available" could not be changed. 544 F.2d 657, 661 (3d Cir. 1976). However, this holding has little weight here, as what is required for effluent limitations

is not necessarily required for TMDLs. Effluent limitations apply to point sources, whereas TMDLs also apply to non-point sources.

Also, the 1977 deadline required industries adopt the best technology *currently* available. In other words, industries were required to implement the best technology available in the mid to late 1970s. The fact that *Bethel*, a decision from 1976, held that this deadline could not be extended merely speaks to what industries were required to do in 1976. This ruling has no implications for when TMDLs set in the twenty first century much achieve water quality standards, as TMDLs which do not require industries utilize the best technology currently available. Rather, TMDLs, as the District Court itself stated, are more so informational programs than implementation programs. TMDLs are merely reduction targets, and the pollution limits necessary to achieve that reduction. Thus, although Congress set a 1977 deadline for point sources to implement the best technology available at that time, that deadline does not apply to TMDLs.

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The statutory language, purpose of the Act, and judicial disagreement all indicate Congress neither directly and unambiguously stated that TMDLs must be measured in strict daily limits, nor did Congress preclude phased-in percentage reductions. Furthermore, both interpretations were reasonable, as a contrary interpretation would have absurd implications for application of the CWA. Thus, the EPA's annual TMDL and phased in percentage reductions are consistent with the CWA.

## IV. The EPA's Incorporation of Nonpoint Source Best Management Practices to Offset Point Source Reductions was not Arbitrary and Capricious, as no Authority on Point Suggests Implementation Plans are Required in 40 C.F.R. § 130.2(i).

As the District Court correctly concluded, the EPA's decision to interpret its own regulation 40 C.F.R. § 130.2(i) to suggest nonpoint source best management practices may offset point source

reductions, even absent evidentiary proof of future implementation plans, was not arbitrary and capricious or an abuse of discretion.

Agency consideration of their own regulations are reviewed under the familiar arbitrary and capricious standard. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Thus, the EPA's action here may be arbitrary and capricious if it "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* This standard is satisfied when an agency's explanation is transparent enough such that its "path may be reasonably discerned." *Bowman Transp., Inc. v. Ark.–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). This is considered a particularly "narrow scope of review . . . ." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 764 (2016).

Contrary to the CLW's contentions, the EPA's interpretation of 40 C.F.R. § 130.2(i) is not reviewed under the unfamiliar "reasonable assurance" standard, despite what an outdated EPA guidance document may suggest. As the District Court concluded, a standard not codified in formal EPA regulations that was plucked from one guidance document created 25 years ago should not alter the standard of review here. This is especially true for TMDLs, as the guidance document advocates that reasonable assurance is appropriate for implementation, whereas TMDLs are simply for planning purposes. U.S. Environmental Protection Agency, *Guidance for Water Quality-Based Decisions: The TMDL Process*, 24 (1991), https://www.epa.gov/sites/default/files/2018-10/documents/guidance-water-tmdl-process.pdf; *see also Conservation Law Found. v. EPA*, 2016 U.S. Dist. LEXIS 172117, 2016 WL 7217628, at *6 (D.R.I. Dec. 13, 2016) (explaining TMDLs are used in planning processes). The opposition's absence of any precedential authority suggesting otherwise elucidates our point that implementation is not needed for a TMDL here.

## CONCLUSION

Upon the foregoing, EPA respectfully requests this Court reverse the district court's partial

grant of summary judgment in favor of New Union in No. 66-CV-2020 and affirm summary judgment in favor of EPA dismissing the complaint in No. 73-CV-2020.