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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendant-Appellant,

v.

CHESAPLAIN LAKE WATCH

Plaintiff-Appellee-Cross Appellant,

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

Appeal from the United States District Court
for the District of Union
No. 73-CV 2020 (RNR) and 66-CV-2020 (RNR) (Consolidated)

APPELLANT'S OPENING BRIEF

Table of Authorities

Statutes

Rules

Regulations

Statement of Jurisdiction

Both actions were brought in district court pursuant to the judicial review provisions of the Administrative Procedure Act, APA § 702. The district court had federal question jurisdiction over this action under 28 U.S.C. § 1331.

The judgment of the district court was entered on August 15, 2021. This court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Statement of the Issues

The issues requested by this court and briefed in order are:

1) 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.

2) 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).

3) 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.

4) Whether EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

Standard of Review

This court reviews a district court's review of an agency action de novo. *See United States v. Int'l Bhd. of Teamsters,* 170 F.3d 136, 142 (2d Cir.1999).

Statement of Facts

This Court is being asked to reverse the judgment of the district court that granted summary judgment in favor of New Union and Chesaplain Lake Watch against EPA with respect the multiple challenges facing EPA's New Union Chesaplain Watershed phosphorus TMDL.

Lake Chesaplain, a fifty-five mile-long, natural lake located in the state of New Union has experienced declining water quality for several decades. Record at P. 7.

Lake Chesaplain is bounded on the west side by the Chesaplain National Forest (used for timber and recreation), on the east side by agricultural lands ad vacation properties, and the City of Chesaplain Mills at the north end. Record at P. 7.

Lake Chesaplain previously had excellent water quality, but starting int the 1990s, due to increased economic development pressures, the water quality began to deteriorate. Record at P. 7. Ten Concentrated Animal Feeding Operations (CAFOs) and a large-scale slaughterhouse were developed in the area. Around the same time, the Lake Chesaplain shoreline became a popular place for second home construction which were largely serviced by septic systems. Another source of discharge into the river was the publicly owned treatment plant which discharges treated effluent directly into the Lake. Record at P. 7.

In particular, the water quality visibility declines and the water became saturated with algae during the summer months due to an ecological process called eutrophication. Record at P. 7-8. Eutrophication makes a lake less biologically productive and can decrease the dissolved oxygen in the water below levels needed for a healthy fishery. The nutrient phosphorus was the main pollutant causing the eutrophication.

The New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality criteria for Class AA (the water designation) of 0.014 mg/l which the Lake was not

meeting as phosphorus levels were between .020 and .034 mg/l. This made the Lake an impaired waters that DOFEC would then be required to list and submit to EPA. Following the listing DOFEC was required to submit a TMDL (Total Maximum Daily Load) for Lake Chesaplain.

Once a water is listed as impaired, CWA § 303(d) directs the state to develop, and submit to the Environmental Protection Agency (EPA), a TMDL for the offending pollutants for that water body "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." Record at P. 6. TMDLs are like pollution diets for the impaired water.

After DOFEC did not submit a TMDL for Lake Chesaplain and EPA did not object, the citizen group, Chesaplain Lake Watch (CLW), served a notice letter on both New Union and EPA, threatening to sue. Following this notice letter, DOFEC then commenced a state rulemaking proceeding to establish TMFLs. Through a Supplemental Report, DOFEC determined that the maximum loading of phosphorus to meet water quality standards was calculated at 120 metric tons annually and current annual phosphorus loading was at 180 metric tons. From a breakdown of source, CAFOs contributed the most substantial amount of phosphorus loadings to the Lake (54.9 metric tons). Record at P. 8-9.

DOFEC then submitted public notice of its proposal to implement TMDL through equal phased reduction in phosphorous discharges by both point and nonpoint sources. Record at P. 9. This phased reductions would increase from 7% up to 35% over five years. Point source reductions would be incorporated through permit limits and nonpoint source reductions were proposed to be achieved through Best Management Practices (BMPs).

Ultimately, DOFEC did not adopt this proposal and instead adopted a different TMDL.

EPA disapproved of New Union's TMDL and promulgated the five-year phased annual reductions that DOFEC originally proposed through the "Chesaplain Watershed Implementation Plan" (CWIP). CLW and New Union challenged EPA's rejection of New Union's TMDL and promulgation of its own TMDL on several grounds discussed in the next section.

Summary of the Argument

EPA's discretion on how to best evaluate and promulgate TMDLs must be upheld. In order to effectively carry out the CWA, Congress has delegated interpretive and enforcement authority to the EPA. This was intentional, as Congress wanted to provide flexibility for the experts at EPA to determine the best methods and tailor solutions on a case-by-case basis. For the last half century, EPA has built a successful and reliable framework for this process that is well understood by the agency, Congress, and the concerned public. The CWA has been amended many times with complete understanding of how the TMDL program was being defined and implemented. Congress expressed its approval of EPA's use of discretion, declining to alter the regulations that precipitate the controversy below. EPA continues to operate the TMDL program within its legal authority while exercising effectively exercising its discretion.

The lower court's decision, however, has thrown this stable regime into flux by invalidating long-standing regulations, narrowly interpreting statutory language, and prescribing entirely new binding rules without any democratically authorized authority. The court's decision substantially hinders EPAs ability to carry out its mandate by constructing functional obstacles against a considerate approach to defining and developing TMDLs. If this court fails to remedy this decision, the longstanding TMDL structure will cease to operate in a functional and predictable manner.

Argument

I. EPA'S REJECTION OF NEW UNION'S CHESAPLAIN WATERSHED PHOSPHORUS TMDL AND ADOPTION OF ITS OWN TMDL IS NOT RIPE FOR JUDICIAL REVIEW.

This Court should reverse the lower court and hold that EPA's actions were not ripe for judicial review. The ripeness doctrine requires courts to avoid "premature adjudication" that imprudently contemplates "abstract disagreements over administrative policies[.]" *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148 (1967). Fundamentally, ripeness "protect[s] . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-149. This analysis evaluates the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration. *Id.* Critically, this analysis "look[s] primarily to whether the agency's position is 'definitive' and whether it has a 'direct and immediate ... effect on the day-to-day business' of the parties challenging the action." *Id.*

EPA's adoption of the Chesaplain Watershed phosphorus TMDL is not ripe for review because the TMDL has not been implemented, lacking any concrete and direct effect on the day-to-day business of New Union and Chesaplain Lake Watch. Withholding court consideration of these challenges will not produce any meaningful hardship to the parties, given that they do not currently face any compliance decisions related to EPA's TMDL promulgation. Furthermore, this Court would benefit from greater factual development of the issues, as seeing how the TMDLs are implemented will provide the best evidence to evaluate their conformance with the Clean Water Act. For these reasons, this court must hold that these challenges are not ripe and the lower court should have granted EPA's motion for summary judgment.

A. Promulgating the unenforced Chesaplain Watershed phosphorus TMDL is not a final agency action because it does not have a direct and immediate legal effect on the parties challenging the action.

Ripeness requires present injury to the parties seeking review. *See Wyo. Outdoor Council v. United States Forest Serv.,* 165 F.3d 43, 48 (D.C.Cir.1999) ("Just as the constitutional standing requirement for Article III jurisdiction bars disputes not involving injury-in-fact, the ripeness requirement excludes cases not involving present injury."). Section 702 of the Administrative Procedure Act "provides right of judicial review to persons who have suffered legal wrong because of action of federal agency, or persons who are 'adversely affected or aggrieved by agency action within meaning of [the] relevant statute.'" 5 U.S.C. § 702; *Coeur D'Alene Lake v. Kiebert*, 790 F.Supp. 998 (D.Idaho 1992). However, this right of judicial review is available only when the agency action is final. Final agency actions are actions where "rights or obligations have been determined" in which "legal consequences will flow." *Food & Water Watch v. United States Env't. Prot. Agency*, 5 F. Supp.3d 62, 81 (D.D.C. 2013).

EPA's creation of the Chesaplain Watershed Implementation Plan (CWIP), does not qualify as final agency action because it has no direct and appreciable legal consequences on the challenging parties at this point in time. The CWIP did not specify whether or how the proposed BMP measures would be enforced. Record at P.10. The CWIP, therefore, is waiting on the state to take further implementation measures which will generate direct legal consequences. EPA's action is not final until it has an effect, and in the last two years New Union has not incorporated the CWIP into any point source permits or non-point source management programs. Record at P.10. Until the CWIP has an impact on New Union and CLW, their claims are not ripe.

Although EPA conducted notice and comment rulemaking and issued the CWIP, courts have found that similar TMDLs are not ripe for review. For example, the United States District Court for the District of Columbia found no final agency action even where TMDLs had been issued. *See Food & Water Watch*, 5 F. Supp. 3d at 80-83. The court found that the Chesapeake

Bay TMDLs references to offsets and trading did not constitute final agency action because they did not impose binding legal requirements on the state. *Id.* at 84.This was partly on the grounds that the state had not been forced to implement them and EPA did not intend for them to be mandatory. *Id.* at 83. In fact, the court asserts that "EPA's language cannot be mandatory because the CWA does not confer on the EPA the authority to command or to require that States to take specific actions, with respect to their implementation plans." *Id.*; *See Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 984 F. Supp. 2d 289 (M.D. Pa. 2013), aff'd, 792 F.3d 281 (3d Cir. 2015) ("EPA is not authorized to establish or otherwise take over TMDL implementation plans.").

Here, too, New Union has not begun to implement the phosphorus TMDLs. EPA asserts that the TMDLs are not enforceable until the state begins this implementation process. Record at P. 10. Significantly, EPA contemplates further administrative action before the TMDLs are enforceable. This further administrative action entails New Union deciding how to implement the 35% annual phosphorus loading reductions, phased over 5 years after permit issuance. At present, no phosphorus limits have been included in permits. Additionally, several administrative hearings requested by the Chesaplain Mills sewage treatment plant and the slaughterhouse on the phosphorus controls are pending. Record at P.10. The Ninth Circuit has held that EPA's approval of state TMDLs were not ripe for review because "further administrative action . . . is contemplated before the TMDL becomes enforceable." *City of Arcadia v. U.S. E.P.A.*, No. 03-16309, 2005 WL 1403006 1,1 (9th Cir. June 15, 2005). In *City of Arcadia* , the Ninth Circuit affirmed the district court's dismissal of the challenge to EPA's promulgation of a TMDL for trash and later approval of California's TMDL for trash for not being ripe for review where the TMDLs had yet to be implemented into any enforceable measures. *City of Arcadia*, No. 03-16309, 2005 WL 1403006 at 1. From this the court seemed to implicitly acknowledge that the

TMDL promulgation was simply the first major step in the administrative process of actualizing the trash controls.

Although the lower court classified *City of Arcadia*, as "inapposite," *City of Arcadia* recognizes that "TMDL[s] are not self-enforcing, but serve[s] as an informational tool or goal for the establishment of further pollution controls." *City of Arcadia*, 411 F.3d at 1105. Like in *Arcadia*, Chesaplain Watershed phosphorus TMDLs remain unenforceable until the state of New Union begins implementing them. The lower court states that the Chesaplain TMDLs "contemplate[] specific NPDES permits within the State of New Union," but no actions can be taken until the state makes further decisions about how these limits will be incorporated into NPDES permits. After all, the record states, without providing a deadline for compliance, that the TMDLs will be "implemented through permit controls on point source and BMP requirements for nonpoint source[,]" both of which are state-run and enforced. Record at P.10. Without implementation or immediate plan of implementation, the TMDLs have no direct legal consequences on the challenging parties, and therefore do not constitute final agency action or actions that are ripe for review.

B. EPA's Chesaplain Watershed phosphorus TMDL regulation is not prudentially ripe for review.

Even if the parties have proven injury sufficient for "constitutional ripeness" and "final agency action" for review under the APA, courts must also "analyze the prudential aspect of ripeness." *Nat'l Treas. Employees Union v. United States,* 101 F.3d 1423, 1427 (D.C.Cir.1996); *Food & Water Watch*, 5 F. Supp. 3d at 80. Prudential ripeness requires the court to balance "'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Food & Water Watch*, 5 F. Supp. 3d at 80.

As part of the ripeness inquiry, the court must consider "(1) whether delayed review

would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative actions, and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). In addition, "neither the possibility that the petitioner may have to make capital budgeting decisions under a cloud of uncertainty, nor the fact that it may incur future expense in challenging the regulations in a later permit or enforcement proceeding, will qualify as hardship." *Food & Water Watch*, 5 F. Supp. 3d at 80.

Delayed review would not cause hardship to CLW or New Union. Proving hardship is a high bar, precluding claims even when parties face "capital budgeting decisions under a cloud of uncertainty, [or] incur[ing] future expense in challenging the regulations in a later permit or enforcement proceeding[.]" *Natural Res. Def. Council, Inc. v. E.P.A.,* 859 F.2d 156, 166 (D.C.Cir.1988). In fact, the "paradigmatic hardship situation is where a petitioner is put to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for non-compliance." *Natural Res. Def. Council, Inc.,* 859 F.2d at 166. Some courts have found that TMDL measures do not cause hardship because they impose no legal obligation on the plainiffs. The D.C. District Court found that EPA's adoption of state TMDLs for the Chesapeake Bay -- specifically, the provisions establishing trading and offset measures -- "impose[d] no legal obligation on the plaintiffs[] or any other actor[.]" *Food & Water Watch*, 5 F. Supp. 3d at 80.

The challenging parties do not face legal obligations flowing from the promulgation of the TMDLs. In the current stage of the administrative process, the CWIP does not have any immediate regulatory effect. None of the point and nonpoint sources contributing to the impaired water of Lake Chesaplain have been required to adopt more stringent effluent controls since the

TMDLs were promulgated. The two major point sources discharging into the Chesaplain are still operating under the permit conditions in place prior to the phosphorus TMDLs. The parties are not currently being asked to incur "substantial costs to comply" nor are they at risk of "serious penalties for noncompliance." *See Natural Res. Def. Council, Inc.,* 859 F.2d at 166 (Discussing the paradigmatic example of when the hardship test is met -- "substantial costs to comply" and at risk of "serious penalties for noncompliance"). The TMDLs lay dormant until the state decides how and when to incorporate the phosphorus TMDLs into BMPs and NPDES permits. Therefore, the parties have failed to show how delaying review of these unripe claims review would result in any hardship.

Judicial review should be saved for when implementation of the TMDLs has begun and its legal effect on the challengers has been determined. The Supreme Court considers "whether the courts would benefit from further factual development of the issues presented." The Court would benefit from implementation of the TMDLs because their actual impact is not yet understood. TMDLs set broad pollution load budgets but do not immediately effect day-to-day operations of point and nonpoint source without further implementation by the state. *See* 40 C.F.R. § 130.2(i) (EPA defines TMDLs as "the sum of individual wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural"). As the court in *Food & Water Watch* recognized, TMDLs have "multiple stages of implementation . . . [which] occurs primarily through the actions of state actors[.]"5 F. Supp. 3d at 81. Here, EPA promulgated a TMDL for phosphorus that required a 35% phased annual reduction for all point and nonpoint sources. While the TMDL is obviously a step towards actualizing pollution load reductions for the Chesaplain, this broad load reduction will need to be allocated by source and structured into permits (for point sources) and Best Management Practices (for nonpoint) before taking shape as

actualized pollution reductions. Without more specifics about the implementation of EPA's TMDL, this court is severely limited in its ability to assess the adequacy of the TMDLs and its compliance with the Clean Water Act. Deciding these issues now would interfere with the administrative process and be tantamount to making a determination of a plan's efficacy with only broad goals outlined and implementation details missing.

In conclusion, this Court should reverse the lower court and hold that EPA's actions were not ripe for judicial review. Given the facts at hand, there is no final agency action and granting review is not prudent at this time since the challengers will not face hardship if review is withheld and the court would benefit from further factual development.

II. THIS COURT MUST RESTORE EPA'S LONGSTANDING, REASONABLE, AND EFFECTIVE MEASUREMENT OF TOTAL POLLUTANTS IN SEVERELY POLLUTED WATERS.

The lower court vacated a definition that has guided every TMDL developer, reviewer, implementor, and permittee for the last 46 years. Consistency has benefited all parties. Upholding this decision would destabilize an effective regulatory framework and substantially restrict EPA's ability to perform its congressional mandate. Defining a TMDL as the sum of load and wasteload allocations allows EPA to limit the actual total pollution in an impaired body of water. Congress itself has adopted EPA's definition, acknowledging that a TMDL may contain waste load allocations in CWA amendments signed after the definition was finalized. This deference has been respected by the First, Second, Third, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. Only the Third Circuit has run EPA's point and nonpoint inclusive definition through the *Chevron* analysis, finding that the statute was ambiguous.

Congress loudly intended for EPA to determine how to define and promulgate TMDLs, and EPA's definition was not only permissible, but an implicit requirement. New Union's claim that this determination unduly restricts state power ignores the Clean Water Act's clear assertion

of federal authority. Congress expressly charged EPA with effectively cleaning America's severely polluted water sources. EPA has accomplished that goal with this reasonable structure. The 1985 definition and TMDL framework have been understood through seventeen sessions of Congress, and only the voice of Congress can change such a long-standing effective process of law.

The Clean Water Act intentionally delegates authority to EPA to implement broad and complex mandates. *See, e.g.*, *Rapanos v. U.S.*, 547 U.S. 715, 758 (2006) (Roberts, C.J., Concurring: "Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute.") Circuits interpreting agency authority are governed by *Chevron v. NRDC,* 467 U.S. 837 (1984). *Chevron*'s two-step analysis first asks, "whether Congress has directly spoken to the precise question at issue." *Id.* at 842-43. If intent to delegate is apparent from ambiguity, the court asks "whether the statute unambiguously forbids EPA's interpretation." *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002). The analysis below shows that 1) Congress intended EPA to define Total Maximum Daily Load, and 2) EPA's definition effectuates the CWA's mandate to prescribe remedies for severely polluted waters.

A. The Clean Water Act Intentionally Delegates Authority for EPA to Define Total Maximum Daily Load

Congress gave clear signals encouraging EPA to interpret the CWA with intentionally ambiguous language, and express grants of authority, with a structure that explicitly empowered EPA to fill in gaps. The statute says nothing about what the Administrator may require from a state's proposed TMDL, establishing a gap that the CWA is intentionally structured for EPA to fill. *See Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part: "The fact that Congress has left a gap for the agency to fill means that courts

should defer to the agency's reasonable gap-filling decisions").

The TMDL program is described in 33 U.S.C. § 1313(d). Total Maximum Daily Load is not a defined or even capitalized phrase, but states the metric of how much of a particular pollutant is acceptable to be discharged into an identified water. *Id.* Section 1313(d) instructs the Administrator to review state-identified impaired waters and proposed load restrictions, and to "establish such loads for such waters as he determines necessary to implement the water quality standards." *Id.* These factors express that Congress intentionally delegated interpretive authority for EPA to define TMDL, satisfying the first step of *Chevron*.

The CWA is designed for EPA to have discretion to make expert decisions. Courts favor *Chevron* deference when an agency is implementing a statute with subject matter that is "technical, complex, and dynamic." *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). The CWA is one such statute, as the Act aimed "to restore and maintain the chemical, physical, and biological integrity" of American waters through a "broad systemic view of the goal." *United States v. Riverside Bayview Homes*, Inc., 474 U.S. 121, 132–33 (1985). EPA refers to the TMDLs that were drafted and approved in the 1990s are "the technical backbone" of cleaning U.S. waters. Congress recognized that EPA's technical experts are more capable of determining the best methods for setting limits on water pollution. EPA exerted exactly this kind of authority by determining that assessments of a water's "total" intake must include introductions of a pollutant by both point source and non-point sources.

The CWA's structure shifts decisions about specific implementation onto EPA. Where a statute's instructions are broad enough to create a gap in understanding, Congress is understood to have instructed the implementing agency to fill in that gap with its own interpretation. *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, (2005) (

"*Chevron* ... held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). The statute intentionally states broad prescriptions without specific instructions for implementation, creating interpretive gaps that the Agencies must fill to accomplish Congress's goals.

Section 1313(d)'s broad prescriptions create gaps by declining to specify precisely how the Administrator is required to review TMDL proposals. The CWA creates a duty for states to identify severely impaired waters and propose TMDLs for each on the list to the Administrator. 33 U.S.C. § 1313(d). The Administrator is granted the choice "to either approve or disapprove" those proposals and the authority to enforce its own TMDL and impaired waters list. *Id.*. at § 1313(d)(2). When assigning the Administrator the duty to choose between approving or denying a proposal, Congress would reasonably have expected these decisions to rely on some rubric with finite criteria. Granting an agency the ability to enforce standards on states is a an exercise of federal power that Congress does not assign lightly, suggesting a well-considered silence. By declining to specify the TMDL decision criteria, Congress has created a gap wherein EPA is encouraged to develop implementation methods and criteria.

Similarly, Congress could reasonably anticipate that defining a TMDL would be an essential step to assessing a State's proposed model. The CWA, however, does not provide a definition. Section 1313(d) instructs states only that the TMDL "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." *Id.* By omitting a clear statement of what must be included in a TMDL and asking EPA to make reasoned judgments of whether a proposed statement of allocations is complete, Congress delegated authority for EPA to determine what

"complete" actually entails.

The lower court rejected this functionalist view, asserting a misplaced conviction that the term "total" is unambiguous. Record at P.12. In doing so, the court turned away from the many Circuits that have proceeded to *Chevron*'s Step 2 on the basis that some or all of the phrase "total daily maximum load" is ambiguous. *See e.g., American Farm Bureau Federation v. U.S. E.P.A*, 792 F.3d 281, 307 (3d Cir. 2015) (Upholding EPA's delegated authority to define TMDL as including point source and nonpoint source emissions because "the Act is silent on *how* to account for those sources."). *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 245 (D.D.C. 2011) (CWA's silence on how to assess particular criteria in a TMDL proposal was sufficiently ambiguous to progress the court to reviewing whether EPA's decision was reasonable.). *NRDC v. Muszynski,* 268 F.3d 91, 98–99 (2d Cir. 2001) (Declining to read "daily" as unambiguous since Congress did not intend to be confine EPA with strict parameters.). Congress is silent on the definition of "total," an ambiguous phrase with multiple valid meanings. *Chevron* recognizes that this sort of unspecific language progresses the court to "whether the agency's answer is based on a permissible construction of the statute. 467 U.S. at 843.

Even if the word "total" should be read on its face, a plain reading does not mandate the simplest definition possible, nor prohibit EPA from defining a TMDL as the sum of two allocation categories like the lower court suggests. "Total" can mean a single number, as the Appellees assert, and it can mean the sum of specific numbers. EPA has defined total maximum daily load as the latter for 46 years, requiring proposed totals to represent "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). This is a reasonable use of the term "total," but the lower

court's assertion of a controversy is self-evident that the word's meaning is ambiguous. Using an ambiguous word this way and declining to clarify a definition for nearly a half century is another signal from Congress for EPA to interpret the statute.

Beyond tacit encouragement for EPA to fill in gaps, silences, and ambiguities, the CWA also confers a presumptive delegation of implementation authority, stating "[e]xcept as otherwise expressly provided in this chapter, [the Administrator] . . . shall administer this chapter." 33 U.S.C. § 1251(d). The majority of Section 1313(d) is written to dictate the activities of States, not EPA or Administrator. States are required to identify impaired waters, submit TMDL proposals, and comply with any enforced standards promulgated by EPA. 33 U.S.C. § 1313(d). The Administrator is empowered to determine regulated pollutants, deny proposed TMDLs, and even supplement its own standards that the states are forced to implement. *Id.*

Congress has given EPA the responsibility to implement the statutory provision of Section 1313(d) with the force of law, a recognized justification for *Chevron* deference. *United States v. Mead Corp.,* 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Section 1313(d) intentionally imbues EPA with the force of law to effectuate Congress's goals.. *Pronsolino v. Nastri,* 291 F.3d 1123, 1131 (2d Cir. 2001) ("[EPA] has the delegated authority to enact regulations carrying the force of law regarding the identification of § 303(d)(1) waters and TMDLs."). Section 1313(d) provides some instructions to the states, but only provides EPA with broad mandates, implying that EPA is responsible for determining how to administer the law. Promulgating a definition against which a TMDL proposal can be compared is well within the

administration authority that the CWA's structure depends on EPA to exercise. *See* 33 U.S.C. § 1251(d). Without this discretion, the TMDL program would be ineffective and carry only theoretical power.

The national consensus, which this Circuit must join, holds that Congress used intentional gaps and ambiguity when assigning EPA duties with the force of law to implement Section 1313(d). The CWA is structured to provide space and discretion for EPA's experts to most effectively accomplish their mandate. That discretion is signaled by the CWA's silence on the definition of TMDL, a clearly ambiguous phrase. Congress expected that EPA would have to develop its own definition, and has constructively adopted that definition in its endorsement of the TMDL program for the last 46 years. This recognition of EPA's authority expresses that Congress remains pleased with its decision to delegate authority, as the TMDL program has made significant progress in restoring the most severely polluted waters in the United States. This express and long-standing delegation of interpretive authority to EPA satisfies *Chevron* Step 1, progressing the Court to inquire "whether the statute unambiguously forbids EPA's interpretation." *Walton*, 535 U.S. at 217–18.

B. EPA's definition of TMDL to require both point and nonpoint allocations effectuates the Clean Water Act's purpose.

The TMDL program is meant to establish a diet for a body of water, similar to a nutritionist capping a client's sugar intake. If a diet plan accounted for sugars ingested from soda but ignored cookies, total sugar levels would exceed the diet's limit even when the client conformed with the soda restrictions. If an Agency allocated the total pollutant budget among point sources alone, inputs from non-point sources would cause the body of water to exceed the TMDL's allowance. EPA has reasonably determined that a TMDLs is most effective when it accounts for all sources of pollution, and accordingly defined a TMDLs as the sum of point

source and non-point source allocations. This has allowed EPA to effectuate the goals of Section 1313 and the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The EPA definition's widespread adoption is the plainest evidence that it reasonably satisfies the dictates of Section 1313(d). Congress signaled its acceptance of EPA's TMDL definition in a 1987 amendment to the CWA, which passed two years after EPA promulgated its definition. P.L. 100–4 § 404(b) (Feb. 4, 1987). The amendment added section 1313(d)(4)(A)&(B) governing the revision of effluent limitations "based on a total maximum daily load or other waste load allocation." *Id.* As the Third Circuit points out in *Farm Bureau*, "'other' suggests that a TMDL contains a wasteload allocation." 792 F.3d at 308. The Third Circuit was also persuaded that Congress adopted EPA's definition because the original Section 1313 made no reference to wasteload allocations, the language only appears in EPA's regulations. *Id.* Congress's recognition and reliance on EPA's definition of TMDL further supports the finding that Congress intended for EPA to promulgate a definition that would be binding.

Following Congress's lead, every federal circuit has deferred to EPA's definition of TMDL. *See e.g., Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 n. 8 (1st Cir.2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir.2009); *Friends of Earth v. EPA*, 333 F.3d 184, 186 n. 5 (D.C.Cir.2003); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002); *Hayes v. Whitman*, 264 F.3d 1017, 1021 n. 2 (10th Cir.2001); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir.1995). Including both point and non-point sources in a TMDL has become the status quo for both Congress and the Courts, which would not have persisted for so long if the definition failed to represent the statute's purpose.

EPA's definition has been widely adopted because it makes the most functional sense. The TMDL program is designed to remedy bodies of water where point source reductions are not enough, meaning that non-point source discharges are bringing pollution above acceptable levels. *Farm Bureau*, 792 F.3d at 299 ("States must submit to the EPA a list of the waters within their boundaries for which effluent limitations (a.k.a. point-source pollution limits) are, by themselves, inadequate to attain the applicable water quality standard—i.e., those waters for which both point source and nonpoint source limitations will be necessary."). Because a body of water will only be listed for a TMDL if point-source controls are inadequate, it would be impossible to accomplish the TMDL standard by only accounting for point source discharges. This led the Third Circuit to conclude that not only was including non-point source allocations permissible, failing to do so would handicap EPA's implementation of Section 1313(d). *Id.* The same is true here, where upholding the lower court's decision would nullify Congress's mandate to reduce pollution from all source that enters America's dirtiest waters. The *status quo* has endured because EPA's inclusion of non-point sources in its TMDL definition is the most effective way to fulfill Section 1313(d)'s mandate. This satisfies *Chevron* Step-2, as EPA's definition is a reasonable and considerate interpretation of unclear statutory language. EPA's definition must be restored.

III. THIS COURT MUST REVERSE THE LOWER COURT'S DETERMINATION THAT EPA'S ISSUED TMDL, EXPRESSED AS A PHASED PERCENTAGE REDUCTION IN ANNUAL LOADINGS, WAS NOT PERMISSIBLE UNDER THE CLEAN WATER ACT

The lower court's decision that EPA's Chesaplain Watershed phosphorus TMDLs violated the section 303(d) of the Clean Water Act is erroneous. Specifically, this Court is asked whether TMDLs expressed as annual phased load reductions, violates the section 303(d) of the Clean Water Act. Section 303(d) states that each state shall identify and rank waters within its

boundary that have not attained water quality standards and establish a

> "total maximum daily load (TMDL), for those pollutants which the Administrator identifies . . . as suitable for such calculation . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which considers 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). The lower court claims that the term "total maximum daily load" is unambiguous, and held that EPA's Chesaplain Watershed phosphorus TMDLs expressed as annual phased load reductions, fell outside of this plain meaning.

The lower court failed to read the phrase "total maximum daily load" in context of the CWA's mandate, which grants the EPA discretionary authority to remedy America's most polluted waters. This mandate influences the CWA's structure, promoting ambiguous language with wide interpretive gaps for EPA to fill. Congress did not intend to bind the agency with any definition of "total maximum daily load," leaving the phrase open for EPA to interpret in the most a manner necessary to effectuate Congress's goals. Rather than affording EPA's interpretation due deference, the Lower Court supplemented its judgment for the agency and prescribed a rule that strictly limits TMDLs to 24-hour intervals of measurement, a needlessly restrictive and absurd result. Congress intended for EPA to promulgate effective TMDLs, and EPA did so in the most functional possible manner.

Allowing annual phased load reductions where EPA has a reasonable justification for doing so is the more reasonable interpretation of the TMDL requirement. The Lower Court supplemented its preferences for EPA's own determination, exceeding the judiciary's careful role in reviewing agency actions. For these reasons, this Court should reverse and hold that EPA's Chesaplain Watershed phosphorus TMDLs, expressed in annual phased reductions, was a reasonable and functional interpretation of the statute's mandate.

A. The Clean Water Act grants broad discretion for the EPA to express TMDLs as annual phased reductions.

The Lower Court failed to recognize that the Clean Water Act is "a comprehensive water quality statute" that delegates broad authority to EPA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology,* 511 U.S. 700, 704, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (quoting 33 U.S.C. § 1251(a)). The "national goal" of the Act is to eliminate the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1). Congress delegated authority to EPA to administer this Act to ensure this goal is met. They did not intend for courts to insert narrow readings of undefined phrases undercutting EPA's ability to exercise its technical expertise in advancing the statute's goals.

The lower court found the term "total maximum daily load" unambiguous and that TMDLs expressed as annual phased load reductions fall outside the plain meaning of "daily." However, as the Second Circuit acknowledged, this "overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).The Second Circuit in *Muszynski* held that it is permissive for EPA to express "total maximum daily loads" in another measure of mass per time besides daily limits. *Muszynski*, 268 F.3d at 98. This Court should follow the Second Circuit's lead and interpret TMDLs within the context of the comprehensive statute. The Clean Water Act leaves room for EPA to craft policy and regulatory schemes, informed by technical considerations, to achieve the ambitious goals of the CWA. Hamstringing EPA's discretion through a narrow statutory reading that ignores Congress's overall statutory intent to task the EPA with the regulatory authority to restore and maintain the integrity of our nation's waters is erroneous.

The Clean Water Act requires a comprehensive contextual reading to ascertain Congressional intent. Other "courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments." *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981); *See also N.R.D.C., Inc. v. Costle,* 564 F.2d 573, 579 (1977).This Court "should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.,* 120 S. Ct. 1291, 1300-01 (2000). Instead, "[t]he 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. Put simply, "[A] statute is to be considered in all its parts when construing any one of them." *Muszynski*, 268 F.3d at 98.

In context, "total maximum daily loads," does not convey the restrictive intent as the Lower Court suggested. No provision of the Clean Water Act states that TMDLs must be expressed in daily terms. Congress declined to define "daily" as well as the entire phrase "total maximum daily load." *See* 33 U.S.C. §1251 et seq. Nor does the CWA dictate how a TMDL should be expressed. *Id.*

The provisions that do speak to TMDL promulgation provide discretion to EPA and states. Specifically, the statute provides that TMDLs be set for "pollutants which the Administrator identifies . . . as suitable for such calculation." *Id.* at (d)(1)(C). The statute only mandates that TMDLs be promulgated "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." *Id.* Phrases such as "suitable for calculation," "seasonal variation," and "margin of safety" suggest that Congress was focused on giving EPA and states flexibility to craft TMDLs with

case-by-base scientific and technical considerations. Congress did not require EPA to express TMDLs in a uniform and inflexible manner. Congress was silent on how TMDLs should be articulated, providing ample discretion for EPA to determine the proper expression of these limits so long as they adequately "implement the applicable water quality standards." Reviewing the language of the statute, the Second Circuit was convinced "that the term 'total maximum daily loads' is susceptible to a broader range of meanings." Muszynski, 268 F.3d at 98. The Second Circuit, in *Muszynski*, held that TMDLs could be expressed in periodic measures other than daily load limits because the number and variety of pollutants that EPA and states must regulate through TMDLs requires "far-ranging agency expertise" that Congress could not have intended to be "narrowly confined in application to regulation of pollutant loads on a strictly daily basis." *Id.* at 98-99. The reasoning of the Second Circuit, the discretionary language of the TMDL provisions, and the statute's silence on the precise meaning of TMDLs, this Court should overturn the Lower Court's finding that "total maximum daily loads" is unambiguous.

B. EPA's discretionary decision to allow TMDLs expressed in annual phased loads was reasonable, and the lower court's prescription leads to absurd results.

EPA's decision to promulgate its Chesaplain Watershed phosphorus TMDLs in terms of phased annual limits is reasonable. As the Second Circuit discussed, "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. Separately, the Southern District of New York held that phosphorus TMDLs expressed in annual loads was reasonable and adequately accounted for seasonal variation. *Nat. Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 555-556 (S.D.N.Y. 2000).

With respect to the Chesaplain Watershed phosphorus TMDLs, EPA followed the same scientifically-grounded reasoning for promulgating annualized loads that the Second Circuit and the Southern District of New York found reasonable. EPA, through notice and comment rulemaking, carefully considered the comments and alternate proposals and decided to put forward the 35% phased annual reduction for both point and nonpoint sources. Phosphorus, as a pollutant, poses unique challenges to promulgating a TMDL in a daily limit. The seasonal effects, the delayed effects, and the numerous nonpoint source contributors are challenges in regulating phosphorus loads. The phased aspect of the TMFL allows the state and nonpoint sources, in particular, time to establish Best Management Practices and enforce them. EPA understand through decades of working on TMDLs that promulgating, implementing, and enforcing maximum pollution loads that meet water quality standards takes time. Therefore, EPA's phased annual limits for phosphorus in the Chesaplain are reasonable considering the unique scientific and technical challenges that the pollutant poses.

EPA's construction is more reasonable than the lower court's restrictive view because it avoids absurd results. A canon of statutory construction helpful in the determining the proper interpretation of Section 303(d), states that "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Muszynski*, 268 F.3d at 98; quoting *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *see also Dauray,* 215 F.3d at 264 ("A statute should be interpreted in a way that avoids absurd results."). Applying this canon to the lower court's conclusion that "total maximum daily loads" can only be expressed in 24-hour intervals generates absurd results. The CWA "contemplates the establishment of TMDLs for an open-ended range of pollutants that are susceptible to effective regulation by such means." *Muszynski*, 268 F.3d at 98; *See* 33 U.S.C. § 1313(d)(1)(c) (noting

that states must establish TMDLs for all "pollutants which the Administrator identifies ... as suitable for such calculation"). Each pollutant is distinct, requiring unique considerations. Regulating pollutants requires EPA and states to determine how pollutants enter waterways, affect water quality, and interact with other pollutants. EPA must determine the specific level of pollutant reductions that are necessary to meet water quality standards. This is clearly a pollutant-specific inquiry that relies heavily on scientific and technical considerations. To impose an inflexible requirement that EPA and states express load limits exclusively in terms of daily values absurdly restricts regulators from determining the most scientifically and practically prudent measure of load limits.

This would run entirely counter to Congress's clear intention to afford regulators flexibility. The Second Circuit agrees that it is absurd to require daily load limits when "'total maximum daily load' 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." *Muszynski*, 268 F.3d at 99. Therefore, the Second Circuit held that it was "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." *Id.*

Of particular concern here, phosphorus is a complex pollutant to regulate. It discharges through point and nonpoint sources and causes eutrophication, an ecological process that deteriorates a lake's biological health through excessive algae growth. As the Second Circuit recognized, a waterbody's tolerance for phosphorus will "vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately." *Muszynski*, 268 F.3d at 98. Given these pollutant-specific considerations, regulators must be afforded the flexibility to craft load limits that best address these specific

needs.

Requiring daily allocations for pollutants that would be more effectively regulated by annual allocations compromises EPA's ability to carefully tailor regulatory measures to accomplish the CWA's mandate – restoring and maintaining water quality. The absurd results of formalistically binding EPA to expressing load limits in daily measures should persuade this Court to overturn the lower court's holding on this issue. Congress meant for EPA to determine how to express TMDLs. EPA exercised its discretion and expressed its TMDL in phased values. EPA did so because it determined that this would facilitate the most effective plan for remediating an overly-polluted waterbody, precisely the rationale that Congress intended EPA to pursue. The lower court's rejected of this method is an inappropriate obstruction to the CWA's purpose that this court must vacate.

IV. DECLINING TO REQUIRE ASSURANCES OF STATE IMPLEMENTATION DOES NOT RENDER EPA'S DECISION ARBITRARY AND CAPRICIOUS

CLW appeals from the lower court's proper ruling that EPA is not required to seek assurances that states will implement nonpoint source BMP pollutant reductions. Appellants incorrectly claim that a 1991 guidance document binds EPA more than the Clean Water Act's language or EPA's duly promulgated regulations. While assurances of state implementation would strengthen some TMDLs, this is not a blanket requirement. As discussed above (*See Section II*), Congress intentionally conferred broad discretion for EPA to develop and implement the TMDL program. EPA created regulations to dictate the approval or denial of a TMDL proposal including BMP credits. EPA requires the discretion to interpret its own regulations and make TMDL determinations on a case-by-case basis. This court must uphold the lower court's grant of summary judgment and the longstanding principle that courts must not substitute their

judgment for an agency's expertise.

Since the CWA does not require EPA to seek assurances before approving a TMDL, the only authority binding the EPA to do so would come from its own regulations. The CWA prescribes a duty to approve or disapprove state proposals, a decision-making function. 33 U.S.C. § 1313(d). However, the CWA is silent on *how* the EPA should make this decision, leaving EPA discretion over what to require from state proposals. *See Chevron,* 467 U.S. at 843 (Agencies have discretion to administer a congressionally created program by forming policies for implementation when the statute is silent on such methods.). Section 1361, regarding the CWA's administration, encourages EPA to "prescribe such regulations as are necessary to carry out [its] functions." 33 U.S.C. § 1361(a). It is therefore proper for EPA to construct and rely on its own regulations for decision-making criteria. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001) ("Even if a statutory scheme requires individualized determinations, ... the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.").

EPA has the authority to interpret its own regulations and reasonably concluded that it is not required to seek assurances before approving a TMDL. This interpretation is entitled to deference unless it is "plainly erroneous." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its regulation is entitled to deference unless "plainly erroneous"). Controls on nonpoint sources take the form of Best Management Practices (BMPs), which the regulations define as:

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

40 C.F.R. § 130.2(m). This definition does not prescribe that states must guarantee implementation or even accept the BMP's prescriptions. To approve BMPs within a TMDL, then, EPA need only look at whether they conform with this definition. EPA's approval that New Union's BMP met the regulatory standard was not plainly erroneous.

The only regulation CLW invokes is 40 C.F.R. § 130.6, which states that a State's Water Quality Management Plan (WQMP) must include "implementation measures necessary to carry out the plan." The WQMP is a statement of the comprehensive scheme through which a state regulates water quality, including its TMDLs, Effluent Limitations, Municipal and Industrial Waste Treatment Measures, Non-point source BMPs, and other programs. 40 C.F.R. § 130.6. While the regulation acknowledges that EPA should ask states to explain how they will fund and technically implement their water quality scheme, it places this disclosure with the WQMP as opposed to any individual program. This suggests that EPA should make that assessment when reviewing the totality of a state's programs and not on every individual program. New Union should provide its implementation measures for the Lake Chesaplain TMDL in the WQMP, not the TMDL. Recognizing this, EPA properly declined to require an assurance of implementation in the TMDL proposal.

After failing to identify a valid regulatory or statutory source for the alleged requirement to seek assurances of implementation, CLW now asks this Court to elevate a 1991 guidance document into binding law. It is well established that agencies are not obliged to follow guidance documents, and their role in challenging an agency's action is "irrelevant because the guidance document is simply a non-binding policy statement." *Association of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 719 (D.C. Cir. 2015) (citing *Perez v. Mortgage Bankers Association,* 575 U.S. 92, 100 (2015)). EPA's policy preferences articulated in a guidance

document from 20 years ago have no legal effect today. This non-binding authority could support CLW's opinions about what the EPA *should* do, but it is a very different matter to consider the guidance document's prescriptions to dictate what the EPA *must* do. Accepting the proposed supremacy of the guidance document would abuse the court's power by creating a legally enforceable rule without a regulation or statute. Regulations and statutes derive their legitimacy from public participation and due process requirements that ensure their mandates conform with the principle of popular sovereignty at the core of American democracy.

In addition to the clear lack of authority for this purported requirement, mandating that EPA only approve TMDLs when state's provide assurances would create major functional issues. Section 1313(d) is meant to facilitate a partnership between states and the federal government but provides EPA with the ability to replace a state's proposed TMDL with its own. This contemplates a situation, as here, where the state and EPA disagree on the adequacy of a proposed TMDL. When EPA creates its own TMDL that the state must follow, they are exercising federal authority to override the state's preference. It follows, then, that the state may be frustrated by the assigned TMDL and seek ways to invalidate its prescriptions. If CLW's position were true, that a TMDL containing BMPs is invalid without assurances from the state, then a state could block EPA's efforts to promulgate a TMDL by simply refusing to provide such assurances. This would remove EPA's ability to assign TMDLs without a state's consent, neutering the TMDL scheme created by congress that has worked effectively for nearly 50 years.

Conclusion

In consideration of the foregoing, this Court should vacate the lower court's denial of summary judgment hold that EPA's actions were not ripe for judicial review. In the alternative, this court should reverse in part and affirm in part, holding that EPA's longstanding definition of

TMDL remains valid, that EPA has the discretion to express TMDLs as annual scaled reductions, and that EPA has the discretion to approve a TMDL without assurances of state implementation.

Certification

We hereby certify that the brief for The University of Texas School of Law is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief.

We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules. _

Team Member _____Liam Veazey_____
Team Member Graham Pough
Date_____November 22, 2021_____