TEAM 46

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

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

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

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JURISDICTIONAL STATEMENT

This case arises under the judicial review provision of the Administrative Procedure Act (APA). 5 U.S.C. § 702. The United States District Court for the District of New Union had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, as the action arose under federal law. The district court granted the State of New Union's ("New Union") Motion for Summary Judgment. Record at 5. It also denied the Environmental Protection Agency's (EPA) Motion for Summary Judgment in part and granted Chesaplain Lake Watch's (CLW) Motion for Summary Judgment in part. *Id.* The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 28 U.S.C. § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE ISSUES

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 is permissible pursuant to the CWA § 303(d) requirements for a valid TMDL.

IV. 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 permissible despite the lack of assurance of BMP implementation.

STATEMENT OF THE CASE

I. Statement of Facts

Plaintiff-Appellee New Union brought this suit against Defendant-Appellant Environmental Protection Agency (EPA), seeking a declaration that EPA's rejection of New Union's proposed "total maximum daily load" for phosphorus in Lake Chesaplain, and the regulations EPA based this rejection on, were invalid. Record at 5. Plaintiff-Appellant Chesaplain Lake Watch (CLW) brought this suit against EPA for declaratory judgment that EPA's Lake Chesaplain phosphorus TMDL was insufficiently protective and therefore should be vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. *Id.*

Lake Chesaplain is a natural lake in the State of New Union. *Id.* at 7. The lake abuts the Chesaplain national forest, Chesaplain State Park, agricultural lands, lakefront vacation communities, and the City of Chesaplain Mills. *Id.* The Union River flows into the lake, and the lake flows into the Chesaplain River, a navigable-in-fact interstate body of water. *Id.* Prior to the 2000s, Lake Chesaplain had excellent water quality. *Id.*

New Union water quality standards (WQS) designate Lake Chesaplain as a Class AA water, the highest quality standard in the state. *Id.* at 8. Lake Chesaplain's designated uses include drinking water, primary contact recreation, and fish propagation and survival. *Id.*

In the 1990s, agricultural interests built a large-scale slaughterhouse in Chesaplain Mills and ten concentrated animal feeding operations (CAFOs) for hog production in the Union River

watershed. *Id.* at 7. The lake's eastern shore concurrently had a boom in second home construction, increasing use of the area's septic systems. *Id.*

In the early 2000s, Lake Chesaplain water quality visibly declined. *Id.* During the summer, algae mats obscured the water and gave off offensive odors. *Id.* Chesaplain State Park's beach became unsuitable for swimming. *Id.* Fish productivity, property values, and tourism revenues declined. *Id.*

As a point source that directly discharges into the Union River, the slaughterhouse operates under a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit issued by the State of New Union. *Id.* Chesaplain Mills' sewage treatment plant, which directly discharges into Lake Chesaplain, also operates under a CWA point source permit. *Id.* In contrast, the area's septic systems are nonpoint sources not subject to CWA permits. *Id.* Additionally, despite inclusion in the definition of "point sources" under the Clean Water Act, 33 U.S.C. § 1362(14), the hog CAFOs do not require CWA permits, as they are "non-discharging" under EPA's regulatory definition of CAFOs. *Id.* However, the CAFOs are subject to permitting under New Union law requiring the New Union Agricultural Commission to review and approve of nutrient management plans for the application of liquid manure to fields. *Id.*

In August 2012, the Chesaplain Commission issued a report which found that high phosphorus levels in Lake Chesaplain were causing excess algae growth and eutrophication of the lake. *Id.* at 8. The algae growth was responsible for the odors, decreased water clarity, and decreased dissolved oxygen (DO) levels well below the standard for Class AA waters. *Id.* The Commission concluded that maximum phosphorus levels should not exceed 0.014 mg/l throughout the lake to maintain a healthy lake ecosystem. *Id.*

In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a WQS of 0.014 mg/l for Class AA waters. *Id.* DOFEC subsequently included Lake Chesaplain on its § 303(d) impaired waters list for violations of DO, odor, and water quality standards; DOFEC submitted the list to EPA the same year. *Id.* DOFEC did not submit a total maximum daily load (TMDL) for Lake Chesaplain with its impaired waters list. *Id.* EPA did not object to DOFEC's § 303(d) submission. *Id.*

In 2015, following threats by CLW to sue New Union and EPA, DOFEC commenced state rulemaking to establish a TMDL. *Id.* The Chesaplain Commission released the Chesaplain Supplemental Report (SR), which calculated that the maximum load of phosphorus necessary to meet the WQS was 120 metric tons (mt), annually. *Id.* The SR also found that the CAFOs and septic systems were substantial contributors of phosphorus in the Lake Chesaplain watershed. Record at 9. Additionally, neither point source in the watershed had permit limits for phosphorus. *Id.*

In October 2017, DOFEC issued public notice of a proposed annual TMDL with a five-year phased reduction in phosphorus. *Id.* Point source reductions, as WLAs, would occur through permitting, and nonpoint source reductions, as LAs, would be incorporated through best management practices (BMP) programs. *Id.*

DOFEC's proposal was met with controversy over the expense of BMPs and point source discharge management. *Id.* Additionally, CLW argued that the BMPs were insufficient to meet the required reduction in nonpoint source phosphorus discharge and that New Union lacked the statutory authority to enforce BMPs against agricultural sources. *Id.* at 9–10. Instead, CLW demanded zero phosphorus charges from the two identified point sources using a daily TMDL without phased implementation. *Id.* at 10.

In July 2018, DOFEC adopted an annual, phased-in TMDL of 120 mt without any wasteload or load allocations. *Id.* EPA rejected the TMDL pursuant to CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). *Id.*

In May 2019, EPA adopted DOFEC's original TMDL proposal, with a five-year phased-in annual TMDL achieving phosphorus reductions of 35% using WLAs and LAs. *Id.* Both the slaughterhouse and the sewage treatment plant have sought administrative hearings on cost of compliance. *Id.* EPA's Chesaplain Watershed Implementation Plan (CWIP) outlined reductions through permit controls on point sources and BMP requirements for nonpoint sources, although it did not specify enforcement of BMP measures. *Id.* All scientific reports and public comments before DOFEC were added to EPA's administrative record. *Id.*

II. Procedural History

On January 14, 2020, Plaintiff New Union filed action No. 66-CV-2020 in the United States District Court for the District of New Union. *Id.* New Union sought declaratory judgment that EPA's rejection of its TMDL was invalid under the CWA. *Id.* at 5, 11. New Union also sought a declaration that 40 C.F.R. § 130.2(i), requiring that a state's TMDL submission include wasteload and load allocations, was contrary to law. *Id.* at 11.

On February 15, 2020, Plaintiff Chesaplain Lake Watch filed action No. 73-CV-2020 in the same court. *Id.* At 5, 11. CLW also sought declaratory judgment, challenging EPA's TMDL on the basis that TMDLs must be stated in terms of daily load and may not use phased implementation. *Id.* at 11. CLW also sought a declaration that EPA may not take credit for phosphorus load allocation reductions due to BMPs in the CWIP TMDL. *Id.* It alleged that EPA had no authority to require implementation and therefore could give no reasonable assurance that reductions would be achieved. *Id.*

On March 22, 2020, the district court granted unopposed motions to consolidate the two actions. *Id.* at 10. On July 1, 2020, EPA lodged the administrative record with the district court. *Id.*

All three parties filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. *Id.* at 5. New Union asserted that EPA's rejection of New Union's proposed TMDL on the grounds that the TMDL did not include WLAs and LAs was an incorrect interpretation of "total maximum daily load" in § 303(d). *Id.* at 2. New Union also argued that the regulations EPA based its decision on were invalid. *Id.* at 5. CLW claimed the EPA's final TMDL violated the requirements of the CWA because it was in annual terms and incorporated a phased implementation. *Id.* at 2. In addition, CLW argued that the inclusion of BMP pollution credits in the Lake Chesaplain TMDL were arbitrary and capricious or an abuse of discretion due to lack of reasonable assurance of BMP implementation. *Id.* EPA asserted that its determination to reject the New Union TMDL and adopt its own TMDL and implementation plan was not ripe for judicial review. *Id.* at 11. EPA also denied that its interpretation of "total maximum daily load" was incorrect or that the TMDL's incorporation of BMP credits was arbitrary and capricious. *Id.*

On August 15, 2021, the district court granted New Union's Motion for Summary Judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL and substitute its own. *Id.* at 16. Additionally, the court denied EPA's Motion for Summary Judgment in part and granted CLW's Motion for Summary Judgment in part. *Id.* at 15, 16. The court decided on the basis that (1) the claims were ripe for review;[1] (2) EPA's definition of the

[1] Record at 12.

phrase TMDL to require WLAs and LAs was contrary to law;[2] (3) the language of the CWA did not allow for an annual or phased-in TMDL;[3] and (4) EPA's determination to include nonpoint source BMPs was not arbitrary and capricious or an abuse of discretion.[4]

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court was correct in holding that the claims were ripe for review and that EPA's rejection of New Union's TMDL because it lacked WLAs and LAs was based on an incorrect interpretation of CWA § 303(d). Additionally, the court was correct in concluding that EPA's determination to include nonpoint source BMPs was not arbitrary and capricious or an abuse of discretion. However, the court was incorrect in finding that an annual, phased-in TMDL was impermissible under the CWA.

New Union's claim challenging EPA's TMDL as exceeding its statutory authority is ripe for judicial review. An administrative decision—even before enforcement—is justiciable if the *Abbott Laboratories* two-part test is met. Because this case involves a matter of statutory interpretation about whether or not EPA exceeded its authority under the Clean Water Act, and because waiting to hear this case will cause irreparable economic harm to New Union when implementing the EPA's TMDL, the *Abbott Laboratories* two-part test has been satisfied. Therefore, the case is ripe for review.

EPA based its rejection of New Union's TMDL on an impermissible interpretation of the CWA. Relying on 40 C.F.R. § 130.2(i), EPA rejected the TMDL application solely on the basis that it did not include wasteload allocations (WLAs) and load allocations (LAs). But a *Chevron*

[2] Record at 13.
[3] Record at 15.
[4] Record at 16.

analysis shows that the traditional tools of statutory interpretation indicate that Congress directly spoke to the precise question at issue: the CWA only gives EPA the authority to require TMDLs to be expressed as a single sum, not to demand that it be broken down into WLAs and LAs. Therefore, 40 C.F.R. § 130.2(i)'s WLA and LA requirements were properly vacated by the District Court as exceeding EPA's statutory authority, and the vacatur of EPA's rejection for failure to include WLAs and LAs was also proper and should be affirmed.

EPA's adoption of a TMDL that included an annual limit phased in over five years is a permissible interpretation of CWA § 303(d) that is due *Chevron* deference. The plain language, statutory context, and legislative history of § 303(d)(1)(C) demonstrate that total maximum daily load is meant to be a term of art, whose meaning is ambiguous in the CWA. TMDLs are created while taking into account a number of substantive factors that require complex analysis. The existence of these factors, along with the need for the TMDLs to effectuate the purpose of the CWA and Congress's historical acknowledgment that TMDLs are notoriously difficult to determine, demonstrates that the mechanisms by which EPA incorporates in TMDLs are ambiguously defined in the statute. As Congress has not directly addressed the precise question of annual, phased-in limits, EPA is entitled to use its technical expertise to establish a reasonable interpretation of this statutory gap. Here, EPA's interpretation of total maximum daily load to permit the use of annual, phased-in limits is reasonable. EPA has previously found daily limits of phosphorus to be less effective than limits with other timeframes, as phosphorus varies seasonally and annually. CLW's displeasure with EPA's policy choice does not make EPA's TMDL based on an unreasonable construction of the CWA. Instead, EPA should be afforded *Chevron* deference, and its TMDL should stand.

EPA's decision to allow BMPs and other nonpoint source pollution controls to offset point source reductions for water quality standard planning met the deferential standard for such agency decision making. It was not arbitrary and capricious or an abuse of discretion because EPA made a reasonable decision based on its consideration of the relevant factors, and there was no clear error of judgment. It must be upheld notwithstanding EPA's discussion of reasonable assurances in a previous non-binding agency document, since EPA was not bound to applying that standard, and the standard it did apply was reasonable, authorized by statute, and not an arbitrary and capricious exercise of EPA decision-making authority.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court of Appeals reviews a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party. *See Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 547 (2d Cir. 1998); *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377, 1380 (9th Cir. 1996); *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 21 (1st Cir. 2018).

ARGUMENT

I. EPA'S REJECTION OF NEW UNION'S CHESAPLAIN TMDL IS RIPE FOR JUDICIAL REVIEW.

New Union's action for declaratory judgment is ripe for judicial review. Article III of the Constitution limits the scope of what this Court can hear to "cases" or "controversies." U.S. Const. art. III, § 2. As part of the case or controversy requirement, the plaintiff must have standing; that is, a plaintiff must have an injury-in-fact that is both concrete and particularized, that the defendant caused, and that is likely to be redressed by judicial decree. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In addition to the doctrine of standing, the Supreme

Court has also recognized other limitations on the types of cases a court can hear, including the requirement that a court may only decide "ripe" cases.

Ripeness is a justiciability doctrine designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and . . . [to prevent] judicial interference until an administrative decision has been . . . felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967). In other words, the doctrine of ripeness prevents courts from hearing "hypothetical threat[s]" to the party challenging an administrative action. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 90 (1947). The doctrine is rooted in prudential concerns over the timing of an action. *See Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 71 (1993) ("[P]rudential considerations . . . weigh in the ripeness calculus, [including] the need to flesh out the controversy and the burden on the plaintiff who must adjust his conduct immediately.") (cleaned up) (internal citation omitted); *Blanchette v. Conn. Gen. Ins. Corps.,* 419 U.S. 102, 140 (1974) ("[R]ipeness is peculiarly a question of timing.").

Despite the fact that the TMDL remains unenforced (and cannot be until New Union implements it as part of the state's planning process), *see* 33 U.S.C. § 1313(e)(2), this Court should still find New Union's challenge ripe for review. In *Abbott Laboratories*, the Supreme Court adopted a two-part test when determining whether an administrative decision is ripe for judicial review pre-enforcement. First, the reviewing court must evaluate the "fitness of the issues for judicial decision." *Abbott Lab'ys*, 387 U.S. 136 at 149. Second, the court must evaluate "the hardship to the parties of withholding court consideration." *Id.*

In this case, both prongs of the *Abbott Laboratories* test are satisfied. First, the EPA's rejection of New Union's proposed TMDL is fit for judicial review. A TMDL rejection is final

"agency action" within the meaning of the Administrative Procedure Act (APA). 5 U.S.C. § 702. To be final, two conditions must be satisfied: the action must not be "merely tentative," and the action "must be one . . . 'from which legal consequences flow.'" *Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). In evaluating those two conditions, the DC Circuit has found finality when the EPA issues guidelines—"[t]hat the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years." *Id*. Although a TMDL might be subject to a state's subsequent implementation, like an agency decision to issue guidelines, the decision of the EPA to reject a prior TMDL is conclusive. In addition, just as in *Abbott Laboratories*, the issues here are purely legal—whether EPA correctly interpreted and applied the CWA when rejecting New Union's proposed TMDL. *See Abbott Lab'ys*, 387 U.S. at 149 ("[T]he issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner.").

Second, failure to review this case would cause hardship to New Union because the impact of EPA's TMDL is "sufficiently direct and immediate" and will cause irreparable economic injury to New Union. *See id*. at 152. In *American Farm Bureau Federation*, Farm Bureau sued EPA for exceeding its statutory authority when issuing a TMDL that had deadline requirements for point and nonpoint source limitations. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 292 (3d Cir. 2015). The Third Circuit found the controversy ripe "because [the parties] are poised to spend more time, energy, and money in developing an implantation plan." *Id*. at 293–94. Similarly, in this case, EPA's adopted TMDL is far more expansive and precise than New Union's proposed TMDL. It requires additional—and expensive—measures to be taken in order to comply with the reduction in annual phosphorous discharges. New Union would be

required to modify its existing NPDES permit system and to implement more stringent regulations over BMPs within the state. Therefore, requiring New Union "to challenge these regulations only as a defense to an action brought by the [EPA] might harm [it] severely and unnecessarily." *Abbott Lab'ys.*, 387 U.S. at 153.

In sum, the court should find New Union's claim to be ripe for judicial review because "if there is something wrong with the TMDL, it is better to know now than later." *Am. Farm Bureau Fed'n*, 792 F.3d at 294.

II. EPA'S REJECTION OF NEW UNION'S PROPOSED TMDL FOR NOT INCLUDING WASTELOAD ALLOCATIONS AND LOAD ALLOCATIONS IS BASED ON AN IMPERMISSIBLE INTERPRETATION OF THE TERM "TOTAL MAXIMUM DAILY LOAD" IN § 303(D).

EPA lacked statutory authority to reject New Union's proposed TMDL on the basis that it did not include WLAs and LAs. 40 C.F.R. § 130.2(i), which requires WLAs and LAs, is based on an incorrect and impermissible interpretation of "total maximum daily load" in Clean Water Act § 303(d), 33 U.S.C. § 1313(d). The CWA states, in relevant part:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load 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. § 1313(d)(1)(C). The CWA does not define the term "total maximum daily load."

In its regulations, EPA defines TMDL as "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i) (2021). EPA defines WLAs as "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution"; they are "a type of water quality-based effluent limitation." *Id.* § 130.2(h). EPA defines LAs as "[t]he portion of a receiving water's

loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." *Id.* § 130.2(g).

Agencies' interpretations of their enabling statutes are evaluated under the doctrine established in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* doctrine, a court proceeds in two steps. *Id.* at 842. First, a court must consider "whether Congress has directly spoken to the precise question at issue." *Id.* If it has, courts and agencies "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. During this Step One inquiry, the reviewing court "employ[s] traditional tools of statutory construction" to determine whether Congress spoke directly to the question at issue. *Id.* at 843 n.9. These "traditional tools" include evaluating plain meaning, structure, purpose, and legislative history. *See e.g.*, *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403 (1988) ("The plain meaning of the statute decides the issue presented."); *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 126 (1985) (evaluating whether "the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress").

After exhausting those tools of statutory interpretation, if the court finds that the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. An agency's regulations are controlling unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Here, the issue is whether EPA must interpret total maximum daily load to require a breakdown of WLAs and LAs and reject a TMDL that does not have such a breakdown. Some courts have recognized that "the WLA requirement is a creature of EPA regulation" without a statutory mandate in the CWA. *See Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210,

249 (D.D.C. 2011). Others have disagreed. *See Am. Farm Bureau Fed'n*, 792 F.3d at 310 (upholding EPA's rejection of a TMDL on the basis that it lacked a breakdown of WLAs and LAs). However, this Court should uphold the district court's determination, which properly applied statutory tools and vacated EPA's rejection of New Union's TMDL.

In rejecting New Union's TMDL on the basis of 40 C.F.R. § 130.2(i), EPA has exceeded its statutory authority. The plain meaning, structure, purpose, and legislative history of the CWA confirm that Congress spoke directly to the precise question at issue: it intended "total maximum daily load" to refer to a total *sum* of pollutant load, not to the allocation of that load among different types of sources. *See* CWA § 303(d). Because 40 C.F.R. § 130.2(i) requires such an allocation, it is contrary to the CWA; it fails at *Chevron* Step One and cannot stand. EPA's determination to reject New Union's phosphorous TMDL based on this regulation is thus unsupportable as applied to New Union and was properly vacated. The district court's vacatur of EPA's rejection of the Lake Chesaplain TMDL and of the definition of TMDL in 40 C.F.R. § 130.2(i) should therefore be affirmed.

A. The ordinary meaning of "total maximum daily load" is a sum of pollutants from all sources, expressed as a single quantity.

Congress's intent in using the word "total" in CWA § 303(d) was clear: states are to express, as a singular sum, the maximum load of pollutants that a body of water can tolerate and still achieve set water quality standards. Statutory interpretation must begin with "the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where Congress has not defined a statutory term, a court gives the term "its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

The ordinary definition of total shows that total maximum daily load is one unallocated number. "Total" is defined as "comprising or constituting a whole," *Total*, Merriam-Webster's

Collegiate Dictionary (10th ed., 1996), an ordinary meaning which comports with the notion of the *total* maximum daily load being a single sum.

Additionally, the conventional use of "total" refers to the sum of several items rather than a breakdown of its components. For example, when a customer is making a purchase, it is common for the cashier to say: "Your total is $5.00. Would you like a receipt?" Just as a customer who was satisfied with her total bill might not request an itemized receipt, Congress similarly declined to solicit a breakdown of itemized components from the states. Congress only asked for a *total* load; EPA cannot, without clearer statutory authorization, demand a "receipt" from the states that allocates the load into WLAs and LAs. The ordinary meaning of total is conclusive, and "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

On its own, the word "total" indicates a single sum. Read in the context of "total maximum daily load" in 33 U.S.C. § 1313(d)(1)(C), "total" clarifies that the "maximum…load" for each pollutant is meant to be set at a single "level" for pollutants the Administrator identifies as suitable for calculation. When interpreting a statute, a court should construe it "so as to avoid rendering superfluous" any of its statutory language. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Similarly, the canon *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). "Total" and "maximum" are both adjectives, describing the "level" at which the load is set. "Maximum" is defined as "greatest possible, permissible, or reached." *Maximum*, Webster's New World Dictionary (3rd College ed.) (1988). Level means, in this context, "the degree of concentration of a substance in a fluid." *Level*,

Webster's New World Dictionary (3rd College ed.) (1988). A "maximum" load set at a certain "level" thus expresses the greatest permissible concentration of a substance in a body of water. The addition of total as a modifier indicates that the word adds some additional meaning. Thus, "total" should be interpreted as modifying this text to clarify that this concentration is to be expressed as a single sum.

Using the plain and ordinary meaning of total, TMDLs must be singular, unallocated numbers under the CWA.

B. The structure of the CWA confirms that § 303(d) does not authorize EPA to require states to include WLAs and LAs in their TMDLs.

The CWA's structure also supports the conclusion that 40 C.F.R. § 130.2(i) oversteps EPA's statutory authority, as the different phrasing between 303(d)(1)(C)–(D) and the contents of § 319 indicate that the TMDL is a distinct, singular value. Courts do not read statutory provisions independently; instead, "[i]t is a fundamental canon . . . that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

First, § 303(d)(1)(D) contains an explicit reference to sources, indicating that Congress would have included a similar source breakdown in § 303(d)(1)(C) if it had so intended. When Congress omits language in one section but includes the same language in another part of the same statute, it is generally presumed that Congress intentionally did so. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). In referring to the procedure for limiting thermal discharges CWA § 303(d)(1)(D) specifically requires the State to "take into account . . . existing *sources* of heat input." 33 U.S.C. § 1313(d)(1)(D) (emphasis added). However, a directive that the State identify specific, existing sources for pollutants like phosphorous is conspicuously absent from § 303(d)(1)(C), which merely refers generally to the level required. *See id.* § 1313(d)(1)(C). This

disparity indicates that EPA is not authorized to reject a TMDL on the basis that it lacks WLAs and LAs and that 40 C.F.R. § 130.2(i) oversteps EPA's statutory grant of authority from Congress.

Additionally, the CWA's provision on nonpoint source management programs, § 319, similarly indicates that a breakdown of WLAs and LAs in § 303(d) is not statutorily required. Section 319 notes that a State preparing a state assessment report (SAR) for nonpoint source management can use the "information developed pursuant to . . . 1313(e)." *Id.* § 1329(a)(2). The nonpoint source management program SARs in § 319 include, among other considerations, "those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution." *Id.* § 1329(a)(1)(B). If States were required to break sources down into point and nonpoint sources to create WLAs and LAs during the 303(d) TMDL process, then this provision could simply direct them to use those amounts in their preparation of SARs. But § 319 does not refer to the WLAs or LAs that EPA can request to be made in § 303(d) because, of course, that provision contains no such authorization. *See id.*

Therefore, the structure of the CWA confirms that § 303(d) does not authorize EPA to reject a TMDL on the basis that it does not include WLAs and LAs.

C. EPA's interpretation of TMDL as requiring WLAs and LAs is contrary to the purpose and legislative history of the CWA.

Even if "total" were ambiguous, the purpose and legislative history of the CWA also show that Congress did not give EPA the authority to require States to partition their TMDLs into WLAs and LAs. Where words are ambiguous, the courts may use legislative history to determine meaning. *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953). Federal statutes may not be interpreted to "negate their own stated purposes." *N.Y. State Dep't. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973).

The modern "Clean Water Act" was enacted in 1972 via amendments to the Federal Water Pollution Control Act. An Act to Amend the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972); *see* David M. Bearden et al., Cong. Rsch. Serv., RL30798, *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency* (Dec. 20, 2013) [hereinafter *Environmental Laws*]. The amendments were passed amid a slew of environmental legislation designed to address environmental degradation. *See generally id.* at 1.

The CWA's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Importantly, this goal is to be achieved as an exercise in cooperative federalism. *See* Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 447, 448 (Feb. 2018) ("[T]he Act[] . . . operates within a framework of cooperative federalism. That framework is evidenced in part by how the Act chooses to regulate pollution that reaches regulated waters.") (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . .")).

The role of states is central to the operation of the CWA: "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C. § 1251(b). This notion of cooperative federalism is reflected in how the CWA regulates—and perhaps more importantly, *declines* to regulate—different types of pollution.

Point source pollution, which is defined in 33 U.S.C. § 1362(14), is directly regulated by the CWA. *See* 33 U.S.C. § 1311(a). However, nonpoint source pollution is not defined in the CWA; the statute does not expressly instruct states to identify the relative contributions of point and nonpoint sources to water quality. Moreover, the Supreme Court has rejected an agency interpretation of the CWA that "would result in a significant impingement of the States' traditional and primary power over land and water use," citing the policy statement in 33 U.S.C. § 1251(b). *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting an agency interpretation of federal jurisdiction over abandoned gravel pits in order to "avoid . . . significant constitutional and federalism questions"). Here, EPA's regulation requiring WLA and LA breakdowns for TMDLs has no apparent statutory justification. The provision should be similarly interpreted to give effect to Congress's express intention to leave land use regulation to the States by not forcing them to identify the precise composition of source allocations when making their TMDLs.

EPA itself has acknowledged that it lacks the authority to directly regulate implementation of LAs. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation; 65 Fed. Reg. 43,632 (July 13, 2000) ("EPA believes this authority to condition [section 319] grants will generally be the sole or primary basis by which it will demonstrate reasonable assurance for the implementation of load allocations . . . . EPA cannot . . . require States, Territories or authorized Tribes to use their statutory and regulatory authorities.").

The historical background of the statute when compared with the Clean Air Act also points to "total maximum daily load" as not requiring WLA and LA distinctions. The CWA

shares many similarities with the Clean Air Act (CAA), codified generally at 42 U.S.C. §§ 7401–7671q. They were adopted within just years of each other and both incorporate some State-federal cooperation for achieving environmental goals; both require states to set a plan to achieve their respective goals of meeting water and air quality standards. For the CWA, this means in part that States set TMDLs, and for the CAA, they set state implementation plans (SIPs). *See* 33 U.S.C. § 1313(d)(1)(C); 42 U.S.C. § 7410(a)(1). But there is an important difference: the CAA has a backup provision authorizing EPA to substitute its own *federal* implementation plan (FIP) if a SIP is found to be inadequate, 42 U.S.C. § 7410(c), while the CWA has no such provision. If Congress had intended for EPA to substitute its judgment for the States', it could have made that clear in the text of the statute. Instead, it said simply that States are to submit a "total maximum daily load." EPA cannot insert itself into States' decision-making process by requiring them to allocate this load between point and nonpoint sources when it has no statutory authorization to do so.

The traditional tools of statutory interpretation evince a clear Congressional intent to answer this precise question at issue: the TMDL requirement in § 303(d) requires states to submit a single sum of their maximum pollutant load level. This is unambiguous, and in conflict with EPA's regulatory definition of TMDL in 40 C.F.R. § 130.2(i). EPA's interpretation therefore fails at Step One of *Chevron* and thus exceeds the authority granted to it in the CWA. New Union's TMDL complied with all the CWA's statutory requirements; nothing in the statute required it to contain the WLA and LAs for phosphorous nor gave EPA the authority to invent such a requirement. EPA's rejection of the TMDL, made solely on the basis that New Union's TMDL did not include the WLAs and LAs, was thus properly vacated by the district court.

III. EPA'S ADOPTION OF A TMDL CONSISTING OF AN ANNUAL REDUCTION PHASED IN OVER FIVE YEARS IS PERMISSIBLE UNDER CWA § 303(D).

Evaluated under the *Chevron* framework, EPA's adoption of an annual total maximum daily load phased in over five years is a permissible interpretation of CWA § 303(d). Under the CWA, "total maximum daily load[s] . . . . shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). EPA regulations specify that "TMDLs can be expressed in terms of either *mass per time*, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i) (emphasis added). The *Chevron* doctrine applies to the determination of whether the CWA unambiguously rejects phased-in, annual limits, or if EPA's adoption of a TMDL with those characteristics is reasonable. *See generally Chevron*, 467 U.S 842–43. EPA's interpretation is controlling unless arbitrary and capricious, and considerable weight is given to the implementing agency's construction of a statutory scheme. *See id.* at 844.

Here, the issue is whether an annual TMDL is a permissible interpretation of CWA § 303(d). Circuits are split on this issue. The Third Circuit has held that total maximum daily load is "a term of art meant to be fleshed out by regulation." *Am. Farm Bureau Fed'n*, 792 F.3d at 298. There, the court determined that because the CWA requires EPA to take into account water quality standards, seasonal variations, a margin of safety, and any lack of knowledge when creating TMDLs, Congress was ambiguous on the meaning of "total maximum daily load." *Id.* The Second Circuit has similarly found that TMDLs "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." *NRDC v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001); *but see*

Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 142 (D.C. Cir. 2006) ("Daily means daily, nothing else.").

CLW challenges EPA's adoption of the Chesaplain TMDL on the basis that an annual load with a phased percentage reduction is an impermissible interpretation of the CWA. Record at 14. CLW argues that the plain meaning of total maximum daily load requires a daily limit, rather than an annual one. *Id.* Additionally, CLW argues that the clear intent of § 303(d) is to generate a TMDL that achieves the requisite WQS immediately, rather than after five years. Record at 15. Both of these arguments fail.

EPA's determination of the Chesaplain TMDL as an annual, phased-in limit is a permissible interpretation of CWA § 303(d). First, the statutory context and legislative history of the CWA indicates that "total maximum daily load" is an ambiguous term of art that EPA should receive considerable deference to interpret, and an annual limit is a reasonable interpretation. Second, the omission of clear limits on TMDL effectiveness timelines, statutory context, and legislative history of § 303(d) confirm that phased-in TMDLs are a permissible interpretation under the CWA.

A. The plain language, statutory context, and legislative history of § 303(d)(1)(C) show that "total maximum daily load" is an ambiguous term of art establishing the ambiguity necessary for EPA to receive *Chevron* deference.

A TMDL expressed in annual terms is a permissible interpretation of CWA § 303(d), as "total maximum daily load" is an ambiguous term of art in the context of the CWA and EPA's interpretation is reasonable. Courts determine whether statutory language is ambiguous "by reference to the language itself, the specific context in which [it] is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). However, Agency interpretations that "fill[] a gap or define[] a term in a way that is reasonable in light of

the legislature's revealed design" are given controlling weight. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

The plain language and statutory context of § 303(d) demonstrate that "total maximum daily load" is a term of art with an ambiguous technical meaning. First, the plain language of § 303(d) shows that TMDL is a term of art. Section 303(d)(1)(C) includes a number of complex, technical requirements for TMDLs, including consideration of water quality standards, seasonal variations, margins of safety, and any lack of knowledge about the connection between the effluent limitations and water quality. 33 U.S.C. § 1313(d)(1)(C). Each of these factors requires EPA to make a determination on a complex matter based on its technical expertise. When taken together, they demonstrate that total maximum daily load is an ambiguous term of art, as it is a highly technical value that does not have a clear meaning and shifts according to the circumstances of the waters and pollutants at issue.

Additionally, when read in the context of the CWA as a whole, total maximum daily load must be a term of art that allows for flexibility in EPA's interpretation to carry out the purpose of the CWA. The CWA's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Section 303(a)(1) reiterates that purpose just before directing EPA to set water quality standards and implementation plans, including TMDLs. *See id.* § 1313(a)(1) ("In order to carry out the purpose of this chapter . . . ."). The purpose of the CWA requires effective TMDLs. However, for some pollutants, "effective regulation may best occur by some other periodic measure than a diurnal one." *Muszynski*, 268 F.3d at 99. This means that, despite "daily" being part of the term TMDL, the term must retain flexibility in order for EPA to promulgate the most effective TMDLs possible to restore bodies of water. Additionally, for some pollutants, a phased-in implementation plan may be more effective in

achieving the CWA's purposes. Faster implementation may not feasible by the affected sources, and rapid change in water quality may have further unexpected effects on the bodies of water in question. The statutory context further confirms that total maximum daily load is ambiguous.

Furthermore, of the limited legislative discussion of TMDLs at the time of the CWA's passing, the historical record supports that phased-in TMDLs with annual limits are a permissible interpretation of § 303(d). Courts read statutory language as a term of art "when the language was used in that way at the time of the statute's adoption." *Yellen v. Confederated Tribes of Chehalis Rsrv.,* 141 S.Ct. 2434, 2445 (2021). At the time of the CWA's adoption, the House Public Works Committee recognized that setting TMDLs was "a time-consuming and difficult task," further emphasizing that TMDLs are a technical term of art. *See* H.R.Rep. No. 92-911, at 106 (1972). A phased-in, annual limit is reasonable given the complexity of the task of setting TMDLs and the agency expertise require.

Therefore, the plain language and statutory context of § 303(d) demonstrate that total maximum daily load is an ambiguous term of art, satisfying *Chevron* Step One. Congress has not directly addressed the precise question at issue, and EPA is entitled to use its technical expertise to establish a reasonable interpretation of this statutory gap. The Court should therefore move on to *Chevron* Step Two to evaluate whether the interpretation was reasonable.

B. EPA's interpretation of total maximum daily load to include phased-in, annual limits is reasonable, and therefore deserving of deference, under *Chevron* Step Two.

Under *Chevron* Step Two analysis, EPA's interpretation of total maximum daily load to include annual limits is reasonable, and the court must defer to that interpretation and accordingly to its adoption of New Union's phased annual pollution loading reduction. Once a reviewing court has established that "Congress has not directly addressed the precise question at

issue, the court does not simply impose its own construction on the statute . . . . the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." *Chevron*, 467 U.S. at 843 (emphasis added). *Chevron* Step Two analysis thus proceeds by evaluating whether an ambiguous statutory term has been reasonably interpreted by the agency. *Mayo Found. For Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 58 (2011) ("[T]he second step of *Chevron* . . . . asks whether the [agency's] rule is a reasonable interpretation of the enacted text.") (internal citation omitted).

Critically, this highly deferential second step is intended not to question the agency's policy choice, but rather for the narrow purpose of ensuring that the agency has reasonably exercised its statutory authority. *Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."). And though there could be multiple reasonable interpretations of the statutory gap, the court must uphold the agency's interpretation as long as it is among those permissible options. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843–44) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

Here, CLW's challenge to EPA's approval of this permit is based on its disagreement with the wisdom of the policy choice to set a phased-in, annual TMDL rather than whether it is reasonable. But displeasure with EPA's policy choices is not grounds for invalidating EPA's reasonable construction of the CWA, which must be afforded deference in keeping with

Chevron. First, the same facts that showed the term was ambiguous in Step One also support that EPA's interpretation was permissible. The substantive requirements of TMDLs "expand the scope of a TMDL beyond a mere number." *Am. Farm Bureau Fed'n*, 79 F.3d at 298. As a technical term of art, the TMDL is subject to interpretation guided by agency expertise. And in fact, EPA has previously found that regulating phosphorus specifically with a daily limit is not effective, as "phosphorus concentrations vary seasonally and annually." *Muszynski*, 268 F.3d at 99. Here, EPA has also found that an annual limit for phosphorus is suitable. In addition, EPA has found that a phased-in implementation approach was preferable, as evidenced by its rejection of New Union's second TMDL proposal that did not include the phase-in. EPA is much more well-suited to make policy decisions of this complexity than the court, as it has the expertise to determine whether a daily limit is feasible for a particular pollutant, and *Chevron* mandates that the court defer to this expertise. *See Chevron*, 46 U.S. at 865.

Therefore, under the high level of deference afforded by *Chevron*, the court must accept EPA's interpretation of § 303(d).

IV. EPA'S DETERMINATION SUGGESTING NONPOINT SOURCE BMPS AS AN OFFSET TO POINT SOURCE REDUCTIONS FOR WATER QUALITY STANDARD PLANNING WAS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION.

The district court correctly held that EPA lacked the statutory authority to promulgate the provisions of 40 C.F.R. § 130.2(i) which required States to create LAs and WLAs as part of the TMDL process. Nonetheless, EPA's determination that States can take credit for nonpoint source BMP pollutant loading reductions was not arbitrary and capricious or an abuse of discretion when evaluated under the deferential judicial review standard applied to such agency decision-making.

An agency's application of its regulatory standards is evaluated under the deferential arbitrary and capricious standard articulated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) and *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29 (1983). A reviewing court may set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Overton Park*, 401 U.S. at 414 (internal citation omitted). But the reviewing court's "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Rather, the standard is that the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The court then "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park,* 401 U.S. at 416.

Here, EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance satisfied this generous standard. EPA was free to make such a determination regardless of its 1991 guidance document which referenced "reasonable assurances" that the BMPs will actually cause reductions. EPA, *Guidance for Water Quality Based Decisions: The TMDL Process* 15 (1991) [hereinafter *Guidance*].

EPA was not bound by the "reasonable assurance" standard it articulated in the 1991 Guidance. In fact, the document itself denied that its contents were binding:

> This document provides guidance only. It does not establish or affect legal rights or obligations. This guidance may be reviewed and revised periodically to reflect changes in EPA's strategy for the implementation of water quality-based controls, to include new

> information, or to clarify and update the text. Decisions in any particular case will be made by applying the Clean Water Act and implementing regulations.

Id. EPA's own guidelines left the agency free to revise the standards as it best saw fit when implementing the CWA.

An agency document "will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). But a court may find disclaimers similar to that found in the 1991 guidelines "relevant to the conclusion that a guidance document is non-binding." *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 228 (D.C. Cir. 2007) (finding that EPA guidance was not binding based on a similar disclaimer in the document); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999) (same). Hence, this Court should find that EPA was not bound to apply a reasonable assurance standard when evaluating BMPs for tradeoff credit.

The inquiry is thus whether EPA's determination was based on a consideration of the relevant factors and whether there was a rational connection between the facts found and the choice made. *See Motor Vehicle Mfrs. Ass'n of U.S.,* 463 U.S. at 42–43 ("[Petitioner] argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. We do not disagree."). This is a low bar. The Supreme Court has found this standard satisfied even when EPA decision-making is internally inconsistent within a proceeding. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 658–59 (2007) (holding that EPA's decision to approve a transfer application was neither capricious nor arbitrary, despite applying different legal standards throughout one proceeding). Therefore, the

Court should not find EPA's decision to fail this test unless the agency "relied on factors which Congress had not intended it to consider." *State Farm*, 463 U.S. at 43.

Here, EPA's decision to suggest nonpoint source BMPs as an offset to point source reductions in 40 C.F.R. § 130.2(i) can "reasonably be discerned" and is consistent with the goals of the CWA. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). First, "one of the key goals of the [Clean Water Act] is more effective control of nonpoint source pollution" because these sources of pollution "are believed to be the largest remaining water pollution problem affecting United States waters." Cong. Rsch. Serv., RL 30437, *Water Quality Initiatives and Agriculture* (Dec. 20, 2000). Second, "the TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i). And finally, "[t]he TMDL process distributes portions of the waterbody's assimilative capacity to various pollution sources . . . so that the waterbody achieves its water quality standards . . . . By optimizing alternative point and nonpoint source control strategies, the cost effectiveness and pollution reduction benefits of allocation tradeoffs may be evaluated." *Guidance*, *supra*, at 20. Taking everything into consideration, EPA's tradeoff consideration for the implementation of BMPs at nonpoint sources was reasonable.

In sum, if this Court finds that EPA had statutory authority to promulgate its TMDL, then it should find that BMP tradeoff credits are not an arbitrary and capricious exercise of EPA decision-making.

* * *

In conclusion, this Court should hold that (1) this case is ripe for judicial review; (2) EPA's determination to reject the New Union Chesaplain phosphorus TMDL on the basis that it did not include WLAs and LAs is contrary to law; (3) EPA's adoption of an annual TMDL

phased in over five years satisfies § 303(d) requirements for a valid TMDL; and (4) EPA's adoption of a credit for anticipated BMP pollution reductions is not arbitrary or capricious or an abuse of discretion.

CONCLUSION

For the reasons stated above, New Union respectfully requests that this Court affirm the United State District Court for the District of New Union's grant of summary judgment for New Union, affirm the district court's partial denial of summary judgment for EPA, reverse the district court's partial grant of summary judgment for CLW, and remand for further proceedings consistent with that decision.