

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

IN THE
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 APPELLEE-CROSS APPELLEE,
THE STATE OF NEW UNION**

Oral Argument Requested

Attorneys for Appellee-Cross Appellee,
STATE OF NEW UNION

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JURISDICTIONAL STATEMENT

This case arises on appeal from an Order of the United States District Court for New Union. R. at 2. The United States Court of Appeals for the Twelfth Circuit is vested with jurisdiction over this appeal from a final decision of a District Court of the United States. 28 U.S.C. § 1291. All parties have filed a timely Notice of Appeal. R. at 2.

STANDARD OF REVIEW

Ripeness (issue one) is a question of law that is reviewed de novo. *Urban Developers v. City of Jackson*, 468 F.3d 281, 292 (5th Cir. 2006). Issues two and three are questions of law pertaining to agency interpretation of statute, which are generally reviewed de novo but are guided by *Chevron* deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Issue four relates to an agency's decision to approve a TMDL, and an arbitrary and capricious or abuse of discretion standard based on the agency's record applies. *See Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992); *see also* 5 U.S.C. § 706 (2)(A).

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 violates 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 arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. The Clean Water Act and TMDLs

Total maximum daily loads (TMDLs) are one element of the Clean Water Act (CWA) meant to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The cooperative federalism framework under which TMDLs fall involves a two-step approach that requires states to (1) set water quality standards (WQS)—criteria necessary to support a water body’s designated use, 33 U.S.C. § 1313(c), and (2) ameliorate any failure to meet those WQS through TMDLs. 33 U.S.C. § 1313(d)(1)(A), (1)(C). The CWA provides that a TMDL “shall be established at a level necessary to implement the applicable [WQS] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C). In 1985, EPA defined “total maximum daily load” by regulation as the sum of wasteload allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources. Water Quality Planning and Management, 50 Fed. Reg. 1774, 1780 (Jan. 11, 1985) (codified at 40 C.F.R. § 130.2(i)). The definition also states that a TMDL may be “expressed in terms of either mass per time, toxicity, or other appropriate measure.” 40 CFR § 130.2(i). At issue are “blended TMDLs,” which address waters impaired by both point and nonpoint sources.

B. The Lake Chesaplain TMDL and Chesaplain Watershed Implementation Plan

Lake Chesaplain is a 275 square mile natural lake situated between Chesaplain National Forest and Chesaplain State Park. R. at 7-8. As a Class AA water, Lake Chesaplain’s designated uses include drinking water source, recreation, and fish sustenance. R. at 8. The Lake Chesaplain area benefits economically from the vacation communities located along the lake’s shore, in addition to prominent timber production and agriculture industries. R. at 7. The city of Chesaplain

Mills operates a publicly-owned sewage treatment plant which discharges directly into Lake Chesaplain and, as a point source, is subject to a CWA National Pollutant Discharge Elimination System (NPDES) permit. R. at 7. A NPDES-permitted slaughterhouse located in Chesaplain Mills discharges into the Union River, which flows into Lake Chesaplain. R. at 7.

Several nonpoint sources of phosphorus also discharge in or nearby Lake Chesaplain. Ten hog concentrated animal feeding operations (CAFOs) operate in the Union River watershed in addition to many residential communities which rely on septic systems. R. at 7. Nonpoint sources account for nearly half of the total phosphorus loadings in Lake Chesaplain. R. at 9. Hog CAFOs are designated as “non-discharging” and not subject to CWA permits; however, they are subject to permits under a New Union statute providing for review and approval of site-specific nutrient plans. *See* 40 C.F.R. § 122.23; R. at 7. Private septic systems that discharge into groundwater are also exempt from CWA permitting. R. at 9.

After a visible decline in water quality in the early 2000s, New Union created the Lake Chesaplain Study Commission (“the Chesaplain Commission”) which issued a report in 2012 (“the 2012 Chesaplain Report”). R. at 7-8. The report determined the maximum phosphorus level consistent with Class AA waters—0.014 mg/l—based on dissolved oxygen data collected during the summer season and a range of recorded phosphorus levels (varying from 0.020 to 0.034 mg/l). R. at 7-8. In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted the 0.014 mg/l phosphorus standard. R. at 8. Due to Lake Chesaplain’s failure to meet this standard, DOFEC added it to its list of impaired waters; however, DOFEC refrained from submitting a TMDL to EPA. R. at 8. Though EPA did not object to this omission, Chesaplain Lake Watch (CLW) threatened litigation against both New Union and EPA in 2015, agreeing to withhold its lawsuit in exchange for New Union’s commitment to establish a TMDL. R. at 8. In

2016, a Chesaplain Commission Supplemental Report identified the proportion of annual phosphorus loadings (180 mt) from point (PS) and nonpoint (NPS) sources: PS comprise 34.38% (Sewage Treatment Plant: 13%; Slaughterhouse: 21.39%); NPS comprise 47.67% (CAFO manure spreading: 30.5%; Other agriculture: 10.72%; and Septic tanks: 6.4%); Natural sources comprise 17.94%. *See* R. at 8-9.

The Chesaplain Commission subsequently determined phosphorus levels would need to be lowered between .006mg/l and .020 mg/l to meet the 0.014 mg/l standard. R. at 8. In 2017, DOFEC proposed a TMDL that entailed a 35% phased reduction from all point and nonpoint sources. R. at 9. Public backlash ensued with residential lakefront owners, CAFOs, and the point source sites all objecting to costly upgrades required to comply with the phased reductions. R. at 9. DOFEC responded to these concerns and in July 2018 ultimately submitted an altered TMDL (“New Union’s TMDL”) to EPA, which included a 120 mt annual maximum load, with no allocations, to meet the 0.014 mg/l phosphorus standard. R. at 10. The information from the 2012 Chesaplain Report is in the record that was before EPA and no party has challenged its findings. R. at 8 n.1.

Using its authority under the CWA Section 303(d)(2), EPA rejected this compromise based on its regulatory interpretation of “total maximum daily load” which requires WLAs and LAs to be included in a TMDL. R. at 10; *see* U.S.C. § 1313(d)(2). Instead, EPA adopted a TMDL and Chesaplain Watershed Implementation Plan (CWIP) in May 2019 that was identical to the controversial 35% reduction plan DOFEC initially considered. R. at 10. EPA’s annually phased Lake Chesaplain TMDL (“EPA’s TMDL”) implements load reductions from the 180 mt baseline on the following schedule: Year One—7% reduction; Year Two—14% reduction; Year Three—21% reduction; Year Four—28% reduction; and Year Five—35% reduction. R. at 9. EPA’s TMDL accounts for the blended nature of Lake Chesaplain’s sources of pollution by including a tradeoff

where point source reductions are less stringent because of intended nonpoint source reductions—achieved in part through best management practices (BMPs) for the CAFOs and septic systems. R. at 9-10; *see* 40 C.F.R. § 130.2(i).

The two NPDES permit-holding point sources—the slaughterhouse and the Chesaplain Mills sewage treatment plant—are currently in the process of renewing their expired permits. R. at 10. They have challenged DOFEC’s proposed implementation of EPA’s TMDL requiring phased phosphorus reductions as part of their permit renewals. R. at 10.

II. PROCEEDINGS BELOW

In January of 2020, plaintiff New Union filed action No. 66-CV-2020 in the United States District Court of New Union. R. at 10. CLW filed related action No. 73-CV-2020 shortly thereafter and the cases were consolidated. R. at 10. The district court proceeded with judicial review of EPA’s actions pursuant to Section 702 of the Administrative Procedure Act (APA). R. at 10.

The district court found that, primarily due to impacts on New Union’s ability to issue NPDES permits, the challenges to the TMDL and CWIP were ripe for review. R. at 12. Judge Remus found EPA’s arguments to the contrary to be inapposite and that further delay of judicial review would prejudice the parties. R. at 12.

The district court granted summary judgment in favor of New Union on the second issue, creating a circuit split between the Twelfth and the Third Circuits. R. at 14. The court vacated EPA’s decision to reject New Union’s submitted (unallocated) TMDL and also vacated EPA’s regulatory definition of “total maximum daily load.” R. at 14; 40 C.F.R. § 130.2(i). The court deemed EPA undeserving of *Chevron* deference based on the term’s plain meaning. R. at 13.

On issue three, the district court granted summary judgment in favor of CLW. R. at 15. The court held that the plain meaning of “total maximum daily load” supported CLW’s contention that an annually phased percentage reduction in loadings did not comprise a sufficient TMDL. R.

at 14-15. The court determined that Congress’s use of “daily” in the CWA was not ambiguous and thus failed at step one of the *Chevron* analysis. R. at 15. The court also found that a phased reduction over five years was not sufficient under the CWA. R. at 15.

Finally, the district court granted summary judgment in favor of EPA on the fourth issue. R. at 16. The court found that EPA’s inclusion of a credit tradeoff between nonpoint source and point source reductions was not arbitrary and capricious or an abuse of discretion. R. at 16. The district court relied upon an EPA regulation that allows a credit for nonpoint source loading reductions achieved through BMPs. *See* 40 C.F.R. § 130.2(i). The court rejected CLW’s reliance upon EPA’s 1991 Guidance and assertion that “reasonable assurance” is required to approve a credit between point and nonpoint source loading reductions. R. at 15. The court’s review was limited to whether EPA considered the relevant factors and provided a reasonable basis for its decision pursuant to the highly deferential arbitrary and capricious standard of review. R. at 15.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court properly held that the present challenge to EPA’s rejection of New Union’s proposed TMDL and substitution of its own TMDL and CWIP is ripe for judicial review. Judicial review is proper in the context of resource management plans like TMDLs if (1) delayed review will cause hardship to the plaintiff; (2) judicial intervention will not inappropriately interfere with further administrative action; and (3) the facts on the issues are fully developed. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998). First, delayed review will cause hardship for New Union by hindering its ability to conduct its statutorily required NPDES permitting, further imperiling the water quality of Lake Chesaplain. Second, there is no administrative process with which this Court could inappropriately interfere because EPA’s

TMDL and accompanying CWIP constitute final agency action fit for judicial review. Finally, the comprehensive factual record before this Court is neither abstract nor unsettled and is not dependent upon further administrative, or other, developments. The present dispute challenging EPA's TMDL and CWIP is ripe for judicial review.

Though the *Chevron* doctrine affords substantial deference to agency interpretations of statute in circumstances where Congress's intent was unclear, EPA's definition of "total maximum daily load" does not warrant deference under *Chevron* for two reasons. First, Congress clearly expressed an intent through its selected language and cooperative federalism plan for CWA Section 303. Congress intended the term "total maximum daily load" to be a singular number that could then be further budgeted by states. This Court should rely on the unambiguous plain meaning of "total maximum daily load" which indicates an overall quantity of pollutant a waterbody can receive while still implementing WQS. Second, even if this Court disagrees, *Chevron* deference should not extend to an agency's interpretation that pushes the limits of congressional authority by permitting federal encroachment into traditional state authority. An exception to the typical expansive *Chevron* deference exists in this case where the EPA attempts to usurp New Union's land use authority rooted in the Tenth Amendment by mandating load allocations.

EPA's annually phased TMDL is consistent with the CWA, satisfies regulatory requirements, and manifests the congressionally intended cooperative federalism approach to restoring impaired water quality. Given the CWA's scope and contextual meaning of "total maximum daily load," the meaning of "daily" is ambiguous and warrants *Chevron* deference. EPA's interpretation that a TMDL may be expressed through terms other than just twenty-four-hour increments constitutes a reasonable interpretation bolstered by agency expertise and congressional delegation of authority. EPA's TMDL utilizing phased percentage reductions is

appropriate under the CWA and agency regulations because a percentage reduction in phosphorus loadings satisfies the CWA requirements and the determination of a reasonable period of time for WQS attainment is case-specific. EPA's annually phased TMDL adheres to statutory and regulatory requirements while also positioning New Union for an effective and responsive implementation process in accordance with the cooperative federalism framework.

EPA's inclusion of a credit for nonpoint source and point source reductions in EPA's TMDL for Lake Chesaplain is not arbitrary and capricious or an abuse of discretion because the CWA affords EPA discretion to determine the necessity and rigor of reasonable assurance showings on a case-by-case basis. CLW's claim that reasonable assurance is a required element fails because a blanket requirement by EPA would infringe on New Union's congressionally protected implementation role and states' traditional power to regulate land use. CLW's argument that EPA's 1991 Guidance mandates reasonable assurances for blended TMDLs also fails because the guidance is not persuasively binding on this Court—it has not been applied consistently, was not thoroughly considered, and if binding would be an unlawful extension of EPA's authority under the CWA. Finally, even if EPA determined reasonable assurances were appropriate in this case, EPA's TMDL for Lake Chesaplain satisfies the requisite level of reasonable assurance.

ARGUMENT

I. EPA'S INVALID REJECTION OF NEW UNION'S TMDL AND SUBSTITUTION OF ITS OWN TMDL AND IMPLEMENTATION PLAN CONSTITUTE FINAL AGENCY ACTION RIPE FOR JUDICIAL REVIEW BECAUSE DELAY WOULD HARM NEW UNION.

New Union's challenge to EPA's rejection and replacement of its proposed Lake Chesaplain phosphorus TMDL is ripe for resolution by this Court and New Union would be significantly harmed by delay. The United States Supreme Court has long grounded the ripeness requirement in the policy of restraining the judiciary from interference "until an administrative

decision has been formalized” and results in concrete effects such as requiring “an immediate and significant change in the plaintiffs’ conduct.” *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148-49, 153 (1967); accord *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998), *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803 (2003). Thus, courts examine “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration” to determine whether a dispute is judicially ripe. *Abbott Lab’ys*, 387 U.S. at 149.

To determine ripeness in the context of challenges to land and resource management plans—akin to the challenge to EPA’s TMDL and CWIP—the United States Supreme Court considers the issue’s fitness for judicial review and hardship to parties by utilizing a three-pronged approach: “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Ohio Forestry*, 523 U.S. at 733. The instant complaint satisfies these three prongs because the administration of New Union’s permitting program awaits judicial resolution of this issue; the TMDL and CWIP are final agency action and so the parties have no further administrative recourse; and the actions are based on an exhaustive, fully developed record.

A. Delaying judicial review of EPA’s TMDL and CWIP impairs New Union’s ability to conduct its statutorily required NPDES permitting, imperiling state and private resources.

Withholding consideration of EPA’s TMDL and CWIP would cause significant hardship to New Union. Delaying a ruling on the legality of EPA’s action frustrates DOFEC’s ability to efficiently carry out its statutorily required permitting programs by perpetuating uncertainty regarding the governing TMDL and CWIP. *See* 33 U.S.C. § 1313(d)(2), (e)(2). Collaterally, NPDES permittees’ pending state administrative challenges to DOFEC’s proposed application of EPA’s CWIP are dependent on the legitimacy of the EPA’s requirements. R. at 10.

In contrast to the facts in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-34 (1998), where the Supreme Court held the United States Forestry Service's resource management plan was not yet ripe for judicial review, the TMDL and CWIP provisions at issue here "create adverse effects of a strictly legal kind" and "inflict[] significant practical harm upon the interest of the [plaintiff]." See *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009). EPA's TMDL and CWIP, which set specific NPDES permit limits for point source discharges, unambiguously create legal obligations for New Union. See 33 U.S.C. § 1313(d)(2), (e)(2). Unlike the Forestry Service's logging permits in *Ohio Forestry*, which entailed future specialized assessments and were generally speculative at the time of judicial review, the Lake Chesaplain watershed is the final, and only, regulated location, and EPA's TMDL and CWIP mandate exact percentage reductions through phased point source discharge limits that are subject to no further assessment. 523 U.S. at 733-34; R. at 10.

In 2015, the Third Circuit considered a challenged TMDL, prior to any incorporation of the TMDL into an implementation plan, and held that "it would impose hardship on the EPA and the states not to hear this dispute now If there is something wrong with the TMDL, it is better to know now than later." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293-94 (3d Cir. 2015). Here, not only has EPA mandated an already controversial TMDL, but it has gone a step further and imposed an implementation plan on New Union under which DOFEC must issue NPDES permits. R. at 10; see also *Mo. Soybean Ass'n v. EPA*, 289 F.3d 509, 513 (8th Cir. 2002). Delaying judicial review of the CWIP would only result in uncertainty surrounding the validity of DOFEC's statutorily required NPDES permitting program, exposing New Union to the paradigmatic hardship seen in circumstances ripe for judicial review—"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.” *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988).

The NPDES permit renewal process for the affected entities illustrates the uncertainty and hardship further delay would cause. R. at 10. EPA’s TMDL dictates the legal qualifications these applicants must meet to obtain NPDES permits, which New Union is required to enforce under CWA Section 402(b). *See* 33 U.S.C. § 1342(b); R. at 9-10. Both prospective permittees have sought preemptive state administrative review of DOFEC’s authority to condition NPDES permit renewal on the CWIP, therefore leaving New Union in the precarious position of defending a TMDL and implementation plan that are the subjects of a legal challenge. R. at 10; *see also Am. Farm Bureau*, 792 F.3d at 293. Moreover, both permittees legally continue to operate under expired permits as they await renewals. R. at 10; *see* 40 C.F.R. § 122.6.

Every day that goes by is another day that New Union must delay its implementation of a TMDL for the Lake Chesaplain watershed, R. at 10; another day that both point and nonpoint sources continue to discharge phosphorus into Lake Chesaplain—subject to no limits, 40 C.F.R. § 122.6—in violation of the water quality standards dictated pursuant to the CWA, 33 U.S.C. § 1313(d)(1)(A); another day that the state’s administrative review process is hamstrung, R. at 10; and another day New Union residents suffer damage to their state waters. R. at 10.

B. No further administrative recourse is available to New Union to seek redress from EPA’s promulgation of the TMDL and CWIP, which constitutes binding agency action fit for judicial review under Section 702 of the APA.

EPA’s adoption of the TMDL and CWIP is an “agency action” under the plain meaning of the statute. 33 U.S.C. § 1313(d)(2); 5 U.S.C. § 551(13). Because New Union challenges EPA’s actions under the “general review provisions of the APA, the ‘agency action’ in question must be ‘final agency action.’” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990); *see also* 5 U.S.C. §§ 702, 704. Whether EPA’s promulgation constitutes a “final agency action” is subject to a two-

pronged inquiry: (1) does the action mark the consummation of EPA's decisionmaking process, and (2) do legal consequences flow from the action. *Sackett v. EPA*, 556 U.S. 120, 126-27 (2012).

As demonstrated by the exhaustive collection of scientific reports and public comments in EPA's record and under review in this litigation, EPA's decisionmaking process has reached its culmination. *See R.* at 7-10. The statute provides for no subsequent administrative review following the EPA Administrator's rejection and replacement of a state's TMDL. *See* 33 U.S.C. § 1313(d)(2). EPA issued the CWIP following a notice and comment period, concluding an even more exhaustive administrative procedure than was statutorily required, implying its determination to treat its newly established TMDL as final. *See id.*; *R.* at 10. Nor is there any commitment here by the EPA to revisit the TMDLs at any point in the future, as was the case in *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003), relied upon heavily by EPA in its argument before the district court. *See R.* at 10. After nearly a year-long review of DOFEC's TMDL submission, the entire record before the state, and solicitation of further public comment, the CWIP issued in May of 2019 constituted the consummation of EPA's Lake Chesaplain phosphorus TMDL decisionmaking process. *See R.* at 10.

In addition to the deluge of records EPA collected and developed and the excess procedure EPA followed, EPA's action satisfies the second prong; the plain language of Section 303 of the CWA demonstrates that the TMDL and CWIP adoption evoke legal consequences. Section 303(d)(2) requires New Union to incorporate the EPA TMDL and CWIP into its continuing planning process under Section 303(e). 33 U.S.C. § 1313(d)(2). Furthermore, 303(e) prohibits EPA from approving any state NPDES permitting program which is not part of an approved continuing planning process. *Id.* § 1313(e)(2). New Union additionally assumes potential liability for future judgments brought by EPA for violation of its CWIP by any municipalities within New Union. *Id.*

§ 1319(e). Finally, through Section 402, New Union is required to enforce against any violations of any future permits it may grant pursuant to the CWIP, exposing prospective permittees to the legal consequences of EPA's action. *Id.* § 1342(b)(7).

Thus, there is no further administrative action available to New Union to challenge EPA's TMDL and CWIP. *See id.* § 1313(d)(2); *see also id.* § 1313(d)(4). Even if there were, because the EPA has issued a final order defining the Lake Chesaplain phosphorus TMDL and nothing in the statutory language explicitly, or even implicitly, authorizes any additional steps for administrative reconsideration, judicial review is proper. *See* 5 U.S.C. § 704(10)(c); *see also Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993) (“If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense.”).

C. EPA's TMDL and exhaustive CWIP are neither abstract nor unsettled and require no further factual development.

The plethora of scientific and administrative evidence regarding the actions taken by EPA makes clear that “[t]his is not a situation where ‘further factual development regarding the agency’s application of the [TMDL] would aid [this Court’s] decision.’” *City of Kennett v. EPA*, 887 F.3d 424, 433 (8th Cir. 2018) (quoting *Nat’l Park Hospitality*, 538 U.S. at 812). The creation of the Chesaplain Commission in 2008 yielded several scientific reports regarding the watershed’s water quality which were subsequently submitted to EPA in 2014 and 2015. R. at 8-9. DOFEC commenced a rulemaking proceeding to establish a TMDL in 2015 and publicly noticed a proposal to implement it in 2017. R. at 8-9. EPA, after rejecting New Union’s TMDL in 2018, proceeded with an additional notice and comment period. R. at 10. In addition to its own records, the “entire record of scientific reports and public comments before DOFEC” were incorporated into the final EPA record. R. at 10.

The court in *City of Arcadia v. EPA* reviewed the impact on a municipality in its ripeness inquiry and found the facts insufficiently developed as the state's creation of the implementation plan was still pending. 265 F. Supp. 2d at 1142. But unlike in *City of Arcadia*, here EPA fulfilled that requisite factual development by establishing an implementation plan itself. *Id.* at 1159; *see R.* at 10; *see also Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 81 (D.D.C. 2013). EPA has determined its own TMDL, formulated the implementation plan, and New Union is now bound to give these actions effect. *See R.* at 10; 33 U.S.C. § 1313 *et seq.*

For the foregoing reasons, delayed review of this matter will result in hardship to New Union, engendering no benefit to phantom administrative or fact-finding proceedings. The Ninth Circuit proceeded on similar facts without even mentioning ripeness, so clear was it to the court that a TMDL's review was justiciable once promulgated by EPA. *See Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). Here, too, this dispute challenging EPA's TMDL and CWIP is ripe for immediate judicial review.

II. EPA'S REJECTION OF NEW UNION'S TMDL IS CONTRARY TO LAW BECAUSE IT DISREGARDS THE CWA'S PLAIN MEANING AND STRUCTURE AND RAISES SIGNIFICANT FEDERALISM CONCERNS.

Section 501 of the CWA authorizes EPA to "prescribe such regulations as are necessary to carry out the [EPA's] functions under the Act," which includes approving or disapproving TMDLs. 33 U.S.C. §§ 1313(d)(2), 1361(a). But in 1985, EPA exceeded this authority by adopting a regulatory definition of "total maximum daily load" that betrays the plain meaning of the statutory language and forces states to bear a constitutionally questionable burden regarding the expression of a total maximum load. Water Quality Planning and Management, 50 Fed. Reg. 1774, 1780 (Jan. 11, 1985) (codified at 40 C.F.R. § 130.2(i)). Accordingly, the regulatory requirement to include WLAs and LAs in TMDLs does not withstand judicial scrutiny under *Chevron* because there were no initial gaps for the agency to fill in the CWA. In other words, "Congress has directly spoken on

the precise question at issue,” and this Court “must give effect to” that unambiguously expressed intent. *Chevron*, 467 U.S. at 842-43. And even if this Court finds Congress’s intent is unclear, EPA’s interpretation does not warrant deference because it unreasonably expands federal power to impinge on powers traditionally held by the states. *Id.*

A. EPA’s interpretation of “total maximum daily load” to include WLAs and LAs is inconsistent with the CWA’s unambiguous language, contrary to the CWA’s structure, and thus undeserving of *Chevron* deference.

EPA’s preferred interpretation of “total maximum daily load” with regard to the expression of a total maximum load contravenes Congress’s clearly expressed intent to limit EPA’s authority. Congress’s chosen design of the CWA preserves and protects the primary responsibilities of states for using state land and water resources. 33 U.S.C. § 1251(b).

The plain meaning of “total maximum daily load” demonstrates Congress intended TMDLs to take the form of the single threshold amount. The dictionary defines “total” as “overall,” “maximum” as “upper limit,” and “load” as “quantity carried at one time.” *Webster’s 3d New Int’l Dictionary* 1396, 2414, 1325 (1986). Furthermore, “load” is the operative word, given it is the subject of the immediately following instruction “such *load* shall be established at a level necessary to implement” WQS. 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Both words, “load” and “level,” in singular form demonstrate Congress’s intent that the thing that should be established is one singular amount. *Id.* Moreover, the definite article “the” before a string of singular nouns further reinforces the reference to a single quantity. *See Rapanos v. United States*, 547 U.S. 715, 732 (2006).

The Third Circuit is the only court to have ruled on the precise question at issue here. *See Am. Farm Bureau*, 792 F.3d at 297 (finding the words “total maximum load” ambiguous). However, multiple courts have indicated a common understanding of the term “total maximum daily load” by describing the term consistent with its plain meaning. The Eleventh Circuit referred

to it as a “set measure or prescribed maximum quantity of a particular pollutant in a given waterbody.” *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002). The D.C. District Court stated, “TMDLs . . . specify the absolute amount of particular pollutants.” *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 213 (D.D.C. 2011). The Ninth Circuit identified a TMDL as “the specified maximum amount of a pollutant which can be discharged or ‘loaded’ into the waters at issue from all combined sources.” *Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002).

Contrary to the aforementioned courts, the Third Circuit found ambiguity in the term “total maximum daily load” by applying the canon against surplusage and reasoning that the word “maximum” appears to make “total” redundant. *Am. Farm Bureau*, 792 F.3d at 297. But similar terminology used in mathematics counter a finding of redundancy: maximum serves as a qualifier for total, much like is seen in the term “absolute maximum” in function intervals, where one point represents the largest value possible for a function.*

New Union does not contest that states may construct WLAs and LAs subsequent to TMDL approval. However, New Union takes issue with EPA’s demand that the total that is submitted in a TMDL be represented as the total limit along with multiple subparts. The text of the CWA clearly instructs states to submit one number to EPA for approval. After EPA approves the total, states are free to establish WLA and LAs according to their specific land use needs. EPA initially justified its impinging definition by claiming “it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards” without considering WLAs and LAs. Comments, Water Quality Planning and Management, 50 Fed. Reg. 1774, 1775 (Jan. 11, 1985).

* “Absolute maximum” refers to an absolute value that a function can take on, or the largest value a function can have over its entire curve. *The Penguin Dictionary of Mathematics* (4th ed. 2008).

Conflictingly, EPA also instructs state managers that LAs and WLAs should not be established upfront but should be later determined after the “total assimilative capacity” (or load) is derived. ENV’T PROT. AGENCY, EPA 841-B-99-007, PROTOCOL FOR DEVELOPING NUTRIENT TMDLS 6-1 (1st. ed., Nov. 1999). The intended sequence of events under the TMDL scheme is further supported by the D.C. Circuit’s opinion in *Environmental Defense Fund v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981). The D.C. Circuit stated, “TMDLs set the maximum amount of a pollutant which can be contributed” to a waterbody, and elaborated, “TMDLs *can then be allocated*” among various dischargers. *Id.* (emphasis added). The D.C. Circuit’s interpretation, which was published before EPA’s regulatory definition, underscores the term’s plain meaning.

The plain meaning of a “total maximum load” is also guided by the structure of the CWA in which Congress guarded states from EPA overreach through its cooperative federalism design of the TMDL program. Notably, the CWA does not authorize EPA to manage TMDL implementation outside of the context of NPDES permitting oversight. 33 U.S.C. § 1313(e)(3)(A). Rather, only states may determine how to achieve TMDLs—a responsibility that includes establishing pollutant loading allocations. As the Ninth Circuit noted, EPA cannot “specify the load of pollutants that may be received from particular parcels of land or describe what measures the state should take to implement the TMDL” without intruding into implementation territory that is within state authority under the CWA’s cooperative federalism framework. *Pronsolino*, 291 F.3d at 1128. Accordingly, EPA may only set the aggregate limit for pollutant load; it may not micromanage how states achieve that goal. EPA’s interpretation “is inconsistent with the design and structure of the [CWA] as a whole” because it infringes on state authority to implement TMDLs and to control nonpoint source pollution, duties reserved to states in CWA Section 303(d).

Util. Air Regul. Grp. v. EPA, 537 U.S. 302, 321 (2014). Accordingly, EPA’s interpretation “does not merit deference.” *Id.*

B. EPA’s interpretation of any ambiguity in “total maximum daily load” with regard to expression of total maximum load does not survive *Chevron* scrutiny because it raises significant federalism questions.

Even if this Court finds “total maximum daily load” to be ambiguous, EPA’s interpretation, and thus its rejection of New Union’s TMDL, does not satisfy *Chevron* step two scrutiny. The mandated inclusion of LAs and WLAs in a TMDL, even if otherwise acceptable, deserves no deference because it raises significant constitutional problems by “alter[ing] the federal-state framework by permitting federal encroachment upon a traditional state power.” *Solid Waste Agency v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 173 (2001).

The United States Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states . . . or the people.” U.S. Const. amend. X. Congress intended to preserve this “dual sovereignty” constitutional mandate in the CWA by designing a cooperative federalism framework. Most notably, Congress delineated federal and state authority in the CWA by the source of pollution. EPA has primary regulatory authority regarding point source pollution while states enjoy reserved authority to control nonpoint source pollution because of states’ traditional land use role derived from their police power. *See* 33 U.S.C. §§ 1311(a), 1342, 1313(d), (e), 1329. Similarly, the United States Supreme Court has upheld the constitutional protections afforded to states by the Tenth Amendment by refusing to extend administrative deference “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power,” unless there exists “a clear indication that Congress intended the result.” *SWANCC*, 531 U.S. at 172. Here, EPA’s expansive definition significantly impinges on “a quintessential state and local power”—land use regulation. *Rapanos*, 547 U.S. at 737-38.

The Third Circuit was unpersuaded in *American Farm Bureau* that the term “total maximum daily load,” when viewed in the context of applying *Chevron* deference, pushes the bounds of federal authority “in any extraordinary way.” 792 F.3d at 302. However, the Third Circuit’s analysis and conclusion that the TMDL scheme only “obliquely affects land use regulations” was limited by its focus on the TMDL in question—the Chesapeake Bay TMDL—not the CWA framework as a whole. *Id.* at 301-04. The Third Circuit noted that its analysis may have been different if “the TMDL in fact made land-use decisions diminishing state authority in any significant way.” *Id.* at 302 (emphasis added). Consequently, the court erroneously based its decision on EPA’s specific role in developing one uniquely complex TMDL for a massive interstate waterbody. Instead, the appropriate question is whether EPA’s definition can be used to significantly infringe upon states’ land use authority for *any* TMDL. *See SWANCC*, 531 U.S. at 173. EPA itself recognized that “allocations involve issues such as equity, economics, and political considerations” and urged the states to involve stakeholders in the TMDL creation process, demonstrating its understanding that EPA might surpass its “information gathering” role were it to require allocations that ignore state stakeholder input. ENV’T PROT. AGENCY, EPA 841-B-99-007, PROTOCOL FOR DEVELOPING NUTRIENT TMDLS 7-4 (1st. ed., Nov. 1999).

Had the Third Circuit been presented with the facts of New Union’s case, it might have found a significant infringement on state authority in EPA’s allocation mandate. New Union’s residents expressed overwhelming objections to the allocations in the ultimately adopted Lake Chesaplain TMDL due to the substantial cost of new land use compliance. R. at 9. EPA’s decision to force those allocations highlights how its interpretation can be used to significantly “diminish[] state authority” to manage nonpoint source pollution through land use regulation. *See Am. Farm Bureau*, 792 F.3d at 302. Consequently, “total maximum load” should be read to avoid questions

concerning EPA imposing itself into land use regulation and coercing states to comply with allocations developed under EPA's present regulation. *See SWANCC*, 531 U.S. at 174.

III. EPA'S ANNUALLY PHASED PHOSPHORUS TMDL IS VALID BECAUSE IT IS CONSISTENT WITH THE CWA, SATISFIES REGULATORY REQUIREMENTS, AND MANIFESTS COOPERATIVE FEDERALISM.

EPA's annually phased phosphorus TMDL is valid because it comports with agency regulation, which is a reasonable interpretation of ambiguous statutory language. Through the CWA, Congress delegates an avenue of authority to EPA within a cooperative federalism framework to coordinate with states to address impaired waters. *See* 33 U.S.C. § 1313 *et seq.* CLW argues that TMDL measurement in annual terms does not adhere to statutory language because it must be in daily increments and, additionally, a phased TMDL does not satisfy a level necessary to assure WQS achievement. *See id.* § 1313(d)(1)(C); R. at 15. CLW's claim and the district court's interpretation fail to fully consider "daily load" within the context of other qualifiers in the statutory provision, the broader statutory structure and purpose, and Congress's carefully designed cooperative federalism foundation in the CWA.

A. EPA's TMDL is valid because allowing TMDLs to be expressed in annual loads is a reasonable agency interpretation of ambiguous statutory language and appropriately advances the CWA's purpose.

EPA's TMDL adheres to the requirements of the CWA and presents Lake Chesaplain's phosphorus reduction plan in terms that provide an effective form of measurement for both the targeted pollutant and the watershed. EPA regulation provides that a TMDL may be "expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). CLW contends that a valid TMDL must express all pollutant loads by a "daily," or twenty-four hour period, measurement based on TMDL's plain meaning. R. at 15; 33 U.S.C. § 1313(d)(1)(C). When presented with a question of agency interpretation and requisite deference, courts first determine whether Congress has spoken directly to the issue. *Chevron*, 467 U.S. at 843. In the absence of

direct, unambiguous intent from Congress, courts then evaluate whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* In this step two of *Chevron* analysis, deference to agency interpretation is appropriate unless the agency's regulation is "manifestly contrary to the statute," and courts are restricted from substituting their own statutory construction in the place of a reasonable interpretation by the agency. *Id.* at 844.

The Second and D.C. Circuits are split as to whether "daily" presents ambiguity necessitating *Chevron* deference to rational agency interpretation. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001); *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006). The CWA does not define the term "daily" nor does it specify how a TMDL must be expressed. *See* 33 U.S.C. §§ 1362, 1313(d). The Second Circuit found statutory ambiguity in its evaluation of New York's phosphorus TMDLs for eight reservoirs, which were expressed in annual terms. *Muszynski*, 268 F.3d at 98-99. The Second Circuit utilized a canon of statutory interpretation: text should be placed within the context of the entire statutory structure when determining ambiguity. *Id.* at 99. The United States Supreme Court recognized the significance of this canon when it reasoned that "a reviewing court should not limit itself to examining a particular statutory provision in isolation" and meaning or ambiguity "may only become evident when placed in context." *FDA v. Brown & Williams Tobacco Corp.*, 529 U.S. 120, 132 (2000).

The Second Circuit's analysis considered the "broader range of meanings" that could be applied to "daily" in the context of "total maximum daily load" and focused on the frustration of the CWA's purpose if a court were to substitute an "overly narrow" definition and override important structural context and meaning provided by Congress. *See Muszynski*, 268 F.3d at 98. The Second Circuit emphasized that Congress "directs EPA to approve TMDLs for hundreds of different pollutants in thousands of different waterbodies"; given that delegation, it would be

“excessively formalistic” to restrict EPA from expressing “these standards in different ways, as appropriate to each unique circumstance.” *Id.* at 97-98. Furthermore, the Second Circuit recognized that EPA’s identification of pollutants, expertise, and role in the TMDL planning process, is founded upon a technical understanding of effective pollutant regulation and tailored approaches to management. *Id.* at 98-99.

Unlike highly toxic pollutants, which are better measured in terms of twenty-four hour periods given the immediacy of impact on a watershed at lower levels, pollutants like phosphorus tend to vary in daily discharge amounts and cause concern when accumulated over time at an excessive level; thus, an annual load is a more effective metric for monitoring and regulating. *See id.* at 99; *Options for the Expression of Daily Loads in TMDLs*, Draft, EPA 2 (Jun. 22, 2007) (recognizing cumulative phosphorus loads as more relevant to WQS achievement). The Second Circuit also recognized that an annual load could be calculated to account for seasonal variation when data is based on summer discharges, which is a season of higher discharge. *Muszynski*, 268 F.3d at 103. Accordingly, the Second Circuit held that EPA’s regulation providing for expression of TMDL in measures other than a daily increment was an appropriate interpretation of the statute and served the purpose of effective regulation. *See id.* at 99.

Conversely, the D.C. Circuit found “daily” unambiguous in its interpretation of the statute, focusing primarily on the plain meaning of the singular word. *Friends of the Earth*, 446 F.3d at 142. Evaluating annually measured TMDLs for oxygen-depleting pollutants, the D.C. Circuit emphasized the dictionary definition of daily (as occurring every day) and referenced colloquial usage. *Id.* at 144. The D.C. Circuit purported to consider “daily” in context of the full provision and statute but its analysis ultimately rested on the determination that daily cannot mean anything but every twenty-four hour period. *See id.* at 147. The court declined to fully consider the broader

structure and context provided by the statute, including the statutory authorization for EPA to identify and manage a broad range of pollutants and the qualification of TMDLs that they must be “established at a level necessary to implement the applicable water quality standards”—both of which contribute to the ambiguity in the exact measurement required of a “total maximum daily load.” *See id.* at 144-45; 33 U.S.C. § 1313(d)(1)(C).

EPA’s annual TMDL properly comports with CWA requirements and satisfies agency regulations, which are reasonable agency interpretations of ambiguous statutory language. The district court’s hyper-focus on the term “daily” in isolation from the remainder of the statute and its ultimate purpose works to the detriment of comprehensive statutory analysis. In aligning with the D.C. Circuit’s interpretation and declining to apply *Chevron*, the district court’s analysis undercuts the primary purpose of the CWA—providing a workable framework for coordination between EPA and states to address the degradation of impaired waters. Furthermore, it promotes a statutory construction that runs counter to scientific understanding of effective pollution monitoring and management.

Given the ambiguity of “daily” in the phrase, deference to a reasonable agency interpretation is warranted under *Chevron*. TMDLs require complex assessment of science, analytics, and balancing of state and federal powers. The process progresses over years comprised of public engagement opportunities and scientific evaluations to create an effective plan. *See Overview of TMDLS*, EPA (last updated Sept. 20, 2021). The CWA is the foundation this planning process depends upon; thus, the ambiguity of “daily” in “total maximum daily load” and EPA’s delegated authority to provide its expertise in planning pollutant management create the precise situation in which *Chevron* is applicable and beneficial.

EPA's TMDL, including an annual measurement of phosphorus loadings, comports with agency regulation that reasonably interprets ambiguous statutory language and allows TMDL expression by other appropriate measures. With respect to accounting for seasonal variation, the phosphorus load allocation is calculated based on summer dissolved oxygen amounts, which reflects the higher season of phosphorus discharges. R. at 8. As the Second Circuit recognized in *Muszynski*, an annual load could be calculated to account for seasonal discharge when based on periods of higher discharge. Furthermore, the Chesaplain Commission's calculation of maximum phosphorus loadings is based on data from a range of phosphorus levels, reflecting an accounting for variation. *See* R. at 8.

B. Phased percentage reduction in EPA's TMDL is valid because it comports with CWA requirements and WQS attainment timelines are case-specific and tailored to the respective watershed.

EPA's TMDL utilizing phased percentage reductions in phosphorus loadings is appropriate because a percentage reduction in phosphorus loadings satisfies CWA requirements and the determination of a reasonable period of time for WQS attainment is case-specific. CLW argues that a TMDL must be set at a level that ensures achievement of WQS on the day of its adoption, rather than achieved by staged implementation over five years. R. at 11. This argument reflects a misunderstanding of the CWA process for addressing impaired waters.

The percentage reduction in loadings expressed in EPA's TMDL aligns with the CWA and regulatory requirements because it establishes maximum loadings that can be received by the Lake Chesaplain watershed. The district court cited a 2018 D.C. District Court case rejecting an Anacostia River TMDL measured by percentage reduction in trash. R. at 15; *see Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 143-45 (D.D.C. 2018) (holding that the percentage reduction in trash did not set sufficient maximum load). The D.C. District Court's reasoning was bound by the D.C. Circuit's narrow interpretation of TMDL in its consideration of the specific

trash percentage reduction calculation, which dealt with narrative water criteria and included trash removal as a reduction method. 301 F. Supp. 3d at 143. This Court is not bound by the D.C. Circuit's interpretation. The percentage reduction in EPA's TMDL is valid because it establishes the maximum loadings Lake Chesaplain can receive from each source based on numerical WQS criteria rather than narrative criteria and effectively sets a maximum load calculated from the 180 mt baseline. R. at 9.

EPA's TMDL appropriately implements a schedule for effluent limitations and nonpoint source discharge reduction that satisfies statutory requirements. The district court relied on statutory cross-references without full examination of the language and relationship between the cited provisions and a 1976 case delivered prior to amendments extending certain deadlines. R. at 15. Section 303(d) of the CWA, which speaks most directly to the issue, does not include a timeline or deadline for reaching the "applicable water quality standards"—it only specifies the TMDL be at a "level necessary to implement" the WQS. 33 U.S.C. § 1313(d)(1)(C). Here, the district court interpreted "clear intent" and thus neglected to consider the comprehensive design in EPA's TMDL, which outlined a schedule of load reductions for point and nonpoint sources that are necessary to implement the applicable WQS. Contrary to the district court's interpretation, EPA's TMDL comports with the language of 303(d). Furthermore, as EPA created this TMDL after rejecting New Union's original proposal, the determination of loads is also subject to Section 303(d)(2) which directs the EPA Administrator to establish loads as he "determines necessary to implement" the applicable WQS, which indicates EPA discretion in determining adequate stringency. *Id.* § 1313(d)(2).

The district court also relied on cross-references between the CWA implementation section (303(e)) and the effluent limitation section (301(b)) to suggest the importation of deadlines

between the sections. R. at 15; 33 U.S.C. §§ 1313(e)(3)(A), 1311(b). The language of Section 303(b)(1)(C), which includes reference to a 1977 deadline, directs achievement of “any more stringent limitation, including those necessary to meet water quality standards . . . or schedules of compliance.” 33 U.S.C. § 1311(b)(1)(C). EPA’s TMDL, with its inclusion of nonpoint source reduction, does lay out a sufficiently stringent limitation on a schedule necessary to meet the applicable WQS. R. at 9. The district court also cited a 1976 case that does not accurately reflect the impact of future CWA amendments extending the statutory deadlines and creating more flexibility for states in reaching WQS standards. R. at 15; *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976) (delivering a holding prior to 1977 amendments extending compliance deadlines); *see also* ENV’T PROT. AGENCY, NPDES PERMIT WRITERS’ MANUAL 1-3-1-5 (2010) (outlining 1977 and 1987 amendments extending Section 301(b)(1)(A)-(B) deadlines). Regarding setting deadlines for WQS attainment, EPA proposed a rule in 2000 that would have required WQS attainment within ten years of TMDL development; however, the rule was withdrawn due to concerns about workability. Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,585, 43,591 (July 13, 2000) (withdrawn by 68 Fed. Reg. 13,608 (Mar. 19, 2003)). Notably, EPA’s 2000 rule elaborated that practicability in meeting WQS on a set timeline is dependent upon various factors (including nonpoint source management, cost, and community engagement) but ten years was selected as “reasonable.” Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. at 43,627.

In response to questions about “phased” TMDLs and advancements in management, EPA published a memo in 2006 clarifying its 1991 Guidance. *Clarification Regarding “Phased” TMDLS*, EPA 1 (Aug. 2, 2006). EPA recognized that contemporary TMDLs involve more “uncertainty” and combination approaches to reduce point source and nonpoint source pollutant

discharge. *Id.* at 3. The memo emphasized that all valid TMDLs are calculated to achieve WQS; however, determining a reasonable period of time in which a watershed meets WQS may be a “case-specific determination” and staged implementation of a TMDL is likely to be particularly relevant and significant if a TMDL includes nonpoint sources. *Id.* at 5.

EPA’s TMDL is set at a level necessary to attain WQS and adequate stringency of effluent limitations given the inclusion of nonpoint reductions. The TMDL percentage reductions are based on data from the 2012 Chesaplain Report identifying the 0.014 mg/l maximum phosphorus standard, which was adopted as the numerical WQS and used to derive Lake Chesaplain’s maximum annual phosphorus loadings. R. at 8. The report is included in the EPA record and no party challenged its findings, which supports a determination that the reductions are sufficient to attain WQS. R. at 8. Furthermore, EPA’s TMDL addresses significant discharge from nonpoint sources, contributing nearly 50% of the total phosphorus load, which positions the TMDL as a candidate for staged implementation in accordance with EPA’s clarifying memo. R. at 9. There are also uncertainties in the interaction between sources’ load reductions and the technologies used to implement BMPs, which also supports staged implementation. *See* R. at 9-10. The staged implementation reaches the 35% reduction needed for WQS attainment within five years—well within EPA’s “reasonable” ten-year timeline. R. at 9. EPA’s TMDL provides an opportunity to address significantly discharging nonpoint sources, which otherwise would not be covered under the CWA, and limit point source discharge at appropriate stringency levels to achieve WQS.

IV. EPA’S INCLUSION OF A CREDIT FOR NONPOINT SOURCE REDUCTIONS IS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION BECAUSE THERE IS NO REASONABLE ASSURANCE MANDATE IN THE CWA, AND EVEN IF REASONABLE ASSURANCES MAY BE CONSIDERED, EPA’S TMDL PROVIDES THE APPROPRIATE ASSURANCES.

A. Congress did not include nor intend a reasonable assurance mandate for TMDLs, and therefore EPA’s informal guidance deserves no judicial deference.

EPA regulations provide that “blended” TMDLs—those for water bodies impaired by both point sources and nonpoint sources, like Lake Chesaplain—may include a credit for best management practices (BMPs) when those BMPs “make more stringent load allocations practicable” for a state. 40 C.F.R. § 130.2(i). Consequently, the planned BMPs for nonpoint sources in the Lake Chesaplain watershed allow the inclusion of a credit in EPA’s TMDL—lessening the proportion of phosphorus reductions that point sources in the watershed are expected to bear. *Id.* Nothing in the CWA or EPA regulations require that the proposed BMPs be “reasonably assured” for the state to benefit from this credit. Further, a reasonable assurances requirement would exceed EPA’s statutory authority—which is limited to aiding states in planning and information gathering—and would thus upset the cooperative federalism goals of the TMDL scheme and the CWA as a whole.

1. EPA’s reasonable assurance guidance is not legally binding and judicial deference is not required by *Skidmore*.

CLW relies on an inconsistently applied and legally questionable regulatory guidance document for its claim that EPA’s decision to include a credit in the TMDL was arbitrary and capricious. The cited guidance (“1991 Guidance”), originally published thirty years ago and which has since undergone revisions that belie CLW’s claim, states that “in order to allocate loads among both nonpoint and point sources, there must be reasonable assurances that nonpoint source reduction will in fact be achieved.” ENV’T PROT. AGENCY, 440/4-91-001, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS 15 (1991).

EPA's 1991 Guidance did not undergo notice and comment rulemaking and does not carry the force of law. As a result, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) controls the Court's determination whether to afford the 1991 Guidance weight regarding EPA's authority to impose a reasonable assurance requirement. *United States v. Mead Corp.*, 533 U.S. 218 (2001). The United States Supreme Court's *Skidmore* decision instructs that "interpretations and opinions" of federal agencies, "while not controlling upon the courts by reason of their authority," represent the agency's specialized expertise and knowledge. 323 U.S. at 140. However, an informal agency interpretation should be given weight by a court only if it has the "power to persuade." *Id.* To determine persuasive authority, courts consider the following factors: the thoroughness of the agency's consideration; the validity of the agency's reasoning; and consistency with earlier statements. *Id.* Accordingly, this Court should consider EPA's failed attempt in 2000 to formalize the reasonable assurance requirement, the agency's marked disregard for the CWA's reservation of the authority to regulate nonpoint source pollution to the states alone, and the various iterations of the language used by EPA regarding "reasonable assurances." *See id.*

First, in 1999 the EPA attempted to formally place into effect its 1991 Guidance. Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,058 (proposed Aug. 23, 1999). Although the EPA adopted a final rule which would have made reasonable assurance a TMDL requirement, Congress blocked the rule from taking effect because of concerns regarding the rule's workability. Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608 (Mar. 19, 2003); *Bravos v. Green*, 306 F. Supp. 2d 48, 52 (D.D.C. 2004). The amount of controversy generated by the proposed rule casts doubt on whether EPA deeply reflected when developing its 1991 Guidance. *See* Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000). Second, although EPA's

expertise on water quality supports the guidance document’s power to persuade, such benefit is eclipsed by the significant federalism concerns raised. EPA’s 1991 Guidance upends congressional design, which explicitly reserved in states the authority to manage nonpoint source pollution. 33 U.S.C. §§ 1288, 1313(e), 1329. Finally, EPA’s inconsistent proclamations regarding the necessity of “reasonable assurances” further highlights the standard’s unworkability, and the guidance document’s undesirability as an informal rule. EPA’s website refers to reasonable assurance as a “recommended element” of a TMDL, telling any public visitor that reasonable assurances are not required. *Overview of TMDLS*, EPA (last updated Sept. 20, 2021); *see also Supplemental Module: Listing Impaired Waters and Developing TMDLS*, EPA (last updated July 13, 2021). Furthermore, EPA issued guidelines in 2002 interpreting its 1991 Guidance, moving away from the compelling “must” language to “should provide reasonable assurances.” ENV’T PROT. AGENCY, 2002 GUIDELINES FOR REVIEWING TMDLS UNDER EXISTING REGULATIONS ISSUED IN 1992 1, 4 (2002). EPA’s 1991 Guidance, upon which CLW bases its challenge to the inclusion of a credit tradeoff in EPA’s TMDL for Lake Chesaplain, is neither statutorily nor persuasively binding and thus, does not impose a blanket reasonable assurance standard. R. at 15.

2. EPA’s decision not to require reasonable assurances is not arbitrary and capricious or an abuse of discretion because EPA appropriately acted within the bounds of its statutory authority.

CLW’s claim that states must provide reasonable assurances for a blended TMDL that plans for nonpoint source reductions advocates for an unlawful extension of EPA authority under the CWA. CLW correctly admits that EPA has no authority to require implementation of BMPs. R. at 9-11; 33 U.S.C. § 1313(e) (cross-referencing other *implementation* sections of the CWA). Nevertheless, CLW persists in its claim that EPA should mandate that states submit for approval a detailed plan regulating their citizens’ land use—“perhaps the quintessential state activity”—to

assure that BMPs will be implemented. *Fed. Energy Regul. Comm'n v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). Nothing in the CWA authorizes EPA to strongarm states in this manner.

The Third Circuit, which affirmed EPA's authority to require reasonable assurances for the Chesapeake Bay TMDL, acknowledged that EPA's role in TMDL development is purely to gather information and help states plan. Nonetheless, the Third Circuit described a reasonable assurance requirement as a valid policy choice—instead of “blindly accept[ing] states' submissions,” the EPA may make sure a state's “proposal *would actually implement*” WQS. *Am. Farm Bureau*, 792 F.3d at 300 (emphasis added). How EPA's role in forcing implementation differs from the states' role in overseeing implementation may have been mere semantics to the Third Circuit but has drastic consequences for states. If the EPA were to require reasonable assurances for every blended TMDL, New Union would face significant legal consequences if it failed to adequately satisfy the unadopted reasonable assurance requirement. For example, EPA may withhold nonpoint source grant funding or revoke New Union's NPDES permitting authority. 33 U.S.C. §§ 1288, 1313(e)(2); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000). EPA is bound by the CWA's delegation of authority, and the CWA does not grant EPA authority to require states to show *how* they will go about implementation through reasonable assurances.

For these reasons, EPA's TMDL, including the credit tradeoff, satisfies the arbitrary and capricious standard because it is based on a rational connection between the facts presented and the relevant factors and it is within the scope of EPA's delegated authority. *Motor Vehicle Mfrs. Ass'n, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). EPA regulation only requires a TMDL to include applicable WQS; loading capacity; LAs and WLAs; margin of safety; and consideration of seasonal variation. 40 C.F.R. § 130.7. EPA's TMDL for Lake Chesaplain meets each requirement.

B. If this Court determines EPA has the authority to require reasonable assurance, it is a tool to be used at EPA’s discretion based on a watershed’s characteristics—not a blanket requirement—and not necessary for EPA’s TMDL.

If this Court finds that Congress delegated EPA the authority to require reasonable assurance, there is still no mandate that a reasonable assurance requirement must be applied in every TMDL review. The Third Circuit determined that the CWA statutory language and context was enough to “allow EPA to consider and express these [reasonable assurance] factors in its final action.” *Am. Farm Bureau*, 792 F.3d at 301 (emphasis added). The case before the Third Circuit dealt with a particularly unique watershed, and a confluence of other factors contributed to EPA’s more active role in that instance. The Chesapeake Bay example is not reflective of more common watersheds’ TMDL processes. EPA applies a range in assessment rigor to reasonable assurance showings. Therefore, EPA’s inclusion of a credit in this case is not arbitrary and capricious or an abuse of discretion because it was a rational decision within the agency’s scope of authority.

EPA’s TMDL satisfies statutory and regulatory requirements and is distinguishable from the Chesapeake Bay TMDL, which included significant focus on reasonable assurance. The Chesapeake Bay TMDL included novel qualities reflective of the unique, complicated, and drawn-out nature of that watershed’s management. *See* Claudia Copeland, *Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs)*, CONG. RSCH. SERV. 1, 13 (2012). The Third Circuit outlined many of these extenuating factors in reasoning that EPA had authority to require reasonable assurances: a unique TMDL development process; specific congressional involvement; multi-jurisdictional management; length of time; and the extreme degradation of water quality. *Am. Farm Bureau*, 792 F.3d at 287-308. Notably, EPA drafted the TMDL in the first instance for the Chesapeake Bay, rather than the states, which is a departure from the usual process set forth by the CWA. *Id.* at 290; 33 U.S.C. § 1313(d). Also contributing to a heightened level of EPA

involvement, Congress ratified the Chesapeake Bay Program—a voluntary partnership between the involved states and EPA—and specifically amended the Program in 2000 to include a provision directing EPA to “ensure that management plans are developed and implementation is begun” in the Chesapeake Bay watershed. *Am. Farm Bureau*, 792 F.3d at 308 (quoting 33 U.S.C. § 1267(g)). The Third Circuit took this action as evidence of Congress’s approval of EPA’s distinctly substantial role in the Chesapeake Bay TMDL process. *Id.* at 308.

Additional details feature prominently in the Third Circuit’s reasoning, including the necessity to coordinate Chesapeake Bay’s management between seven states compared to a traditional TMDL under one state’s jurisdiction. *See id.* at 287. Furthermore, the planning and regulatory process spanned decades leading up to EPA’s actions in the early 2000s, which then had to address extreme degradation due to the absence of management. *Id.* at 287, 309. The Third Circuit’s use of permissive language and attention to specific characteristics of the Chesapeake Bay watershed and management process suggest its acknowledgement of agency discretion in the application of reasonable assurances during TMDL review.

The TMDL process for Lake Chesaplain differs in significant measure from that for the Chesapeake Bay, and the rationales behind Chesapeake Bay’s novel TMDL do not apply to Lake Chesaplain’s TMDL. Unlike EPA’s initial involvement in TMDL drafting for the Chesapeake Bay, New Union developed and submitted the first TMDL proposal. *R.* at 9-10. Although EPA has statutory authority to set a TMDL after rejecting a state’s proposal, Congress did not take separate action—as was the case in the Chesapeake Bay process—directing further EPA involvement in coordinating Lake Chesaplain’s pollution reduction. Moreover, New Union is the only state managing the Lake Chesaplain watershed, unlike the seven state, multijurisdictional circumstances of Chesapeake Bay. *R.* at 7.

For watersheds with more common characteristics and TMDL procedures, EPA employs a range of rigor for reasonable assurance. EPA's general approach to reasonable assurance as a possible tool for TMDL review is reflected in its materials outlining the process. In 2012, the agency provided supplemental TMDL review information to regional offices and explained that "[e]ach TMDL's demonstration of reasonable assurance is, of necessity, case-specific" and the degree to which reasonable assurance factors are addressed depends on the watershed's particular circumstances. *Supplemental Information for Reasonable Assurance TMDL Reviews*, EPA (Feb. 12, 2012). Variation in reasonable assurance demonstration is exemplified in other EPA approved TMDLs. For example, in 2007, EPA approved a blended TMDL for Maryland's Wills Creek watershed based on a general plan to implement BMPs by prioritizing the nonpoint sources with the greatest impact on the watershed but acknowledging "ease of implementation and cost" as factors in BMP implementation. *Final Wills Creek Watershed TMDL*, EPA 8-9 (Jan. 16, 2007). EPA's approval of Maryland's TMDL demonstrates that EPA has found general plans for BMPs sufficient without highly specific details.

Considering the range in assessment rigor, EPA's TMDL with a credit tradeoff is not arbitrary and capricious because it is a rational decision based on EPA's consideration of TMDL requirements and the facts in the record. Under arbitrary and capricious and abuse of discretion review, agency action will stand if based on a rational connection between the facts presented and the relevant factors and is within the scope of authority delegated to the agency. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43. The record presents sufficient information for EPA's inclusion of a credit tradeoff between nonpoint source and point source reductions. EPA's TMDL presents planned reductions for identified nonpoint sources to be accomplished through BMPs to meet the 0.014 mg/l phosphorus WQS. R. at 8-9. The BMPs for CAFOs and other agricultural sources

include modified feeds for animal production facilities, physical and chemical treatment of manure streams, and restrictions on manure spreading; the septic tank BMPs include increased inspections and pumping schedules. R. at 9. EPA's TMDL provides greater specificity regarding planned BMPs in comparison to the EPA-approved Maryland Wills Creek TMDL. Although cost arose as a public concern regarding the BMPs, EPA's comments on the Maryland Wills Creek TMDL approval specifically noted that cost and ease of implementation would be a factor in BMP adoption. *See* R. at 9-10.

EPA's TMDL includes specific BMPs to meet the ultimate 35% reduction for nonpoint sources and all necessary TMDL elements. As there is no statutory or regulatory mandate for a reasonable assurance requirement in a TMDL, EPA's TMDL with credit tradeoffs is not an abuse of discretion by the agency. The TMDL, including a credit for anticipated BMP reductions, provides all necessary components for approval under statute and regulation and EPA's determination was rationally based on the record before it; thus, it prevails under arbitrary and capricious review. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43; 40 C.F.R. § 130.7.

CONCLUSION

For the foregoing reasons, New Union respectfully requests this Court affirm the district court's determination of these issues as ripe for judicial review, affirm the district court's decision to vacate EPA's regulatory definition and its associated denial of New Union's TMDL, reverse the district court's rejection of EPA's annually phased TMDL, and affirm the district court's finding that EPA's inclusion of a nonpoint source credit in the annually phased TMDL was a valid agency action.