TEAM 5

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 Appellee, THE STATE OF NEW UNION

Non-Measuring Brief

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Introduction

Sometimes, seeing the sun shimmer off of a lake on a warm summer day is a dreamlike sight. Other times, such as in 1969 Cleveland, it can be a nightmare. In June of that year, the Cuyahoga River burst into flames, sparking national outrage and eventually leading to the passage of the Clean Water Act of 1972 (CWA). The CWA was enacted for the explicit purpose of restoring and maintaining the nation's waters. Since the enactment of the CWA, many states have diligently worked to improve the water quality of waters within their borders. New Union appears before this court as one of these states working to clean up its waters to ensure all persons and nature can enjoy their benefits.

Prior to the turn of the century, Lake Chesaplain was an ideal location for recreation, sport and industry. The lake's 275 square miles of pristine water attracted people throughout the mid-north region of the country. Understandably, the land was highly sought after. Throughout the watershed, farming and agriculture boomed and new homes were constructed so residents could enjoy the beautiful view from their back porches. But these improvements to the land came with a cost.

Starting in the 1990s, this rapid economic development caused Lake Chesaplain's water quality to decline, partially as a result of an overabundance of phosphorus being discharged into the lake. In 2012, the State of New Union began the process of restoring the lake to its former glory. After conducting a careful study of the sources of pollution, New Union promulgated a plan to reduce the levels of pollution and return Lake Chesaplain to its former glory. This plan required a delicate balance, distributing the burden of the restoration equally and equitably across contributors of the excess phosphorus such that restoration could actually be achieved. But some would like to delay water restoration and decrease the likelihood of returning Lake Chesaplain to

its former glory merely for want of formalistic boxes. Even so, New Union will continue to push to improve the water quality for the benefit of all.

Jurisdictional Statement

The United States Environmental Protection Agency (EPA) appeals from an Opinion and Order granting summary judgment in favor of New Union and against EPA in No. 66-CV-2020, and Chesaplain Lake Watch (CLW) appeals from an Opinion and Order granting summary judgment in favor of EPA in No. 73-CV-2020, both of which were entered on August 15, 2021 by the Honorable Judge Romulus N. Remus of the United States District Court for the District of New Union. The district court had subject-matter jurisdiction under the judicial review provisions of the Administrative Procedure Act (APA) and pursuant to 28 U.S.C. § 1331 because the cause of action is provided by federal law. EPA and CLW filed timely Notices of Appeal. The Twelfth Circuit Court of Appeals has jurisdiction over this matter under 28 U.S.C. § 1291.

Questions Presented for Review

1) Whether EPA's decision to reject New Union's Lake Chesaplain phosphorus TMDL and adopt its own is ripe for judicial review.
2) Whether EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL solely because it did not set distinct limits for wasteload allocations and load allocations was contrary to law, based on an incorrect interpretation of "total maximum daily load" in CWA § 303(d).
3) Whether § 303(d) of the CWA requires EPA to only adopt TMDLs that measure pollutants in daily terms despite more scientifically-relevant mass over time measurements, and prohibits phased-in TMDLs.

4) Whether EPA's adoption of a credit for anticipated BMP of Lake Chesaplain's nonpoint sources was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

Standard of Review

"Courts review a district court's review of an agency action de novo." *United States v. Int'l Bhd. of Teamsters*, 170 F.3d 136, 142 (2d Cir. 1999); *see also Safari Club Int'l v. Zinke*, 878 F.3d 316, 325 (D.C. Cir. 2017). Under the APA, a court may "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. While the "court may not substitute its judgment for that of the agency," an agency decision may be set aside where the agency relied on factors Congress did not intend it to consider, "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 96–97 (2d Cir. 2001).

Statement of the Case

I. Statutory Background

The CWA creates a system of cooperative federalism designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. EPA sets national water quality standards and states implement regulatory programs to meet these standards. *See New York v. United States*, 505 U.S. 144, 145, 167 (1992).

Under CWA § 303(a), states must adopt water quality standards (WQS) for bodies of water within its borders. 33 U.S.C. § 1313(a). In a WQS, the state designates uses for each waterbody and then sets water quality criteria necessary to support the waterbody's designated use. *Id.* at § 1313(c)(2)(A). The water quality criteria may be numerical limits on pollutant concentrations in

the waterbody or narrative standards for aesthetic qualities and non-specific pollutants. *See id.* at § 1313(c)(2)(B); 40 C.F.R. § 131.3(b). The state must review and, if appropriate, revise its WQS at least every three years. 33 U.S.C. § 1313(c)(1)–(3).

When a specific body of water fails to meet the WQS for its designated use, the state must list the waterbody as impaired and develop a plan to improve the water quality and restore it to the desired purpose. *Id.* at § 1313(d)(1). This plan is commonly referred to as a TMDL, which is the abbreviation for the CWA term "total maximum daily load." A TMDL sets the maximum amount of offending pollutants in a waterbody "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." *Id.* at § 1313(d)(1)(C). In 40 C.F.R. § 130.2(i), EPA defines a TMDL as the "sum of the individual [waste load allocations (WLA)] for point sources and [load allocations (LA)] for nonpoint sources and natural background." The state may take credit for nonpoint source pollution reduction in order to make the WLA less stringent, but only if Best Management Practices (BMP) or "other nonpoint source pollution controls make more stringent load allocations practicable." 40 C.F.R. § 130.2(i).

EPA must review each step in the WQS process and has authority to approve or reject state-submitted TMDLs. 33 U.S.C. § 1313(c)(3), (d)(2). If EPA agrees that a waterbody is impaired but disapproves of the state's TMDL, EPA must establish its own TMDL for the impaired waterbody within thirty days of its date of disapproval. *Id.* at § 1313(d)(2).

II. Factual Background

CWA § 303(d) requires each state to adopt a WQS for each waterbody within its borders. *Id.* at § 1313(a). In accordance with § 303(d), New Union established a WQS for Lake Chesaplain and designated it a Class AA waterbody, a classification reserved for the highest quality waters. R. at 8. Class AA waterbodies are designated for uses including drinking water, recreation, and

fish propagation and survival. *Id.* In 2008, New Union created the Lake Chesaplain Study Commission (the Commission), which issued a report in August 2012. *Id.* The report found Lake Chesaplain suffered from excessive algae growth caused by disproportionate amounts of phosphorus in the water. *Id.* In line with these findings, New Union's Division of Fisheries and Environmental Control (DOFEC) adopted a water quality criterion of 0.014 mg for Class AA waters. *Id.* Current phosphorus levels in Lake Chesaplain varied between .020 mg/l and .034 mg/l. *Id.* In 2016, DOFEC issued a supplemental report calculating the maximum allowable phosphorus loading to achieve the WQS and identified existing sources of phosphorus inputs. *Id.* The maximum phosphorus loading for Lake Chesaplain was calculated at 120 metric tons (mt) annually. *Id.*

Unfortunately, as of 2015, existing phosphorus loads in Lake Chesaplain were 180 mt, including 61.9 mt from point sources, 85.8 mt from nonpoint sources, and 32.3 mt from natural sources. *Id.* at 8–9. The point sources for Lake Chesaplain are the Chesaplain Mills sewage treatment plant and Chesaplain slaughterhouse. *Id.* at 8. The nonpoint sources for Lake Chesaplain are the concentrated animal feeding operations (CAFOs) manure spreading, other agricultural resources, and septic tank inputs. *Id.* at 8–9. In 2017, DOFEC noticed a proposal to implement a TMDL, which proposed an equal-phased reduction in both point source and nonpoint source discharges that would be phased in over five years with a stacking 7% decrease each year. *Id.* at 9. Under this plan, there would be a 35% reduction of phosphorus in Lake Chesaplain by year five. *Id.* To reach this 35% reduction by year five, permit limits for phosphorus inputs would be imposed on point sources and BMP would be implemented for nonpoint sources. *Id.* The proposed BMP for agricultural sources included modified feeds for CAFOs, physical and chemical treatment of manure streams, and restrictions on manure spreading when the soil is frozen or saturated. *Id.*

Proposed BMP for private septic systems consisted of increased septic tank inspection and pumping schedules. *Id.* By instituting BMP, New Union could receive credits from EPA that would allow it to increase the point source permit limits for phosphorus. *Id.* at 6.

While the science behind DOFEC's plan was not disputed, the proposed method of achieving the WQS through a 35% phased-in reduction was highly criticized by interested parties. *Id.* at 9. The nonpoint sources objected to the costs associated with the proposed TMDL, and CLW objected to the phased annual reduction, New Union's statutory authority to impose and enforce BMP, and the credits available through the institution of BMP. *Id.* at 9–10. In light of these criticisms, New Union decided to submit to EPA a TMDL that consisted of a 120 mt annual phosphorus maximum and did not include WLA or LA. *Id.* at 10. Using its authority to review each step of the CWA process, EPA rejected New Union's TMDL on the grounds that it did not include WLA and LA, and adopted DOFEC's original 35% phased-in reduction TMDL. *Id.*

III. Procedural Background

In 2015, CLW served a notice letter on New Union and EPA to compel promulgation of a Lake Chesaplain TMDL. *Id.* at 8. Agreeing with CLW, New Union's DOFEC commenced a state rulemaking proceeding to establish a Lake Chesaplain TMDL. *Id.* In July 2016, the Commission issued a supplemental report on Lake Chesaplain (Supplemental Report), calculating the maximum phosphorus loadings necessary to meet the WQS and identifying existing sources of phosphorus inputs. *Id.* In October 2017, the DOFEC publicly noticed a proposed TMDL, implemented through a 35% reduction in phosphorus discharges from point and nonpoint sources, phased in over a five-year period. *Id.* at 9. After reviewing comments and balancing the costs of implementation, the DOFEC decided to abandon the 35% phosphorus reduction and ultimately, New Union submitted to EPA a TMDL that consisted of a 120 mt annual maximum for phosphorus and did not contain

any WLA or LA. *Id.* at 10. In July 2018, EPA rejected New Union's Lake Chesaplain TMDL and adopted DOFEC's original 35% phased-in TMDL in May 2019 after notice and comment. *Id.*

On January 14, 2020, New Union filed an action (No. 66-CV-2020) against EPA pursuant to APA § 702. *Id.* CLW also filed an action (No. 73-CV-2020) against EPA on February 15, 2020, also pursuant to APA § 702. *Id.* The cases were consolidated on March 22, 2020 and EPA submitted its administrative record to the district court on July 1, 2020. *Id.* On August 15, 2021, the district court granted summary judgment in favor of New Union, vacating EPA's determination to reject New Union's Lake Chesaplain TMDL and directing EPA to approve the TMDL. *Id.* at 16. The district court simultaneously granted partial summary judgment in favor of CLW regarding EPA's TMDL, and granted partial summary judgment in favor of EPA affirming the validity of the wasteload allocation credit system. *Id.*

Summary of Argument

New Union's challenge to EPA's decision to reject New Union's TMDL for Lake Chesaplain is ripe for judicial review because it satisfies the two-part test promulgated by the Supreme Court in *Abbott*. *Abbott Lab'ys v. Gardner*. 387 U.S. 136 (1967) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). A challenge to an agency action is ripe for judicial review if: (1) the challenge is fit for judicial consideration; and (2) there will be hardship to the parties if judicial consideration is withheld. *Id.* New Union's challenge is fit for judicial review because New Union needs to know if the EPA's TMDL is invalid before it takes significant steps towards implementation, such as reductions to National Pollution Discharge Elimination System (NPDES) permit limits. *See id.* New Union will face hardship if judicial consideration is withheld because New Union would need to expend significant funds to determine permit limits

and ensure compliance with a TMDL that has uncertain legal validity. Because both prongs of the test are satisfied, New Union's challenge is ripe for judicial review. *Id.*

EPA should not have rejected New Union's TMDL because New Union took every step required by the CWA and outlined a plan to restore the water quality of Lake Chesaplain to its ideal state. In its TMDL, New Union chose to measure in terms of annual loadings as it is a scientifically relevant mass over time standard for the pollutant at issue, phosphorus. *Muszynski*, 268 F.3d at 98. Because this is a review of an agency decision, this Court must review EPA's rejection of New Union's TMDL under the *Chevron* two-step analysis. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). New Union's TMDL succeeds at Step One of *Chevron* because the language of the CWA is clear and does not require LA and WLA to be included in the final measurement, just that they are included while formulating the TMDL. New Union did just that. Alternatively, even if this Court finds ambiguity in the text of the CWA, at Step Two, New Union still prevails. When considering the entire scope of the CWA's regulatory framework and the legislative history, New Union's TMDL satisfied all of the requirements and best serves the legislative intent behind the CWA.

If this Court were to uphold EPA's decision to reject New Union's TMDL, then the annual loading reduction phased in over five years does not violate CWA § 303(d). The vast majority of courts have determined that there is sufficient ambiguity in the CWA to permit courts to find that the most scientifically relevant measurement of pollution is permissible. The majority of circuits agree that at Step One in a *Chevron* analysis, a full reading of the CWA statutory framework leaves sufficient ambiguity such that the term of art "total maximum daily loads" needs EPA to fill the gaps with regulation and guidance. 467 U.S. at 842; *see e.g., Am. Farm Bureau Fed'n v. E.P.A.*, 792 F.3d 281 (3rd Cir. 2015). At Step Two, EPA's regulation explicitly permits TMDLs to use the

most scientifically relevant measurements and this decision is well within the deference given to administrative agencies. EPA's decision to adopt a phased in TMDL is permissible under the CWA. A phased TMDL complies with the CWA's statutory and regulatory schemes, best serves the goal of restoring Lake Chesaplain's water quality, and is practical.

Finally, EPA's adoption of a credit for anticipated BMP was a permissible agency action because EPA's 1991 Guidance is a general statement of policy regarding how EPA will enforce 40 C.F.R. § 130.2(i). The 1991 Guidance does not impose rights or obligations on New Union, EPA, or any other party, and does not bind any of the parties to conduct certain activities. Therefore, EPA is not bound by the "reasonable assurance" standard provided in its 1991 Guidance. Even if this Court finds the 1991 Guidance binds EPA, the reasonable assurance standard should be struck down due to EPA's failure to follow the APA's procedural requirements.

Argument

I. New Union's Challenge is ripe for review.

New Union's challenge to EPA's decision to reject New Union's 120 mt annual phosphorus maximum TMDL for Lake Chesaplain (New Union's TMDL) and adopt its own, 35% equal phased reduction TMDL (EPA's TMDL) is ripe for judicial review. New Union's challenge clearly satisfies the two-prong ripeness analysis promulgated in *Abbott*. 387 U.S. at 149. New Union's challenge also satisfies the three additional criteria for judicial consideration of an administrative action promulgated in *Ohio Forestry Ass'n, Inc. v. Sierra Club*. 523 U.S. 726, 733 (1998). Even if there was any doubt regarding the ripeness of New Union's challenge, APA § 704 and *Abbott* create a presumption of judicial review of agency actions and EPA has not met its burden to overcome this presumption. *See* 5 U.S.C. § 704; *Abbott*, 387 U.S. at 141.

A. New Union's challenge to EPA's decision is ripe for review under *Abbott* because the facts satisfy both prongs of the test.

New Union's challenge to EPA's decision to reject New Union's TMDL and adopt its own is ripe for judicial review under the *Abbott* test. 387 U.S. at 149. In *Abbott*, the Supreme Court held that a challenge to an agency action is ripe for judicial review if: (1) the challenge is fit for judicial consideration (fitness); and (2) there will be hardship to the parties if judicial consideration is withheld (hardship). *Id*. Here, EPA's action is fit for judicial consideration and New Union faces a hardship. Thus, New Union's challenge is ripe for review. *See id.*

1. Fitness

A challenge to an agency action is fit for judicial review when the facts before the court sufficiently demonstrate that the agency will likely not modify its action and the challenging party will feel the effects of the agency action in a concrete way. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867–68 (8th Cir. 2013). In determining whether a challenge is fit for review, the court will consider, *inter alia*, whether the regulation, if upheld, will require the regulated parties to change their operations. *Abbott*, 387 U.S. at 153.

Here, New Union's challenge is fit for review because, as the implementing agent of the TMDL, New Union needs to know if EPA's TMDL is invalid before it takes significant steps towards implementation. *See id.* at 152; *Am. Farm Bureau*, 792 F.3d at 293. If New Union decides to implement the TMDL, New Union would be required to immediately reduce phosphorus emissions from point sources through NPDES permit limits and from nonpoint sources through BMP. 40 C.F.R. § 130.2(i). Unlike *City of Arcadia v. E.P.A.*, where the plaintiffs had three years until the first compliance point and could even alter or abolish the compliance points, the first compliance point under EPA's Lake Chesaplain TMDL is immediate, requiring a 7% reduction of

phosphorus emissions in the first year, and not subject to alteration or abolition. 265 F. Supp. 2d 1142, 1157 (N.D. Ca. 2003).

New Union's challenge is also fit for review because it does not have a choice in how to comply with a 35% reduction of point source and nonpoint source phosphorus emissions: it must do so through NPDES permit limits and BMP. This is distinguishable from *City of Arcadia*, where the TMDL was not fit for review because it identified multiple compliance options without mandating the use of any particular measure. *Id.* Since the first compliance point is immediate and not subject to change and New Union's method of compliance is already known, judicial review of EPA's TMDL is fit for review. *See Am. Farm Bureau*, 792 F.3d at 293 (finding the petitioners' pre-enforcement challenge to EPA's TMDL was fit for review because "members of the trade associations will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation").

EPA relies on *Bravos v. Green* to argue New Union's challenge is not fit for review. *See* 306 F. Supp. 2d 48, 53 (D.D.C. 2004). However, *Bravos v. Green* is not analogous to this case. *See id.* In *Bravos*, the plaintiffs challenged EPA's process of using the state's proposed implementation plan for its TMDL, which involved voluntary compliance, as a basis for approving the TMDL. *Id.* at 53–54. In this case, New Union is not challenging the process through which EPA evaluates TMDLs. New Union is challenging EPA's final decision to reject New Union's TMDL and adopt its own. *See id.*

2. Hardship

To determine whether withholding judicial consideration would cause hardship to the challenging parties, the court will consider, *inter alia*, whether changing the regulation after implementation will harm the challenging parties severely and unnecessarily. *Abbott*, 387 U.S. at 153.

New Union would suffer a hardship if judicial consideration of EPA's TMDL were withheld because it is "poised to spend more time, energy, and money in developing an implementation plan" of EPA's Lake Chesaplain TMDL. *Am. Farm Bureau Fed'n*, 792 F.3d at 293–94; *see City of Kennett, Missouri v. E.P.A.*, 887 F.3d 424, 433 (8th Cir. 2018) ("[The affected party] must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money") (internal citation omitted). Although TMDLs are primarily planning devices, EPA's Lake Chesaplain TMDL imposes affirmative duties on New Union: if New Union decides to implement EPA's TMDL, it must do so by incorporating the equal-phased reduction into NPDES permit limits and BMP. *See Abbott*, 387 U.S. at 153.

In fact, New Union's DOFEC has already proposed to modify the permits of the slaughterhouse and the Chesaplain Mills sewage treatment plant to reflect the 35% phosphorus loading reduction. *See id.* The slaughterhouse and sewage treatment plant have already sought administrative review of the proposal. *See id.* If judicial consideration of EPA's TMDL were withheld, New Union would need to invest significant funds into administrative review of the proposal. Further, if the proposal were upheld, New Union would need to expend significant funds into determining permit limits and ensuring compliance. *See Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000) ("Delayed judicial resolution would [. . .] require [petitioners] to gamble millions of dollars on an uncertain legal foundation").

B. New Union's challenge satisfies the additional considerations of *Ohio Forestry*.

In *Ohio Forestry*, the Supreme Court explained that when conducting the *Abbott* analysis, courts should also consider: (1) whether delayed review would cause hardship to the parties, (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. 523 U.S. at 733.

In light of these considerations, New Union's challenge is ripe for judicial review. *See id*. at 723. First, as discussed above, New Union will endure significant hardship if judicial consideration were withheld. *See id.* Second, judicial review of EPA's TMDL will not inappropriately interfere with further administrative action because there is no ongoing or further administrative process with which judicial consideration would interfere. *See id.*; *see also Sierra Club, N. Star Chapter v. Browner*, 843 F. Supp. 1304, 1311 (D. Minn. 1993). EPA took a final agency action when it rejected New Union's TMDL for Lake Chesaplain and adopted its own; and New Union, if it decides to implement EPA's TMDL, has no choice but to do so through point source permit limits and BMP. *See City of Arcadia*, 265 F. Supp. 2d at 1158 (finding judicial consideration would interfere with the Los Angeles Regional Board's plan to revisit the TMDL at the end of the monitoring period).

Third, the Court would not benefit from additional factual development because the Court has before it the entire administrative record EPA used to make a final agency decision regarding the Lake Chesaplain TMDL. *See Ohio Forestry*, 523 U.S. at 733. Given the detailed administrative record, the court would "be in no better position later than [it is] now to decide" the validity of EPA's TMDL and whether the TMDL could have provided more flexibly. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978) (citation omitted).

C. The APA and *Abbott* establish a presumption of judicial review of agency actions.

In addition to satisfying the ripeness factors, New Union's challenge is ripe for judicial review because EPA has not shown through clear and convincing evidence that Congress did not intend for judicial review of agency action of this kind. *See Abbott*, 387 U.S. at 140. The APA and *Abbott* create a presumption of judicial review of agency action. 5 U.S.C. §§ 701–704; *Abbott*, 387 U.S. at 140. To overcome this presumption, EPA must demonstrate that Congress intended to preclude judicial review of the relevant agency action either through express language in the statute

or inferences "drawn from the statutory scheme as a whole." *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)). Neither of the CWA's judicial review provisions expressly preclude judicial review of EPA's decision to approve or disapprove state TMDLs. *See* 33 U.S.C. §§ 1365; 1369(b).

The CWA also does not imply congressional intent to preclude judicial review of EPA approval and disapproval of TMDLs. In *Sackett*, the Supreme Court stated that "if the express provision of judicial review in one section of [the] long and complicated [CWA] were alone enough to overcome the APA's presumption of reviewability for all agency action, it would not be much of a presumption at all." 566 U.S. at 129. Nothing in the CWA suggests that Congress intended to "strong-arm[]" states into accepting EPA's decision to either approve or disapprove its submitted TMDL "without the opportunity for judicial review." *Id.* at 131.

II. New Union reasonably exercised its statutory authority when formulating its TMDL and chose to pursue a water quality improvement plan that best serves the purpose of the CWA, its people, and the state.

New Union took each step required by the CWA and outlined a plan to restore the water quality of Lake Chesaplain to its ideal state. However, EPA and CLW disregard the reality of the situation and instead ask this court to create formalistic roadblocks, harkening back to the days of writs in the court of the King of England.

A. Under the CWA, New Union properly promulgated a TMDL for Lake Chesaplain and EPA's rejection of the TMDL exceeded their authority.

The CWA requires states to set water quality standards for bodies of water within their borders. 33 U.S.C. § 1251. For all waters found to be impaired by statutorily enumerated pollutants, states must limit effluent discharge and restore the desired water quality. 33 U.S.C. § 1313(d)(1)(C). A TMDL represents the greatest amount of a pollutant that can be discharged into a waterbody without causing a violation of the WQS. *Id.*; *Anacostia Riverkeeper, Inc. v.*

Wheeler, 404 F. Supp. 3d 160, 165 (D.D.C. 2019). New Union's TMDL satisfied all CWA requirements.

New Union conducted an extensive scientific investigation of Lake Chesaplain's water quality, and its results are not in dispute. New Union determined the phosphorus loadings from point sources, nonpoint sources, and natural sources. Based on its scientific study, New Union noticed a proposal to implement reductions of phosphorus discharges from point sources and nonpoint sources necessary to restore the lake's water quality. *See* 33 U.S.C. § 1313; *Maryland Dept. of Env't v. Anacostia Riverkeeper*, 134 A.3d 892, 901 (Md. 2016). New Union then used the comments to its proposed TMDL to formulate a flat reduction requirement that would actually make restoration of Lake Chesaplain's water quality feasible. But because the TMDL is based on a flat reduction requirement, rather than a breakdown on sources already included in the study, EPA and CLW ask this Court to further delay the restoration process. EPA's rejection of New Union's TMDL is contrary to clear statutory language and is arbitrary and capricious. This Court should hold that New Union's TMDL is not contrary to law. *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 145, 145 (D.C. Cir. 2006); *Muszynski*, 268 F.3d at 96–97.

1. Under *Chevron* Step One, this Court should allow New Union to reasonably create standards for water quality improvement as the text of the CWA clearly intends for states to be the party primarily responsible for setting pollution limitations.

EPA rejected New Union's TMDL, arguing that because the TMDL did not explicitly include WLA and LA, New Union's interpretation of "total maximum daily load" was contrary to law. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.2(i); *Chevron*, 467 U.S. at 842. EPA's argument, however, fails at Step One of the *Chevron* analysis. *See* 467 U.S. at 842–43.

The *Chevron* analysis applies because this Court is reviewing an administrative agency interpretation of statutory language. *See id.* At Step One, the court must narrowly identify the

"precise question at issue," particularly where the agency has acted pursuant to a general authority to implement a statute through regulation. *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the intent of Congress is expressed ambiguously, then the court may proceed to Step Two. *Id.* at 843. Analysis must begin with the language of the statute itself. Here, the text in question reads:

> *Each State shall establish* for the waters [. . .] in accordance with the priority ranking, *the total maximum daily load, for those pollutants* which the Administrator identifies [. . .] 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.

33 U.S.C. § 1313(d)(1)(C) (emphasis added). The plain language sets clear targets for states as they formulate a TMDL. *Id.* The states must (1) track pollutants identified by the EPA Administrator, (2) calculate the present load, and (3) set limits on the amount of pollution needed to achieve the water quality standard. *See id.* This court must decide if the statutory language above creates sufficient ambiguity such that EPA is empowered to fill in the gaps of the statute. *See id.*

EPA and CLW argue that this Court should automatically move on to Step Two of the *Chevron* analysis because the very nature of the CWA is so expansive and complex that the courts must defer to agencies. This argument is contrary to the holding in other circuits and would set a troubling precedent in this circuit. The D.C. Circuit held, in *Friends of Earth, Inc.*, that just because the CWA is a large statutory scheme, this alone does not permit EPA to get past Step One of a *Chevron* analysis without more. *See* 446 F.3d at 145; *see also Sierra Club v. E.P.A.*, 294 F.3d 155, 161 (D.C. Cir. 2002) (rejecting EPA's argument that the sheer size of the Clean Air Act permitted EPA to regulate unambiguous aspects of the law). Allowing litigants to avoid Step One of a *Chevron* analysis simply because of the size of the statute would permit administrative agencies

to render the plain text of the statute moot. *See Friends of Earth, Inc.*, 446 F.3d at 145. Furthermore, permitting agencies to disregard their congressionally-authorized mandate and rewrite the statutes would corrupt the legislative process. *Id.*

To get past Step One of the *Chevron* analysis, EPA and CLW further argue that this Court should look at the legislative history and regulatory scheme of the CWA. *See* 467 U.S. at 842. This argument also fails to hold water. At Step Two, courts may consider legislative history to the extent that it may clarify the policies framing the statute. *Am. Farm Bureau*, 792 F.3d at 307. But not at Step One. Furthermore, EPA and CLW endorse the regulations defining a TMDL to include WLA and LA on the grounds that it constitutes better policy. *Id.*; *see also* 40 C.F.R. § 130.2(i). But that interpretation exceeds the authority delegated to EPA by Congress. "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of Earth, Inc.*, 446 F.3d at 145 (quoting *Engine Mfrs. Ass'n v. E.P.A.*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

Section 1313(d) requires states to study the total amount of pollutants entering impaired bodies of water and create effective limitations to restore the water qualities. *See* 33 U.S.C. § 1313(d). New Union studied the sources of phosphorus entering Lake Chesaplain and determined a flat percentage reduction was the best available and feasible remedial step. EPA and CLW argue that because New Union's TMDL did not further breakdown the limitations as requested by EPA's regulation, it fails to comply with EPA's interpretation of "total maximum daily load." *See id.*; 40 C.F.R. § 130.2(i). This interpretation is contrary to the plain language of the statute and common sense. Accordingly, this Court should reject EPA and CLW's argument at Step One of the *Chevron* analysis. *See* 467 U.S. at 842; *Friends of Earth, Inc.*, 446 F.3d at 145.

2. Even if the CWA is ambiguous, EPA's rejection of the New Union TMDL was arbitrary and capricious under *Chevron* Step Two.

Assuming *arguendo* that the statutory text does not by itself resolve the matter, EPA's rejection of New Union's TMDL constitutes an arbitrary and capricious decision. *See Sierra Club*, 294 F.3d at 163. New Union's TMDL would improve the water quality of Lake Chesaplain by setting limits on the amount of phosphorus emanating from point sources and nonpoint sources, meeting the requirements of the CWA. EPA's rejection of the New Union's TMDL is arbitrary and capricious because it is contrary to the scientific record. *See Am. Farm Bureau*, 792 F.3d at 307; *Sierra Club*, 294 F.3d at 163; *Muszynski*, 268 F.3d at 96–97.

If a court determines that Congress has left gaps in the statutory scheme and thereby delegated the implementation of the law to the agency, the court proceeds to *Chevron* Step Two. 467 U.S. at 843. Under this step, agency action is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Courts must consider whether the agency made "a reasonable policy choice" in its interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005) (quoting *Chevron*, 467 U.S. at 845). At Step Two courts may consider legislative history. *Am. Farm Bureau*, 792 F.3d at 307.

EPA and CLW argue that EPA's regulation defining TMDL is controlling, but this interpretation gets lost in the trees and fails to see the forest. *See* 40 C.F.R. §§ 130.0 (program summary and purpose); 130.2(i) (definition of total maximum daily load). EPA defines TMDL as "[t]he sum of the individual WLA for point sources and LA for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). But in light of the full scope of the regulatory framework, it is clear that TMDLs are vehicles for states to set guidelines to restore water quality. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("[The CWA] anticipates a partnership between the States and

the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'") (quoting 33 U.S.C. § 1251(a)); *see also* 40 C.F.R. §§ 130.0; 130.7; *Am. Farm Bureau*, 792 F.3d at 308.

Even EPA's own regulation outlining the CWA's purpose endorses the cooperative federalism Congress clearly intended: the CWA "provides the authority for a consistent national approach for maintaining, improving and protecting water quality while allowing States to implement the most effective individual programs." 40 C.F.R. § 130.0. Further, another EPA regulation states that "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS." 40 C.F.R. § 130.7(c)(1). New Union's TMDL is the most effective program because it established sufficient reductions to attain and actually maintain the desired WQS. *See id.*; *see also Am. Farm Bureau*, 792 F.3d at 309.

In New Union's 2016 Supplemental Report, the New Union DOFEC studied the waters and calculated the annual phosphorus loadings which totaled 180 mt. This included 61.9 mt from *point sources* (WLA) and 85.8 mt from *nonpoint sources* (LA). *See* 40 C.F.R. § 130.2(g) (defining LA as a portion of a water's loading capacity attributed to nonpoint sources); 40 C.F.R. § 130.2(h) (defining WLA as a portion of a water's loading capacity attributed to point sources). Having studied the levels of phosphorus pollution and taking into consideration the comments on the proposed TMDL from potentially-regulated parties, New Union's TMDL set the desired phosphorus annual maximum to 120 mt, consistent with the Chesaplain Commission's scientific findings in its Supplemental Report. This reduction—undisputed by EPA and CLW—would achieve the desired water quality improvement. Based on this regulatory framework, EPA should have approved New Union's TMDL because it has the potential to account for WLA and LA,

establishes the phosphorus decrease necessary to restore water quality, and sets reasonably achievable goals. *See Am. Farm Bureau*, 792 F.3d at 309; *Muszynski*, 268 F.3d at 96–97.

Even though New Union calculated the needed reduction and set attainable goals through percentage reductions, EPA and CLW argue that the TMDL should be discarded because it did not explicitly include WLA and LA. Common sense, however, shows that New Union constructively considered WLA and LA as the TMDL measured point source and nonpoint source pollution levels. Similar to a cap-and-trade system, New Union's TMDL will ensure that those with the lowest costs to reduce pollution do so, thereby increasing the likelihood of actually restoring Lake Chesaplain's water quality. The New Union TMDL satisfied CWA requirements and therefore, this Court should hold EPA's rejection of the TMDL was arbitrary and capricious. *See Am. Farm Bureau*, 792 F.3d at 309; *Muszynski*, 268 F.3d at 96–97.

B. EPA's rejection of New Union's TMDL and adoption of its own TMDL is contrary to the structure of the CWA and, if upheld, would grant EPA authority in excess of that intended by Congress.

EPA and CLW have a tough task: to convince this Court to disregard the undisputed scientific record and reject New Union's TMDL as it does not achieve the results EPA and CLW desire in the way that they desire. But that is not the authority Congress granted EPA with respect to the CWA. *See Am. Farm Bureau*, 792 F.3d at 288. The CWA exists within a "cooperative federalism" framework. *Id.* at 302. CWA assigns the states and EPA with distinct yet complementary roles to clean the nation's waters. *See* 33 U.S.C.A. § 1313 ("Each *State shall submit* to the Administrator from time to time [. . .] for his approval the waters identified and the loads established" and "*[t]he Administrator shall either approve or disapprove* such identification and load") (emphasis added); 40 C.F.R. § 130.0; *Am. Farm Bureau*, 792 F.3d at 288.

This approach requires states to implement plans to meet federally-set thresholds to improve the quality of impaired waters, but reserves the responsibility for determining the most effective path to the individual states. 40 C.F.R. § 130.0 ("[T]his regulation provides the authority for a consistent national approach for maintaining, improving and protecting water quality while *allowing States to implement the most effective individual programs*. The process is implemented jointly by EPA, the States, interstate agencies, and areawide, local and regional planning organizations.") (emphasis added). Permitting EPA to usurp the states' authorities to determine the best methods for restoring their waters would be contrary to the intent of the CWA and raise alarming federalism questions. *Am. Farm Bureau*, 792 F.3d at 310. Based on the roles set for the states and EPA, EPA cannot disregard the TMDL of the states without properly finding it is insufficient to achieve the desired restoration goals. Therefore, this Court should reject EPA's claims and approve, as a matter of law, New Union's TMDL. *See id.*

III. The TMDL for the Lake Chesaplain Watershed is valid under CWA § 303(d).

Not all pollutants behave the same way and the CWA must be read such that the TMDLs are effective tools to attain and maintain desired WQS. *See* 33 U.S.C. § 1313(d)(1)(C); *Am. Farm Bureau*, 792 F.3d at 296. Depending on the pollutant's chemical structure, the water temperature, presence of other chemicals, as well as numerous additional variables, the effect on the waters of discrete pollutants changes. Understanding the inherent need for flexibility to tackle the challenges posed by restoring the nation's waters, "CWA contemplates the establishment of TMDLs for an open-ended range of pollutants that are susceptible to *effective* regulation by such means." *Muszynski*, 268 F.3d at 98 (emphasis added). In its TMDL, New Union chose to measure in terms of annual loadings because it is a scientifically relevant mass over time standard for the pollutant at issue, phosphorus. *Id.*

A. This Court should hold that CWA permits certain pollutants to be measured in scientifically relevant mass over time figures.

EPA's Lake Chesaplain TMDL accurately measures the phosphorus entering the water and sets realistic limitations that will lead to the restoration of the water quality, as desired by all parties. This scientific conclusion is undisputed by the parties. CLW, however, argues that because the TMDL measures phosphorus using annual pollution loading reductions, rather than daily load reductions, this Court should invalidate the TMDL.

In a question as old as clean water, all three parties hoping to see improved water quality argue about which mass over time measurement is permissible under the CWA: annual permissible loads or daily permissible loads. EPA's decision to adopt an annual loading reduction requires the courts to conduct a *Chevron* analysis. 467 U.S. at 842. Other circuits have addressed this issue, with the majority of courts having determined that there is sufficient ambiguity in the CWA to permit courts to find that the most scientifically relevant measurement of pollution is permissible. *See Muszynski*, 268 F.3d at 98 ("If the language of the statute is as plain as [appellant] urges, [appellant's] reading of the statute easily prevails. [. . .] We believe, however, that the term "total maximum daily load" is susceptible to a broader range of meanings."); *see, e.g., Am. Farm Bureau*, 792 F.3d at 296; *Upper Blackstone Water Pollution Abatement Dist. v. E.P.A.*, 690 F.3d 9, 14 n.8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Friends of Earth v. EPA*, 333 F.3d 184, 186 n.5 (D.C. Cir. 2003); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017, 1021 n.2 (10th Cir. 2001); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). *But see Friends of Earth*, 446 F.3d at 144 (holding the opposite view).

The majority view is straightforward. The statutory text appears clear at first glance but in context of the statute, the plain language is sufficiently ambiguous to reach *Chevron* Step Two,

and at Step Two, courts provide EPA with sufficient deference to permit the use of relevant alternative mass over time measurements. *Muszynski*, 268 F.3d at 98; *see* 40 C.F.R. § 130.2(i).

1. The vast majority of circuits agree, the CWA left sufficient ambiguity to permit TMDLs to advance past Step One of a *Chevron* Analysis.

Under Step One, this Court must determine whether the statute unambiguously forecloses EPA's interpretation and hence, the agency is not entitled to deference. *See Chevron*, 467 U.S. at 842. Under the CWA, each state must estimate:

> *the total maximum daily thermal load* required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates *shall take into account the normal water temperatures, flow rates, seasonal variations*, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and *shall include a margin of safety* which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

33 U.S.C. § 1313(d)(1)(D) (emphasis added). EPA's implementing regulations note 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).

In *Am. Farm Bureau*, the Third Circuit lays out the majority view, stating that although intuitively, the statutory text and more specifically, the term "total maximum daily loads," appears to set a clear requirement, a further reading of the CWA leaves pure textualists wanting. 792 F.3d at 298. For example, the CWA is silent on other vital aspects, such as how to formulate TMDLs and what TMDLs must measure. *Id.* The statute only expressly requires TMDLs to be set 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[.]" 33 U.S.C. § 1313(d)(1)(C). The Third Circuit noted EPA's regulations are narrowly tailored to clear up the existing ambiguity in the plain language of the statute. *Am. Farm Bureau*, 792 F.3d at 296; *see also Chevron*, 467

U.S. at 842. "The agency has chosen to lay out in detail (1) how and why it arrived at the number it chose; (2) how it thinks it and affected jurisdictions will be able to achieve that number; (3) why that number is 'necessary to implement the applicable water quality standard[ ];' (4) when it expects the TMDL to achieve the applicable water quality standard; and (5) what it will do if the water quality standard is not met." *Am. Farm Bureau*, 792 F.3d at 298 (quoting § 1313(d)(1)(C)) (citations omitted). If this Court stopped at the plain text, the ambiguity of "total maximum daily load" would prevent effective implementation of the CWA. *See id.* For these reasons, a vast majority of circuits have been unwilling to confine such far-ranging expertise so narrowly. *Muszynski*, 268 F.3d at 98–99.

There is only one instance where a circuit held that the phrase "total maximum daily load" was unambiguous. In *Friends of Earth, Inc.*, the D.C. Circuit held that the word "daily" required all TMDLs to be measured accordingly, without regard to scientific merit. 446 F.3d at 145. While this is one possible reading, there are numerous reasons this Court can and should reach a different conclusion. *See id.* at 144. As discussed above, looking at the full context of the CWA reveals more ambiguity than an initial reading of a specific subsection. *See Am. Farm Bureau*, 792 F.3d at 298; *Muszynski*, 268 F.3d at 98 ("overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA"). Further, this Court should also consider *Muszynski*, where the Second Circuit held that limiting measurements of all pollutants to daily loads would be "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." 268 F.3d at 99. Based on the summation of persuasive case law from the other circuits, and absurd results that would occur if otherwise applied, this Court should determine there is sufficient ambiguity to resolve this issue at *Chevron* Step Two. 467 U.S. at 844.

2. EPA's regulations fill the gaps left by Congress and thereby permit TMDLs to set annual pollution limitations.

If the statutory text is ambiguous, courts proceed to Step Two of a *Chevron* analysis. At Step Two, agency interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* "When the agency interpretation faithfully fills the gap that Congress created [. . .], we do not ask whether it is the best possible interpretation of Congress's ambiguous language. Instead, we extend considerable deference to the agency and inquire only whether it made 'a reasonable policy choice' in reaching its interpretation." *Am. Farm Bureau*, 792 F.3d at 298 (quoting *Brand X*, 545 U.S. at 986). All courts that have reached Step Two on this question have concluded "EPA's interpretation falls within the gap created by Congress." *Id.*; *see* 40 C.F.R. § 130.2(i) ("TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure").

Since the vast majority of circuits agree that the plain text of the CWA leaves sufficient ambiguity to proceed to *Chevron* Step Two, this Court should provide EPA with deference because the decision to approve an annual TMDL was based on the scientific record before the agency, and thus was not arbitrary or capricious. *See Muszynski*, 268 F.3d at 98–99; *Am. Farm Bureau*, 792 F.3d at 298 ("These factors suggest that Congress wanted an expert to give meaning to the words it chose, and, as we explain below, we believe EPA's interpretation falls within the gap created by Congress"). This conclusion is not only the most faithful interpretation of the statute but is also the best policy to clean up Lake Chesaplain. Accordingly, this Court should reverse the district court's determination and remand consistent with the rule set by a majority of circuits. *See Muszynski*, 268 F.3d at 98–99*; see also Am. Farm Bureau*, 792 F.3d at 298; *Meiburg*, 296 F.3d at 1025.

B. Phased TMDLs are permissible under the CWA and best serve the goal of restoring Lake Chesaplain's water quality.

The decision to phase in the Lake Chesaplain TMDL over a five-year period is permissible under 33 U.S.C. § 1313(d). Phased TMDLs are acceptable for achieving WQS because they are not expressly precluded by the CWA, EPA has issued guidance for phased TMDLs, and EPA has approved phased TMDLs on numerous occasions. *See e.g., City of Arcadia v. State Water Res. Control Bd.*, 38 Cal. Rptr. 3d 373, 390 (Cal. Ct. App. 2006) (approving a TMDL set to be phased in over fourteen years).

EPA's phased TMDL, if implemented, would likely "attain and maintain the applicable water quality standard." U.S. Envtl. Prot. Agency, OFF. OF WATER, EPA 440/4-91-001, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991) [hereinafter *1991 Guidance*]. U.S. Envtl. Prot. Agency, OFF. OF WATER, MEMORANDUM: CLARIFICATION REGARDING "PHASED" TOTAL MAXIMUM DAILY LOADS (2006) [hereinafter *2006 Phased TMDL Memorandum*]. EPA states that a "TMDL under the phased approach will establish the schedule or timetable for the installation and evaluation of point and nonpoint source control measures, data collection, the assessment for water quality standards attainment, and, if needed, additional predictive modeling." 1991 Guidance. EPA further provides that phased TMDLs would be useful when there is data uncertainty. 2006 Phased TMDL Memorandum. The data for Lake Chesaplain is uncertain because the Union River watershed, which affects Lake Chesaplain's water quality, is changing significantly and consistently. *See id.* In the 1990s alone, ten CAFOs and a slaughterhouse were added to the watershed, and home construction boomed. Because of the high probability that additional point and nonpoint sources will be added to the watershed, the data regarding phosphorus emissions into Lake Chesaplain is uncertain and a phased TMDL is the appropriate approach. *See id.*

In light of this data uncertainty regarding Lake Chesaplain's phosphorus levels, the phased TMDL allows New Union to revisit its NPDES permit limits and BMP each year and evaluate whether they need to be adjusted to achieve the next compliance point and reach a 35% reduction of phosphorus by year five. Since EPA's TMDL would require a 35% reduction across all point and nonpoint sources and not a specific percentage reduction for each source, if another source is added to the watershed, like the slaughterhouse or ten CAFOs in the 1990s, New Union would need to collect data on the impact of the new point or nonpoint source on phosphorus emissions and possibly adjust its permit limits and BMP to meet the 35% reduction by the fifth year. *Id.*; *see Muszynski*, 268 F.3d at 95 ("developing TMDLs for a large watershed can be data intensive and a phased approach is often used to protect the waterbody while additional information is collected.") (internal quotation omitted).

The phased TMDL also makes common sense because it gives regulated parties time to invest in technology and adopt practices that decrease phosphorus emissions into Lake Chesaplain. *See State Water Res. Control Bd.*, 38 Cal. Rptr. 3d at 390. By requiring a 35% reduction to be completed over five years instead of a 35% reduction to be completed all at once, the phased TMDL softens the blow of the costs of compliance by providing regulated parties with time to gradually incorporate these costs into their financial plans. *Cf. id.* The slaughterhouse and sewage treatment plant's challenge to the DOFEC's proposed permit limits demonstrates that the cost of complying with a TMDL is likely to be determinative of the success or failure of the TMDL in reducing phosphorus in Lake Chesaplain. Therefore, softening the blow of the costs of compliance by phasing in phosphorus reductions over five years will increase the likelihood of actually achieving the WQS for Lake Chesaplain.

IV. EPA's adoption of a credit system in the TMDL for anticipated BMP was not arbitrary or capricious.

TMDLs use a permitting system for point sources that places a strict cap on the amount of discharge a point source can contribute to a waterbody. 40 C.F.R. § 130.7(a). Additionally, TMDLs must take into account pollution stemming from nonpoint sources, such as sewer systems and agricultural runoff. 40 C.F.R. § 130.2(i). If pollution from nonpoint sources increases, the amount of pollution point sources can contribute to a waterbody decreases. *See id.*

One method to reduce nonpoint source pollution is for states to institute BMP. "If [BMP] or other nonpoint source pollution controls make more stringent [LA] practicable, then [WLA] can be made less stringent." 40 C.F.R. § 130.1(i). Therefore, if a state introduces BMP for nonpoint sources in an effort to make nonpoint source pollution controls more stringent, then EPA can issue credits to the state. The state could then use those credits to increase the cap on point sources, allowing for a higher threshold of pollution in each point source's permit. 1991 Guidance.

CLW challenges EPA's issuance of credits to New Union for anticipated BMP, arguing that EPA's decision was arbitrary and capricious or an abuse of discretion. CLW argues there is no reasonable assurance that the nonpoint sources will implement the BMP, thereby rendering the TMDL unlikely to achieve the WQS. CLW bases its argument upon "reasonable assurance" language in the 1991 Guidance which states:

> When establishing permits for point sources in the watershed, the record should show that in the case of any credit for future nonpoint source reductions, (1) there is *reasonable assurance* that nonpoint source controls will be implemented and maintained or (2) that nonpoint source reductions are demonstrated through an effective monitoring program.

(emphasis added). The district court properly rejected CLW's argument that the 1991 Guidance binds EPA. Under CLW's theory, EPA arbitrarily and capriciously issued credits to New Union because the adopted Lake Chesaplain TMDL does not provide reasonable assurance

that the BMP will be implemented and maintained. However, CLW's theory fails because the 1991 Guidance is merely a general statement of policy and is not binding on EPA, New Union or any other party.

A. Administrative guidance falls into one of three categories: (1) general statement of policy, (2) legislative rule, or (3) interpretive rule.

Courts reviewing agency guidance must determine if the guidance is (1) a general statement of policy, (2) imposes a legislative rule, or (3) creates an interpretative rule. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Each categorization imposes different requirements and obligations on the administrative agency. *See id.*

A general statement of policy entails an agency explaining how it will enforce a statute or regulation. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014). For example, in *Cement Kiln Recycling Coal. v. E.P.A.*, the D.C. Circuit held a general statement of policy does "not impose legally binding requirements on EPA, state, or the regulated community, and may not apply to a particular situation based on the specific circumstances of the combustion facility." 493 F.3d 207, 227 (D.C. Cir. 2007). General statements of policy provide suggestions for implementations but do not create legally binding requirements. *See id.*

Guidance may also create a legislative rule. A legislative rule is "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 251–52. However, legislative rules must go through a notice and comment period under the APA. *See* 5 U.S.C. § 553.

The final categorization of guidance is an interpretive rule. *See Am. Mining Cong.*, 995 F.2d at 1109. Guidance falls into this category when "[a]n agency action … merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 251–52. Guidance is an

interpretative rule when none of four factors are present: (1) the rule functions as a basis for enforcement, a basis to confer benefits, or to ensure the performance of duties; (2) the agency published the rule in the Code of Federal Regulations; (3) the agency explicitly invoked its legislative authority; (4) the rule effectively amends a prior legislative rule. *Am. Mining Cong*, 995 F.2d at 1112.

To ascertain the appropriate categorization of administrative guidance, courts ask: (1) whether the guidance imposes any rights or obligations upon the parties, and (2) whether the guidance genuinely leaves the agency and its decision makers freedom to exercise discretion. *See Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 382 (D.C. Cir. 2002). Courts consider three additional factors: "(1) The agency's own characterization of its action, (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Id.* (citing *Molycorp, Inc. v. E.P.A.*, 197 F.3d 543, 545 (D.C. Cir. 1999)). Courts place the most weight on whether the guidance imposes any rights or obligations upon the parties and whether the action has binding effects on private parties or on the agency. *Id.* at 383.

B. Courts give substantial deference to agency categorization of its own guidance and EPA views the 1991 Guidance as a general statement of policy.

Under *Chevron*, an agency interpreting its own regulation and providing further guidance on how to comply with the regulation, is afforded substantial deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). In *Shalala*, the Secretary of Health and Human Services (HHS) interpreted regulations issued by HHS in order to clarify particular reimbursement provisions in the Medicare regulation. *Id.* In determining whether the Secretary's interpretation of HHS' own regulations was arbitrary and capricious, the Supreme Court explained, "[w]e must give substantial deference to an agency's interpretation of its own regulations." *Id.* The Court continued,

"[o]ur task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (citations omitted).

Here, EPA interpreted its own regulations and provided guidance related to the TMDL process. *See id.* When reviewing EPA's interpretation of its own regulations, this Court must grant EPA the same "substantial deference" to its interpretation of its own regulation. *See id.* EPA's interpretation of 40 C.F.R. § 130.1(i) is not plainly erroneous or inconsistent with the regulation because the regulation provides for the application of credits, but does not state how the credit process will operate nor what EPA should use to evaluate the application of credits to a state's TMDL.

Importantly, EPA explicitly says in its 1991 Guidance that the guidance is not binding: "[t]his 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." 1991 Guidance. Agency documents that do not impose legally binding requirements on any entities cannot be binding on any of the parties individually. *See Gen. Elec. Co.*, 290 F.3d at 382; *Molycorp, Inc.*, 197 F.3d at 545. When the pages of guidance documents are "replete with words of suggestion[,] its provisions are described as recommendations, that permitting authorities are encourage[d] to consider[;]" they are not binding on any of the parties. *Cement Kiln Recycling Coal.*, 493 F.3d at 227 (citation omitted).

The language provided at the beginning of the document discloses to any reader that the information contained within is not binding and does not create any legal rights or obligations. *See id.* Furthermore, the 1991 Guidance contains a variety of measures that states may or should

institute in order to take advantage of the credit program. *See id*. The 1991 Guidance's numerous uses of "should" and "may" illustrate that the document does not dictate requirements, but rather, provides recommendations. *See id.*

Even if this Court does not grant substantial deference to EPA's categorization of its own 1991 Guidance, the 1991 Guidance should still be considered a general statement of policy because it merely explains how EPA will enforce the TMDL process, including an explanation of how the agency makes determinations about the application of credits when BMP are instituted for nonpoint sources. *See id*. The "reasonable assurance" language in the 1991 Guidance does not appear anywhere in 40 C.F.R. § 130.2(i), but rather is agency terminology used to explain what it will look for when evaluating whether credits should be applied.

Additionally, the 1991 Guidance is a general statement of policy because it does not create any rights or obligations on the state with regard to the application of a credit. *See Gen. Elec. Co.*, 290 F.3d at 382. The approval of a state's TMDL does not depend upon the application of credits or not. The state determines whether or not it will implement BMP, the method of implementation, and the method of overseeing the implementation. EPA allows the state to take advantage of the credit process by implementing BMP. States are not required nor do they have any obligation to seek credits for instituting BMP for nonpoint sources. Accordingly, this Court should affirm the district court's holding. *See id.*

C. Even if this Court overrides EPA's categorization of the guidance and determines it is a legislative rule, the TMDL's credit system survives judicial review.

1. If the guidance is not a general statement of policy, the rule must be struck down under the APA.

If the 1991 Guidance is a legislative rule, then it is required to have gone through notice and comment rulemaking. *See Am. Mining Cong.*, 995 F.2d at 1112. If this Court views the 1991 Guidance as a legislative rule, then this Court must strike down the 1991 Guidance as an

improperly passed legislative rule because it violated the procedural requirements of the APA. *See* 5 U.S.C. § 553. EPA must publish a notice of proposed rulemaking, give interested parties an opportunity to comment, and hold an informal hearing. *See id.*

For example, in *General Elec. Co.*, the D.C. Circuit found an EPA guidance constituted a legislative rule and then struck down the legislative rule for failure to notice the proposed rulemaking. 290 F.3d at 385. The court overturned the rule and provided interested parties an opportunity to comment and hold informal hearings. *Id.* The 1991 Guidance issued by EPA was not published with a notice of proposed rulemaking, did not give interested parties an opportunity to comment, and did not hold an informal hearing about the reasonable assurance standard. *See id.* Without following any of the steps required under the APA, this Court must strike down the reasonable assurance standard if it determines the 1991 Guidance is a legislative rule. *Id.*

Notably, the 1991 Guidance is also not an interpretive rule. Guidance can only be an interpretive rule when it satisfies any of the four factors listed in *Am. Mining Cong*. 995 F.2d at 1112. The first factor is whether the rule functions as a basis for enforcement, *a basis to confer benefits*, or to ensure the performance of duties. *Id.* Because the 1991 Guidance does confer benefits, it cannot be an interpretive rule. *See id.*

2. Alternatively, if the reasonable assurance standard does apply, the TMDL's credit system meets this standard.

The BMP New Union planned to institute went through notice and comment from the nonpoint sources. Although the nonpoint sources may have raised concerns about the implementations of the new guidelines and requirements, it is still reasonably assured that New Union can institute the BMP over the course of the phase in period. "Assurances may include the application or utilization of local ordinances, grant conditions, or other enforcement authorities." 1991 Guidance. New Union does, however, need time to implement these assurances. *See id.*

EPA approved the TMDL in May of 2019. The present action was filed eight months after the approval of the TMDL. New Union must be given sufficient time to institute requirements through legislation and local ordinances to incentivize and require nonpoint sources to comply with the TMDL. *Cf. City of Arcadia*, 256 F. Supp. 2d at 1157. New Union is fully behind cleaning up Lake Chesaplain and must be given ample time to institute measures to implement the TMDL. *See id.* This is precisely why the TMDL has a five-year phase in period.

Conclusion

For the reasons stated above, Appellee THE STATE OF NEW UNION respectfully requests that this Court affirm the district court's grant of summary judgement for New Union and remand to the district court consistent with that decision.