TEAM 7

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

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 in consolidated case nos. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

Brief of Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The Environmental Protection Agency ("EPA") appeals from an Opinion and Order granting partial summary judgment for plaintiff Chesaplain Lake Watch ("CLW") and the State of New Union, entered August 15, 2021, in the United District Court for the District of New Union, No. 66-CV-2020 and No.73-CV-2020 (consolidated cases). The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. All parties filed timely notice of appeal. This Court has proper jurisdiction over this appeal from the District Court's final decision pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Is EPA's approval of New Union's original TMDL proposal ripe for judicial review when the State has not yet implemented any portion of the TMDL and ongoing administrative hearings are delaying issuance of new NPDES permits?

II. Is EPA's longstanding regulatory definition of "total maximum daily load" as a sum of allocations from various sources, and its corresponding requirement that those details be included in the TMDL document which serves as the informational basis for bringing "impaired waters" in line with a state's water quality standards, correct?

III. Is EPA's adoption of the Lake Chesaplain TMDL, consisting of annual pollution load reduction to be phased in over five years, in violation of the CWA Section 303(d) when the statutory text only states TMDLs shall be established at a level necessary to meet water quality standards?

IV. Does EPA's adoption of a credit for anticipated BMPs allow for reduction of the stringency of wasteload allocations when TMDLs do not require implementation?

STATEMENT OF THE CASE

A. The Clean Water Act and the TMDL

The Clean Water Act ("CWA") is a comprehensive regulatory program aimed at curbing the discharge of pollutants into the waters of the United States, thus ensuring the "chemical, physical, and biological integrity" of those waters. 33 U.S.C. § 1251(a). Congress committed administration of the Act to EPA, though with the clear intention for coordination with state governments in recognition of states' traditional role in addressing water pollution. *See* 33 U.S.C. §§ 1251(b), (d).

Section 303 of the CWA sets out the process for establishing water quality standards ("WQSs"), directing states to adopt WQSs consisting of a water's designated uses and the water quality criteria – either numeric or narrative – necessary to support those uses. 33 U.S.C. §§ 1313(a); (c)(2)(A)-(B); 40 C.F.R. § 131.3(b). Where the full implementation of permit limitations on point source pollution is incapable of bringing a water body into attainment of its state's WQSs, the state must identify that water body to EPA as "impaired." 33 U.S.C. § 1313(d)(1)(A). After this identification, the state must establish the "total maximum daily load" of a pollutant "necessary to implement the applicable [WQSs]." 33 U.S.C. § 1313(d)(1)(C). In accordance with longstanding EPA regulation, a state's TMDL[1] proposal must identify the "wasteload allocations" (attributed to point sources) and "load allocations" (attributed to nonpoint and natural sources) that contribute to that sum figure. 40 C.F.R. §§ 130.2(g)-(i). Where a TMDL proposes Best Management Practices ("BMPs") for nonpoint sources, any anticipated reductions may be "credited" to allow the state to make wasteload allocations less stringent. *Id.*

[1] Within the remainder of this filing, the phrase "total maximum daily load" is used to connote the statutory and regulatory phrase, while "TMDL" is used to refer to the actual document.

States' TMDL proposals – like all aspects of the WQSs process – are subject to review by EPA, and the agency retains the authority to reject them. 33 U.S.C. § 1313(d)(2). Should they do so, the Act then compels EPA to issue its own TMDLs for such waters as *they* "determine[] necessary to implement the [WQSs]." *Id.*

B. Decline in water quality of the Lake Chesaplain Watershed, and government response

The State of New Union's WQS designated Lake Chesaplain as a Class AA water – the highest quality classification available – to reflect designated uses of drinking water source, primary contact recreation, and fish propagation and survival. *Chesaplain Lake Watch v. EPA*, No. 66-CV-2020 RNR (D.N.U. August 15, 2021) ("Order") at 8. However, the Lake's formerly pristine waters are now contending with increasing sources of pollution, including ten large-scale hog CAFOs (concentrated animal feeding operations), the Chesaplain Mills slaughterhouse, a wave of new residences (and accompanying septic systems), and the Chesaplain Mills sewage treatment plant. *Id.* at 7. As a result, the Lake's water quality has declined, jeopardizing the area's biological resiliency and recreational value. *Id.*

In 2008, New Union created the Lake Chesaplain Study Commission ("Commission") to assess the extent and root causes of the decline. *Id.* at 8. That assessment, issued in 2012, made clear that the various indications of decline – eutrophication, decrease in dissolved oxygen levels, objectionable odors, decreased water clarity – were attributable to excessive amounts of the nutrient phosphorus in the Lake. *Id.* The Commission found that phosphorus levels in the Lake reached as high as 0.034 mg/l, nearly 250 percent of the desired level of 0.014 mg/l, which the New Union Division of Fisheries and Environmental Control ("DOFEC") subsequently adopted as the necessary numeric water quality criteria for Class AA WQSs in 2014. *Id.* At this

time, New Union also decided to include the Lake on its impaired waters list (though without an accompanying TMDL), a submission which EPA approved. *Id.*

In 2015, at the urging of Chesaplain Lake Watch ("CLW"), the State commenced a rulemaking proceeding to establish a TMDL for the Lake. *Id.* As part of this process, the Commission completed a second report to supplement its 2012 findings. Issued in 2016, the supplemental report concluded that, in order to reach the desired 0.014 mg/l level, annual total phosphorus loadings would have to be reduced from an existing 180 mt to 120 mt. *Id.* The Commission's report calculated that of the existing 180 mt of annual phosphorus loadings, approximately 34 percent were attributable to point sources (21.4 percent to the Chesaplain Slaughterhouse, and 13 percent to the Chesaplain Mills STP, respectively), 48 percent to nonpoint sources (30.5 percent to the CAFOs, 6.4 percent to septic tank inputs, and 10.7 percent to other agricultural sources, respectively), and 18 percent to natural sources. *Id.* at 8-9. While neither of the point sources had permit limits for phosphorus, nonpoint sources – particularly the hog CAFOs – were found to contribute the bulk of non-natural phosphorus loadings. *Id.* at 9.

Neither the findings of the Commission's 2012 report, nor the scientific conclusions in the Commission's 2016 supplemental report, have been subject to substantive challenge. *Id.*

Consistent with the Commission's findings, in October 2017, DOFEC published a TMDL proposal for notice and comment. *Id.* The State's TMDL proposal set a goal of 35 percent reduction of phosphorus discharges over the course of five years, with a suggested annual 7 percent reduction from the first year's 180 mt baseline. *Id.* Both point and nonpoint sources would contribute to the reductions, potentially through permit limitations for point sources and encouragement of BMP programs among nonpoint sources (e.g., modified feeds for agricultural sources, and increased inspection and maintenance of septic tanks). *Id.*

While the Commission's scientific conclusions were not challenged, the State's TMDL proposal encountered varied opposition (forecasting the challenges brought by New Union and CLW in this litigation). *Id.* at 9-10. In response, DOFEC adopted a new TMDL, in July 2018. *Id.* at 10. This alternative TMDL abandoned incorporation of the specific wasteload (point source) and load (nonpoint source) allocations calculated by the State's Commission, instead substituting a single "maximum" number – 120 mt – for the entire Chesaplain Watershed. *Id.*

EPA rejected this proposal, and, after requisite notice and comment, adopted DOFEC's original TMDL proposal (renaming the framework of suggested allocations and practices the "Chesaplain Watershed Implementation Plan") in May 2019. *Id.*; 33 U.S.C. § 1313(d)(2). By this time, the NPDES permits for both the slaughterhouse and the sewage treatment plant had expired, and while both filed timely applications for renewal, neither has been yet renewed. Order at 10. Both facilities have now sought administrative hearings on proposed limits on phosphorus discharges, and neither is currently subject to such limits. *Id*. In addition, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources. *Id.*

C. Procedural History

Pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, both New Union (No. 66-CV-2020) and Chesaplain Lake Watch (No. 73-CV-2020) brought suit to challenge EPA's adoption of the State's October 2017 TMDL proposal in place of the July 2018 proposal. *Id.* New Union sought a declaration that EPA's rejection of its July 2018 TMDL proposal, as well as the regulation, 40 C.F.R. § 130.2(i), upon which EPA based its rejection, is invalid. *Id.* at 5. CLW sought a declaration that the TMDL subsequently adopted by EPA – specifically its proposals to phase in annual loading limits over five years and to accept reductions by BMPs as "credits" for point source reductions without "reasonable assurances" – is insufficiently protective, contrary to law, arbitrary and capricious, and unsupported by the

administrative record. *Id.* The District Court for the District of Union granted unopposed motions to consolidate the actions. *Id.* at 10. All three parties filed cross-motions for summary judgment. *Id.* at 5. EPA argued that, notwithstanding the fact that neither of the two complaints were ripe for judicial review, its decision to reject the July 2018 TMDL and adopt the October 2017 proposal was consistent with the CWA and merited by the scientific record. *Id.* at 11.

The district court interpreted the more detailed provisions of New Union's October 2017 TMDL – adopted by EPA – as akin to an implementation plan. *Id.* at 12-13. Based on this finding, it first held that challenges to this TMDL were ripe because the TMDL "contemplates specific NPDES permit limits for [] point source discharges." *Id*. Continuing to rely on this interpretation, the court concluded that EPA's substitution of the more detailed proposal in place of the State's more generalized July 2018 proposal constituted an unauthorized extension of EPA's authority under the CWA, and, further, vacated the agency's regulatory definition of "total maximum daily load," which requires inclusion of more detailed allocations and was the basis for EPA's rejection and substitution. *Id.*; 40 C.F.R. § 130.2(i).

The court then held that plain reading of the phrase "total maximum daily load" precludes EPA from expressing a TMDL in anything other than daily terms, and thus that the annual limits in its Lake Chesaplain TMDL were contrary to law. *Id.* at 14-15. Turning to the TMDL's phased percentage reductions, the court held that a five-year schedule for attainment of WQSs is impermissible when the CWA specifies a "long since passed" July 1, 1977 deadline for achievement of effluent limitations (for which the court found the TMDL serves as a basis). *Id*. Finally, the court held that EPA's suggestion of nonpoint source BMPs as potential offsets to point source reductions in its TMDL is not arbitrary and capricious. *Id.* at 16.

This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the district court with respect to its holding that (1) the challenges to the Lake Chesaplain TMDL are ripe for review; (2) EPA's regulation requiring specific wasteload allocations ("WLA") and load allocations ("LA") is contrary to law; and (3) EPA's construction of "total maximum daily load" to include expression in annual terms with phased pollution reductions is contrary to law. Additionally, this Court should affirm the ruling of the district court with respect to its holding that the use of nonpoint source best management practices ("BMPs") as an offset to point source reductions in the Lake Chesaplain TMDL is not arbitrary or capricious.

Consideration of the factors articulated in *Abbott Labs* and *Ohio Forestry Association* for assessing ripeness shows that EPA's adoption of the October 2017 Lake Chesaplain TMDL proposal is not ripe for judicial review. The Lake Chesaplain TMDL has not yet been implemented through the issuance of NPDES permits or nonpoint source management plans by the State of New Union. Additionally, the administration of new NPDES permit limits under the TMDL are still pending administrative hearing. Therefore, there is no immediate harm to the plaintiffs by delaying review, judicial intervention would interfere with administrative action, and the factual basis for this review has not been allowed to be entirely developed requiring the court to determine this action is not ripe for judicial review. *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967); *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

EPA's rejection of New Union's July 2018 TMDL, and subsequent adoption of the State's original, more specific TMDL in line with the agency's regulations, was a reasonable interpretation and exercise of authority under the CWA. Congress committed the authority to interpret and administer the CWA to the EPA. 33 U.S.C. § 1251(d). Pursuant to this authority,

and in light of the lack of a statutory definition, EPA has properly defined a "total maximum daily load" as "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). This longstanding definition, requiring the inclusion and assignment of specific wasteload and load allocations, ensures effective coordination of pollution control mechanisms among individual sources, best furthering the purposes of the CWA. This interpretation, in light of the TMDL's role as an "information tool," also honors the cooperative federalist character of the Act, guiding the State of New Union's implementation of pollution allocations originally recommended by the State's own designated agency, DOFEC. Lastly, EPA's longstanding definition of "total maximum daily load" is entitled to deference in light of the agency's expertise and the "highly technical" nature of TMDLs.

The EPA reasonably interpreted the language of the CWA when adopting the Lake Chesaplain TMDL with pollution reduction allocations framed in annual loadings. Section 303(d)(1)(C) of the CWA states a TMDL's "load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety[.]" 33 U.S.C. § 1313(d)(1)(C). When determining the Congressional intent in a particular statutory provision, "certain words or phrases may only become evidence when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Considering the unique characteristics of different pollutants, including phosphorus, the requirement to only implement TMDLs in terms of daily limits would "lose sight of the overall structure and purpose of the CWA" to implement applicable water quality standards. *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001). Additionally, deference must be afforded to the EPA when filling gaps left by Congress. *Nat'l Cable & Telecomms Ass'n v. Brand X Internet*

Services, 545 U.S. 967, 980 (2005). Framing phosphorus loading in annual limits is a proper expression of the TMDL in mass per time and is entitled to deference. 40 C.F.R. § 130.2(i).

The phased percentage reductions in phosphorus loading in the Lake Chesaplain TMDL is a proper interpretation of Section 303(d)'s direction to calculate "total maximum daily load . . . at a level necessary to implement the applicable water quality standards[.]" 33 U.S.C. § 1313(d)(1)(C). The CWA does not speak directly to whether a TMDL must achieve WQSs on adoption and where a statute is ambiguous to Congressional intent, agencies must be afforded deference when administering the statute. *United States v. Mead Corp.*, 533 U.S. at 227. TMDLs are not self-implementing and require the use of NPDES permitting and state and local nonpoint source management to bring water bodies to applicable WQSs. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Phased percentage load reductions run parallel to NPDES permit schedules of compliance and recognize the cooperative framework set out by the CWA to balance state and federal interests when bringing Lake Chesaplain into attainment. 33 U.S.C. § 1362(17); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300 (3d Cir. 2015) ("*AFBF II*").

Lastly, EPA's allowance of a credit for BMPs is not arbitrary and capricious because "reasonable assurance" is not a promulgated standard. Agency action should only be overruled if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). EPA regulation allows for accounting of BMPs when implementing TMDLs. 40 C.F.R. § 130.2(i). CLW's reliance on the 1991 Guidance Document that requires "reasonable assurance" fails because the guidance was not issued as a regulation or rule under notice-and-comment rulemaking. Additionally, TMDLs are ultimately an informational tool which cannot on its own require state implementation. *AFBF II*, 792 F.3d at 291.

Notwithstanding the issue of the challenges of CLW and New Union not being ripe, the lower court erred first in its decision to vacate both EPA's regulatory definition of "total maximum daily load" and EPA's rejection of New Union's July 2018 TMDL proposal, and again in its finding that a TMDL's proposal for phased implementation of annual reductions was invalid. This Court should reverse accordingly on those issues. Lastly, this Court should affirm the lower court's finding that BMPs can be credited to reduce wasteload stringency.

STANDARD OF REVIEW

Ripeness is a question of law reviewed de novo. *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1084 (9th Cir. 2003); *Roe No.2 v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001). A district court's ruling on cross-motions for summary judgment is also reviewed de novo. *See, e.g., Marable v. Nichtman*, 511 F.3d 924, 929 (9th Cir. 2007); *Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004); *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

ARGUMENT

I. EPA's disapproval of New Union's 2018 Chesaplain Watershed TMDL is not ripe for judicial review.

The ripeness doctrine "prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreement over administrative policies." *Abbott Labs*, 387 U.S. at 148 (1967). Courts consider two factors when assessing a claim for ripeness: "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.* at 149. "Fitness" is evaluated in light of the potential for "judicial intervention [to] inappropriately interfere with further administrative action[,]" and "whether the courts would

benefit from further factual development of the issues presented." *Ohio Forestry Ass'n*, 523 U.S. at 733. Here, the lower court improperly distinguished *City of Arcadia* and *Bravos* when it declared EPAs disapproval of New Union's 2018 TMDL to be ripe for judicial review. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003) ("*Arcadia I*"); *Bravos v. Green*, 306 F. Supp. 2d 48 (D.D.C. 2004). Challenges to EPA's disapproval of New Union's July 2018 TMDL proposal and adoption of New Union's 2017 proposal are not ripe for review because no action has been taken regarding implementation of the permits described in the TMDL and an administrative review process is ongoing which has paused any potential actions by the state to implement the new permits, requiring more facts to be built before judicial review.

Firstly, the lower court improperly distinguishes *Arcadia I* and *Bravos.* The respective holdings would not change even if permit limits were suggested. The two cases demonstrate that this is not a final decision by the agency because there are more steps in a TMDL procedure, that there is minimal hardship on the parties because no implementation has occurred, and that there is current administrative action. *Arcadia I,* 265 F. Supp. 2d at 1158-59 (holding issues not ripe because no harm when TMDLs do not presently impose obligation on states, TMDLs are subject to revision, and facts are not developed due to ongoing administrative review)*; Bravos,* 306 F. Supp. 2d. at 57 (holding issues not ripe where state implementation plans do not require EPA approval and therefore no final agency actions occurred). A permit limit for the states does not change these three ripeness factors in the context of *Arcadia I, Bravos,* or the instant case.

Here, no action has been taken by the state to implement the TMDL permits. While the TMDL in *Arcadia I* did not proffer permitting limits and the permits here have limits which states may or may not implement, in this case neither of the NPDES permits have been reissued since their expiration in November 2018 and February 2019. *Arcadia I,* 265 F. Supp. 2d at 1160.

Since neither the slaughterhouse nor Chesaplain Mills sewage treatment plant are subject to any limits on phosphorus discharge, the very action contested here, there is no present harm at this point in the case, only speculative harm, which is not sufficient to warrant judicial review. *See Arcadia I,* 265 F. Supp. 2d at 1160 ("[T]he Court lacks jurisdiction to grant such relief where Plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy."); *Abbott Labs*, 387 U.S. 136, 153 (1967) ("[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted").

Furthermore, there is a pause on any implementation of the permits due to ongoing administrative hearings from Chesaplain Mills and the slaughterhouse regarding the cost of compliance for the phosphorus reductions, and there is a pause on any implementation of the permits due to the plants' timely applications for permit renewal. Therefore, as in *Arcadia I*, where there was (1) no daily conduct required by the TMDL for the state to act upon, (2) an administrative hearing regarding the TMDLs was ongoing, and (3) no immediate change in plaintiff's conduct was mandated, here the (1) TMDL merely poses goals and leaves implementation to the state who has not taken any action under the TMDL (therefore the TMDL does not currently require any daily conduct for the state), (2) all permitting is paused for an administrative hearing, and (3) no immediate change in plaintiff's conduct is mandated. *Arcadia I,* 265 F. Supp. 2d at 1156, 1159; Order at 10. The ripeness doctrine factors which the courts rely upon specifically attempt to prevent courts from interfering with administrative proceedings. If this appeal were to go forward, this Court would be litigating a case involving permit requirements that are not currently implemented and may or may not come to pass.

While the lower court cited the Third Circuit's finding of ripeness in *AFBF II* as informative to its own finding of ripeness in this case, *AFBF II* notably did not have an ongoing administrative hearing. Unlike *AFBF II*, where the Court found a "well-developed record" and that entities "will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation," here there is an administrative hearing pausing any potential implementation and record development. *Id.* at 294. Here, no entity has any "reason to limit their discharge" because this TMDL may not be implemented through permits and the State has not enforced any aspect of it. *Id.* The Third Circuit, in *AFBF II*, found harm due to the states and EPA having spent "time, energy, and money" in the process of developing an implementation plan, but here all implementation has been paused. *Id.* This case is not ripe for judicial review.

II. EPA's longstanding regulatory interpretation of the term "total maximum daily load" to require the inclusion of allocations among various sources is correct, and its adoption of New Union's more detailed TMDL proposal, made pursuant to that interpretation, is reasonable.

EPA's rejection of New Union's July 2018 TMDL, and subsequent adoption of the State's original, more specific TMDL in line with the agency's regulations, was a reasonable exercise of EPA's authority under the Clean Water Act. Congress committed the interpretation and administration of the CWA to EPA. 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the [EPA] ... shall administer this chapter."). That delegation includes the "authority to enact regulations carrying the force of law regarding the identification of §303(d)(1) waters and TMDLs." *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002) ("*Pronsolino II*"). Congress did not define "total maximum daily load" in the CWA, leaving a gap for EPA, as administrator of the Act, to fill. EPA's longstanding definition of "total maximum daily load" as "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background[,]" has stood virtually unchallenged since being

finalized in 1985 regulation. 40 C.F.R. § 130.2(i). Further, EPA's actions with regards to the establishment of a detailed TMDL for the Lake Chesaplain Watershed are in keeping with the remedial purpose of the CWA and exemplify the kind of cooperative federalism that Congress intended to underlie the statute. The agency's role as the ultimate administrator of the Act, the highly technical nature of the TMDL program, and the longstanding application of its regulatory definition entitle EPA's interpretation – and its decision here, made pursuant to that interpretation – to substantial deference. The lower court erred in vacating EPA's determinations and § 130.2(i), and this court should reverse.

A. The statutory conditions warranting the establishment of a TMDL, and basic principles of rational and informed decision-making, support EPA's interpretation.

The purpose of the TMDL program is to clean those waters for which point-source limitations alone are insufficient, accounting for a more diverse array of pollution sources not addressed by the NPDES permitting program (point-source limitations alone) or the subsequent setting of Water Quality Standards ("WQSs") (which do not differentiate sources of pollution). These sources include nonpoint sources, for which the states bear primary responsibility. *See AFBF II*, 792 F.3d at 299 ("*AFBF II*") ("In drafting a TMDL the Clean Water Act unambiguously *requires* the author . . . to take into account nonpoint sources[.]") (emphasis in original); *Id.* at 289 ("States in turn regulate nonpoint sources. There is significant input and oversight from the EPA, but it does not regulate nonpoint sources directly.").Without quantifying the necessary components of wasteload allocations ("WLAs") (attributed to point sources) and load allocations ("LAs") (attributed to nonpoint sources), it would be virtually impossible to measure the technical integrity and feasibility of WQSs. *See* 50 Fed. Reg. 1774, 1775 (Jan. 11, 1985); *Pronsolino II*, 291 F.3d at 1139.

While the CWA does not mention WLAs or LAs, the term "total maximum daily load" itself speaks to the expectation of allocation. To interpret the word "total" otherwise– as a single figure representing the maximum load – would render the word superfluous within the term "total maximum daily load." *AFBF II*, 792 F.3d at 297.

New Union challenges the required inclusion of these specific allocations, seeking to "excise" from final TMDLs the very source allocations from which, through coordination among federal, state and local stakeholders, final sum figures are calculated. To echo the Third Circuit, such a proposition—making the informational tool that "serve[s] as the cornerstone[] for pollution-reduction plans" *less* specific by eschewing a "commonsense first step to achiev[ing] the target water quality"— can only be described as "strange." *Id.* at 291, 299.

B. EPA's regulatory requirement for specificity in TMDLs best serves the purpose of the CWA, as evidenced by decades of practice and judicial precedent, and by the utility of such detail in fulfilling other of the statute's core programs.

It is telling that there have been virtually no challenges to EPA's regulatory definition of "total maximum daily load" since its articulation in 1985. The only such challenge to be brought prior to this litigation was rejected by the Third Circuit in 2015. In light of this precedent, New Union's challenge should similarly be rejected. EPA's regulatory requirement, articulated in the § 130.2(i) definition, of inclusion of specific allocations in TMDLs is essential to ensuring effective coordination and implementation of core statutory programs such as the NPDES permitting program, and to serving the overarching remedial purpose of the CWA.

1. New Union's challenge to EPA's regulatory definition of TMDL runs counter to decades of practical application and judicial precedent.

For nearly three decades following the issuance of the regulation in question – 40 C.F.R. § 130.2(i) – during which more than 25,000 TMDLs containing WLAs and LAs were issued or approved by EPA, the agency's definition of "total maximum daily load" was unchallenged. *See*

Am. Farm Bureau Fed'n v. EPA, 984 F. Supp. 2d 289, 318-320 (M.D. Pa. 2013) ("*AFBF I*"). In the time preceding and following the first such challenge, brought in *AFBF I* in 2013, the overwhelming weight of case law has cited to the definition with no controversy in discussions of TMDLs,[2] the District Court for the District of Columbia providing a representative treatment:

> A core requirement of any TMDL is to divide sources of contamination along the water body by specifying load allocations, or LAs, to predict inflows of pollution from particular non-point sources; and to then set[ ] wasteload allocations, or WLAs, to allocate daily caps among each point source of pollution.

Anacostia Riverkeeper v. Jackson, 798 F. Supp. 2d 210, 248-49 (D.D.C. 2011). In the face of widespread judicial acceptance and practical application of the terms of § 130.2(i), and in the wake of rejection of the first and only other such challenge to the definition (in *AFBF I* and *II*), New Union's challenge here is misguided. While a regulation's lifespan alone does not preclude its vacation, the Supreme Court has stated that courts ought "accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quoting *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982)).

2. Inclusion of specific allocations within TMDLs provides the basis for effective application of the NPDES permit program.

Assignment of allocations to individual point sources within a TMDL, rather than a single broad WLA number, ensures that individual NPDES permit writers may effectively coordinate pollution levels among those sources, consistent with the TMDL. *See* 40 C.F.R. §

[2] *See, e.g., Rio Hondo Land & Cattle Co., L.P. v. EPA*, 995 F.3d 1124, 1128 (10th Cir. 2021) ("Per EPA regulation, TMDLs are required to include pollutant allocations for both point and non-point sources."); *Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 27 (1st Cir. 2018) ("TMDLs are further subdivided into wasteload allocations and load allocations."); *City of Kennett v. EPA*, 887 F.3d 424, 428 (8th Cir. 2018) ("The TMDL . . . allocates loading capacity between point sources and "nonpoint," "natural background sources."); *Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL . . . allocate[es] the total "load" . . . among contributing point and non-point sources.") (internal citations omitted); *Food and Water Watch*, 5 F. Supp. 3d 62, 69 (D.D.C. 2013) ("The TMDL is the sum of the LA and the WLA . . . .").

122.44(d)(1)(vii)(B). A scenario where multiple polluters are subject to a single, generalized WLA removes the incentive for each polluter "to limit its own outflows because – as long as the outflows from its single point source does not exceed the full WLA – it could not be found in violation of the TMDL." *Anacostia Riverkeeper*, 798 F. Supp. 2d at 250. Such "overly-generous individual allocations [would], in the aggregate, exceed total load limits." *Id.* at 249. Admittedly, the alternative could also occur, where individual permit writers, fearful of that aggregate violation, set overly stringent allocations, an outcome which could benefit water quality. However, the potential benefit of the latter scenario is outweighed by the more probable risk of the former. Including specific WLAs in the TMDL minimizes this risk by reasonably attempting to "divvy up acceptable pollution levels among [individual sources]." *Id.* at 250.

Despite the risk, New Union may cheer a scenario in which these individual permit writers – usually state entities – are entirely responsible for "divvying up" a single general number, arguing that in instances where state primacy can be preserved, it must be, that such is the meaning of the "cooperative federalism" with which Congress imbued the CWA. However, as discussed in Section II(C)(3), below, this conception of cooperative federalism is generally misguided, and is particularly inappropriate where such delegation would potentially undermine the effectiveness of the Act. EPA's inclusion of specific WLAs in the TMDL is reasonable, and best reconciles the purpose and character of the CWA.[3]

[3] In *Pronsolino II*, the Ninth Circuit evaluated a TMDL that dealt *exclusively* with nonpoint sources, the regulation of which has primarily been left to the states. Still, the court found the legal force of EPA's 1985 regulations so convincing as to confirm EPA's authority to set allocations even for a nonpoint-source-exclusive TMDL. *Pronsolino II*, 291 F.3d at 1132-33 ("EPA's regulations concerning § 303(d)(1) lists and TMDLs apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two.")

C. EPA's involvement exemplifies the "cooperative federalism" underlying the CWA.

The purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act "anticipates a partnership between the States and the Federal Government, . . . animated by [that] shared objective." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). In this partnership, "States remain at the front line in combating pollution." *City of Arcadia v. EPA*, 411 F.3d 1103, 1106 (9th Cir. 2005) ("*Arcadia II*"); 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ."). In the TMDL context, this relationship is manifested in the fact that, *inter alia*, states have the first opportunity to promulgate TMDLs and the primary responsibility for creating implementation plans, with the EPA retaining "backstop authority" to ensure consistency with the CWA. *AFBF II*, 792 F.3d at 289. Under the CWA, EPA is compelled to promulgate TMDLs where a state's TMDL proposal is determined by EPA to be insufficient to meet WQSs. 33 U.S.C. § 1313(d)(2).

Here, New Union challenges the inclusion of specific allocations in EPA's TMDL as contrary to the principles of cooperative federalism that underlies the CWA. Beyond the fact that these detailed allocations improve the facilitation of other essential provisions in the statute, New Union's challenge is undermined by the fact that EPA, in promulgating a "substitute" TMDL to New Union's July 2018 proposal, merely adopted the framework originally recommended by the State's own designated agency (DOFEC). Further, within its TMDL, EPA created no binding obligations in terms of compliance or methodology. It could not because, as has been recognized by multiple courts, TMDLs are strictly informational tools, and, while EPA may incentivize adherence to the standards contained therein, they are not binding.

1. EPA, which has ultimate discretion in the promulgation of TMDLs, merely adopted the TMDL that New Union initially recommended.

The CWA expressly states that if the EPA Administrator disapproves of a state's TMDL submission, they "shall . . . establish such loads . . . as [they] determine[] necessary to implement the water quality standards[.]" 33 U.S.C. § 1313(d)(2). The statute does not prescribe any justification that the Administrator must provide for their disapproval of a state's TMDL and for establishment of a new TMDL beyond the Administrator's determination of what is "necessary" to implement the WQSs. It cannot be disputed that while initial state proposals must be given due consideration, ultimate discretion lies with the EPA Administrator. In light of that clear commitment by Congress to EPA, the agency's decisions in the instant case, in fact, demonstrate significant deference to New Union. Rather than fashioning a whole-cloth replacement with no consideration of state input, here, EPA merely adopted the terms of the TMDL originally recommended by the State (through DOFEC). As the court found in *AFBF I*, considering similar circumstances where EPA was not the "sole author of the TMDL[,]" but, rather, accepted allocations "devised largely by the states," EPA's actions here are exemplary of the CWA's cooperative federalism scheme. *See AFBF I*, 984 F. Supp. 2d at 322, 324.

2. TMDLs are informational only, and while EPA incentivizes adherence by the States, those incentives do not impermissibly impose or coerce.

It is now well-settled that, rather than being self-enforcing mechanisms, TMDLs are informational tools. *See, e.g., Pronsolino II*, 291 F.3d at 1129 ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans."); *Anacostia Riverkeeper*, 798 F. Supp. 2d at 217 ("[A] TMDL provides crucial information for federal, state and local actors in furtherance of the cooperative efforts to improve water quality envisioned in the CWA."). Just as their

informational quality does not mean they must eschew specificity, TMDLs' use of specific allocation does not elevate their function to one of implementation and direct limitation. *See Arcadia I*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) ("A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that *may* be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls.") (emphasis added). It is this misconception about the function of the more specific provisions in the 2017 proposal adopted by EPA that was the primary basis for the lower court's decision to — out of concern about "dramatic expansion of EPA's regulatory jurisdiction" — vacate that adoption and EPA's regulatory definition, 40 C.F.R. § 130.2(i).[4] Order at 12-14.

TMDLs themselves do not reduce pollution; rather, they "*inform* the design and implementation of pollution control measures." *Idaho Sportsmen's Coal. v. Browner,* 951 F. Supp. 962, 966 (W.D.Wash.1996) (emphasis added). Here, the TMDL adopted by EPA offers prescriptions for what portion of the TMDL (and of the reductions) should come from point and nonpoint sources, respectively, and suggestions – not mandates – of practices that may best achieve those figures. These suggestions do not carry binding force. New Union is "free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests," [5] though at the risk of losing federal grants. *Pronsolino v. Marcus*,

[4] Admittedly, the name given to the TMDL here – the "Chesaplain Watershed Implementation Plan" –could be construed to imply affirmative performance. However, the implementation methods, (such as BMP programs) proposed within are nothing more than that—*proposals*. The lower court, in fact, conceded this much in its discussion of the validity of wasteload allocation credits, where it explicitly stated, "EPA's TMDL provides New Union with information concerning possible BMPs that may be used to achieve compliance with [WQSs]. Nothing in the CWA requires actual implementation and compliance by nonpoint sources[.]" Order at 16.

[5] Modifications are still subject to final approval by EPA. Otherwise, the cooperative TMDL process would be rendered "essentially meaningless." *AFBF I*, at 328.

91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000) ("*Pronsolino I*"); *see* 33 U.S.C. § 1319; *Pronsolino II*, 291 F.3d at 1140 ("States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement."); *Food and Water Watch v. EPA*, 5 F. Supp. 3d 62, 77 (D.D.C. 2013) ("[U]ltimately, it is up to the States to choose how to implement[.]"). While not addressed by the lower court, it bears emphasizing that courts have rejected the proposition that potential withholding of federal grant money in this context amounts to "coercion." *Food and Water Watch*, 5 F. Supp. 3d at 78 ("that the EPA encourages [a] use . . . does not make it the States' only option, or a coercive one at that[.]"); *Id.* at 83 ("EPA's encouragement that one option might be the most logical one does not command a State to implement it."); *see also AFBF I*, 984 F. Supp. 2d at 329 ("[T]he prospect of losing federal grant money does not make TMDLs 'binding' or invade in the states' planning process.")

3. New Union misinterprets the meaning of "cooperative federalism."

Ultimately, New Union's arguments on this point are undermined by its fundamental misinterpretation of the cooperative federalism contemplated by Congress in the CWA. Far from the "partnership" described by the Supreme Court, the conception that New Union seeks to employ involves much less cooperation. "Disagreements between the states and the federal government regarding some of the allocations necessary to achieve water quality standards [are] to be expected . . . in a cooperative federalism scheme." *AFBF I*, 984 F. Supp. 2d at 324. To adopt New Union's position here would suggest that where such disagreements arise, cooperative federalism demands that they be resolved in favor of the states. To New Union, "cooperation" on the part of the federal government really means subordinating itself to the states. Unfortunately for the State, the CWA is clear that while preservation of states' rights and

responsibilities and consideration of states' input regarding mitigation of pollution are essential, administration of the Act ultimately rests with EPA, and the agency will not "blindly accept states' submissions" if compliance with the CWA requires otherwise. *AFBF II*, 792 F.3d at 300.

D. EPA's regulatory definition is entitled to deference.

Congress committed administration of the CWA, and accompanying rule-making authority, to the EPA. 33 U.S.C. § 1251(d). Thus, "EPA has the delegated authority to enact regulations carrying the force of law regarding . . . TMDLs." *Pronsolino II*, 291 F.3d at 1131; *see also Mead Corp.*, 533 U.S. at 226-27 (citing *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Beyond the general authority delegated to EPA, other considerations also weigh in favor of deference to EPA's regulatory interpretation: the longstanding nature of the interpretation (discussed in Section II(B)(1), *supra*), and the "highly technical" nature of TMDLs. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 90 (2007).

Ultimately, where a statute "is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Unless the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute[,]" courts defer to that interpretation. *Id.* at 844. Congress did not define "total maximum daily load" in the CWA, leaving a gap for EPA, as administrator of the Act, to fill. For the reasons discussed, EPA's definition of "total maximum daily loads," and its decision to reject New Union's July 2018 TMDL for failure to satisfy that

definition, were neither arbitrary nor capricious, but, rather, were executed to best serve the remedial purposes of the CWA.

III. EPA reasonably interpreted Section 303(d) when adopting annual pollution load reductions to be phased in over five years in the Lake Chesaplain TMDL.

The EPA reasonably interpreted Section 303(d) in light of the CWA's statutory framework when expressing pollution loading for phosphorus in annual terms to be phased in over five years. The appropriate standard for this Court to apply when reviewing an agency's interpretation of a statute that it administers is set out in *Chevron. Chevron*, 467 U.S. at 842 (1984); 33 U.S.C. § 1251(d) ("[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] . . . shall administer this chapter."). Under the *Chevron* framework courts must first inquire whether "Congress has directly spoken to the precise question at issue." *Id.* at 842-43. If the statute unambiguously forbids the agency's interpretation then the intent of Congress must be given effect, but if Congressional intent is ambiguous courts must give the Agency's interpretation "controlling weight" unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

A. The EPA's adoption of the Lake Chesaplain TMDL with annual pollution load limits and the agency's reasonable application of its regulations must be afforded deference.

The EPA's adoption of the Chesaplain TMDL with pollution load allocations in annual limits is reasonable because Congress has not made clear whether all TMDLs must be set at "daily limits" and the EPA has promulgated regulations that have interpreted this ambiguity to allow for pollution allocation to be set in annual limits.

1. "Total maximum daily load" is an ambiguous term that allows for flexibility when setting pollution allocations.

Section 303(d)(1)(C) of the CWA states a TMDL's "load shall be established at a level

necessary to implement the applicable water quality standards with seasonal variations and a margin of safety..." 33 U.S.C. § 1313(d)(1)(C). Congress does not further define TMDL within the statute.

"In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132 (2000); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666-67 (2007). When placed into the context of the statute, a literal interpretation of "daily" "loses sight of the overall structure and purpose of the CWA." *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001).

The Second Circuit correctly recognized the ambiguous nature of the term when holding TMDLs could be expressed as "an hourly, weekly, monthly, or annual load." *Id.* at 98. This interpretation properly recognizes the unique characteristics associated with how different pollutants enter, interact with, and at certain levels, adversely impact an affected waterbody. As is the case with phosphorus – the pollutant with which the Lake Chesaplain TMDL is concerned – annual loads best account for seasonal cycles, allowing the TMDL to account for an open-ended range of pollutants for the purpose of reaching applicable WQSs. *Id* at 98; 33 U.S.C. § 1313(d)(1)(C) (requiring states must establish TMDLs for all "pollutants which the Administrator identifies . . . as suitable for such calculation"). TMDLs provide the informational basis for state determinations of which pollution control mechanisms to incorporate into their continuing implementation plans; restricting pollution load measurements solely to "daily" quantifications not only undercuts the administration of agency-specific expertise when implementing the CWA but also does not comport with the goal of "implementing applicable

water quality standards." 33 U.S.C. § 1313(d)(1)(C); *Meiburg*, 296 F.3d at 1025 (holding TMDLs are a goal for which individual pollution discharge permits and other pollution reduction mechanisms are set).

The D.C. Circuit's literal interpretation of "daily" as unambiguous Congressional intent to require TMDLs to be set in daily limits was improper. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). This reading fails to place the meaning of TMDL into the context of the CWA, moving away from the flexible nature of the phrase other circuits have found. *See, e.g.*, *AFBF II*, 792 F.3d at 296. Additionally, the D.C. Circuit focused on EPA regulation that states "all pollutants [regulated by the CWA] are suitable for the calculation of total maximum daily loads," attempting to identify a self-imposed predicament created by the EPA when issuing TMDLs. *Friends of Earth, Inc.*, 446 F.3d at 146 (citing 43 Fed. Reg. at 60,665). But, this interpretation fails to recognize the true function of the provision to establish TMDLs "at a level *necessary* to implement the applicable water quality standards[.]" 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Allowing TMDLs to be calculated for all pollutants points to the recognition that the EPA may administer the provision however it sees *necessary* to bring a waterbody into applicable WQSs, using the flexible definition of "total maximum daily load" as it has before. *AFBF II*, 792 F.3d at 296. Restricting EPA to a one-size-fits-all approach undermines thorough consideration of the complex circumstances of water pollution and rejects Congress's direction to set TMDLs at a level that is "necessary," in light of those complexities, when meeting WQSs.

Recognizing the impracticality of such a restrictive approach and recognizing that *Friends of Earth* merely creates a circuit split on the issue, EPA has continued, in subsequent guidance, to articulate the need for flexibility when setting TMDL load limits by allowing for annual and seasonal allocations along with daily limits. U.S. ENV'T PROT. AGENCY,

ESTABLISHING TMDL "DAILY" LOADS IN LIGHT OF THE DECISION BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT IN FRIENDS OF THE EARTH, INC. V. EPA, ET AL., NO. 05-5015, (APRIL 25,2006) AND IMPLICATIONS FOR NPDES PERMITS (2006); *AFBF II*, 792 F.3d at 296; *Anacostia Riverkeeper*, 798 F. Supp. 2d at 245.

The District Court's determination that annual limits cannot allow for seasonal variations as required by Section 303(d)(1)(C) is unfounded. 33 U.S.C. § 1313(d)(1)(C); Order at 14-15. Courts must afford deference to the agency's expert judgement in its determinations of whether seasonal variations are accounted for in a TMDL, so long as it is supported by evidence in the administrative record. *Nat. Res. Def. Council v. Fox*, 93 F. Supp. 2d 531, 555-56 (S.D.N.Y. 2000) ("[T]he Court must accord deference to EPA's expert judgment as to whether [phosphorus TMDL limits set in] annual loads satisfactorily incorporated seasonal variations, and the record shows that EPA gave deliberate consideration to the question.").

Furthermore, EPA's guidance supports flexibility of TMDL load allocation to comport with the framework of the CWA by recognizing the utility of such calculations for NPDES permits, the primary mechanism for WLA reductions. Daily limits are inconsistent with NPDES permits which do not require effluent limitations to be expressed in daily terms. *See* 33 U.S.C. § 1362(11) ("effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ."). Like TMDLs, the central focus of NPDES permits is to implement applicable water quality standards allowing pollutant parameters to be expressed in differing temporal periods of duration. 33 U.S.C § 1342(b)(1)(C); *see* 40 C.F.R § 122.44(d)(1)(vii)(A) ("The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards"). The CWA's reliance on

NPDES permits to meet a TMDL's proposed WLA reflects Congressional intent to give the EPA authority to issue TMDLs with the best applicable calculation of load limits to serve the purpose of WQSs. Therefore, when reading "total maximum daily load" in the context of the statute, Congress has not resolved the issue under the first step in *Chevron*. *Chevron*, 467 U.S. at 842 (1984).

2. EPA properly interpreted the term "total maximum daily load" to allow for annual load limits in the Lake Chesaplain TMDL

Where congressional intent is silent or there is ambiguity to the meaning of a provision the agency's interpretation must be given "controlling weight" unless "plainly erroneous or inconsistent with the regulation." *N.Y. Currency Research Corp. v. CFTC*, 180 F.3d 83, 88 (2d Cir. 1999) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Controlling weight is afforded not only to fill gaps but also where the agency "'defines a term in a way that is reasonable in light of the legislature's revealed design.'" *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (quoting *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)).

Congress only provides that TMDLs must be set "at a level *necessary* to implement the applicable water quality standards[.]" 33 U.S.C. § 1313(d)(1)(C) (emphasis added). EPA's implementing regulations elaborate on this direction, stating TMDL load limits "can be expressed in terms of either mass per time, toxicity, or other appropriate measures." 40 C.F.R. § 130.2(i).

The scientific complexity associated with regulating highly toxic pollutants, which are often unsuitable for daily load limits, requires the EPA to apply flexibility when establishing TMDLs to meet applicable WQSs. *Muszynski*, 268 F.3d at 98; *see Brand X*, 545 U.S. at 1002-03 (holding deference is appropriate where an agency administers a complex statutory scheme

requiring technical or scientific sophistication); *Train v. Nat'l Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975) (holding the CWA complexity affords judicial deference to EPA's statutory construction.) EPA's interpretation of the statute through its implementing regulations must be afforded deference, and adoption of annual limits in the Lake Chesaplain TMDL is an appropriate "mass per time" calculation afforded by regulation in light of the complex scientific circumstances associated with calculating TMDL pollution loading limits. 40 C.F.R. § 130.2(i); *Brand X*, 545 U.S. at 1002-03.

Viewing "daily" in the TMDL's language as a requirement to set 24-hour loads is "excessively formalistic" and ignores the EPA's role in administering TMDLs to "to implement applicable water quality standards" under unique circumstances. *Fox*, 93 F. Supp. 2d at 556; 33 U.S.C. § 1313(d)(1)(C). Here, the unique characteristics of phosphorus are best represented through annual loads and the EPA must be provided deference when filling the gaps left by Congress for a statute it administers. *Mead Corp.*, 533 U.S. at 227.

B. The Lake Chesaplain TMDL's Phased Implementation of Phosphorus Load Reductions Is Valid In Light of The Requirements of the CWA.

The text of the CWA does not require TMDLs to ensure achievement of WQSs on date of adoption. In reference to WQSs, the CWA only requires that a TMDL set load levels "necessary to attain and maintain applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). There is no textual enactment that provides for how a TMDL is applied to meet TMDL WQSs, including timeframe. *AFBF II*, 792 F.3d at 298; *Anacostia Riverkeeper*, 798 F. Supp. 2d at 245.

1. The adopted phased implementation of phosphorus load reductions is permissible under EPA regulation allowing for "Schedules of Compliance."

The EPA has properly resolved this issue of ambiguity through agency's statutory interpretation. *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1266 (1994) (citing *Chevron*, 467 U.S.

at 843). TMDLs "tie together point-source and nonpoint-source pollution issues . . . [to] address[] the whole health of the water." *Meiburg*, 296 F.3d at 1025. Considering the scientific complexity of pollution control, EPA regulations allow for flexibility when establishing WLAs in NPDES permits set to meet the WQSs served by TMDLs. 40 C.F.R. § 122.44(d)(1)(vii)(B); *AFBF I*, 984 F. Supp. 2d at 328 ("[I]n some circumstances, a state may write a NPDES permit limit that is different from the WLA, provided that it is consistent with the operative assumptions underlying the WLA."); *In re Alexandria Lake Area Sanitary Dist.*, 763 N.W.2d 303, 314 (Minn. 2009) (noting that the "suggestion that the effluent limits in [a] reissued permit must fully restore [an impaired lake] within the span of the five-year NPDES permit is neither realistic nor supported by the regulatory scheme"). Flexibility is provided to permitting authorities when setting effluent limitations through implementation of a "schedule of compliance" allowing for a schedule to be established to reach WQSs. 33 U.S.C. § 1362(17) ("an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."); 40 C.F.R. § 122.2. The phased implementation of phosphorus in the Lake Chesaplain TMDL falls directly within the definition of a schedule of compliance as provided by the statute to bring WLAs into compliance through permitting.

The District Court relies heavily on Section 301(b)(1)(C) of the Act, holding the outlined schedule of compliance to be contrary to the July 1, 1977 deadline for limitations necessary to meet WQSs. 33 U.S.C. § 1311(b)(1)C); Order at 15. This holding turns against EPA's long held view allowing for application of schedules of compliance where there has been a new or revised WQS as set out in EPA's 1994 Whole Effluent Toxicity (WET) Control Policy ("WET Policy"). U.S. ENV'T PROT. AGENCY, EPA 833-B-94-002, WHOLE EFFLUENT TOXICITY (WET) CONTROL POLICY (1994). The WET Policy provides that schedules of compliance are permitted beyond the

July 1, 1977 deadline as long as the limitation is based on a new or revised WQS. Here, the established revised WQSs meet these requirements and although this is an agency guidance document "[c]ogent 'administrative interpretations...nevertheless warrant respect.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004) (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003).

2. Phased phosphorus pollution reductions are proper in light of the CWA's cooperative framework to restore the Nation's waters.

Considering the structure and purpose of the CWA, a phased load reduction in this case recognizes the "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.' 33 U.S.C. § 1251(a)." *Arkansas v. Oklahoma*, 503 U.S. at 101 (1992). States are required to prepare a nonpoint source management plan and a "continuing planning process" outlining steps to meet WQSs. 33 U.S.C. § 1313(e)(1). The reduction of pollutants in water bodies and waterways is a dynamic practice that must consider changes over time. *AFBF II*, 792 F.3d at 300. Issuing a pollution reduction timeline recognizes the complexity of coordinating pollution control mechanisms, consistent with the partnered effort embodied in the CWA. *Id*.

Additionally, TMDLs are not self-implementing – as they do not prohibit conduct or require specific action – and act to set a goal which may be implemented through NPDES permits or nonpoint source controls. *See, e.g.*, *Meiburg*, 296 F.3d at 1025 ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Pronsolino II*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint source pollution reduction . . .").

Requiring the implementation of NPDES permits, nonpoint source management programs, and other mechanisms for meeting applicable WQS at the time of enactment would unlawfully impinge on state implementation authority that is tantamount to the CWA framework. *AFBF II*, 792 F.3d at 332-33.

C. Requiring implementation of WQSs on date of TMDL adoption would lead to absurd results that are inconsistent with the CWA.

When interpreting the language of a statute where ambiguity exists "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981). It would be absurd in this case to interpret the statute to require implementation of WQSs as soon as a TMDL is adopted. The administration of TMDLs is a complex process that must acknowledge complex scientific calculations and mechanisms for WQS attainment. Courts have acknowledged this complexity when reviewing the legality of TMDLs allowing for phased approaches to meet the statute's goals. *AFBF II*, 792 F.3d at 309 (finding the EPA has deference when administering the Chesapeake TMDL which uses a framework that sets phased load allocation goals to meet WQS).

The CWA is ambiguous as to whether a TMDL must meet applicable WQS at the time of its adoption. The EPA properly interpreted the statutory language when adopting the Lake Chesaplain TMDL in light of the cooperative framework of the provision. Interpreting the statute otherwise would lead to absurd results, contrary to the TMDLs purpose as an information tool for the implementation of WQS.

IV. EPA's allowance of a credit for Best Management Practices is not arbitrary or capricious.

Best Management Practices (BMPs) may lessen the stringency of other pollution controls, according to Title 40 of the CFR, which neither in the regulation's language nor purpose requires

"reasonable assurance." 40 C.F.R. § 130.2(i). Additionally, Congress has left open to the states whether the TMDLs will be implemented, therefore "reasonable assurances" cannot be the standard for accepting the credit outlined in Section 130.2(j). Lastly, in reviewing EPA's actions to accept credit, the Court may only overrule this agency's decision if it's arbitrary.

CLW's argument is that since New Union has not yet taken steps towards implementing the BMPs, a credit allowing for reduced stringency of wasteload allocations is premature, citing 1991 EPA Guidance which proffers the need for "reasonable assurance" of implementation in order to allow a credit. U.S. ENV'T PROT. AGENCY, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991).

However, CLW's argument ignores that an agency's action should only be overruled if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). If an action is part of a rulemaking procedure, then it may be overruled if not supported by "substantial evidence." 5 U.S.C. § 706(2)(E). However, here, the arbitrary and capricious standard applies to EPA's decision to allow credit for BMPs because the EPA was not engaged in rulemaking processes. In reviewing the EPA's actions, the Court must "consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgement." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, "the court is not empowered to substitute its judgement for that of the agency." *Id.* This standard gives considerable weight to the agency's actions.

Here, the EPA is following 40 C.F.R. § 130.2(i), which says "[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent." This regulation allows the EPA to consider BMPs when adopting TMDL pollution load allocations. This is

neither arbitrary nor capricious as EPA is following the exact allowances the regulation gives regarding TMDLs and BMPs.[6] Furthermore, the goal of the TMDL is to provide an informational tool to guide states in creating implementation frameworks. Consequently, neither in the purpose of a TMDL nor in this Act's language is "reasonable assurance" required regarding the BMPs. While assurances are required by the statute and by EPA regulation for point source permits (*see* 33 U.S.C. §§ 1341, 1342; 40 C.F.R. § 121.3), no similar assurances are required with regards to nonpoint sources within a TMDL (40 C.F.R. § 130.7; 33 U.S.C. § 1313). However, the EPA – following § 130.2(i) – loosens the stringency since there are BMPs proffered to various entities of nonpoint sources that would help limit the amount of pollution in total.

Importantly, CLW's argument also ignores that Congress has left optional to the states whether to require actual implementation of, or compliance with, the TMDL. *See Meiburg,* 296 F.3d at 1025 (holding that the TMDLs bring point and nonpoint sources together to address the health of the body of water as a whole, but do not include implementation plans which is left to the state to create under cooperative federalism concept)*; Arcadia I*, 265 F. Supp. 2d 1142 at 1145 (N.D. Cal. 2003) (explaining that TMDLs do not prohibit conduct or require actions because they are only a planning and information tool that represents a goal that can be implemented by the states); *AFBF II*, 792 F.3d at 291 (describing TMDLs as informational tools that are "not self-executing" and do "not create enforceable rights and obligations"); *Bravos,* 306 F. Supp. 2d at 56 ("EPA's approval of a State's TMDL does not translate into approval of the State's implementation plan."); *Appalachian Voices v. State Water Control*, 912 F.3d 746 (4th

[6] While New Union has challenged allocations between source types under 40 C.F.R § 130.2(i), addressed in Section II, the State did not challenge the portion of the regulation concerning using BMPs as credit.

Cir. 2019). Therefore, from both the purpose and the language of the regulation, it does not require any assurance or implementation. Since implementation is not required in a purely informational TMDL and EPA regulation expressly allows credit to be taken from BMPs and applied to point sources, the standard cannot be "reasonable assurance" because TMDLs do not require implementation. 40 C.F.R. § 130.2(i).

CLW also heavily relies on the 1991 EPA Guidance Document to argue that "reasonable assurance is required" because this non-binding document suggested the idea of needing reasonable assurance in order to reduce wasteload allocation stringency. However, as agency guidance documents do not carry the same binding weight as rules, EPA retains discretion as to the extent to which it administers the provisions contained in such guidance, as further indicated in this instance by the express note that the agency may "revise" the document as new information and updates become necessary. U.S. ENV'T PROT. AGENCY, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991). Since the guidance did not go through proper rulemaking procedures, including notice-and-comment, deference is not owed to this document.

Since considerable deference is owed to the EPA when deciding how to create a TMDL and § 130.2(i) explicitly grants the ability to tradeoff between BMPs and point sources, this Court should affirm the lower court's holding that a previous agency document, which is not binding, cannot outweigh the purpose of the TMDL as an informational tool.

CONCLUSION

For the foregoing reasons, the EPA respectfully requests that this Court affirm in part and reverse in part the district's court's decision. On the issue of ripeness, this Court should reverse the lower court's holding and find that because the state has not implemented any portion of the

TMDL and an ongoing administrative hearing regarding the TMDL, the adoption of New Union's 2017 TMDL is not ripe for judicial review. On the issue of EPA's regulatory interpretation regarding the definition of "total maximum daily load," this Court should reverse the lower court's holding and accord EPA appropriate deference, as the statutorily committed administrator of the CWA, to require the inclusion of specific allocations within the TMDL. On the third issue regarding EPA's TMDL consisting of annual load limits with phased pollution reductions, this Court should reverse the lower court's finding and hold that annual load limits and phased pollutions reductions are allowable because the statutory text is ambiguous to how TMDLs must meet applicable WQSs. Finally, this Court should affirm the lower court's holding that there is no requirement of "reasonable assurance" to allow credit for BMPs when reducing the stringency of other sources.