TEAM 9

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 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

This Court has jurisdiction to review the final order of the United States District Court of New Union under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review.
2. Whether the EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).
3. Whether the EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years violates the CWA § 303(d) requirements for a valid TMDL.
4. Whether the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

STATEMENT OF THE CASE

Statement of Facts

Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located within the State of New Union ("New Union") that is designated to be used as a drinking water source, a recreation area for swimming, and an area for fish propagation. R. at 7-8. New Union's water

quality standards ("WQS") classification of Lake Chesaplain reserved it for the highest quality of waters in the state. R. at 8. Before various economic developments, Lake Chesaplain was enjoyed by recreational boaters and fishers "from the entire mid-north region of the country." R. at 8. Additionally, it served as a vacation community for many. R. at 8.

However, as Lake Chesaplain became subject to rapid economic development, algae blooms caused a decline in fish productivity, property values, and tourism and rendered the Chesaplain State Park unsuitable for swimming. R. at 7. Over a decade of vast economic development, ten concentrated animal feed operations ("CAFOs") were developed in the Union River watershed, and Lake Chesaplain experienced a boom in second home construction. R. at 7. These developments, although responsible for a vast amount of phosphorus input on Lake Chesaplain, are not subject to the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") permitting requirements because they are nonpoint sources of pollution. R. at 7-8. However, a slaughterhouse and the Chesaplain Mill publicly owned sewage treatment plant ("STP") contribute to the phosphorus input on Lake Chesaplain and are subject to NPDES permit requirements as point sources of pollution. R. at 7.

After New Union realized these algae blooms were causing a decline in water quality, it created the Lake Chesaplain Study Commission ("Commission") in 2008, which found the phosphorus loading by the recent economic development to be causing violations of their WQS. R. at 8. A 2012 report by the Commission determined that the excess phosphorus loading in Lake Chesaplain caused excessive algae growth, which in turn was responsible for odors, decreased water clarity, and decreased dissolved oxygen levels in violation of the WQS. R. at 8. In 2014, the New Union Division of Fisheries and Environmental Control ("DOFEC") found the phosphorus levels in excess of the requisite water standard and listed Lake Chesaplain as

impaired–as required by the CWA in § 303(d). R. at 7. However, DOFEC failed to submit a TMDL and did not take action to do so until Chesaplain Lake Watch ("CLW") sent a letter threatening to sue if a TMDL was not created for Lake Chesaplain. R. at 8. CLW agreed to refrain from suing if New Union initiated a TMDL rulemaking. R. at 8.

Subsequently, DOFEC submitted a report in July 2016 that identified how much phosphorus each source was emitting and included a plan consistent with reaching the phosphorus limit. R. at 8-9. To achieve this phosphorus limit, DOFEC set the maximum phosphorus loading at 120 metric tons ("mt"). R. at 9. However, the report noted that the CAFOs and private septic tanks–which are nonpoint sources of pollution–accounted for more phosphorus loading than the point sources of pollution. R. at 8-9. Further, the report indicated that the Chesaplain Slaughterhouse and the Chesaplain Mills sewage treatment plant–the point sources of pollution–did not have NPDES permit limits for phosphorus. R. at 9.

In 2017, DOFEC submitted a proposal to implement a TMDL through an equal phased reduction in phosphorus discharges of point and nonpoint sources of pollution over five years. R. at 9. This TMDL planned to reduce the 180 mt baseline of 2016 phosphorus loading by seven percent each year for five years. R. at 8. The point source reductions were to be achieved by incorporating the annual, incremental seven percent reductions in NPDES permits. R. at 9. Additionally, it proposed using best management project ("BMP") programs to reduce nonpoint source pollution from agricultural sources and private septic systems. R. at 9.

In 2018, DOFEC adopted a TMDL that would have only limited phosphorus to a 120 mt annual maximum. R. at 10. After a notice and comment period, the Environmental Protection Agency ("EPA") rejected the 2018 New Union TMDL and adopted DOFEC's 2016 TMDL called the Chesaplain Watershed Implementation Plan ("CWIP"). R. at 10. This plan did not

purport to instruct New Union on how it had to enforce the BMP provisions. R. at 10. Currently, neither the Chesaplain Slaughterhouse nor the Chesaplain Mills sewage treatment plant are subject to a NPDES permit to reduce their phosphorus loading. R. at 10. Additionally, New Union has failed to take action to reduce phosphorus loading from nonpoint sources of pollution. R. at 10.

Procedural History

Plaintiff, the State of New Union filed an action against the EPA in the United States District Court for the District of New Union on January 14, 2020. R. at 10. Plaintiff CLW also filed an action against the EPA on February 15, 2020, and this Court granted a motion to consolidate the actions on March 22, 2020. R. at 10. CLW submitted a motion for summary judgement and affidavits establishing the member-resident's standing to bring suit. R. at 11. The district court found CLW and New Union met the requirements for standing under Article III of the Constitution. R. at 11. The district court issued an order ruling: 1) the EPA's interpretation of TMDL violated the CWA, 2) the EPA's credit program for nonpoint sources was not arbitrary or capricious or an abuse of discretion, 3) the EPA's rejection of New Union's phosphorus TMDL was impermissible and vacated the action, and 4) the phased percentage reduction TMDL was a violation of the CWA. R. at 3. Following an issuance of an order by the district court, the EPA and CLW each filed a timely Notice of Appeal. R. at 2. The Court of Appeals for the Twelfth Circuit reviews the decision. R. at 1.

SUMMARY OF ARGUMENT

I.

This Court should determine that the issues at hand are unripe because New Union has failed to take any steps to implement the TMDL at issue. The issues are unfit for judicial review

because New Union must take additional administrative action to implement the TMDL before it is finalized. There is only at most minimal future hardship to New Union and CLW because New Union has the freedom to elect how it will implement the TMDL, and an adequate TMDL will remedy the water quality of Lake Chesaplain. This case would also benefit from further factual development because New Union must still determine how it will implement the TMDL.

II.

If this Court determines that the issues are ripe for review, it should determine that Congress clearly intended the statutory term "total" to mean parts–point source and nonpoint source load allocations–constituting the whole load. The plain meaning, structure and purpose, and legislative history of "total" in CWA §303(d) indicates that Congress intended "total" to mean the point and nonpoint sources allocations constituting the whole load. Even if this Court determines that Congressional intent was not clear, it should determine that the EPA's interpretation warrants deference. This is because EPA's interpretation is the most reasonable, Congress acquiesced to this interpretation, allows the EPA to withstand judicial review, and accords with the federalism and constitutional avoidance canons.

III.

This Court should determine the EPA's interpretation of the CWA as reasonable. The EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years does not violate the CWA § 303(d) requirements for a valid TMDL. The CWA's "silence on whether applicable criteria must be achieved at all times or may be periodically violated" requires the Court to defer to the EPA and determine whether the administrative body has reasonably implemented Congress's intended

purpose. Where there is a circuit split on the definition of terms within the meaning of a TMDL, the EPA's decision should be affirmed so long as it's not arbitrary or capricious.

The language and purpose of the CWA supports the EPA's decision to allow a percent TMDL reduction for two reasons. First, the TMDL stated in percent reductions still would limit daily discharge, promoting the purpose of the CWA to reduce identified pollutants and improve the health of United States waterways. Second, the CWA's language shows the Lake Chesaplain TMDL is adequate to ensure achievement of WQS, even when the EPA cannot enforce the implementation of the plan.

IV.

This Court should determine that the EPA's adoption of a credit for anticipated BMP pollution reductions was not arbitrary or capricious because the "reasonable assurance" standard is not applicable to the adoption of BMP credit. The EPA is not required to show that BMP reductions will be achieved because this standard has never been adopted by EPA through notice and comment rulemaking. Additionally, the CWIP is not an implementation program; the TMDL is an informational guide, and there is nothing in the CWA that requires the implementation and compliance of BMP for nonpoint sources. Therefore, the "arbitrary and capricious" standard is the proper standard—not the "reasonable assurance" standard—for the EPA's adoption of BMP credit because the calculation of wasteload and load allocation is a matter of the EPA applying its regulatory standards.

Under the "arbitrary and capricious" standard, this Court must simply consider whether the EPA considered the relevant factors and gave a reasonable basis for its decision. The record shows that the EPA considered the relevant data as it relates to its adoption of the BMP credit and the adoption of the credit for anticipated BMP pollution reductions was not implausible.

ARGUMENT

I. THE ISSUES AT HAND ARE UNRIPE FOR JUDICIAL REVIEW BECAUSE NEW UNION HAS NOT YET DECIDED ON HOW TO IMPLEMENT THE TMDL.

The Founders of the United States Constitution thought it was necessary to limit federal court jurisdiction to only disputes that constitute an actual case or controversy. Const. Art. III § 2, cl. 1. In interpreting this constitutional provision, the Supreme Court has created the ripeness doctrine to prevent courts from impermissibly deciding disputes concerning administrative policies, which would cause judicial interference with administrative decisions. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). When applying the ripeness doctrine to an agency's decision, a court evaluates whether a certain legal action is premature by considering: (1) the fitness of the issues for judicial review; (2) the hardship to the parties of withholding judicial consideration; and (3) the benefit of further factual development of the issues presented. *See Abbot Lab'ys v. Gardner*, 387 U.S. 1507, 1515 (1967); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

A. The Issues at Hand Are Unfit for Judicial Review Because New Union Has Not Taken Steps to Implement The TMDL And Additional Administrative Actions Are Required.

Under the first prong, judicial review has been determined to interfere with administrative action where a TMDL has not been completely finalized. In *City of Arcadia v. EPA*, the plaintiffs argued that an EPA approval of a TMDL was ripe for judicial review because the pending compliance requirements would impose an economic burden on them along with other monitoring requirements. 265 F. Supp. 2d 1142, 1155-56 (N.D. Cal. 2003). However, the court determined that judicial review would likely interfere with the administrative action because the agency creating the TMDL stated that it was subject to further revision at a future time. *Id.* at 1158. The court recognized that these revisions could lead to alterations of the compliance dates and requirements, or that the revision could reverse these compliance requirements altogether.

City of Arcadia, 265 F. Supp. 2d at 1159. Thus, judicial review of a TMDL that is subject to future alterations impermissibly interferes with the administrative action of the agency creating the TMDL.

Here, the TMDL at issue is similarly in a review phase because New Union has only proposed to modify NPDES permits for the Chesaplain Slaughterhouse and Chesaplain Mills sewage treatment plant. R. at 10. Since these facilities have only sought an administrative hearing on the–proposed–requirement of annual phosphorus load reductions, there is no concrete compliance requirement for this Court to review. R. at 10. Further, judicial review is also unfit because New Union "has taken no steps to require phosphorus reduction BMPs by nonpoint sources." R at 10. Comparably to the lack of certain compliance dates and requirements in *City of Arcadia*, the TMDL at issue is still being forged by New Union to ascertain what specific administrative requirements are appropriate. *See* 265 F. Supp. 2d at 1159; R. at 10. Thus, judicial review would inappropriately interfere with the additional steps that New Union must undertake prior to the creation of concrete compliance requirements. Therefore, this Court should determine that the TMDL is unfit for judicial review because New Union must undertake further administrative steps to create any concrete compliance requirements.

B. There Is at Most Minimal Hardship to New Union and Chesaplain Lake Watch Because New Union Retains the Authority to Implement the TMDL and Implementing the TMDL Will Remedy Lake Chesaplain.

Under the second prong of the ripeness test, future minimal hardship is insufficient to satisfy the hardship prong. In addressing the hardship prong to the same facts from above, the *City of Arcadia* Court determined that the plaintiffs would have, "at most, minimal hardship" because they were unable to signal a future event or condition that would adversely affect them. 265 F. Supp. 2d at 1156. This was because the TMDLs at issue would not require compliance until nearly three years from the date that the case was decided. *Id.* at 1156-57. Further, the plaintiffs

failed to explain any enforcement or citizen suits that they would be exposed to under the CWA. *City of Arcadia*, 265 F. Supp. 2d at 1157. Lastly, the costs that the TMDLs purported to impose were to be borne by all permittees, rather than solely by the plaintiffs. *Id.* Therefore, minimal future hardship is insufficiently concrete to satisfy the hardship prong of the ripeness test.

New Union and CLW will only sustain minimal future hardship because they are unable to point to any conditions of the TMDL causing hardship. Like the agency in *City of Arcadia*, New Union still must undertake additional administrative proceedings to effectuate changes to the permit's annual phosphorus loading reductions. R. at 10. Thus, there is no current hardship to New Union until concrete compliance requirements are created because citizen suits challenging the details of such requirements first require New Union to promulgate concrete requirements. CLW similarly faces no hardship because administrative actions are being initiated to remedy the conditions of Lake Chesaplain. The only plausible hardship to CLW is the absence of a TMDL, which is addressed by the fact that New Union is in the process of creating these requirements. R. at 10. This is to be distinguished from a situation where CLW is facing hardship due to an inexistent TMDL. Therefore, this Court should determine that any hardship New Union or CLW faces is minimal future hardship because New Union is not subject to legal attacks from citizens and CLW will have no hardship once the TMDL compliance requirements are implemented.

C. This Proceeding Would Benefit from Further Factual Development Because A TMDL Has No Effects Until New Union Has Undertaken Additional Administrative Processes To Implement The TMDL.

When an administrative decision does not create obligations for a party to conduct their conduct in a particular manner, further factual development in the administrative process is required. Under the Administrative Procedures Act, courts are "only permitted to review 'final agency action' for which there is no other adequate remedy in a court." *Bravos v. Green,* 306 F.

Supp. 2d 48, 55 (D.D.C. 2004) (quoting *Transport Robert (1972) LTEE v. United States Immigr. & Naturalization Serv.*, 940 F. Supp. 338, 340 (D.D.C. 1996) (quoting 5 U.S.C. § 704.)) For an agency's action to be final it must (1) be the conclusion of the agency's decision-making process rather than a tentative decision and (2) be a decision where rights or obligations have been fixed or will follow from. *Bravos,* 306 F. Supp. 2d at 55 (quoting *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F. 3d 45, 48 (D.C. Cir. 2000)). Under CWA § 303(d), a TMDL is distinct from a state implementation plan of that TMDL. *Sierra Club v. Meiburg*, 296 F. 3d 1021, 1030 (11th Cir. 2002). Rather, "TMDLs are primarily informational tools that allow the states to proceed" with creating the implementation plans in attempt "of attaining water quality goals for the nation's waters." *Pronsolino v. Nastri*, 291 F. 3d 1123, 1129 (9th Cir. 2002). On the other hand, "the CWA leaves to the states the responsibility of developing plans to achieve water quality standards if the statutorily-mandated point source controls will not alone suffice[.]" *Id.*

Further factual development of this case would build a more complete administrative record for this Court to review because New Union must take further administrative steps to implement the TMDL. First, the TMDL at issue serves "primarily [as an] informational tool[]" for New Union to use as a guide to achieve its applicable WQS and receive federal funding in doing so. *Id.* at 1128-29. Thus, except for the point source limitations in this TMDL, New Union is only obligated to implement this TMDL to the extent that they desire to receive federal funding. Therefore, this TMDL only created a legal obligation for New Union to implement point source reductions. However, this legal obligation contains the same goal that New Union set for itself–a TMDL to achieve a reduction in phosphorus levels to 120 mt annually. R. at 9-10. Therefore, the TMDL at issue has created no new legal obligations for New Union because New Union had already decided to implement a 120 mt annual point source reduction of

phosphorus, and New Union has no legal obligation to implement nonpoint source limitations. Thus, this Court should determine that the record would benefit from further factual development because New Union must still decide how to implement the 120 mt annual reductions and if they are going to pursue federal funding.

This Court should determine that the issues at hand are unripe for judicial review because New Union must still decide how they will implement the limitations, there is minimal hardship to New Union or Lake Chesaplain Watch, and further factual development will would benefit this proceeding.

II. CONGRESSIONAL INTENT AS TO THE MEANING OF "TOTAL" SUPPORTS THE EPA'S INTERPRETATION, AND THE EPA'S INTERPRETATION DESERVES DEFERENCE.

The CWA gives the EPA the primary responsibility for regulating point sources through effluent limitations, while states regulate nonpoint sources with a substantial amount of input and oversight from the EPA. *See* 33 U.S.C. § 1311(b)(1)(A); *Am. Farm Bureau Fed'n v. EPA*, 792 F. 3d 281, 289 (2015). If these effluent limitations are insufficient to protect waters for their designated uses, states are required to submit a list, commonly referred to as a "Section 303(d) list[,]" to the EPA of waters where effluent limitations are insufficient to meet the applicable WQS. *See* 33 U.S.C. § 1313(d); *Am. Farm Bureau Fed'n*, 792 F. 3d at 289. Using this Section 303(d) list, states must submit TMDLs for each of those waters. 33 U.S.C. § 1313(d)(1)(A) & (C). The EPA defines "total maximum daily load" as the sum of "waste load allocations" ("WLAs") and "load allocations" ("LAs"). 40 C.F.R. § 130.2(i). Further, the EPA defined WLAs as pollutants from point sources and LAs as pollutants from nonpoint sources. 40 C.F.R. § 130.2(g) & (h); *Am, Farm Bureau Fed'n*, 792 F. 3d at 290. Once a state submits this Section 303(d) list and the accompanying TMDLs, the EPA must either approve or disapprove of the documents. 33 U.S.C. § 1313(d)(2). If the EPA disapproves of any of the documents because

they are inadequate, it must promulgate a § 303(d) list and TMDL to implement the applicable WQS. 33 U.S.C. § 1313(d)(2).

Here, New Union alleges the EPA's interpretation of "total maximum daily load" to include limitations for both point and nonpoint sources of pollution is contrary to the term "total." R. at 12. Since New Union challenges the EPA's construction of the CWA, the Chevron Doctrine must be applied to determine whether the EPA's interpretation is unambiguously forbidden by the CWA. *See Am. Farm Bureau Fed'n*, 792 F. 3d at 294 (quoting *Barnhart v, Walton*, 535 U.S. 212, 217-18 (2002)).

Under the Chevron Doctrine, a court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The agency and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Although individual judges and commentators differ on which statutory interpretation tools should be utilized at step-one of a Chevron analysis, courts traditionally use plain language, objective and structure, and legislative history. *See generally* Valerie C. Brannon & Jared P. Cole, Cong. Research Serv., R44954, *Chevron Deference: A Primer* at 14 (Sept. 19, 2017) https://sgp.fas.org/crs/misc/R44954.pdf. However, if a court determines that Congress was ambiguous or silent on the issue, the court must give effect to the agency's interpretation unless it is arbitrary, capricious, or contrary to the statute. *Id.* at 843-44. This is because executive agencies, like the EPA with the CWA, have been delegated by Congress to fill statutory gaps. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005); *see also Am. Farm Bureau Fed'n*, 792 F. 3d at 289.

A. Congress Was Clear in Conveying Their Intent For The Statutory Term "Total" To Mean The Parts Of Waste Load Allocations And Load Allocations Constituting The Whole Load.

All the relevant interpretive tools indicate Congress intended "total" to mean the parts–WLAs and LAs–constituting the whole load. Using the canon against surplusage, comparisons of other uses of "total" in the CWA, and the fact that "total" is used as an adjective modifying "load" in § 303(d) all indicate Congress intended EPA's interpretation. Further, the structure Congress created for the CWA to achieve its objective also indicates that it intended a TMDL to be used to create limitations for nonpoint source limitations when point source limitations alone were insufficient. Lastly, the legislative history displays that Congress acquiesced to the EPA's interpretation of "total maximum daily load" as WLAs and LAs in its 1987 amendments to the CWA.

1. The plain meaning of the term "total" in section 303(d) indicates that Congress intended to give it a meaning of the waste load allocations and load allocations that make up the total maximum daily load.

Under the canon against surplusage, the EPA's interpretation is the best interpretation that gives meaning to Congress' decision to use "total" in § 303(d). This is not a case of first impression, and thus, this Court should consider the Third Circuit Court precedent interpreting "total" in § 303(d). *Am. Farm Bureau Fed'n*, 792 F. 3d at 295. First, the Third Circuit analyzed the language of § 303(d), which states that "total maximum daily load[s] shall be established a level necessary to implement the applicable water quality standards" for impaired waters. *Id.* at 297. The petitioners in *American Farm Bureau Federation* argued that the plain meaning of "total" should be construed as "a number set at a level needed to alleviate water pollution" as opposed to allocations of WLAs and LAs. *Id.* However, the Third Circuit found that while such an interpretation is plausible, it would not give effect to Congress' decision to include the term "total" in § 303(d). *Id.* This was because "[m]aximum daily loads . . . established at a level

necessary to implement the applicable water standard" means the same thing as "a number set at a level needed to alleviate water pollution." *Am. Farm Bureau Fed'n*, 792 F. 3d at 295. The Third Circuit found that the petitioners' interpretation violated the canon against surplusage because it gave no effect to the word "total" in modifying "total maximum daily load." *Id.*

To give "total" an effect, the term should be construed as an adjective modifying "load" to require more than what the phrase alone stands for. Comparably to the petitioners in *American Farm Bureau Federation*, the district court erred in stating that "total" simply means "total" in the context of § 303(d). *See* 792 F. 3d at 297; *see also* R. at 13. In § 303(d), "total" is used as an adjective, as "maximum" and "daily" are, to modify the term "load." 33 U.S.C.A. § 1313(d)(3). The dictionary defines "total" as "constituting or comprising the whole" when it is used as an adjective. *"Total," Merriam-Webster.com Dictionary* (Oct. 31, 2021), https://www.merriam-webster.com/dictionary/total. Here, the EPA's regulation gives effect to the word "total" by defining "total maximum daily load" as requiring allocations for both WLAs and LAs that constitute or comprise the whole load. 40 C.F.R. § 130.2(i). Therefore, this Court should use plain language and the canon against surplusage to determine that Congress intended to give "total" the same meaning the EPA's interpretation has.

Next, the Third Circuit looked to other provisions of the CWA using the term "total" to discern congressional intent in using the word "total." *Am. Farm Bureau Fed'n*, 792 F. 3d at 297. It noted that in approving projects for any treatment works, the EPA administrator is required to consider "'the total cost of operation and maintenance of such works by each user class (taking into account total wastewater loading of such works, the constituent elements of the wastes, and other appropriate factors).'" *Id.* (quoting 33 U.S.C. § 1284(b)(1)). This comparison conveys that Congress did use "total" in the CWA "to mean something more than a single

number." *Am. Farm Bureau Fed'n*, 792 F. 3d. at 297. In fact, § 303(d)(1)(C) does list out factors to calculate the total load. *See* 33 U.S.C. § 1313(d)(1)(C).

This section of the CWA requires the load to be set at a level: (1) to implement the applicable WQS; (2) with seasonal variations; and (3) a margin of safety considering any lack of knowledge cornering the relationship between effluent limitations and water quality. 33 U.S.C. § 1313(d)(1)(C). The third factor strongly indicates that a TMDL should include allocation of pollution load limitations for both point and nonpoint sources because it requires consideration of any lack of knowledge concerning effluent limitations and water quality. *See* 33 U.S.C. § 1313(d)(1)(C). WLAs should be included in the lack of knowledge concerning water quality because nonpoint sources are typically more difficult to identify, and states often lack "the data they need to develop TMDLs for" waters impaired by nonpoint sources. T-RCED-00-88 1 (2000-02-10) Water Quality: Identification And Remediation Of Polluted Waters Impeded By Data Gaps at 2. Therefore, this section of the CWA suggests that the EPA must consider allocations for both WLAs and LAs in creating a TMDL because the EPA must consider any lack of knowledge, which includes data states lack to develop adequate nonpoint source limitations.

2. The structure and objectives of the CWA convey that Congress intended that the EPA have the final power to decide the best manner to create the details contained in a TMDL.

The purpose of the CWA is to create a partnership between the Federal and State governments to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 501 U.S. 91, 101 (1992). In achieving this, the CWA set out two mechanisms: (1) effluent limitations promulgated by the EPA to regulate discharges from point sources and (2) WQS generally promulgated by States to remedy the condition of a waterway to a desirable state. *See id.* However, Congress specifically provided that the EPA

would retain authority to promulgate changes to the WQS if a state does not comply with an EPA recommendation. *Arkansas*, 501 U.S. at 101. Thus, Congress envisioned that the EPA would be the ultimate entity responsible for ensuring goals–in the form of WQS–are being set to attain restoration of the waters of the United States.

To ensure attainment of WQS, Congress declared that controls through "both point and nonpoint sources of pollution" should be developed and implemented to achieve the goals of the CWA. 33 U.S.C. § 1251(a)(7). By requiring the creation of a TMDL, Congress put in place a mechanism to achieve this goal. *See Am. Farm Bureau Fed'n*, 792 F. 3d at 299. This is because, initially, each state creates water quality-based goals discussed above. *Id.* Subsequently, states must set effluent limitations for point sources to achieve this goal. *Id.* Next, when state waters are out of attainment of the applicable WQSs, the state must submit a section 303(d) list of such waters to the EPA. *Id.* This means that the point source limitations were inadequate for the identified waters because the effluent limitations alone were insufficient to achieve attainment of a particular water's WQS. *Id.*

Since the point source limitations alone were insufficient to meet the WQS, it is illogical to conclude that the EPA cannot not prescribe both WLAs and LAs in a TMDL. Such a conclusion would prohibit the EPA from prescribing limits on the class of pollution that gave rise to the need for a TMDL. Thus, "allocating the pollution load between point sources . . . and nonpoint sources . . . is a commonsense first step to achieve the target [WQS]" through the creation of a TMDL. *Id.* at 299-300 (referencing Michael M. Wenig, *How "Total" are "Total Maximum Daily Loads"?—Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act* 12 Tul. Envtl. L. J. 87, 150). Since Congress structured the CWA to require a TMDL once effluent limitations proved ineffective at achieving WQSs, this

Court should determine that Congress intended TMDLs to include the allocation of both WLAs and LAs.

3. The applicable legislative history indicates congressional acquiescence to the EPA's regulation defining a TMDL to include allocations for both point and nonpoint sources.

Congress' adoption of the term "waste load allocations" in its 1987 amendments to the CWA display that it intended to adopt the EPA's regulation defining "total maximum daily load" as allocations of WLAs and LAs. There is only one piece of legislative history to help guide congressional intent of the word "total." *See Am. Farm Bureau Fed'n*, 792 F. 3d at 308. This document states that a TMDL must be developed by the state for all waters requiring more stringent effluent limitations, which the committee admitted would be a "time-consuming and difficult task." *See id.* (quoting H. R. Rep. No. 92-911, at 106 (1972). However, after the EPA "defined 'total maximum daily load' as the sum of WLAs for point sources and LAs for nonpoint sources, Congress" amended the CWA. *Id.* at 308 (quoting P. L. 100-4 § 202(b) (Feb. 4, 1987). In its amendment, Congress required point source limitations to be "'based on [the] total maximum daily load or other waste load allocation.'" *See id*. Congressional use of "waste load allocation," combined with the absence of "waste load allocation" in the CWA, indicates congressional acquiescence to the EPA's regulation creating the term. *Id.* at 308. Thus, Congress agreed with and embraced the EPA's regulation defining "total maximum daily load" as the allocation of WLAs and LAs constituting the whole load.

B. If This Court Determines That Congress Was Ambiguous As To The Meaning of "Total," The EPA's Interpretation Warrants Deference Because It Is The Most Reasonable Definition Of "Total," Congress Acquiesced To The Interpretation, And It Allows A TMDL To Withstand Judicial Review.

If this Court determines that Congress was silent or ambiguous as to the meaning of the word "total" in § 303(d), it should determine that the EPA's interpretation of total is reasonable. First, the EPA's interpretation of "total" is the most reasonable definition considering the context

in which "total" is used in § 303(d). Second, the 1987 amendment and historic use of the EPA's interpretation of "total" indicates congressional acquiescence to this interpretation. Third, the Administrative Procedures Act hard look requirements warrant granting deference to the EPA's interpretation of "total" so that it may adequately explain how it reached a particular "total." Lastly, the EPA's interpretation of "total" does not violate the federalism or constitutional avoidance canons because they still allow the states to implement a TMDL for waters that are under federal jurisdiction.

1. The alternative definitions of "total" warrant granting deference to the EPA's interpretation because the EPA's interpretation accords with one of those definitions.

The Supreme Court has held that where there are alternative dictionary definitions for a statutory term, the term is ambiguous and open to interpretation. *Nat'l R.R. Passenger Corp. v. Boston and Main Corp.*, 503 U.S 407, 408 (1992). In *National Railroad Passenger Corporation*, when analyzing the statute at issue on Chevron step-two, the court determined that the Interstate Commerce Commission's interpretation as most reasonable because it gave effect to the full statutory phrase compared to the lower courts isolated interpretation. *Id.* Here, the statutory term "total" has multiple dictionary definitions including: (1) "constituting or comprising the whole" and (2) "the total amount." *"Total," Merriam-Webster.com Dictionary* (Oct. 31, 2021), https://www.merriam-webster.com/dictionary/total. On its own "maximum daily load" would mean the single number comprising the maximum daily load. *See Am. Farm Bureau Fed'n*, 792 F. 3d at 297. The EPA's interpretation gives effect to the word "total," which is used as an adjective along with "maximum" and "daily" to modify "load." This is because the dictionary defines "total" as "constituting or comprising the whole" when it is used as an adjective. *"Total," Merriam-Webster.com Dictionary* (Oct. 31, 2021), https://www.merriam-webster.com/dictionary/total. Therefore, even if the plain language is found to be ambiguous,

the EPA's interpretation is the most reasonable interpretation because it gives effect to the word "total" as it would be defined when considering the statutory phrase.

2. The historical use of the EPA's regulation interpreting "total" shows congressional acquiescence to the EPA's past practice of using this interpretation.

Under the canon of past practice, this Court should uphold the EPA's interpretation of "total" because the interpretation's longtime use shows congressional acquiescence to its interpretation. The Supreme Court has supported their decision to uphold an agency rule based on past practice providing insight to congressional intent. *See Cuozzo Speed Tech., LLC v. Lee*, 136 S.Ct. 2131, 2134 (2016). As discussed, after the EPA "defined 'total maximum daily load' as the sum of waste load allocations for point sources and load allocations for nonpoint sources, Congress" amended the CWA. *Am. Farm Bureau Fed'n*, 792 F. 3d at 308 (quoting P. L. 100-4 § 202(b) (Feb. 4, 1987). In doing so, Congress required point source limitations to be "'based on total maximum daily load or other waste load allocation.'" *See id.* Further, the amendments did not define "waste load allocations[,]" and this phrase only appears in the EPA's regulations. *See id.* This indicates that Congress agreed with the EPA's interpretation because it adopted the terminology that only the EPA had used. *Id.* Therefore, this 1987 amendment should be construed as congressional acquiescence to the EPA's interpretation of "total." If Congress believed the EPA regulation unreasonably conflicted with its intent in enacting section 303(d), Congress would have created an amendment correcting the EPA's interpretation rather than adopting it.

3. The requirements of judicial review of a TMDL warrants granting deference to the EPA's interpretation because it will enable the EPA to show how it came to a particular "total."

If Congress did not unambiguously convey what it intended "total" to mean, this Court should grant deference to the EPA's interpretation to ensure that it can adequately explain how it

created a TMDL. 5 U.S.C. § 706. The Administrative Procedure Act would mandate that the EPA demonstrate how it came to a particular "total" for a given TMDL even if it was only allowed to prescribe a sum. *See Am. Farm Bureau Fed'n*, 792 F. 3d at 298 (referencing *Cement Kiln Recycling Coal v. EPA*, 493 F. 3d 207, 255 (D.C. Cir. 2007)). Thus, the EPA must be enabled to set the allocations that constitute the whole load allocation to survive judicial review. *See id.* Further, the public would suffer from a lack of information about how the EPA arrived at a "total" because they would not have the requisite information to challenge a TMDLs limitations on point and nonpoint sources. Therefore, this Court should defer the highly scientific process of determining the "total" for a TMDL to the EPA to preserve its ability to survive judicial review.

4. The EPA's interpretation does not violate the federalism canon nor the constitutional avoidance canon because New Union may still choose how to implement the TMDL, and Lake Chesaplain is subject to federal jurisdiction.

The EPA's interpretation does not violate the federalism or constitutional avoidance canon because the allocations allow New Union to choose how it will implement the TMDL. Under the federalism canon, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Where the authority of the Federal government does not clearly extend to allow a certain statutory interpretation, the Supreme Court has invoked the constitutional avoidance and federalism canon to reject such interpretations. *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). First, the EPA's interpretation does not violate the federalism canon because the provisions that could be viewed as affecting state sovereignty to regulate land use are explicitly permitted by Congress or too general to alter state sovereignty in an extreme way. *See Am. Farm Bureau Fed'n*, 792 F. 3d at 302. Further, the

prescription of certain TMDL allocations by the EPA does not dictate the approach states must utilize to meet those allocation limits. *Am. Farm Bureau Fed'n*, 792 F. 3d at 302. Thus, there is even less concern of federal government encroachment on state sovereignty because states can still choose how to meet the EPA's prescribed allocation limits. Rather, these allocation limits serve as a tool for the EPA to ensure that states are working towards the goal of remedying impaired waters–a requirement under the CWA. *See* 33 U.S.C. §§ 1251(a) and 1313(d).

Additionally, there is also no issue with the EPA's regulations under the federalism canon because Lake Chesaplain is likely a navigable water under the Clean Water Act, and thus, Lake Chesaplain is subject to federal jurisdiction. In *Rapanos v. United States*, the Court explained that an intrastate lake, "which could affect interstate or foreign commerce," is a navigable water subject to the CWA. 547 U.S. 715, 724 (2006). It is likely that Lake Chesaplain is a navigable water because it is a fifty-five mile long and five-mile-wide natural lake with a great deal of historic interstate commerce. *See* R. at 7. Since the record indicates that tourism "from the entire mid-north region of the country" has been affected by the water quality in Lake Chesaplain, it is reasonable, within these limited facts, to assume that Lake Chesaplain does affect interstate commerce. R. at 7. Further, the vacation housing market has likely affected out-of-state property owners because out-of-state owners of lakeside property could have had the value of their property decreased due to Lake Chesaplain's condition. *See id.* Therefore, this Court should not invoke the federalism or constitutional avoidance canons because the EPA's authority is allowed by statute, does not completely limit state sovereignty, and Lake Chesaplain is subject to the EPA's jurisdiction under the CWA.

III. CHEVRON AND MEAD DEFERENCE SHOULD BE AFFORDED TO THE KNOWLEDGEABLE ADMINISTRATIVE BODY WITH TECHNICAL EXPERTISE, WHICH IN THIS CASE IS THE EPA.

The EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years does not violate the CWA section 303(d) requirements for a valid TMDL. As noted above, *Chevron* requires courts to determine whether Congress expressed unambiguous intent in the statute. *Chevron* demands that courts defer to the administrative agency's interpretation, as they are the experts in promulgating these policies. *Chevron*, 467 U.S. at 482. If the statute is ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction. *Id*. at 483. When the agency has acted reasonably, the court must defer to the agency's decision, regardless if there is a "more reasonable" interpretation. *Id*. at 845 (citing *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)). Furthermore, the EPA deserves substantial deference as the regulatory body Congress identified to promulgate the CWA. Where "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority," *Mead* deference should be afforded. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Courts acknowledge the EPA's authority to fill the CWA's considerable gaps on how to promulgate particular rules. *Pronsolino*, 291 F.3d at 1131. The Supreme Court held this is especially true when an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication. *Brand X.*, 545 U.S. at 1002-03.

Here, the § 303(d) terms to establish TMDLs are unclear and undefined, because there are no particular time constraints explicitly demanded for the implementation of a TMDL. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 296 (3d Cir. 2015). The CWA's references to water quality standards require *only* that a TMDL sets load levels "necessary to attain and maintain

applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). The language of the CWA does not necessitate that the standards of a TMDL be met at all times, just that the TMDL is set to eventually reach a WQS for that particular type of waterway. *Am. Farm Bureau Fed'n*, 792 F.3d at 296. Furthermore, there is a split of authority on the interpretation of the term "daily." *Id.* at 297. In this case, the statute's language is ambiguous and the application is inconsistent, so the Court must look to whether the EPA's interpretation and application of this rule in the Lake Chesaplain TMDL is acceptable. The CWA is also a highly technical statute, with standards that require constant oversight and particularized knowledge to implement. Thus, the CWA's "silence on whether applicable criteria must be achieved at all times or may be periodically violated," requires the Court to defer to the EPA and determine whether the administrative body has reasonably implemented Congress's intent. *Id*. at 296

IV. THE LANGUAGE AND PURPOSE OF THE CWA SUPPORTS THE EPA'S DECISION TO ALLOW A PERCENT TOTAL MAXIMUM DAILY LOAD ALLOCATION.

Where the ordinary meaning of a word is incongruous with the function of the statute, courts may consider the statute's overall purpose to inform the word's meaning. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The language of §303(d) of the CWA has caused a divide in the circuit court's application of the definition of TMDL. *Am. Farm Bureau*, 792 F.3d at 297. The plain meaning of the word "daily" cannot be taken on its face because it is incompatible with the function and the purpose of the statute. The Court here must look to whether the EPA's interpretation serves the purpose of the CWA. The CWA's goal is to limit pollutant discharge to eventually eradicate all pollution of United States waterways. 33 U.S.C. § 1251. A percent reduction TMDL promotes the goals of Congress and does not overstretch the boundaries of statutory interpretation.

A. The TMDL Stated in Percent Reductions Would Limit Daily Discharge, Promoting The Purpose Of The CWA.

The implementation of phased percentage reduction in phosphorus loading achieves the purpose of the CWA. The purpose of the CWA is to prevent, reduce, and eliminate pollution in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 303(d)'s direction to calculate a "total maximum daily load" gives only the guidance that the TMDL must be set 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). Thus, the CWA's guidance stating that "TMDLs *can* be expressed in terms of either mass per time, toxicity, or other appropriate measure" is correctly read in a way which is permissive of various TMDL standards, so long as they promote the purpose of the CWA. 40 C.F.R. § 130.2(i) (emphasis added).

TMDLs are primarily informational tools that allow the states to proceed from the identification of waters to the required creation and implementation necessary water quality control plans. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-8 (9th Cir. 1994). Although the ultimate objective of the CWA was to eliminate all discharges of pollutants into the navigable waters by 1985, the statute sets forth a scheme of phased compliance. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 317 (1982). This is exemplified in *Weinberger v. Romero-Barcelo*, where the Supreme Court ruled that immediate changes in compliance measures with the CWA are not necessary except in circumstances which pose imminent and substantial danger to health and welfare of the public. *Id*. (citing 33 U.S.C. § 1364(a)). In *Weinberger*, citizens and officials of Puerto Rico brought an action against officials of the Navy regarding violations of the CWA. *Id.* at 307. The district court found that respondents violated the CWA, but refused to issue an injunction, believing that it was not necessary to encourage swift compliance by the

Navy. *Weinberger*, 456 U.S. at 309. The Supreme Court affirmed the district court's withholding of an injunction—even though it allowed the Navy to continue violating the statute while it obtained the requisite permit—as an acceptable application of the district court's equitable discretion. *Id.* at 307.

The Court here has the same authority to affirm the EPA's proposed TMDL and rejection of the New Union TMDL. The district court, like the court did in *Weinberger*, could have imposed stipulations with regard to the TMDL which allowed the EPA to potentially alter the terms as needed without vacating the EPA TMDL entirely. While the court in *Weinberger* dealt with the implementation of the NPDES, another regulatory scheme under the CWA, TMDLs and NPDES function in similar ways. Thus, the ruling in *Weinberger* is still applicable as another pollution limiting regulatory scheme within the CWA, which both have the purpose of reducing pollutants and improving the quality of United States waters.

The CLW might argue advancing "the purpose of the [CWA]" cannot lead to extravagant interpretations, and that imposed limits are also a part of the purpose of any statute. *Rapanos v.*, 547 U.S. at 752. Here, there are limits well defined within the parameters of the CWA. The EPA's interpretation can hardly be categorized as extravagant. The outcome results in total reduction in discharge into United States waterways and an improvement in Chesaplain Lake's biological health. The hardline rules of reduction in discharge for the improvement of the waterway have been followed, and even exceeded.

B. The CWA's Language Shows The Lake Chesaplain TMDL Is Adequate To Ensure Achievement Of Water Quality Standards.

When construing the text of a statute, the courts should "look first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013). In *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001), the Second Circuit

opined that the term "daily" is not as obviously construed as other circuits have determined. Where there are several options in promulgating a rule, the statute should be interpreted in a way that avoids absurd results. *See, e.g., United States v. Hendrickson*, 26 F.3d 321, 336 (2d Cir. 1994). The court in *United States v. Dauray* notably considers a regulation that would prohibit an interpretation of a statute that effectively has the same outcome as an absurd result. 215 F.3d 257, 264 (2d Cir. 2000).

TMDL is defined in terms of the "greatest amount of [a pollutant] that a water can receive without violating water quality standards." *Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 140 (D.D.C. 2018) (citing 40 C.F.R. § 130.2(f)). TMDLs can be expressed in terms of mass per time, toxicity, or other appropriate measures. 40 C.F.R. § 130.2(i). The only requirement established by § 303(d) is that each state include in its continuing planning process "adequate implementation, including schedules of compliance, for revised or new water quality standards." *Pronsolino*, 291 F.3d at 1140. TMDLs must be implemented by states to the extent required to prevent the loss of federal funding. *See id*.

In *Nat. Res. Def. Council, Inc. v. Muszynski*, for example, the Second Circuit held that a TMDL could be expressed as "an hourly, weekly, monthly, or annual load." 268 F.3d at 98. The Second Circuit Court of Appeals reasoned that a literal construction of the term "daily" would be "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id*. at 99. *Nat. Res. Def. Council, Inc. v. EPA* limits the ruling in *Muszynski*, however, stating "[i]n this circuit . . . agencies seeking to demonstrate absurdity have an exceptionally high burden." 301 F. Supp. 3d at 143 (citing *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006)). The D.C. Circuit Court does not clearly define what constitutes a sufficient showing of absurdity, only that circumstances caused by the

agency's own decisions will not be considered in a favorable light. *See id*. Rather, the court simply concludes without explanation that the EPA did not meet the standard in that case. *Nat. Res. Def. Council, Inc. v. EPA* 301 F. Supp. 3d at 143. However, the court in *United States v. Dauray* notably considers a regulation that *would prohibit an interpretation of a statute which would effectively have the same outcome* as an absurd result. 215 F.3d at 264 (emphasis added).

The Chesaplain TMDL as implemented by New Union is considered an absurd result for two reasons. First, a daily load allocation would be ineffective and would not achieve the purpose of improving water quality in an area where the main source of phosphorus loading cannot be regulated by the EPA, much less on a daily basis. The EPA regulation requires a state, as part of its TMDL submission, not only to establish the total maximum level of pollutant loading for a water body, but to allocate that level of loading among CWA permitted point sources in the watershed, taking into account the non-permitted nonpoint sources and natural background sources. 40 C.F.R. § 130.2(i). As applied here, two of the major sources of pollution that the EPA must account for are non-point sources. R. at 9. These sources are 1) ten large-scale hog production facilities, also known as CAFOs, and 2) second home development on the Lake Chesaplain shoreline. R. at 9. Both of these sources, however, are exempt from CWA permitting. *See* 33 U.S.C. § 1362(14). Additionally, while CAFOs comply with their respective regulations, CAFOs still are the biggest contributing source of phosphorus to Chesaplain Lake, and the suggested TMDL cannot regulate CAFOs phosphorus contribution in the process. R. at 9. Second, the rejection of the TMDL would be considered an absurd result as noted in *Dauray*, because the regulation which is being rejected (the EPA's proposed TMDL) would have the same result as the New Union TMDL, both of which would effectively reduce phosphorus loading into Lake Chesaplain.

Furthermore, when pollution standards are imposed over a period of time, it is unlikely the polluter will continue to discharge at the same levels and then suddenly reduce their discharge sharply to meet compliance standards. Technology limitations and cost feasibility points to the likelihood of a gradual change. Therefore, while the TMDL is not expressed explicitly as a daily load value, the effect of a percent reduction would still lead to an improvement in water quality and thus is a permissible interpretation of the CWA.

While CLW may argue that *Natural Resource Defense Council, Inc. v. EPA*, is dispositive in determining whether a TMDL expressed in terms other than daily load is appropriate, those facts are readily distinguishable from the case at bar. *See generally Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d at 133. There, a TMDL for the Anacostia River was established by ascertaining the amount of trash that flowed into the river with the stormwater, and then established the amount of trash that had to be captured or removed from the water body after adding a five percent margin of safety. *Id*. at 139. The court there held the plain meaning and enforcement of the EPA's regulations demand that "maximum load" be established as limiting a quantity of pollutants *added* to the water, not *removing* quantities of pollutants. *Id*. at 141. While there is a circuit split regarding the definition of "daily," the court there held the meaning of "maximum" and "load" is clearly established, and the EPA's approval of the TMDL was inappropriate. *Id.* Here, the EPA did not approve a TMDL that suggested the removal of any material. The TMDL properly sets a maximum limit by considering historical trends and calculated a reduction plan based off the information in the Chesaplain Supplemental Report. R. at 9. Where a TMDL sufficiently establishes a maximum load allocation which is pursuant to the goals of the CWA, there is no reason to challenge the EPA's decision.

V. THE EPA'S ADOPTION OF A CREDIT FOR ANTICIPATED BMP POLLUTION REDUCTIONS WAS NOT ARBITRARY OR CAPRICIOUS BECAUSE THERE IS NO "REASONABLE ASSURANCE" STANDARD FOR ALLOCATION OF BMP CREDIT.

A TMDL is an informational guide to the total amount of a pollutant from point sources, nonpoint sources, and natural background, that a water quality limited segment can tolerate before violating the applicable WQS. *See In re City of Moscow, Idaho*, 10 E.A.D. 135, 2001 WL 988721, at *4 (EAB July 27, 2001). BMPs, on the other hand, are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.'" 40 C.F.R. § 122.2; cf. *Natural Res. Def. Council, Inc. v. EPA*, 808 F.3d 556, 579 (2d Cir. 2015). Point source pollution is controlled directly by the CWA's federal permit program. *Oregon Nat'l Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). By contrast, nonpoint source pollution "is not regulated directly by the [CWA] and is instead left to the States to regulate under state programs." *Id.*; *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (holding that nothing in the CWA requires the implementation and compliance of BMP for nonpoint sources, which Congress left optional to the states); s*ee also City of Arcadia v. U.S. EPA*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003). States have the obligation of setting the TMDL with BMPs and submitting them to the EPA for approval. However, if the EPA disapproves of the TMDL, the EPA can set a new TMDL itself. 33 U.S.C. § 1313(d)(2).

This Court should affirm the decision of the lower court, because there is no "reasonable assurance" standard for the adoption of a credit for anticipated BMP pollution reductions and the EPA's allocation of the BMP credit is not arbitrary or capricious.

a. The "Reasonable Assurance" Standard Is Not Applicable To BMP Credit For Pollution Reductions Because It Was Never Adopted By The EPA.

The district court correctly ruled that there is no "reasonable assurance" standard for the adoption of a credit for anticipated BMP pollution reductions because the "reasonable assurance" standard has not been adopted by the EPA for BMP credit. TMDLs are primarily informational tools that allow the states to proceed from the identification of waters to the required creating and implementing necessary water quality control plans. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994). A TMDL is only a step toward the improvement of WQS by informing the design and implementation of pollution control measures. *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996). The CWA uses different methods to control pollution released from point sources and nonpoint sources. *Pronsolino*, 291 F.3d at 1126. The EPA requires a TMDL, whether it is developed for point sources only or nonpoint and point sources, to provide a "reasonable assurance" that the wasteload allocations contained in the TMDL will be achieved. EPA, *Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992* (2002), https://www.epa.gov/tmdl/guidelines-reviewing-tmdls-under-existing-regulations-issued-1992.

Here, the EPA's BMP credit is part of the TMDL to reduce the stringency of wasteload allocations for point sources. However, the EPA does not need to show that reductions will be achieved because this standard has never been adopted by the EPA through notice and comment rulemaking and the CWIP is not an implementation program. R. at 16. The EPA's guideline for reviewing TMDLs does not require a "reasonable assurance" standard for allocating BMP credit—this standard is appliable for the issuance of NPDES permits for waters impaired by point sources only and for the WLA for nonpoint source control measures for waters impaired by both point and nonpoint sources. *Id.* The BMP credit is not a practice made to control measures

to achieve expected load reductions; instead, it is a suggested practice to make the load allocations more practicable (which are within the EPA's control) and wasteload allocations less stringent (which are within New Union's control). R. at 15. Because EPA's calculation of wasteload and load allocation is a matter of the EPA applying its regulatory standards, the appropriate standard of review is not "reasonable assurance," but "arbitrary and capricious."

b. The EPA's BMP Credit Adoption Is Not Arbitrary and Capricious Because The TMDL Does Not Require Implementation Or Compliance For Nonpoint Sources.

The EPA's adoption of a credit for anticipated BMP pollution reductions is not arbitrary or capricious because the TMDL is an informational tool that does not require implementation of BMPs for nonpoint sources. This Court must apply a highly deferential "arbitrary and capricious" standard of review when evaluating the EPA's action because this is a matter of the EPA applying its regulatory standards to the record before the agency. Therefore, the EPA just needs to show that it considered the relevant factors and gave a reasonable basis for its decision.

Under the Administrative Procedure Act, the proper standard of review for agency action is "arbitrary and capricious;" this is a highly deferential standard where the court will only set aside the agency's action if it is either not in accordance with the law or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A), (E); *See Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013). Instead of substituting its own judgment for that of the agency, this Court must simply consider whether the agency considered the relevant factors and gave a reasonable basis for its decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, (1971); *see also City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). The relevant factors in considering whether the agency's action was arbitrary and capricious include the agency: (1) failing to explain relevant data that relates to its decision; (2) relying on factors which Congress has not intended it to consider; (3) failing to consider an

important aspect of the problem and to respond to flaws about the evidence they used to support their own claims; (4) offering an explanation for its decision that runs counter to the evidence; and (5) enacting an action so implausible that it could not be attributed to a simple difference in agency expertise. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983); s*ee Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). Additionally, when evaluating these factors, the court must limit its analysis to whether there exists a rational connection between the facts found in the administrative record and the decision made: the court cannot come up with support for the agency's deficiencies in reasoning. *State Farm*, 463 U.S. at 43; *See Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 667 (6th Cir. 2013); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007).

Congress enacted the CWA to establish a basic structure for regulating discharges of pollutants into the waters of the United States and for regulating quality standards of surface. EPA, *Summary of the Clean Water Act* (2021), https://www.epa.gov/laws-regulations/summary-clean-water-act. Under the CWA, the EPA is allowed to enact regulation governing wasteload allocations to allow credit against the TMDL for leading reductions achieved through BMPs: if BMPs, or other nonpoint source pollution controls, "make more stringent load allocations practicable, then waste load allocations can be made less stringent." 40 C.F.R. § 130.2(i). The EPA also has authority to either approve or reject each step of the WQS process, including the establishment of TMDLs for impaired waters. *See* 33 U.S.C. §1313(c)(3).

Here, the EPA, within its authority granted by CWA § 303(d)(2), rejected DOFEC's July 2018 TMDL and instead adopted the original DOFEC TMDL proposal (the CWIP). R. at 10. Under the CWIP, point sources were to be regulated by permit controls and nonpoint sources

were to be regulated by BMP measures, including adoption of credit for BMP pollution reductions. R. at 10. However, both the TMDL and the BMP credit are both guidelines and information concerning possible methods that could help New Union comply with the WQS set forth in the CWA. R. at 16. The EPA needed to set an information guide for nonpoint sources even if it cannot require the implementation of BMPs for nonpoint sources. According to the data of existing loadings, out of a total of 180 mt, 85.8 were from nonpoint sources (opposed to the 61.9 from point sources and 32.3 from natural sources). R. at 8-9. Majority of the existing loadings were from nonpoint sources and the EPA's proposed implementation of BMPs is a plausible action given its agency expertise. On the contrary, CLW argues that the EPA may not take any credit for phosphorus load allocation reductions anticipated from the implementation of BMPs for nonpoint sources because the EPA has no authority to require the implementation of BMPs. R. at 11. Under CWA §303, the proposal provided New Union with information concerning possible BMPs that might be used to achieve compliance with water quality standards. R. at 9, 16.

Additionally, the EPA's adoption of a credit for anticipated BMP pollution reductions was not arbitrary and capricious because there exists a rational connection between the facts found in the administrative record and the adoption of CWIP. Because of the declining quality of the Lake Chesaplain watershed, the DOFEC publicly noticed a proposal to implement the TMDL through an equal phased reduction in phosphorous discharges by both point and nonpoint sources. R. at 9. The proposal incorporated point source reductions as permit limits, while the nonpoint source reductions were to be achieved through a series of BMP programs designed to encourage the hog CAFOs and other agricultural sources to reduce phosphorus loadings. R. at 9. The EPA eventually approved and adopted CWIP after notice and comment and after

incorporating the entire record of scientific reports and public comments before the DOFEC into its own record. R. at 10. The CWIP—the combination of phased point source limits and BMP measures—did not specify whether or how the proposed BMP measures would be enforced. R. at 10.

Although not part of the record before the EPA, affidavits submitted by CLW—which are undisputed by New Union or the EPA—establish that since the EPA's adoption of the proposal, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed. R. at 10. No new permits were issued to the nonpoint sources to incorporate any phosphorus reduction measures contemplated by the CWIP, and the Lake Chesaplain waters continue to violate water quality standards. R. at 10. CLW's point about the absence in the record of any indication that New Union intended to require implementation of the BMPs contemplated by the CWIP lacks merit because the political opposition to the implementation of the BMPs prompted New Union to limit its efforts to establish a total loading. R. at 16. In the two years since the adoption of the CWIP, New Union has taken no action to implement the BMPs. R. at 16.

Because the CWIP does not require implementation or compliance for nonpoint sources, this Court must simply analyze whether the EPA considered the relevant factors and gave a reasonable basis for its decision. The EPA explained the relevant data as it relates to its adoption of the BMP credit and in light of this data, the adoption of credit for anticipated BMP pollution reductions was not implausible. Therefore, EPA's BMP credit was not arbitrary or capricious.

CONCLUSION

This Court should reverse the decision of the District Court and determine that the following issues are unripe for judicial review because New Union must take additional action to

implement the TMDL, which will remedy Lake Chesaplain's water quality issues. If this Court determines that the issues are ripe for review, it should reverse the decision of the District Court and determine that the EPA's interpretation of "total" is what Congress intended it to mean in CWA § 303(d). This Court should reverse the district court's vacation of the EPA TMDL and find that the EPA's phosphorus TMDL was permissible under the CWA. Finally, this Court should affirm the district court's decision and hold that the EPA's determination to adopt BMP credit for nonpoint sources as an offset to point source reductions is not arbitrary or capricious.