TEAM NO. 10

Docket No. CA-20-000123
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.

ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

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-CROSS APPELLEE CHESAPLAIN LAKE WATCH

Oral Argument Requested

Attorneys for the Plaintiff-Appellant-Cross Appellee,
Chesaplain Lake Watch

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Materials

JURISDICTIONAL STATEMENT

Chesaplain Lake Watch, Inc. (CLW) appeals from an Opinion and Order entered August 15, 2021, which disposed of all party claims for CLW, Plaintiff-Cross Appellee State of New Union (New Union), and Defendant-Appellant Environmental Protection Agency (EPA) by the Honorable Judge Remus in the United States District Court for the District of New Union from the consolidated actions No. 66-CV-2020 and 73-CV-2020. The district court had subject-matter jurisdiction pursuant to the citizen-suit provision of the Administrative Procedure Act, 5 U.S.C. § 702, and the federal question doctrine, 28 U.S.C. § 1331. CLW, New Union, and EPA all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015) (acknowledging that an order granting summary judgment is a final, appealable decision).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether EPA's rejection of a proposed TMDL, adoption of another TMDL, and subsequent adoption of an implementation plan for Lake Chesaplain, in combination with the agency's independent act of filing within its own records all scientific reports and public comments related to the Lake Chesaplain TMDL, constitute a single final agency action that is ripe for judicial review?
2. Whether EPA's interpretation that a total maximum daily load must include separate allocations for point and nonpoint sources is reasonable, given that total is not a defined term within the Clean Water Act.
3. Whether the plain meaning of the word daily unambiguously forecloses EPA's interpretation that a total maximum daily load can be expressed in annual terms.
4. Whether the Clean Water Act's mandate that a total maximum daily load be set at a level necessary to achieve water quality standards forecloses EPA's interpretation that it can adopt a TMDL that fails to meet water quality standards until five years after its adoption.
5. Whether EPA may adopt less stringent point source pollution reductions and more stringent nonpoint source pollution reductions in the absence of reasonable assurances that the nonpoint sources can actually decrease their daily loadings.

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act establishes a comprehensive framework for regulating pollution in waters of the United States. 33 U.S.C. §§ 1313, 1342, 1344. Under a scheme of "cooperative federalism," Congress delegated authority to EPA to oversee state implementation of effluent limitations for the state's waters, permitting EPA to take control of the process if the state's regulation is inadequate. *See* 33 U.S.C. § 1313. To reach the EPA's desired water quality standards, point sources receive individual numerical permit limits, but nonpoint sources lay outside the direct regulation of the permit program. R. at 5.

As part of this scheme, the Clean Water Act first directs states to adopt water quality standards (WQS) for their subjected waters. 33 U.S.C. § 1313(a). After establishing WQS, states must assess each waterbody to determine if the waterbody meets the applicable WQS with only general point source effluent limitations. *See* 33 U.S.C. § 1313(d). If a water body fails to meet the WQS, it is deemed impaired, and the state must develop a Total Maximum Daily Load (TMDL) for the impaired water's pollutants "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C).

EPA defines a TMDL as "the sum of individual [wasteload allocations (WLAs)] for point sources and [load allocations (LAs)] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). In its TMDL submission, a state must establish a water's total maximum level of pollutant loading for permitted point sources, while simultaneously accounting for additional pollutants from non-permitted nonpoint sources. *Id.* And if a state can implement Best Management Practices (BMPs) to make more stringent LAs practicable, the state may take credit for nonpoint source pollution reductions and enforce less stringent WLAs for point sources. *Id*.

However, if a state fails to act on any part of the permitting process—or if EPA disapproves of the state's suggested action—EPA must create its own corresponding WQS, list of impaired waterbodies, and/or TMDLs for the state to implement. *See* 33 U.S.C. § 1313(c)(3), (d)(2).

B. Decline of Lake Chesaplain Water Quality

This current litigation concerns the declining water quality of New Union's former tourist oasis, Lake Chesaplain. Beginning in the 1990s, Lake Chesaplain saw an increase in phosphorus discharges from both point and nonpoint sources, including a sewage treatment plant operated by Chesaplain Mills, "ten large-scale hog production facilities," and a large-scale slaughterhouse. R. at 7. Increased residential developments along Lake Chesaplain also necessitated the installment of a septic system that discharges into the lake. R. at 7. While the sewage treatment plant and slaughterhouse obtained permits to limit discharges, the septic system and hog farms remained unregulated as "non-discharging" point sources, despite their "substantial phosphorus loadings." *See* 40 C.F.R. § 122.23; *see generally Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011); R. at 7, 9. Today, Lake Chesaplain is a cesspool that is unsuitable for swimming, fishing, or boating. R. at 7.

In 2014, as a response to Lake Chesaplain's declining water quality, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a 0.014 mg/l WQS for phosphorous in Lake Chesaplain and listed the lake as an impaired waterbody. R. at 8. Two years later, DOFEC established a new TMDL for phosphorous in the lake, set at 120 metric tons (mt) annually to reach the 0.014 mg/l WQS necessary for a healthy ecosystem. R. at 8. DOFEC's goals for implementation included a phased reduction of 35% in phosphorus discharges over five years that would be implemented through permits for point source discharges and BMPs for nonpoint sources. R. at 9. However, DOFEC faced backlash over these "expensive" compliance costs, and

New Union subsequently backed away from these stringent controls . R. at 9. DOFEC now awaits administrative hearings with the slaughterhouse and Chesaplain Mills to discuss the hardships of implementing these BMPs. R. at 9-10. In the meantime, both facilities continue to operate on expired NPDES permits, and New Union has neglected to implement BMPs to reduce phosphorous pollution from nonpoint sources. R. at 10.

Prior to the eventual adoption of the TMDL at issue, CLW argued that DOFEC's proposed changes were "insufficient to achieve a 35% reduction in nonpoint phosphorus inputs," and the reduction suggestions did not take the statutorily required form of a "daily limit based on the scientific calculation without a phased implementation." R. at 9-10. Nevertheless, DOFEC adopted a TMDL for phosphorous in July 2018 that consisted only of a 120 mt annual maximum, without any wasteload allocations or load allocations. R. at 10. Pursuant to § 303(d)(2) of the Clean Water Act, EPA rejected the July 2018 TMDL, and in May 2019, EPA adopted the original TMDL consisting of a 35% reduction of annual phosphorus over five years. R. at 10. EPA subsequently compiled the phased point source limits and BMP measures into an official Chesaplain Watershed Implementation Plan (CWIP), which EPA recorded, along with the "entire record of scientific reports and public comments." R. at 10.

C. Proceedings Below

New Union commenced its suit on January 14, 2020, less than a year after the EPA adopted the original DOFEC TMDL and incorporated these measures into the CWIP. R. at 10. Then, on February 15, 2020, CLW filed its own suit. R. at 10-11. Since both suits arose under the APA, the district court granted unopposed motions to consolidate the two actions on March 22, 2020. R. at 10. Subsequently, EPA lodged the administrative record with the court on July 1, 2020. R. at 10.

All three parties then filed cross-motions for summary judgement. R. at 5. New Union argued that its phosphorous TMDL consisting of the 120mt/year total loading capacity satisfied the requirements for a valid TMDL, and New Union additionally argued that EPA's regulation that requires a TMDL to include separate pollution allocations among point, nonpoint, and natural sources runs contrary to law. (R. at 11). CLW argued that EPA impermissibly adopted the original DOFEC TMDL in the absence of reasonable assurances that the required WQS would be met, and CLW further argued that EPA's adoption of the TMDL was arbitrary and capricious because the final Lake Chesaplain TMDL was expressed as a five-year phased implementation, rather than the statutorily required daily limit on pollutant loadings. R. at 11. EPA sought to dismiss the plaintiffs' claims on the merits, arguing that the Lake Chesaplain TMDL and CWIP are consistent with the requirements of the Clean Water Act, and additionally on procedural grounds, arguing that neither claim was ripe for review. R. at 11.

Even though New Union has not incorporated the adopted TMDL into any permits, the court found all the necessary facts were sufficiently developed to make the issue ripe for review. R. at 12. Next, the court held that EPA's interpretation that a TMDL must have separate WLAs and LAs runs contrary to the plain language of the Clean Water Act and that EPA's implementing regulation, 40 C.F.R. § 130.2(i), is contrary to law. R. at 13. Thus, the court granted summary judgement for New Union on this issue, finding that EPA's rejection of the 120 mt annual maximum TMLD was based on an invalid reading of the Act. R. at 14.

The district court then found EPA's implementation of a phased percentage reduction in phosphorus loadings contradicted the plain meaning of the phrase "total maximum daily load," since the "clear intent" of § 303(d) did not contemplate a loading standard that would take five years to implement. R. at 15. Finally, the court found that EPA's reasonable assurances standard

deserves no deference and does not control EPA's decision to tradeoff loading allocations between point and nonpoint sources in the absence of reasonable assurances that BMPs for nonpoint sources are practicable. R. at 16.

This appeal followed.

SUMMARY OF ARGUMENT

First, the Lake Chesaplain TMDL and EPA's subsequent recordation of all reports is ripe for review because it meets the fitness and hardship prongs. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). The final Lake Chesaplain TMDL constitutes a final agency action "in itself" because it constitutes the "consummation" of EPA's decisionmaking process, and EPA's other actions also constitute a final action. *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 82 n.16 (D.D.C. 2013); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir 1986).

Second, EPA's rejection of New Union's proposed TMDL was valid because the TMDL failed to include separate allocations for point and nonpoint sources, in violation of 40 C.F.R. 130.2(i).

Third, EPA's adoption of a phased-annual TMDL that did not meet water quality standards for five years was arbitrary and capricious and contrary to the plain meaning of the word "daily," as the term is only susceptible to a single interpretation.

Finally, EPA's decision to award offset credits for nonpoint source reductions without reasonable assurances that nonpoint source controls would be implemented was arbitrary and capricious. The reasonable assurances standard reflects EPA's attempt to eliminate ambiguity created by use of the term "practicable," and the standard otherwsaie deserves defernece. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300 (3d Cir. 2015). In contrast, EPA's recent determination that it can award offset credits for nonpoint source reductions based on suggested nonpoint source controls does not reflect a reasonable construction of the statute and merits no deference.

ARGUMENT

I. CLW and New Union's claims are ripe for review.

EPA's action is ripe for judicial review because it constituted a final agency action pursuant to 5 U.S.C. § 704 and imposed an immediate hardship on CLW and New Union that requires court intervention. The ripeness doctrine protects administrative agencies from premature judicial interference with their actions unless a court finds an immediate issue that leaves a concrete effect on the challenging parties. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49, 152 (1967). To determine whether an administrative action is ripe, a court must evaluate both the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Following its decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court elaborated on this two-pronged analysis by noting the fitness prong evaluates whether "judicial intervention inappropriately interferes with future administrative actions" and whether there is "no benefit for further factual development of the issue." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

In the present case, both prongs weigh substantially in CLW and New Union's favor, and this Court should, according, hold that issues before it are ripe for review.

A. EPA's adoption of the original DOFEC TMDL constitutes a final agency action because it marks the consummation of an agency's act that confers rights and obligations upon CLW and New Union.

The first consideration of the ripeness doctrine tests whether an issue is "fit" for judicial consideration. *Abbott Lab'ys*, 387 U.S. at 149. The crux of the fitness prong "rests primarily on whether a case would benefit from further factual development" and "whether judicial intervention would inappropriately interfere with further administrative actions." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013); *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 733. Under this

framework, the "key consideration" to evaluate an issue's fitness for review is to determine the degree of finality of the agency's action. *Transport Robert (1973) LTEE v. U.S. Immigr. & Naturalization Serv.*, 940 F. Supp. 338, 340 (D.D.C. 1996).

The APA provides for "judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett v. EPA*, 566 U.S. 120, 129 (2012). Whether a court declares an action "final" under the APA is governed by 5 U.S.C. § 704, and administrative acts are ripe for review prior to state enforcement if the regulation "requires an immediate and significant change in the plaintiff's conduct…with serious penalties attached to noncompliance." *Abbott Lab'ys*, 387 U.S. at 153; *Am. Farm Bureau*, 792 F.3d at 293-94. An aggrieved party is entitled to judicial review, so long as the action is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Thus, under the APA, an agency's action is deemed "final" when it (1) marks the "consummation" of an agency's decision-making process and (2) gives rise to determinable, legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

First, the "consummation" of an agency's decision-making is not "merely tentative" in nature; instead, it must have a "direct and immediate . . . effect on the day-to-day business of the challenging parties. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir 1986); *Abbott Lab'ys*, 387 U.S. at 152. And a final agency action can arise out of a "series of agency pronouncements rather than a single edict." *Ciba-Geigy*, 801 F.2d at 435 n. 7. Moreover, agency decisions embody the consummation of an act if they are not subject to further review by the agency. *Sackett*, 566 U.S. at 127. The mere possibility of an agency reviewing its decision amidst an "informal discussion [or] invited contentions of inaccuracy" is inadequate to render a final agency action nonfinal. *Id*.

Courts are split over whether EPA's approval of a TMDL constitutes a final agency action. Some courts hold that agency actions must involve separate implementation to be ripe for review., concluding that "mere[] comments" on "generic" implementation plans for TMDLs does not mark the consummation of an agency's actions for purposes of review. *Bravos v. Green*, 306 F. Supp. 2d 48, 56 (D. D.C. 2004); *see also City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1157 (N.D. Cal. 2003) (finding there was no final agency action when the TMDLs imposed no obligations because they were subject to further revision by the agency.).

However, EPA's approval of a TMDL can be a final agency action "in itself." *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 82 n.16 (D.D.C. 2013); *see also Conservation L. Found. v. EPA*, No. 2:08–cv–238, 2010 WL 11606971, at *3 (D. Vt. August 26, 2010) (finding that EPA's approval of TMDL was a final agency action). According to the Ninth Circuit in *Friends of Wild Swan v. EPA*, 74 F. App'x 718 (9th Cir. 2003), EPA's approval of a TMDL constituted a final agency action. The court held that the TMDL marked the consummation of the decision-making process because the TMDL's approval contained a "statement of reasons explaining the EPA's analysis" that was not "tentative or interlocutory." *Friends of Wild Swan*, 74 F. App'x at 720. And the court held that EPA's approval created legal consequences by requiring the state to incorporate the TMDL into its continuing planning process under 33 U.S.C. § 1313(e), which requires EPA approval prior to the issuance of new permits. *Id.* at 721. Thus, EPA's approval of a TMDL "easily met" the requirements for a final agency action. *Id*. at 720.

To be ripe for review, a final agency action must also give rise to "determinable, legal rights or obligations" that impose consequences upon those that do not comply. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Mar. Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Although TMDLs are not self-executing, they "serve as

the cornerstones for pollution-reduction plans that do create enforceable rights and obligations." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 291 (3d Cir. 2015); *see also Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) (holding a "guidance document reflecting an agency's position with determined legal consequences" constituted a final agency action); *Ciba-Geigy Corp*, 801 F.2d at 436-39, 438 n.9 (holding a letter from an agency that states the agency's position and threatens enforcement if there is noncompliance constitutes a final agency action).

Failure to comply with expected changes to a previous policy constitutes a created legal right and obligation. In *Sackett v. EPA*, 566 U.S. 120, 126 (2012), the Supreme Court held that an EPA compliance order under the Clean Water Act created an obligation upon the plaintiffs to restore their property according to EPA's "Agency-approved Restoration Work Plan." The court found the issue created legal obligations since the order restricted the Sacketts from obtaining a future permit and increased their penalties in any subsequent enforcement proceedings, so the issue was ripe for judicial review. *Id.* at 126.

In the present case, the EPA's action against CLW and New Union is fit for judicial review because it meets all criteria required to be a final agency action. First, EPA's rejection of the July 2018 TMDL and subsequent approval of the original DOFEC TMDL proposal in May 2019 constitute a single final agency act "in itself." *Food & Water Watch*, 5 F. Supp. 3d at 82 n.16. Lake Chesaplain's TMDL has "easily met" the requirements of a final agency action because the TMDL contains a statement on how it plans to reduce phosphorus pollution from "both point and nonpoint sources phased in over five years, via permit controls on point sources and BMP requirements for nonpoint sources." *Friends of Wild Swan v. EPA*, 74 F. App'x at 720; R. at 10. Furthermore, the the CWIP that was a product of the TMDL framework must be incorporated under New Union's continuing planning process required by 33 U.S.C. § 1313(e). R. at 10. Thus, the EPA's rejection

and approval of the relevant TMDL proposals constitute a final agency action that is ripe for review.

B. EPA's separate actions that are related to the Lake Chesaplain TMDL also constitute a final agency action.

Though EPA's rejection and adoption of various TMDL proposal constitutes a final agency action in itself, EPA's additional actions may also be considered to be a final agency action. . For instance, throughout the entirety of the TMDL's adoption, EPA followed "each step of the water quality standards process, from the designation of uses to the establishment of water quality criteria to the listing of impaired waters to the establishment of TMDLs for impaired waters" *See* 33 U.S.C. § 1313(c)(3), (d)(2); R. at 6. And when eventually adopting the original DOFEC TMDL, EPA incorporated "the entire record of scientific reports and public comments . . . into its own record." R. at 10. This demonstrates that the TMDLs and subsequent implementation plan were "not subject to further review by the agency." *Sackett*, 566 U.S. at 127. Even though the slaughterhouse and sewerage treatment plant sought administrative hearings over the proposed TDML requirements, those are merely "invited contentions of inaccuracy" which do not render a final agency action nonfinal. *Id*.

Additionally, while New Union has not granted any permits that use the newly adopted TMDL as a baseline, the present action is still a final agency action prior to state enforcement because there is "little dispute" as to the rights and obligations required under the CWIP. *City of Kennett v. EPA*, 887 F.3d 424, 434 (8th Cir. 2018). The original DOFEC TMDL proposal will "impos[e] limits on discharge" by requiring a "35% reduction of annual phosphorus discharges by both point and nonpoint sources over the next five years." R. at 10. Furthermore, the CWIP is more than a "generic" implementation plan because it contains a "combination of phased point source

limits and BMP measures." *Bravos*, 306 F. Supp. 2d at 56; R. at 10. While the TMDLs and the CWIP have not been carried out under New Union's permit program, they are not subject to "further revision" by EPA because the CWIP along with all the scientific reports and public comments were formally recorded in EPA records. *City of Arcadia*, 265 F. Supp. 2d at 1157; R. at 10.

EPA's actions further meet the standard for judicial review because they give rise to "determinable" rights and obligations that carry *legal consequences*. *Bennett*, 520 U.S. 154, 178. The most apparent obligation falls on New Union, who "shall" make a "continuing planning process" subject to EPA approval. 33 U.S.C. § 1313(e). However, the discharging community around Lake Chesaplain also has an obligation to decrease pollution to meet the new standard. Alternatively, because there is a significant reduction in phosphorus discharges, some parties may lose their ability to discharge into the lake at all. And noncompliance with these rights and obligations carries serious civil and criminal penalties. Negligent violators of permit regulations "shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both," and knowing violators "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." 33 U.S.C. § 1319(c). Therefore, because the EPA's act constitutes the consummation of an agency's action that gives rises to legal rights and obligations, it is a final agency action "fit" for judicial consideration.

C. The EPA's action creates a direct and immediate hardship on CLW and New Union because it places serious penalties that result in plaintiff's uncertainty-induced behavior for fear of noncompliance.

The second prong under the *Abbott Lab'ys* formula for ripeness is to determine "the hardship to the parties of withholding court consideration." 387 U.S. at 149. An administrative

action imposes a hardship ripe for review when "postponing review . . . impose[s] a hardship on the complaining party that is immediate, direct, and significant." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986). The cost of compliance in anticipation of a TMDL's implementation imposes a hardship because affected parties will have to spend "more time, energy, and money" to meet the implementation requirements. *Am. Farm Bureau*, 792 F.3d at 293-94.

Additionally, hardship looks to a party's harm both "financially and as a result of uncertainty-induced behavior modification in the absence of judicial review." *Iowa League of Cities*, 711 F.3d at 867. For example, in *Iowa League of Cities v. EPA*, 711 F.3d 844, 855 (8th Cir. 2013), the Eighth Circuit held that delaying the review of impending regulatory burdens under the Clean Water Act in the wake of EPA modifications would cause immediate harm to certain parties. There, the court found the issue ripe for review prior to the issuance of state permits because the uncertainty of the effects of the EPA's modification placed a hardship on municipal water authorities who might invest "irretrievable funds" to design and implement waste water processes only to be denied permits under the new rules. *Id*. at 868; *see Am. Farm Bureau*, 792 F.3d at 293-94 (holding that a pre-enforcement challenge was ripe for review because it imposed a hardship because "members of the trade associations will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation."); *see also Blanchette v. Conn. Gen. Ins. Coops.*, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.").

In the instant case, EPA's action meets the hardship prong for ripeness because it imposes both economic harm and potential uncertainty-induced modification behavior. First, there is an economic hardship placed on parties to spend "more time, energy, and money" to meet the

compliance costs of purchasing and upkeeping costly machinery. *Am. Farm Bureau*, 792 F.3d at 293-94. For example, not only would residential homeowners have to pay for maintenance and use of an "expensive septic tank," but the slaughterhouse and Chesaplain Mills would have to purchase an "expensive phosphorus treatment system" to reduce phosphorus discharges by the expected 35% over five years. R. at 9. Second, parties are forced to engage in anxious modifications in anticipation of the restrictive permits, as present NPDES permit holders will need to comply with the standards set forth in the DOFEC TMDL. The uncertainty of the effects of EPA's modification places a hardship on hog farms who may have to limit their discharges to avoid civil actions. Like the parties in *Iowa League of Cities*, the present hog production facilities may spend "irretrievable funds" to limit their phosphorus discharges only to be denied a permit under the new guidelines. 711 F.3d at 868. Without the instant implementation of restrictive permits, Lake Chesaplain water quality will continue to decrease from an increased growth of algae, reducing water clarity and creating an offensive odor, and fish productivity will continue to decline; the beach will remain unsuitable for swimming, and general tourism from fishing and boating trips will continue to plummet. R. at 7. Finally, current permit holders are caught under an ever-looming threat of suit, despite New Union's inaction, because EPA can sue current permit holders for failing to comply with the new standards.

If this Court denies CLW's right of judicial review until after New Union issues its first set of new permits, this Court will be putting a greater strain on judicial resources, agency resources, and CLW's resources. Because New Union has taken no steps to implement phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed, and because the state-issued nutrient management permits for the hog CAFOs remain unmodified to reflect the CWIP phosphorus reduction measures, the waters of Lake Chesaplain remain polluted with no solution on the

horizon. R. at 10. This places a hardship on CLW and its members who will have to spend more time and money as each day passes without any change to the toxic phosphorus levels in the lake. Furthermore, if this Court denies judicial review of the TMDL until New Union issues new permits, CLW will be forced to individually challenge each permit, which places further strain on CLW's ability to litigate each permit and burdens courts with increased dockets to settle each claim one at a time. Thus, because EPA's act constitutes a final agency action that is ripe for judicial review.

II. EPA validly rejected the New Union Chesaplain Watershed Phosphorous TMDL because the TMDL failed to include separate load allocations and wasteload allocations.

Under the Administrative Procedure Act, a court "shall hold unlawful and set aside agency action, findings, and conclusions" that it finds to be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. When evaluating the lawfulness of an agency decision, the reviewing court must defer to an agency's reasonable interpretation of a statute that it administers, provided that Congress did not unambiguously foreclose such an interpretation. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Accordingly, this Court should reverse the decision below and, instead, hold that EPA's rejection of New Union's proposed TMDL was not arbitrary and capricious, as New Union's TMDL violated EPA's validly promulgated regulation that reasonably requires a TMDL to at least allocate pollution between point sources and non-point sources.

A. Congress did not foreclose EPA's interpretation of the word "total."

When drafting legislation, Congress does not etch in stone instructions on exactly how an agency is to enforce every statutory provision. Rather, where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific

provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. But this delegation of authority may also be implicit, arising from "the agency's generally conferred authority to resolve a particular statutory ambiguity." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Along these lines, the Supreme Court has recognized that "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). Therefore, to initially determine whether an agency is permitted to interpret the terms of a statue, a court must ask whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

Despite the importance of the term throughout the statute, Congress did not define "total maximum daily load" under the Clean Water Act, nor did Congress define any of the individual words that make up the term. *See* 33 U.S.C. § 1313. Indeed, the only guidance Congress provided for establishing TMDLs is that TMDLs must "be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." *Id.* Here, the district court reasoned that this "lack of specific direction" regarding the creation and implementation of TMDLs "seems to be an intentional omission by Congress out of deference to the primary role of states in protecting water quality." R. at 13. However, the Supreme Court has held that "silence [by Congress] is meant to convey nothing more than a refusal to tie the agency's hands." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). Thus, Congress's failure to unambiguously define EPA's role in the creation of TMDLs cannot foreclose EPA's interpretation that a TMDL must include specific LAs and WLAs.

Moreover, no appellate court has ever held that the statutory language of the CWA unambiguously forecloses an interpretation of "total" that requires separate WLAs and LAs; the courts that have addressed this issue, instead, have uniformly found ambiguity in the language of

the statute. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 295-98, 306 (3d Cir. 2015) ("'Total' is susceptible to multiple meanings."); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1128 n.3 (9th Cir. 2002) (acknowledging that TMDL is not a defined term). Accordingly, EPA is free to reasonably interpret the ambiguous term "total maximum daily load" as is necessary to carry out the agency's duties under the CWA, and no prior judicial decision can require otherwise. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005).

In contrast to those decisions, the district court, here, relied on the legislative history of the Clean Water Act to hold that Congress squarely decided to defer entirely to the state for all matters related to the creation of a TMDL. R. at 13. But the court should never have considered the legislative history of the CWA at *Chevron* Step One. *See Am. Farm Bureau*, 792 F.3d at 307 n.8. At Step One, courts are only to use "traditional tools of statutory construction," and "[l]egislative history is generally not used to assess whether the words of a statue are ambiguous or to interpret unambiguous words." *Id.*; *see also Milner v. Dep't of Navy*, 562 U.S. 562 (2011). Based on these traditional tools of statutory construction, Congress did not clearly intend to prevent EPA from requiring WLAs and LAs in a TMDL, so EPA is, at the very least, implicitly authorized to promulgate regulations that more closely define these terms as they are used in the Act.

B. EPA's interpretation warrants deference.

Filling statutory gaps left by Congress "involves difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980. Accordingly, courts must accept an agency's reasonable interpretation of an ambiguous statute it has been charged with administering, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* In *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), the Supreme Court held that "a reviewing court has no business rejecting an agency's exercise of its

generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." Such "deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal citations and quotation marks omitted). Indeed, courts must defer to an agency's interpretation "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." *Mead*, 533 U.S. at 226-27. Accordingly, any regulation that is promulgated pursuant to Congressional authorization "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227.

In line with precedent, this Court should defer to EPA's interpretation that a TMDL must include separate WLAs and LAs because EPA's interpretation is embodied in regulations meant to carry the force of law, and EPA's interpretation accords with the purpose and structure of the Clean Water Act. Congress delegated authority to the EPA Administrator to "administer" the Clean Water Act, and Congress explicitly authorized the Administrator "to prescribe such regulations as are necessary to carry out his functions," which includes ensuring that TMDLs are set at levels sufficient to establish water quality standards for any particular body of water. 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called 'Administrator') shall administer this chapter."); 33 U.S.C. § 1361(a) ("The Administrator is authorized to prescribe such

regulations as are necessary to carry out his functions under this chapter."); *see* 33 U.S.C. § 1313(d)(2) (requiring the Administrator to evaluate and approve or reject TMDLs).

Pursuant to this authority, EPA promulgated a regulation that requires states to include separate wasteload allocations (WLAs) and load allocations (LAs) in any TMDL. 40 C.F.R. § 130.2(i) (defining TMDL as "[t]he sum of the individual WLAs for point sources and LAs for non point sources and natural background"). Now, New Union argues that this regulation extends EPA's authority further than intended by Congress and "is contrary to the plain meaning of the term 'total,' as well as being contrary to the structure of the CWA and its incorporation of principles of comity and federalism." R. at 12. This argument fails, though, and precedent supports the view that EPA's interpretation is reasonable and necessary for the "achievement of state water quality standards," "one of the Act's central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992).

For instance, in *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 132-33 (1977), the Supreme Court held that § 501 of the Clean Water Act, which authorizes EPA to promulgate "such regulations as are necessary to carry out" the agency's objectives under the Act, allows EPA to establish pollution control requirements through regulation, rather than on a permit-by-permit basis. Indeed, the Court held that any interpretation to the contrary would unreasonably "conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purpose for which it has acted." *E.I. DuPont*, 430 U.S. at 132. "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect," so "the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999).

Furthermore, the Third Circuit has recognized that EPA's interpretation of "total," which is embodied in 40 C.F.R. § 130.2(i), "furthers the Clean Water Act's goal of achieving water quality standards" in an efficient manner:

> As noted above, "total" can mean "a sum of parts," and interpretating "total" that way gives greater guidance to states in cleaning their waters, provides greater transparency to the public who may comment on a TMDL, and furthers the Act's requirement that the TMDL account for both point sources and nonpoint sources.

Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281, 306-07 (3d Cir. 2015). Here, the district court incorrectly determined that Congress' failure to specifically define the roles of EPA and the states in the pollution reduction allocation process forecloses EPA's interpretation and "seems to be an intentional omission by Congress out of deference to the primary role of states in protecting water quality." R. at 13. As explained above, however, Congressional silence "is meant to convey nothing more than a refusal to tie the agency's hands." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). No provision of the Clean Water Act unambiguously defines the meaning of the "total," and nothing in the Act contradicts EPA's interpretation that a TMDL must include separate LAs and WLAs. Thus, EPA's interpretation is reasonable, and this Court should reverse the district court's opposite holding.

III. EPA's adoption of the phased annual TMDL that would not meet water quality standards for five years was invalid.

To reiterate, agencies are free to interpret *ambiguous* statutes when "Congress has explicitly left a gap for the agency to fill," but if the statute's language only lends itself to a single interpretation, "that is the end of the matter." *Chevron*, 467 U.S. at 842-44; *see King v. Burwell*, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, [a court] must enforce it according to its terms."). A court's inquiry into the validity of an agency's statutory construction "must begin with the language employed by Congress and *the assumption that the ordinary meaning of that*

language accurately expresses the legislative purpose." *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 175 (2009) (emphasis added and internal quotation marks omitted). But "[t]he meaning—or ambiguity—of words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson*, 529 U.S. 120, 132 (2000).

Here, this Court must look to the language of the Clean Water Act, remembering that the statute ought to be construed so that "no clause, sentence or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 543 U.S. 19, 31 (2001); *see Nat'l Ass'n of Mfrs. v. Dept. of Def.*, 138 S. Ct. 617, 632 (2018) ("As this Court has noted time and time again, the Court is obliged to give effect, if possible, to every word Congress used." (internal quotation marks omitted)). And in contrast to the undefined term "total," "daily" is not an ambiguous term that is susceptible to multiple valid interpretations. Rather, a TMDL must be expressed as the maximum amount of pollutant that can enter a waterbody on any given day while still allowing the waterbody to meet the applicable water quality standards, and EPA's differing interpretation contradicts the plain meaning and purpose of the Clean Water Act and warrants no deference.

A. Congress unambiguously foreclosed EPA's interpretation of daily.

Section 303 of the Clean Water Act explicitly provides that "[e]ach State shall establish . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation," 33 U.S.C. § 1313(d)(1)(C), and through regulation, EPA has found that all pollutants are "suitable for the calculation of total maximum daily loads." 43 Fed. Reg. 60,665 (Dec. 28, 1978). EPA, therefore, met its statutory duty to establish a TMDL for the Chesaplain Lake, but the TMDL itself is invalid because "it is framed as a phased percentage reduction in annual loadings, rather than a fixed daily limit on total loading" and is not set "at the level

necessary to assure achievement of water quality standards (at least until the reduction is fully phased in after five years).” R. at 14.

To be sure, Congress requires that “the total maximum daily load . . . shall be established as 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). Importantly, “[n]othing in this language even hints at the possibility that EPA can approve total maximum ‘seasonal’ or ‘annual’ loads.” *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). “The law says ‘daily,’” and Congress enacted Section 303 of the Act to ensure that water quality standards are met *each day*. *Id.*; *see Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) (“A TMDL establishes a maximum daily discharge of pollutants into a waterway. A TMDL must be obeyed even if a monthly allowable average could be achieved in the face of some daily discharges above the TMDL.”). Along these lines, courts have vacated TMDLs that fail to express loading allocations as daily limits. *See Friends of Earth*, 446 F.3d at 144-45; *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 172 (D.D.C. 2018) (vacating a TMDL that was expressed as a 30-day geometric mean that did not “represent[] the greatest amount of a pollutant that can be discharged into a water body on any given day without causing a violation of the water quality standards”).

As New Union points out, however, Congress did not define the term “daily” when it drafted the Clean Water Act. But Congress only did this because Congress is not required “to use superfluous words,” and the term is only susceptible to a single interpretation. *See New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006). Indeed, “daily” means “occurring, made, or acted upon every day,” “issued every day or every weekday,” “reckoned by the day,” or simply “every day.” *Dictionary Entry for Daily*, MERRIAM-WEBSTER (Nov. 21, 2021), https://www.merriam-webster.com/dictionary/daily; *see Friends of Earth*, 446 F.3d at 144 (“‘Daily’ connotes ‘every

day.'" (citing *Webster's Third New International Dictionary* 570 (1993))). As the D.C. Circuit has recognized, "[d]octors making daily rounds would be of little use to their patients if they appeared seasonally or annually," and "no one thinks of 'give us this day our daily bread' as a prayer for sustenance on a seasonal or annual basis." *Friends of Earth*, 446 F.3d at 144 (internal citations omitted).

Here, the TMDL for the Chesaplain Lake is invalid because it is not expressed in daily terms. EPA and New Union contend that the statutory provision allowing for "seasonal variations" in a TMDL creates enough ambiguity to allow EPA to interpret the entire statutory provision as allowing for TMDLs to be framed as a phased percentage reduction in annual or seasonal loadings. R. at 14-15; *see* 33 U.S.C. § 1313(d)(1)(C). But to repeat the D.C. Circuit's conclusion in *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006), "[n]othing in this language even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads." The statute simply recognizes that seasonal variations in natural pollution levels may require TMDLs to be modified throughout the year, but the statute does not authorize EPA to frame a TMDL in any manner other than a *daily* maximum. *Id.*

B. EPA's interpretation is not in accordance with the law.

In addition to requiring that TMDLs be expressed as *daily* loads, Section 303 of the Act requires that each TMDL 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). The district court correctly determined that this language "does not admit of a loading standard that will not achieve water quality standards until five years hence." R. at 15.

EPA construes the Act to the contrary, claiming that the Clean Water Act does not require a TMDL to be set at a level that achieves water quality standards *on the date of its adoption*. R. at

15. In *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001), the Second Circuit utilized similar reasoning, refusing to conclude that "Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis." This argument, however, was rejected in *Friends of the Earth*; indeed, "EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy," nor can the agency ignore "a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Friends of the Earth*, 446 F.3d at 145 (internal quotation marks omitted). This is especially true when "all the other evidence from the statute points the other way." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Therefore, EPA must adhere to the plain language of the Clean Water Act, which requires TMDLs to be "established at a level necessary to implement the applicable water quality standards" on the date of adoption. 33 U.S.C. § 1313(d)(1)(C).

Moreover, EPA also failed to express the TMDL as the maximum amount of pollutant that the Chesaplain Lake could *receive*, a require established by EPA's own regulations. 40 C.F.R. § 130.2 (defining the components of a TMDL as "portions of the receiving water's loading capacity," and defining "loading capacity" as the "*greatest amount of loading that a water can receive without violating water quality standards*" (emphasis added)). In *Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 142 (D.D.C. 2018), the District Court for the District of Columbia set aside a TMDL that was "expressed as the quantity of trash that must be captured or removed for the waterbody to achieve the narrative criteria," rather than the maximum amount of trash that could enter the waterbody. Along these lines, this Court should affirm the district court's decision to vacate the Chesaplain Lake TMDL because the TMDL is expressed as a proportional reduction

in phosphorous pollution, rather than as a maximum amount of pollutant that may enter the body, and this Court should otherwise set aside the TMDL because it is not expressed as a *daily* limit on pollution.

IV. EPA Reasonably Administers the Clean Water Act by Requiring States to Provide Reasonable Assurances that Nonpoint Sources can Implement Best Management Practices (BMPs) to Decrease Their Load Allocations Before Granting Less Stringent Wasteload Allocations as a Tradeoff.

In addition to requiring that EPA or States establish TMDLs for any impaired waters, Section 303 of the Clean Water Act impliedly authorizes EPA to promulgate regulations outlining how TMDLs must be implemented. Pursuant to that authority, EPA promulgated 40 C.F.R. § 103.2(i), which allows for less stringent WLAs when nonpoint sources can decrease their daily effluent discharges through Best Management Practices (BMPs). The ambiguity related to EPA's role in reviewing submitted TMDLs made it appropriate for the agency to promulgate regulations, rules, and guidance indicating how it would evaluate TMDLs. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see* 33 U.S.C. § 1251 (authorizing EPA to "prescribe such regulations as are necessary to carry out" its statutory functions); *see, e.g., Lopez v. Davis*, 531 U.S. 230, 243-244 (2001). And 40 C.F.R. § 130.2(i) represents a reasonable construction of the statute that this Court should afford deference. *Chevron,* 467 U.S. at 842-45.

A. EPA's regulation, which clearly requires reasonable assurances, deserves deference

To preserve the far-reaching enforcement discretion provided by Congress through statutes, agencies often build ambiguities into their implementing regulations by employing broad terms like "practicable." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2448-49 (2019) (Kavanaugh, J., concurring). Nevertheless, an agency's interpretation of a genuinely ambiguous statute must "come within the zone of ambiguity the court has identified after employing all its interpretive tools" before a court will apply *Auer* deference. *Id.* at 2415-16 (majority opinion). Put another

way, EPA is only permitted to "choose among the options allowed by the text of the rule." *Id.* at 2449 (Kavanaugh, J., concurring).

Pursuant to 40 C.F.R. § 130.2(i), "[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." Though not defined by this regulation, something is "practicable" when it is "reasonably capable of being accomplished; feasible in a particular situation," BLACK'S LAW DICTIONARY (11th ed. 2019). But the regulation does make clear that less stringent WLAs are justifiable only when BMPs or other nonpoint source pollution controls will actually lessen pollution from nonpoint sources. Here, the reasonable assurances standard reflects EPA's attempt to eliminate ambiguity created by use of the term practicable without straying outside of the regulation's zone of ambiguity. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300 (3d Cir. 2015) ("This requirement made sure that the EPA could exercise 'reasoned judgment' in evaluating the states' proposed standards and was thus consistent with the Clean Water Act.").

The reasonable assurances standard is EPA's thorough answer to a vexing question posed by 40 C.F.R. § 130.2(i): How can EPA provide for tradeoffs between WLAs, which it has the power to enforce, and LAs, which are overseen by states, without compromising the integrity of the TMDL process? *See Brief for Amici Curiae Law Professors, Craig N. Johnston, et al.* at 26-28, Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3d Cir. 2015) (No. 13-4079). And this straightforward rationale has consistently been applied by EPA when the agency reviews TMDLs and broader Watershed Improvement Plans (WIPs). *See* EPA, CHESAPEAKE BAY TMDL, SECTION 7: REASONABLE ASSURANCE AND ACCOUNTABILITY FRAMEWORK, at 7-2 (Dec. 29, 2010); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (recognizing that "it surely tends to

show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion" when EPA had consistently applied said practice). Finally, and crucially, the standard aligns with the text, history, structure, and purpose of the regulation. Specifically, it articulates the inescapable requirement that, within the context of a TMDL, tradeoffs between LAs and WLAs can only be practicable if the applicable nonpoint source controls actually exist, whether in plan or in practice.

Though 40 C.F.R. § 130.2(i) leaves room for EPA to contemplate control measures that might ultimately be ineffective or even unrealized, it does not allow for those which are merely hypothetical. The "zone of ambiguity" created by the regulation stops at the threshold between the practicable and the merely aspirational. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Indeed, the regulation's stated purpose supports the assertion that more stringent LAs are "practicable" only when proposed nonpoint source controls are more than theoretical. EPA, *Water Quality Planning and Management*, 50 Fed. Reg. 1773, 1774 (Jan. 11, 1985) (explaining that EPA's regulation aimed to "ensure that State, areawide, interstate, local, and regional water quality agencies can implement individually effective water quality programs"). This interpretation accords with the notion that TMDLs are "informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." *Pronsolino v. Nastri*, 291 F.3d at 1129. Indeed, the Clean Water Act "envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants." *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

Because of EPA's limited role in the process of implementing a state's TMDL, the agency "is not required to and does not approve TMDL implementation plans." EPA, GUIDELINES FOR REVIEWING TMDLS UNDER EXISTING REGULATIONS ISSUED IN 1992 at 5 (2002); EPA, GUIDANCE

FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS at 22 (1991) ("Under the CWA, the only federally enforceable controls are those for point sources through the NPDES permitting process."). Nonetheless, Section 303(d) of the Clean Water Act requires EPA to evaluate TMDLs for waterbodies that are polluted by both point and nonpoint sources. 33 U.S.C. § 1313(d)(1)(C). And if EPA is to effectively analyze a state's TMDL and potentially approve less stringent WLAs, "there must be reasonable assurances that nonpoint source reduction will in fact be achieved." EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS at 22 (1991). The alternative, blind acceptance of a state's TMDL, not only renders the entire TDML process a theoretical exercise, but it also compromises—and even negates—EPA's ability to fulfill its statutory duty. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300 (3d Cir. 2015). Thus, EPA's interpretation can only be construed to support the reasonable assurances standard, and the purpose and structure of the Clean Water Act and EPA's implementing regulation foreclosed any interpretation to the contrary.

B. EPA's reasonable assurances standard was issued pursuant to Congressional authority and in a manner that deserves deference.

When evaluating the applicability of the reasonable assurances standard in this case, the district court refused to defer to the standard, claiming that "the 'reasonable assurance' standard has never been adopted by EPA through notice-and-comment rulemaking, and accordingly receives no deference." R. at 16. Not only is this conclusion contrary to law, but it also misconstrues the facts in this case.

Importantly, EPA *has* issued its interpretation that reasonable assurances are a necessary requirement for allocation tradeoffs within a TMDL through notice-and-comment rulemaking. Though the interpretation initially took the form of a guidance document, EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991), EPA clarified that this standard

still applies when publishing a final rule related to the regulation of tribal nations under the Clean Water Act.[1] *See* EPA, *Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act*, 81 Fed. Reg. 65,901, 65,905 (Sept. 26, 2016). In that final rule, EPA explicitly states that "[w]here a TMDL makes allocation tradeoffs between point and nonpoint sources, the TMDL record must also demonstrate 'reasonable assurance' that the nonpoint source allocations will be achieved." *Id.* Because the reasonable assurance framework appears in guidance and a final rule that underwent notice-and-comment, it was clearly issued in a manner meant to have the force of law, and this Court should afford the interpretation *Auer* deference. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The standard has provided States with clear guidelines and been subjected to comment from diverse stakeholders, and thus reflects the agency's reasoned judgment and merits deference. *Id*. at 227.[2]

C. EPA's interpretation advanced as part of this litigation does not merit any deference.

EPA's current interpretation is contrary to the specific and consistent view of the regulation advanced over the last three decades, where the agency has repeatedly articulated and required the need for reasonable assurances of nonpoint source controls. "Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary,

[1] EPA also reiterated this interpretation in 1997 and 2002, though neither instance involved notice-and-comment rulemaking. *See* Memorandum from Bob Perciasepe, EPA Assistant Administrator, "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)" ("Our current regulations, guidance, and policies remain unchanged regarding implementation of TMDLs for those waters impaired by point sources or by a blend of point and nonpoint sources in which point sources dominate."); EPA, GUIDELINES FOR REVIEWING TMDLS UNDER EXISTING REGULATIONS ISSUED IN 1992 (2002).

[2] If this Court determines that *Auer* deference is inapplicable, the reasonable assurances standard should still be given persuasive weight pursuant to the Supreme Court's holding in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because the interpretation embodies the sum of the agency's expertise and experience. EPA has consistently affirmed the reasonable assurances standard through guidance and final rules, and EPA has never issued or applied a different standard, despite developing tens of thousands of TMDLs since the standard was first issued. EPA, *Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act*, 81 Fed. Reg. 65,901, 65,905 (Sept. 26, 2016); EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS at 22 (1991); *see also* EPA OFFICE OF INSPECTOR GENERAL, TOTAL MAXIMUM DAILY LOAD PROGRAM NEEDS BETTER DATA AND MEASURES TO DEMONSTRATE ENVIRONMENTAL RESULTS, REPORT NO. 2007-P-00036, at 3 (Sept. 19, 2007) (explaining that EPA and states developed over 24,000 TMDLs between 1985 and 2006).

capricious [or] an abuse of discretion," and therefore unworthy of deference. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (internal quotation marks and citations omitted). While the agency has discretion to change its position "within the limits of reasoned interpretation if it adequately justifies the change," nothing in the record indicates EPA has explained the departure from its previous process. *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 1000 (2005). Morever, agency's are not permitted to "depart from a prior policy sub silentio or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Such unexplained changes in an agency's interpretation do not reflect the agency's "fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Indeed, "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988).

Here, EPA approved the Lake Chesaplain TMDL with no specification of "whether or how the proposed BMP measures would be enforced." R. at 10. Given that EPA has given the reasonable assurances standard controlling weight as recently as 2016, EPA's decision to approve the TMDL for Chesaplain Lake is inexplicable. *See* EPA, Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65,901, 65,905 (Sept. 26, 2016). EPA's new position is "wholly unsupported by regulations, rulings, [and] administrative practice," and it merits no deference. *Bowen*, 488 U.S. at 212–13. And EPA's litigating position does not fall "within the bounds of reasonable interpretation" and thus merits no deference. *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). EPA is simply proffering a *post-hoc* rationalization to justify the agency's failure to undertake the practicability analysis of the tradeoffs that is required by 40 C.F.R. § 130.2(i) and the reasonable assurances standard.

Indeed, in the two years since the TMDL was adopted, New Union has taken no steps to require BMPs from nonpoint sources. R. at 10. EPA's decision to allow for tradeoffs between LAs and WLAs without reasonable assurances of nonpoint source controls turned the TMDL process into a theoretical exercise. By determining it could perform its informational role without evaluating the validity of its information, EPA abdicated its responsibility under the Clean Water Act and frustrated the ability of the Lake Chesaplain TMDL to meet its § 303(d) goal to implement applicable water standards. Instead, EPA effectively adopted the position that "Congress intended the Clean Water Act to authorize states to propose ineffectual nonpoint source pollution control measures with impunity, forever." See *Brief for Amici Curiae Nat'l Parks Conserv. Ass'n, et al.* at 25, Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3d Cir. 2015) (No. 13-4079). Because it omitted the "reasoned analysis" required by the regulation and reiterated by subsequent enforcement, EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions without reasonable assurances is arbitrary and capricious. *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (deferring to the Secretary of Health and Human Services‟ interpretation, because "the Secretary amply justified his change of interpretation with a "reasoned analysis"). This is not a reasonable interpretation of the regulation and thus EPA's approval of the Lake Chesaplain TMDL must be vacated.

CONCLUSION

For the foregoing reasons, Appellant-Cross Appellee Chesaplain Lake Watch respectfully requests that this Court affirm the district court's ruling that 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. Chesaplain Lake Watch respectfully requests this court reverse the district court's ruling that EPA's interpretation of the term Total Maximum Daily Load to include wasteload allocations and load allocations violated the Clean Water Act (CWA) § 303(d), 33 U.S.C. § 1313(d) and the district court's ruling that EPA's decision to award offset credits for nonpoint pollution reductions without reasonable assurance of nonpoint source controls was not arbitrary and capricious. Additionally, Chesaplain Lake Watch respectfully requests that this Court affirm the district court's holding that phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C. § 1313(d).