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

In the United States Court of Appeals for the Twelfth Circuit

CHESAPLAIN LAKE WATCH,

Plaintiff-Appellant-Cross Appellee,

-and-

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
Honorable Romulus N. Remus, Judge Presiding
Consolidated Case Nos.66-CV-2020 and 73-CV-2020

BRIEF OF CHESAPLAIN LAKE WATCH,
PLAINTIFF-APPELLANT-CROSS APPELLEE

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STATEMENT OF JURISDICTION

Chesaplain Lake Watch ("CLW"), the State of New Union ("New Union"), and the U.S. Environmental Protection Agency ("EPA") each appeal from an Opinion and Order entered August 15, 2021, by the honorable Judge Remus in the U.S. District Court for New Union, consolidated case nos. 66-CV-2020 and 73-CV-2020. The district court had subject-matter jurisdiction under the citizens-suit provision of the Clean Water Act, 33 U.S.C. § 1365, as well as federal question jurisdiction under 28 U.S.C. § 1331. Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4. The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 29 U.S.C. § 1291, which grants this Court "jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF ISSUES

I. Is EPA's rejection of New Union's amended TMDL and adoption and implementation of New Union's originally proposed TDML ripe for judicial review?

II. Is EPA's rejection of New Union's amended TMDL on the grounds that it failed to include waste load and load allocations valid?

III. Is EPA's adoption of a TMDL with a five-year phased annual pollution loading reduction valid under the requirements of CWA § 303(d)?

IV. Is EPA's adoption of a credit program for anticipated pollution reductions arbitrary and capricious or an abuse of discretion due to the lack of assurance of implementation?

STATEMENT OF CASE

Congress first officially recognized the need for federal water protections as early as 1948. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155. Beginning in the 1900s, nation-wide industrialization and the resulting years of pollution required Congress to develop a regulatory framework to restore and preserve the waters of the United States. *See* David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q. J. of Econ. 349, 350 (2019).

The modern structure of federal water pollution control was formally established as the Clean Water Act following decades of legislative amendments and judicial interpretations. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816-904 (codified as amended at 33 U.S.C. §§ 1251-1387) (hereinafter "CWA" or "the Act").[1] Under the cooperative federalism implemented by the Act, EPA establishes national guidelines that states must implement through their own regulatory programs via permits and established water quality standards. R. at 5; *see* 33 U.S.C. § 1251.

I. Factual Background

Lake Chesaplain's pristine waters were an attractive destination for recreational boaters and fishers prior to the twenty-first century, resulting in the development of vacation homes on the east shore of the lake. R. at 7. However, during the nation-wide industrialization of the 1900s, the area went from a remote getaway to the home of ten large-scale hog production facilities, or concentrated animal feeding operations ("CAFOs"), as well as a slaughterhouse processing over

[1] While this amended version of the Water Pollution Control Act is what is collectively referred to as the "Clean Water Act," this moniker was not formally acknowledged until the Act was amended again in 1977. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

fifty million pounds of hog meat per year. *Id.* At the same time, the number of homes on the east side of the Lake continued to grow rapidly. *Id.*

Today, Lake Chesaplain is surrounded to the west by the Chesaplain National Forest and a twenty-mile-long shorefront of the Chesaplain State Park; to the east by agricultural lands, with several lakefront vacation communities; and to the north by the City of Chesaplain Mills. R. at 5. The city sits at the junction where the Union River flows into Lake Chesaplain and ultimately to the Chesaplain River, "a navigable-in-fact interstate body of water." *Id.* These waters constitute the Lake Chesaplain watershed, which encompasses the hog CAFOs and slaughterhouse, Chesaplain Mills, and the lakeside residential homes.

A. Lake Chesaplain Water Quality

In accordance with the CWA, the slaughterhouse near Lake Chesaplain is required to have a state-issued National Pollutant Discharge Elimination System ("NPDES") permit for any direct discharges into the Union River. R. at 7; *see* 33 U.S.C. § 1342. The City of Chesaplain Mills also has a publicly owned sewage treatment plant ("STP") regulated by a CWA point source permit; however, the Act does not require permits for the waterfront-home-developments' septic systems or the hog CAFOs' runoff.[2] R. at 7. New Union's regulations are more stringent than the CWA and require the CAFOs to be subject to permits for "site-specific nutrient management plans" which the State's Agricultural Commission must review. *Id.*

Despite regulating the three major polluters around Lake Chesaplain—the slaughterhouse, Chesaplain Mills STP, and hog CAFOs—under federal and state water quality protections, the

[2] "The hog CAFOs are not subject to CWA permits, because although CAFOs are included in the definition of 'point source' under the CWA, 33 U.S.C. § 1362(14), they are considered 'non-discharging' CAFOs exempt from permitting requirements under the EPA regulatory definition of CAFOs." R. at 7; *see* 40 C.F.R. § 122.23. *See generally Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).

"water quality [of the lake] visibly declined during the first decade of the twenty-first century." R. at 7. Odorous mats of algae diminished water clarity in the summer, fish productivity declined, Chesaplain State Park's beach became un-swimmable, property values for lake houses declined, and tourism revenues from fishing and boating plummeted. R. at 7. Because Lake Chesaplain connects to a "navigable in fact water," the Chesaplain River, New Union must periodically review and revise the water quality standards ("WQS") for the lake as required by 33 U.S.C. § 1313(c).[3]

WQS designate the uses for navigable waters to "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." *Id.* As a Class AA water – the highest standard the State uses – Lake Chesaplain is designated as a "drinking water source [and for] primary contact recreation (swimming) . . . and fish propagation and survival." R. at 8. In 2008, New Union created a Lake Chesaplain Study Commission in response to the declining water quality; in 2012 they released a report that found decreased water oxygen levels along with violations of the state's WQS for odor and water clarity. *Id.*

The next triennial WQS review, conducted in 2014 by the New Union Division of Fisheries and Environmental Control ("DOFEC") found Lake Chesaplain still in violation of the Class AA standards as purported in 2012. R. at 8. DOFEC, as the designated New Union agency, included Lake Chesaplain on the impaired waters list submitted to EPA as required under § 1313(d). *Id.* However, DOFEC violated the requirements of § 1313(d) when they did not include a TMDL submission for Lake Chesaplain and EPA should have objected to this when it received Lake Chesaplain's listing as an impaired water. *See id.* In 2015, CLW stepped in and served notice to both EPA and New Union threatening to sue for failure to establish a TMDL. R. at 8. CLW did

[3] This brief cites to the U.S. Code when referencing Section 303(d) of the 1972 the Federal Water Pollution Control Act Amendments, codified as the Clean Water Act, 33 U.S.C. § 1313. However, the District Court interchangeably refers to the prior and current statutes.

not ultimately bring suit because New Union, through DOFEC, began the rulemaking process to establish a TMDL for Lake Chesaplain's phosphorus load. *Id.*

B. New Union's TMDL Rulemaking

In 2016, the Chesaplain Commission issued a supplemental report "calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard, as well as identifying the existing sources of phosphorus inputs." R. at 8. The report looked at the previous year's loadings from point sources, nonpoint sources, and natural sources and identified two nonpoint sources contributing substantial phosphorus loadings to Lake Chesaplain. First, manure spreading from the hog CAFOs reached the lake via "groundwater flows and surface runoff, despite compliance with state-mandated nutrient management plans and the CWA exemption for agricultural stormwater runoff." R. at 9. Second, the private septic systems from the lake's eastside second homes and the town of Chesaplain Mills contributed substantially to the pollution, "even though these sources are exempt from CWA permitting as discharge[r]s to groundwater rather than surface water." *Id.* The report also noted that "neither of the point sources in the Chesaplain Watershed had any permit limits for phosphorus, as no such limits are provided for in the relevant technology-based effluent limitations guidelines issued by EPA." *Id.*

Pursuant to EPA guidelines and the CWA, DOFEC published the Lake Chesaplain TMDL for public comments, proposing an "equal phased reduction in phosphorus discharges by *both the point and nonpoint sources*" over a five-year period. R. at 9 (emphasis added). Point source reductions would be ensured through permit limits, and the nonpoint source reductions through BMPs "designed to encourage the hog CAFOs and other agricultural sources" to reduce phosphorus run-off. *Id.* The CAFO's BMPs included modified feeds that would reduce phosphorus in manure and restrictions on spreading of manure, while the BMPs for private septic systems included increased inspections and pumping schedules. *Id.*

Objections arose to New Union's proposal regarding the thirty-five percent reduction for CAFOs, other agricultural sources, private residential septic systems, and point source dischargers. R. at 9. CLW had three main objections: (1) that the proposed BMPs in the nonpoint source phosphorous reduction credit program were insufficient to achieve a thirty-five percent reduction in phosphorus inputs; (2) that New Union lacked the statutory authority to impose and enforce such BMPs against agricultural sources; and (3) that using a phased annual reduction in the TMDL was contrary to the statutory terms that establish a "daily" limit. R. at 9-10.

CLW also argued "that the sixty-three mt annual reduction [should] be achieved by requiring zero phosphorus discharges from the two identified point sources." R. at 10. Nonpoint source objections came from lakefront homeowners who would be required to do "expensive septic tank maintenance and pumping" and from the hog CAFOs due to the imposition of BMPs on their operations. *Id.* Finally, nonpoint source objections were made on behalf of both the slaughterhouse and Chesaplain Mills STP because of the "expensive phosphorus treatment system that would be required to reduce discharges by 35%." *Id.* DOFEC ultimately agreed with the industries' and City's objections and amended the TMDL, removing all Waste Load Allocations (WLAs) and Load Allocations (LAs). R. at 10. Neither CLW's nor the residents' concerns were reflected in the new proposal. *See id.*

DOFEC submitted this amended TMDL proposal in July 2018 pursuant to § 1313(d)(2), which EPA correctly rejected. *Id.* Then, in May 2019, EPA adopted New Union's original TMDL proposal that included the WLAs in permits for point sources and BMPs for nonpoint sources to achieve an annual 35% reduction in phosphorus inputs phased over five years. *Id.*; § 1313(d). EPA called the approved TMDL the "Chesaplain Watershed Implementation Plan" (CWIP), which was to be implemented by New Union. *Id.*

C. New Union CWIP Implementation

Unfortunately, not much has been done to implement the CWIP since May 2019 and Lake Chesaplain's "waters continue to violate water quality standards." R. at 10. For nonpoint sources, New Union has not taken any steps to require phosphorus reductions through BMPs or nutrient management permits for the hog CAFOs. *Id.* DOFEC has proposed to modify the permits for the slaughterhouse and Chesaplain Mills STP; however, their NPDES permits expired in November 2018 and February 2019 respectively. *Id.* Both facilities are stalling due to the cost of compliance and have sought administrative hearings on these proposed requirements. *Id.*

Both facilities "continue to operate under their expired permits as administratively extended based on their timely applications for permit renewal." *Id.*; *see* 40 C.F.R. § 122.6. Therefore, "neither plant is currently subject to any limit on phosphorus discharges." R. at 10. None of the responsible parties identified in the TMDL have made any steps to comply with EPA's requirements implemented by New Union to reduce the level of phosphorus to preserve Lake Chesaplain as a Class AA recreational and life sustaining water.

II. Procedural History

New Union filed suit on January 14, 2020, challenging EPA's rejection of its amended Lake Chesaplain TMDL and implementation of New Union's originally proposed TMDL. New Union claims that, if implemented, the original TMDL proposal will require the State to administer NPDES permits under 33 U.S.C § 1342(b) and affect New Union's eligibility for federal water quality planning funds under 33 U.S.C. § 1288. R. at 10-12.

Appellant CLW filed suit on February 15, 2020, seeking a declaration that the Lake Chesaplain phosphorus TMDL is insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. R. at 4. The District Court was satisfied that CLW meets the requirements for standing under Article III of the

Constitution, having established injury in fact, causation, and redressability. R. at 11; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167 (2000). The District Court granted unopposed motions to consolidate the two actions on March 22, 2020, and EPA lodged the administrative record with the Court on July 1, 2020. R. at 10.

The District Court "denied EPA's motion for summary judgment in part, granted CLW's motion for summary judgment in part, and granted New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL." *Id.* CLW, New Union, and EPA each filed a timely Notice of Appeal following the U.S. District Court for the District of New Union's Order dated August 15, 2021. R. at 2.

SUMMARY OF ARGUMENT

This Court should affirm the district court's holding that the phased implementation of Lake Chesaplain's annual percentage reduction TMDL violated § 303(d) of the Clean Water Act. However, the district court erred in finding (1) that EPA's interpretation of TMDLs to include wasteload allocations and load allocations violated the Act and (2) that the Agency's use of credits for nonpoint pollution reductions through BMPs was not arbitrary or capricious or an abuse of discretion.

Challenges to EPA's rejection of New Union's amended TMDL and subsequent adoption of the amended TMDL are ripe for judicial review. The Ripeness doctrine only allows courts to review cases that are fit for review and where there would be hardship on the parties upon a delayed review. The Supreme Courts has created three factors to established whether a case is ripe for judicial review. The review of Lake Chesaplain's TMDL satisfies all three of these factors established by the Court. First, if review is delayed due to the uncertainty regarding the

interpretations of the TMDLs Plaintiffs would suffer financial hardship, due to the cost of implementation, and practical harm, because the uncertainty is leading to inaction by enforcement authorities. Uncertainty could prevent New Union from creating and implementing NPDES permits to point source polluters due to a lack of clear guidance from the TMDLs, which would further violate the CWA.

Second, judicial review would not interfere with further agency action because EPA's approval of TMDLs constitutes final agency action. Because the approval process marks the consummation of the agency's decision-making process and the TMDLs created a legal right by requiring New Union to establish NPDES permits, EPA's approval is a final agency action, which under the APA is reviewable by the courts. Lastly, this Court would not benefit from further factual development because at issue is the legal question of EPA's approval of the initial TMDL and all relevant facts in this case are fully developed as part of the record. Thus, EPA's approval of New Union's initial TMDL is ripe for judicial review by this Court.

The district court erred in rejecting EPA's interpretation of "total" in "total maximum daily load" to include both point source and nonpoint source dischargers. When reviewing an agency decision, the court first looks to the plain language to determine if EPA's interpretation was permissible. While the case law is divided on whether Congress has spoken to the definition of "total," the dictionary definition of the word is "comprising or constituting a whole." https://www.merriam-webster.com/dictionary/total. Applying this plain meaning to the TMDL requirements supports EPA's inclusion of both point and nonpoint sources – the total load cannot be assessed by considering only part of the whole. EPA's definition of "total" is also supported by agency guidance and Congress's intent behind the CWA.

Additionally, this Court should uphold the district court's ruling that EPA's approved TMDL including annual phased limits violated the requirements of the Act. Unlike with the term "total," courts have been consistent in applying the plain language when interpreting the word "daily." The district court rightfully followed this line of reasoning and applied the plain meaning of the word and agreed that EPA's interpretation went against the plain meaning of the Act. By adopting annual reductions in pollution limits, passed over five years, EPA failed to adequately protect the water quality in Lake Chesaplain.

The district court erred by not giving deference to EPA's guidance document and their reasonable assurance standard. Under *Skidmore,* deference can be giving to an agency's guidance document that occurred outside of a formal rulemaking process. EPA has created a standard for revieing TMDL allocations where there is a combination of point and nonpoint source pollution. The standard requires reasonable assurance that nonpoint sources will meet the required reductions in order to satisfy WQS. This reasonable assurance standard is thoroughly considered, valid and consistent and therefore is should be given deference by the court.

After giving deference to EPA's guidance documents, EPA has failed to provide reasonable assurance that the TMDLs BMP credit would create nonpoint source reductions. The EPA has not specified how the BMPs will be enforced, or nonpoint source reductions will occur. Furthermore, it is undisputed that since the approval of the TMDLs by EPA, New Union has not taken steps to reduce nonpoint source pollution and polluters continue to violate the WQS. The EPA has failed to reasonably consider the relevant factors for agency action, the reasonable assurance of the BMP credit, therefore their decision should be held to be arbitrary and capricious.

This Court should reverse the district court's decision in part and find (1) that EPA's interpretation of "total maximum daily load" does not violate the CWA by including both

wasteload allocations and load allocations; and (2) EPA's credit program for nonpoint pollution reduction was arbitrary and capricious. Additionally, this Court should uphold the district court's decision with respect to finding the TMDL's phased implementation of annual pollution reduction in violation of § 303(d) of the Clean Water Act.

STANDARD OF REVIEW

The U.S. District Court for the District of New Union granted New Union and CLW's motions for summary judgement in part and denied EPA's motion for summary judgement in part. This court reviews a grant of summary judgement *de novo* and views the facts in a light most favorable to the nonmovant. *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 523 (D.C. Cir. 2019).

ARGUMENT

I. EPA's Rejection and Subsequent Adoption of the New Union TMDL is Ripe for Judicial Review

Ripeness is a longstanding judicial doctrine flowing from Article III of the Constitution that limits judicial power and prevents the courts "from entangling themselves in abstract disagreements over administrative policies." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967). It is also intended to protect agencies from undue court intervention without a formal decision that has affected a party in a concrete way. *Id.* Courts must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. The Supreme Court has since further specified these requirements by stating that the court must consider "(1) whether the delayed review would cause hardship to the plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action, and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Review of Lake Chesaplain's TMDL satisfies all three of these factors established by the Court. First, failure to review EPA's decision would cause New Union, CLW, EPA, the Lake's nearby residents, and the industries relevant to this suit hardship. Second, judicial review would not interfere with any further administrative action as there are no pending or potential actions dependent on this decision. Third, this Court would not benefit from further factual development because at issue is the legal question of EPA's approval of the initial TMDL and all relevant facts in this case are fully developed as part of the record. Thus, EPA's approval of New Union's initial TMDL is ripe for judicial review by this Court.

A. Delayed Review Would Cause Chesaplain Lake Watch and the People Around Lake Chesaplain Hardship

Courts have defined "hardship" both broadly, to encompass uncertainty, and narrowly, to mean actual and imminent harm. *See, e.g.*, *NRDC v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988) (discussing judicial history of evolving definition of "hardship" and required harm). Under both interpretations of this term, Plaintiffs will suffer hardship if judicial review is delayed. In the case at hand, the major uncertainty is in the re-issuance of the expired NPDES permits and the allocations between point and nonpoint sources. The uncertainty surrounding the final TMDL regulations is causing hardship to CLW and its concerned members; the businesses and residents of Chesaplain Mills and the surrounding areas; the industry subject to its regulation; New Union and its agencies charged with implementing the TMDL; and is impacting the water quality of Lake Chesaplain itself. Moreover, the uncertainty caused by the continued legal actions against EPA's decision is also creating hardship for Plaintiffs by preventing New Union from taking further action in the meantime.

The Eighth Circuit's broad interpretation defines "hardship" as "the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence

of judicial review." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). Moreover, the court included agency action that creates uncertainty for parties moving forward if judicial review does not occur in its definition of "hardship." *See id.* at 868 (finding hardship in delaying review of an EPA decision because of the uncertainty around water quality standards).

Similarly, the Third Circuit found a TMDL approved by EPA ripe for judicial review although it had not yet been implemented at the state level and no harm was imminent. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293-94 (3d Cir. 2015). The court clarified that the case was a "purely legal dispute" based on a complete record. *Id.* at 293. Declining to review EPA's promulgation of the TMDL would "impose hardship because [EPA and the states] are poised to spend more time, energy, and money in developing an implementation plan." *Id.* at 293-94. The court concluded that it was better to hear the case now and preempt any potential hardships or any issues with the TMDL. *Id.*

The facts in *American Farm Bureau* are analogous to the case at hand. The question here is a similar legal dispute regarding a TMDL approval by EPA, and the record for this case is complete and well-adjudicated. Additionally, the same hardships face the plaintiffs in this case if judicial review of this TMDL is denied or delayed. However, in the current case, the NPDES permits have expired, raising the potential of creating further hardship on the parties if not quickly resolved. Therefore, judicial review of Lake Chesaplain TMDL meets the hardship standards for ripeness under a broad interpretation of the term.

Lake Chesaplain's case also satisfies a narrower interpretation established in *Ohio Forestry*, defining hardship to include "significant practical harm." 523 U.S. at 733. When denying the claim for lack of ripeness, the Court held that the petitioner could have brought the claim at a different time where the "harm is more imminent and more certain." *Id.* at 734. Under this

interpretation, the Court defines a narrower understanding that prevents uncertainty from being categorized as a hardship. The court also questioned whether the agency action "establishes a legal right" or if the action would cause a party to "modify its behavior to avoid future adverse consequences." *Id.* at 733. *But see Nat'l Park Hosp. Ass'n v. U.S. Dep't of the Interior*, 538 U.S. 803, 805 (2003) (holding that amended contracting regulations issued by the National Park Service failed to meet the hardship standard and were merely a "general statement of policy.").

Under this interpretation, and contrary to the parties *Ohio Forestry*, Plaintiffs will still suffer hardship if judicial review is delayed. Depending on the interpretation of the TMDL plan that is ultimately implemented, the level of phosphorus allowed to be released by the point source polluters is variable and will influence the pollution reduction practices followed. This delay will also create practical hardship for New Union in creating and enforcing the NPDES permits without clear guidance on TMDL implementation at the local level. Consequently, each of these decisions will impact the continued pollution of Lake Chesaplain and its effects on local businesses and residents, including the concerned members of CLW.

As in *American Farm Bureau*, the question at hand centers around a fully developed record of the claims and facts of the case. Furthermore, unlike prior cases finding EPA approval of state TMDLs not ripe for judicial review, the TMDL in question considers specific permit limits that require immediate implementation. Thus, under both the broad and narrow interpretations of hardship factor, claims regarding EPA's approval of the New Union TMDL are ripe for judicial review as held by the District Court.

B. Judicial Review Would Not Inappropriately Interfere with Further Administrative Action

The second factor a court must consider for ripeness is whether judicial review will inappropriately interfere with further administrative action. Final agency action is reviewable by

the courts, therefore, if an agency's action is final then judicial review would not interfere with further action. Under the Administrative Procedures Act ("APA"), " a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. In *Bennett v. Spear*, the Supreme Court laid forth two elements that are required to show final agency action: (1) that "the action must mark the 'consummation' of the agency's decision-making process," and (2) it "must be one of which 'rights and obligations have been determined' or from which 'legal consequences will flow.'" 520 U.S. 154, 178 (1997) (citing *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970)). Not only is the TMDL approval the final stage in EPA's decision-making process on the matter, but legal consequences, rights, and obligations flow from EPA's decision.

Regarding the first element of final agency action, the Ninth Circuit Court of Appeals found that the Army Corps' jurisdictional determinations mark the consummation of the decision-making process because the agency took a "firm position about the presence of jurisdictional wetland." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008). This firm position standard indicates it is sufficient to show an agency is unwavering in their stance in order to prove that an agency is at the consummation of their decision-making process. In this current case, when the EPA rendered the TMDL to New Union, they finalized the process.[4] After approval of TMDLs there is no further obligation required by EPA to reconsider at that time, therefore, EPA's final decision marks the consummation of agency decision-making process.

[4] This case it distinguishable from *City of Arcadia v. EPA*, because currently there is no indication that the EPA or New Union will revisit the TMDL and change the allocations, making their decision a firm position. *See* 264 F. Supp 2d 1142, 1158 (Holding that judicial intervention would interfere due to evidence that the city of Los Angeles would be revisiting the TMDLs)

In determining the rights and obligations that flow from agency action, the *Fairbanks* court held that the jurisdictional determination did not create a legal right because it does not "command Fairbanks to do or forbear from anything." *Fairbanks N. Star Borough*, 543 F.3d at 593. Because the action of the agency was seen as being merely an opinion, it "can be neither the subject of 'immediate compliance' nor of defiance." *Id.* at 594 (quoting *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980)). This holding is distinguishable from Lake Chesaplain because EPA's approval of the TMDL goes beyond a mere opinion and commands the state to act. Under the CWA for point sources, New Union must follow the TMDL allocations for NPDES permits. This is a legal requirement that is created, and if New Union does not follow, they can be found to be in defiance of the Act. Thus, there are legal consequences that flow from the agency's action, EPA's approval of the TMDL is considered a final agency action, and judicial review at this time would not interfere with further administrative action.

C. The Court Would Not Benefit from Further Factual Development of the Issues Presented

Courts have previously ruled that the validity of EPA's approval of a TMDL is an issue of law and not a situation where further factual development would be beneficial to a court's decision. *See City of Kennett v. EPA*, 887 F.3d 424, 433 (8th Cir. 2018) (holding that a question regarding EPA's TMDL approval was ripe because it depended on the complete administrative record of EPA's decision and thus did not require actual implementation of the TMDL to bring suit). Similarly, this case challenges whether the EPA has the legal authority to implement the TMDL, and therefore, no additional factual information should be required in order for the court to make a decision regarding the case. The Supreme Court has waited for more development when the question presented was not a concrete dispute. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812. However,

the case at hand is an entire legal dispute and waiting for further factual development would not assist this Court's review of EPA's TMDL approval.

Judicial review of the Lake Chesaplain TMDL satisfies *Ohio Forestry's* three factor test established by the Supreme Court. First, if this Court delayed review, the uncertainty of the TMDL allocation would cause the Plaintiffs hardship both financially and by preventing further required action. Second, judicial review would not interfere with other administrative action. EPA's approval of New Union's TMDL allocation constitutes a final agency action because it occurred at the consumption of the agency's process, and the TMDL allocations create a legal right on New Union to implement NPDES permits. Lastly, this Court would not benefit from further factual development. The TMDL allocation is an issue of law. The full and complete record created by the EPA is sufficient to rule on the legal rights without waiting for implementation by New Union. Therefore, the two issues of hardship and fitness for review are also satisfied. This Court should affirm the lower courts holding and rule that this case is ripe for judicial review.

II. EPA's Interpretation of "Total" and Subsequent Rejection of New Union's Amended TDML Was Not Contrary to Law

Under the CWA, each state is required to identify waters within its boundaries where the technology-based permit controls of point sources and publicly owned treatment works "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). These identified waters are colloquially referred to as "impaired waters" and often cannot meet the water quality standards due to significant nonpoint sources of pollution. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). For each impaired water, the state must establish a "total maximum daily load" for all sources of pollution at the "level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." § 1313(d)(1)(C).

EPA has acknowledged that "it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component [allocations] and how these loads were calculated." Final Rule, Water Quality Planning and Management, 50 Fed. Reg. 1774, 1775 (Jan. 11, 1985). The congressional intent behind the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"; a goal carried out by the EPA as the responsible agency. *See* 33 U.S.C. § 1251. Since 1985, EPA has defined the "total" of a TMDL to be the sum of WLAs and LAs or BMPs. 40 C.F.R. § 130.2(i). This is a permissible interpretation of "total" within the CWA and EPA was thus correct in rejecting New Union's amended TDML lacking regulations for all necessary sources.

A. EPA Correctly Interpreted TMDLs to Include Both Point Source and Nonpoint Source Dischargers

EPA correctly interpreted a TMDL "total" calculation to include both waste load allocations (WLAs) for point sources and load allocations (LAs) or best management practices (BMPs) for nonpoint sources to reach the necessary water quality standards. Whenever an agency's interpretation of a statute it administers is questioned, courts turn to the framework of *Chevron v. NRDC*, 467 U.S. 837 (1984). First this Court must consider whether Congress has clearly spoken on the "precise question at issue." *Id.* at 842. Second, if Congress is silent or ambiguous then the Court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

i. Congress Has Not Clearly Defined "Total" under the CWA

In *American Farm Bureau*, the Third Circuit held that "Congress was ambiguous on the content of the words 'total maximum daily load': they are not defined in the statute, and *'total' is susceptible to multiple interpretations*." *Am. Farm Bureau Fed'n*, 792 F.3d at 298 (emphasis added). Starting with the statutory text and applying the cannon against surplusage, the court held

that "a plausible understanding of 'total' is that it means the sum of the constituent parts of the load." *Id.* at 297. Next, the court turned to the statutory structure and purpose of the entire CWA and found that EPA's construction of TMDLs is central to the Act's goal of addressing the nonpoint sources, which are usually the state's dominion. *Id.* at 299; *see also Meiburg*, 296 F.3d at 1025. Ultimately, the Third Circuit found that Congress had not spoken on the definition of "total" in a TMDL precisely. *Am. Farm Bureau Fed'n*, 792 F.3d at 306.

Alternately, numerous courts have held that Congress intended each word in "total maximum daily load" be read with its plain meaning. *But see NRDC v. Muszynski*, 268 F.3d 91, 97-98 (2d Cir. 2001) ("[I]t is excessively formalistic to suggest that EPA may not express these standards in different ways, as appropriate to each unique circumstance . . . the term 'total maximum daily load' is susceptible to a broader range of meanings."). In *Muszynski*, the court upheld EPA's interpretation of "total maximum daily load" contrary to the plain meaning of the individual terms but in a way "reasonable in light of the legislature's revealed design." *Id.* at 97 (internal quotations omitted). While courts have yet to give a definitive answer to whether the word “total” on its own should be read according to its plain meaning, the next question for this Court is the same under the second step of the *Chevron* analysis.

ii. EPA's Interpretation of "Total" is Permissible and Entitled to Deference Under Chevron

The Court's analysis now continues to the second step of the *Chevron* framework to evaluate whether EPA's TMDL requiring the control of both point source and nonpoint source allocations is a permissible interpretation of the Act. When EPA's interpretation "represents a reasonable accommodation of manifestly competing interests" it is entitled to deference. *Chevron*, 467 U.S. at 2792-93. Deference is given when "the regulatory scheme is technical and complex,

the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.*

In 1985, EPA amended the process for establishing water quality standards for impaired waters to require "wasteload allocations [(WLAs)], load allocations [(LAs)] and total maximum daily loads," and to set priorities for each. 40 C.F.R. § 130.7(a); *see* § 1251(d). A clearer definition of TMDL was added because "it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated." Final Rule, Water Quality Planning and Management, 50 Fed. Reg. at 1775. To only continue regulating the point source LAs in place, which are subject to NPDES, would be contrary to the WQS needed to lessen pollution in the impaired water.

Defining total to include WLAs and LAs serves other goals through the CWA's public comment process by providing "greater transparency to the public who may comment on a TMDL." *Am. Farm Bureau Fed'n*, 792 F.3d at 306. If "total" is interpreted in the way New Union suggests, the public has no allocations or limits to challenge and no way of holding nonpoint source polluters accountable. This is precisely what the CLW environmental group did in DOFEC's public comments stage of the purposed WQS.

While Congress has not spoken directly on the term "total," Congress added § 1313(d)(4)(A) & (B) "governing the revision of effluent limitations 'based on a total maximum daily load *or other waste load allocation* established under this section'" in 1987 (after EPA's amendment to 40 C.F.R. § 130.7). *Am. Farm Bureau Fed'n*, 792 F.3d at 308 (quoting P.L. 100-4 § 404(b) (Feb. 4, 1987)) (emphasis added to amended language). Congress has clearly shown support for EPA's interpretation of the amended language to include nonpoint source WLAs. Furthermore, Congress expressly stated "it is the national policy that programs for the control of

nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7).

Thus, deference should be given to EPA's definition of "total" to include WLAs and LAs because the CWA is a "technical and complex" cooperative federal model that must look specifically at impaired waters' uses, pollution levels by contaminant, and create a process to regulate that contaminant for a variety of sources. *See* 33 U.S.C. § 1313. EPA has also continued to be "detailed and reasoned" in its definition of "total" in TMDLs, in fact, the TMDL load allocation's purpose is to be as detailed as possible so polluter's protocols can be reasonably changed in order to protect impaired waters from further damage. Finally, the WQS framework was implemented in 1985 to include WLAs and LAs in 40 C.F.R. § 130.7 due to conflicting ideas about what a TMDL should include, shown in the public comments EPA addressed during the rulemaking process. *See* Final Rule, Water Quality Planning and Management, 50 Fed. Reg.

The definition of a TMDL may not be expressed in § 1313(d), but the CWA was not meant to be read in sections separately from the rest of EPA's "detailed and reasoned" guidelines on the complex statutory framework of TMDLs. New Union asserts that the interpretation is incorrect and contrary to law when only looking at the procedure process for identifying and managing impaired waters in § 1313(d); however, the accompanying § 130.7 and the Act as a whole supports the EPA's definition of "total" to be a sum of specific parts broken down into nonpoint and point source allocations.

B. EPA Correctly Rejected New Union's Amended TMDL That Did Not Regulate Nonpoint Source Dischargers

The Court must now turn to the issue of whether the EPA can reject New Union's amended TMDL because it lacks a "total" including WLAs and LAs. Each state must submit the impaired

waters it identifies, and the loads established for each, to EPA for approval. 33 U.S.C. § 1313(d)(2). If EPA disproves of the submitted regulations, it shall "establish such loads [as] necessary to implement the [applicable] water quality standards" and "the State shall incorporate them into its current plan." *Id.*

New Union properly identified and submitted Lake Chesaplain as an impaired water to the EPA, however, the issue of an established load only was addressed by both EPA and New Union after CLW gave notice to file suit for noncompliance with the CWA. New Union then established an initial TMDL including phosphorus LAs and BMPs as an acceptable alternative to WLAs, but subsequently removed the BMPs after vocal objections from the hog CAFOs during the public comment period. EPA then denied New Union's amended TMDL submission and established the originally proposed TMDL as the phosphorus loads in the CWIP. Thus, the amended New Union TMDL did not meet the criteria set out by EPA and the Administrator correctly disapproved of the amended proposal.

New Union argues that the current load established by EPA is incorrect, yet New Union was the original creator of this load. EPA may establish its own load for impaired waters, but here New Union did so itself to a level that EPA believed would allow for the implementation of the WQS for phosphorus at Lake Chesaplain. The EPA simply required New Union to implement a plan that the State had come up with on its own before being influenced by regional industry's comments against the proposed standards. EPA followed the steps for rejection pursuant to § 1313(d)(2); therefore, the TMDL was rejected correctly both procedurally and in line with the required nonpoint and point source regulation as part of the "total" in the maximum daily load.

New Union may argue that their original proposed load when used by EPA was not an acceptable revision because "any water quality standard established under this section, or any other

permitting standard may be revised only if *such revision is subject to and consistent with the antidegradation policy established under this section*." 33 U.S.C. § 1313(d)(4)(B) (emphasis added). The antidegradation policy is CWA's goal of ensuring that existing water uses and the level of water quality necessary to protect existing beneficial uses are maintained and protected. *See* 40 CFR § 131.12. Any TMDL without the appropriate nonpoint source LAs or BMPs would not fully follow the antidegradation policy of the EPA because TMDLs are only implemented when the regulation of point sources is not enough to maintain the water quality standards, so the nonpoint sources must be included to "maintain and protect" the navigable waters. Therefore, the EPA was correct to establish New Union's original TMDL that did regulate the second half of the equation necessary to adhere to CWA's antidegradation policy.

III. EPA's Adoption of a Five-Year Annual Phased Pollution Loading Reduction Violates the § 1313(d) TMDL Requirements

By adopting a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years, rather than daily pollution limits, EPA violated the requirements for a valid TMDL under § 1313(d). EPA's interpretation of the term "daily" within "total maximum daily load" goes against both the plain meaning of the term and the intent of the statute and is thusly not entitled to deference. *See Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) ("Congress specified 'total maximum *daily* loads.' We cannot imagine a clearer expression of intent." (emphasis in original)). Additionally, the phased pollution reduction set forth in the TMDL is not adequate to ensure the achievement of applicable water quality standards. Therefore, this Court should affirm the District Court's holding and find the EPA TMDL invalid.

This Court reviews EPA's interpretation of "total maximum 'daily' loads" to allow for phased 'annual' reductions under *Chevron*. 467 U.S. 837, 842 (1984); s*ee also NRDC v. EPA*, 859 F.2d at 202. *Chevron* review begins with looking at the plain language of the statute and, "[w]here an

agency's interpretation contradicts the plain language of the statute or regulation in question, the "plain language of course controls.'" *Accord NRDC v. Fox,* 93 F. Supp. 2d 531, 554 (S.D.N.Y. 2000) (quoting *N.Y.C. Currency Rsch. Corp. v. CFTC*, 180 F.3d 83, 89 (2d Cir. 1999)); *Friends of the Earth*, 446 F. 3d at 144. A statute's plain meaning can be surmised by using the words "in their ordinary sense." Muszynski, 268 F.3d at 98. If Congress' intent is still unclear, the court turns to the structure and history of the statute.

A. Annual TMDL Goes Against the Plain Meaning of "Daily"

EPA's interpretation of "daily" under § 1313(d) to allow for annual limits in the Lake Chesaplain TMDL is invalid because it goes against the "unambiguously expressed intent of Congress." Chevron cite. Unlike the ambiguity in case law defining "total," the question of whether Congress has directly spoken to the definition of "daily" in "total maximum daily load" was addressed by the D.C. Circuit Court of Appeals in *Friends of the Earth*, 446 F.3d 140. *But see Am. Farm. Bureau Fed'n*, 792 F.3d at 297 (noting the split of authority on the term "daily"). The same Section of the CWA was in question that is relevant to the case at hand, and the court was very explicit in its judgment of EPA's interpretation allowing for an "annual" load:

> Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." *See* Webster's Third New International Dictionary 570 (1993) (defining "daily" to mean "occurring or being made, done, or acted upon every day"). Doctors 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. Matthew 6:11 (King James).

Id. at 144. In *Friends of the Earth*, EPA had similarly approved TMDLs that set limits on annual pollutant discharges. This holding was reached despite EPA's argument that the purpose of establishing TMDLs and the technical nature of the pollutants at issue allowed for the alternate interpretation of the statute. *Id.* at 144-45.

Courts have not been unanimous in their treatment of this language within the CWA. *Supra* Discussion, Section II. In *American Farm Bureau*, the court held found "total" to be ambiguous and open to interpretation by EPA. 792 F.3d at 306. The court acknowledged the holding in *Friends of the Earth*, noting that the D.C. Circuit did not consider the entire phrase "unambiguous in all respects," only the term "daily" itself. *Id.* (quoting *Friends of the Earth*, 446 F.3d at 144). *But see Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 172 (D.C. Cir. 2019) ("There is no basis for concluding that stringing [the individually unambiguous terms] together creates an ambiguity that warrants departure from the [D.C.] Circuit's reasoning."). It also noted that "the statute is explicit about the requirement for a daily load" and is only silent on "whether another timeframe may be used when that would be more appropriate for the particular pollutant at issue." *Am. Farm. Bureau Fed'n*, 792 F.3d at 306.

While EPA may argue that the situation at hand calls for an alternative definition under this reasoning, the agency's own regulations provide that "all pollutants . . . are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. at 60,665. Rather than reconsidering this position and utilizing a "straightforward regulatory fix" to explicitly define the situations in which the Agency's technical expertise justifies the establishment of non-daily loads, EPA has instead continued to engage in the "tortured argument that 'daily' means something other than daily." *Friends of the Earth*, 446 F.3d at 146.

In *Friends of the Earth*, EPA countered this reasoning by arguing that requiring the promulgation of exclusively daily limits for all pollutants would be an absurd interpretation of the requirements. *See id.* (citing *Muszynski*, 268 F.3d at 99). However, as the court noted, "to avoid a literal interpretation . . . [EPA] must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost

surely could not have meant it." As evidenced by the Agency's regulations, it is clearly not absurd to conclude that Congress intended for the TMDL requirements to apply to "all pollutants" and EPA cannot circumvent Congress' intent simply because it believes "its preferred approach would be better policy." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

B. Annually Phased Pollution Limits Are Not a Permissible Construction of the TMDL Requirements

The Supreme Court has explicitly acknowledged that the complexity of the CWA supports the high judicial deference awarded to EPA's statutory construction. *See Train v. NRDC*, 421 U.S. 60, 75 (1975). However, this deference is only given where the Agency's interpretation is "reasonably in light of the legislature's revealed design." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). In each instance that EPA has been challenged for approving a TMDL with a non-daily timeframe, the Agency has argued that setting a strict daily limitation on TMDLs undermines this authority. *See Anacostia Riverkeeper*, 404 F. Supp. 3d at 172. When courts *have* conceded EPA this discretion it has been because EPA has shown that an alternative interpretation of "daily" standards is necessary or more effective in obtaining appropriate water quality standards.

In *NRDC v. EPA*, a TDML containing annual reductions in the quantity of trash for the waterbody was challenged on the basis it lacked daily limits. 301 F. Supp. 3d 133, 142 (D.C. Cir. 2018). In this case, the court agreed with EPA that the term "total maximum daily load" should be read according to the intent of the CWA rather than the plain meaning of the words. *Id.* The court still found the TMDL invalid, reasoning that "nothing in the CWA suggests that the word 'maximum' can mean 'minimum,' or that the word 'load' can refer to a quantity of pollution either that is removed from or that is prevented from entering a waterbody." *Id.* at 144. The court concluded that a pollution reduction, rather than a pollution limit, went against the congressional

intent behind the Act. *Id.* at 142 (“A speed limit would be no limit at all if it simply required drivers to slow down ten miles per hour.").

This is analogous to *Anacostia Riverkeeper*, wherein the court vacated a TMDL with annual pollution reductions approved by EPA. 404 F. Supp at 172. The court explicitly noted that when a state's water pollution controls are insufficient, the "leeway in choosing the timeframes" for WQS diminishes and EPA "must set a *daily* limit on pollutants, even if that limit seeks to effectuate a *non-daily* goal." *Id.* (citing *Friends of the Earth*, 446 F.3d at 144-45) (emphasis in original). The goal of including deadlines in the TMDL requirements is the prompt accomplishment of "something beneficial (recall that the [CWA] enacting Congress's goal was to have the Nation's waters clean by 1985)." *Am. Farm Bureau Fed'n* at 307.

In the case at hand, New Union's initial TMDL approved by EPA proposed a phased annual pollution reduction to be implemented over five years. This violates the timeline requirements of a TMDL because it lacks any type of *daily* pollution limits and only includes annual benchmarks. This goes against the plain meaning of the word and the intent of the Act to establish pollution limits for impaired waters. Moreover, the annual benchmarks in EPA’s TMDL are merely reduction goals for pollution levels in the lake rather than the intended source-based effluent limits required by the Act. This court should uphold the district court’s finding that EPA’s use of a phased annual reduction violated the TMDL requirements of § 1313.

IV. The Wasteload Allocation Credits Based on Assumed Nonpoint Source BPM Was Arbitrary and Capricious Due to the Lack of Reasonable Assurance

A. EPA's Interpretation is Entitled to Deference Under *Skidmore*

The lower court incorrectly applied the *Chevron* doctrine to the BMPs and ruled that the EPA's reasonable assurance standard isn't entitled to deference by the courts. This reasoning is inconsistent with the Supreme Court's holding in *Christensen v. Harris County*, where the Court

confronted the issue of providing deference to agency action that occurs outside the formal rulemaking process. 529 U.S. 576, 587 (2000). The Court ruled that interpretations contained in "policy statements, agency manuals, and enforcement guidelines" do not warrant *Chevron* deference, however, they are entitled to respect by the courts. *Id.* In *Skidmore v. Swift*, The Supreme Court held that interpretations and rulings by agencies should be considered because agencies "constitute a body of experience and informed judgement to which courts and litigants may properly resort to guidance." 323 U.S. 134, 140 (1944). The Court highlighted the importance of agency opinions that occur outside of the formal rulemaking process because those opinions are "based on more specialized experience" than a judge will likely possess. *Id* at 139. However, *Skidmore* deference is not as absolute as *Chevron* because the agencies opinion is not "controlling upon the courts," however the weight courts give to the agency depends on the agencies persuasive reasoning. *Id*. at 140. *Skidmore* created three factors to weigh in order to provide deference to the agency: (1) thoroughness of agency consideration, (2) validity of the agency's reasoning, and (3) consistency with earlier and later pronouncements. *Id*.

In 1991 EPA created a guidance document that laid out a structure for how to create a TMDL where there are nonpoint and point source controls. U.S. Env't Prot. Agency, Guidance for Water Quality-Based Decision: The TMDL Process at 15 (1991). Under the approach, EPA states that "[i]n order to allocate loads among both nonpoint and point sources, there must be reasonable assurances that nonpoint source reduction will in fact be achieved." *Id*. Further, where there is not reasonable assurance, the entire load allocation "must be assigned to point sources." *Id.* Only point sources are federally controlled, therefore, without reasonable assurance that nonpoint source reduction will be achieved there is no other way to enforce nonpoint point sources from a federal level. *Id*. The EPA then published an additional guidance document stating that in order to be

approved, the TMDL allocations must provide reasonable assurance that "nonpoint source control measures will achieve expected load reductions" in order to satisfy WQS. U.S. Env't Prot. Agency, Guidance for Reviewing TMDLs Under Existing Regulations Issued in 1992 at 4 (2002). In addition to the guidance document, EPA has published an email explaining how reasonable assurance is important to the TMDL allocation approval process. E-mail from Denis Keehner, Dir., U.S. Env't Prot. Agency (Feb. 15, 2012, 12:51 PM). The EPA stated that reasonable assurance is "important to realizing future water quality and environmental gains" and without reasonable assurance the collaboration between point and nonpoint sources working to create "water quality improvement is significantly diminished." *Id*.

EPA's documents satisfy the three factors required by the courts to gain deference. First, there are multiple guidance documents referring to the topic of TMDL allocations showing that the EPA has spent a significant amount of time and resource in order to develop guidance for the agency to implement accurate regulations that conform to the CWA and its overall goals. Second, the agency has given multiple reasonings in support of the reasonable assurance standard. The fact that there are no federal regulations on nonpoint sources is a valid reason why the EPA would want to assurance that nonpoint reductions would occur under TMDL allocations otherwise water quality standards as a whole are in jeopardy. Finally, each of the documents cited was created in different decade, yet the requirement of reasonable assurance has stayed the same, therefore there is consistency through the EPA implementation of their guidance documents. Therefore, this court should give deference under *Skidmore* to the EPA's guidance documents and their policy of reasonable assurance.

B. EPA's Allocation Credits Based on Assumed Nonpoint Source BMP is Arbitrary and Capricious

Although the EPA is entitled to a highly deferential arbitrary and capricious standard for review of an agency action, the EPA has failed to meet that standard. Under this standard a court must hold an agency action unlawful when the action was found to be "arbitrary, capricious, an abuse of discretion." 5 U.S.C § 706 (2)(A). Under the analysis in *Citizens to Preserve Overton Park v. Volpe,* courts must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. 402, 416. The Supreme Court further explained this standard by stating that,

> The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.

FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158. An agency must have reasonably considered and explained their decision in order for a court to find their decision to not be arbitrary and capricious.

After giving deference to the EPA's guidance document through *Skidmore* deference, the court must look at whether the EPA in the approval of the nonpoint source BMPs provided reasonable assurance that the nonpoint reductions will be met. Under this standard EPA did not reasonably consider reasonable assurance nor was it explained in their approval of their TMDL. The 1991 guidance document specifies that assurance "may include the application or utilization of local ordinances, grant conditions, or other enforcement authorizes." Guidance for Water Quality-based Decisions at 15. In cases where state TMDL did not provide reasonable assurance, courts have upheld EPA implementing their own allocation plans to assure nonpoint source reduction. *See Am. Farm. Bureau Fed'n,* 984 F. Supp 2d at 326-27 (finding that EPA can create

backstop provisions for TMDLs to satisfy the reasonable assurance standard). However, this case is distinguishable because in the current case the EPA did not provide any backstop allocations in order to assure compliance with WQS. The EPA's point and nonpoint source TMDL plan "did not specif[y] whether or how the proposed BMP measure would be enforced." R. at 10. The EPA did not provide how nonpoint source reduction would occur under the approved TMDL using BMP, therefore their requirement to provide reasonable assurance was not satisfied. The EPA did not reasonably consider the required issue of reasonable assurance, making the EPA's approval of the nonpoint source BMP measures arbitrary and capricious.

In addition, it is undisputed that in the two years since the TMDLs have been approved by the EPA, New Union has not taken any steps to reduce nonpoint source pollution. R. at 10. New Union has not implemented the required procedures to reduce both nonpoint and point source pollution and "Lake Chesaplain waters continue to violate water quality standard" every day. R. at 10. This is proof that the New Union does not have any intention on reducing the nonpoint source pollution under the TMDL allocations which goes against the goals of the CWA. As referenced above, because the EPA does not have the ability to federally enforce nonpoint sources, it is vital that the EPA has reasonable assurance that the TMDL allocations will result in the reduction of nonpoint source pollution in order to satisfy the WQS. Lake Chesaplain completely lacks assurance because of the absence of a reasonable explanation in the TMDL plan, as well as in the subsequent actions or lack thereof taken by New Union. As a result, the WQS continue to be breached and the environment, as well as the community, will continue to suffer by the seemingly unending pollution.

The lower court also felt that "if the standard for taking credit for BMPs was indeed [the] 'reasonable assurance' standard, then this court would be convinced that EPA's reliance on BMP

implementation was indeed arbitrary and capricious." R. at 16. EPA had a duty under their own guidance to provide reasonable assurance for nonpoint source reduction to further the goals of the CWA and protect the environment from harmful pollutants. Under this duty they have failed by not providing the required information. In conclusion, the EPA's guidance document requiring reasonable assurance of TMDL allocations is entitled to deference under *Skidmore*. Because of this, the absence of any reasonable assurance in the EPA's BMP credit requirements of TMDL implementation plan was arbitrary and capricious.

CONCLUSION

For these reasons, this Court should affirm the judgment of the District Court of New Union and find that (1) the EPA's rejection of New Union's amended TMDL and adoption of New Union's original TMDL plan is ripe for judicial review; and that (2) the EPA's use of a 5-year "annual" pollution load reduction violates the CWA "daily" load reduction requirement for a valid TMDL. Additionally, this Court should reverse the judgement of the district court and find (1) the EPA's interpretation of "total" in TMDL to include both point and nonpoint source allocations correct and the rejection of New Union's amended TMDL lacking those requirements lawful under the CWA; and (2) that the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for the TMDL implementation plan was arbitrary, capricious, and an abuse of discretion due to the lack of reasonable assurance of BMP implementation?

CLW respectfully requests that the Twelfth Circuit Court of Appeals affirm the district court's decision in part, reverse the district court's decision in part, and remand the TMDL to establish a “daily” load allocation in the CWIP.