Team Number: 18

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

UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

-and-

THE STATE OF NEW UNION,
Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

On Appeal from the United States District Court for the District of New Union

Brief of Appellant-Cross Appellee, CHESAPLAIN LAKE WATCH

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INTRODUCTION

This case arises out of the United States Environmental Protection Agency's (EPA) failure to fulfill the requirements of the Clean Water Act (CWA) and Administrative Procedure Act (APA) in adopting its own phosphorous Total Maximum Daily Load (TMDL) for Lake Chesaplain. Specifically, Chesaplain Lake Watch (CLW) seeks review of: the District Court's determination that (1) EPA's interpretation of TMDL violates the Clean Water Act § 303(d), 33 U.S.C. § 1313(d) by including wasteload allocations (WLAs) and load allocations (LAs); and (2) that EPA's credit for nonpoint pollution reductions be achieved through implementation of best management practices (BMPs) to make point source pollution reductions less stringent was not arbitrary or capricious or an abuse of discretion based on the record before EPA.

JURISDICTIONAL STATEMENT

CLW appeals from an Opinion and Order granting partial summary judgment for defendant EPA and intervenor the State of New Union (NU), entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, consolidated cases nos. 66-CV-2020 and 73-CV-2020. The district court had jurisdiction to review the Administration's action under the judicial review provisions of the Administrative Procedure Act, APA § 702 and under 28 U.S.C. § 1331. CLW, EPA, and NU all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4.

The United States Court of Appeals for the Twelfth Circuit 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." An order granting

summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 135. S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

I. Is the EPA's disapproval of NU's Chesaplain Watershed phosphorous TMDL and adoption of its own TMDL and implementation plan for the Lake Chesaplain watershed ripe for judicial review?

II. Is the EPA's disapproval of NU's Chesaplain Watershed phosphorous TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations contrary to law and an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d)?

III. Is the EPA's adopted TMDL for the Lake Chesaplain Watershed violative of CWA § 303(d) requirements for a valid TMDL because its annual pollution loading reduction is to be phased in over five years?

IV. Is the EPA's adoption of reducing the stringency for point source wasteload allocations based on credits for anticipated Best Management Practices (BMP) pollution reductions arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation?

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act (CWA) was enacted by Congress with the core objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To achieve that objective, Congress declared as a "national goal"

that "the discharge of pollutants into the navigable waters be eliminated by 1985," and that "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." CWA §§ 101(a)(1) and (2).

In furtherance of these goals, the Act required *inter alia* that point sources—including any "pipe," "conduit," or other "discernible, confined and discrete conveyance"—meet technology-based effluent limitations. Clean Water Act § 301(b)(1)(A) and (B), 33 U.S.C. § 1311(b)(1)(A) and (B). However, recognizing that this approach by itself would not produce clean water, the Act also required each state to have in place EPA-approved water quality standards sufficient to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." CWA § 303(c)(2)(A), 33 U.S.C. § 1303(c)(2)(A).

The achievement of water quality standards is one of the Act's "central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). To provide for such achievement, "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title [Clean Water Act §§ 301(b)(1)(A) and 301(b)(1)(B)] are not stringent enough to implement any water quality standard applicable to such waters." Clean Water Act § 303(d)(1)(A). For the waters thus identified, States must establish "the total maximum daily load. . . at a level necessary to implement the applicable water quality standards with season variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." Clean Water Act § 303(d)(1)(C). The Act provides for EPA approval or disapproval of state TMDLs, as well as for establishment of federal TMDLs. Clean Water Act§ 303(d)(2).

TMDLs are implemented *inter alia* through point source discharge permits, which must be consistent with the TMDL. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (requiring achievement of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standards established pursuant to this chapter"). *See also* 40 C.F.R. § 122.44(d)(1)(vii)(B); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981). A TMDL must include the sum of (1) allowable pollution from each existing or future point sources (called wasteoad allocations (WLAs)), 40 C.F.R. § 130.2(h); (2) allowable pollution from nonpoint and natural background sources, if any (called load allocations (LAs)), *id*. § 130.2(g); and a margin of safety which takes into account any lack of knowledge concerning the relationship between pollution controls and water quality, The Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). 40 C.F.R. § 130.2(i).

B. The Impaired Water Status Finding

Lake Chesaplain is a once-beautiful fifty-five mile-long, five-mile wide natural lake located within the lush Chesaplain National Forest and the twenty-mile long shorefront of Chesaplain State Park, filled with hiking trails, boat ramps, a public beach, and a campground, perfect for a myriad of recreational activities. The east side of Lake Chesaplain predominantly features sprawling agricultural lands, and several lakefront vacation communities. Lake Chesaplain flows into the Chesaplain River, which crosses state boundaries.

Only thirty years ago, Lake Chesaplain enjoyed excellent water quality. Its pristine waters attracted recreational boaters and fishers across the mid-north region of this country. The

stunning natural landscape also attracted vacation communities on the east shore of the lake. However, starting in the 1990's, Lake Chesaplain began experience pressure from various economic developments suffocating the lake's natural vitality.

Over the following decade, the upstream Union River watershed would come to be the site for a total of ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs). Additionally, a large-scale slaughterhouse, outputting greater than fifty million pounds per year, was built in Chesaplain Mills to service the CAFOs. Concurrently, the recreational attractions of Lake Chesaplain drew a market boom for second home construction, replete with corresponding septic tanks, on and near the eastern lake shore. The destruction of these caustic new developments was further exacerbated by the Chesaplain Mills publicly owned sewage treatment plant (STP), which discharges directly into Lake Chesaplain.

The slaughterhouse has a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit issued by NU which allows the slaughterhouse to discharge directly into the Union River, immediately upstream of Lake Chesaplain. The STP discharges directly into Lake Chesaplain and is regulated by a Clean Water Act point source permit. The hog CAFOs, meanwhile, are not subject to Clean Water Act permits or regulations, because although the CAFOs are included in the definition of a "point source" under the Clean Water Act, 33 U.S.C. § 1362 (14), they are nevertheless considered to be "non-discharging" CAGO exempt from permitting requirements under the EPA regulatory definition of CAFOs. 40 C.F.R.§ 122.23. NU has sole discretion in regulating and permitting the hog CAFOs under NU statute providing for New Union Agricultural Commission review and approval of site-specific nutrient management plans for the application of liquid manure wastes to fields.

Since introducing these large-scale polluters to Lake Chesaplain and the surrounding environment, the Lake Chesaplain's previously crystal waters have visibly declined; abundant with mats of algae which exudes offensive odors and created a decline in fish productivity. Even the swimming beach at Chesaplain State Park has become unsuitable for the very act of swimming. Further, the property values for the surrounding vacation home communities has plummeted in addition to the revenues from fishing and boating trips.

Despite the debilitating quality of Lake Chesaplain, the lake is designated as Class AA, pursuant to the NU WQS, which is the classification reserved only for the highest quality waters of the state. This highest quality Class AA water standard is dedicated to uses such as drinking water source, primary contact recreation (swimming), and fish propagation and survival. To combat the declining water quality, NU created a Lake Chesaplain Study Commission in 2008 (the Chesaplain Commission), which issued a report in August 2012 (the 2012 Chesaplain Report), stating that the Commission determined that Lake Chesaplain was suffering from eutrophication, the ecological process by which a lake becomes less biologically productive due to an excess in algae growth. This overgrowth of algae not only detracts from the lake's natural beauty, but also creates objectionable odors, decreased water clarity, and a decrease in dissolved oxygen (DO) levels, dipping below the necessary level for a healthy fishery. Summer DO levels were three milligrams per liter (mg/l), well below the five mg/l DO standard designated for class AA waters by NU.

The algae growth responsible for this havoc was determined to be the result of excessive amounts of the nutrient phosphorus in the water body. The commission determined that the maximum phosphorus levels for a healthy lake ecosystem would be 0.014 mg/l throughout the lake; however, the results from testing Lake Chesaplain varied from 0.020 to 0.034 mg/l,

reaching more than double the maximum level. In addition to the phosphorus violations, the commission also identified violations of the state's water quality standards for odor and water clarity.

In the 2014 triennial WQS review, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality criterion for Class AA waters of 0.014 mg/l. Further, due to the violations for DO, odors, and water clarity, DOFEC (as the designated NU agency) submitted to EPA, an impaired waters list to include Lake Chesaplain. DOFEC, however, did not submit a Total Maximum Daily Load (TMDL) for Lake Chesaplain with its list of impaired waters—despite this requirement failure, EPA, seemingly arbitrarily, did not object to the § 303 submission. In response, CLW submitted a notice letter on both NU and EPA in 2015, threatening to sue based on the failure of both agencies to establish a TMDL for Lake Chesaplain, as is required for an impaired water. CLW agreed not to take further action so long as a TMDL was established for Lake Chesaplain.

Together, DOFEC and the Chesaplain Commission calculated the maximum phosphorus loadings necessary to achieve the 0.014 phosphorus standard and identified the existing sources of phosphorous inputs. The maximum loading amount was calculated at 120 metric tons (mt) annually, whereas the loadings as of 2015 were calculated at totaling 180 metric tons (mt), well above the maximum. The breakdown is as follows:

Point Sources:

Chesaplain Mills TP	23.4
Chesaplain Slaughterhouse	38.5

Nonpoint Sources:

CAFO Manure Spreading	54.9
Other agricultural sources:	19.3

Septic tank inputs		11.6
Natural sources		32.3
	Total	180 mt

In October 2017, DOFEC announced proposal to implement the TMDL through an equal five-year phased reduction in phosphorus discharges by point and nonpoint sources, alike. The phasing was intended to start with a 7% reduction the first year, 14% the second, 21% the third, 28% the fourth, and a 35% by the fifth year. Point sources were to be regulated as permit limits and nonpoint source reductions were proposed to be achieved through a series of BMP programs with the intention of encouraging the hog CAFOs and other agricultural sources to reduce discharges.

DOFEC's proposal was met with intense controversy, chiefly among the objections were the hog CAFOs, residential lakefront homeowners, the slaughterhouse, and Chesaplain Mills. CLW opposed the plan, stating that it objected to taking credits for nonpoint source reductions, arguing that the proposed BMPs were grossly insufficient to achieve the class AA WQS and that NU lacked the statutory authority to impose and enforce such BMPs regardless. CLW demanded a sixty-three mt annual reduction be achieved by requiring zero phosphorus discharges from the point sources. CLW further argued that a phased annual reduction was inconsistent with the CWA for a TMDL, which by statutory terms, should be a daily limit.

The hog CAFOs objected to the imposition of BMPs on their operations and argued to the DOFEC that EPA lacked the authority to require loading limits against nonpoint sources. Unfortunately, DOFEC conceded to the hog CAFOs position and in July of 2018, adopted a paltry TMDL consisting solely of a 120 mt annual maximum, without any wasteload allocations or load allocations. In response, the EPA rejected the July 2018 TMDL and adopted the original DOFEC TMDL proposal, which CLW contested. EPA called its combination of phased point

source limits and unspecified BMP measures the "Chesaplain Watershed Implementation Plan" (CWIP).

Further, it is undisputed and relevant to this case to note that the NPDES permit for the slaughterhouse expired in November 2018 and has not been reissued. The NPDES permit for the Chesaplain Mills sewage treatment plant also expired in February of 2019. Both plants have continued to operate with expired permits with no agency objection. See 40 C.F.R. § 122.6, Accordingly, neither plant is currently subject to any limit on phosphorus discharges. DOFEC has proposed to modify their permits to reflect the updated 35% annual phosphorus loading reduction and both plants have sought hearings to buck this proposed requirement. Since EPA's adoption of the completely inadequate CWIP TMDL, NU has taken absolutely no steps to require phosphorus reduction BMPs by the nonpoint sources. Thus, Lake Chesaplain and the corresponding ecosystem continues to suffer at the hands of these unencumbered polluters.

C. Proceedings Below

In 2015, CLW properly served notice of its intention to sue EPA under the Clean Water Act's citizen suit provision, 33 U.S.C. 1365(a), for failure to act on its duty to regulate the pollution entering Lake Chesaplain by way establishing a TMDL. CLW agreed to refrain from filing suit so long as NU conducted a TMDL rulemaking proceeding. NU subsequently commenced a rulemaking proceeding. NU adopted a TMDL in 2018 which consisted of solely a 120 mt annual maximum. In July of 2018 EPA rejected Nu's proposed TMDL, then adopted the Agency's own TMDL in May of 2019.The following January, nearly a year followings EPA's adoption of a TMDL, NU filed an action to seek judicial review of EPA's rejection of its proposed TMDL. In February 2020 CLW filed an action, challenging the adoption of a TMDL

which consisted of an annual loading limit to be phased in over a period of five years, while also challenging the WLA and LAs adopted in the adopted TMDL. Both actions were brought under the right to judicial review provision in APA § 702, claiming that the legal wrong the parties experienced was the Agency's action to adopt the TMDL. Further this court had jurisdiction to hear these issues under 28 U.S.C § 1331, wherein the legal matter in dispute is a civil action under the Constitution of the United States. On March 22nd, 2020 this Court granted motions which consolidated the actions of NU and CLW. On the first of July 2020 the EPA lodged the administrative record with the Court.

To meet the requirements of standing under Article III of the Constitution, CLW submitted affidavits establishing that its membership included individuals who reside near Lake Chesaplain and use the lake for recreational purposes including, swimming, boating and fishing claiming that the pollution of the Lake disrupts these acts of recreation. The Court was satisfied that these affidavits showed the elements of injury in fact, causation, and redressability were met and thus standing was appropriate for CLW and its members. *See Friends of the Earth Inc. v. Laidlaw Env't Servs. Inc.*, 528 U.S. 167 (2000).

This Court was satisfied with NU's standing to challenge EPA's rejection of NU's Lake Chesaplain's TMDL. EPA's action requires that NU implement state issued NPDES permits as well as affecting NU's eligibility for federal water quality planning funds under 33 U.S.C § 1288. Thus, legal consequences flow such that NU will be affected from the rejection and subsequent adoption of the EPAs own TMDL. Both parties submitted motions for summary judgements.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court was correct in holding that the challenges to the Lake Chesaplain TMDL are ripe for judicial review because the adoption of a TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or regulatory actions. The court was incorrect in finding for NU and vacating the definition of "total maximum daily load" in 40 C.F.R. § 130.2(i). The court, however, was correct in its determination that "daily" in "total daily maximum load" should be read in its plain meaning and finding that the EPA may not grant a five-year extension to NU for a deadline that has long-since passed, in favor of CLW. The court was incorrect in its decision for EPA, finding that the agency's decision to suggest nonpoint source BMPs as an offset to point source reductions is not arbitrary and capricious.

The adoption of a TMDL is an issue fit for judicial review because it is a final agency action, and final agency actions are fit for judicial review pursuant to APA §§ 551(4) and (13). *See also, Abbott Labs v. Gardner*, 387 U.S. 136, 139 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). The APA defines an "agency action" to "include the whole or a part of an agency rule, order, license, sanction, relief, or equivalent or denial thereof, or failure to act," and defines "rule" as an "agency statement of general or particular applicability and future effect designated to implement, interpret, or prescribe law or policy." APA §§ 551(4), (13). Here, EPA's rejection of Nu's proposed TMDL and adoption of its own TMDL falls squarely within the APA's definition of "rule" because a TMDL is an agency statement of "general or particular applicability" and further, create a future effect designated to implement CWA policies and is therefore, additionally, an agency action. Therefore, the district court was correct in holding that the challenges to Lake Chesaplain's TMDL are ripe for review.

EPA's decision to reject the NU TMDL due to its determination that the TMDL failed to include wasteload and load allocations was valid under the plain meaning of the CWA. The

statutory language of the CWA does not prohibit wasteload and load allocations in TMDLs. The CWA states that, "the Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following: total maximum daily load for pollutants in accordance with subsection (d) of this section." The Clean Water Act § 303(e)(3)(c), 33 U.S.C. 1313(e)(3)(C). Further, the statute continues in stating "[e]ach state shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." Clean Air Act § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). The statute lacks any further explanation as to what is to be considered in a TMDL. Therefore, the EPA was valid in its determination to reject NU's TMDL on the basis that it failed to include wasteload and load allocations.

The district court was correct in requiring that TMDLs be expressed in daily terms as opposed to annual terms and in disallowing the EPA's phased TMDL pursuant to the Clean Water Act's clear and unambiguous language regarding TMDL expressions. Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). EPA, in allowing for a phased TMDL expressed in annual terms, was arbitrary and capricious, for it was in explicit opposition to the language of the statute and EPA offered no basis for its decision to allow for a TMDL so contrary to the CWA's statutory language. Under *Chevron* analysis, in rebutting accusations of an arbitrary and capricious agency action, the agency must provide reasonable basis for its decisions, which EPA has failed to provide here.

The district court was also correct by determining that the EPA may not grant a five-year extension for achievement of water quality standards when the statutory deadline has long

passed. No efforts have been made to accomplish the proposed water quality status for the two years provided nor has NU or EPA provided any valid reasons as to why the deadline should be extended under the circumstances, as required. *State Water Control Board v. Train*, 424 F.Supp. 146 (E.D.Va.1976), aff'd, 559 F.2d 921 (4th Cir.1977); *Student Public Interest Research Group v. Fritzsche*, 579 F.Supp. 1528, 1536 (D.N.J.1984); *Nunam Kitlutsisti v. Arco Alaska*, Inc., 592 F.Supp. 832, 842–44 (D.Alaska 1984); *U.S. v. City of Hoboken*, 675 F.Supp. 189 (D.N.J.1987)

By lacking any reasonable assurances for nonpoint BMP credits, EPA's adoption of a less stringent phosphorus reduction in point sources is an arbitrary and capricious agency decision. Agency action is arbitrary and capricious if the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to consider relevant factors, *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto In. Co.*, 463 U.S. 29, 43 (1983), *Fox Television Stations v. FCC*, 280 F.3d 1027, 1050-51, 1052 (D.C. Cir. 2002); if it has reached a conclusion that is unsupported by substantial evidence, or runs counter to the record, *Assn. of Data Processing Service Orgs. v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Circ. 1984), MVMA, 463 U.S. at 43; or if it has failed to explain a connection between facts and its conclusions. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995). Here, the Clean Water Act, unequivocally states that EPA cannot approve a TMDL unless it is "established at a level necessary to implement the applicable water quality standards." The Clean Water Act § 303(d), 33 U.S.C. § 1313(d). Here, EPA provides no reasonable assurance that the BMPs will be implemented and therefore, has not established that the TMDL will reach the applicable water quality standards. Without reasonable assurance that the TMDL will be successful in its intended purpose, EPA has acted arbitrarily and capriciously and the Court should remand the district court's decision.

STANDARD OF REVIEW

On appeal from the dismissal of an APA claim, this Court reviews the Administrative Record *de novo* and applies the well-settled standards for judicial review of administrative action under the APA. *See City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). Section 706(2) of the APA provides that final agency action may be set aside only if "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under this provision of the APA is a 'narrow one.'" *Shalala*, 34 F.3d at 1167 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). "This 'arbitrary and capricious' standard of review is a highly deferential one which presumes the agency's action to be valid." *Costle*, 657 F.2d at 283 (citations omitted). In other words, the highly deferential APA standard of review "mandates judicial affirmance if a rational basis for the agency's decision is presented." *Id.*

Statutory Violations. "If a court, employing traditional tools of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, USA v. NRDC*, 467 U.S. 837, 843 n.9 (1984). "An agency is given no deference at all on the question whether a statute is ambiguous." *Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

If Congress has not expressed a clear intention on the question at hand, and if Congress has delegated interpretational authority to the agency, then the Court defers to an agency interpretation that is "reasonable." *See Chevron*, 467 U.S. at 845; *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See also Rettiq v Pension Benefit Guarnty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) (under *Chevron* Step two, "a reviewing court must determine both whether the

interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the agency considered the matter in a detailed and reasoned fashion.") (citation and internal quotations omitted).

Arbitrary and Capricious Action. Agency action will be held arbitrary and capricious if the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to consider relevant factors, *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto In. Co.*, 463 U.S. 29, 43 (1983), *Fox Television Stations v. FCC*, 280 F.3d 1027, 1050-51, 1052 (D.C. Cir. 2002); if it has reached a conclusion that is unsupported by substantial evidence, or runs counter to the record, *Assn. of Data Processing Service Orgs. V. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Circ. 1984), *MVMA*, 463 U.S. at 43; or if it has failed to explain a connection between facts and its conclusions. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995).

ARGUMENT

I. EPA'S ADOPTION OF ITS TMDL IS RIPE FOR REVIEW BECAUSE IT IS A FINAL AGENCY ACTION AND TO WITHOLD JUDICIAL REVIEW WOULD CAUSE HARDSHIP TO THE PARTIES

EPA argues that the mere adoption of a TMDL is not ripe for judicial review because it does not have any impact on the parties unless it is incorporated into specific permits or other regulatory actions. However, this is a misunderstanding of what the adoption of a TMDL implicates. The adoption of a TMDL is an issue fit for judicial review and to withhold judicial review would cause hardship to the parties. *Abbott Labs v. Gardner*, 387 U.S. 136, 153 (1967), abrogated by *Califano v. Sanders*, 430 U.S. 99 (1977).

As stated in Water Quality Planning Management, 50 Fed. Reg. 1774 (Jan. 11 1985), "[o]nce a TMDL has been completed, a wasteload allocation or load allocation (WLA/LA) for

that TMDL forms the basis for permit limitations for individual dischargers." The regulation that EPA adopted to address TMDLs explicitly states that a TMDL forms the basis for how permit limitations are to be doled out to polluters. Thus, the adoption of a TMDL by an agency is an action which constitutes a "final agency action" as defined under the APA.

A. EPA's TMDL to regulate Lake Chesaplain is a "final agency action" that is judicially reviewable under the APA, and thus is an issue ripe for review.

All 'final agency action[s]' are issues fit for judicial review. *Abbott Labs v. Gardner*, 387 U.S. 136, 139 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). The APA defines an "agency action" to "include the whole or a part of an agency rule, order, license, sanction, relief, or equivalent or denial thereof, or failure to act," it further defines a "rule" as "an agency statement of general or particular applicability and future effect designated to implement, interpret, or prescribe law or policy." APA §§ 551(4), (13). Here, EPA's rejection of NU's proposed TMDL and subsequent adoption of EPA's own TMDL falls squarely within the definition of "rule" because a TMDL is an agency statement of general or particular applicability and future effect designated to implement CWA policies and thus is an "agency action." Record at 10.

TMDLs specify the "maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). The NPDES permit system enforces TMDL limits, in part, on point source polluters and such permits "must be consistent with the terms of the TMDL." *Id*. Thus, the adoption of a TMDL is a rule of "general applicability" with the "effect" to "prescribe a law or policy" through the issuance of an NPDES permit. APA §551(4). Here, EPA adopted a TMDL to regulate the pollution entering Lake Chesaplain which it enforces, in part, by permitting point sources with NPDES permits; and therefore, is an agency action under the definition of the APA. Record at 10-11.

Under the *Bennett* analysis, an agency action is "final," first, if it is "a consummation of the agency's decision-making process," and second, if either "rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1810 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177-178, (1997)). An adopted TMDL satisfies *Bennett*'s first condition. It clearly "mark[s] the consummation" of EPA's decision-making on the question whether a particular water body can sustain a specified level of a pollutant in accordance with water quality standards. It is issued after extensive factfinding by EPA regarding the total pollution loading that is feasible when considering current and future pollution sources as well as natural background levels. *See Hawkes Co., Inc.*, 136 S.Ct. at 1810; *Accord Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) (holding that an "issuance of a compliance order also marks the 'consummation' of the Agency's decision-making process)[1]. Indeed, EPA itself describes adopted TMDLs as "final agency action" and may be set aside only if "arbitrary and capricious." *See Natural Resources Defense Council, Inc. v. Fox*, 30 F. Supp. 2d 369 (S.D. N.Y. 1998).

In *Bennett v. Spear*, the Supreme Court reasoned that the issuance of a "Biological Opinion" was the consummation of an agency's decision-making process because it was not merely tentative or interlocutory in nature. *Bennett v. Spear* 520, U.S. 154, 178 (1997). A Biological Opinion is a report that assesses whether a proposed Federal action is likely to jeopardize a listed species or results in the destruction of critical habitat. 50 C.F.R. § 402.02. Similarly, TMDLs are the result of an assessment that informs whether a proposed federal action,

[1] Since a point source must comply with the limits set by a TMDL by maintaining compliance with an NPDES permit, a TMDL therefore satisfies the first *Bennett* condition.

i.e., issuance of an NPDES permit, is likely to jeopardize or destroy critical habitat of a water body. 40 C.F.R. § 130.2(i). Both a TMDL and a Biological Opinion allow for the respective Agency to navigate the potential environmental affects to be considered for further Agency actions.

Further in *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers* "there is nothing "tentative" or "interlocutory" about the issuance of permits allowing any party who meets conditions to discharge fill and dredged material into navigable waters." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1279 (D.C. Cir. 2005). It can hardly be said that the TMDL which will inevitably decide if the slaughterhouse and the Chesaplain Mills sewage will be granted a NPDES permits merely tentative or interlocutory. Both plants are sitting on expired NPDES permits, although, at present, have been granted an extension to operate under their expired permits under 40 C.F.R. § 122.6. Regardless, the plants must inevitably comply with EPA's published TMDL under 5 U.S.C. § 558(c)(2) wherein they "demonstrate or achieve compliance with all lawful requirements" of the EPA's published TMDL. The EPA's published TMDL is the consummation of the agency's decision-making process directly affecting the future potential viability of two plants on Lake Chesaplain such that the actions taken by the agency dictate by what standard the polluters must abide by. Record at 10. "Legal consequences" will flow from the publishing the EPA's TMDL, if not the agency will not able to abide to the goals of the Clean Water Act. Therefore, the publishing of EPA's TMDL is neither "tentative" or "interlocutory" in nature. The definitive nature of an adopted TMDL also gives rise to "direct and appreciable legal consequences," thereby satisfying the second condition of *Bennett,* 520 U.S., at 178.

B. EPA's adoption of the TMDL is an issue fit for judicial consideration because its implementation will have a direct effect on the status of the lake.

EPA'S reliance on *City of Arcadia v. EPA* and *Bravos v. Green*is misguided. These cases merely contemplate TMDLs on a state-wide level—not on a particular waterbody, in contrast to the case at present. Here, there is a direct connection between the TMDL dictating if the slaughterhouse and sewage treatment plant are to be granted their NPDES permits, which runs contrary to both *City of Arcadia* and *Bravos. City of Arcadia v. U.S. Envtl. Prot. Agency*, 265 F. Supp. 2d 1142, 1149 (N.D. Cal. 2003); *see also*, *Bravos v. Green*, 306 F. Supp. 2d 48 (D.D.C. 2004).

In *Columbia Broadcasting System v. United States*, the court held reviewable a regulation of the FCC setting forth proscribed contractual arrangements. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563. In *Columbia*, no license had been issued or revoked, however, the court still held that "such regulations have the force of law before their sanctions are invoked as well as after." Likewise, in the case at bar, while no permits have been issued, denied, or revoked, the TMDL still has the "force of law," exemplified by the TMDL's authority to decide how much point sources may pollute. Further, in *United States v. Storer Broadcasting Co.* , the court held that a commission policy that would not issue a television license to an applicant already owning five licenses was a final agency action because the process of rulemaking was complete. *United States v. Storer Broadcasting Co.*, 351 U.S. 192Similarly, in the instant case, EPA's adopted TMDL will have a direct effect in determining how NPDES permits are to be issued. Ultimately, deciding if the slaughterhouse or the Chesaplain Mills sewage treatment plant would be issued a NPDES permit to continue to pollute Lake Chesaplain, a particular waterbody. Record at 10.

C. Withholding review will cause hardship to the City of Chesaplain Mills and the surrounding area who are obligated to implement the EPA's TMDL.

The second prong of *Abbott Labs* evaluation of ripeness is based on the hardship the parties would experience if court consideration was withheld. As stated in *American Farm Bureau Federation v. EPA*, when deciding if a case is ripe

> "[a]lthough the TMDL has yet to be incorporated into a state's continuing planning process and enforced against any individual plaintiff, members of the trade associations will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation. And it would impose hardship on the EPA and the states not to hear this dispute now because they are poised to spend more time, energy, and money in developing an implementation plan."

Am. Farm Bureau Fed'n v. U.S. E.P.A., 792 F.3d 281 (3d Cir. 2015). In the instant case the TMDL adopted by EPA proposed a phased phosphorus reduction. This approach will inevitably cause local businesses to curb their use prior to any enforcement action occurring. The businesses will also be required to think ahead five years to comply with the EPA's TMDL which will in turn affect how they conduct business in the long term.

Further, as stated in *City of Arcadia v. U.S. Environmental Protection Agency*, a "TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies". Reiterated differently in *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D.Wash.1996) the court stated that a "TMDL informs the design and implementation of pollution control measures." Thus, to withhold review of the EPA's TMDL would cause a cascade event wherein the TMDL will inevitably inform the design of further administrative actions without ever assessing if the initial TMDL is adequate to address the pollution entering Lake Chesaplain. It could be all for naught.

II. EPA'S REJECTION OF THE NU TMDL ON THE GROUNDS THAT IT FAILED TO INCLUDE WASTELOAD AND LOAD ALLOCATIONS IS A VALID INTERPRETATION OF TMDL

NU erroneously argues that EPA's interpretation of the statutory phrase "total maximum daily load" to include specific allocations to individual point sources and nonpoint sources is

contrary to the plain meaning of the term "total" and runs contrary to the structure of the CWA with its principles of comity and federalism.

It is well established deference given to agency's interpretation of a statute it is empowered to implement. When deciding to set aside an agency's interpretation of a statue, this court must defer to the *Chevron* doctrine. *Chevron, USA v. NRDC,* 467 U.S. 837, 843 (1984).

A. The statutory language does not prohibit Wasteload (WLA) or Load allocations (LA) to be included in a TMDL.

The *Chevron* doctrine asks two questions, the first being "whether congress has directly spoken to the precise question at issue." *Chevron, USA v. NRDC,* 467 U.S. 837, 843 (1984). If Congress has spoken directly to the issue, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. However, if Congress has not spoken to the precise question at issue, then the second question is "whether the agency's answer is based on a permissible construction of the statute." *Id.* Agency's regulation are controlling unless they can be proven to be "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844.

Here, Congress has directly addressed the issue NU raises. The Clean Water Act does not explicitly define "total maximum daily load," nor does it define the term "total." Looking to the language of the statute in question, the Clean Water Act § 303(e)(3)(c), 33 U.S.C. 1313(e)(3)(C) states that, "the Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following: total maximum daily load for pollutants in accordance with subsection (d) of this section." Further, the statute continues in stating that "[e]ach state shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." Clean Air Act §

303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). States are also charged with establishing "the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). The statute lacks any further explanation, only offering concessions to the agency to decide what are the necessary load levels which would implement the applicable water quality standards.

In the instant case, Lake Chesaplain was designated as a Class AA, the classification reserved for highest quality of waters. Record at 8. EPA's interpretation of "total maximum daily load" is embodied in its Water Quality Planning Management, 50 Fed. Reg. 1774 (Jan. 11 1985), in which it states, "TMDLs are important elements of WQM plans. Section 303(d) of the CWA requires each State to develop TMDLs for each water body that cannot meet water quality standards after point sources are controlled to prescribed technology-based levels. The process of approval for a TMDL process is detailed in Water Quality Planning and Management 50 FR 1774, which states, "[a]lthough section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, 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. Thus, it is necessary for EPA to review and approve or disapprove a TMDL in conjunction with component WLAs and LAs." Water Quality Planning and Management, 50 FR 1774-01. This guidance clearly requires that Wasteload and Load Allocations be included in TMDLs. LA's are defined as, "[t]he portion of a receiving water's

loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution…"*Id*. The EPA is only delegated authority to regulate point sources via the NPDES program, however when drafting a TMDL the CWA requires the author to take into account nonpoint sources. If the goal is to attain the water quality standards of "Class AA" such that the "load shall be established at a level necessary to implement the applicable water quality standards imposed" on to Lake Chesaplain, a TMDL with allocations for Load and Wasteload is essential. Clean Water Act 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). This is especially relevant in the case at bar, wherein nonpoint sources, such as the hog CAFOs, predominantly contribute to the phosphorus pollution. Record at 9.

Taking NU's position in simply adopting the "plain meaning" of the word "total" may be tempting. However, this hamstrings the ability of the agency and the state to properly address the issues that are plaguing Lake Chesaplain.

B. Congress's mootness on what is to be included in a TMDL does not mean that WLA and LA are not to be included.

NU argues that Congress's intention to be moot about by what manner states are to implement TMDLs lends credence that WLA and LAs are to not be included. Citing to how Congress adopted the Clean Water Act versus the Clean Air Act, where in the former Congress deliberately declined to include EPA supervised state implementation requirements for water quality standards. To contrast when the Clean Water Act was passed Congress incorporated a framework for implementation of air quality standards. *See* Clean Air Act § 110(a), 42 U.S.C. § 7410(a). Congress also delegated authority to EPA to impose a federal implementation plan on states that fail to submit a satisfactory plan. *See* Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1). Under *Chevron*, "there is an express delegation of authority to the agency to elucidate a specific provision of the statue by regulation.". *Chevron* at 844.

Ultimately, the Supreme Court has held that *Chevron* deference is appropriate when an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication. *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002). There is little doubt that CWA is a "broad, technical, complex and dynamic [system]" attempting to maintain and restore the integrity of the Nation's water quality. *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 296 (3d Cir. 2015). Thus, the statute is ambiguous by the manner in which the State or Agency is required to implement TDMLs such that it does not directly reference WLA, or LA being prohibited from being included in EPA's TMDL.

C. EPA's requirement to include WLA and LA to a TMDL is a permissible construction of the statute and is not arbitrary and capricious.

The second prong of the *Chevron* Doctrine asks, "whether the agency's answer is based on a permissible construction of the statute." *Chevron* 467 U.S. at 843. NU argues that EPA's interpretation of the term "total" in "total maximum daily load" is invalid. Record at 12. NU contends that EPA's interpretation runs counter to the incorporation of principles of comity and federalism. *Id*. However, courts have repeatedly held that when the meaning of an agency's regulation is in doubt, the agency's interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent. *Auer v. Robbins,* 519 U.S. 452 (1997); *see also*, *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945) NU's argument is invalid and the contention that EPA's interpretation is "plainly erroneous" is contrary to the meaning of the Clean Water Act's statutory language.. 40 C.F.R. § 130.2(h). The EPA, in requiring WLA and LAs is attempting to merely identify and address the multiple sources of solution in order to create an effective TMDL. As stated in *Am. Farm Bureau Fed'n v. E.P.A.* "the TMDL does not prescribe any particular *means* of pollution reduction to any individual point or nonpoint source. *Am. Farm*

Bureau Fed'n v. U.S. E.P.A., 792 F.3d 281, 303 (3d Cir. 2015) Instead, it contains pollution limits and allocations to be used as an informational tool used in connection with a state's efforts to regulate water pollution." *Id*. It is ultimately the state's decision as to how to regulate pollutants. TMDLs give state that flexibility in achieving the limits the EPA set and thus preserving state autonomy, quelling the concerns of federalism NU highlights. Record at 12.

In *Kisor v. Wilkie*, the court gives further deference to this construction of the statute in stating that "the regulatory interpretation must be the agency's authoritative or official position, rather than any more ad hoc statement not reflecting the agency's views." *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) The Water Quality Planning Management, 50 Fed. Reg. 1774, states explicitly that "[o]nce a TMDL has been completed, a wasteload allocation or load allocation (WLA/LA) for that TMDL forms the basis for permit limitations for individual dischargers." Water Quality Planning Management, 50 Fed. Reg. 1774 (Jan. 11 1985). The inclusion of WLA and LA to a TMDL is not an ad hoc statement by the Agency, in fact is the basis for the permit limitations to be lessened.

EPA's determination of rejecting NU's TMDL because it failed to include WLA and LAs is valid because, the lack of a clear definition of what is to be considered in a "total maximum daily load" nor a clear definition of what is "total" within the statute thus giving the agency discretion to interpret those terms. The agency's interpretation to include WLA and LAs is a permissible construction of the statute. Therefore, this Court should reverse the district court's holding.

III. COURT SHOULD AFFIRM LOWER COURT'S DECISION IN FAVOR OF CLW REQUIRING THAT TMDLS BE EXPRESSED IN DAILY TERMS RATHER THAN ANNUAL AND DISALLOWING A PHASED TMDL

A. EPA Arbitrarily and Capriciously Approved and Established Annual and Seasonal Loads.

By establishing an annual and seasonal TMDL, EPA violated the Clean Water Act and EPA's own regulations.

(1) Annual and Seasonal Loads Are Invalid Under the CWA which requires "Total Maximum Daily Loads.

Under *Chevron*, the EPA acted unlawfully in establishing an annual and seasonal loads. The Act expressly requires "total maximum daily loads." Clean Water Act § 303(d)(1)(C), 33 U.S.C. §1313(d)(1)(C). *See also* A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legis. Hist."), at 306, 308, 793. § 303(d) illustrates Congress's intention to impose a "daily" standard and not an annual one; more specifically § 303(d)(1)(C) provides for a "daily" load, set at a level necessary to implement applicable water quality standards "with seasonal variations." § 303(d)(1)(C).

In short, under *Chevron*, EPA acted unlawfully in approving and establishing annual and season TMDLs. *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.") *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871 (N.D. Ga. 1996)(certain Georgia TMDLs "clearly do not satisfy the requirements of § 303(d) because they do not provide daily limits for priority pollutants.") In *Friends of the Earth, Inc. v. EPA*, the court held that the CWA unambiguously required the establishment of daily loads for waterbodies failing to meet water qualities standards and that therefore the EPA could not approve seasonal or annual loads regardless of the EPA's argument that some pollutants were poorly suited for daily load regulation. *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 6 (D.C. Cir. 2006). *Lewish v. Grinker*, 965 F.2d 1206, 1221 (2d Cir. 1992) (quoting Ardestani v. INS, 502 U.S. 129, 135-36 (1991).

Additionally, the EPA did not offer any statutory analysis for its decision to approve and establish annual and seasonal loads in violation of the terms of the Clean Water Act. However, the EPA has previously attempted to argue that the statute allows for loads expressed in annual and seasonal terms, however, EPA has been unsuccessful in such attempts. In fact, as the Second Circuit has noted, "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances' where contrary legislative intent is clearly expressed."

(2) Annual and Season Loads Unlawfully and Arbitrarily Violate the Clean Water Act.

Assuming arguendo that the statutory term "daily" does not independently resolve the issue, the application of annual and seasonal loads violates the Clean Water Act and EPA's own regulations. Section 303(d)(1)(C) plainly states that loads "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (Emphasis added.) §303(d)(1)(C). EPA regulations state that TMDLs are to be established at levels necessary to "attain and maintain the applicable narrative and numerical WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 40 C.F.R. § 130.7(c)(1)

The EPA asserts that the statutory term "daily" is not controlling, it has previously conceded that a longer-than-daily averaging period can be used if "compliance with applicable WQS is assured." 50 Fed. Reg. 1776 (Jan. 11, 1985)[JA16]. Furthermore, in the EPA's updated 2000 TMDL regulation it indicates that it would retain language from the 1985 rule on the appropriate time frame for a TMDL, which as previously stated, the EPA has interpreted that

language "to permit TMDLs to be expressed in terms other than daily loads as long as compliance with [WQS] is assured." 65 Fed. Reg. 43629/2-3[JA82].

The EPA, in allowing for "longer-than-daily" averaging periods in exceptional circumstances plainly indicates that the EPA recognizes "daily" loads to be the governing principle. The EPA further acknowledged that "the concern that use of other than daily loads could allow for excessive loadings over short time periods, that when averaged with periods of no loading, might satisfy the wasteload and load allocation, but would cause the water quality standard to be exceeded." Id. 43629/3. Therefore, the EPA requires that any TMDL with longer-than-daily period must be accompanied by an "explanation . . . as to the reasons why it is appropriate to express the TMDL in terms other than a daily load." Id. 43629-30[JA82]. Further, "If a TMDL for a particular pollutant contained an expression other than a daily load, and the situation indicated that expressing the TMDL as a daily load is a necessity to attain and maintain water quality standards, EPA would disapprove the TMDL as insufficient to maintain water quality standards." Id. 43630/1[JA83].

Here, the TMDL is expressed in seasonal and annual terms without the required explanation as to the "reasons it is appropriate to express the TMDL in terms other than a daily load," moreover, even if it had, the EPA has previously stated that "If a TMDL for a particular pollutant contained an expression other than a daily load, and the situation indicated that expressing the TMDL as a daily load is a necessity to attain and maintain water quality standards, EPA would disapprove the TMDL as insufficient." Id. 43630/1[JA83]. Therefore, the EPA should have disapproved of the CWIP TMDL which lacks the required explanation for a longer-than-daily term. Further the EPA should have disapproved of the CWIP TMDL because the particular pollutant, phosphorous, is more appropriately expressed in a daily load to attain

and maintain the proposed water quality standards. The EPA has, in fact, previously approved a phosphorus TMDL expressed in daily limits for Lake Chelan in Washington State.1 This discrepancy calls into question the EPA's basis for arguing against daily limits in this case. Furthermore, when agency action is inconsistent, the agency is entitled to less deference. *INS V. Cardoza-Fonesca*, 480 U.S. 421, 448 n.30 (1987).

If the EPA seeks to permit the expression of TMDLs for phosphorus in waterbodies, the EPA is required to explain how the annual period of measurement for phosphorus used in the state's TMDL took seasonal variations into account. APA, U.S.C. § 706. EPA has failed to offer any such explanation and thus violates the Code.

Here, TMDLs expressed as annual and seasonal loads allows for continued violation of water quality standards and thus violates CWA § 303(d) and 33 C.F.R. § 130.7(c)(1) specifically based on the nature of the water quality standards at issue and the nature of the pollutant. For all of these reasons, the court should affirm the lower court's decision for CLW.

B. EPA Has Not Adopted a TMDL at the Level Necessary to Assure Achieve of Water Quality Standards Within Five-Year Phased Plan.

The July 1, 1977 deadline prescribed by the Clean Air Act § 301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C) is a hard deadline that may not be extended by administrative action.

(1) The EPA May Not Grant a Five-Year Extension for Achievement of Water Quality Standards When the Statutory Deadline Has Long Since Passed.

A "total maximum daily load" does not mean a percentage reduction in loadings. *NRDC v. EPA*, 301 F. Supp. 3d 133 (D.D.C. 2018). Further, the clear intent of section 303(d)'s direction to calculate a "total maximum daily load . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety," does not indicate a loading standard that will not achieve the proposed water quality standard five years into the

future. This is reinforced by § 301(b)(1)(C) of the Clean Water Act which states, "there shall be achieved . . . no later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations." Clean Air Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). The TMDL calculation is designed to form the basis of section 301(b)(1)(C) effluent limitations on point sources. In fact, the section 303(e) planning process for state implementation of TMDLs specifically references section 301(b). CWA § 303(e)(3)(A), 33 U.S.C. § 1313(e)(3)(A).

The July 1, 1977, deadline for achievement of effluent limitations is a hard deadline and it may not be extended by administrative action, as the EPA seeks to do here. *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976). The Third Circuit described the compliance deadline as "a rigid guidepost" to which the EPA must adhere. *Id*. The EPA may not grant a five-year extension for achievement of water quality standards when the statutory deadline has long since passed.

Before the July 1, 1977 deadline, the EPA provided an avenue for relief for certain industrial dischargers who, for reasons outside of their control, could not meet the imposed deadline, in the form of issuance of Enforcement Compliance Schedule Letters (ECSL). MONONGAHELA POWER COMPANY, Petitioner, v. THE ENVIRONMENTAL PROTECTION AGENCY, Respondent., 1977 WL 203064 The ECSL contained a commitment, for those who qualified, that the EPA would not seek enforcement action before the set date in the ECSL. Id. To qualify, dischargers were required to provide: (1) documented evidence that, despite all reasonable good faith efforts, it could not achieve the BPT by July 1, 1977; and (2) a critical path or other construction management analysis of the shortest reasonable schedule by

which it can achieve BPT. *Id*. Additionally, the ECSLs were only meant to be issued in the event that NPDES permits were not issued in a time manner, where delays occurred in the resolution of adjudicatory proceedings, or where thermal discharge changes under § 316(a) of the FWCPA, 33 U.S.C. § 1326(a), had resulted in a delay. Id. If a dischargers failure to achieve the BPT was a result of a lack of good faith, the ECSL was not to be issued. Id.

The court in *Save Our Bars and Beaches v. City and County of Honolulu*, stated "It appears that all courts which have considered the flexibility of this rule have concluded that administrative agencies have no power to extend the deadline." *Save Our Bays and Beaches v. City and County of Honolulu,* 904 F.Supp. 1098, 19 (1994). Later courts faced with similar cases have also held that the EPA is without authority to grant an extension of the July 1, 1977 date. *State Water Control Board v. Train*, 424 F.Supp. 146 (E.D.Va.1976), aff'd, 559 F.2d 921 (4th Cir.1977); *Student Public Interest Research Group v. Fritzsche,* 579 F.Supp. 1528, 1536 (D.N.J.1984); *Nunam Kitlutsisti v. Arco Alaska, Inc.*, 592 F.Supp. 832, 842–44 (D.Alaska 1984); *U.S. v. City of Hoboken,* 675 F.Supp. 189 (D.N.J.1987). In fact, in *City of Hoboken*, the defendant received consent to extend beyond the statutory deadline and the District Court disagreed and reaffirmed that the "EPA had no authority to extend the secondary-treatment standard deadlines" and emphasized that "this statutory limit on extensions is wholly unambiguous." *Id*.: see also *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978), cert. denied, 440 U.S. 909, 99 S.Ct 1219, 59 L.ED.2d 457 (1979)(holding that the July 1, 1977 compliance deadline is unconditional).

Here, no such qualifications are shown to be present. Furthermore, no efforts have yet been made to accomplish the proposed WQS. Rather, NU took no action for the two years following development of the TMDL and now seeks for extension of a long overdue deadline.

Record at 10. Nor has the EPA or NU proposed an alternate course of action per prong two of the ECSL guidance.

Therefore, the court should affirm the lower court's decision for CLW.

IV. BY LACKING ANY REASONABLE ASSURANCES FOR NONPOINT BMP CREDITS, EPA'S ADOPTION OF A LESSER STRINGENT PHOSPHORUS REDUCTION IN POINT SOURCES AMOUNTS TO ARBITRARY AND CAPRICIOUS DECISIONMAKING

Agency action will be held arbitrary and capricious if the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to consider relevant factors, *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto In. Co.*, 463 U.S. 29, 43 (1983), *Fox Television Stations v. FCC*, 280 F.3d 1027, 1050-51, 1052 (D.C. Cir. 2002); if it has reached a conclusion that is unsupported by substantial evidence, or runs counter to the record, *Assn. of Data Processing Service Orgs. V. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Circ. 1984), *MVMA*, 463 U.S. at 43; or if it has failed to explain a connection between facts and its conclusions. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995).

The Clean Water Act § 303(d) unequivocally states that EPA cannot approve a TMDL unless it is "established at a level necessary to implement the applicable water quality standards." The Clean Water Act § 303(d), 33 U.S.C. § 1313(d). EPA's adopted TMDL (CWIP) intends to achieve Class AA water quality standards by relying on a 35% phosphorous reduction among point sources and a 35% reduction among nonpoint sources. Yet EPA arbitrarily chose these percentages. The point source reduction is calculated based on anticipated credits generated from nonpoint BMPs. Without a reasonable assurance that the BMPs will be implemented, EPA fails to give a reasoned basis that water quality standards will be met by the point sources' 35% reduction. Contrary to the statutory mandate, EPA's CWIP will *never* achieve water quality

standards due to this cascading failure. Indeed, in the two years since CWIP's adoption, there has been no showing that NU required nonpoint sources to implement the BMPs. In fact, major political animus existed against the BMPs which had resulted in DOFEC's TMDL that abandoned all efforts at allocating reductions among nonpoint sources and which EPA ultimately rejected.

Therefore, EPA's failure to identify and explain a reasoned basis for its adoption of CWIP, further compounded by its failure to consider relevant contextual factors and their relationship with EPA's conclusion, amounts to arbitrary and capricious decisionmaking when it accepted BMP credits without any reasonable assurance.

A. EPA establishing a TMDL and constituent BMPs is promulgated through notice-and-comment rulemaking.

The District Court's determination that a reasonable assurance standard receives no deference because EPA has not adopted it by a notice-and-comment rulemaking is erroneous. EPA's only method of promulgating TMDLs has been through notice-and-comment rulemaking. *American Farm Bureau Federation v. U.S. E.P.A.*, 792 F.3d 281, 298 (2015). *Accord American Farm Bureau Federation v. U.S. E.P.A.*, 984 F.Supp.2d 289 (2013); *Fairfield City Board of Commissioners v. Nally*, 34 NE.3d 873 (S. Ct. OH 2015). Accordingly, under the APA, EPA must provide adequate supporting information to allow the public to comment on a TMDL. *See Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007)[2]. Crucially, EPA

[2] "A notice of proposed rulemaking must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

"would fall afoul of this requirement if it published only a number with no supporting information." *Am. Farm. Bureau,* 792 F.3d at 298.

This is precisely what EPA has done. EPA's CWIP arbitrarily concludes an equal 35% phosphorous reduction among point and nonpoint sources will achieve Class AA water quality standards. However, the APA requires EPA to provide information about how it arrived at its conclusion. *Id*. Therefore, EPA failed to meet the APA information requirement by incorporating a BMP credit without providing a reasonable assurance standard or explanation and acted arbitrarily and capriciously.

B. EPA is authorized and compelled to utilize a reasonable assurance standard by statute when establishing a TMDL.

Without mentioning the term "reasonable assurance," EPA's TMDL regulations clearly evince this concept: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i) (emphasis added).

Section 301(b)(C) of the Clean Water Act and EPA's permitting regulations provide additional support for evaluating "reasonable assurance" in a TMDL. The Clean Water Act § 301(b)(1)(C), 33 U.S.C.§1311(b)(1)(C). Section 301(b)(C) of the Clean Water Act requires that point source permits contain effluent limits as stringent as necessary to meet applicable water quality standards. EPA's permitting regulations echo that requirement and, in addition, require that permits include effluent limits "consistent with the assumptions and requirements of any available [WLA] for the discharge" approved by EPA pursuant to 40 C.F.R. § 130.7. 40 C.F.R. § 122.44(d)(1)(vii)(A) & (B). For WLAs to serve as a basis for water quality-based effluent

limits, they must be stringent enough so that (in conjunction with the waterbody's other loadings) they meet applicable water quality standards.

In the absence of reasonable assurance that a TMDL's LAs will in fact be met, the TMDL's WLAs cannot serve as an effective permitting guide. Such a demonstration ensures that an effluent limitation that is "consistent" with a TMDL's WLAs pursuant to § 122.44 (d)(1)(vii)(B) will also meet applicable water quality standards as required by section 1311(b)(1)(C) and § 122.44 (d)(1)(vii)(A). *See also* The Clean Water Act § 303(d)(4)(A), 33 U.S.C. § 1313(d)(4)(A) (permit limits in impaired waters may only be revised to be less stringent if the cumulative effect of all revised limits based on the TMDL "will assure" attainment of water quality standards).

The need for reasonable assurance is not a new concept. EPA's very first TMDL guidance in 1991 spoke to the need for "reasonable assurance." EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991) ("there must be reasonable assurances that nonpoint source reduction will in fact be achieved"). It remains EPA's position to this day. EPA statutory guidance is entitled to deference under *Skidmore v. Swift & Co*. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

CONCLUSION

Upon the foregoing, Appellant CLW respectfully requests that this Court affirm the district court's partial grant of summary judgment for CLW, reverse the district court's partial grant of summary judgment for NU and EPA, and remand for further proceedings consistent with that decision.