IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 20-000123
CONSOLIDATED WITH
C.A. No. 21-000124

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross-Appellee,

-and-

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.
Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

NO. 66-CV-2019 and 73-CV-2020

HONORABLE JUDGE ROMULUS N. REMUS

Brief for CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross-Appellee.

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JURISDICTIONAL STATEMENT

Chesaplain Lake Watch ("Chesaplain") and the State of New Union (together "Appellants"), appeal an Opinion and Order which granted partial summary judgment against Appellants and for the Environmental Protection Agency ("EPA"), entered August 15, 2021, by the Honorable Judge Remus in the United States District Court for the District of New Union. The District Court exercised federal question jurisdiction pursuant to 28 U.S.C. §1331 (2012) and jurisdiction for the Administrative Procedure Act under APA §702. Appellants filed a timely Notice of Appeal, and the U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal pursuant to 28 U.S.C § 1291 (2019).

STATEMENT OF THE ISSUES

I. Is EPA's determination to use its authority under the Clean Water Act to supplant the New Union Chesaplain Watershed TMDL with its own TMDL ripe for review?

II. Is EPA's determination to reject the CWIP on the grounds that the TMDL failed to include wasteload allocations and load allocations contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d)?

III. Does an annual pollution loading reduction phased over five years violate the Clean Water Act's "Total Maximum Daily Load" requirements?

IV. Is a BMP pollution reductions credit arbitrary and capricious and an abuse of discretion, due to the lack of assurance of BMP implementation?

STATEMENT OF THE FACTS

I. The Clean Water Act

Congress passed the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As part

of its comprehensive framework for water quality regulation, Congress requires the States to adopt water quality standards ("WQS") that limit effluent discharge into its navigable waters. 33 U.S.C. § 1313(a)(3)(A). Such standards must set out the designated uses ("DUs") of the waters involved and be sufficiently stringent in limiting effluent discharge to maintain the quality required for those uses, and to "protect the public health or welfare . . . ." 33 U.S.C. § 1313(c)(2)(A). The EPA Administrator will promulgate standards to replace State WQS the Administrator finds to be deficient. 33 U.S.C. § 1313(c)(3).

As part of its ongoing requirements, each State must identify waters for which the set effluent limitations lack the stringency required to implement the applicable WQS and make those waters a regulatory priority. 33 U.S.C. § 1313(d)(1)(A). The State must then set total maximum daily loads ("TMDLs") for those waters, limiting the amount of pollutants which the EPA has found suitable for regulation that may be discharged into those waters. 33 U.S.C. § 1313(d)(1)(C). If a State fails to adopt WQS or TMDLs in accordance with the requirements, the Administrator will establish loads that meet the requirements of the CWA. 33 U.S.C. § 1313(d)(2).

EPA has the authority and responsibility to directly regulate point sources as defined by 33 U.S.C. § 1362(14), to which the WQS and TMDL permitting scheme apply. EPA is also entitled to submissions from the Governor of each State delineating the management strategies for nonpoint sources as necessary to meet WQS. 33 U.S.C. § 1329(a)(1). These State management programs must include "an identification of the best management practices and measures which will be undertaken to reduce pollutant loadings" as required by the WQS. 33 U.S.C. § 1329(b)(2)(A).

II. Deterioration of the Chesaplain Watershed

Lake Chesaplain once "enjoyed excellent water quality" and was considered among "the highest water qualities of the state." Record at 7-8. Under the New Union WQS, Lake Chesaplain had designated uses ranging from drinking water, swimming, and fish propagation. *Id.* at 8. A robust ecosystem lent itself to recreational activities like fishing and hiking; industries such as tourism, lumber, and agriculture; and augmented property values. *Id.* at 7. The idyllic lake saw a rapid expansion of polluting influences in the 1990s, causing a visible decline in the water quality. *Id.* Specifically, ten concentrated animal feeding operations (CAFOs) and a large-scale slaughterhouse began operating while home construction in the area skyrocketed. *Id.* A 2012 study by the Lake Chesaplain Study Commission (the Chesaplain Commission) revealed that increased pollution led to the phosphorous levels rising to 0.034 mg/l at times—more than double the maximum healthy amount. *Id.* at 8. Algae mats bloomed in response, making the waters of Lake Chesaplain murky and odorous. *Id.* at 7-8. Eventually, the algae caused the dissolved oxygen (DO) in Lake Chesaplain to plummet to 3 mg/l, well below the 5 mg/l standard and the levels required to support the designated use of fishing. *Id.* at 8. By 2010, Lake Chesaplain had become unsuitable for swimming or fishing, while property values and tourism sank. *Id.* at 7-8.

In the 2014 triennial WQS review, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted the 0.014 mg/l phosphorus recommendation of the 2012 Chesaplain Report. *Id.* at 8. DOFEC subsequently included Lake Chesaplain in its submission of impaired waters to EPA. *Id.* DOFEC failed to include a TMDL for Lake Chesaplain in its submission, to which the EPA did not object. *Id.* After Chesaplain Lake Watch (CLW) threatened suit if the organizations did not conduct TMDL rulemaking, DOFEC began a state notice-and-comment period to establish a TMDL for Lake Chesaplain. *Id.*

In July 2016, the Chesaplain Commission released a supplemental report quantifying the amount of annual phosphorus attributable to each source around Lake Chesaplain. *Id.* at 8-9. Of the 180 megatons (mt) of phosphorus dumped into Lake Chesaplain in 2015, 61.9 mt—approximately one-third—came from two point sources: the Chesaplain Mills STP and the Chesaplain Slaughterhouse. *Id.* at 8. Nonpoint sources totaled 85.8 mt of phosphorous loading—approximately one-half of the 180 mt total. *Id.* at 9. Of the nonpoint sources, the CAFOs alone loaded nearly one-third of the 180 mt total. *Id.* Finally, roughly one-sixth of the loading came from natural sources. *Id.* Altogether, the Chesplain Commission found that the annual maximum loading needed to be cut down to 120 mt in order to restore Lake Chesaplain's WQS compliance. *Id.* at 8-9. These scientific conclusions went substantively unchallenged. *Id.* at 9.

In October 2017, DOFEC proposed a loading reduction for both the point sources and nonpoint sources, to be phased in by one-fifth of the required amount each year over five years. *Id.* Under this implementation plan, point sources would have their effluent loading limited via permitting, while nonpoint sources would be incentivized through Best Management Practice credits (BMPs). *Id.* The CAFOs and lakefront homeowners—together making up over one-third of the 180 mt total loading in 2015—protested the proposed BMPs. CLW also objected to the BMPs as unenforceable, instead supporting an implementation plan that achieved the 120 mt goal by eliminating discharge from both point sources. *Id.* DOFEC responded in July 2018 by promulgating a TMDL that consisted solely of a 120 mt annual maximum. *Id.* EPA supplanted that plan with the original five-year phased design, now called the Chesaplain Watershed Implementation Plan (CWIP). *Id.* The CWIP functions via permit controls on only the point sources, merely contemplating BMPs for nonpoint sources at the discretion of the State. *Id.* at 10. In undisputed fact, New Union had abandoned plans for BMPs due to political opposition and has

taken no action at any point to implement them. *Id.* at 16. The CWIP also includes load allocations ("LAs") and wasteload allocations ("WLAs") for each source of pollution, to which New Union objected. *Id.* at 10, 12.

III. Procedural History

Appellants filed separate actions against EPA in New Union District Court, pursuant to the judicial review provisions of the Administrative Procedure Act ("APA"). Record at 10. On January 14, 2020, Chesaplain challenged specific aspects of EPA's plan as contrary to law under the CWA. *Id.* at 4. On February 15, 2020, New Union sought to invalidate EPA's rejection of its TMDLs and the regulations on which EPA based its authority to do so. *Id.* at 5. The District Court granted unopposed motions to consolidate the two actions. *Id.* at 10. All three parties filed cross-motions for summary judgment. *Id.* at 5.

The District Court first denied in part EPA's motion for summary judgment, finding the issues presented were ripe for judicial review. *Id.* at 5, 12. The District Court then granted in part and denied in part summary judgment to Chesaplain, agreeing that the phased TMDL was contrary to law but holding that EPA may accept the hypothetical BMP credits. *Id.* at 15-16. Finally, the District Court granted New Union's motion to invalidate EPA's replacement of the state implementation plan with its own, holding the inclusion of WLAs and LAs was invalid because the word "total" in the phrase "total maximum daily load" was not ambiguous. *Id.* at 5, 14. This appeal followed. *Id.* at 2.

SUMMARY OF THE ARGUMENT

The district court correctly held that the merits of this action are ripe for review, and that EPA's understanding of the word "daily" in the phrase "total maximum daily load" was impermissibly broad. The court incorrectly found EPA's inclusion of load allocations in the CWIP contrary to law. The court also erred in permitting the EPA to accept purely theoretical BMPs in

the absence of assurance of BMP implementation. Broadly, The CWA should be interpreted to provide the highest possible protection for the navigable waters of the United States because Congress established it with high goals and tight deadlines.

This case is ripe for review because the facts of the record have fully developed as they pertain to the legal issues involved. Lake Chesaplain has violated its statutory water quality standards for at least two decades, to economic and environmental detriment. EPA's use of regulatory authority creates legal obligations enforceable through the provisions of the CWA. Judicial review of these issues is appropriate.

EPA may include LAs and WLAs in its implementation plan under the *Chevron* deference test. The word "total" is ambiguous in its plain meaning and the context of the CWA, EPA's inclusive reading of the term is permissible, and EPA has interpreted "total" as it does here for many years with numerous courts affirmatively citing EPA's own definition.

An annual TMDL phased in over five years violates the requirements of the CWA because the word "daily" has a plain meaning that settles the matter under *Chevron*. Even if the term is found to be ambiguous, EPA's interpretation of the term is permissible. The single Circuit Court of Appeal that found to the contrary misunderstood the structure of the CWA's regulation.

EPA acted arbitrarily and capriciously by accepting purely theoretical BMP credits which the State of New Union demonstrably has no intention to implement. The only enforceable provisions of the CWIP—indeed, the only provisions that were ever likely to be enforced—fail to bring Lake Chesaplain into attainment of the unchallenged water quality standards.

STANDARD OF REVIEW

The U.S. District Court for the District of New Union erred as a matter of law when it granted partial summary judgment against Appellants. Thus, this court should review the decision

de novo. *See Pavoni v. Chrysler Grp., LLC*, 789 F.3d 1095, 1098 (9th Cir. 2015) ("[T]he district court incorrectly applied the relevant substantive law."). Under the de novo standard, the evidence is viewed as a whole and "in the light most favorable to the party opposing the motion." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The district court's legal determinations are entitled to little or no deference. *Pavoni*, 789 F.2d at 1098.

ARGUMENT

I. EPA ADOPTION OF THE CWIP SATISFIES THE RIPENESS DOCTRINE AND IS AVAILABLE FOR JUDICIAL REVIEW.

The Supreme Court has established that a determination of ripeness requires the reviewing court to evaluate two factors: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). This Court should uphold the New Union District Court's denial of summary judgment to EPA on the issue of ripeness because the issues in this case are fit for review and will cause hardship to the parties involved. Cases regarding statutory interpretation, sporting facts sufficiently developed to decide the issues, are fit for judicial review.

a. The present case is ripe for judicial review, given the fitness of the issues and the risk of genuine hardship to the parties.

In considering fitness, the Supreme Court asks whether the issue is purely legal, constitutes final agency action, and does not significantly require further factual development. *Nat'l Park Hosp. Ass'n v. Dep't of Interior,* 538 U.S. 803, 812 (2003). *See also Iowa League of Cities v. EPA,* 711 F.3d 844, 867 (8th Cir. 2013) ("Fitness rests primarily on whether a case would benefit from further factual development, and therefore cases presenting purely legal questions are more likely to be fit for judicial review.") (internal quotations omitted). The facts of the present case are fit for judicial review according to all three of the Supreme Court's factors.

i. *An agency's statutory interpretation is a purely legal question.*

The issues presented here are purely legal because they revolve entirely around statutory interpretation by an agency. If a question "is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented,'" then that question is purely legal under the ripeness doctrine. *Whitman v. American Trucking Ass'ns.*, 531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). *Whitman* saw the plaintiffs challenge an EPA interpretation of its authority to create standards under the Clean Air Act. 531 U.S. at 463. The Supreme Court further found the challenge ripe because judicial review would not "'inappropriately interfere with further administrative action,' since the EPA has concluded its consideration of the implementation issue." *Id.* at 479 (quoting *Ohio Forestry*, 523 U.S. at 733).

As in *Whitman*, the three substantive issues presented here revolve around EPA's interpretation of an environmentally focused authorizing statute. Record at 2. Further, EPA has "concluded its consideration of the implementation issue" per *Whitman* and *Ohio Forestry* by adopting an implementation plan that places all future obligations on New Union, without need for further EPA consideration. Record at 10.

ii. *EPA's adoption of the CWIP TMDLs is a "final agency action".*

The Administrative Procedure Act subjects "final agency action" to judicial review. 5 U.S.C. § 704. The Supreme Court has held that agency action is "final" for APA purposes if it both marks the consummation of the agency's decision-making process and determines rights or obligations. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 597 (2016). The possibility of further revision under the CWA does not make EPA's action here any less final, as review upon new information is a "common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Id.* at 598. In *Hawkes*, the Supreme Court held that by

issuing a determination under statutory authority, the Army Corps of Engineers "for all practical purposes 'has ruled definitively'" and thus conducted a final agency action. *Id.* (citing *Sackett v. EPA*, 566 U.S. 120, 132 (2012)). The action by EPA here fulfills both requirements of the *Hawkes Co.* inquiry.

In this case, EPA has clearly consummated its decisionmaking process. The CWA obligates EPA to approve or disapprove of states' water quality implementation plans. 33 U.S.C. § 1313(c)(3). If EPA disapproves, the CWA requires states to adopt the changes in order to bring their implementation plans into compliance. *Id.* Should states fail to do so, EPA will promulgate its own implementation plan as a rule, which is the end of EPA's involvement in the requirements of the section. *Id.* Here, EPA disapproved of the implementation plan adopted by New Union for Lake Chesaplain, promulgating its own. Record at 10. In doing so, EPA incorporated the public comments from DOFEC's notice-and-comment rulemaking into its record. *Id.* As in *Hawkes Co.*, the agency has promulgated a binding rule under statutory authority and thus consummated its decision-making process.

EPA's action here has also created clear legal obligations. The Supreme Court in *Sackett* held that EPA's compliance order constituted final agency action because the order legally obligated the plaintiffs to act according to an agency-approved plan. 566 U.S. at 126. The creation of an obligation in *Sackett* is analogous to the present case, where EPA has also used its authority under the Clean Water Act to force compliance with its rule. Record at 10.

iii. *The facts in this case are fully developed.*

The Supreme Court in *Abbott Labs* found the challenged agency action to be fit for review because both sides had moved for summary judgment on a final agency determination, indicating that no factual disputes remained to be adjudicated. 387 U.S. at 149. Conversely, the Supreme

Court in *National Park Hospitality Ass'n* found the issue before it to be unripe because, despite its purely legal nature and status as a final agency action, further factual development would better equip the Court to grapple with the legal issues presented. *538 U.S. at 812*; *compare American Farm Bureau Fed'n v. U.S. EPA, 792 F.3d 281, 293 (3d Cir. 2015)* ("Here the parties present a purely legal dispute on a well-developed record about the EPA's process of promulgating a TMDL.")

No further factual development would be relevant to deciding the issues presented in this case. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691 (2d Cir. 2013) ("What future contingencies remain . . . are not determinative of the questions before us.") As in *Abbott Labs*, all parties agreed that the case should be decided based on existing law and the record and moved for summary judgment in the trial stage. Record at 4-5. The administrative record in this case spans thirty years, including two comprehensive and unchallenged scientific reports delineating Lake Chesaplain's steep environmental decline. Record at 9. The case before the Court here "presents legal questions and there is a concrete dispute between the parties." *Walsh*, 714 F.3d at 691 (internal quotation marks omitted). As such, "[t]he issues presented have sharpened into a live case which is fit for judicial decision." *Id.* (internal quotation marks omitted).

b. Appellants are at risk of genuine hardship if EPA improperly interprets its statutory responsibility or authority in reviewing and supplanting the CWIP.

The Supreme Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club* explained that a showing of hardship requires either "adverse effects of a strictly legal kind" or "significant practical harm" to the plaintiffs. 523 U.S. 726, 733 (1998) (citing *Abbott Laboratories*, 387 U.S. at 152-54). The Court in that case found neither, saying that the challenged action does not "command anyone to do anything or refrain from doing anything" and that the plaintiff "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.* at

733-34. As established above, EPA's action in the present case does create affirmative legal obligations. The situation at Lake Chesaplain also represents harm that is imminent and certain, both to the state litigants and to Chesaplain.

New Union faces mandatory compliance with agency regulation it argues is contrary to law. Record at 11. This regulation carries the force of law under 33 U.S.C. § 1313(c)(3). *Cf. Nat'l Park Hospitality Ass'n*, 538 U.S. at 809 (holding that no hardship existed because the challenged statutory language "cannot be a legislative regulation with the force of law.") The economic harms resulting from Lake Chesaplain's decay have surpassed imminence and become established fact, illustrated by sinking property values and tourism revenue. Record at 7.

Chesaplain also faces continuing harm if this Court withholds judgment. Lake Chesaplain currently violates water quality standards as polluters load an estimated 180 mt of annual phosphorus effluent. Record at 8. The CWIP put forth by EPA guarantees only a 35% reduction in point sources over the next five years. *See id.* at 8-10. This translates to a reduction of effluent loading to approximately 157 mt per year over five years, against an unchallenged scientific determination that annual load must be reduced to 120 mt per year. *Id.* at 8. The harm will therefore continue in violation of the CWA unless New Union implements the contemplated BMP credits, which it has taken no action to do in the three years since adoption of the CWIP. *Id.* at 16. Lake Chesaplain's polluted state is being prolonged by the agency designed to prevent it, so Chesaplain requests that this Court find the issues on appeal ripe for judicial review.

II. EPA CAN LAWFULLY INCLUDE WASTELOAD ALLOCATIONS AND LOAD ALLOCATIONS IN ITS PLAN.

This Court should reverse the District Court's grant of summary judgment in favor of New Union under the Clean Water Act (CWA), § 303(d), 33 U.S.C. §1313(d), and reverse the District Court's vacation of 40 C.F.R. § 130.2(i) for the following reasons: (A) the word "total" is

ambiguous in its meaning under Step One of the Chevron deference test; and (B) the EPA reasonably interpreted the word "total" under Step Two of the Chevron deference test, in light of the legislative history and structure of the CWA. The Third Circuit in *American Farm Bureau* came to these same conclusions, and the Supreme Court has let their decision stand. 792 F.3d 281 (cert. denied).

a. Congress left the word "total" ambiguous in 33 U.S.C. § 1313(d).

When a court reviews agency interpretation of a statute, "[f]irst, always, is the question whether Congress has directly spoken to the question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If . . . Congress has not directly addressed the precise question that issue," the reviewing court will grant deference only to a reasonable interpretation by the agency. *Id.* at 843-44. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, the statutory language, its immediate context, and its place in the broader scheme all reflect a lack of specific congressional intent, leaving a gap for EPA to fill with its own determination.

i. *The language of the CWA is ambiguous and does not prohibit EPA from interpreting a "total" load as the sum of specific allocations.*

The plain meaning of the word "total" cannot alone support a denial of judicial deference to EPA's interpretation. Most standard definitions of "total" as an adjective describe adding several quantities in order to form a whole. *E.g. Total, Merriam-Webster*, https://www.merriam-webster.com/dictionary/total (last visited Nov. 14, 2021) ("comprising or constituting a whole"); *total, Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/total (last visited Nov. 14, 2021) ("including everything"). "Total" may also be read as in the phrase "total

amount", referring to the single sum of smaller constituent parts. Additionally, the Third Circuit noted that Congress has used the word "total" to refer to quantities that may be more diverse than can be quantified in a single number, such as the phrase "total quantity of commerce" in the Water Resources Reform and Development Act of 2014. *American Farm Bureau*, 792 F.3d at 297-298 ("It is unclear how 'commerce' can be expressed as a number, and we surmise that 'total' in that context allows the EPA to consider and express a complex mix of activities that affect its judgment.")

Congress provided no definition of "total" in reference to "total maximum daily loads." CWA § 303, 33 U.S.C. § 1313. The Clean Water Act defines "total" as accounting for various factors in other contexts, however. *See* 33 U.S.C. § 1284(b)(1) (instructing the agency to consider "the *total* cost of operation and maintenance of such works *by each user class* (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors).") (emphasis added). That language resembles CWA § 303(d) as it requires consideration of seasonal variations and a margin of safety in determining a total maximum daily load. 33 U.S.C. § 1313(d). The Third Circuit in *American Farm Bureau* rejected a reading of the word "total" that would require such relevant information to be excised. 792 F.3d at 298 ("It would be strange to require the EPA to take into account these specific considerations but at the same time command the agency to excise them from its final product.")

ii. *The CWA's structure and purpose permit an inclusive definition of "total".*

The purpose and structure of the CWA equally support a more comprehensive reading of "total". "The CWA was enacted in light of severe threats to the Nation's navigable waters, and it was intended to spur immediate action by both federal and state authorities." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 253 (D.D.C. 2011). In its own words, Congress

passed the Clean Water Act to "restore and maintain the . . . integrity of the Nation's waters." CWA § 303(d), 33 U.S.C.A. § 1258(a). "TMDLs are central to the Clean Water Act's water-quality scheme because . . . they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (internal quotation marks omitted).

Here, New Union argues that the EPA definition is contrary to the principles of federalism. Record at 12. Contrary to any argument that a comprehensive reading of "total" would infringe on states' rights to self-regulate, the Third Circuit in *American Farm Bureau* also explained that "the TMDL provision 'explicitly supplants state authority by requiring' states to participate in pollution-reduction programs by, in part, submitting a TMDL, 'and the meaning of that phrase . . . is indisputably a question of federal law." 792 F.3d at 302 (quoting *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 305 (2013) (emphasis in original)). The Supreme Court in *City of Arlington* upheld an FCC interpretation of a jurisdictional clause in its statute, affording the agency Chevron deference. 569 U.S. 290. In doing so, the Court explicitly rejected arguments of federalism or "traditional state or local concern." *Id.* at 305 (internal quotation marks omitted). In the present case, as in *City of Arlington* and other cases, "[t]his is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about" whether an agency or the federal courts will "draw the lines to which they must hew." *Id.* (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 379 n.6 (1999) (internal quotation marks omitted)).

b. EPA's interpretation of "total" must be granted deference in light of the statute's history and purpose.

"[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 844. Permissibility hinges on "whether the Administrator's view . . . is a

reasonable one." *Chevron*, 467 U.S. at 845. The Chevron Court considered legislative history and public policy in making its determination. *Id.* at 859-66. Ultimately, an agency interpretation is "reasonable" if "the agency has stayed within the bounds of its statutory authority". *City of Arlington*, 569 U.S. at 297.

i. *The CWA bears a clear legislative history that favors the inclusive definition.*

The legislative history alone is dispositive to New Union's claims here. 33 U.S.C.A. § 1313(d)(4)(A) and 33 U.S.C.A. § 1313(d)(4)(B) reference "such total maximum daily load or other waste load allocation . . . ." (emphasis added). While the phrase "waste load allocation" here is tied equivalently to the concept of a TMDL, that language did not exist in the original 1972 language of the Federal Water Pollution Control Act, which was later known with its amendments as the Clean Water Act. 33 U.S.C. § 1151 The phrase first appeared in EPA's own regulations in 1985, where the agency defined a TMDL as "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 50 Fed. Reg. § 1774-01. Congress then adopted the language in the Water Quality Act of 1987, the second major amendment to the Clean Water Act. 33 U.S.C. §1251 The fact that Congress adopted EPA's own language proves that TMDLs may contain load allocations while remaining within the intent of Congress.

ii. *Courts agree with EPA's definition of a TMDL.*

Courts have also accepted EPA's definition of the TMDL without exception. The First, Third, Eighth, Ninth, Tenth, and D.C. Circuits have cited affirmatively to 40 C.F.R. § 130.2(i), the EPA regulatory definition of a TMDL. *Conservation Law Foundation, Inc. v. Pruitt*, 881 F.3d 24, 27 (1st Cir. 2018); *American Farm Bureau*, 792 F.3d at 290; *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1310 (9th Cir. 1992); *Ctr. for Native Ecosystems v. Cables*, 509 F.2d 1310, 1319 (10th Cir. 2007); *Friends of Earth, Inc. v.*

EPA, 333 F.3d 184, 186 n.5 (D.C. Cir. 2003). The Fourth and Eleventh Circuits have cited to the same section of Chapter 40, which contains EPA's definitions of waste load allocations, load allocations, and TMDLs. *Ohio Valley Environmental Coalition, Inc. v. Pruitt*, 893 F.3d 225, 227 (4th Cir. 2018) (citing the definition of "Water quality standards (WQS)"); *Meiburg*, 296 F.3d at 1025 (citing the definition of "Load or loading"). Of the eight federal circuit courts referencing § 130.2, all have therefore accepted EPA's regulatory definitions regarding the Clean Water Act.

iii. *The inclusive definition does not expand EPA's power or compromise state autonomy.*

"When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than what is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866. The district court in this case characterizes EPA's longstanding definition of "total" as "expansive" and constituting "a dramatic expansion of EPA's regulatory jurisdiction . . . ." Record at 14. The Supreme Court rejected such alarmist arguments in *Utility Air Regulatory Group v. E.P.A.*, which involved a challenge to EPA interpretation of the Clean Air Act. 573 U.S. 302, 314 (2014). The EPA in *Utility Air* interpreted the Clean Air Act to permit the application of Best Available Control Technology standards to sources that were already regulated under the Act's permitting scheme. *Id.* at 312-13. The Court explained that the suggested regulation "is not so disastrously unworkable, and need not result in such a dramatic expansion of authority, as to convince us that EPA's interpretation is unreasonable." *Id.* at 332.

Utility Air closely resembles the present case, wherein "[w]e are not talking about extending EPA jurisdiction . . . but about moderately increasing the demands EPA . . . can make of entities already subject to its regulation." *Id.* The Court reasoned further that EPA's demands under the newer interpretation will be of a substantially similar character to those traditionally

associated with the existing regulatory structure. *Id.* The same logic applies here, where EPA is expanding neither its jurisdiction nor the character of its regulation, instead creating more concrete requirements to better carry out its mandates under the CWA. EPA's reading of the word "total" is supported by the language, construction, goals, and history of the CWA, as well as the federal circuit courts. To preserve water quality, this Court must reverse the District Court's grant of summary judgment to New Union in favor of Chesaplain.

III. EPA's APPROVAL AND ESTABLISHMENT OF AN ANNUAL TMDL WAS UNLAWFUL.

This court should uphold the District Court's grant of summary judgment in favor of Chesaplain under the Clean Water Act (CWA), § 303(d), 33 U.S.C. §1313(d) because: (A) the plain language of the statute mandates a pollution reduction plan of fixed daily limits not annual limits; and (B) a daily pollution plan is necessary to achieve better water quality of Lake Chesaplain.

a. Congress established within the CWA that a "total maximum *daily* load" must be a "daily" limit.

The Clean Water Act (CWA) §303(d) mandates that "[e]ach state shall establish ... the total maximum daily load, for those pollutants which the Administrator identifies ... as suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Critically, Congress gave EPA the responsibility to implement the CWA and, therefore, the agency's interpretation of the "total maximum daily load" (TMDL) is reviewed under the *Chevron* standard. *Chevron*, 467 U.S. 837 at 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue… that is the end of the matter.").

Here, Congress has spoken on the precise issue at question and, therefore, under the Chevron standard a "daily" limit is required. *See id.* Chesaplain's claim, that a valid "total

maximum daily load" cannot be a phased annual plan, was previously decided in *Friends of Earth*; the D.C. Appeals Court clearly established that "daily" in the CWA meant "daily" and not another measure of time. 446 F.3d at 142. Chesaplain contends that EPA's plan to clean up phosphorus in Lake Chesaplain did not comply with the CWA because it set forth a "total maximum daily load" of a 35% phased annual reduction, instead of a daily reduction. Record at 9. *Friends of Earth*, set forth that an EPA approved TMDL that limits annual pollution reduction is improper. *Id.* at 148 (EPA must "establish daily load limits.").

i. *The plain language of the CWA sets forth a daily limit.*

Congress not only mandated a daily limit in the CWA with the language, "[e]ach state shall establish ... the total maximum daily load, for those pollutants which the Administrator identifies ... as suitable for such calculation," but, also EPA has found that "that "[a]ll pollutants ... suitable for the calculation of total maximum daily loads." 33 U.S.C. §1313(d)(1)(C) (emphasis added); 43 Fed.Reg. at 60665. As a result, the CWA requires the State of New Union to establish a "total maximum daily load" for pollutants that contribute to the declining water quality of Lake Chesaplain. *See id.* Specifically, in Lake Chesaplain, excessive amounts of phosphorus were measured at double the amounts of a healthy ecosystem and, therefore, should be regulated through establishing a "daily" limit of phosphorous (maximum healthy levels are .014mg/l and Lake Chesaplain was between .020mg/l and .034mg/l). Record at 8.

As the D.C. Circuit set forth in *Friends of Earth*, nothing in the plain language of the CWA indicates that EPA can ignore Congress's language and approve a total maximum "annual" load instead of a "daily" load because the law clearly says "daily." 446 F.3d at 144. The use of the word "daily" clearly established Congresses intention to establish daily limits. *Id.* In *Appalachian Power Co. v. EPA*, the D.C. Appeals Court stated, "we should refrain from interpreting a statutory

provision in a way that creates surplusage." 135 F.3d 791, 819 (D.C. 1998) ("because section 407(b)(2) does not specify a compliance date, it would appear that Congress did not intend to set a compliance date."). Here, as in *Appalachian Power Co.*, Congress's intent is clear from the language of the CWA, and the statutes plain language governs. *Id.*; *see Chevron*, 467 U.S. at 842.

ii. *The plain language of the CWA is unambiguous and cannot be set aside.*

Congresses set forth a "total maximum daily load" limit in the Clean Water Act and EPA cannot retroactively change the unambiguous statute to include annual limits. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000) ("for the regulation cannot change the statute."). In *Friends of Earth,* the D.C. Appeals Court stated that the language of the Clean Water Act was unambiguous:

> Nothing in th[e statutory] 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").

446 F.3d at 144. In the CWA, Congress explicitly required EPA to establish "total maximum daily loads" (TMDL). *Id.* While Courts have argued over the ambiguity of how a total maximum daily load should be decided, precisely what EPA should create—a daily pollutant limit—has been clearly decided by Congress and judicial precedent. *Id.*; *see American Farm*, 792 F.3d 281, 307–310 (3rd Cir. 2015) (the Court upheld that a valid TMDL could specify distribution of pollutants and set deadlines for meeting pollutant discharge).

Specifically, the Third Circuit Court of Appeals held in *American Farm Bureau* that "'total' is susceptible to multiple interpretations" because the CWA "is silent on how EPA must set the loads." *Id.* at 299. Therefore, the holding in *American Farm Bureau* is compatible with *Friends of Earth*, because the Third Circuit notes that "the Clean Water Act includes certain

substantive requirements." *Id.* In the CWA a "daily" pollutant limit is a substantive requirement that Congress unambiguously mandated. *Friends of Earth*, 446 F.3d at 144.

b. To improve the poor water quality of Lake Chesaplain, it is necessary to set a fixed daily limit on total pollution loading.

EPA does not dispute that the Clean Water Act and implementing regulations require TMDL's to implement applicable water quality standards to take into account critical conditions with a "margin of safety." 40 C.F.R. §130.7; 33 U.S.C. §1313(d)(1)(C). Here, the TMDL fails to implement applicable water quality standards. It is undisputed that excess algae growth in Lake Chesaplain is a result of unhealthy phosphorus levels in the water. Record at 8. Like in *Friends of Earth*, where annual dissolved oxygen standards did not meet water quality standards for fixing the biochemical pollutants it caused, EPA's annual TMDL phosphorus limit for Lake Chesaplain does not meet water quality standards sufficient to fix the algae growth. 446 F.3d at 143. A long-term average phosphorus limit is deficient and does not improve the poor water quality of Lake Chesaplain.

Similarly, long-term average was found to be deficient in *U.S. Air Tour Assn. v. FAA*, when trying to regulate aircraft noises in the Grand Canyon, "because the use of an annual average does not correspond to the experience of the Park's actual visitors." 298 F.3d 997, 1017 (D.C. Cir. 2002). Here, the record reflects that a seasonal average is insufficient because daily the phosphorus is feeding algae growth which his plagued the lake with less biologically productivity, objectional odors, decreased water quality, and a decrease in dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. Record at 8. The D.C. Appellate Court has already ruled on this exact issue and held that dissolved oxygen standards must controlled in a TMDL with a set daily limit. *See Friends of Earth,* 46 F.3d at 143. Therefore, phosphorus levels which cause dissolved oxygen standards and a myriad of problems every day in Lake Chesaplain must also be

controlled by a TMDL with a set daily limit. Because the statutory requirements are clear and a daily load is necessary to achieve the aims of the CWA, Chesaplain requests this Court affirm the District Court's grant of summary judgment regarding the reading of "daily".

IV. IN THE CWIP A BMP CREDIT IS AN ABUSE OF DISCRETION.

This court should rule in favor of Chesaplain and reverse summary judgement under 40 C.F.R. § 130.2(i) because: (A) EPA's grant of nonpoint source BMP credits as an offset to point source reduction in the Lake Chesaplain TMDL was unenforceable; and (B) EPA was arbitrary and capricious when they recommended the unenforceable nonpoint source BMP's.

a. EPA did not act to improve the waters of Lake Chesaplain when it failed to manage and control its plan to credit nonpoint pollutant sources with BMPs.

Under the Clean Water Act, a state may take credit for nonpoint source reduction if "other nonpoint source pollution controls make more stringent load allocations practicable…TMDL process provides for nonpoint source control tradeoff." 40 C.F.R §130.2(i). Both the statute CWA, 33 U.S.C. § 1313(d)(1)(C) and the regulation 40 C.F.R §130.2(i), require that each TMDL "be established at a level necessary to implement water quality standards." The EPA has consistently interpreted the language to support implementation plans. *See Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002) ("Once established, TMDLs are implemented through various mechanisms, some of which are provided in the Act, with responsibilities for implementation divided between EPA and the states."). EPA's suggestion of nonpoint source BMP pollutants as a credit against point source reduction in Lake Chesaplain is not compatible with the CWA's goal of improving water quality because it is unenforceable, makes achieving water quality standards impossible, and allows contributors of both point and nonpoint pollutants to go unchecked. Record at 19.

i. *The unenforceable BMP credit fails to manage or control nonpoint-source polluters.*

In Lake Chesaplain, the BMP does not achieve water quality standards because it gives unenforceable credits to the nonpoint sources of pollution. While the EPA and the state's share the responsibilities of implementing TMDL's, the EPA interpretated the CWA to include implementation plans as being part of TMDL's because "[o]therwise the allocations presented in a TMDL lack a necessary link to anticipated attainment of water quality standards." 65 Fed. Reg. at 43598. In Lake Chesaplain, the complete failure of the EPA's BMP credit to reduce nonpoint source pollution at all, means it fails in the "attainment of water quality standards" and is insufficient. *Id.*

Additionally, the Ninth Circuit Court in *Pronsolino*, clarified that EPA regulations addressing states' water quality management plans under 40 C.F.R. §130.6, must include "TMDLs, effluent limitations, and nonpoint source management and control." 291 F.3d at 1133. In *Pronsolino,* the Ninth Circuit held that the EPA's regulation was sufficient because regardless of the source of the pollution it focused on achieving water quality standards. 291 F.3d at 1126-1132 (explaining that point sources of pollution come from a "discrete conveyance such as a pipe or tunnel" and BMP's which are nonpoint sources of pollution, "are non-discrete sources" like sediment run-off); *American Iron and Steel Institute v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (holding that since the Guidance "contains regulations and measures for managing and reducing pollution from nonpoint sources" it was sufficient) (emphasis added); *See Dioxin/Organochlorine Ctr. v. Clark*, 57 F.3d 1517, 1525 (9th Cir. 1995) (noting that the EPA was within its discretion to set the dixion level at .013 ppq and not lower because if "the EPA had chosen to set a lower level, the evidence suggests that it would have been unenforceable.").

Here, unlike in *Pronsolino* and *American Iron and Steel Institute*, the EPA's credit for nonpoint sources is not enforceable and, therefore, it does not achieve water quality standards. *See*

291 F.3d 1123; 115 F.3d 979; cf. 65 Fed. Reg. at 43598 (the Lake Chesaplain standard fails to provide the "necessary link to anticipated attainment of water quality standards.") Notably, for Lake Chesaplain the record is completely absent of EPA's plan to implement the nonpoint source BMP's and has failed to do so for the two years in which it has been enacted. Record at 19. Unlike in *Dioxin/Organochlorine Center* where the EPA's .013 ppq standard was high enough to be enforceable, the BMP credit has been enacted for two years and not limited nonpoint source pollution at all. 57 F.3d at 1525. The BMP credit is unenforceable.

Additionally, the current annual load of phosphorous in Lake Chesaplain is 180 metric tons, which is a massive 60 metric tons above the maximum load threshold which was calculated to be 120 metric tons annually. Record at 8-9. Three nonpoint source polluters, CAFO Manure Spreading, Other Agricultural sources, and Septic Tank inputs, contribute 85.8 metric tons of phosphorous annually—more than half of the phosphorous pollution in Lake Chesaplain. Record at 9. As a result, nonpoint source pollutants need to be regulated because they are the single largest contributor of algae overgrowth in Lake Chesaplain. Contrary to *Pronsolino* and *Dioxin/Organochlorine Center*, the EPA has failed to implement a management and control plan for nonpoint sources that is enforceable and, therefore, the BMP credit fails to further the CWA's goal of achieving higher water quality standards in Lake Chesaplain. *Id.*; 57 F.3d at 1525. The unenforceability of the BMP credit makes it unmanageable by the EPA and does not regulate Lake Chesaplain's nonpoint phosphorous pollution problem. *See 40 C.F.R. §130.6.*

ii. *The unenforceable credit makes IMPOSSIBLE the achievement of Lake Chesaplain's WQS or the goals of the CWA.*

In Lake Chesaplain, the unenforceable BMP credit makes more stringent load allocations impossible because it exempts nonpoint source limitations, and point source limitations are insufficient on their own to decrease phosphorus pollution to the recommended level. *See* 40 C.F.R

§130.2(i)("other nonpoint source pollution controls make more stringent load allocations practicable…TMDL process provides for nonpoint source control tradeoff."). The Eighth Circuit has reiterated the Ninth's Circuit position that when determining TMDL's both point sources and nonpoint sources must be considered to effectuate water quality standards. *Thomas*, 581 F.3d at 667 (citing *Pronsolino*, 1291 F.3d 1133); *See Env'tl Prot. Info. Ctr. v. Pacific Lumber Co.*, 266 F.Supp.2d 1101, 1118 (N.D. Cal. 2003) (citing *NRDC v. Costle*, 568 F.2d 1369, 1369 (D.C. Cir. 1977) (The EPA does not have authority to exempt categories of point sources from regulations); See *American Farm Bureau*, 792 F.3d at 307 (noting that the goal of allocating pollution limits "between the EPA-regulated point sources and state-regulated nonpoint sources" is to "further the Clean Water Act's goal of achieving water quality standard.")

First, the nonpoint source BMP credit makes it impossible to decrease phosphorous pollution in Lake Chesaplain from 180 annual metric loads to the recommended 120 annual metric loads because it is unenforceable. Record at 8. For two years, the Lake Chesaplain TMDL has given credit for nonpoint sources, and there has been no action to reduce nonpoint source pollution. Record at 19. Unlike in *Thomas*, *Pronsolino*, and *American Farm Bureau* where the Circuit Courts have noted that both nonpoint and point sources need to be considered to increase water quality standards, the BMP credit for Lake Chesaplain makes it impossible for water quality standards to be met because it eliminates the reduction of non-point source pollutants. *Id.* Regulation of point source reduction does not mandate that a source completely stops producing phosphorus, and to reduce the annual phosphorous in Lake Chesaplain to the recommended 120 metric tons, there needs to be at least a reduction of 60 metric tons of phosphorous pollutants; point source polluters contribute, in total, 61.9 metric tons of phosphorus annually. Record at 8-9. Therefore, even if

point source polluters are limited significantly, it will be impossible for Lake Chesaplain to reach a healthy phosphorus level because non-point source regulations are not enforced.[1]

Second, the BMP credits allows polluters, which contribute as point and nonpoint sources, to go unchecked. Chesaplain Mills STP and Chesaplain Slaughterhouse are the only two point sources of phosphorous water pollution in Lake Chesaplain: (1) Chesaplain Slaughterhouse also contributes to the nonpoint source of CAFO manure spreading[2]; (2) Chesaplain Mills STP also contributes to the nonpoint source of "other agricultural sources,"[3] and (3) together Chesaplain Slaughterhouse and Chesaplain Mills STP could contribute as much as 136.1 metric tons annually. Record at 8-9. The Third Circuit in *American Farm Bureau* clearly stated that the purpose of allocating pollution limits between point source and nonpoint sources was to achieve water quality standards, and the EPA in Lake Chesaplain set forth an unenforceable credit for nonpoint source reduction, which allowed both Chesaplain Mills STP and Chesaplain Slaughterhouse to pollute as point and nonpoint sources of pollution without consequences. *See* 792 F.3d at 307. The unenforceability of the BMP credit makes it impossible for Lake Chesaplain to achieve its own set water quality standard and, therefore, summary judgment must be reversed in favor of Chesaplain. *See* 40 C.F.R. §130.6.

b. It is arbitrary and capricious to recommend nonpoint-source BMPs as part of a point source-based reduction plan to improve Lake Chesaplain's water quality.

Directly on this issue, the Third Circuit in *American Farm Bureau* stated that "it would surely be arbitrary or capricious for the EPA to approve a plan that a state is incapable of

[1] Noting that the other 32.3 mt of phosphorus pollution comes from natural sources and, therefore, cannot be limited. Record at 9.
[2] Chesaplain Slaughterhouse contributes 23.4 mt as a point source and contributes to the 54.9 metric tons from nonpoint source CAFO spreading, totaling 78.3 metric tons annually of the total 180 mt.
[3] Chesaplain Mills STP contributes 38.5 mt as a point source and contributes to the 19.3 mt from other agricultural sources, totaling 57.8 mt annualy of the total 180 mt.

following." 792 F.3d at 307. Similarly, the Supreme Court has observed that, "[a]s we have often recognized, an agency ruling is 'arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem.'" *Dioxin/Organochlorine Ctr.*, 57 F.3d at 1525 (citations omitted) (finding the EPA was not arbitrary and capricious because its standard was enforceable); *see Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 790 F.2d 289, 305 (3rd Cir. 1986) (holding that EPAs reduction of a consistency requirement that it acknowledged could lead to violations by both indirect and direct dischargers of toxic waste was arbitrary and capricious).

EPA argues that the arbitrary and capricious standard is narrow, and the court should not substitute its judgment for the agency. EPA desires its BMP nonpoint credit affirmed because the TMDL provided New Union with information concerning BMPs and nothing in the CWA requires actual implementation and compliance by nonpoint sources. *See Meiburg*, 296 F.3d at 1025; *City of Arcadia v. U.S. EPA*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003). Nevertheless, EPA's argument fails because the Supreme Court has stated that under the arbitrary and capricious standard the agency must still examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Supreme Court has further stated that an agency rule "would be arbitrary and capricious" if it "entirely failed to consider an important aspect of the problem." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Here, EPA entirely failed to consider the unenforceability of the BMP credit and the resulting impossibility of attaining its set water quality standards.

Here, as the EPA approved a BMP credit that the state of New Union has shown, over the period of two years, that it is incapable of following. Record at 19. As in *Natural Resources Defense Council, Inc.*, EPA's BMP credit is arbitrary and capricious because it allows for

Chesaplain Mills STP and Chesaplain Slaughterhouse to pollute as point and nonpoint sources of Lake Chesaplain, like the rule allowed for the direct and indirect discharge of toxic waste into water. *See* 790 F.2d at 305. The EPA's established annual 120 metric ton phosphorous limit will be impossible to satisfy if the unenforceable BMP credit remains and, therefore, the EPA has "entirely failed to consider an important aspect of the problem." *Dioxin/Organochlorine Ctr.*, 57 F.3d at 1525.The pollution of Lake Chesaplain will go unchecked if EPA's acceptance of insubstantial BMP credits stands. Therefore, this Court must reverse the District Court's grant of summary judgment in favor of Chesaplain.

CONCLUSION

Chesaplain is asking this Court to enforce legislative efforts to combat the pollution of Lake Chesaplain by enforcing the Clean Water Act, closing loopholes, and holding polluters accountable. The challenges to the controversial Lake Chesaplain TMDL are ripe for judicial review and, therefore, this court should affirm the District Court's holding that a "Total Maximum Daily Load" must include wasteload allocations and must be a fixed daily limit. Further, this court should reverse the grant of summary judgment in favor of wasteload allocation credits and hold that granting such credits to nonpoint source BMPs is arbitrary and capricious because unenforceable pollution efforts are contrary to Congressional efforts to rehabilitate dirty waters.

Respectfully submitted,

Team 1

Attorneys for Chesaplain Lake Watch

Plaintiff-Appellant-Cross-Appellee

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