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

IN THE

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NOVEMBER TERM 2021

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 Writ of Certiorari to the United States
Court of Appeals for the District of New Union

BRIEF FOR PLAINTIFF-APPELLEE-CROSS APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

QUESTIONS PRESENTED

I. Under *Abbott*, the Supreme Court held that a case is ripe if the issues presented are fit for judicial review and hardship to the parties would result without hearing the suit. Here, the issues are questions purely of congressional intent, and New Union must incorporate the challenged action to issue permits. Is this case ripe?

II. Under Section 303(d) of the Clean Water Act, Congress defines "total maximum daily load" as a singular, total load level of pollutants. And under the CWA, Congress gives states the exclusive right to determine nonpoint source allocations. But, here, the EPA determined point source allocations pursuant to its own regulation, which purports to rely on Section 303(d). Is the EPA action permissible under the CWA?

III. Under *Chemical Manufacturer's Association* and *Chevron*, an agency may reasonably interpret a statute if statutory language would produce an absurd result. Here, if this Court read CWA § 303(d) to prohibit daily limits, it would force the EPA establish daily limits on pollutants better suited for non-daily limits. May the EPA interpret the CWA to establish a more suitable limit?

IV. Under Section 303(d) of the Clean Water Act, states hold sole authority over implementation of non-source point controls. The EPA did not seek "reasonable assurances" that New Union's BMPs will achieve non-point source reductions. Should this Court determine the EPA acted arbitrarily or capriciously by not seeking "reasonable assurances?"

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Kunelias v. Town of Stow*, 588 F.3d 1, 8 (1st Cir. 2009). Further, "the presence of cross-motions for summary judgment does not alter or dilute this standard." *Id.* And this Court reviews a district court's statutory interpretation *de novo*. *See Salman Ranch Ltd. v. United States*, 573 F.3d 1362, 1370 (Fed. Cir. 2009).

STATEMENT OF THE CASE

I. Factual Background

In May of 2019, the EPA adopted a highly controversial total maximum daily load (TMDL)—upsetting locals in the State of New Union (New Union). R. at 9–10. The EPA adopted this detailed TMDL after rejecting the TMDL proposed by New Union Division of Fisheries and Environmental Control (DOFEC). *Id.* Importantly, the EPA rejected the TMDL favored by New Union home-and-businessowners. *Id.* New Union must now implement this contentious TMDL into its implementation plan under the CWA or risk losing federal funding and permit issuing abilities. *Id.* at 12.

Lake Chesaplain is a fifty-five mile long, five mile wide natural lake located entirely in the State of New Union. R. at 7. Lake Chesaplain's outlet is the Chesaplain River, which is a navigable-in-fact interstate waterbody. *Id.* In 1991, economic pressures led to the development of ten large-scale hog production facilities (CAFOs) and a large-scale slaughterhouse bordering Lake Chesaplain. *Id.* The slaughterhouse has a CWA National Pollutant Discharge Elimination System (NPDES) permit. *Id.* The CAFOs are not subject to CWA permits because the EPA classifies them as "non-discharging." *Id.*

In 1991, Lake Chesaplain's water quality began to decline due to excessive levels of the nutrient phosphorous. R. at 8. Currently, its phosphorous levels vary from 0.020 to 0.034 mg/l, which exceed the maximum level of 0.014 mg/l. *Id.* High phosphorous levels caused "mats of algae" to form in the summer months, which in turn caused a host of water quality issues. R. at 7–8. Namely, algae growth caused eutrophication, an ecological process that decreases the productivity of the lake. R. at 8. Additionally, algae growth caused "objectionable odors, decreased water clarity, and a decrease in dissolved oxygen levels." *Id.*

In 2016, The Chesaplain Commission issued a report (Report) calculating the maximum phosphorous loadings consistent with achieving the 0.014 mg/l phosphorous standard. *Id.* The report also identified existing sources of phosphorous inputs. Specifically, the Report determined hog CAFOs contributed substantial phosphorous loadings into Lake Chesaplain, despite their status as non-discharging. R. at 9. As of 2015, existing loadings total 180 mt, as follows:

Point Sources

Chesaplain Mills STP	23.4
Chesaplain slaughterhouse	38.5

Non-point Sources

CAFO manure spreading	54.9
Other agricultural sources	19.3
Septic tank inputs	11.6

Natural Sources

32.3

In October 2017, DOFEC publicly noticed a proposal to implement the TMDL through an equal phased reduction in phosphorous discharges. *Id.* This reduction purported to be phased in over a five-year period. *Id.* Specifically, the load would reduce 7% from the 180 mt baseline in the first year, 14% from the baseline in the second year, and so forth. *Id.* New Union would

incorporate point source reductions as permit limits. New Unions aimed to achieve non-point source reductions through a series of Best Management Practices (BMPs). For example, proposed BMPs for private septic systems included "increased septic tank inspection and pumping schedules." *Id.*

The proposed Chesaplain TMDL proved highly controversial among residents of New Union. Residential lakefront homeowners objected to the "expensive septic tank maintenance and pumping. *Id.* The slaughterhouse and Chesaplain Mills objected to the "expensive phosphorous system" called for by BMPs. *Id.* The hog CAFOs objected to implementation of BMPs on their operations. Due to these objections, DOFEC abandoned the phased TMDL proposal and instead submitted a TMDL solely consisting of a 120 mt maximum, without any wasteload allocations or load allocations. *Id.*

Under CWA § 303(d)(2), the EPA rejected DOFEC's proposed TMDL and instead adopted the original DOFEC proposal (Chesaplain TMDL). The Chesaplain TMDL consisted of a 35% reduction of annual phosphorous discharges by both point and non-point sources phased in over five years, to be implemented through permit controls on point sources and BMP requirements for non-point sources.

II. Procedural History

New Union filed action against the EPA on January 14, 2020. R. at 10. The court consolidated New Union's case with the Chesaplain Lake Watch action filed on February 15, 2020. *Id.* The District Court granted summary judgment in favor of New Union and against the EPA. R. at 16. But the court granted summary judgment in favor of the EPA and dismissed CWA's complaint. *Id.*

The court vacated the EPA's rejection of the Chesaplain TMDL. *Id.* And the court ordered the EPA to approve the Chesaplain TMDL. *Id.* The EPA appealed the court's vacating order and validity determination of the Chesaplain TMDL. R. at 2.

SUMMARY OF THE ARGUMENT

Under *Abbott Laboratories v. Gardner* this case is ripe for review. Specifically, the issues presented are fit for judicial review because they are issues of congressional intent. And hardship to the parties would result without hearing this case because New Union must implement the challenged total maximum daily load ("TMDL") before issuing National Pollutant Discharge Elimination System ("NPDES") permits.

Next, in 40 C.F.R. § 130.2, the EPA erroneously defines "total maximum daily load" to require wasteload allocations ("WLAs") and load allocations ("LAs") amongst point and nonpoint sources. This allocation requirement misapplies the clear congressional intent detailed in Section 303(d) of the Clean Water Act ("CWA"). Pursuant to its regulation—which strays from the CWA—the EPA erroneously rejected New Union's TMDL (the "Chesaplain TMDL"). Even more, the EPA implemented its own TMDL, which assigned point and nonpoint source load allocations—an exclusive state right under the CWA. In doing so, the EPA exceeded its power and wildly disrupted congressional intent and federalism concerns under the CWA.

Furthermore, the EPA correctly approved the Chesaplain TMDL. The CWA does not prescribe how to express TMDLs. In light of implicit legislative designation, the EPA reasonably interpreted the CWA to permit an annual load. CLW's interpretation would create an absurd result. It would force the EPA to establish daily limits pollutants better suited for non-daily limits. Instead, the EPA established an annual TMDL because a "rational connection" existed between Lake Chesaplain's water quality standards and the annual limit on phosphorous.

Furthermore, the EPA reasonably interpreted the CWA to permit a phased percentage reduction. The EPA could not develop numerical limit due to the lack of information surrounding non-point source contributions and varied phosphorous levels in Lake Chesaplain. Thus, because a rational connection existed between the facts found and the choices made, the EPA acted within its authority by approving the Chesaplain TMDL. Accordingly, the EPA's interpretation merits deference.

Finally, the EPA did not act arbitrarily or capriciously by crediting anticipated BMP pollution reductions without seeking reasonable assurances. Rather, its decision accorded with the language, structure, and purpose of the CWA. TMDLs function as informational devices. Applicable laws, such as the CWA and binding regulation, do not require the EPA to seek reasonable assurances before crediting Best Management Practices ("BMPs"). Rather, if the EPA required BMPs, it would encroach on state authority regarding land use and water planning. This encroachment would contradict the CWA's clear division of state and federal power. Accordingly, the EPA did not act arbitrarily nor capriciously by crediting BMPs without seeking reasonable assurances.

ARGUMENT

III. This Court should affirm the district court's holding that this case is ripe is for review because the issues presented are fit for judicial review and hardship to the parties would result without hearing the suit.

The lower court correctly determined that this case is ripe for review. In *Abbott Laboratories v. Gardner*, the Supreme Court concluded the ripeness doctrine aims "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. 387 U.S. 136, 148 (1967). Accordingly, the Court held that the ripeness doctrine "protects the agencies from judicial interference until an

administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." *Id.* at 148–49. Finally, the Court held that the ripeness problem "is best seen in a twofold aspect, requiring [courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

Here, this case is ripe for review because the issues satisfy the twofold concerns detailed by the Supreme Court. First, the issues presented are fit for judicial review. Second, withholding court consideration would cause hardship to the parties. Finally, C. This case is distinguishable from *City of Arcadia v. EPA* and *Bravos v. Green*.

A. The questions presented are fit for judicial review because they are issues of congressional intent.

The issues presented are fit for judicial review. An issue is fit for judicial review when it is an issue "purely of congressional intent, and the Government made no effort to justify the regulation in factual terms." *Id.* In *Abbott*, the Court held that the agency action was final, and therefore reviewable, because the "regulation . . . [was] quite clearly definitive, . . . [not] informal, . . . [not] only the ruling of a subordinate official, . . . or tentative." *Id.* at 151. Significantly, the "regulations . . . purport[ed] to be directly authorized by the statute." *Id.* at 152. So, the Court stated, "[i]t would be adherence to a mere technicality to give credence to [the] contention" that there is no final action because "the agency . . . could [not] implement the policy directly." *Id.* at 151–52.

Here, the questions presented are issues purely congressional intent. Like *Abbott*, these EPA regulations are clearly definitive— they are not informal, the ruling of a subordinate official, nor tentative. Specifically, the second and third issues presented turn on the permissibility of the EPA's interpretation of "total maximum daily load" in § 303(d). And the final issue concerns whether the EPA acted arbitrarily or capriciously by crediting assumed

BMPs reductions. Accordingly, under the *Chevron* framework, these issues are purely questions of congressional intent. The EPA purports that the CWA authorized the regulations supporting their challenged actions. Therefore, even though the EPA cannot implement the policies directly, the challenged EPA actions are final for the purposes of ripeness. And the issues presented are, thus, fit for judicial review.

B. Withholding court consideration causes hardship to the parties because New Union cannot receive federal funding or issue permits without incorporating the challenged EPA TMDL.

Additionally, finding this case unripe would create hardship to the parties. The Supreme Court in *Abbott* held that "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted, absent a statutory bar or some other unusual circumstance." *Abbott*, 387 U.S. at 153.

Here, as the lower court noted, "the TMDL in question . . . contemplates specific NPDES permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay." R. at 12. Therefore, 40 C.F.R. § 130.2 requires an immediate and significant change in New Union's conduct. Specifically, New Union must immediately implement the permit limits under the challenged TMDL. Further, there is no statutory bar or unusual circumstance here. Accordingly, the parties must have access to the courts to litigate these issues that are fit for judicial review.

Any contention that litigation delays or impedes effective enforcement of the CWA misses the point. Importantly, this argument did not convince the Supreme Court in *Abbott*. *Id.* at 154. The Court reasoned that "[i]f the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation." *Id.* Here, the

issues present the same dichotomy. The challenged EPA regulations and actions affect all water quality preservation plans. And if the EPA loses, it can and must revise its regulation.

Finally, and importantly, this is not a novel issue. *See Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281 (3d Cir. 2015). Therefore, judicial review is paramount for effective enforcement of the CWA. *In American Farm*, the Third Circuit held these same issues were ripe for judicial review. *Id.* Like the lower court and Third Circuit, this Court should therefore hold that the issues presented are ripe.

C. This case is distinguishable from *City of Arcadia v. EPA* and *Bravos v. Green.*

This Court should not rely on the district court cases cited by the EPA because they are distinguishable from the ripe controversies presented. In *City of Arcadia v. EPA*, the court held that the issues were not ripe for review after finding three factors weighed against ripeness. 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003). These factors were: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). Similarly, in *Bravos v. Green*, the district court held that the issues were not ripe for review because they did not concern "final agency action." 306 F. Supp. 2d 48, 58 (D.D.C. 2004).

Here, the three factors cited in *City of Arcadia* weigh in favor of permitting judicial review, and unlike *Bravos*, the issues before this court concern final agency action. First, as explained above, delay of judicial review would cause hardship to New Union because New Union risks losing federal funding and must issue NPDES permits under the challenged EPA action. R. at 12. Second, judicial intervention would not interfere with administrative action

because the remaining action is state implementation action. Moreover, this is an issue that must be clarified to appropriately apply the CWA. Third, this court does not need further factual development because the issues presented are questions purely of congressional intent under the CWA. Finally, as explained in Section I.A. of this Analysis, the questions presented concern final agency action fit for judicial review. Therefore, this case is ripe.

IV. This Court should affirm the lower court's holding because Section 1313 speaks directly to the precise question at issue, and the EPA offers an impermissible definition of "total maximum daily load."

The EPA impermissibly rejected the Chesaplain TMDL because the CWA does not require states to include LAs and WLAs in TMDLs. Under *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 842 (1984). And "[i]f the intent of Congress is clear, that is the end of the matter." *Id.* Accordingly, courts will move to the second *Chevron* step *only* where "the court determines that Congress has delegated authority to address the issue to the agency." *Id.* at 843. And, even still, if the court determines the agency's regulation is "arbitrary, capricious, or manifestly contrary to the statute," the court must reject the agency's interpretation of the statute. *Id.* at 844.

Here, 33 U.S.C. § 1313 speaks directly to the precise question regarding the meaning of "total maximum daily load," and the EPA's interpretation of the statute in 40 C.F.R. § 130.2(i) impermissibly strays from this definition. But, even if this court finds that "total maximum daily load" is ambiguous, the EPA's definition is manifestly contrary to the CWA and arbitrary. Therefore, this Court should affirm the lower court and find that the Chesaplain TMDL satisfied the CWA requirements.

A. *CWA Section 303(d) unambiguously requires only a total level of loadings, and therefore, this Court should not grant the Chevron deference to the EPA's impermissible regulation requiring WLAs and LAs in TMDLs.*

This matter ends at *Chevron* step one because CWA § 303(d) speaks directly to the definition of "total maximum daily load." The EPA "has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). *Chevron* is "not quite the 'agency deference' case that it is commonly thought to be by many of its supports (and detractors)." *Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 299 n.34 (5th Cir. 1994) (en banc). Rather, the Supreme Court commands that reviewing courts "*must* reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). Thus, if Congress's intent is clear, "that is the end of the matter." *Id.* And this Court "must give effect to the unambiguously expressed intent of Congress." *Id.*

Here, first, the plain meaning of "total" in "total maximum daily load" is unambiguous and contrary to the EPA's interpretation of § 303(d). Second, the purpose, structure, and context of § 303 demonstrates the provision is purely informational—leaving all implementation of pollution controls to the states. Finally, the EPA's interpretation ignores Congress's clear intent under § 303 to give states the *exclusive* right to control implementation considerations.

1. The plain meaning of "total" in § 303 is unambiguous, and the EPA's interpretation of "total maximum daily load" strays from § 303's clear definition.

Congress defined the elements of "total maximum daily load," and this unambiguous definition does not permit EPA allocation of loadings among sources. Specifically, in § 303(d) of the CWA, Congress states that TMDLs require only a "*load* . . . established at a *level* necessary to implement . . . water quality standards." 33 U.S.C. § 1313(d)(1) (emphasis added). There is nothing ambiguous about the *singular* terms "total," "load," or "level." Congress clearly

permitted the EPA to establish a singular, total load necessary to implement water quality standards. Because the plain meaning of § 303 unambiguously calls for a single load total, this is the end of the matter.

But even more, in the CWA, Congress *specifies* when "total" means more than a single number. For example, when detailing the EPA's power to grant funds, the EPA must consider "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)." 33 U.S.C. § 1284(b)(1) (emphasis added). In this provision, Congress explicitly permitted the EPA to seek calculations amounting to the total cost. Therefore, Congress recognized that total means total. And, *if* Congress intends to delegate more power to the EPA by granting it access to information beyond the total, Congress does so. Yet, Congress did not do so here. Therefore, Congress clearly defined "total maximum daily load" as a single load level.

2. Section 303(d) is only an informational tool and does not authorize EPA involvement in the implementation of proposed water quality plans.

As the lower court found, § 303(d) demonstrates that TMDLs are informational tools. And the CWA does not authorize the EPA to supervise implementation. So, requiring allocations contradicts to the context of the CWA. The Supreme Court held that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Further, courts must not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [courts'] reluctance is even

greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

Here, first, Section 303(d) explicitly defers to Section 303(e) for *state* incorporation of an EPA approved total maximum load into *its* implementation plan. *Id.* § 1313(d)(2). Importantly, Section 303(e) cross-references other planning and implementation sections of the CWA, while Section 303(d) does not. *Id.* § 1313(e). Furthermore, in Section 303(e), Congress requires only that the plans include the single "total maximum daily load" established under Section 303(d). *Id.* § 1313(e)(3)(C).

Accordingly, as the lower court emphasized, Section 303(e) does not authorize the EPA to impose an implementation plan if the EPA disapproves of the state's plan—because Congress clearly did not intend to grant the EPA power to control an implementation plan. Therefore, Congress left all implementation power to the States under Section 303(d). Any power delegated to the EPA under Section 303(d) does not include allocation input. New Union therefore correctly provided a total load necessary to implement water quality standards in its Chesaplain TMDL. Yet, the EPA erroneously rejected the Chesaplain TMDL and intruded upon New Union's exclusive power under Section 303(e) determine an implementation plan.

Second, Congress deliberately declined to include an EPA supervised implementation requirement—even though Congress incorporated an identical framework in the Clean Air Act (CAA) two years prior to adopting the CWA. *See* Clean Air Act § 110(a), 42 U.S.C. § 7410(a). Under the CAA, Congress also granted the EPA authority to require states implement a federal plan if it submits an unsatisfactory plan. 42 U.S.C. § 7410(c)(1). But Congress did not grant the EPA any of this power under the CWA. Rather, if states submit an unsatisfactory plan, the EPA

may *only* deny federal funding and permit authority. *See Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008); R. at 13. Therefore, § 303(d) is purely an informational tool, and Congress intentionally left implementation of pollution controls to the states.

3. Congress expressed clear federalism concerns in the CWA, and the EPA's interpretation of Section 303(d) does not respect Congress's division of state and federal power.

The EPA's interpretation of Section 303(d) directly contradicts Congress's clear federalism concerns under the CWA. The Supreme Court found that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). The Court emphasized that the CWA "provides for a system that respects the States' concerns." *Id.* (quoting 33 U.S.C. §§ 1251(b), 1370)).

The CWA recognizes, preserves, and protects state authority regarding land use and water quality planning. *See* 33 U.S.C. §§ 1251(b), 1370, 1313(e). Specifically, Section 1251(b) details the "policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" within land use and water quality planning. *Id.* § 1251(b). And Congress reiterated that "[e]xcept as expressly provided in this chapter, nothing . . . shall . . . preclude or deny" this state primacy. *Id.* § 1370. Congress's intent to prioritize states' rights is therefore clear in the CWA.

Further, the Supreme Court and lower courts consistently highlight the CWA's demand for state primacy. The Supreme Court stated that courts must interpret the CWA to "preserve[] the state authority apparently intended." *Bass*, 404 U.S. at 349 (interpreting § 401 of the CWA). Following the Supreme Court's guidance, lower courts similarly interpret the CWA to preserve state authority. For example, the Ninth Circuit, relying on § 303(d), found that an approved state TMDL supersedes an earlier EPA TMDL because it "is consistent with the basic goals and

policies . . . that States remain at the front line in combating pollution." *City of Arcadia v. EPA*, 411 F.3d 1103, 1106–07 (9th Cir. 2005). Similarly, the Seventh Circuit found that "it seems beyond argument that [courts] should construe the [CWA] to place maximum responsibility for permitting decisions on the states." *Am. Paper Inst. v. EPA*, 890 F.2d 869, 873 (7th Cir. 1989).

Here, the EPA's interpretation of § 303(d) contradicts the clear congressional intent in the CWA to leave land use regulation and water quality planning to the states. Allocation of loadings among nonpoint sources is a state concern that implicates land use and water quality planning. Therefore, under the CWA, allocation of loadings is a primary responsibility and right of the States. And the EPA's interpretation of "total maximum daily load" infringes upon this exclusive state right—wholly ignoring the clear congressional intent in the CWA and eroding the federal-state balance.

B. Even if this Court finds that § 303(d) is ambiguous, the EPA definition of "total maximum daily load" is unreasonable because it is contrary to the CWA and arbitrary.

Although this Court should find that Section 303(d) is unambiguous, defining "total maximum daily load" to include allocations is, nevertheless, contrary to the CWA and arbitrary. Once again, courts apply step two of the *Chevron* test *only* where "the court determines that Congress has not directly addressed the precise issue," *and* that Congress "explicitly left a gap for the agency to fill." *Chevron*, 467 U.S. at 843–44. But "[e]ven under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321, (2014) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)). And "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Court reasoned that "an

agency interpretation that is 'inconsisten[t] with the design and structure of the statute' . . . does not merit deference." *Id.* (quoting *Robinson*, 519 U.S. at 341).

Here, the EPA's interpretation of "total maximum daily load" to include WLAs and LAs is unreasonable. First, this interpretation is contrary to the purpose of the CWA, which explicitly left land use and water quality planning to the states. Second, the legislative history of the CWA does not support the EPA's interpretation. Finally, the EPA's regulation is arbitrary because it is internally contradictory.

1. The EPA's interpretation of Section 303(d) is unreasonable because it is contrary to the expressed purpose of the CWA.

This Court should find that the EPA's definition of "total maximum daily load," which includes allocations, is contrary to the purpose of the CWA. Congress stated that the purpose of the CWA is "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To serve this purpose, Congress "recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *Id.* § 1251(b).

Congress intentionally left nonpoint source limit decisions to the states because such limits affect land use planning, which is a traditional state power. *See Oregon Nat. Desert*, 550 F.3d at 785. Specifically:

> [U]nlike the permitting and enforcement provisions for point sources, [under the CWA] EPA lacks direct implementation or regulatory authority in the face of nonexistent or inadequate state implementation. At most, under the nonpoint source control provisions, EPA is authorized to withhold grant funding for delinquent states. This policy judgment appears consistent with Congress's reluctance, as expressed in sections 101(b) and (g) of the Act, to allow extensive federal intrusion into areas of regulation that might implicate land and water uses

> in individual states. *Id.* (quoting Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 Envtl. L. 29, 56 (2003)).

Moreover, the Supreme Court held that Congress must provide a clear statement before "permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). And land use regulation and planning are "perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). Accordingly, "state governments traditionally perform[]" land use regulation. *Hess v. Port Auth.*, 513 U.S. 30, 44 (1994).

Here, the EPA impermissibly intrudes upon the traditional state power to govern land use and property rights. By requiring states to provide WLAs and LAs, the EPA intrudes upon the States' power to regulate individual nonpoint sources. Specifically, the CWIP includes BMPs that proved highly controversial. Homeowners and businesses complained that the BMPs were expensive and insufficient to achieve the needed phosphorus reductions. This debate highlights the unreasonable nature of EPA's interpretation of Section 303(d).

The EPA, a *federal* agency, does not have input in land use disputes. Power to regulate land use is left to the states because each locality has differing populations, markets, resources, and more. A federal agency with no knowledge or stake in these localities cannot reasonably regulate these disputes. Congress knew this. And Congress, accordingly and explicitly, constructed the CWA to serve this federalism reality. Therefore, allowing a *federal* agency to regulate individual source points is unreasonable because it is directly contrary to the clear purpose of the CWA.

Further, principles of cooperative federalism or usefulness to the EPA cannot excuse this federal intrusion into land use regulation. Once again, the EPA "literally has no power to act …

unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. at 374. Even if some states "may be content to leave 'responsibility' with [EPA] because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests," a state's desire to unburden themselves "makes no difference to the statute's stated purpose of preserving States' 'responsibilities and rights.'" *Rapanos v. United States*, 547 U.S. 715, 737 n.8 (2006) (quoting 33 U.S.C. §1251(b)). And the Supreme Court urged "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.*, 573 U.S. at 328.

Here, although the CWA encourages cooperative federalism and TMDLs should be useful to the EPA, these principles do not permit the EPA to act beyond the bounds of the CWA. A chief purpose of the CWA is to preserve and protect State primacy. The congressional intent to leave land use regulation to the states is clear under the CWA. And this clear purpose cannot be reasonably disturbed because it would be useful to the EPA to intrude upon State power. In fact, it is almost always useful to an agency to grant them excess power. But this result is impermissible under *Chevron*. The EPA rewrote Section 303(d) with blatant disregard for state primacy and usurped power that Congress left to the states. This is unreasonable. This Court cannot permit this overstep and disregard for the purpose of the CWA.

2. The legislative history of the CWA does not support the EPA's interpretation of section 303(d).

The legislative history of the CWA does not support the EPA's interpretation of Section 303(d). First, when determining the reasonableness of an agency regulation courts turn to legislative history for indicators of Congressional intent. However, when "general remarks . . . 'were obviously not made with [the challenged] narrow issue in mind . . . they cannot be said to demonstrate Congressional desire." *Chevron*, 467 U.S. at 862 (quoting *Jewell Ridge Coal Corp.*

v. Mine Workers, 325 U.S. 161, 168–169 (1945)). And when "'subsequent history is less illuminating than the contemporaneous evidence,' respondents face a difficult task in overcoming the plain text and import" of the CWA. *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 170 (quoting *Hagen v. Utah*, 510 U.S. 399, 420 (1994)).

Here, even though the CWA alone expresses Congress's intent to leave implementation of pollution controls to the States, the legislative history confirms this intent. *See* S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3744 ("The control of pollutants from runoff is applied pursuant to Section 20912 and the authority resides in the State or other local agency."). Even more, in the 1987 amendments, Congress added Section 319, which "establishe[d] a national policy that programs for the control of nonpoint sources of pollution be developed." Section-by-Section Analysis of the Water Quality Act of 1987, reprinted in 1987 U.S.C.C.A.N. 5, 30. But Congress did *not* mention TMDLs in the "comprehensive" Section 319 framework. And if Congress intended the federalize land use regulation of nonpoint sources, it would have given the EPA authority to establish nonpoint source limits and required allocation information in TMDLs. But Congress did not. At best, the legislative history illuminates, again, Congress's intent to leave implementation of pollution controls to the states.

3. EPA's interpretation of Section 303(d) is arbitrary because its own regulation is internally inconsistent.

Finally, the EPA's own regulation does not support requiring allocations in TMDLs and is therefore arbitrary. 40 C.F.R. § 130.2 defines a "total maximum daily load" as the "sum" of individual pollutant source load allocations. "Sum," like "total," cannot be reasonably interpreted to mean individual allocations. Rather, this regulation reflects the statutory requirement that a TMDL be set at a "level" representing the total pollutant load permissible to maintain water

quality standards. Once again, the EPA may only regulate the "sum" or "total" pollutant level because only the states may establish how to maintain this permissible level.

Accordingly, the EPA's regulation asks *only* for a sum of pollutants. Yet, the EPA also demands that TMDLs include source point allocations. These requested allocations are unsupported by the CWA and contradict the plain meaning of "sum" within 40 C.F.R. § 130.2. Therefore, EPA's contention that the New Union TMDL required a showing of WLAs and LAs is arbitrary. And it is, thus, unreasonable for the EPA to require source load allocations in TMDLs.

V. Under *Chevron*, this Court should uphold the Chesaplain TMDL because it meets CWA § 303(d) requirements

The Chesaplain TMDL is a valid TMDL because it meets CWA § 303(d) requirements and the EPA reasonably interpreted the CWA. As a threshold matter, *Chevron* deference governs both challenges. Under *Chevron*, reviewing courts should defer to reasonable agency interpretations when Congress has not spoken directly to the issue. *Chevron*, 467 U.S. at 844. Congress need not explicitly leave a gap for the agency to fill. Instead, legislative delegation may be "implicit rather than explicit." *Id.* In such case, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* Here, Congress did not prescribe how to express TMDLs — it left that issue open for states and the EPA. In light of implicit legislative designation, the EPA acted within its regulatory authority. Therefore, this Court should affirm the lower court and hold that the Chesaplain TMDL satisfied the CWA requirements.

A. The EPA has the legal authority to approve and establish TMDLs expressed in annual terms

This Court should uphold the Chesaplain TMDL because the EPA approved it within its regulatory authority. The CWA does not prohibit the EPA from approving a TMDL expressed annual terms. To do so would create a scientifically absurd result by forcing the EPA to limit all pollutants with daily limits, even when a non-daily limit would better suit a particular pollutant. The EPA interpretation is reasonable because a rational connection links annual limits on phosphorous with water quality standards in Lake Chesaplain. Thus, the EPA's interpretation merits *Chevron*-deference.

1. The CWA left room for states and the EPA to decide whether to express a particular TMDL in annual terms.

The CWA does not prohibit states or the EPA from expressing a TMDL in annual terms. The CWA does not prescribe how states and the EPA should express TMDLs. Instead, the CWA merely requires that the EPA establish TMDLs:

> [A]t 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.
>
> 33 U.S.C. § 1313(d)(1)(C).

Accordingly, the CWA does not require TMDLs be set as a daily limit. Instead, it requires TMDLs be set at a "level necessary to implement the applicable water quality standards with seasonal variations." 33 U.S.C. § 1313(d)(1)(C). Filling in the gap left by the Congress, the EPA permits states to express TMDLs "in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). As the EPA explained upon establishing this interpretation, TMDLs "may be expressed in terms of an appropriate averaging period, such as weekly or monthly, as long as compliance with applicable [water quality standards] is assured." 50 Fed. Reg. at 1776/1.

2. This Court should not read the term "daily" to require that states and the EPA express TMDLs in daily terms—that would create scientifically absurd results.

CLW's interpretation creates an absurd result by forcing the EPA to establish daily limits pollutants better suited for non-daily limits. The Supreme Court has stressed that courts should avoid absurd results when interpreting statutes. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Pub. Citizen v. U.S. Dep' t of Just.*, 491 U.S. 440, 470 (1989) (observing that courts should not construe a statute to produce absurd consequences that Congress could not have intended). When statutory language would produce absurd results, the statute "is the proper subject of construction by the EPA and the courts." *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985).

If this Court confined "total maximum daily loads" to daily limits, the EPA could not effectively regulate pollutants. To effectively regulate, the EPA must express the TMDL in terms appropriate for the particular pollutant. The CWA applies to "hundreds of different pollutants in thousands of different waterbodies." *Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001); 33 U.S.C. § 1313(d)(1)(c). For certain pollutants, "effective regulation may best occur by some other periodic measure than a diurnal one." *Muszynski*, 268 F.3d at 99. For example, some pollutants only trigger harmful reactions during certain seasons or when accumulated in large quantities. *Id.* For these pollutants, a daily measure would be inappropriate. *Id.* Yet, CLW's interpretation would prohibit the EPA from approving a TMDL expressed in another temporal measure, even if scientific data established that a non-daily measure would better suit the waterbody or pollutant. Accordingly, this Court should not presume that "Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis." *Id.* at 98–99. To do so would create an absurd result that Congress could not have intended.

3. Under *Muszynski*, a "rational connection" exists between Lake Chesaplain's water quality standards and the annual limit on phosphorous.

An annual TMDL on phosphorous protects water quality standards. Under Chevron, the EPA need only examine relevant data and establish "a rational connection between the facts found and the choice made." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000). Here, the Record reflects excessive phosphorous levels caused eutrophication in Lake Chesaplain. Currently, phosphorous levels varied from 0.020 to 0.034 mg/l, exceeding the maximum level of 0.014 mg/l. Excessive phosphorous caused excessive algae growth, which in turn caused eutrophication. This created "objectionable odors," in addition to decreased water clarity and dissolved oxygen levels. New Union established an annual limit on phosphorous to prevent further eutrophication in Lake Chesaplain.

To achieve water quality standards, phosphorous requires an annual limit. Phosphorous does not immediately trigger eutrophication in waterbodies like Lake Chesaplain. Instead, lakes can tolerate varying amounts of phosphorous depending on the season of the year. *Muszynski*, 268 F.3d at 98. Moreover, phosphorous concentrations may "vary seasonally and annually." *Id.* at 99. The "seasonal interplay of temperatures, density, and wind," causes "very large short-term yearly variations" in phosphorous levels. *Id.* Finally, phosphorous that enters a waterbody may spur algae growth in another season. The optimal season for algae growth is May-October. *Id.* In Lake Chesaplain, "mats of algae form during the summer months. R. at 7. Accordingly, phosphorus is less likely to cause eutrophication during other times of years. Because phosphorous concentrations vary annually and seasonally, a rational connection exists between achieving water quality standards in Lake Chesaplain and the annual phosphorous limit.

Accordingly, this agency action, which "fills a gap" and "defines a term in a way that is reasonable in light of the legislature's revealed design," merits "controlling weight." *Chevron*, 467 U.S. at 844.

B. The EPA acted within its regulatory authority because a "rational connection" exists between the phased TMDL and water quality standards in Lake Chesaplain.

The EPA was within its regulatory authority to approve a phased percentage reduction in phosphorous loadings. First, Congress has directly not spoken to the precise question at issue. Per the above analysis, the CWA does not prescribe how states or the EPA should express TMDLs. Rather, the CWA solely requires that states set TMDLs at "a level necessary to implement water quality standards with seasonal variations." 33 U.S.C. 1313(d)(1)(C). In light of this statutory silence, this Court should defer to the EPA's interpretation unless arbitrary and capricious.

The EPA acted within its regulatory authority when it approved a phased percentage TMDL. In light of statutory silence, the agency need only establish "a rational connection between the facts found and the choice made." *Cellular Phone Taskforce*, 205 F.3d at 89. Here, there is a rational connection between Lake Chesaplain's water quality and the phased percentage TMDL. In Lake Chesaplain, measured phosphorous levels vary from 0.020 to 0.034 mg/l. While current levels exceed the maximum phosphorous level, the excess amount varies from 0.06 to 0.020 mg/l. Furthermore, non-point sources, exempted from the CWA, contribute a significant amount of pollution through non-discharging CAFOs and private septic systems. Currently, both facilities evade phosphorous discharge limits. In light of the lack of information

associated with the non-point sources, a rational connection exists between a phased TMDL and water quality standards.[1]

VI. The EPA did not act arbitrarily or capriciously by crediting anticipated BMP pollution reductions—applicable law does not require "reasonable assurances" of implementation.

EPA did not act arbitrarily or capriciously by approving the TMDL without first seeking reasonable assurances. A reviewing court may set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2)(A); *Chevron*, 467 U.S. at 844. This standard of review presumes the validity of agency action. It requires only that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). The reviewing court must not "substitute its judgment for that of the agency," and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

Judged under the above standards, the EPA did not act arbitrarily or capriciously by crediting anticipated BMP pollution reductions. Applicable law does not require the EPA to seek reasonable assurances that BMP will achieve reductions. Rather, both the CWA and binding regulations merely require information necessary to implement, rather than implementation itself.

[1] While non-binding, EPA Guidelines specifically contemplate use of a phased TMDL in this circumstance. EPA, Guidance for Water Quality-Based Decisions: The TMDL Process (1991) [hereinafter "1991 Guidelines"] ("An example of a phased TMDL could be a TMDL for phosphorus in a lake watershed where there are uncertain loadings from the major land uses and/or limited knowledge of in-lake process.")

EPA did not act arbitrarily or capriciously by crediting anticipated BMP pollution reductions without first seeking reasonable assurances. A reviewing court may set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2)(A); *Chevron*, 467 U.S. at 844. This standard of review presumes the validity of agency action. It requires only that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). The reviewing court must not "substitute its judgment for that of the agency," and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

Judged under the above standards, the EPA did not act arbitrarily or capriciously by crediting anticipated BMP pollution reductions. Applicable law does not require the EPA to seek reasonable assurances that BMP will achieve reductions. Rather, the CWA, binding regulations, and the Congress's intent to preserve federalism suggest EPA need not seek reasonable assurances.

A. The CWA does not require "reasonable assurances" of implementation—TMDLs function primarily as informational devices.

The EPA's decision is not arbitrary, capricious, or contrary to law. Rather, it accords with the language and structure of the CWA, which characterizes TMDLs as informational devices. Indeed, the CWA does not require implementation of Section 303 plans nor does it provide for their enforcement. For instance, in Sections 303(d)(1)(A)–(B), the CWA merely requires states to identify waterbodies with insufficient water controls. 33 U.S.C. §§ 1313(d)(1)(A)–(B). Then, in Section 303(d)(1)(C), the CWA requires states to identify, for each waterbody, the "level

necessary" to achieve water quality standards. *Id.* § 1313(d)(1)(C). This provision only requires identification, not implementation. In Section 303(d)(2), the CWA requires states to submit this information for EPA approval. *Id.* § 1313(d)(2). Finally, in Section 303(e), the CWA requires each state to have a "continuing planning process." *Id.* § 1313(e)(3). This provision gives some operational force to information provided by TMDL. The EPA may approve only if it will result in plans for adequate implementation. *Id.*

Accordingly, under the CWA, TMDLs need not implement loading reductions—they must merely result in implementation plans. TMDLs provide a link in an "implementation chain" between "federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality." *Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002). States may find implementation mechanisms in other processes under the CWA, state law, and federal and state regulations. *Am. Farm Bureau Fed'n v. United States*, 984 F. Supp. 2d 289, 297–98 (M.D. Pa. 2013), *aff'd* 792 F.3d 281, 300 (3d Cir. 2015). For example, states may implement point source controls through the NPDES permit process. 40 C.F.R. § 122.44(d)(1)(vii)(B). Through this intricate process, the CWA leaves to the states "the responsibility of developing plans to achieve water quality standards.[2] *Id.*

The Third Circuit in *American Farm* did not hold to the contrary. In *American Farm*, the Third Circuit upheld the EPA's decision to require "reasonable assurances" before approving a TMDL. *Am. Farm*, 792 F.3d at 300. The CWA did not plainly authorize the EPA to seek "reasonable assurances." *Id.* In light of statutory silence, the Third Circuit reasoned that the

[2] Other courts have similarly held that TMDLs are not self-implementing. *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216; *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–85 (9th Cir. 1994); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002)

CWA did not forbid the EPA from seeking reasonable assurances. *Id.* Then, after determining reasonable assurances were consistent with the CWA's purpose and structure, the Third Circuit held the EPA was within its regulatory authority to require reasonable assurances. *Id.*

This Court should not read *American Farm* as a requirement that the EPA must seek reasonable assurances before approving a TMDL. The CWA is silent on this question. In light of statutory silence, *American Farm* suggests the EPA is within its regulatory authority to seek reasonable assurances if it so chooses. Here, the EPA did not seek reasonable assurances from New Union. Instead, the EPA approved the Chesaplain TMDL without requiring reasonable assurances that the TMDL will achieve water quality standards. Because the CWA does not require the EPA to seek reasonable assurances, the EPA is well within regulatory authority not to seek them. Thus, it is not arbitrary, capricious, or contrary to law.

B. This Court should not afford deference to the EPA's 1991 Guidelines because they do not hold force of law.

Regulatory language does not require reasonable assurances that reduction will be achieved. Chevron deference applies only to an "agency's regulation containing a reasonable interpretation of an ambiguous statute." *Harris Cnty.*, 529 U.S. 576, 587 (2000) (citing *Chevron*, 842–44). By contrast, "interpretations contained in policy statements, agency manuals, and enforcement guidelines" lack the force of law and do not warrant *Chevron*-style deference. *Id.*; *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004). Sometimes, such interpretations may merit "some deference" to "the extent that those interpretations have the 'power to persuade.'" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Courts may defer to interpretive statements when they are longstanding and have been applied consistently.

Here, the EPA did not act arbitrarily or capriciously by approving the Chesaplain TMDL without reasonable assurances. As explained above, the CWA does not require reasonable

assurances. Likewise, the EPA's regulations on TMDLs do not require it to seek reasonable assurances before crediting BMPs. Rather, the regulatory language permits states to make wasteload allocations less stringent if BMPs "make more stringent load allocations practicable." 40 C.F.R 130.2(i). Accordingly, regulatory language only requires that BMPs exist. It does not require "reasonable assurances" that BMPs will achieve reductions. In light of this statutory silence, this Court should uphold the EPA's decision to promulgate the Chesaplain TMDL without first seeking reasonable assurances.

Furthermore, the EPA has not issued any binding regulations that interpret the CWA to require "reasonable assurances." Rather, the only such interpretation comes from a 1991 EPA Guideline. 1991 Guidelines. Yet, the 1991 Guidelines lack force of law, and thus do not warrant *Chevron*-style deference.[3] This Court should also not defer to the guidelines under *Skidmore* because they do not have "the power to persuade." The EPA did not intend to give the 1991 Guidelines force of law. Notably, it chose not to adopt the alleged-requirement of "reasonable assurances" into regulation, even the EPA though promulgated regulations on TMDLs in 2003. 40 C.F.R. § 130.2

Moreover, the EPA did not intend to give the 1991 Guidelines force of law. Rather, the EPA began the 1991 Guidelines by stating it did not intend them to hold "the power to persuade." On the first page, the EPA warns that "this document provides guidance only" and "does not establish legal rights or obligations." 1991 Guidelines, at 3. Furthermore, the EPA did not intend these guidelines to govern any cases arising under the CWA. The EPA established that "decisions in any particular case will be made applying the Clean Water Act and implementing

[3] *But see Maryland Dep't of the Env't v. Cnty. Comm'rs of Carroll Cnty.*, 214 A.3d 61, 101 (Md. Ct. App. 2019), *cert. denied sub nom. Cnty. Comm'rs of Carroll Cnty., Maryland* v. *Maryland Dep't of Env't*, 140 S. Ct. 1265 (2020)

regulations." *Id.* Thus, these forewarnings suggest the EPA did not intend to give these guidelines the force of law. Accordingly, the 1991 Guidelines do not merit *Skidmore* deference, and thus do not establish that the EPA must seek "reasonable assurances" before crediting BMPs.

C. If the EPA required reasonable assurances, it would contradict the CWA's clear division of state and federal power.

CLW's argument directly contradicts Congress's clear federalism concerns under the CWA. As explained Section II.A.3 of this analysis, the CWA preserves states authority regarding land use and water planning. *Bass*, 404 U.S. at 349 (citing 33 U.S.C. §§ 1251(b), 1370). Specifically, Congress reiterated that "[e]xcept as expressly provided in this chapter," nothing shall preclude or deny this state primacy. *Id.* § 1370. Accordingly, these provisions express clear congressional intent to prioritize states' rights to implement pollution in the CWA.

Here, CLW's argument contradicts the clear congressional intent in the CWA to leave implementation of pollutant controls to the states. Specifically, "the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature." *Oregon Nat. Desert*, 550 F.3d at 785. Thus, the "EPA lacks direct implementation or regulatory authority in the face of nonexistent or inadequate state implementation." Accordingly, CLW's argument requiring of "reasonable assurances" infringes upon this exclusive state right—wholly ignoring the clear congressional intent in the CWA and eroding the federal-state balance.

Accordingly, the EPA did not act arbitrarily or capriciously by crediting BMPs without first seeking reasonable assurances.

CONCLUSION

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

DATED this 22nd day of November, 2021