IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

CHESPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Union
(Consolidated cases nos. 66-CV-2020 and 73-CV-2020)
District Judge: Hon. Romulus N. Remus

BRIEF OF PLAINTIFF-APPELLANT-CROSS APPELLEE

Team 27

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JURISDICTIONAL STATEMENT

On January 14th, the State of New Union sued the United States Environmental Protection Agency ("EPA"). (*R. at 10*). On February 14th, Chesaplain Law Watch ("CLW") sued the EPA. (*R. at 10*). CLW, the State of New Union, and the EPA each filed a timely Notice of Appeal. (*R. at 2*). CLW, New Union, and EPA appealed the Order of the United States District Court for the District of New Union dated September 1st, 2021. (*R. at 2*). The district court asserted jurisdiction under the judicial review provisions of the Administrative Procedure Act, APA § 702 as well as federal jurisdiction under 28 U.S.C. § 1331. (*R. at 10*). EPA timely lodged the administrative record with the Court on July 1, 2020. the same date that the cases were consolidated. (*R. at 10*).

STATEMENT OF THE ISSUES

I. Under the ripeness doctrine, is the EPA's determination to reject New Union's TMDL proposal and implement its own ripe for judicial review?

II. Under *Chevron* deference, is the EPA interpretation of "total" an appropriate definition?

III. Under the CWA, does the EPA's definition of "daily" in TMDL violate §303(d)?

IV. Under EPA regulations, is the adoption of a credit for anticipated BMP pollution arbitrary and capricious or an abuse of discretion?

STATEMENT OF THE CASE

Prior to excessive pollution in the latter half of the 20th century, Lake Chesaplain ("Lake") was a prime location for lakefront vacation communities and recreational activities such as camping, fishing, boating, hiking, and the public beach. (*R. at 7*). Notably, the Lake's

"clear waters attracted recreational boaters and fishers from the entire mid-north region of the county, as well as supporting the [lake's] vacation communities." (*R. at 7*).

Regrettably, agricultural developments in the 1990's led to the construction of ten concentrated animal feeding operations ("CAFOs"), a slaughterhouse, and residential homes. (*R. at 7*). These developments, combined with the existing sewage treatment plant, caused large amounts of phosphorous-ridden excrement to be deposited in the Lake. (*R. at 7*). Consequently, phosphorus levels in the lake skyrocketed. (*R. at 7*). High levels of phosphorus caused rapid algae growth and a rapid decrease in the Lake's dissolved oxygen ("DO") levels, which in turn decreased the lake's fish population and rendered the waters unsuitable for public use. (*R. at 7*). As a result, the State of New Union ("New Union") suffered significant economic loss. (*R. at 7*). In an attempt to save the lake and ultimately, the community at-large, the Chesaplain Lake Chesaplain Study Commission ("the Chesaplain Commission") was established in 2008 to conduct scientific research and the Division of Fisheries and Environmental Control ("DOFEC") to adopt water quality criteria for the lake. (*R. at 8*). Following the Chesaplain Commission's extensive findings, which identified phosphorus as the source of the lake's depraved condition, DOFEC adopted water quality criteria for lake Chesaplain, a designated Class AA water, of 0.014 mg/l in 2014. (*R. at 8*). Finding that standard, along with "water quality criteria for DO, odors, and water clarity," to be violated, the DOFEC submitted Lake Chesaplain to the Environmental Protection Agency ("EPA") as an impaired water in 2014. (*R. at 8*). The Chesaplain Commission issued a supplemental report in 2016, which identified sources of phosphorus in the Lake in 2015 and "calculated the maximum phosphorus loadings consistent with achieving a 0.014 mg/l phosphorus standard [as 120 metric tons ("mt").]" (*R. at 8*).

Specifically, the Chesaplain Commission concluded the Sewage Treatment Plant and Slaughterhouse – both point sources – collectively contributed 61.9/180 mt of total phosphorus in the Lake. (*R. at 8*). Neither point source identified by the Chesaplain Commission is currently subject to phosphorus permit limits pursuant to EPA guidelines. (*R. at 9*). The Sewage Treatment Plant discharges directly into the Lake and is subject to a Clean Water Act ("CWA") point source permit. (*R. at 7*). The Sewage Treatment Plant's permit expired in November 2018 and "has not yet been reissued." (*R. at 10*). Similarly, the Slaughterhouse discharges directly into the New Union River, subject to a CWA National Pollutant Discharge Elimination System ("NPDES") permit. (*R. at 7*). The Slaughterhouse's permit expired in February 2019 and has not yet been reissued. (*R. at 10*).

Additionally, the Chesaplain Commission concluded manure spreading from Certified Animal Feeding Operations ("CAFOs"), other agricultural sources, and septic tank inputs--non-point sources--contributed 85.8/180 mt of total phosphorus in the Lake. (*R. at 9*). Despite substantial contributions to phosphorus levels in the Lake both directly and through groundwater flows and surface runoff, the CAFOs are labelled "non-discharging" under the EPA and thus are "exempt from permitting requirements" under the EPA. (*R. at 7, 9*). Similarly, private septic systems are "exempt from CWA permitting as discharges to groundwater rather than surface water." (*R. at 9*). However, CAFOs are subject to permits under a state statute "providing for New Union Agricultural Commission review and approval of site-specific nutrient management plans for the application of liquid manure waste to fields." (*R. at 7*). Finally, natural sources – neither point sources nor nonpoint sources – contributed 32.3/180 mt of phosphorus in the Lake. (*R. at 9*).

Unfortunately, the DOFEC neglected to include a total maximum daily load ("TMDL") for the Lake with its submission and, further, the EPA neglected to establish a TMDL. (*R. at 8*). Accordingly, Chesaplain Lake Watch threatened to sue both the State and EPA for failure to establish a TMDL. (*R. at 8*). In response, DOFEC commenced the rulemaking process (*R. at 8*). In 2017, DOFEC "publicly noticed a proposal to implement the TMDL." (*R. at 9*). The DOFEC's proposed TMDL consisted of a phased reduction of phosphorus over five years through regulation of both point and nonpoint sources. (*R. at 9*). Under the DOFEC's original TMDL, point sources would be reduced by permit-limits and nonpoint sources would be reduced through Best Management Practices programs ("BMPs"). (*R. at 9*).

While the Chesplain Commission's scientific findings remained unchallenged, the DOFEC's proposed TMDL proved highly controversial. (*R. at 9*). Residential homeowners objected to "expensive septic tank maintenance," point source emitters objected to "expensive phosphorus treatment system," and Chesaplain Lake Watch objected to requirements on nonpoint source reduction and claimed that "New Union lacked the statutory authority to impose and enforce such BMPs against agricultural sources." (*R. at 9, 10*). Finally, CAFO's "objected to the possible imposition of BMPs on their operations and argued to DOFEC that EPA lacked the statutory authority to require implementation of loading limits against nonpoint sources." (*R. at 10*).

In July of 2019, the DOFEC adopted a TMDL consistent with the CAFO's position, which EPA immediately rejected. (*R. at 10*). Then, following notice and comment, the EPA adopted DOFEC's initial TMDL proposal, The "Chesaplain Watershed Implementation Plan" ("CWIP"), "consisting of a 35% reduction of annual phosphorus discharges by both point point and nonpoint sources phased in over five years, to be implemented through permit controls on

point sources and BMP requirements for nonpoint sources." (*R. at 10*). The CWIP was silent as to enforcement of BMPs and included only scientific research and public comments initially before DOFEC. (*R. at 10*).

SUMMARY OF ARGUMENT

First, the Court should find that the EPA's determination to reject New Unions proposed TMDL and implement its own is right for judicial review because the Court would not benefit from further factual development, delayed review would cause hardship to the regulated parties, and judicial intervention would not inappropriately interfere with administrative action. No benefit would be derived from further factual findings because the factual record is complete. Delayed review would cause hardship to the regulated parties because they will suffer a direct legal harm pursuant to the zone of interest test as a result of the EPA's action. Judicial intervention would not inappropriately interfere with administrative action because the EPA's adoption of a TMDL constitutes final agency action.

Second, the Court should find that the EPA's decision to reject New Union's TMDL interpretation in favor of its own is appropriate because *Chevron* deference applies, and the EPA's interpretation was permissible. *Chevron* applies because the EPA administers the CWA and the word "total" is not clearly defined by the statute. The EPA's interpretation of TMDL is permissible because it is not arbitrary and capricious, and it is consistent with the Congressional content of the CWA.

Third, the Court should find that the EPA interpretation of "daily" in TMDL violates CWA section 303(d). *Chevron* deference should not apply to this agency interpretation because "daily" is unambiguous as used in the CWA. Furthermore, if a court were to give *Chevron* deference, it should reject the agency's interpretation as arbitrary and capricious because it is

inconsistent with the Congressional intent of the CWA, and the EPA's interpretation would create absurdity.

Lastly, the Court should find that the EPA's decision to provide credits for anticipated BMP reductions is arbitrary and capricious because it is inexplicably inconsistent with prior agency policy and the EPA did not provide adequate rationale for its decision. This action constitutes an unexplained departure from previous policy because the plain meaning of 40 CFR § 130.2(i). Furthermore, the EPA did not provide adequate rationale for its decision because it did not articulate its findings and it failed to demonstrate that its decision would result in good policy.

ARGUMENT

I. THE COURT SHOULD FIND THAT THE EPA'S DETERMINATION TO REJECT THE NEW UNION CHESAPLAIN WATERSHED PHOSPHOROUS TMDL AND ADOPT ITS OWN IS RIPE FOR JUDICIAL REVIEW.

The ripeness doctrine serves the important purpose of permitting courts to review administrative policies where the adjudication is not premature and "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967*), abrogated by Califano v. Sanders*, 430 U.S. 99 (1977). Thus, to protect parties from hardship, courts apply "injunctive and declaratory judgment remedies . . . to administrative determinations" that are "ripe" for judicial review. *Id*. at 148. An agency's decision is ripe for judicial review where: (1) courts would not "benefit from further factual development of the issues presented;" (2) "delayed review would cause hardship to the plaintiffs;" and (3) "judicial intervention would [not] inappropriately interfere with further administrative action." *Ohio Forestry Ass'n., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Fitness and hardship are weighed on a sliding scale, but each element must be satisfied, at least

minimally, for a claim to be ripe. *City of Kennett, Missouri v. E.P.A.,* 887 F.3d 424, 433 (2018). Finally, in evaluating ripeness, courts consider the current state of affairs and whether the situation now justifies review. *Id*.; *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974).

A. The Court should find that no benefit would be derived from further factual development because the factual record is wholly complete.

Citing to *Arcadia*, the EPA erroneously alleges that this action is not justiciable under section 704 of the APA because plaintiffs did not exhaust administrative remedies. This logic fails for two reasons. First, under *McCarthy*, where an action involves an agency's bias, exhaustion of administrative remedies is not required for a claim to be ripe for review. Moreover, the authorities cited by the EPA are distinguishable from this case because unlike *Arcadia*, where impositions of TMDLs did not "require immediate changes in [p]laintiffs' conduct" due to a baseline monitoring period, here, as discussed below, implementation of any TMDL would immediately impose affirmative legal duties on plaintiffs. Accordingly, plaintiffs' claims are ripe for judicial review because the record is wholly complete and delayed judicial review would cause severe hardship to plaintiffs. *See Abbott Laboratories*, 387 U.S. at 149. Fitness primarily considers whether a case would benefit from further factual development. *Kennett*, 887 F.3d at 433. To determine whether an issue is fit for review, courts look to the "administrative record supporting the EPA's decision." *Id*. at 433.

An action is reviewable under section 704 of the APA where legal remedies have been exhausted. 5 U.S.C. §704 In evaluating the ripeness of the EPA's approval of a TMDL, the Eighth Circuit in *Kennett* determined that the fitness prong was met where the parties did not dispute the means of implementation of the TMDL and further, "[t]he upcoming permit must implement the TMDL by imposing limits on discharge consistency with the TMDL's wasteload

allocations for the City." *Id*. at 433. Accordingly, the court concluded that further factual development on the record would not prejudice the regarding the agency's application of the [TMDL]'" would not affect the outcome of the court's decision. *Id*.

Here, parties do not dispute the scientific and factual findings of CLW or the proposed means of implementation advanced by each party. Further, all scientific findings and public comments are included in the record. Here, New Union created the Chesaplain Commission in 2008. The Chesaplain Commission's first report, issued in 2012, attributed the Lake's depraved condition to excessive amounts of phosphorus ranging .006-.020 mg/l above the maximum phosphorus levels for a healthy ecosystem. These findings were submitted to the EPA in 2014, with subsequent 2016 Supplemental Report enumerating all known sources of point, nonpoint, and natural sources that contributed to existing loadings in 2015. Plaintiffs here presented a thorough record, supported by 11 years of thorough research and calculation. Moreover, as discussed below, the proposal was presented to the public and subject to notice and comment. Accordingly, all facts necessary to adjudicate this case are developed and included in the record and thus the court would not benefit from further factual development of the record.

B. <u>The Court should find that delayed review will cause severe hardship for the regulated parties because the EPA's action constitutes a direct legal harm under the zone of interest test.</u>

The EPA incorrectly analyzes the element of hardship in alleging that plaintiffs will not suffer hardship where permits must be issued to comply with the implementation of the TMDL, and further argues under *Heckler v. Chaney* that an agency's failure to act does not constitute legal harm. On the contrary, pursuant to section 702 of the APA, an action falls within the zone of interest where plaintiffs stand to suffer legal harm or incur legal rights and obligations. 5 U.S.C. § 702. As discussed below, New Union's choices following implementation of a TMDL are to either: (1) immediately issue and comply with permits and BMPs, or (2) fail to issue and

fail to comply with permit regulations and BMPs imposed by TMDL. In either instance, plaintiffs face a choice between incurring an affirmative legal action or suffering an adverse legal consequence under CWA section 502(a)(2) following failure to act affirmatively. Consequently, here, it is clear that plaintiffs collectively stand to either suffer legal harm under section 702 of the APA and thus delayed review would severely hardship plaintiffs.

In evaluating hardship, courts consider the harm parties would suffer in the absence of judicial review, such as financial loss and induced behaviors. 5 U.S.C. § 702; *Kennett*, 887 F.3d at 424. The element of hardship is met where an agency decision inflicts legal or practical harm upon the regulated party's current or future interests. *Sierra Club* 523 U.S. at 733-34. Adverse legal effects are present where an agency's decision creates "'legal rights or obligations'" by a party's acts or omissions. *Id*.; *United States v. Los Angeles & Salt Lake R. Co*., 273 U.S. 299, 309-10 (1927). Similarly, adverse practical effects exist where harm is imminent and certain, requiring the plaintiff to "bring its challenge [immediately] in order to get relief." *Id*. Finally, the Supreme Court has consistently found hardship where an agency decision could force plaintiffs "to modify [their] current behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions." *Id*. at 734.

TMDLs are considered a cornerstone for pollution-reduction plans that create enforceable rights and obligations. *American Farm Bureau Federation v. U.S. E.P.A*., 792 F.3d 281, 291 (2015). Accordingly, in *Kennett*, the Eighth Circuit held that the EPA's approval of a TMDL in light of the city's expired NPDES permits was ripe for review because the city would face hardship implementing a plan based on TMDL's wasteload allocations. *Kennett* 887 F.3d at 433. In rejecting the EPA's proposal to delay review, premised on speculative future changes that

could arise before or during the city's implementation of the TMDL, the Kennett court asserted that "the expiration date of the City's permit has passed, [the State] and the EPA are developing a new permit, and the DO criterion has not changed." *Id*. Consequently, the Eighth Circuit concluded that "[t]he chance in change in the TMDL before implementation does not warrant delay." *Id*.

Here, as in *Kennett*, New Union would suffer adverse effects under section 702 of the APA because implementation of any TMDL would immediately impose affirmative duties on the state. First, as in *Kennett*, the DO criterion of lake Chesaplain has not changed since initiating this lawsuit. Additionally, like the plaintiffs in *Kennett*, who were responsible for drafting, issuing, and implementing expired permits, New Union and CLW would similarly be responsible for drafting, issuing, and complying with expired NPDES permits and BMP programs. Section 402(b) of the CWA charges States with undertaking permitting systems. 33 U.S.C. § 1342(b) Provided the court interprets "total" in TMDL to include both wasteload and load allocations, New Union will be responsible not only for issuing NPDES permits for all point source emitting facilities currently operating under expired permits, but also for financing and implementing proposed BMP programs to achieve projected nonpoint source reductions. Even if the court construes "total" in TMDL to include only wasteload allocations for point source allocations, New Union would be responsible for promulgating permits and regulations because neither the point sources in the Chesaplain Watershed have a permit limiting phosphorous, because the EPA provides relevant technology-based effluent limitations. Furthermore, failure to comply with either NPDES permit requirements or implementation of BMP programs would be a direct violation of a regulation imposed by a federal agency, the EPA. Thus, like the *Kennett* court, this court should determine that delayed review would cause hardship to Plaintiffs.

C. The Court should find that judicial intervention would not interfere with further administrative action because the EPA's approval of an implementation plan constitutes final agency action.

Relying substantially on *Bravos*, the EPA inaccurately asserts that approval of an implementation plan does not constitute a final agency action pursuant to section 704 of the APA because the issuance of state permits is pending. On the contrary, the Supreme Court rejected this argument in its unanimous decision *U.S. Army Corps of Engineers v. Hawkes Co.,* providing:

> Parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." And the permitting process is not only costly and lengthy, but also irrelevant to the finality of the approved JD and its suitability for judicial review. Furthermore, because the Clean Water Act makes no reference to standalone jurisdictional determinations, there is little basis for inferring anything from it concerning their reviewability. Given "the APA's presumption of reviewability for all final agency action," . . . "[t]he mere fact" that permitting decisions are reviewable is insufficient to imply "exclusion as to other[ ]" agency actions, such as approved JDs.

U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1810–11 (2016) (*internal citations omitted*). Accordingly, the EPA's approval or denial of a TMDL pursuant to section 1313(d) of the CWA is a prime example of final agency action that courts are charged with reviewing under section 704 of the APA. 5 U.S.C. § 704; *see also Army Corps of Engineers*, 136 S. Ct. 1807 (2016).

An agency action is final under section 704 of the APA upon satisfaction of the following two conditions: "'First, the action must mark the "consummation" of the agency's decision-making process-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow.'" *Friends of Wild Swan v. U.S. Env't Prot. Agency*, 74 F. App'x 718, 720

(9th Cir. 2003) (quoting *Bennett v. Spear*, 520 U.S. 154 (1997)). Consequently, guidance documents are not binding and thus are not reviewable by courts. *Assn. of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015). Notably, agency decisions that the agency has power over the state generally are not revisited and thus constitute a final agency action. U.S. Army Corps of Engineers.

Here, the TMDL adopted by the EPA is not a guidance document and thus is binding and reviewable by courts pursuant to section 704 of the APA. Moreover, the Ninth Circuit in *Friends of Wild Swan* concluded that the *Bennett* factors were "easily met" in an action brought under section 1313 of the CWA where "the district court found that the [EPA] violated the [APA] and [CWA] by arbitrarily and capriciously approving Montana's 1998 list of [WQLs] and corresponding [TMDLs] submitted to EPA pursuant CWA § 303(d)." *Friends of Wild Swan*, 74 F. App'x at 720. In so concluding, the court asserted that the EPA's reasons and "basis for approval" of TMDLs was clear, legal consequences would flow from the EPA's decision under section 1313 because "the TMDLs must be incorporated into the [s]tate's continuing planning process," and, finally, "[t]he approval of the list [and TMDLs] sets parameters for future licenses, which must comply with TMDLs." *Id*. at 721. As such, plaintiff's action was reviewable. *Id*. at 720.

Similarly, here, the court is tasked with reviewing the EPA's adoption and implementation of TMDLs, the EPA's possible violation of the APA, and the validity of the EPA's interpretation of the CWA. The TMDL adopted by the EPA, the DOFEC's original TMDL proposal, was subject to public notice and comment and further was supported by extensive research conducted and documented by CLW. Moreover, the CWIP ultimately adopted by the EPA clearly creates legal rights and obligations in the parties because it requires permits

for point sources and BMP requirements for nonpoint sources. As discussed above, the means of implementing CWIP require State issuance of expired permits and modification of existing permits, all of which impose both affirmative duties and expenses on plaintiffs. Accordingly, as in *Friends of Wild Swan*, here, the requirements of APA section 704 are "easily met" in plaintiff's CWA section 1313 action because the EPA's TMDL adoption was predicated on extensive research, notice, and comment, and would undoubtedly impose affirmative costs and duties on plaintiffs.

Therefore, this action is ripe for review because: (1) the court would derive no benefit from further factual development of the issues presented and delayed review would cause hardship to the plaintiffs, and (2) judicial intervention would not inappropriately interfere with further administrative action because the EPA's approval of an implementation plan constitutes a final agency action.

II. THE COURT SHOULD FIND THAT THE EPA'S INTERPRETATION OF TOTAL MAXIMUM DAILY LOAD IS APPROPRIATE BECAUSE CHEVRON DEFERENCE APPLIES AND THE EPA CONSTRUCTION IS PERMISSIBLE.

Court apply *Chevron* deference to an agency interpretation of a statute which it administers. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). Here, Chevron applies because the EPA historically has authority to administer the CWA and adopt regulations pursuant to the statute's purpose. 40 C.F.R 103.21(i). Moreover, section 1361(a), provides, "The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act [33 USCS §§ 1251 et seq.]. Accordingly, this provision authorizes the EPA to carry out and create regulations that further support the Clean Water Act. 33 U.S.C. § 1361(a). Therefore, in reviewing the regulations set forth by the EPA, Chevron deference is required.

First, a court should consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. If Congress has spoken directly on the issues, then the "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. However, if Congress has not directly spoken to the precise question at issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. An agency's construction of a statutory scheme is permissible and controls unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844. This principle of deference is consistently followed by courts whenever decisions as to the meaning or reach of a statute have involved reconciling conflicting policies. *Id*. If the agency's interpretation represents a reasonable accommodation of conflicting policies, this Court should not distribute it "unless it appears from the state or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. There are different ways to interpret statutory construction, such as a direct review of the text and structure of the statute, the legislative history, and prior agency practices and authority. *Id*. at 844.

A. <u>The Court should find that "total" is ambiguous as it is used in TMDL because it is not defined by CWA 303(d) and a narrower definition of the term "total" would defeat the purpose of the CWA.</u>

New Union erroneously contends that the statute is unambiguous and thus *Chevron* does not apply. In New Union's view, interpreting the term "total" in section 303(d) to include detailed specific allocations to individual point sources and nonpoint sources is contrary to both the structure of the CWA and the plain meaning of the term "total." As discussed below, this interpretation of the term "total" is incorrect in light of congressional intent and the stated purposes of the CWA. First, when the statute states an explicit policy, it should be considered with high deference. *See generally TVA vs. Hill*, 437 U.S. 153. *Hill* shows that "[Section 7] substantially [amplifies] the obligation of [federal agencies] to take steps within their power to

carry out the purposes of this act," meaning that if there is an obligation to carry out a particular policy in the statue, the agency will use that policy to interpret the statute to the best of their ability. *Id*. The statue explicitly speaks to the congressional intent, giving more deference to the legislative history, more so than a plain meaning interpretation. *Id*.

Here, The Clean Water Act seeks to manage all pollution, with the ultimate goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 USCS § 1251. Pollution and pollutants originate not only from point sources, but also from nonpoint sources. Accordingly, point and nonpoint sources, or the waste load allocations (WLAs) or load allocations (LAs), should be included in the Act's definition of the term "total." Where an Act's goal is to prevent all forms of pollution--even under a TMDL--it follows that some form of pollution to a certain level is acceptable. This was further upheld in *Pronsolino*, where the interpretation that nonpoint sources of polluted runoff should be addressed along with point sources to which they contribute to water quality impairment. *See generally Pronsolino v. Marcus*, 91 F. Supp.2d 1337 (N.D. Cal 2000).

Second, section 303(d) is silent as to whether the term "total" refers to the total amount of point sources or the total amount of nonpoint sources. Additionally, Congress has never spoken to the issue on what "total" means in the context of the Clean Water Act, particularly regarding "total maximum daily load" ("TMDL"). Thus, the term "total" in the CWA is ambiguous. Where a statute is silent on a term or that term is ambiguous, courts first look to the dictionary to ascertain the plain meaning of the term. *E.g., MCI Telecomms. Corp. v. AT&T Co.,* 512 U.S. 218, 227-29 (1994). The dictionary defines "total" as "comprising the whole number or amount." Total, New Oxford American Dictionary. Similarly, Black's Law dictionary defines "total" as "Whole; not divided; full; complete." Total, Black's Law dictionary, 11th edition. Turning to the

text of the Clean Water Act, a "total maximum daily load" stands for the calculation of the maximum amount of a pollutant that a waterbody can accept and still meet the state's water quality standards for public health and ecosystems. 33 U.S.C. 1313(d). Thus, in applying the term "total" in TMDL, the load must account for the whole amount of pollution in the waters.

Admitting to a construction that doesn't require the "total" to include a specific component of the total would defeat the purpose of what total means in total maximum daily load. If total was defined in this way, it would go against 303(d)(1)(C) which states "for those pollutants which the administrator identifies under section 1314(a)(2) for this title as suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C) The purpose of this section is the identification of pollutants suitable for maximum daily load measurements correlated with the achievement of water quality objectives. Achieving water quality objectives involves incorporating non-point sources. *See generally Pronsolino*, 91 F. Supp.2d. Therefore, the failure to account for nonpoint sources for water quality objectives would defeat the purpose of the term "total" as used in TMDL.

Finally, if "total" had been intended to exclude non-point sources, Congress would have clarified this further in the statute. Based on the broad construction above with the Clean Water Act aiming to reduce nonpoint source pollution, it would make sense that this provision would include waste load allocations and load allocations for non-point sources, considering that non-point source pollution is a significant source of pollution in the waters of the United States. Therefore, the statute is ambiguous as to the meaning of whether total should include wasteload and load allocations.

B. <u>The Court should find that the EPA interpretation of TMDL is not arbitrary and capricious because it is consistent with Congressional intent and CWA 303(d) is not merely a listing requirement.</u>

New Union erroneously asserts that the EPA regulation is arbitrary and capricious because under section 319 of the CWA, New Union has the authority to set its own state implementation plans and that development of these plans should be left to the states for non-point sources. This argument fails because as an administrative agency, the EPA has the authority to adopt its own regulations under the Clean Water Act so long as it does not confuse the purposes of the statute and, further, section 319 is not an excuse for going against a 303(d) listing.

Courts have interpreted the CWA as giving the EPA authority to adopt rules "as broad as necessary" to carry out its Clean Water Act responsibilities. *See generally Am. Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 931 (C.D. Cal. 1978). The court in *American Petroleum Institute* reinforces certain powers of the EPA, summarizing the principle in that "the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated." *Id*. In general, this means that due to the confusing nature of the congressional mandates set forth under the Clean Water Act, the EPA is given authority to clarify complex terms – as long as it does not further confuse the purposes of the statute. *See generally Whitman v. Am. Trucking Associations,* 531 U.S. 457 (2001).

The Clean Water Act defines pollutants under CWA 502(6) without reference to whether it comes from a point source or a non-point source. 33 U.S.C. § 1362(6). There is at least one provision where the CWA references pollutants to non-point sources. *Id*. at § 1329. However, it was never clarified whether "pollutants" in 303(d) refer to point or nonpoint sources. *Id*. at § 1313(d). Pollution is defined as "man-made" or "man-induced." *Id*. at § 1362(19). Congress would not have chosen this interpretation if it did not intend to apply to a broader source of

pollution, which is what 303(d), seeks to achieve, making it a permissible construction that WLAs and LAs should be incorporated under total in total maximum daily load. If Congress wanted to clarify that this only applies to point sources, they would not have focused on pollutants and pollution, it would have used the term, point source pollution and not nonpoint source pollution.

Furthermore, as discussed above, the EPA can clarify this issue through its regulations to give a permissible construction of the statute as Congress has not clarified the scope of the term "total." Moreover, the EPA is clarifying what the Act means with its best interpretation and is exercising its authority narrowly to address whether both point and nonpoint sources should be a part of 303(d) as it was never specified in this part of the statute. Therefore, EPA can clarify this section that would allow for a permissible construction.

Next, the purpose of submitting the TMDL is not just for information gathering purposes, it is to also determine the maximum amount a pollutant can be discharged and identify allowable loads from contributing sources, all of which relates to water quality impairments. *Id*. at § 1313(d). The TMDL must show a pollutant source analysis, load allocations, how targets are met, and a margin of safety. *Id*. The 303(d) listing and provision of its consequences serve valuable environmental objectives, set forth in the CWA, even if it appears that the TMDL itself may not cure the cause of a water quality impairment. *See generally Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210 (D.D.C. 2011). While 303(d) appears at first glance to be a list, TMDLs provide crucial information for federal, state, and local actors in furtherance of cooperative efforts to improve water quality as envisioned by the CWA. *Id*. at 216-17. To the extent that TMDLs guide the states' implementation processes, it is essential that the allocations contained therein be reasonably calculated to achieve those goals. This point was recognized by

the court in *Anacostia*, which stated that WLAs and LAs can be "developed at the stage when both the State and the [EPA] are evaluating the health of an entire water body — i.e., when developing the TMDL, because the designers of the TMDL can more easily take into account all point sources and attempt to divvy up acceptable pollution levels among them." *Id*. at 250.

Furthermore, if states have full authority over setting nonpoint sources and ignore the significance of these nonpoint sources, then states can take the approach of being as fanciful as one wishes in their waste load and load allocations, which would give unlimited authority to the states, which was never meant to be a part of the CWA. Therefore, reading the Clean Water Act in such a way would give free reign to states in determining to what extent non-point sources should be considered and would defeat the purpose of the statute and its overarching goals, while at the same time respecting the concepts of federalism and comity.

Finally, the EPA's interpretation of the regulation is permissible within the context of the broad goals of the CWA. Congress would not have tolerated defining the scope of individual TMDLs in a way that would address unified water quality problems in a divided fashion. This is especially true if the approach delayed addressing those problems or, even worse, ignored components altogether, such as the combined, synergistic effects of all pollutants and pollutant sources. The necessarily holistic approach to pollution control suggests that a TMDL should be as broad as possible and should include both the total wasteload and load allocations for non-point sources. Therefore, defining "total" in total maximum daily load to include both point and nonpoint sources would be a permissible construction of the statute thus rendering the EPA's interpretation of the total maximum daily load in the regulation of including both waste load and load allocations sound.

III. THE COURT SHOULD FIND THAT THE EPA'S ADOPTION OF A TMDL BASED ON PHASED ANNUAL POLLUTION LOADING REDUCTIONS VIOLATES CWA §303(d).

Once again, Chevron applies to the EPA's interpretation of the word "daily" in CWA section 303(d) because the EPA is the administrative agency that has authority over the CWA. *Chevron*, 467 U.S. 837, 842-43 (1984). Under Chevron an agency's interpretation only receives deference when Congress has not spoken directly to the issue, such that the statute is unambiguous. *Id*. Moreover, an agency's construction of an ambiguous statute from which Congressional intent cannot be discerned, the interpretation is not binding on courts if it is arbitrary, capricious, or contrary to the statute. *Id*. at 843.

A. The Court should find the term "daily" is unambiguous as used in TMDL because it has a readily discernible plain meaning.

Lake Chesaplain shows that this TMDL is framed as a phased percentage reduction in annual loading, rather than a fixed daily limit on total loads that are necessary to provide for the achievement of water quality standards. Congress meant daily when it said daily. In referring to Chevron Step one, it shows at the outset that the TMDL should not be expressed in annual terms rather than in daily terms. Section 303(d)'s text on "total maximum daily load" reads that"

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section [304(a)(2)] of this title as suitable for such calculation. Such measures shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

33 U.S. C. § 1313(d)(1)(C)

In Black's Law dictionary, "daily" means "every day; every day in the week; every day in the week except one." Here, the plain meaning of the text shows that "daily" is an

unambiguous term. The dictionary definition does not admit to a construction that would incorporate daily, weekly, monthly, or annually. In conjunction with the text of the statute and the dictionary definition, it is shown that construing the text beyond daily to incorporate monthly or annual loads would defeat the purpose of the term seasonal variation. Here an annual limit is not a daily limit in this context, and an annual limit does not allow for seasonal variation.

Case law further supports this point. For example, in *Friends of the Earth*, the court held that § 303(d) unambiguously requires "daily" loads, and therefore the EPA does not have discretion to approve TMDLs based solely on seasonal or annual load. *Friends of the Earth Inc. v Environmental Protection Agency*, 446 F.3d 140, 146 (D.C. Cir. 2006). If Congress wanted to incorporate seasonal or annual loads, they could have authorized this by stating "maximum daily" season or annual loads. Alternatively, Congress could have left a gap by stating "total maximum load."

The EPA will state that "daily" needs to have a broad range of meanings because some pollutants would not be well suited to daily load regulation and that certain pollutants would affect a body of water over a longer period of time. In this case, they are stating that the adoption of a phased annual TMDL would not violate 303(d) because it would be reasonable construction in achieving the management of those pollutants. The EPA, however, cannot avoid "Congressional intent clearly expressed in the text by asserting that its approach would be a better policy." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Therefore, because the EPA would be attempting to implement its own best definition against the clear meaning of the word daily, they would defeat Congressional intent.

B. <u>The Court should find that the EPA interpretation of "daily" is arbitrary and capricious because it is contrary to the purpose of the CWA.</u>

The CWA requires the EPA to determine a TMDL at the level necessary to achieve the proper water quality standards. 33 U.S.C. § 1313(d)(1)(A). To establish this TMDL, the EPA must take into consideration the severity of the pollution and the designated uses of the water source. *Id*. A circuit split exists as to whether "daily" in TMDL may be interpreted to mean a timeframe other than daily. The D.C. Circuit has barred the EPA from adopting a different interpretation because the statute itself contemplate for a "daily" total. *Friends of Earth, Inc. v. E.P.A.,* 446 F.3d 140, 146 (C.A.D.C., 2006). Conversely, Second Circuit held that EPA need only provide numerical standards for other periods of time to satisfy the statutory requirement of a TMDL determination. *Nat. Resources Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

IV. THE COURT SHOULD FIND THE EPA'S ADOPTION OF A CREDIT FOR ANTICIPATED BMP POLLUTION REDUCTIONS TO BE ARBITRARY AND CAPRICIOUS BECAUSE THERE IS NO ASSURANCE OF BMP IMPLEMENTATION.

When reviewing an agency's decision to implement a certain policy, a court must set aside any agency action determined to be arbitrary and capricious, an abuse of discretion, or contrary to the law. 5 U.S.C. § 706(2)(A). Generally, agency action is arbitrary and capricious when it inexplicable departs from previous agency practices. *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). The narrow standard of arbitrary and capricious requires courts to consider only whether the agency examined the relevant data and articulated a satisfactory explanation, including a rational connection between the facts and the agency's decision. *Dept. of Com. v. New York,* 139 S. Ct. 2551, 2569 (2019). A court may not substitute its own judgment when agency action is based on rational consideration of the relevant factors; however, such action may be arbitrary and capricious if it is not supported by an adequate consideration. *Motor*

Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). Furthermore, any agency decision must be supported by an explanation of why the decision is a good policy to survive judicial review. *F.C.C. v. Fox TV Stations, Inc.,* 556 U.S. 502, 515 (2009).

A. The Court should find the EPA adoption of a credit for anticipated BMP reductions is arbitrary and capricious because it constitutes an unexplained inconsistency with prior agency regulations.

An agency has broad authority to change its position, but it must demonstrate that it is cognizant of existing policies and explain its reason for the change; therefore, an unexplained inconsistency is unlawful exercise of discretion. *Encino Motorcars*, 136 S.Ct. at 2125-26. To determine the meaning of an agency's regulations, a court should only defer to the agency's interpretation if the regulation is genuinely ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). A court should only defer to an agency's interpretation of its own regulations after the regulation is determined to be genuinely ambiguous. *Id*. at 2415. To determine that a regulation is genuinely ambiguous, a court must exhaust all standard tools of construction. *Id*. at 2414. Any regulation that is not genuinely ambiguous must be given its plain meaning as required by the text. *Id*. at 2415.Even if a regulation is genuinely ambiguous, court should not give weight to an agency's interpretation of its own regulation if such interpretation is plainly erroneous or contrary to the regulation. *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 155 (2012); *see also Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). While an agency may not contradict its valid regulations, an inconsistency between the agency's position at the early stages of consideration and final action is not sufficient to show that the agency acted arbitrarily and capriciously. *Natl. Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007).

A regulation is only considered genuinely ambiguous if it remains ambiguous even after exhausting all standard tools of construction. *Kisor*, at 2414. For example, a regulation will not be held as genuinely ambiguous if the court has not made a conscientious effort to apply

common interpretive canons such as text, structure, history, and purpose. *Id*. at 2423-24. The Court in *Kisor* held that it was improper to give deference to the Board of Veterans' Appeals' interpretation before the regulation was found to be genuinely ambiguous. *Id*. at 2424. It concluded that if a regulation is not genuinely ambiguous, there is no need for deference, so courts should apply the plain meaning of the regulation. *Id*. at 2415. The court also recognized that it is not always appropriate to afford deference, even when the regulation is ambiguous, if the interpretation is not one that Congress would intend to receive deference. *Id*. at 2424. If the regulation is genuinely ambiguous, a court may still consider the agency's interpretation, but it should reject any interpretation that is plainly erroneous or contrary to the regulation. *Christopher*, 567 U.S. at 155; *see also Seminole Rock*, 325 U.S. at 414.

An agency may not take action that is inexplicably inconsistent with its prior policies; however, mere inconsistency between the agency's position at the earlier stages of consideration and final action is insufficient set aside such action as arbitrary and capricious. *Encino Motorcars*, 136 S.Ct. at 2126; *Defs. of Wildlife*, 551 U.S. at 658-59. For example, agency action will not be found arbitrary and capricious simply because the agency changed its mind and adopted a different position than it first considered. *Defs. of Wildlife*, 551 U.S. at 658-59. In *Defenders of Wildlife*, the Court held that an EPA policy was not arbitrary and capricious when it was inconsistent with the position the agency had first considered. *Id*. The Court reasoned that only final agency action was reviewable; therefore, an agency overruling of its own non-binding determination does not per se render the action arbitrary and capricious. *Id*. at 659.

The current case is similar to *Kisor* and distinguishable from *Defenders of Wildlife*. This case is comparable to *Kisor* because the lower court in both cases improperly gave deference to an agency interpretation of its own regulations. In *Kisor*, the court failed to consider standard

canons of construction before determining that the regulation was genuinely ambiguous. Similarly, the trial court in this case did not consider any common interpretive canons before deferring to the EPA's interpretation of 40 C.F.R. § 130.2(i). The court in *Kisor* held that it was improper to defer to the Board of Veterans' Appeals' interpretation before the regulation was found genuinely ambiguous through exhaustion of such canonical considerations. This court should similarly find that the EPA's interpretation of 40 C.F.R. § 130.2(i) should not receive deference because the lower court did not exhaust standard canons of interpretation to determine that the regulation was genuinely ambiguous.

The present case is also distinguishable from *Defenders of Wildlife* because the EPA's action here is inconsistent with prior binding regulations, not just agency guidance documents. In *Defenders of Wildlife*, the final agency action was only challenged as inconsistent with a preliminary determination of the agency before promulgation of binding regulations. In this case however, the policy adopted by the EPA is inconsistent with 40 C.F.R. § 130.2(i), not just the 1991 guidance document requiring a reasonable assurance of BMP reductions to provide a credit for point sources. The Court in *Defenders of Wildlife* held that the agency did not act arbitrarily and capriciously because the inconsistency was between the agency's position at the earlier stages of consideration and final action. Conversely, this Court should find the EPA's determination arbitrary and capricious because the inconsistency arises between multiple binding regulations if it constitutes a departure from its established practices.

Because agency regulations that are not genuinely ambiguous must be interpreted by their plain meaning, the text of the EPA regulation itself is controlling. In its own regulations, the EPA defines TMDL as:

> The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point

> source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

40 C.F.R. § 130.2(i). The regulation contemplates that the TMDL will be the sum of pollution from all point sources, nonpoint sources, and natural sources, allowing for tradeoffs between sources within the defined maximum. *Id*. Although the regulation allows credit for BMP reductions of nonpoint source pollution, such credit is only permissible when such reductions are practicable. *Id*. This language inherently qualifies the issuance of BMP credits; therefore, consideration of anticipated reduction is only permissible if it is reasonably likely that the proposed BMPs will be successful.

The EPA may argue that this case is factually similar to *Defenders of Wildlife* because the agency's final action in both cases was inconsistent with prior, non-binding agency positions. While this factual contention is accurate, the argument should be rejected because the agency's final action in *Defenders of Wildlife* was only inconsistent with a non-binding consideration, but in this case, the agency's action conflicts with its own binding regulations. Furthermore, the EPA may argue that its interpretation of 40 C.F.R. §130.2(i) should receive judicial deference because the regulation is ambiguous. Even if that were true, an agency's interpretation of an ambiguous regulation cannot be contrary to the regulation or plainly erroneous.

The EPA regulation allowing for BMP credits was not genuinely ambiguous, so the plain meaning of the regulation controls. This regulation is binding; therefore, any unexplained inconsistency resulting from agency action will be considered arbitrary and capricious. The plain meaning of the regulation only provides credits when nonpoint source BMP reductions are

practicable. Because the current proposed BMPs are unlikely to be successful in reaching water quality standards, the reduction of nonpoint source pollution is not practicable. Issuance of a BMP credit under the current EPA proposal does not satisfy the qualifying requirement in the EPA's own regulations; therefore, such action is arbitrary and capricious.

B. The Court should find the EPA adoption of a credit for anticipated BMP reductions is arbitrary and capricious because the decision was not supported by adequate consideration of relevant factors.

When determining whether agency action is arbitrary and capricious, a court may not substitute its own judgement for that of the agency. *State Farm*, 463 U.S. at 42-43. The court should only consider whether the agency used relevant data and articulated a satisfactory explanation of the rationale for its decision. *Id*. at 43; *New York*, 139 S. Ct. at 2569. An agency has broad discretion to make decisions based on its expertise, but a decision will still be found arbitrary and capricious:

> If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43. Furthermore, courts should not accept post hoc rationalizations for agency action. *Id*. at 50. If agency action is to survive judicial review, it must do so based solely on the agency's articulated rationale. *Id*.; *Burlington Truck Lines, Inc. v. U.S.,* 371 U.S. 156, 168-69 (1962). It is not sufficient for the agency to show that a rationale exists, but rather that the articulated rationale will result in a good policy. *F.C.C.,* 556 U.S. at 515 (2009).

Agency action should be set aside as arbitrary and capricious when such action is based on improper or inadequate consideration of relevant factors. *State Farm*, 463 U.S at 43. For example, the Supreme Court has held agency action to be arbitrary and capricious when the

agency fails to consider important relevant factors or considers factors that Congress did not intend. *Id*. at 43. In *State Farm*, the Court set aside a decision by the National Highway Traffic Safety Administration to rescind seatbelt regulations because the agency did not adequately articulate a rational connection between its judgment and findings of fact. *Id.* at 56. The Court recognized that, while the agency was correct to consider cost in the decision-making process, the agency gave too much consideration to that factor. *Id*. at 54-55.

In addition to consideration of the relevant factors, and perhaps more importantly, an agency must show that its judgement will produce good policy. *F.C.C.,* 556 U.S. at 515 (2009). For example, agency action has passed the arbitrary and capricious standard, despite the lack of empirical evidence, when it provides sufficient qualitative support for its decision. *Id*. at 519. In *F.C.C.,* the Court found the agency's rational to limit the exposure of children to indecency was sufficient to survive an arbitrary and capricious challenge. *Id*. The Court emphasized the importance of articulating rationale so that an agency may demonstrate its judgement as a good policy choice. *Id*. at 515. While the agency need not demonstrate that its policy choice is the best option, it must at least show that it is a good option. *Id*.

The case now before the Court is similar to *State Farm* and distinguishable from *F.C.C.* This case is comparable to *State Farm* because the agencies in both cases failed to support their action with adequate consideration of the relevant factors. In State Farm, the National Highway Traffic Safety Administration did not articulate a rationale for its decision and gave too much weight to one consideration. The EPA in this case also failed to provide adequate justification for its decision to adopt the TMDL implementation plan first proposed by New Union. Furthermore, the CWA requires the EPA to consider the severity of pollution and the designated uses of the water source in implementing a TMDL. There are no facts to indicate that the EPA considered

either of those factors before adopting the state's original TMDL proposal. The Court in *State Farm* held that the agency action was arbitrary and capricious for improper or inadequate consideration of relevant factors. Likewise, this Court should hold that the EPA's adoption of New Union's first proposed TMDL because the EPA did not consider the relevant factors as intended by Congress or articulate its rationale.

This case is also distinguishable from *F.C.C.* because the EPA here failed to show that the adoption of a credit for anticipated BMP reductions. In *F.C.C.,* the agency articulated its rationale providing qualitative support for its decision. The agency in that case was able to show that its decision was good policy. In this case, however, the EPA did not provide any reasons, qualitative or otherwise, as to why the adoption of the BMP credit was good policy. In fact, the EPA's own findings seem to indicate the opposite. The EPA plan identifies no method for enforcing the BMPs and recognizes the likelihood that these BMPs will not be implemented. The Court in *F.C.C.* held that the agency's action was not arbitrary and capricious because it showed that its decision would result in good policy. This Court should reach the opposite conclusion and hold the EPA's action to be arbitrary and capricious because the EPA can not demonstrate that its adoption of the BMP credit is good policy.

The EPA may argue that *State Farm* is distinguishable because it considered the extensive factual record of the state agency. It may further challenge that F.C.C. is similar because any policy which reduces the current level of pollution in Lake Chesaplain is a good policy relative to the current lack of quality standards. Both of these arguments should be rejected as contrary to public policy. Regardless of the EPA's internal considerations, it is still required to articulate its rationale to show a reasonable connection between its judgement and the facts. Furthermore, the very essence of this articulation requirement is to show that agencies are

cognizant of their actions and demonstrate to the public that their action will result in good policy.

The EPA's adoption of a credit for anticipated BMPs was not supported by adequate consideration of the relevant facts, nor any articulation of the agency's rationale. Furthermore, the agency did not demonstrate that this action would result in good policy. The EPA decision to provide the BMP credits was arbitrary and capricious because it failed to provide reasoned support connecting its decision to the facts. Furthermore, the decision is arbitrary and capricious because it constitutes an unexplained inconsistency with prior agency policy. Because of these reasons, the EPA adoption of a credit for BMP reductions should be set aside as arbitrary and capricious.

CONCLUSION

First, the Court should find that the EPA's action is ripe for judicial review because no more benefit should be derived from further factual findings, delayed review will cause severe hardship for the regulated parties, and such review would not interfere with further agency action. Second, the Court should find that the EPA's rejection of New Union's TMDL is a permissible construction because the statute is ambiguous, and the EPA's construction was not arbitrary and capricious. Third, the Court should find that the EPA's interpretation of "daily" was in violation of CWA § 303(d) because it was contrary to the Congressional intent. Lastly, the Court should find that the EPA's decision to adopt credits for anticipated BMPs was arbitrary and capricious because it was not supported by adequate consideration of the relevant facts.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the brief for _____ Law School is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules. _____

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