Team No. 29
NON-MEASURING BRIEF

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

UNITED STATES COURT OF APPEALS
for the
TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

Appeal from the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-202, Judge Romulus N. Remus.

BRIEF FOR PLAINTIFF-APPELLEE,
THE STATE OF NEW UNION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT

UNITED STATES COURTS OF APPEALS

FEDERAL DISTRICT COURTS

FEDERAL STATUTES

UNITED STATES CONSTITUTION

FEDERAL ADMINISTRATIVE & EXECUTIVE MATERIALS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from a final order of the United States District Court for the District of New Union. The district court had jurisdiction under the judicial review provisions of the Administrative Procedure Act, APA § 702, and under federal question jurisdiction as authorized in 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The notices of appeal were filed in a timely manner. Fed. R. App. P. 4; Record at 2.

STATEMENT OF THE ISSUES

I. Is EPA's determination to reject the New Union Chesaplain Watershed phosphorous TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed ripe for judicial review?

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

III. Does EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years violate the CWA § 303(d) requirements for a valid TMDL?

IV. Is EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation?

STATEMENT OF THE CASE

I. Facts

Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located entirely within the State of New Union. Record at 7. Lake Chesaplain is bounded, among other things, by the City of Chesaplain Mills. *Id.* In the 1990s, the City experienced economic development, resulting in several new concentrated animal feeding operations ("CAFOs"), a large-scale slaughterhouse, septic systems, and a new sewage treatment plant ("STP") in the New Union River watershed. *Id.* Lake Chesaplain water quality subsequently declined. *Id.*

In response to the decline in water quality, New Union created a Lake Chesaplain Study Commission. *Id.* at 8. The Chesaplain Commission concluded that Lake Chesaplain was experiencing eutrophication due to excessive levels of phosphorous that contributed to algae growth during the summer. *Id.* The algae growth caused offensive odors, diminished water clarity, and decreased dissolved oxygen ("DO") levels in violation of the state's water quality standards. *Id.* Following the findings in the 2012 report and pursuant to state obligations under Clean Water Act ("CWA") § 303, the New Union Division of Fisheries and Environmental Control ("DOFEC") adopted a water quality criterion of 0.014 mg/l for phosphorous. *Id.* Phosphorus was measured at levels up to 0.034 mg/l in the lake, far above the desired amount for a healthy ecosystem. *Id.* Given the violation of this standard along with the criteria for DO, odors, and water clarity, DOFEC included Lake Chesaplain on its list of impaired waters submitted to the Environmental Protection Agency ("EPA") in 2014. *Id.*

Once a waterbody is listed as impaired, CWA § 303(d) directs states to develop a "total maximum daily load" ("TMDL") for pollutants violating the applicable water quality standards. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). DOFEC did not submit a TMDL for Lake Chesaplain, prompting Chesaplain Lake Watch ("CLW") to serve a notice letter on New Union

and EPA in 2015 threatening legal action. Record at 8. DOFEC then proceeded to establish a TMDL through state rulemaking and set the maximum loading for phosphorous at 120 metric tons (mt) per year to best achieve the 0.014 mg/l standard. *Id.* Per EPA's regulations, DOFEC allocated the load amongst the CWA permitted point sources (the STP and slaughterhouse) as well as the non-permitted nonpoint sources (CAFOs, other agricultural sources, and septic tank inputs) that were found to contribute substantial amounts of phosphorus to the Lake Chesaplain watershed. *Id.* at 8–9; *see also* 40 C.F.R. § 130.2(i) (2003). Since existing loadings totaled 180 mt as of 2015, DOFEC proposed to implement the TMDL through a five-year equal phased percentage reduction beginning with a 7% reduction from 180 mt and ending with a 35% reduction by the fifth year. Record at 9. Point source reductions were to be incorporated as permit limits while the nonpoint source reductions were proposed to be achieved through a series of best management practices ("BMPs") including modified feeds, chemical treatment, restrictions on agricultural sources, and pumping schedules for septic systems. *Id.* at 9.

The proposed TMDL was met with strong resistance, including from the Hog CAFOs, who argued that EPA lacked the statutory authority to enforce loading limits against nonpoint sources. *Id.* Considering the Hog CAFOs position, DOFEC adopted a TMDL that set a 120 mt annual load without specific allocations to point and nonpoint sources. *Id.* EPA rejected this TMDL pursuant to Section 303(d)(2) and adopted DOFEC's original TMDL proposal after notice and comment in May 2019. *Id.* EPA called the combination of phased point source limits and BMP measures for nonpoint sources the "Chesaplain Watershed Implementation Plan" ("CWIP"). *Id.*

II. Procedural History

New Union filed a claim under the Administrative Procedure Act, 5 U.S.C. § 702, challenging EPA's decision to reject New Union's TMDL as invalid as an incorrect interpretation of Section 303 of the CWA. Record at 4–5. Soon after, CLW brought an action challenging the phased percentage reduction in annual loadings and lack of assurances for BMPs in EPA's TMDL. *Id.* at 5. Both actions were consolidated before the district court, and each party filed cross-motions for summary judgment. *Id.* at 2. The district court ruled in part for New Union, vacating EPA's TMDL regulation and decision to reject New Union's TMDL, and ruled in part for CLW, finding that EPA's inclusion of an annual load and phased percentage reduction violated the CWA. *Id.* at 14–15. EPA and CLW appealed. *Id.* at 2.

STANDARD OF REVIEW

A district court's conclusions of law and applications of law to fact are reviewed de novo. *See Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998); *Chandler v. City of Dallas*, 958 F.2d 85, 90 (5th Cir. 1992). Summary judgment is appropriate if there is no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). Subject-matter jurisdiction is a matter of law, which is reviewed de novo. *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016). Agency factual determinations made in a notice and comment rulemaking are reviewed under the arbitrary and capricious standard. *See* APA § 706(2)(a), 5 U.S.C. § 706(2)(a); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Life Ins. Co.*, 463 U.S. 29, 34 (1983).

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's ruling that the challenges to EPA's TMDL are ripe for judicial review. First, the legal disputes in this case are rooted primarily in statutory interpretation. Additional factual development is not necessary and would not benefit the Court's ability to accord effective judicial review. Second, judicial review does not impede EPA's

administrative action because EPA completed its action when it promulgated the TMDL. Finally, New Union would be substantially prejudiced by delayed review because the state would be required to implement "specific NPDES limits" in a manner "without delay" and must implement costly measures necessary to meet EPA's illegal load allocation.

This Court should also affirm the ruling that EPA's determination to reject the New Union TMDL solely on the grounds that the TMDL failed to include WLAs and LAs is contrary to law. EPA's interpretation of TMDL in 40 C.F.R. § 130.2(i) as the sum of WLAs and LAs must be rejected as contrary to congressional intent. The plain meaning of "total" and "load" unambiguously demonstrate congressional intent for a TMDL to only be a number. Any perceivable ambiguity in "total" and "load" is eliminated by statutory context and legislative history which illustrates that implementation authority of a TMDL and regulation of nonpoint sources is exclusively reserved to the States. Even if "total" and "load" are ambiguous, EPA's interpretation must be rejected as unreasonable because the interpretation is inconsistent with statutory context, the Act's goals, and the Act's cooperative federalism framework. Lastly, even if the Act arguably allowed the interpretation, EPA's interpretation still must be rejected because the interpretation raises serious constitutional concerns.

However, in the event that this Court affirms EPA's interpretation, this Court should reverse the district court's ruling that EPA's adoption of an annual pollution loading reduction to be phased in over five years violates CWA § 303(d). EPA's interpretation of "total maximum daily load" to allow for an annual load and phased percentage reduction is a reasonable construction of "daily" and Section 303(d)(1)(C) and thus should be upheld. Section 303 does not preclude EPA from approving or establishing TMDLs expressed in non-daily terms since "daily" is susceptible to more than one meaning when read in light of the overall statutory

scheme. A strict reading of daily would lead to absurd results by preventing EPA from approving or establishing any TMDL expressed in non-daily terms even when scientific evidence demonstrates that another term is better suited to a waterbody or pollutant. A TMDL implemented through a phased percentage reduction is permissible since it achieves the water quality standard and requiring that TMDLs be calculated to meet the expired deadline for effluent limitations in CWA § 301(b) would lead to absurd results.

Lastly, this Court should affirm the ruling that EPA's adoption of a credit for anticipated BMP pollution reductions in EPA's TMDL was not arbitrary and capricious or an abuse of discretion. EPA rationally determined the BMP measures contained in the CWIP can achieve the target load reductions without assurances, and thus its action is not arbitrary and capricious. EPA exercised its expertise to make predictions regarding the technical efficacy of complicated pollution controls. Additionally, EPA considered the relevant factors and articulated a rational conclusion between fact and law, supported by a well-developed record.

ARGUMENT

I. THE ISSUES ARE RIPE FOR REVIEW BECAUSE THE COURT WOULD NOT BENEFIT FROM FURTHER FACTUAL DEVELOPMENT, EPA'S ADMINISTRATIVE ACTION WOULD NOT BE IMPEDED, AND NEW UNION WOULD BE PREJUDICED BY DELAY.

The purpose of ripeness is preventing premature adjudication of abstract administrative policies that have not yet been actualized into concrete disputes with concrete effects. *Reno v. Catholic Soc. Servs., Inc*., 509 U.S. 43, 57 n.18 (1993); *Wyo. Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 50 (D.C. Cir. 1999). To that end, courts evaluating ripeness will consider (1) "whether the courts would benefit from further factual development of the issues presented," (2) the degree to which "judicial intervention would inappropriately interfere with further administrative action," and (3) the extent a party seeking review would be prejudiced by

delaying review. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967), *rev'd on other grounds.*

This case is ripe for review. First, the Court would not benefit from further factual development because the disputes turn on questions of statutory interpretation. Second, EPA's regulatory capacity to pursue further administrative action or refine its policies is not impeded by judicial review. Finally, New Union would be adversely prejudiced by delaying review because New Union is required to implement, "without delay," specific NPDES permit limitations, while at the same time having its authority over land use usurped through load allocations. Record at 12. Additionally, if New Union delays implementing EPA's TMDL, New Union may be deprived of critical federal funds and become subject to enforcement actions. *See* CWA § 319.

a. The Court would not benefit from further factual development because the issues solely involve statutory interpretation and the way EPA's TMDL is implemented is immaterial to such legal questions.

The legality of EPA's TMDL program is irrelevant to the way the program is implemented. *See City of Kennett v. U.S. E.P.A.*, 887 F.3d 424, 433 (8th Cir. 2018).[1] The Court's legal analysis regarding the establishment of EPA's TMDL does not benefit from "further factual development regarding [EPA's] *application* of the [TMDL]." *Id.* (emphasis added). Rather, this case turns primarily on EPA's statutory interpretation of "total maximum daily load." *See* Record at 2; CWA § 303(d). Even if the way EPA's TMDL is implemented is relevant, review does not need to be delayed because the manner of implementation is anticipated in this case. Record at 10. If approved, New Union must implement "specific NPDES limits" in a manner "without

[1] In *City of Kennett*, EPA argued that plaintiffs pre-enforcement review of an EPA promulgated TMDL was not ripe. 887 F.3d at 433–34. The Eighth Circuit rejected the argument, finding the implementation of EPA's TMDL immaterial to the legality of EPA's approval process. *Id*. Accordingly, it was not a case where additional facts would benefit the court. *Id*. The exact same reasoning applies in this case to EPA's federally promulgated TMDL.

delay." *Id.*; *cf. City of Kennett*, 887 F.3d at 433 (City of Kennett "must implement the TMDL by imposing limits on discharge[s]" through "the upcoming permit.").

The Court would also not benefit from further factual development. Delay only benefits cases where additional time is needed to focus the legal issues. For example, in *City of Arcadia v. U.S. Env't Prot. Agency*, a state administrator intended to "revisit" and "reconsider[r]" a TMDL before the first compliance deadline. 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003). Given the clear possibility that the TMDL could be altered from its current form, thereby presenting entirely new legal issues, the court determined that delaying review was appropriate. *Id*. By contrast, in this case, there is no indication that EPA intends to modify its TMDL. Because the issues are not expected to change, delaying review would not elucidate the disputes in any material way.

b. Judicial review would not interfere with EPA's administrative action because EPA has completed the TMDL rulemaking and there are no further opportunities for policy refinement.

Judicial review will not interfere with EPA's administrative action. Judicial intervention only interferes with further administrative action where there are opportunities for the agency to "refine its policies." *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 735. EPA completed its administrative action when it promulgated its TMDL. Since EPA promulgated its TMDL through regulation, EPA lacks the ability to alter its TMDL without renewed notice and comment. In that sense, TDMLs promulgated through regulation are different from other regulatory schemes where agencies may use site-specific proposals to alter or refine administrative policies. *See id*. For example, the Supreme Court held pre-enforcement review of forest plans impaired the Forest Service's ability to refine its policies because the Service often altered plans in response to specific timber sales. *See id.* at 733–36. Even if desired, EPA could

not change its TMDL in response to proposed amendments by New Union without promulgating an entirely new rule. A completely new action is not "refinement." Simply put, translation of the TMDL's allocations into NPDES permits does not present an opportunity for altering or refining the substance of the New Union TMDL.

c. New Union would be prejudiced by delaying review because New Union would be required to implement specific NPDES permit limits and would be coerced into regulating nonpoint sources.

Courts will balance the potential benefits of delaying review against the prejudice caused to the party seeking review. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 81–82 (1978); *Nat'l Treasury Emp. Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). The paradigmatic example of hardship is "where a petitioner is put to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for non-compliance." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 859 F.2d 156, 166 (D.C. Cir. 1988).

New Union will face hardship if judicial review is delayed. Under EPA's TMDL, New Union is required to institute, without delay, illegal NPDES permit limitations for phosphorus. Record at 12. New Union must also incorporate the TMDL into its continuing planning process, and any subsequently issued NPDES permits must be consistent with EPA's TMDL. CWA § 303(e); 40 C.F.R. § 130.5(b). Absent judicial review, New Union "[is] poised to spend more time, energy, and money in developing an implementation plan." *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (*Farm Bureau*), 792 F.3d 281, 293 (3d Cir. 2015). Although EPA impermissibly transforms its TMDL into an implementation plan, the CWIP provides only a framework and is far from complete. Record at 10. The CWIP does not provide how specific dischargers will meet the 35% phosphorus reduction—that is, how the general limitations will be translated into actionable NPDES permit limitations and conditions. That work falls on New Union.

Additionally, the district court correctly points out that the CWIP does not provide "how the proposed BMP measures would be enforced."[2] *Id.* That work falls on New Union. Regardless of specifics, significant and costly planning, coordination, and general administrative homework will be required if review is delayed. Under EPA's view of ripeness, if New Union desires judicial review it must refuse to comply with federal law and hope for the best.[3] New Union would be forced to avail itself to potential litigation and withheld funds just to know whether the regulation it is being forced to implement is legal or not. It does not take deep legal analysis to understand "[i]f there is something wrong with the TMDL, it is better to know now than later." *Farm Bureau*, 792 F.3d at 294.

Finally, the immediacy with which New Union will be impacted distinguishes this case from cases without hardship. *See City of Arcadia*, 265 F. Supp. 2d at 1157 (finding minimal present hardship because "the first Compliance Point is not until Year 3 of the implementation period"). As already noted, New Union is forced to begin implementing "specific NPDES limits" "without delay," which is a far cry from the three-year cushion subject to revision in *City of Arcadia*. *Id.*; Record at 12. Nor is New Union's hardship negated by the phased nature of EPA's TMDL. While New Union only needs to achieve a 7% phosphorus reduction from the 180 mt baseline in a year, the initial regulatory implementation required will involve significant resources and technical effort. Additionally, the phased reductions schedule is unrelated to New

[2] The fact that the CWIP plan does not specify how the BMPs will be enforced does not imply that those measures will not be enforced. Rather, as further evidence of hardship, New Union will bear the burden of doing the legwork to ensure the BMPs are implemented. Otherwise, New Union will face even more stringent wasteload allocations and the possibility of withheld funding. *See infra* Section II.

[3] This is similar to the dynamic Justice Scalia excoriated in *Sackett v. E.P.A.* where, in the context of final agency action, he described the decision as waiting for "the hammer" to drop. 566 U.S. 120, 128 (2012).

Unions planning obligations and consistency requirement. Therefore, the issues presented are ripe for review.

II. EPA'S REJECTION OF NEW UNION'S TMDL IS CONTRARY TO LAW BECAUSE EPA'S INTERPRETATION OF "TOTAL MAXIMUM DAILY LOAD" IS CONTRARY TO CONGRESSIONAL INTENT.

EPA's rejection of New Union's phosphorous TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is contrary to law as an incorrect interpretation of "total maximum daily load." The plain meaning of "total" and "load" unambiguously indicate that a TMDL is only a number. Section 303(d) demonstrates no textual commitment of implicitly delegated authority to EPA to allocate that numeric load among individual point sources and nonpoint sources. Any potential ambiguity in "total" and "load" is rendered unambiguous by statutory context and legislative history. Even if "total" and "load" are ambiguous, EPA's interpretation is not a reasonable construction of the statute. Lastly, even if the Act arguably allowed EPA's interpretation, EPA's interpretation must be rejected under the rule of clear statements and canon of constitutional avoidance.

a. The plain meaning of "total" and "load" unambiguously demonstrate that a TMDL is just a number.

In reviewing EPA's interpretation of "total maximum daily load," the Court must first determine "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 (1982). If the intent of Congress is clear, the Court's analysis must end, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* This *Chevron* step one inquiry requires two determinations. First, the Court must determine whether Congress has implicitly delegated authority to address the issue to EPA through a textual commitment of authority. *Id.* at 843. Second, the Court must determine if the statute unambiguously speaks to the issue. *Id.* Only after

the Court concludes that the statute is ambiguous and that Congress has delegated such authority may the Court then determine whether EPA's interpretation is a "permissible" one. *Id.*

1. The plain language of "total maximum daily load" unambiguously demonstrates that a TMDL is only a number.

Section 303(d) requires each state to "identify those waters within its boundaries for which the effluent limitations required . . . are not stringent enough to implement any water quality standard applicable to such waters." CWA § 303(d)(1)(A). Each state must then establish "the total maximum daily load" for those identified waters "at a level necessary to implement the applicable water quality standards." *Id.* § 303(d)(1)(C). EPA regulations define a TMDL as the sum of individual Wasteload Allocations ("WLA") for point sources and Load Allocations ("LA") for nonpoint sources. 40 C.F.R. § 130.2(i). WLAs and LAs refer to the "portion of a receiving water's loading capacity that is allocated to one of its existing or future" point sources and nonpoint sources, respectively. *Id.* § 130.2(g)–(h).

Section 303 plainly reveals no textual commitment of authority for EPA to establish specific loading allocations. The Act only authorizes EPA to establish a "total maximum daily load." CWA § 303(d)(2). Nothing in the CWA authorizes EPA to allocate that total load or determine how to specifically implement the total load. EPA cannot presume a delegation of power merely because Section 303(d) does not explicitly prohibit the power EPA claims. *See Ry. Lab. Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (such "statutory silence, when viewed in context, is best interpreted as limiting agency discretion."). Nor may EPA use its general administrative and rulemaking provisions to expand the limited grant of authority in Section 303(d). *See Gonzales v. Oregon*, 546 U.S. 243, 264–65 (2006); *Nat. Res. Def. Council, Inc.*, *v. Envt'l Prot. Agency*, 749

F.3d 1055, 1064–65 (D.C. Cir. 2014) ("EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point.").

Even if Section 303(d) contains implicit delegated authority, here, EPA's ability to seize that implicit authority must be especially curtailed because EPA's interpretation holds economic and political significance. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Christensen v. Harris Cnty.*, 529 U.S. 576, 590 (2000). TMDL and water quality standard implementation decisions are explicitly left to the States. CWA § 303(e). As Congress emphasized, unless "*expressly provided*," nothing in the Act shall be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to [their] waters." 33 U.S.C. § 1370; CWA § 510 (emphasis added). Contrary to this plain text, EPA's interpretation seeks to usurp the traditional role of the states in implementing water quality standards. It is highly unlikely that Congress would delegate a decision of such economic and political significance to an agency "in so cryptic a fashion" as "total maximum daily load." *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 160. Therefore, EPA's interpretation must be rejected as *ultra vires* because the CWA plainly does not authorize anything beyond setting the total load.

Further, the plain meaning of the terms "total" and "load," unambiguously demonstrate that a TMDL is just a number. The plain meaning of total is "constituting a whole." *Total*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/total. The plain meaning of "load" is "the quantity that can be carried at one time." *Load*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/load. Therefore, a TMDL defines the maximum "amount" of a pollutant that can be discharged or "loaded" into the waters at issue "from all combined sources." *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th

Cir. 1995); *see also Nat. Res. Def. Council, Inc. v. Env't Prot. Agency*, 301 F. Supp. 3d 133, 141 (D.D.C. 2018) (finding "maximum" and "load" to be unambiguous).

The surrounding language of Section 303(d) and the singular tense of TMDL confirm this plain meaning. Section 303(d) requires "[s]uch load" to be "established at a *level* necessary to implement . . . water quality standards." CWA § 303(d)(1)(C) (emphasis added). TMDL's are only developed for pollutants that are "suitable for such *calculation*." *Id.* (emphasis added). Notably, the use of the definite article "the" in "the total maximum daily load" and the singular tense of the operative terms "total," "load," and "level" confirms this interpretation. *See Rapanos v. United States*, 547 U.S. 715, 732 (2006). By using the words "total" and "load," Congress made clear that while EPA could calculate the "total," it could only set an aggregate load limit.

2. The statutory context and legislative history of the Act confirm that the terms "total" and "load" are unambiguous.

Any conceivable ambiguity over the implicit delegated authority in Section 303(d) is eliminated by statutory context and legislative history. *See United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). Section 303(e) reserves the responsibility to plan and implement TMDLs to the States. CWA § 303(e). EPA lacks authority to disapprove or dictate the content of implementation plans that are developed or to develop a federal plan in place of a state plan. *Id.* § 303(e)(3). Therefore, EPA has no authority to dictate the content of implementation plans by allocating loads to specific point and nonpoint sources. Furthermore, unlike point sources, the Act reserves to States exclusive authority to regulate nonpoint sources. CWA §§ 319(a)(1), 319(b)(2), 33 U.S.C. §§ 1329(a)(1), 1329(b)(2); CWA § 208, 33 U.S.C. § 1288; *see also* S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744 (emphasizing that the authority to regulate non-point source pollution

"resides in the State or local agency . . . ."). Congress gave EPA no backstop authority for nonpoint source regulation, reserving such authority to only "local public agenc[ies] or organization[s]." *See* CWA § 319(e). Notably, the provision that gives States the exclusive authority to regulate nonpoint sources, Section 319, was adopted after EPA's regulatory interpretation of TMDL was promulgated. None of the debates relating to the Section 319 amendments even mention TMDLs. EPA's position that it may automatically regulate unregulated nonpoint sources in any State is also in direct contravention of EPA regulations. *See* 40 C.F.R. § 122.23(c)(1) (2012).

Accordingly, the district court properly concluded that the Third Circuit in *Farm Bureau* misconstrued the plain language and structure of the CWA in determining that "total maximum daily load" is ambiguous. *See* 792 F.3d at 281; Record at 14. Under *Chevron* step one, the Third Circuit found "total maximum daily load" to be ambiguous because interpretating "total maximum daily load" as a number renders "total" redundant, and is inconsistent with other uses of "total" under the Act. *Farm Bureau*, 792 F.3d at 297. First, the Third Circuit's analysis is improper as it did not address the plain meaning of "total," "maximum," "daily," or "load." *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) (courts must first look to the plain language of the statute under *Chevron* step one). Second, the Third Circuit's reading renders "total" to be "mere surplusage." *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997). If Congress had wanted EPA to set all the constituent parts of a total load, it would have omitted the word "total," meaning sum, and merely required "maximum daily loads." The Third Circuit's interpretation completely disregards the plain meaning of "total" and the singular tense of the text. Third, the Third Circuit improperly ignored statutory context by failing to address any of the provisions in the Act that grant States the exclusive authority to

regulate nonpoint sources.[4] This context clarifies that only one permissible interpretation, that a TMDL is nothing more than a number, "produces a substantive effect that is compatible with the rest of the law." *United Savs. Ass'n of Tex.*, 484 U.S. at 371.

b. Even if "total" and "load" were ambiguous, EPA's interpretation is unreasonable because it is inconsistent with statutory context and upsets Congress' framework of cooperative federalism.

Even if there is some ambiguity in Section 303, EPA's interpretation is unreasonable because it is incompatible with the CWA as a whole. EPA's ability to exploit any ambiguity is limited to a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. EPA's interpretation is not permissible because it is "inconsisten[t] with the design and structure of the statute as a whole." *Id.* (citations omitted).

First, EPA's interpretation contravenes the CWA's deliberate cooperative federalism framework by usurping State's exclusive implementation authority. Congress expressly decided to "recognize, represent, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." CWA § 101(b); *see also* CWA § 510. Congress deliberately withheld from EPA the authority it demands here, granting the ability to construct implementation plans only to the States. CWA § 303(e). Notably, Congress previously prohibited EPA from promulgating a final rule that redefined the TMDL from a simple number to a written quantitative plan and analysis for attaining and maintaining water quality standards. *See* Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608, 13,609 (Mar. 19, 2003). Congress also deliberately declined to give EPA

[4] Contrary to the Third Circuit's assertions in *Farm Bureau*, the fact that TMDL's must be established for waters that are not meeting water quality standards with effluent limitations does not inevitably lead to the conclusion that nonpoint sources must be regulated. This interpretation ignores Section 303(d)(3), which considers establishing TMDLS "[f]or the specific purpose of developing information" for waters that are meeting water quality standards. CWA § 303(d)(3).

specific authority to implement TMDLs, despite having incorporated such a framework for implementation of air quality standards. Clean Air Act §§ 110(a), (c)(1), 42 U.S.C. §§ 7401(a), (c)(1); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere . . . that it knows how to make such a requirement manifest.").

Second, EPA's interpretation renders meaningless the careful reservation of authority to regulate nonpoint sources to the States. *See* CWA §§ 208, 319. EPA's authority over nonpoint sources is limited to providing or withholding grant money. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1127–28 (9th Cir. 2002). EPA's interpretation effectively grants itself the backstop authority over nonpoint sources that was denied by Congress.

Thus, the Third Circuit's decision that EPA's interpretation of TMDL is reasonable under *Chevron* step two is incorrect and, at best, distinguishable. *Farm Bureau* found EPA's interpretation to be reasonable because of "congressional acquiescence" under Section 303(d)(4) and Section 117(g), and that Chesapeake Bay would not be cleaned up without EPA intervention since State point source regulation alone had historically proven to be "insufficient." 792 F.3d at 307–09. First, Congress did not acquiesce to EPA's interpretation through amending Section 303(d)(4) or in enacting Section 117. Section 303(d)(4) limits the ability of permitting authorities to relax point source permit limits that have been established on the basis of TMDLs *or* waste load allocations. Congress's recognition that permit limits may be based on a TMDL or a waste load allocation is nowhere near strong enough to support an inference of congressional acquiescence for federally established specific allocations for point sources and nonpoint sources. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* (*SWANCC)*, 531

U.S. 159, 169 (2001). Second, Section 117(g) merely ratified the Chesapeake Bay partnership agreement; it did not mention anything regarding TMDLs or allocations. CWA § 117(g), 33 U.S.C. § 1267(g). Lastly, even if *Farm Bureau* was decided correctly, it is distinguishable. Rather than dealing with North America's largest estuary, here, this Court is dealing with a purely intrastate lake that is just fifty-five miles long. Record at 7. Congress has also not enacted any laws indicating priorities for Lake Chesaplain, such as Section 117(g). Finally, New Union's proposed TMDL gave every indication of cleaning up the lake by point source regulation alone. *Id.* at 10.

c. Even if EPA's interpretation was arguably reasonable, EPA's interpretation must be rejected because it raises serious constitutional concerns.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X. States "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). As such, Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

EPA's interpretation impermissibly transforms the TMDL into a compelled federal operation. EPA's TMDL is given "operational force" by requiring States to incorporate the federal limits into their continuing planning process. *Pronsolino*, 291 F.3d at 1128; CWA § 303(e). EPA reviews the State's approved planning process from time to time to ensure that the state planning process is "at all times consistent" with Section 303. CWA § 303(e). EPA will not approve a State permit program authority for any State which does not have an approved

continuing planning process. *Id.* § 303(e)(2). States that continue to hold an approved permit program must ensure that all permit limitations are "consistent with the assumptions and requirements" of any approved WLA. 40 C.F.R. § 122.44(d)(1)(vii)(B) (2019). Every permit issued by the State is then subject to EPA review and disapproval. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2). The approved load allocations also influence State programs that receive federal funds under section 319. CWA § 319. This coercion leaves States with no choice: States must conform their land use to EPA's allocations or face even more restrictive EPA action later.[5] EPA's interpretation thus runs closer to commandeering "the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 166 (1992) (quoting *Hodel*, 452 U.S. at 288).

EPA's interpretation must also be rejected because Section 303(d) does not contain a "unmistakably" clear statement authorizing an invocation of the "outer limits of Congress' power." *See SWANCC*, 531 U.S. at 172–73; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Supreme Court has adopted clear statement rules in line with the assumption that "Congress does not casually authorize administrative agencies to interpret a statute to push

[5] The Third Circuit in *Farm Bureau* rejected federalism and constitutional concerns because the Act authorized federal oversight and because the EPA had clear jurisdiction over the Chesapeake Bay. 792 F.3d at 301–06. The court noted that the aspects of EPA's TMDL that saved it from raising constitutional concerns were that the TMDL presented load allocations by sector, not by source, the TMDL did not prescribe any particular means of pollution reduction, and, in contrast to the constitutional concerns of regulating a "small intrastate area," the Court was dealing with North America's largest estuary. *Id.* at 302–06. The Third Circuit improperly applied the avoidance canons by engaging in a circular analysis – because the Third Circuit previously found that EPA's interpretation of TMDL was allowed by the statute, the court found no federalism concerns because EPA's action was specifically "allowed under federal law." *Id.* at 304. Even assuming that *Farm Bureau* properly applied the avoidance canons, this case is distinguishable because it presents heightened constitutional concerns. Here, EPA claims the authority to regulate a small intrastate area, Lake Chesaplain, by sources, – CAFOs or septic tanks – and by mandating specific means of reduction. Record at 7–9.

the limit of congressional authority." *SWANCC*, 531 U.S. at 172–73. These constitutional concerns are heightened where "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173.

The phrase "the total maximum daily load," falls far short of providing the clear statement required. *See Rapanos*, 547 U.S. at 738 ("The phrase 'the waters of the United States' hardly qualifies."). Under EPA's interpretation, EPA has the authority to assign federal source limits to particular point sources and nonpoint sources. Record at 9. EPA also asserts the authority to govern the specific mechanisms by which nonpoint sources would meet the federal limits. *Id.* By setting allocations for particular types of land, EPA could determine whether greater reductions should be demanded of farmlands or commercial development and where commercial development should occur. Prioritizing one land use over another is a "complex and important function of the State" and "may indeed be the most essential function performed by local government." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting). EPA has no warrant to use any perceived ambiguity to make itself "a *de facto* regulator of immense stretches of intrastate land" in the manner of "a local zoning board" by specifically allocating loads to particular land uses such as septic systems and CAFOs. *Rapanos*, 547 U.S. at 738. Therefore, EPA's interpretation requires an unmistakably clear statement by Congress since its interpretation would result in an impingement of the States' traditional and primary powers over land and water use planning. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738. Rather than giving such a statement, Congress expressly chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." CWA § 101(b). Had Congress intended to give EPA such sweeping authority as the agency asserts, it surely would have done so explicitly. Therefore, EPA's

interpretation must be rejected due to its claim to push constitutional limits without clear authorization from Congress.

III. EPA'S INTERPRETATION OF TOTAL MAXIMUM DAILY LOAD TO ALLOW FOR ANNUAL LOAD LIMITS AND PHASED PERCENTAGE REDUCTIONS IS A PERMISSIBLE CONSTRUCTION OF THE STATUTE.

In the event this Court finds EPA's interpretation of "total" and "load" to be permissible, this Court should defer to EPA's reasonable interpretation of "daily" and the TMDL's phased percentage reduction. Nothing in Section 303 prohibits a TMDL expressed in non-daily terms and the overall statutory scheme provides for multiple readings of "daily." Strictly reading "daily" would lead to absurd results since EPA must be able to account for scientific complexities and set a TMDL most appropriate to the unique characteristics of each waterbody and pollutant. A TMDL can be implemented through a five-year phased percentage reduction since it does not violate any statutory deadline and avoids absurd results. EPA's construction of "total maximum daily load" to allow for an annual pollutant load phased in over a five-year period is reasonable, thus warranting *Chevron* or *Skidmore* deference.

a. Section 303 does not preclude EPA from approving or establishing TMDLs expressed in non-daily terms.

Interpreting the phrase "total maximum daily load" to allow for terms other than daily is most consistent with the statutory scheme of the CWA and avoids absurd results. If the plain meaning of a statute is susceptible to two or more reasonable meanings, a court may resort to canons of statutory construction to resolve the ambiguity. *See United States v. Dauray*, 215 F.3d 257, 262 (2d Cir. 2000). Two canons are particularly helpful to interpret the meaning of total maximum daily load in Section 301(d)(1)(C). First, the text should be placed in the context of the entire statutory scheme. *See id.* ("[A] a statute is to be considered in all its parts when construing any one of them.") (internal quotations omitted). Second, the statute "should be interpreted in a

way that avoids absurd results." *Id.* at 264. Additionally, considerable deference should be granted to an agency's construction of the statute it is entrusted to administer. *Chevron,* 467 U.S. at 844; *see also United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001).

1. The word "daily" in "total maximum daily load" is susceptible to multiple meanings when placed in the context of the statutory scheme.

A reviewing court "should not confine itself to examining a particular statutory provision in isolation" since "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. Certainly, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citations and internal quotations omitted). Here, CLW's narrow reading of the term "daily" ignores the complexities and purpose of the CWA. The CWA provides that TMDLs must be established for all "pollutants which the Administrator identifies . . . as suitable for such calculation" and must be set "at a level necessary to implement the applicable water quality standards." CWA § 303(d)(1)(C). EPA has interpreted this provision to mean that TMDLs may be expressed in an appropriate averaging period other than daily, such as weekly or monthly, so long as the objective of meeting the relevant water quality standard is achieved. *See* Water Quality Planning and Management, 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). This interpretation fits squarely with the design of TMDLs as "a link in an implementation chain . . . to the end of attaining water quality goals for the nation's waters." *Pronsolino*, 291 F.3d at 1129.

Effective regulation of pollutants to meet water quality standards may require a TMDL expressed in non-daily terms based on determinations of how the pollutant interacts with and impacts the relevant waterbody. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). EPA's regulations provide that "[s]ite specific information should be used

whenever possible" when establishing TMDLs. 40 C.F.R. § 130.7(c)(1)(i). For some pollutants such as phosphorus, the amount a waterbody can tolerate may be dependent on the time of year and the consequences of excessive amounts may not be immediately apparent. *Muszynski*, 268 F.3d at 98. EPA has published specific guidelines to help states develop nutrient TMDLs by detailing the chemical, physical, and biological processes that influence nutrient availability and the associated contribution to eutrophication. U.S. ENV'T PROT. AGENCY, PROTOCOL FOR DEVELOPING NUTRIENT TMDLS, EPA 841-B-99-007, at 2-3 (1999). For example, higher levels of nutrients may only cause eutrophication during certain seasons due to light availability that either promotes or inhibits algae growth. *Id.* at 2-4. Temperature, which fluctuates throughout the year, also affects the rates of algae growth and should be analyzed when setting an appropriate TMDL. *See id.* at 2-4, 2-5. The need to consider these scientific factors, along with others, strongly supports the interpretation of TMDL to allow for annual or seasonal terms that are best suited to the characteristics of each waterbody and pollutant.[6]

EPA has in multiple instances approved phosphorous TMDLs expressed in non-daily terms based on evidence that annual or seasonal loads were most appropriate.[7] Here, EPA's approval of annual phosphorous loads in the Lake Chesaplain TMDL is consistent with the CWA's directive to achieve water quality standards. *See* CWA § 303(d)(1)(C). Courts should be

[6] Even the district court specifically notes how the algal blooms in Lake Chesaplain "formed during the summer months" and how "summertime" dissolved oxygen levels were below the standard for Class AA waters in the State of New Union due to excessive amounts of phosphorous. Record at 7–8.

[7] For example, the State of Maryland developed the Port Tobacco River TMDL after the river was not supporting the identified uses due to algae growths and low dissolved oxygen levels. PROTOCOL FOR DEVELOPING NUTRIENT TMDLS, at 2-10. Since the critical season for excessive algal growth was in the summer, the state set summer TMDLs for phosphorus at 871 lbs/month with an annual average flow of 15,570 lbs/year. *Id.* at 2-11. Similarly, the State of Oregon established the Lake Garrison TMDL with an annual phosphorous load of 562 lbs/year. *Id.* at 2-12.

"mindful that the CWA is a lengthy and complex statute and that its mandate and policy often require the evaluation of sophisticated data." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1401 (4th Cir. 1993). In reviewing EPA's interpretation, "this court does not sit as a scientific body, meticulously reviewing all data under a laboratory microscope." *Id.* The CWA affords EPA the legal authority to approve TMDLs expressed in non-daily terms given the scientific complexities involved and the statutory purpose to achieve water quality protection.

2. Strictly interpreting "daily" would lead to absurd results since EPA would be unable to approve a TMDL expressed in terms most appropriate to a waterbody.

CLW's reading of "daily" cannot be sustained under the doctrine of absurd results. This doctrine embodies "the long-standing rule that a statute should not be construed to produce an absurd result." *Mova Pharm. Corp. v. Shalala,* 140 F.3d 1060, 1068 (D.C. Cir. 1998). Where the literal application of a text would produce results not intended by Congress, courts may override the statutory language. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

A strict reading of daily would preclude EPA from approving a TMDL that is expressed in any other measure even when scientific evidence demonstrates that another measure is more appropriate for the relevant waterbody. *Muszynski*, 268 F.3d at 99. This strict reading struck the Second Circuit in *Muszynski* as absurd since the effective regulation of certain pollutants may best occur by a periodic measure other than daily. *Id.* The Second Circuit was "not prepared to say 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. States and EPA develop several thousand TMDLs each year.[8] Limiting EPA's discretion to a strict reading of

[8] For example, EPA approved 2,566 TMDLs in 2010 and 2,820 in 2011. CONG. RSCH. SERV., CLEAN WATER ACT AND POLLUTANT TOTAL MAXIMUM DAILY LOADS (TMDLS) 5 (2012), https://sgp.fas.org/crs/misc/R42752.pdf.

daily would result in countless TMDLs being disapproved even when they are submitted with sufficient evidence to show that a measure other than daily best suits the characteristics of the relevant waterbody and pollutant. This outcome could not possibly have been contemplated by Congress in drafting the statute to achieve water quality standards.

Despite this, the D.C. Circuit in *Friends of the Earth, Inc. v. E.P.A.*, 446 F.3d 140, 146 (D.C. Cir. 2006), relied on an exceptionally high burden for agencies seeking to demonstrate absurdity when it incorrectly held that EPA could not approve TMDLs expressed in annual or seasonal terms. ("[F]or the EPA to avoid a literal interpretation . . ., it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely cannot have meant it.") (quoting *Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). The court determined EPA failed to make the requisite showing for absurdity based on the sole reason that counsel conceded at oral argument that establishing daily loads for pollutants would be reasonable. *Id.* However, the reliance on this concession to reject an argument for absurdity does not account for the impracticalities produced by a strict reading of daily. While approving TMDLs expressed in daily terms is certainly within EPA's discretion, daily loads cannot be the exclusive measurement allowed by the CWA given the need to account for seasonal fluctuations and the impact on pollutant concentrations in a waterbody when developing an appropriate TMDL. *See Muszynski*, 268 F.3d at 99.[9]

[9] Following the decision in *Friends of the Earth*, EPA issued a memorandum maintaining its position that "daily" is ambiguous but recommending that future TMDLs be expressed in daily loads as well as non-daily loads to facilitate implementation of the applicable water quality standards. U.S. Env't Prot. Agency, Memorandum on Establishing TMDL "Daily" Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No.05-5015, (April 25, 2006) and Implications for NPDES Permits (Nov. 15,

The doctrine of absurdity contemplates the rare case, such as the one at hand, that requires "a more flexible, purpose-oriented interpretation . . . to avoid absurd or futile results." *Env't Def. Fund, Inc. v. E.P.A.,* 82 F.3d 451, 468 (D.C. Cir.), *amended sub nom. Env't Def. Fund v. E.P.A.*, 92 F.3d 1209 (D.C. Cir. 1996) (citations and internal quotations omitted). To avoid absurd results, EPA must be able to approve and develop TMDLs expressed in other periodic terms besides daily. Exercising its discretion in this way is wholly consistent with EPA's prior TMDL approvals that were implemented to best achieve protections for waterbodies across the nation. *See supra* note 8. Indeed, "authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal consistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981). Thus, this Court should uphold EPA's interpretation of "daily" that allows for loads expressed in terms other than daily.

3. A TMDL with a five-year phased percentage reduction is permissible since it achieves the water quality standard and applying the Section 301(b) deadline for effluent limitations would lead to absurd results.

A TMDL calculated to achieve water quality standards through a phased five-year period is not contrary to the statute. The CWA does not specify an exact timeframe during which a TMDL must prevent violations of the relevant water quality standards. *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 246 (D.D.C. 2011). Rather, the crux of the TMDL provision only requires that loads are set "at a level necessary to implement the applicable water quality standards." CWA § 303(d)(1)(C). Additionally, the CWA provisions defining water quality standards and EPA's implementing regulations also do not include any sort of periodic reference. *See id.* § 303(c)(2)(A); 40 C.F.R. § 130.7.

2006). This Court should follow the holding of *Muszynski* and defer to EPA's current stance that TMDLs can be expressed in non-daily terms to best achieve water quality standards.

EPA properly interpreted the phrase "total maximum daily load" to allow for a phased percentage reduction in phosphorus loadings over a five-year period since the statutory deadline to achieve effluent limitations is not a hard deadline. In applying the rule that statutes are to be read to avoid absurd results, courts should "consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intention of the statute's drafters . . . ." *Mova Pharmaceutical Corp.*, 140 F.3d at 1068. The district court points to the July 1, 1977 deadline in Section 301(b)(1)(C) as confirmation that TMDLs cannot be set to achieve water quality standards "until five years hence." Record at 15. However, this deadline passed forty-five years ago and cannot possibly be read to require that current TMDLs meet water quality standards by 1977.[10] Reading Section 301(b)(1)(C) in this way would effectively nullify every TMDL set to achieve water quality standards after 1977, an interpretation that cannot be upheld under the doctrine of absurdity. *See Clean Water Action v. U.S. Env't Prot. Agency*, 936 F.3d 308, 316 (5th Cir. 2019) (concluding that it would be absurd to read the deadline in Section 301(b)(2)(C) as requiring compliance of current effluent limitations by March 31, 1989).

There are multiple deadlines set during the initial passage of the CWA that have long since expired. For example, Section 303 requires states to submit a continuing planning process to EPA "not later than 120 days after October 18, 1972." CWA § 303(e)(2). Under the district court's reasoning, the October 18, 1972 deadline should apply with the same force to States currently submitting continuing planning processes. However, requiring that States meet the 1972 deadline to submit a planning process is as absurd as concluding that a current TMDL is

[10] Even if this Court were to agree with the district court that the July 1, 1977 deadline applies, Section 301(b)(1)(C) is not yet applicable since EPA has not established technology-based effluent limitations for phosphorous. Record at 9. A compliance deadline set in five-years is in no less conflict with the statute than EPA's neglect in not promulgating technology-based limits for phosphorous.

invalid when it does not achieve water quality standards by 1977.[11] It is unfathomable that Congress intended the July 1, 1977 deadline to apply to future TMDL determinations or restrict EPA's specialized expertise in setting TMDLs to achieve water quality standards. Here, EPA's interpretation of TMDL adheres to the CWA and there is no sound statutory basis for concluding that a five-year percentage reduction is an impermissible way to achieve the water quality standard.

b. EPA's interpretation of TMDL to allow for annual loads and phased percentage reductions is reasonable and comports with the goals of the CWA.

EPA's construction of "total maximum daily load" to allow for an annual pollution loading reduction phased in over five years represents a reasonable interpretation that merits *Chevron* deference. *See Chevron*, 467 U.S. at 834. "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *United States v. Haggar Apparel Co*., 526 U.S. 380, 392–93 (1999) (finding that "[f]or purposes of the Chevron analysis, the statute is ambiguous . . . in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms"). Here, EPA has exercised its broad discretion to interpret "daily" and approve an annual phased percentage reduction that best achieves the water quality goals of the statute. Further, "[c]ourts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments." *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981).

[11] The district court makes no mention of other statutory deadlines and instead cites to one case decided forty-five years ago that dealt with a challenge to a different subsection under Section 301(b). *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661–62 (3d Cir. 1976) (holding that the deadline for achievement of effluent limitations for point sources requiring best practicable control technology was intended by Congress to be a "rigid guidepost"). The Third Circuit in *Bethlehem Steel Corp.* specifically addressed Section 301(b)(1)(A) whereas TMDL calculations to achieve water quality standards fall under Section 301(b)(1)(C). *See id.* at 658.

At the very least, this Court should grant EPA's interpretation of Section 303(d) considerable deference under *Skidmore*. *See Pronsolino*, 291 F.3d at 1133; *Mead Corp.*, 533 U.S. at 234. In considering the grant of *Skidmore* deference to an agency's statutory interpretation, "courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228. EPA has the delegated authority to interpret Section 309(d), one of many provisions integral to a statute that addresses scientifically complex issues. *Pronsolino*, 291 F.3d at 1133. EPA's interpretation of the issue at hand is informative given the "specialized experience and broader investigations and information available to the agency." *Mead Corp.*, 533 U.S. at 234. (internal citations omitted). EPA's construction of TMDL to allow for a phased annual load reduction is consistent with earlier pronouncements that were grounded in scientific evidence with an eye towards achieving water quality standards. The congressionally entrusted responsibility, specialized expertise in environmental issues, and consistent interpretation lend support to the conclusion that EPA's interpretation warrants substantial *Skidmore* deference and should be upheld. *See Pronsolino*, 291 F.3d at 1135.

IV. EPA RATIONALLY DETERMINED ASSURANCES ARE NOT REQUIRED BECAUSE LOAD REDUCTIONS ARE ACHIEVABLE WITHOUT ASSURANCES.

In the event this Court finds EPA's interpretation of "total maximum daily load" permissible, the Court should uphold EPA's decision that assurances are not necessary under the "highly deferential" standard of arbitrary and capricious review. APA § 706; *e.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). TMDLs arise from a highly complicated and technical statutory scheme. Against that backdrop, EPA exercised its expertise to make predictions regarding the capability of the CWIP BMPs to achieve future load reductions. The CWIP BMPs are thorough, detailed, and the result of agency and public

deliberation.[12] The arbitrary standard does not require EPA prove the CWIP BMPs are guaranteed to achieve the target load reductions. Rather, EPA must point to sufficient support in the record that the CWIP BMPs are *capable* of achieving the target reduction. EPA's decision also comports with careful balance of cooperative federalism that Congress contemplated in the CWA. *See supra* Section II.

a. EPA's determination that CWIP BMPs are capable of achieving the target load reductions is not arbitrary because EPA reached a rational determination that is supported by the record.

CLW's reliance on EPA's Guidance Document[13] to supports its claim EPA acted arbitrarily when it did not include assurances is unfounded. This Court is not bound by previous EPA Guidance Documents. The Guidance Document is not a legislative rule and does not bind the agency. EPA is free—indeed obligated—to engage in fact specific inquires to shape TMDLs to meet the exigencies of particular water bodies. *See* 40 C.F.R. § 130.7(c)(1)(i) ("Site-specific information should be used wherever possible.").

The district court correctly held that the Guidance Document receives no deference. Record at 16. The Guidance Document has not undergone the crucible of APA notice and comment, does not carry the force and effect of law, and is not published in the Code of Federal Regulations. At best, the Guidance document is an interpretive document. *See id.*; *see Am. Min. Cong. v. Mine Safety & Health Admin*., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (four factors for distinguishing between interpretive rules and legislative rules). Interpretive rules receive no *Chevron* deference. *See Christensen,* 529 U.S. at 587 (interpretive rules that do not carry the force of law do not warrant *Chevron* deference). A lesser deference—based on an agency's

[12] The CWIP BMPs call for modified feeds in CAFO facilities, physical and chemical treatment of manure streams, and restrictions on manure spreading, as well as increased septic tank inspection and pumping schedules. Record at 9.

[13] EPA, GUIDANCE FOR WATER QUALITY BASED DECISION: THE TMDL PROCESS (1991)

power to persuade—is also unwarranted because EPA often takes a directly contrary position, including in this case.[14] *See Skidmore,* 323 U.S. at 140 ("[t]he weight of [agency] judgment in a particular case will depend upon . . . its consistency with earlier and later pronouncements").

The sole potentially binding law on this issue—40 C.F.R. § 130.2(i)—requires only that EPA determine BMPs "make more stringent load allocations practicable" before EPA can adopt less stringent wasteload allocations. Practicability asks whether an action is capable of bringing about a certain result, not whether the action guarantees such result.[15] Since no deference to the Guidance Document is appropriate, EPA need only support its general decision to adopt less stringent wasteload allocations in light of 40 C.F.R. § 130.2(i).[16] *See Mo. Co. for Env't Found. v. Wheeler,* 2021 WL 2211446, at *16 (W.D. Mo. 2021) (holding EPA did not need to "explain its decision to depart from the terms of a non-binding guidance document" because "the document [does] not impose legally binding requirements on EPA") (internal quotations omitted). Accordingly, the sole question is whether there is sufficient evidence in the record to rationally support EPA's determination that the CWIP BMPs are capable of achieving the target load reductions. That threshold is met.

[14] It appears to be a common practice for EPA to approve state TMDLs without requiring assurances. *See, e.g.*, NEV. DIV. OF ENV'T PROT., CARSON RIVER: TOTAL MAXIMUM DAILY LOADS FOR TOTAL SUSPENDED SOLIDS AND TURBIDITY 6 (2007) ("In most states, including Nevada, the nonpoint source load allocations are addressed through voluntary compliance") https://ndep.nv.gov/uploads/water-tmdl-docs/carson_river_tmdl_07.pdf.

[15] Practicability is defined by Section 404 's implementing regulation as "available and capable of being done after taking into consideration cost [and] existing technology." *See* 40 C.F.R. § 230.3 (404(b)(1) Guideline's controlling dredge and fill operations in wetlands). While this regulation is nonbinding, it is persuasive regarding how EPA interprets practicability.

[16] Even if EPA is required to address squarely why the TMDL does not require assurances, it clearly does. There is ample support in the record to justify why assurances were not necessary in this case. *See* Record 9–10.

Courts must be highly deferential to reasoned agency decision making. *E.g.*, *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 168 (6th Cir. 2003); *see also Kevin D. v. Blue Cross of S.C.*, 2021 WL 2590171, at *13 (2021) (describing arbitrary and capricious review as "extremely deferential"). Under arbitrary review, a court's "only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 105 (1983). This is an "extremely narrow" inquiry where courts may not "substitute its own judgment for that of the [agency]." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001); *Motor Vehicle Mfrs. Assn. of US*, 463 U.S. at 43. In addition, courts are especially deferential when agencies make future predictions of a technical nature in areas of special expertise. *See, e.g.*, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 656 (1980).

Here, EPA evaluated the CWIP BMPs, including the extensive record New Union developed surrounding its initial proposal, and exercised its professional judgment to determine the measures could achieve the target load reductions. The CWIP BMPs went through notice and comment rulemaking twice, first under New Union's initial state proposal, then under EPA's final TMDL rule. Record at 9. All the information gathering of rulemaking—including comments from the public, scientists, technical experts, environmentalists, and regulated industry—was incorporated into the record before EPA. Record at 10. At the most basic level, EPA was tasked with making a predictive judgment as to whether the CWIP BMPs are capable of achieving the target load reductions.[17] EPA reached a rational determination, supported by substantial evidence, that the BMPs are capable of achieving the target load reductions.

[17] "[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific

The arguments offered by CLW to the contrary are unavailing. That New Union eventually dropped the BMP measures from its initial proposal does not negate the fact that, now incorporated, those same BMP measures are capable of achieving the target load reductions. CLW also makes much of the fact that in the two years since the adoption of the TMDL, New Union has not yet implemented the BMPs. However, that is not how administrative law works. Courts reviewing agency action under the APA generally only consider the record before the agency at the time the decision was made. *See, e.g.*, *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp*., 423 U.S. 326, 331 (1976). "The focal point for judicial review should be the administrative record *already in existence*, not some new record made initially in the reviewing court." *See id.* (emphasis added). The fact that post-decision developments support or undercut an agency's decision is irrelevant. This Court should uphold the district court's ruling since EPA acted rationally when it adopted less stringent wasteload allocations.

b. EPA does not have the authority to require assurances of the CWIP BMPs since assurances would amount to direct federal regulation of nonpoint source pollution.

EPA lacks authority to require assurances where a TMDL specifies both the manner and from what locations load reductions will be enforced. To be sure, the constitutional and federalism concerns raised by EPA's allocation between point and nonpoint sources, *see supra* Section II, are amplified significantly when EPA goes further and requires assurances. In *Pronsolino*, the Ninth Circuit warned of two specific situations where a TMDL may transgress the bounds of the CWA. First, when EPA "specif[ies] the load of pollutants that may be received from particular parcels of land"; and second, when EPA "describe[s] what measures the state should take to implement the TMDL." *Pronsolino*, 291 F.3d at 1140. EPA's TMDL does both.

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determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balitmore Gas*, 462 U.S. at 103–04.

With assurances, EPA's TMDL not only "describe[s]" the measures New Union *should* take to achieve load reductions, EPA's TMDL would dictate the specific manner New Union *must* take to achieve load reductions. *See* Record at 9.[18] Had EPA required assurances, the federal government would have engaged in direct regulation of nonpoint pollution sources. EPA lacks the authority to amend the jurisdictional scope of the CWA. As the late Justice Scalia once observed, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 468 (2001). Therefore, EPA's adoption of a credit for BMPs was not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, New Union respectfully requests that this Court affirm the district court's rulings that the challenges to the Lake Chesaplain TMDL are ripe for judicial review, that EPA's rejection of New Union's proposed TMDL based solely on the failure to include WLAs and LAs is contrary to law, and that EPA's adoption of a credit for anticipated BMP pollution reductions in the Lake Chesaplain TMDL was not arbitrary and capricious or an abuse of discretion. Additionally, this Court should reverse the district court's ruling that EPA's adoption of an annual pollution loading reduction to be phased in over five years violates CWA § 303(d).

[18] This case is distinguishable from *Farm Bureau* where the Third Circuit upheld assurances because, there, EPA's TMDL did not prescribe how nonpoint pollution sources would be reduced. 792 F.3d at 302–06. The geographic nature was also different so nonpoint allocation did not amount to limitations attached to specific parcels. *Id.*