C.A. No. 21–000123

IN THE

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.

On Appeal from the United States District Court
For The District of New Union

Brief of Plaintiff–Appellant–Cross Appellee
CHESAPLAIN LAKE WATCH

NON–MEASURING BRIEF

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES ..... **ii**

INTRODUCTION **1**

JURISDICTIONAL STATEMENT **1**

STANDARD OF REVIEW **2**

STATEMENT OF ISSUES PRESENTED **2**

STATEMENT OF THE CASE **3**

A. The Vision of the Clean Water Act 3

1. The Fire in Our Face: The Realization That Pollution Affects Navigability 3

2. Setting the Statutory Scene for Scientifically Attacking Point Source and Nonpoint Source Pollution 4

B. Turning a Blind Eye: State and Federal Inaction Expedites Rapidly Declining WQS 6

C. This Court's Opportunity to Bring Clarity to the CWA and Lake Chesaplain 9

SUMMARY OF THE ARGUMENT **10**

ARGUMENT **12**

I. EPA's Statutory Interpretation of TMDL and Authority to Enact a TMDL Implementation Plan is Ripe for Judicial Review **12**

A. EPA's Final Agency Action Enacting a Federal TMDL Implementation Plan is Fit for Judicial Review 13

1. EPA's Statutory Interpretation of TMDL and Improper Approval of BMPs in the CWIP Presents Pure Legal Questions 14

2. EPA's TMDL Implementation Plan is a Final Agency Action That Will Directly Affect CLW and New Union 15

B. CLW and New Union Will Suffer Prejudice Through Hardship If This Court Stalls Judicial Review for Further Improbable Administrative Action 17

1. Compliance With EPA's Inappropriate CWIP Will Impose Significant Hardship on the Industries and Residents of New Union 18

2. Non-compliance with EPA's Inadequate CWIP Poses Serious Civil and Environmental Penalties 19

II. New Union's Refusal to Include WLA and LA in Their TMDL is Contrary to Law Because the CWA Expressly Provides EPA With Authority to Determine Specific Allocations "Necessary to Implement Water Quality Standards" 21

A. Congress Intentionally Drafted § 303(d) of the CWA Without Defining the Technical Phrase TMDL to Ensure EPA Interpretation of Applicable Technical Allocation Standards 22

B. EPA's Interpretation of TMDL to Include WLA and LA is the *Only* Reasonable Way the Implementation of "Necessary [WQS]" Can Be Achieved 25

1. EPA's Interpretation of TMDL to Include WLA and LA is Reasonable and Consistent with the Structure of the CWA 25

2. The Section Title and Legislative History of CWA § 303 Demonstrates Congressional Intent for TMDLs to Limit Both PS and NPS Allocations 26

III. EPA and New Union Are Required to Calculate "Daily" Allocation Limits Under the Plain Meaning of the CWA 28

IV. Under *Auer* Deference, EPA's BMP Credit System is Arbitrary and Capricious Because the Agency Departed from Their Established Regulatory Interpretation and Failed to Provide a Reasonable Basis for Departure 31

A. EPA's Adoption of BMP Credits is an Arbitrary and Capricious Abuse of Discretion Because EPA Relied on Political Opposition Rather Than Technocratic, Statutory, or Scientifically Driven Terms 33

B. The Primary Sponsor of the CWA Established That WQS Programs Require Reasonable Assurances 34

CONCLUSION 35

TABLE OF CITED AUTHORITIES

PROCEEDINGS BELOW

Chesaplain Lake Watch v. EPA,
No. 73–CV–2020 (D.N.U. Nov. 1, 2020) ..... *passim*

CASES

Abbott Laboratories v. Gardner,
87 U.S. 136 (1967) 10, 12, 13, 16, 17, 18, 19, 20

Alaska Ctr. for the Env't v. Reilly,
762 F.Supp. 1422 (W.D.Wash. 1991) 26

American Farm Bureau Federation v. U.S. EPA,
792 F.3d 281 (3d. Cir. 2015) 19, 23

Anacostia Riverkeeper, Inc. v. Jackson,
798 F.Supp.2d 210 (D.D.C. 2011) 26

Ass'n of Am. Med. Colleges v. United States,
217 F.3d 770 (9th Cir. 2000) 2

Auer v. Robbins,
519 U.S. 425 (1997) 2, 32

Barnhart v. Walton,
535 U.S. 212 (2002) 22, 23

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 32

Bravos v. Green,
306 F.Supp.2d 48 (D.D.C. 2004) 16, 17

Bullard v. Blue Hills Bank,
575 U.S. 496 (2015) 2

Burns v. Alcala,
420 U.S. 575 (1975) 28

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 2

Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.,
497 U.S. 837 (1984).....2, 22, 25, 28

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971).....34

City of Arcadia v. U.S. EPA,
265 F.Supp.2d 1142 (N.D. Cal. 2003).....16, 17, 18

Collins v. Bellinghausen,
153 F.3d 591 (8th Cir. 1998).....2

Commonwealth of Massachusetts v. Mellon,
262 U.S. 447 (1923).....19

Darby v. Ciscneros,
509 U.S. 137 (1993).....14

Dioxin v. Clarke
57 F.3d 1517 (9th Cir. 1995).....26

Engine Mfrs. Ass'n v. EPA,
88 F.3d 1075 (D.C.Cir. 1996).....28

Fox Television Stations, Inc. v. FCC,
280 F.3d 1027 (D.C.Cir. 2002).....14

Friends of Earth, Inc. v. EPA,
446 F.3d 140 (D.C.Cir. 2006).....28, 29

Gonzales v. Oregon,
546 U.S. 243, 257 (2006).....32

Idaho Sportsmen's Coalition v. Browner,
951 F.Supp 1304 (W.D.Wa. 1996).....25

King v. Burwell,
576 U.S. 473 (2015).....28

Lighthouse Resources, Inc. v. Inslee,
429 F.Supp.3d 736 (W.D.Wash. 2019).....34

Marbury v. Madison,
5 U.S. 137 (1803).....34

Massachusetts v. EPA,
549 U.S. 497 (2007).....33

Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Life Ins. Co.,
463 U.S. 29 (1983).....2, 33

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.,
545 U.S. 967 (2005).....23

Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.,
534 U.S. 327 (2002).....23

Natural Resources Defense Council, Inc. v. Fox,
909 F.Supp 153 (S.D.N.Y. 1995) 25, 26

Natural Resources Defense Council, Inc. v. Muszynski,
238 F.3d 91 (2nd Cir. 2001).....29

Nix v. Heddon,
149 U.S. 304 (1893).....28

Ohio Forestry Association Inc. v. Sierra Club,
523 U.S. 726 (1998).....13

Perkins v. Lukens Steel Co.,
310 U.S. 113 (1940).....19

Pronsolino v. Marcus,
91 F.Supp.2d 1337 (N.D.Cal. 2000) 26

Pronsolino v. Nastri,
291 F.3d 1123 (9th Cir. 2002) 20

Rajasekaran v. Hazuda,
815 F.3d 1095 (8th Cir. 2016) 2

Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,
619 F.2d 231 (3d. Cir. 1980).....14

Sierra Club v. Browner,
843 F.Supp. 1304 (D.Minn. 1993).....25

Sierra Club v. EPA,
294 F.3d 155 (D.C.Cir. 2002).....28

Sierra Club v. Meiburg,
296 F.3d 1021 (11th Cir. 2002) 26

Shaughnessy v. Pedreiro,
349 U.S. 48 (1955).....12

United States v. Mead Corp.,
544 U.S. 218 (2001).....23

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474 U.S. 121 (1985).....23

United States v. Storer Broadcasting Co.,
351 U.S. 192 (1956).....16

Utility Air Regulation Group v. EPA,
573 U.S. 302 (2014).....24

STATUTES

28 U.S.C. § 1331.....1

28 U.S.C. § 1291.....1

Administrative Procedure Act, § 551, 5 U.S.C. § 551(4).....15

Administrative Procedure Act § 557, 5 U.S.C. § 557(c)(3)(A).....33

Administrative Procedure Act, § 702, 5 U.S.C. § 702.....1, 9

Administrative Procedure Act, § 704, 5 U.S.C. § 704.....13

Administrative Procedure Act § 706, 5 U.S.C. § 706(2)(a).....2

Clean Air Act § 302, 42 U.S.C. § 7602 25

Clean Water Act § 101, 33 U.S.C. § 1251.....4, 23, 31

Clean Water Act § 101, 33 U.S.C. § 1251(a) 5

Clean Water Act § 208, 33 U.S.C. § 1288.....9

Clean Water Act § 303, 33 U.S.C. § 1313(a) 5

Clean Water Act § 303, 33 U.S.C. § 1313(c) 5

Clean Water Act § 303, 33 U.S.C. § 1313(c)(3) 8

Clean Water Act § 303, 33 U.S.C. § 1313(c)(2) 5, 8

Clean Water Act § 303, 33 U.S.C. § 1313(d) 9

Clean Water Act § 303, 33 U.S.C. § 1313(d)(D) 21

Clean Water Act § 303, 33 U.S.C. § 1313(d)(1) 21

Clean Water Act § 303, 33 U.S.C. § 1313(d)(1)(A) 21

Clean Water Act § 303, 33 U.S.C. § 1313(d)(1)(C) 2, 5, 7, 27, 28

Clean Water Act § 303, 33 U.S.C. § 1313(d)(2) 21

Clean Water Act § 303, 33 U.S.C. § 1313(e)(2) 9

Clean Water Act § 309, 33 U.S.C. § 1319(d) 19, 20

Clean Water Act § 309, 33 U.S.C. § 1319(g) 19, 20

Clean Water Act § 309, 33 U.S.C. § 1319(g)(6)(B) 1

Clean Water Act § 309, 33 U.S.C. § 1329 11

Clean Water Act § 309, 33 U.S.C. § 1329(2)(a) 31

Clean Water Act § 309, 33 U.S.C. § 1329(4)(d) 31

Clean Water Act § 402, 33 U.S.C. § 1342 ..... 4, 16

Clean Water Act § 402, 33 U.S.C. § 1342(a) 15

Clean Water Act § 501, 33 U.S. § 1361(a) 11, 23

Clean Water Act § 502(14), 33 U.S.C. §1362(14) 4

Clean Water Act § 505, 33 U.S.C. § 1365 20

Clean Water Act § 509, 33 U.S.C. § 1369(b) 12

Federal Water Pollution Control Act of 1948, Ch. 758, 62 Stat. 1155 (1948) 3

Water Quality Act of 1965, 89 P.L. 234, 79 Stat. 903 4

RULES

FED. R. APP. PROC. 4 1

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REGULATIONS

40 C.F.R. § 130.2(i) 7, 8, 11, 12, 21, 31

WATER QUALITY PLANNING AND MANAGEMENT, 50 Fed. Reg. 1774 (Jan. 11, 1985) 11

LEGISLATIVE AUTHORITY

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H.R. Rep. No. 92–911, at 105–06 (1972) 27

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EPA 841–R–84–100, REPORT TO CONGRESS: NONPOINT SOURCE SOLUTION IN THE U.S. (1984) 27

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841–B–87–110, SETTING PRIORITIES: THE KEY TO NONPOINT SOURCE CONTROL (1987) 32

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ROBERT W. ADLER,
THE CLEAN WATER ACT 20 YEARS LATER, (Island Press, 1993) 3

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JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, BY LOUIS L. JAFFE. BOSTON: LITTLE, BROWN & CO., 1965. Pp. Xvi, 792, 75 Yale L.J. 1208 (1966) 12

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INTRODUCTION

By enacting the Clean Water Act, Congress promulgated an aggressive framework to protect our most precious resource – water. At its enactment, Edmund Muskie, the principal sponsor of the Clean Water Act, proclaimed, "Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? . . . These questions answer themselves."[1] The present action presents the same clear-cut questions to the Twelfth Circuit. Can we afford to allow both EPA and New Union to quarrel and frustrate the most fundamental and definite purpose of the Clean Water Act? This self-answering question dares us to act and implement the most stringent and effective regulations on water quality possible to ensure the possibility of life.

JURISDICTIONAL STATEMENT

Chesaplain Lake Watch ("CLW") appeals from an opinion and order granting partial summary judgment in favor of Plaintiff, The State of New Union ("New Union"), and partial summary judgment in favor of Defendant, Environmental Protection Agency ("EPA"), entered September 1, 2020, by Honorable Judge Remus in the United States District Court for the District of New Union in consolidated action No. 73–CV–2020 and No. 66–CV–2020.[2] The District Court had subject-matter jurisdiction under the citizen-suit provision of the Clean Water Act ("CWA")[3] and 28 U.S.C. § 1331 because the CWA, a federal law, provides this cause of action. CLW, New Union, and EPA each filed timely notices of appeal under FED. R. APP. PROC. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291,

[1] S. Rep. No. 1, 93–1, at 164 (1973).
[2] These actions were consolidated correctly under APA § 702, 5 U.S.C. § 702; *See also Chesaplain Lake Watch v. E.P.A.* ("*Chesaplain.*"), No. 73–CV–020, slip op. at 4 (D.N.U. Nov. 1, 2020).
[3] Clean Water Act of 1977 ("CWA") § 309, 33 U.S.C. § 1319(g)(6)(B).

which authorizes appellate jurisdiction from all final decisions of United States district courts. An order granting summary judgment is a final decision, and thus, appealable.[4]

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewable de novo.[5] If there is no genuine dispute of material fact, the moving party is entitled to summary judgment.[6] The requirement that a claim is ripe for judicial review is an issue of subject-matter jurisdiction.[7] Subject-matter jurisdiction is a matter of law, which is reviewable de novo.[8] This appeal relates to EPA's statutory interpretation of "total maximum daily load" ("TMDL")[9] and agency authority to enact a TMDL implementation plan. These disputes invoke the arbitrary and capricious standard of review under the APA,[10] *Chevron* deference to formal agency interpretations of statutory provisions,[11] and *Auer* deference to agency interpretations of their own regulations.[12]

STATEMENT OF ISSUES PRESENTED

I. Is EPA's TMDL implementation plan that requires a costly change in the conduct of New Union's industries and citizens, enacted through notice and comment rulemaking, ripe for judicial review?

II. Does New Union's evasion of specific waste load allocations and load allocations in their TMDL submissions violate Congress's mandate of water quality standards under the

[4] *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).
[5] *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998).
[6] FED R. CIV. PROC. 56(C); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[7] *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 (9th Cir. 2000).
[8] *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016).
[9] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).
[10] APA § 706, 5 U.S.C. § 706(2)(a); *See also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Life Ins. Co.* ("*State Farm*"), 463 U.S. 29, 42 (1983).
[11] *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).
[12] *Auer v. Robbins*, 519 U.S. 425 (1997).

CWA, where EPA has express authority and expertise to define "TMDL" in a technical manner consistent with achieving sufficient standards?

III. Should EPA and New Union's interpretation of the word "daily" to include a five-year delay be permitted to usurp Congress's plain mandate for *daily* allocations when there is sufficient data and resources to implement daily allocations for phosphorus effectively?

IV. Is EPA's enactment of a Best Management Practice credit system an arbitrary and capricious abuse of discretion, where EPA has irrationally departed from its own regulation guidelines?

STATEMENT OF THE CASE

A. The Vision of the Clean Water Act

1. The Fire in Our Face: The Awakening of Pollution's Effects on Navigability.

The first comprehensive statement of national interest in clean water programs, The Federal Water Pollution Control Act ("FWPCA"), was enacted in 1948 to provide state and local governments with funding for research to resolve water pollution problems.[13] Under FWPCA, water pollution was viewed primarily as a state and local problem; hence, there were no federally required goals, objectives, limits, or guidelines.[14] When it came to enforcement, federal involvement was strictly limited to matters involving interstate waters.[15]

In the late 1960s, the Cuyahoga River, an intrastate water body, burst into flames.[16] This crisis awoke the nation to the magnitude of its pollution problems, prompting Congress to enact laws that promote active federalism involvement in environmental regulation. Accordingly, the

[13] Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (1948) (codified and amended at 33 U.S.C. §§ 1251-1376).
[14] CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, *CLEAN WATER ACT: A SUMMARY OF THE LAW* 2 (2016).
[15] *Id.*
[16] *See* ROBERT W. ADLER, *THE CLEAN WATER ACT 20 YEARS LATER* 5–10 (Island Press, 1993).

1965 Water Quality Act ("WQA") was born to provide for the adoption of water quality standards ("WQS") for both intrastate and interstate waters.[17] WQS within the WQA required states to set standards for interstate waters to determine pollution levels and control requirements.[18] However, by the late 1960s, the WQS approach was flawed and ineffective due to a lack of oversight and difficulty linking dischargers to violations of WQS.[19] With increased public interest in environmental protection, this frustration set the stage for the birth of the CWA.

2. Setting the Statutory Scene for Scientifically Attacking Point Source and Nonpoint Source Pollution.

For almost fifty years, the CWA has been the principal law governing pollution of United States surface waters.[20] In contrast to previous efforts, the CWA set optimistic and ambitious goals, expanding the federal government's authority while retaining state responsibility for the day-to-day implementation of the law. The CWA is a technology-forcing statute with rigorous demands to achieve high levels of pollution abatement.[21]

The structure of the CWA divided water pollution sources into two groups: point sources ("PS") and nonpoint sources ("NPS").[22] PS pollutants discharge from identifiable industrial and municipal entities, such as pipes and other outfalls.[23] NPS pollute water through groundwater runoff, stormwater runoff, agricultural lands, and urban areas.[24] PS polluters must obtain a National Pollutant Discharge Elimination System ("NPDES") permit under § 402 of the CWA.[25]

[17] Water Quality Act of 1965, 89 P.L. 234, 79 Stat. 903.
[18] *Id*. at § 5(c)(4).
[19] COPELAND, *supra* note 14 at 2.
[20] CWA, 33 U.S.C. §§ 1251–1387 (1977).
[21] COPELAND, *supra* note 14 at 2.
[22] CWA, *supra* note 20 at §§ 301, 402.
[23] CWA, § 502(14), 33 U.S.C. § 1362(14).
[24] COPELAND, *supra* note 14 at 4.
[25] CWA § 402, 33 U.S.C. § 1342.

NPDES permits contain effluent limitations, applying CWA technology-based and water quality-based requirements on a discharger.[26]

NPS polluters are indisputably responsible for the majority of water quality decline.[27]

The CWA requires states to adopt WQS for all intrastate bodies of water and submit WQS to EPA for approval.[28] WQS must include designated uses of a waterbody and a numerical or narrative statement identifying maximum concentrations of various pollutants that would not interfere with the designated use.[29] WQS serve as the safety net to federally determined technology-based requirements for PS, indicating additional pollutant controls needed to achieve the overall goals of the CWA.

In waters where industrial and municipal sources have achieved technology-based effluent limitations for PS, yet WQS remain unmet, dischargers may be required to meet additional pollution control requirements for NPS. The CWA requires states to set a TMDL of pollutants to ensure that applicable WQS are attained and maintained for impaired waters.[30] A TMDL dually serves as a planning process for achieving WQS and a quantitative assessment of problematic pollution sources and pollutant reductions needed to restore and protect our water. Both technology-based effluent limitations for PS, and WQS for NPS, work together to secure the CWA's overarching vision "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[31]

[26] *Id*.
[27] COPELAND, *supra* note 14 at 4.
[28] CWA § 303, 33 U.S.C. § 1313(c)(2).
[29] CWA § 303, 33 U.S.C. § 1313(a)–(c).
[30] CWA § 303, 33 U.S.C. § 1313(d)(1)(C).
[31] CWA § 101, 33 U.S.C. § 1251(a).

B. Turning a Blind Eye: State and Federal Inaction Expedites Rapidly Declining WQS.

Lake Chesaplain is a fifty-five-mile-long, five-mile-wide natural lake located entirely within New Union, a Class AA water body – a classification reserved for highest quality waters.[32] The Lake is designated for public drinking, recreation, and the survival of fish reproduction.[33] For over a century, the Lake and its tributaries have sustained the region's economy and defined its culture.[34] Before the turn of the twenty-first century, Lake Chesaplain enjoyed excellent water quality.[35] The clear waters of Lake Chesaplain attracted fishermen from the entire mid-north region.[36] Lake Chesaplain and its opportunities led families to its eastern shoreside, where they invested and built permanent homes for themselves and the future generations of New Union.[37]

Due to economic development pressures, the effects of industrialization have become visible.[38] New Union and EPA can no longer turn a blind eye to the declining WQS of Lake Chesaplain. Over the past two decades, the Lake has become replete with algae mats which have reduced visibility and produced offensive odors.[39] The public right of navigation and fishing, protected since the time of statehood, is drained by non-compliant water quality, suffocating creatures, and the community who cling to it for life.[40] The vibrant environment that Lake Chesaplain once sustained is no longer present, evident by declining tourism revenues and unsuitable water.[41] Given the myriad of sources and pollution volume, regulation of one source will not resolve the Lake's woes.

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[32] *Chesaplain*, slip op. at 7.
[33] *Id*. at 8.
[34] *Id*. at 7.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 8.
[41] *Id*. at 7.

New Union first addressed declining WQS of Lake Chesaplain in 2008, creating the Lake Chesaplain Study Commission ("Chesaplain Commission") to conduct an exhaustive hydrological study and issue a report ("2012 Report") identifying contributing polluters.[42] The 2012 Report concluded: (1) the Lake suffers from eutrophication, the ecological process inhibiting biological productivity due to excessive algae growth, and (2) the Lake suffers from excessive phosphorus, decreasing dissolved oxygen ("DO") levels necessary for a sustainable fishery.[43] To meet its designated purpose as a Class AA water body, the Chesaplain Commission established phosphorus levels must be drastically reduced from their current level of 0.020–0.034 mg/l to 0.014 mg/l.[44] In 2014 New Union Division of Fisheries and Environmental Control ("DOFEC") calculated WQS for Class AA waters at 0.014 mg/l and included Lake Chesaplain on its impaired water list in their triennial WQS submission to EPA.[45]

The solution to remedying Lake Chesaplain is found plainly in § 303 of the CWA through the safety net of a TMDL, which regulates waters failing to meet WQS. Once a water body is listed as impaired, § 303 requires the state to develop and submit to EPA a TMDL for the offending pollutants "at a level necessary to implement the applicable WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."[46] EPA defines a TMDL as "the sum of individual [wasteload allocations] for [PS] and [load allocations] for [NPS] and natural background."[47] In DOFEC's triennial WQS submission to EPA, the agency failed to submit a TMDL for Lake

[42] *Id*. at 8.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 8.
[46] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).
[47] 40 C.F.R. § 130.2(i).

Chesaplain, as required by the CWA.[48] In 2015, CLW notified both New Union and EPA of their intent to file suit for failure to create a TMDL for Lake Chesaplain.[49]

In response, New Union conducted a state rulemaking process to establish a TMDL for EPA approval.[50] In 2017, DOFEC publicly announced a proposal to implement a TMDL through a five-year phased reduction for both PS and NPS.[51] Under the proposed TMDL, the federal government would regulate PS reductions through federally governed NPDES permits, and BMP credit systems would manage NPS.[52] First, CLW objected to the BMP credit system due to its inability to achieve the 35% reduction in phosphorus allocations needed to restore the Lake and New Union's lack of statutory authority to enforce BMPs against the primary culprit of phosphorus allocation – agricultural sources.[53] Second, CLW demanded that a phased phosphorus reduction was inconsistent with the clear CWA statutory requirement for a "daily" implementation.[54]

Despite these objections, DOFEC adopted a phosphorus TMDL implemented under phased reduction and BMP credit systems but removed their consideration of NPS and PS allocations.[55] EPA rejected DOFEC's TMDL for failing to include NPS and PS allocations in the TMDL.[56] After notice and comment rulemaking, incorporating all scientific reports and public comments into the record, EPA adopted a TMDL for Lake Chesaplain and enacted the "Chesaplain Watershed Implementation Plan" ("CWIP").[57] The CWIP included PS and NPS allocations in the TMDL

[48] *Chesaplain*, slip op. at 8.
[49] *Id.*
[50] *Id*.
[51] *Id*. at 9.
[52] *Id*.
[53] *Id*. at 9–10.
[54] *Id*. at 10.
[55] *Id*.
[56] *Id.*; *See also* CWA § 303, 33 U.S.C §§ 1313(c)(3), (d)(2); 40 C.F.R. § 130.2(i).
[57] *Id*.

implemented through phased reduction and BMPs.[58] The BMPs did not specify enforcement measures or provide assurances for implementation, as required by EPA-issued guidelines.[59]

As of date, PS polluters continue to operate under expired NPDES permits and are not subject to any limit on phosphorus discharges.[60] Since EPA's enactment of the CWIP, New Union has not required phosphorus reductions by NPS under the BMP credit system, primarily due to significant political opposition.[61] Lake Chesaplain remains in severe, nearly irreversible decline.[62]

C. This Court's Opportunity to Bring Clarity to the CWA and Lake Chesaplain.

In 2020, CLW and New Union filed actions against EPA under APA § 702, challenging EPA's rejection of New Union's phosphorus TMDL and imposition of a federal TMDL CWIP for Lake Chesaplain.[63] CLW's membership[64] filed an affidavit establishing injury, satisfying standing requirements, due to their inability to use Lake Chesaplain, considering its hazardous water quality.[65] Likewise, New Union has established injury through the costly issuance of new NPDES permits, the threat of losing EPA water quality planning funds,[66] and at-risk eligibility to maintain its delegated NPDES permitting program.[67]

CLW and New Union's actions challenging EPA's regulatory actions were consolidated by the District Court,[68] holding (1) EPA's CWIP is ripe for judicial review,[69] (2) EPA's statutory

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[58] *Id*.
[59] *Id*; *See also* EPA OFF. OF WATER REGUL., EPA 440/4–91–001, GUIDANCE FOR WATER QUALITY BASED DECISIONS: THE TMDL PROCESS 15 (1991).
[60] *Chesaplain*, slip op. at 10.
[61] *Id*. at 9–10.
[62] *Id*. at 10.
[63] *Id*. at 4–5; *See also* APA § 702, 5 U.S.C. § 702; CWA § 303(d), 33 U.S.C. § 1313(d).
[64] *Id*. at 11 (CLW is a group of New Union citizens that reside at or near Lake Chesaplain and other citizens using the lake for recreational purposes, such as swimming, boating, and fishing).
[65] *Id*.
[66] CWA § 208, 33 U.S.C. § 1288.
[67] *Chesaplain*, slip op. at 11; CWA § 303, 33 U.S.C. § 1313(e)(2).
[68] *Chesaplain*, slip op. at 2.
[69] *Id*. at 14.

interpretation of TMDL to include WLA and LA violated the CWA,[70] (3) EPA's phased implementation of an annual percentage reduction for TMDL is contrary to the CWA,[71] and (4) EPA's implementation of a BMP credit system without reasonable assurances for compliance is not an arbitrary and capricious abuse of discretion.[72] This timely appeal followed.[73]

SUMMARY OF THE ARGUMENT

CLW urges this Court to clean up the muddied vision of the CWA and hold EPA's regulatory actions establishing a phosphorus TMDL for Lake Chesaplain insufficiently protective, contrary to law, and an arbitrary and capricious abuse of regulatory discretion.

This Court must *affirm* the District Court's determination that EPA's CWIP is ripe for judicial review because this action satisfies the justiciability doctrine of ripeness established in *Abbott Laboratories*.[74] First, CLW and New Union's claim is fit for judicial review because the legal challenges to EPA's CWIP stem from a final EPA rule enacted through notice and comment rulemaking. Second, this action is fit for judicial review because the CWIP is rooted in pure legal controversies surrounding regulatory control and statutory interpretation. Thus, there is no need for additional factual development. Third, CLW and New Union would suffer severe hardship upon judicial delay through irreversible environmental damage, costly compliance, sanctions to water quality planning funds, and eligibility to maintain their NPDES permitting system. Accordingly, this case is ripe for judicial review, and subject-matter jurisdiction is proper.

This Court must *reverse* the District Court's determination that EPA's interpretation of TMDL to include WLA and LA violated the CWA. First, during drafting, Congress intended to

[70] *Id*.
[71] *Id*. at 15.
[72] *Id*. at 16.
[73] *Id*. at 2.
[74] *Abbott Laboratories v. Gardner*, 87 U.S. 136 (1967).

provide expansive deference for EPA to determine technical allocations necessary to achieve WQS.[75] Second, EPA's interpretation of the term "total" in CWA § 303 to include both PS and NPS is the only reasonable way "necessary [WQS]" can be accomplished following the purpose of the CWA and legislative history of the CWA.[76] Accordingly, EPA's interpretation of TMDL to include a *total* allocation of all polluters, including PS and NPS, is well within the bounds of EPA's authority and the CWA.

This Court must *affirm* the District Court's determination that phased implementation of an annual percentage reduction for TMDLs violates the CWA. EPA's adoption of a five-year phased reduction is contrary to the plain meaning of the CWA's term "daily" under *Chevron* and, therefore, an abuse of regulatory discretion.[77] By including the term "daily," congressional intent is blatantly clear that delayed reduction is impermissible. Furthermore, technology has advanced to a sufficient state that requiring a daily pollution allocation would not be unreasonable or unattainable. Therefore, EPA's enactment of a phased implementation plan is directly contradictory to the plain meaning of the CWA and evasive of congressional intent to control pollution levels on a day-to-day basis.

Finally, this Court must *reverse* the District Court's holding that EPA's BMP credit system is not an arbitrary and capricious abuse of discretion. The CWA delegates authority to EPA for the regulation of BMP credit systems.[78] Under this authority, EPA has issued a regulation and interpretive guideline for BMP credit systems, outlining requirements for effective pollution reduction.[79] Specifically, the interpretive guideline requires *all* NPS polluters to contribute to

[75] CWA § 501(a), 33 U.S.C. § 1361(a).
[76] 40 C.F.R. § 130.2(i); *see* WATER QUALITY PLANNING AND MANAGEMENT, 50 Fed. Reg. 1774 (Jan. 11, 1985) (to be codified at 40 C.F.R. pt. 35, 130).
[77] CWA § 319(d)(1), 33 U.S.C. § 1329.
[78] 40 C.F.R. § 130.2(i); EPA OFF. OF WATER REGUL., *supra* note 59 at 15.
[79] *Id*. at 25.

allocation reduction.[80] Further, the guideline compels the EPA to establish reasonable assurances that such reductions will occur.[81] Here, EPA departed from these regulatory guidelines, bowing to deep pockets and powerful political pressures.[82] Therefore, under *Auer* deference, EPA's consideration of irrelevant political factors in their departure constituted a significant arbitrary and capricious abuse of discretion.

ARGUMENT

I. EPA's Statutory Interpretation of TMDL and Authority to Enact a TMDL Implementation Plan is Ripe for Judicial Review.

The District Court correctly held that CLW and New Union's claims are ripe for judicial review. Judicial review of agency action is a longstanding, liberal legal right authorized by § 704 of the Administrative Procedure Act ("APA") and Article III of the United States Constitution.[83] Only upon evidence of clear legislative intent for the prohibition of judicial review or lack of justiciability can a court restrict judicial review of agency action.[84] Here, EPA insufficiently argues their CWIP and statutory interpretation of TMDL is not ripe for judicial review. Notably, nothing in the CWA or APA precludes judicial review of this action. Quite oppositely, § 509 of the CWA expressly permits judicial review of EPA promulgation of effluent standards.[85] Nevertheless, EPA is attempting to circumvent judicial review by claiming this action is not ripe and, therefore, moot.

The justiciability limitation of ripeness protects the administrative system from premature judicial review until "an administrative decision [is] formalized and its effects [are] felt in a

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[80] *Id.*
[81] *Id*.
[82] *Chesaplain*, slip op. at 9.
[83] *Abbott Laboratories*, 387 U.S. at 141, (citing *Shaughnessy v. Pedreiro*, 249 U.S. 48, 51 (1955)).
[84] *Id*. at 1512, (citing STUART J. LAND, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, BY LOUIS L. JAFFE. BOSTON: LITTLE, BROWN & CO., 1965. Pp. Xvi, 792, 75 Yale L.J. 1208 (1966)).
[85] CWA § 509, 33 U.S.C. § 1369(b).

concrete way."[86] Ripeness requires a two-part evaluation: (1) the fitness of the issues for judicial review, and (2) the hardship the parties may endure without judicial consideration.[87] When evaluating the fitness of issues, this Court must consider whether the issues are purely legal, whether further administrative proceedings may remedy the issue, and whether the regulation is a "final agency action."[88] When evaluating hardship, this Court must consider the direct and immediate harm of the regulation and potential for non-compliant sanctions.[89]

A. EPA's Final Agency Action Enacting a Federal TMDL Implementation Plan is Fit for Judicial Review.

The Supreme Court outlines three elements that must be satisfied to establish fitness. First, the issue tendered must be purely legal.[90] Second, the court must look to whether further administrative proceedings may resolve the issue.[91] Third, the administrative act must qualify as a "final agency action" under § 704 of the APA.[92]

The present action satisfies all three elements required for fitness. First, EPA's rejection of New Union's phosphorus TMDL implementation plan and subsequent enactment of the CWIP invokes legal questions of regulatory control and statutory analysis. Second, to date, the EPA has contemplated no further administrative proceedings. Once EPA established formal acceptance of a proposed NPDES permitting system and BMPs, the administrative process was exhausted. Even if EPA had considered further administrative proceedings, citizen suits do not require the

[86] *Abbott Laboratories*, 387 U.S. at 149.
[87] *Id*., *See also Ohio Forestry Association Inc. v. Sierra Club*, 523 U.S. 726, 733 (1988) (holding courts must consider three factors in administrative actions for ripeness: (1) plaintiff's hardship; (2) inappropriate interference with administrative action; and (3) the benefits of further factual development).
[88] *Id*. at 149.
[89] *Id*. at 151–52.
[90] *Id*. at 149.
[91] *Id.*; *See also Ohio Forestry*, 523 U.S. at 733.
[92] *Id.*; *See also* APA § 704, 5 U.S.C. § 704.

exhaustion of administrative remedies for judicial review.[93] Third, EPA's CWIP is a final agency action enacted through notice and comment rulemaking. Accordingly, as discussed in further detail below, the issues tendered in this action are fit for judicial review.

1. EPA's Statutory Interpretation of TMDL and Improper Approval of BMPs in the CWIP Presents Pure Legal Questions.

EPA's authority to reject New Union's phosphorus TMDL for Lake Chesaplain and enact its own federal implementation plan invokes pure legal questions. EPA demands that the environmental effects of the CWIP may vary upon its change in the issuance of federally enforceable NPDES permits and New Union's adoption of BMP credits.[94] The EPA's argument must fail because it evades the reality that all parties approach this case as one of regulatory control and statutory interpretation. This action is not grounded in the need for scientific, factual clarification. CLW is not asking this Court to become scientific experts in phosphorus and its impact on WQS. This data is already known to all parties to this action. Instead, CLW and New Union are asking several important legal questions regarding who may control the regulation of TMDL implementation plans following a proper statutory interpretation of the CWA. This action centers around EPA's (1) statutory interpretation of the term "total" in TMDL, (2) statutory interpretation of the term "daily" in TMDL, and (3) regulatory authority to allocate BMP credits without assurance for pollution reduction.[95]

This Court can find the answers to these three issues within the legal construction and statutory analysis of the CWA and APA § 704, not factual determinations. Thus, these issues do not present a need for factual development to justify a judicial delay. Nonetheless, EPA maintains

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[93] *Darby v. Ciscneros*, 509 U.S. 137, 155 (1993); *See also Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 244 (3d. Cir. 1980).
[94] *Chesaplain*, slip op. at 12.
[95] *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C.Cir. 2002) (holding a challenge to rule as contrary to a statute is a pure question of law).

that the factual evolution of the record for this case would benefit this action. However, EPA's contention fails because analyses of statutory interpretation and regulatory authority receive no benefit from (1) factual changes to NPDES permits or (2) predicted changes under BMPs.

To EPA's first point, because NPDES permits applicable to PS remain expired and are currently subject to re-approval under EPA authority, EPA argues their future approval or denial of these permits will create factual developments to warrant a judicial delay.[96] This contention misses the mark. CLW is merely asking this Court to determine whether the CWA § 303(d) and 40 C.F.R. § 130.2(i) require the inclusion of LAs for PS under NPDES permits to establish a TMDL to achieve necessary WQS under the CWA. This legal question does not depend on the environmental effects of EPA's issuance of NPDES permits.

To EPA's second point, New Union's BMP credits are unlawful, a primary legal issue in this litigation, and received approval under no rational explanation for EPA's departure from its policies guiding BMPs. Further, NPS polluters have consistently refused to comply with the BMP credit system. Thus, their improbable environmental impact does not affect the legality of EPA's enacted CWIP. Accordingly, EPA's defense that NPDES Permits, and unlawful BMP credits, diminishes the force of the CWIP to a factual question does not stand. Straightforward legal questions of statutory interpretation and regulatory authority remain at the forefront of this action.

2. EPA's TMDL Implementation Plan is a Final Agency Action That Will Directly Affect CLW and New Union.

EPA's decree of a federally mandated CWIP after notice and comment rulemaking is a final agency action. The APA defines "agency action" as "an agency statement . . . designed to implement, interpret, or prescribe law . . . "[97] The CWIP is designed "to give an authoritative

[96] *Chesaplain*, slip op. at 11; *See* also CWA § 402, 33 U.S.C. § 1342(a).
[97] APA § 551, 5 U.S.C. § 551(4).

interpretation of a statutory provision that has a direct effect on the day-to-day" preservation of Lake Chesaplain.[98]

EPA improperly urges that any future changes to New Union's issuance of federally governable NPDES permits and the future implementation of unlawful BMPs impact the finality of their administrative order.[99] Using expected changes to NPDES permits and the development of BMPs as a defense is meritless for two reasons. First, NPDES permits are only applicable in this litigation in their relationship to effectively regulating NPS.[100] Second, the factual changes of BMPs under the CWIP are irrelevant to whether they are legally sufficient.[101]

Regardless of whether this Court holds that EPA's CWIP is improper, it cannot rule that EPA's decision was not a final agency action. The Supreme Court holds that once the process of rulemaking is complete, a final agency action has occurred, regardless of application.[102] Before adopting and enacting the CWIP, EPA conducted notice and comment rulemaking.[103] After rulemaking procedures concluded, the CWIP became effective immediately upon issuance.[104]

EPA relies on *City of Arcadia*[105] and *Bravos*[106] to persuade this Court that this action is not ripe for judicial review. However, these cases are severely distinguishable, and their application in this action is improper. First, *City of Arcadia* is not factually analogous to this case. *City of Arcadia* was concerned with the approval of proposed TMDLs alone, not implementation plans.[107] Because EPA-approved TMDLs are a proposed goal, the city could not sufficiently demonstrate

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[98] *Abbott Laboratories*, 387 U.S. at 151.
[99] *Chesaplain*, slip op. at 11.
[100] CWA § 402, 33 U.S.C. § 1342(a).
[101] *Id*.
[102] *Abbott Laboratories*, 87 U.S. at 151, (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956)).
[103] *Chesaplain*, slip op. at 10.
[104] *Id*.
[105] *City of Arcadia v. EPA*, 265 F.Supp.2d 1142 (N.D.Cal. 2003).
[106] *Bravos v. Green*, 306 F.Supp.2d 48 (D.D.C. 2004).
[107] *City of Arcadia*, 265 F.Supp.2d at 1142.

that TMDL approval is a final agency action.[108] In the present case, we are not dealing with EPA's approval of TMDL goals, but instead, EPA's TMDL implementation plan enacted through notice and comment rulemaking.[109] This crucial distinction places the EPA's regulation well within the bounds of the APA's definition of final agency action.

A similar distinction is present in *Bravos*. In *Bravos*, the court evaluated EPA's procedure of *reviewing* a state's TMDL implementation plan.[110] EPA neither approved nor disapproved the state's proposed implementation plan.[111] Logically, this actionless review did not amount to a final agency action. In the present case, we are not dealing with EPA stagnancy. Instead, this case presents the issue of whether the EPA's enactment of an immediately active implementation plan has legal grounds within the bounds of the CWA.

Accordingly, neither *Bravos* nor *City of Arcadia* can guide a proper analysis of a final agency action. In sum, EPA's CWIP satisfies the APA's definition of "agency action," and the CWIP's immediate, daily effect on Lake Chesaplain through notice and comment rulemaking qualifies EPA's action as final.

B. CLW and New Union Will Suffer Prejudice Through Hardship If This Court Stalls Judicial Review for Further Improbable Administrative Action.

The second determination this Court must review in deciding whether this action is ripe for judicial review is the potential prejudicial hardship the regulation may invoke.[112] A party will face significant hardship under an enacted regulation where the "regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to

[108] *Id*. at 1154.
[109] *Chesaplain*, slip op. at 10.
[110] *Bravos*, 306 F.Supp.2d at 52.
[111] *Id*. at 54.
[112] *Abbott Laboratories*, 87 U.S. at 152.

noncompliance."[113] Here, the EPA's CWIP will result in a significant change in the monitoring of New Union's WQS. Further, New Union's non-compliance puts their water quality planning funds and NPDES permitting authority at risk.

1. Compliance With EPA's Inappropriate CWIP Will Impose Significant Hardship on the Industries and Residents of New Union.

This Court must assess the hardship associated with a significant change in the conduct of polluter affairs in reliance upon EPA's regulation.[114] EPA argues this Court should again adopt the rationale of *City of Arcadia* and hold that a TMDL does not propose immediate or future hardship on industries or residents of New Union.[115] However, as established above, TMDL *implementation plans* are immediately effective, and citizens will rely on the CWIP to invest economically for compliance. Unlike in *City of Arcadia*, where a state proposed a TMDL goal, here the effects of a TMDL implementation plan are comprehensive and final.[116] Therefore, its effects will occur without delay. Notably, *City of Arcadia* does not mention the term "implementation plan" a single time.[117] Accordingly, these factual discrepancies render *City of Arcadia* inapplicable to the hardship New Union will suffer if the CWIP is permitted to stand.

New Union industries and citizens have blatantly expressed concerns of hardship under the CWIP.[118] EPA's CWIP sparked great debate and protest among the Chesaplain community among economic and laborious difficulties associated with compliance.[119] In *American Farm*, the Third Circuit held a pre-enforcement challenge to a state TMDL, without a finalized implementation plan, was ripe for judicial consideration, presenting the same types of hardship existing in this

[113] *Id* at 151.
[114] *Id*.
[115] *Chesaplain*, slip. op. at 12.
[116] *City of Arcadia*, 265 F.Supp.2d at 1142.
[117] *See generally Id*.
[118] *Chesaplain*, slip op. at 9.
[119] *Id*.

action.[120] The Court reasoned that although the state had not yet implemented the TMDL in its planning process, polluters would have reason to limit their discharge in anticipation of the TMDL's implementation.[121] Accordingly, EPA and other states involved in the suit would suffer hardship by spending time, energy, and money preparing for compliance that may ultimately end up in judicial reversal.[122] Recognizing the need for proactive decision making in WQS adjudications, the court established, "[i]f there is something wrong with the TMDL, it is better to know now than later."[123]

EPA may contend that potential economic costs do not warrant sufficient hardship for this case to face judicial reversal. While it is true in standing cases, financial expense alone or possible financial loss is not a justification for pre-enforcement review;[124] here, standing is not disputed by any party.[125] Accordingly, this case is remote from this rule. Therefore, EPA's CWIP invokes immediate and significant consequences, subjecting sufficient hardship upon CLW and New Union for judicial review.

2. Non-compliance with EPA's Inadequate CWIP Poses Serious Civil and Environmental Penalties.

The second determination this Court must evaluate for hardship is the severity of potential penalties for non-compliance of the regulation in dispute.[126] The CWA authorizes EPA to sue for civil penalties for any violation of an NPDES permit, EPA order, or CWA section.[127] Additionally,

[120] *American Farm Bureau Federation v. EPA*, 792 F.3d 281 (3d. Cir. 2015).
[121] *Id*. at 293.
[122] *Id*. at 293–94.
[123] *Id*. at 294.
[124] *Abbott Laboratories*, 387 U.S. at 153, (citing *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)); *See also Perkins v. Lukens Steel Co.*, 310 U.S. 113, 133 (1940).
[125] *Chesaplain*, slip op. at 11.
[126] *Abbott Laboratories*, 87 U.S. at 1518.
[127] CWA § 309, 33 U.S.C. § 1319(d); *See also* CWA § 309, 33 U.S.C. § 1319(g).

if a state fails to comply with an extension of authority granted by EPA, the neglect shall be subject to compliance-motivated sanctions through civil, criminal, or financial administrative means.[128]

Here, the record establishes that non-compliance with EPA's CWIP is ongoing.[129] Both the slaughterhouse and Chesaplain Mills sewage plant continue to operate without a limit on phosphorus discharges and refuse to adopt compliant measures.[130] In addition, New Union has taken no steps to require phosphorus reduction per EPA's BMP provision, and Hog CAFOs have not been modified to incorporate any phosphorus reduction measures.[131] EPA may argue that sanctions for New Union's non-compliance are unlikely. However, regardless of the probability of sanctions, this uncertain representation by EPA is insufficient to defeat the gravity of the penalties New Union's industries and residents face if deemed non-compliant.[132]

For almost fifty years, the CWA has authorized citizen enforcement as the basis for hundreds of suits against dischargers.[133] EPA may fear that if this Court permits review of this consolidated suit, nothing will prevent a multiplicity of suits challenging EPA implementation plans in other jurisdictions. To this, the Supreme Court has established that courts are well equipped to deal with such eventualities.[134] Rejecting ripeness in fear of a flood of litigation is contrary to the purpose of having a judicial system at all. Moreover, the financial cost of later litigation is reason alone to expedite judicial review. We can afford litigation, but we cannot afford to permanently lose the invaluable resource that makes human life possible.

In retrospect, water quality regulation is a sensitive task of which public confidence is of utmost importance. It is dangerous to suggest courts may only review administrative actions after

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[128] *Id*.
[129] *Chesaplain*, slip op. at 10.
[130] *Id*. at 9–10.
[131] *Id*. at 10.
[132] *Abbott Laboratories*, 837 U.S. at 154.
[133] CWA § 505, 33 U.S.C. § 1365.
[134] *Abbott Laboratories*, 837 U.S. at 155.

severe harm to a community's natural resources and health. If this Court were to delay judicial review of EPA's CWIP, further environmental and economic decline may result in the irreparable destruction of a community's primary source of drinking water. Such a decision would leave future generations of New Union in despair. For the preceding reasons, this action is ripe for review.

II. New Union's Refusal to Include WLA and LA in Their TMDL is Contrary to Law Because the CWA Expressly Provides EPA With Authority to Determine Specific Allocations "Necessary to Implement [WQS]."

The District Court incorrectly held that the EPA's requirement to include both WLA and LA in a TMDL submission is an improper statutory construction of "total" in TMDL.[135] The CWA does not explicitly distinguish between WLA measured by PS and LA measured by NPS. Instead, the CWA mandates: "[e]ach state shall identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement . . . [WQS]."[136] After a state identifies a water as impaired, the CWA requires the state to establish a TMDL at a level capable of achieving these WQS. This TMDL must "assure protection and propagation of the balanced indigenous population of shellfish, fish[,] and wildlife . . . "[137] After establishing a TMDL for an impaired water, the state must submit it to EPA for approval.[138] For almost two decades, EPA has regulated that TMDL submissions must include "the sum of individual WLAs for [PS] and LAs for [NPS] and natural background."[139]

Here, traditional effluent limitations were not stringent enough to satisfy WQS for Lake Chesaplain.[140] After Lake Chesaplain's classification as an impaired water and pressures from CLW, New Union submitted a TMDL to EPA for approval.[141] EPA rejected New Union's TMDL

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[135] *Chesaplain*, slip op. at 13.
[136] CWA § 303(d), 33 U.S.C. § 1313(d)(1)(A).
[137] CWA § 303(d), 33 U.S.C. § 1313(d)(D).
[138] CWA § 303(d), 33 U.S.C. § 1313(d)(1); *See also* CWA § 303(d), 33 U.S.C. § 1313(d)(2).
[139] 40 C.F.R. § 130.2(i).
[140] *Chesaplain*, slip op. at 8.
[141] *Id*. at 10.

for failure to include WLA and LA in their submission.[142] New Union argues that their TMDL submission satisfies the CWA and EPA's regulation requiring allocation specifications is contrary to law.[143] However, the express Congressional omission of specific allocations in § 303 is deliberate to provide EPA with authority to exercise their expertise when establishing allocation loads at a level "necessary to implement applicable [WQS]."

To determine whether this Court should give deference to EPA's interpretation of "TMDL," this Court must apply the familiar *Chevron* two-step analysis.[144] *Chevron* deference asks (1) whether Congress has directly spoken to the precise question at issue and if the intent of Congress is unclear (2) whether the agency's interpretation is reasonable.[145] Under *Chevron*, EPA's interpretation of TMDL to require WLA and LA allocations in a TMDL submission is reasonable for two reasons. First, Congress intentionally drafted § 303 to broadly allow EPA to interpret technical standards necessary to achieve WQS. Second, EPA's interpretation of TMDL's to include WLA and LA is not only a reasonable interpretation but the *only* reasonable way "necessary [WQS]" can be accomplished.

A. Congress Intentionally Drafted § 303(d) of the CWA Without Defining the Technical Phrase TMDL to Ensure EPA Interpretation of Applicable Technical Allocation Standards.

The mechanics of *Chevron* are familiar. At step one, courts must inquire whether "Congress has directly spoken to the precise question at issue" or whether the intent of Congress is clear[146] When evaluating "the precise question at issue," this Court must determine "whether the [CWA] unambiguously forbids the agency's interpretation."[147] If Congressional intent is clear, and

[142] *Id*. at 12.
[143] *Id*.
[144] *Chevron,* 467 U.S. at 842–43.
[145] *Id.*
[146] *Id*.
[147] *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002).

the agency's statutory interpretation is not unambiguously forbidden, this Court must provide agency deference.[148]

At step one, this Court must evaluate Congress's intent for agency delegation. Congress may provide a gap within a statutory provision with the "intent to delegate" interpretive power to an agency.[149] Under § 101(d) of the CWA, Congress explicitly delegated authority to EPA for the administration of the CWA.[150] Additionally, the CWA expressly authorizes EPA "to prescribe such regulations . . . necessary to carry out" WQS.[151]

The Supreme Court has established that *Chevron* deference is even more appropriate where Congress has charged an agency with administering a complex statutory scheme requiring technical or scientific sophistication.[152] The CWA falls into this highly technical category.[153] Several courts have recognized EPA's authority to fill CWA technical omissions when regulating TMDLs.[154] Here, the District Court ignored the overall technical purpose of omitting specific TMDL allocations within the CWA. The technical intricacies of TMDLs are indicative of unambiguous Congressional intent for agency delegation. Furthermore, regardless of whether this Court is convinced the term "total" requires technical agency interpretation, other courts had found

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[148] *Chevron,* 467 U.S. at 842–43.
[149] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005); *See also United States v. Mead Corp.*, 544 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision satisfies *Chevron* deference when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency claiming deference was promulgated in the exercise of that authority").
[150] CWA § 101(d), 33 U.S.C. § 1251.
[151] CWA § 501, 33 U.S.C. § 1361(a).
[152] *Brand X*, 545 U.S. at 1002–03; *See also Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("[a]s it was in *Chevron*, the subject matter here is technical, complex, and dynamic . . . ") (citations omitted).
[153] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985) (finding many agency determinations under the CWA are technical and complex).
[154] *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (2002) (holding EPA has delegated authority to enact regulations regarding TMDLs); *American* Farm, 792 F.3d at 297 (holding EPA's interpretation of TMDL to include specific allocations is entitled to *Chevron* deference because the phrase TMDL is technical, and Congress was purposefully silent on the manner of TMDL regulation to ensure agency expertise).

no issue determining that "Congress meant *total* when it said total."[155] To further support this conclusion, "total" is legally defined as "whole; not divided; full; complete."[156]

The District Court reasoned by way of flawed syllogism in determining that courts should interpret the CWA synonymously with previous judicial decisions interpreting the Clean Air Act ("CAA").[157] Referencing *Utility Air*, the District Court reasoned that because EPA was mistaken in determining the CAA provided for the inclusion of greenhouse gases under PSDs, EPA should also be mistaken here in deciding the CWA allows for the inclusion of both WLAs and LAs under TMDLs.[158] The District Court's gymnastical analogy must fail because the EPA's interpretation was impermissible solely because of the hefty consequences likely to ensue.[159] Under the EPA's interpretation of a PSD, annual permit applications would jump from approximately 800 to 82,000, and costs would swell from $12 million to over $1.5 Billion.[160]

In sharp contrast, this interpretation by EPA under the CWA does not ask New Union to increase its permitting applications by even one new application. Nor does EPA ask New Union to expend one dollar to provide the information of WLAs and LAs under the findings of the 2012 Report. In fact, this information is already available.[161] EPA merely asks New Union to provide information already within their reach to effectively restore the non-compliant WQS in Lake Chesaplain through its submission of a transparent TMDL. This reasonable and non-burdensome task is incomparable to the scenario in *Utility Air* and thus deserves no place in the rationale of the District Court's conclusion.

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[155] *Chesaplain*, slip op. at 13 (emphasis added).
[156] *See* BLACK'S LAW DICTIONARY, 11TH ED. p. 1794.
[157] *Chesaplain*, slip op. at 14.
[158] *Utility Air Regulation Group v. EPA* ("*Utility Air*"), 573 U.S. 302, 321 (2014).
[159] *Id.* at 321–32.
[160] *Id*.
[161] *Chesaplain*, slip op at 14.

Further, the CAA defined "air pollutant," which left no gap for EPA to issue an interpretation.[162] Conversely, Congress declined to define TMDL under the CWA, solidifying the conclusion that this omission was intentional to provide room for EPA interpretation due to its technical nature and need for regulatory oversight. Thus, the Twelfth Circuit must reject the rationale in *Utility Air* and hold the lack of definition for TMDL within the CWA is deliberate Congressional foresight for expert interpretation of the most effective means of achieving WQS.

B. EPA's Interpretation of TMDL to Include WLA and LA is the *Only* Reasonable Way the Implementation of "Necessary [WQS]" Can Be Achieved.

Under step two of *Chevron*, this Court must determine whether EPA's interpretation of TMDL is reasonable.[163] Agency interpretations are reasonable and demand "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[164] Under EPA's regulation of CWA TMDLs, states must identify *all* discharge sources to meet applicable WQS. As outlined below, EPA's interpretation of TMDLs to include WLAs and LAs is reasonable because it is consistent with (1) previous judicial decisions, (2) the legislative history of TMDLs, and (3) the purpose of TMDLs under the CWA.

1. EPA's Interpretation of TMDL to Include WLA and LA is Reasonable and Consistent with the Structure of the CWA.

Numerous courts have examined the language of CWA § 303 and recognized the "comprehensive" and "integrated" characteristics of the TMDL process are integral to achieving WQS under the CWA.[165] As one district court has explained, including WLAs and LAs in TMDL

[162] CAA § 302, 42 U.S.C. § 7602.
[163] *Chevron*, 467 U.S. at 842–43, 845.
[164] *Id*. at 844.
[165] *See Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp 962, 966 (W.D.Wa. 1996); *Sierra Club v. Browner*, 843 F. Supp. 1304, 1311 (D.Minn. 1993); *NRDC v. Fox*, 909 F.Supp. 153, 156 (S.D.N.Y. 1995).

calculations ensures that multiple PS dischargers' cumulative impact is accounted for and evaluated in conjunction with NPS polluters.[166]

These courts have emphasized that including both WLAs and LAs in TMDL submissions is "central to the [CWA's] water-quality scheme because . . . they tie together [PS] and [NPS] pollution issues in a manner that addresses the whole health of the water."[167] The standard-setting processes of § 303 plainly apply to waters polluted by PS and NPS, either alone or in combination.[168] Therefore, because courts have recognized that the purpose of a TMDL, in conjunction with the CWA's comprehensive structure, is to provide an outlet for effectively combating NPS pollution, EPA's interpretation of TMDL to include both WLAs and LAs is a reasonable and adequate means to ensure WQS.

2. The Section Title and Legislative History of CWA § 303 Demonstrate Congressional Intent for TMDLs to Limit Both PS and NPS Allocations.

Congress's placement of TMDLs in § 303, titled "WQS and Implementation Plans," demonstrates Congress's intent for TMDLs to be part of a water quality-based approach not limited to particular sources, but a maximum limit for *all* sources.[169] As explained by EPA, "[t]he TMDL process is a rational method for weighing the competing pollution concerns and developing an integrated pollution reduction strategy for [WLAs] from [PS] and [LAs] from [NPS]."[170]

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[166] *Alaska Ctr. for the Env't v. Reilly*, 762 F.Supp. 1422, 1424 (W.D.Wash. 1991) (emphasis added) (footnote omitted); *See also Dioxin v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (holding a TMDL must include the cumulative total load of all NPS, natural background sources, and PS).
[167] *Anacostia Riverkeeper, Inc. v. Jackson,* 798 F. Supp. 2d 210, 216 (D.D.C. 2011), (quoting *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002)).
[168] *Pronsolino v. Marcus*, 91 F. Supp.2d 1337, 1343 (N.D. Cal. 2000); *Natural Resources Defense Council, Inc. v. Fox*, 30 F.Supp.2d 369 (S.D.N.Y. 1998) (TMDLs lacking the required different point and nonpoint allocations are not in accordance with the CWA).
[169] *See generally* CWA § 303.
[170] EPA OFF. OF WATER REGUL., *supra* note 59 at 15.

The legislative history of § 303 demonstrates that Congress understood WLAs from PS controls alone would be insufficient to meet applicable WQS.[171] The House Committee Report on the bill that introduced § 303 plainly recognized that PS controls alone would be inadequate to implement applicable WQS.[172] Furthermore, the Committee expressly noted its concern for LAs from NPS that significantly contribute to the ongoing water quality problems.[173]

Here, not only is EPA's interpretation of TMDLs to include WLAs and LAs reasonable, but it is also the *only* reasonable interpretation to achieve "necessary [WQS]" mandated by Congress under § 303.[174] Put simply, if a TMDL were only to include a speculated maximum, EPA would have no way to determine whether the TMDL would meet WQS. Without dispute, LAs from NPS pollution need regulation as they remain at the forefront of the Nation's leading water quality crisis, contributing to nearly half of water quality impairment.[175] In 2011, EPA reaffirmed its conclusion that "the vast majority of our nation's impaired waters have no possibility of being restored unless the [LAs] from [NPS] . . . are effectively remediated."[176]

It would be misguided for this Court to turn a blind eye to this significant source of water pollution and allow New Union to frustrate the TMDL, one of the only tools to restore Lake Chesaplain. To do so would defeat the purpose of the CWA. To believe that Congress in its enactment of such a technical and comprehensive act forgot about NPS from the inception of the CWA, one would have to ignore (1) the overall purpose TMDLs serve in the greater scheme of the CWA; (2) the requirement for the attainment of WQS; and (3) the section title and legislative

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[171] H.R. Rep. No. 92–911, at 105–06 (1972).
[172] *Id*.
[173] *Id*.
[174] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).
[175] *See* EPA OFF. OF WATER REGUL., EPA 841–R–07–001, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS 13 (2002) (identifying runoff from agricultural activities as a cause of pollution in 48% of impaired waters).
[176] EPA OFF. OF. WETLANDS, A NATIONAL EVALUATION OF THE CLEAN WATER ACT SECTION 319 PROGRAM 1 (2011); *See also* EPA OFF. OF. WATER REGULATIONS, EPA 841R84100, REPORT TO CONGRESS: NONPOINT SOURCE SOLUTION IN THE U.S. (1984).

history of the Act. Therefore, EPA's interpretation of TMDL to include WLAs and LAs is reasonable and deserves deference under *Chevron*.

III. EPA and New Union Are Required to Calculate "Daily" Allocation Limits Under the Plain Meaning of the CWA.

The District Court correctly concluded EPAs approval of a five-year phased TMDL for Lake Chesaplain is contrary to the plain meaning of the term "daily" under § 303(d)(1)(c).[177] Because this issue turns on EPA's legal construction of the phrase "total maximum daily load," this Court must again apply the analysis of *Chevron* and first determine if Congress has resolved the issue through its language in the statute.[178] For bodies of water, like Lake Chesaplain, that fail to meet applicable WQS, the CWA requires: "Each State shall establish . . . the total maximum *daily* load, for those pollutants . . . suitable for such calculation."[179]

When the text of a statute is unambiguous, a court must enforce it according to its terms.[180] Unless otherwise defined, courts must interpret words under their ordinary or common meaning.[181] Courts use dictionary definitions to aid their understanding of the ordinary meaning of a word.[182] The dictionary definition of the word daily is "every day."[183] Furthermore, courts may not set aside plain language in a statute simply because an agency thinks it leads to undesirable consequences in some applications.[184] Under this rule, EPA may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy."[185]

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[177] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).
[178] *Chevron,* 467 U.S. at 842–42.
[179] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (emphasis added).
[180] *King v. Burwell*, 576 U.S. 473, 474 (2015).
[181] *Burns v. Alcala*, 420 U.S. 575, 581–82 (1975).
[182] *See Nix v. Heddon*, 149 U.S. 304, 307 (1983) (holding a tomato is a vegetable under its common ordinary meaning and its established dictionary definition).
[183] *See* Webster's Third New International Dictionary (1993) (defining "daily" to mean "occurring or being made, done, or acted upon every day").
[184] *Sierra Club v. EPA*, 294 F.3d 115, 161 (D.C.Cir. 2002).
[185] *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1039 (D.C.Cir. 1996); *See also Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C.Cir. 2006).

As information regarding water pollution has become more readily available, modern courts have determined that states cannot frustrate the term "daily" in § 303 when the inherently dangerous effects of phosphorus on a water body are determinable on a day-to-day basis.[186] In *Friends of Earth*, the District of Columbia ("D.C.") submitted two proposals for an annually phased TMDL for phosphorus and a seasonally phased TMDL for phosphorus for one of the ten most polluted rivers in the country.[187] D.C. proposed these phased TMDLs to remedy WQS violations for DO levels and impaired water visibility.[188] During approval, EPA established *"all pollutants* . . . are *suitable* for the calculation of [TMDLs]" and further emphasized that establishing daily loads is logical.[189] Accordingly, the court rejected the contention that Congress's use of the word "daily" was illogical or contrary to the language of the CWA.[190] The court established Congress's unambiguous requirement that *daily* loads in § 303 must not be substituted, and Congress remains the only actor who can change its directive.

Contrary to the holding in *Friends of Earth*, in the past, courts had applied the absurdity doctrine to the term "daily" in § 303 when a lack of information regarding phosphorus loads warranted daily calculations immeasurable.[191] In *National Resources Defense Council*, New York submitted a proposal for an annually phased phosphorus TMDL due to limited scientific records of specific allocation discharges.[192] At the time of their TMDL submission, New York was still in the process of collecting data to develop the most effective standard to protect the water.[193] Because additional research was needed to determine the amount of phosphorus New York

[186] *Friends of Earth*, 446 F.3d at 145.
[187] *Id*. at 142–43.
[188] *Id*.
[189] *Id*.
[190] *Id*. at 146.
[191] *Natural Resources Defense Council, Inc. v. Muszynski*, 238 F.3d 91, 103 (2nd Cir. 2001).
[192] *Id*. at 103.
[193] *Id*. at 100.

reservoirs can tolerate, the court rejected the statute's plain meaning under the absurdity exception to avoid a result contrary to legislative intent.[194]

In the present case, for over twenty years, it is an undisputed fact that phosphorus loads have created declining DO levels and water visibility.[195] Like in *Natural Resources Defense Council*, where New York sought to implement an annually and seasonally phased TMDL, New Union seeks to implement a lengthy five-year phased TMDL for Lake Chesaplain, which continues to severely violate WQS.[196] The phased TMDL was permissible under the factual scenario in *National Resources Defense Council*, where a clear need for data was present to implement adequate phosphorus allocation limits. However, this is not the case for New Union as they have tangible access to readily available scientific conclusions from the Chesaplain Commission regarding tolerable phosphorous allocations.[197] The 2012 Report determined with certainty the maximum phosphorus levels consistent with a healthy lake ecosystem must be 0.014 mg/l throughout Lake Chesaplain.[198] This conclusion requires a drastic reduction in currently measured phosphorus levels, which vary from 0.020 to 0.034 mg/1 throughout the Lake.[199] Additionally, the 2012 Report statistically affirmed that all polluters' 35% annual reduction would bring New Union into compliance with WQS.[200]

It would be unfounded for this Court to allow New Union to turn a blind eye to the solution for declining water quality. The strong opposition from the residential lakefront homeowners, the slaughterhouse, and Chesaplain Mills has no legal authority to usurp the plain congressional mandate upon states to determine TMDLs *daily*. While a daily allocation may not be publicly

[194] *Id*. at 103.
[195] *Chesaplain*, slip op. at 7–8.
[196] *Id*. at 14.
[197] *Id*. at 8.
[198] *Id*. at 8.
[199] *Id*. at 9.
[200] *Id*. at 8.

favorable or inexpensive for the entities contributing to Lake Chesaplain's declining WQS, Congress established that a daily tally is the best means of calculating pollution levels and to create a concrete level of accountability.

In sum, the text of § 303 commands this Court to uphold the plain and ordinary meaning of "daily" in TMDL to require a day-to-day assessment of phosphorous allocations. In addition, this Court must adopt the rationale in *Friends of Earth* and command New Union and EPA to utilize accessible data to establish effective means of combating phosphorus allocations.

IV. Under *Auer* Deference, EPA's BMP Credit System is Arbitrary and Capricious Because EPA Departed from Their Established Regulatory Interpretation and Failed to Provide a Reasonable Basis for Departure.

The District Court improperly held that EPA's BMP credit system is not an arbitrary and capricious abuse of regulatory discretion.[201] Under the CWA, states may prepare a management program using BMPs to reduce pollution.[202] EPA exercises oversight over BMP programs and must approve them.[203] As established above, under § 101 of the CWA, Congress explicitly delegated authority to EPA to administer the CWA.[204] Therefore, EPA holds the force of law to determine the adequacy of a state's proposed BMP.

Under 40 C.F.R. § 130.2(i), EPA regulates WLA of PS by offering credits against the TMDL for NPS pollution reductions achieved through BMPs. Specifically, "[i]f [BMPs] or other [NPS] pollution controls make more stringent [LAs] practicable, then [WLAs] can be made less stringent."[205] In sum, EPA authorizes states to take "credit" for implementing stricter allocations on PS polluters and allocate that credit to NPS polluters.

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[201] *Id*. at 16.
[202] CWA § 319, 33 U.S.C. § 1329(2)(a).
[203] CWA § 319, 33 U.S.C. § 1329(4)(d).
[204] CWA § 101(d), 33 U.S.C. § 1251.
[205] 40 C.F.R. § 130.2(i).

Under 40 C.F.R. § 130.2(i), BMP credits are traditionally generated through stricter PS allocations.[206] However, EPA has issued a guidance document interpreting its regulation to allow an exception for BMP credits from NPS contributors *only* when the "full participation by all contributing sources of nonpoint pollution" is present.[207] This guidance document requires a state to document coordination among *all* landowners and operators contributing to NPS pollution to ensure a BMP credit system is effective and capable of achieving pollution reduction.[208]

The District Court's determination that EPA's guidance document does not require deference is contrary to law because it was issued to aid in interpreting EPA's regulation.[209] Under *Auer* deference, courts must defer to an agency's interpretation of its regulation.[210] Here, because EPA's guidance document further explains their regulation of BMP credit systems, the guidance document must receive *Auer* deference. The guidance document provides "specificity" to the requirements necessary to ensure a BMP credit system for NPS can reduce pollution.[211] EPA's approval of New Union's proposed BMP credit system for Lake Chesaplain's TMDL must be consistent with the standards set by their regulations and guidelines. EPA must require that *all* NPS polluters contribute to reducing LA to assure substantial pollution reduction reasonably.

Currently, three NPS polluters continue to desecrate Lake Chesaplain: (1) Hog CAFOs, (2) other agricultural sources, and (3) private septic tank inputs.[212] Under New Union's initial proposal of the BMP credit system, the State established plans to ensure the contribution of two of the three

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[206] *Id*.
[207] EPA OFF. OF WATER REGUL., EPA 440/4–91–001, GUIDANCE FOR WATER QUALITY BASED DECISIONS: THE TMDL PROCESS 25 (1991) (CITING EPA OFF. OF WATER REGUL., 841–B–87–110, SETTING PRIORITIES: THE KEY TO NONPOINT SOURCE CONTROL (1987)).
[208] *Id*.
[209] *Chesaplain*, slip op. at 16.
[210] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding an agency's interpretation of its regulation has "controlling weight" unless it is erroneous or inconsistent with that regulation); *See also Auer*, 519 U.S. 425, 461–63 (1997) (upholding *Seminole Rock* and confirming that agency deference of their own regulation survives *Chevron*).
[211] *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).
[212] *Chesaplain*, slip op. at 9–10.

NPS polluters.[213] First, for agricultural sources, proposed BMPs included (1) modified feeds for animal production facilities to reduce phosphorus in manure, (2) physical and chemical treatment of manure streams, and (3) restrictions on manure spreading at times when the soil is frozen or saturated.[214] Second, for private septic tank inputs, proposed BMPs included (1) increased septic tank inspection and (2) pumping schedules.[215] New Union neglected to create any BMP proposals for the third NPS polluter, the Hog CAFOs.[216] Instead, New Union merely "encourage[ed]" the Hog CAFOs to contribute.[217] Therefore, when the EPA approved and enacted Lake Chesaplain's BMP credit system, it approved a system inconsistent with its guidance document mandating the "full participation" of *all* nonpoint source polluters.

A. EPA's Adoption of BMP Credits is an Arbitrary and Capricious Abuse of Discretion Because EPA Relied on Political Opposition Rather Than Technocratic, Statutory, or Scientifically Driven Terms.

EPA's approval and enactment of New Union's BMP proposal were "arbitrary and capricious" because the agency did not provide a sufficient basis for its departure from its regulatory interpretation under the APA and *State Farm*.[218] In fact, EPA did not include a single finding or conclusion to support agency departure. As the Supreme Court emphasized in *State Farm*, an agency is obliged to explain its decisions for departure from precedent in technocratic, statutory, or scientifically driven terms – not political terms. [219] Under the arbitrary and capricious

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[213] *Id*. at 8–9.
[214] *Id*. at 9.
[215] *Id*.
[216] *Id*.
[217] *Id*.
[218] 5 U.S.C. § 557(c)(3)(A); *See State Farm*, 463 U.S. 29, 43 (1983) (holding the court must "examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made"); *See also Massachusetts v.* EPA, 549 U.S. 497, 499 (2007).
[219] *See* JERRY L. MASHAW, *THE STORY OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE U.S. V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.: LAW, SCIENCE AND POLITICS IN THE ADMINISTRATIVE STATE, in* Administrative Law Stories, 355 (Peter L. Strauss ed., 2006) (noting that *State Farm* established "politics and ideology [must] take a backseat to administrative law's demand for reasoned policy judgment").

standard of review, if agency departure has a basis in irrelevant factors, the agency made a clear, arbitrary, and capricious error of judgment.[220]

EPA's departure from their regulatory interpretation of BMP credit systems, requiring (1) *all* NPS polluters to engage in a BMP credit system and (2) reasonable assurances for effective pollution reduction, is not based on scientific determinations. Instead, EPA has departed from their BMP policy due to political opposition posed by NPS polluters.[221] Over 200 years ago, the Supreme Court established in its hallmark decision, *Marbury v. Madison*, that agencies must not consider political actors in their regulatory decisions.[222] Therefore, by succumbing to political pressures and abandoning delegated Congressional oversight to regulate and assure the effectiveness of BMPs, EPA is engaging in an arbitrary and capricious abuse of discretion.

C. The Primary Sponsor of the CWA Established That WQS Programs Require Reasonable Assurances.

The primary sponsor of the CWA, Senator Edmund Muskie, explained, "No polluter will be able to hide behind a federal license or permit as an excuse for a violation of [WQS]. No polluter will be able to make major investments in facilities under a federal license or permit without *providing assurance* that the facility will comply with [WQS]."[223] When EPA approved and enacted New Union's proposed BMP credit system and abandoned their policy requiring full participation by all NPS and reasonable assurances of pollution reduction, EPA effectively facilitated NPS polluters to "hide" behind a faulty permit.

In sum, EPAs departure from an established policy is arbitrary and capricious because the agency made a clear error of judgment in approving BMPs in which all NPS did not participate.

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[220] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
[221] *Chesaplain*, slip op. at 9.
[222] *Marbury v. Madison*, 5 U.S. 137, 146 (1803); *see also* supra note at 124.
[223] *Lighthouse Resources, Inc. v. Inslee*, 429 F.Supp.3d 736, 741 n.1 (W.D.Wash. 2019), (citing 116 Cong. Rec. 8984 (1970) (emphasis added)).

EPA knew how to efficiently regulate the formation of effective BMP credits for NPS yet bypassed its regulations and guidelines to approve a plan to appease New Union's politically resistant polluters. EPA's reliance upon irrelevant political terms, not technocratic, statutory, or scientifically driven terms, supports the clear conclusion that the agency's departure is an arbitrary and capricious abuse of discretion.

CONCLUSION

For all of the preceding reasons, CLW requests that this Court (1) *affirm* the District Court's determination that EPA's CWIP is ripe for judicial review; (2) *reverse* the District Court's determination that EPA's interpretation of TMDL to include WLA and LA violates the CWA; (3) *affirm* the District Court's determination that phased implementation of an annual percentage reduction for TMDLs is a violation of the CWA, and (4) *reverse* the District Court's holding that EPA's BMP credit system is not an arbitrary and capricious abuse of discretion.