TEAM 38

C.A. No. 21-000123

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

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INTRODUCTION

The Clean Water Act was created with the ambitious goal of preventing, reducing, and eventually completely eliminating pollution in the nation's waters. Initially, technology-based controls were adequate to steer the country towards these aspirations, but eventually they began to see a declining rate of return. Acting to continue pursuit of clean water, Congress updated the Clean Water Act and expanded the Environmental Protection Agency's authority, simultaneously switching the emphasis from technology-based controls to water quality-based actions.

At the heart of these new water-quality based actions was the total maximum daily load (TMDL) program. Facially, a TMDL can be summed up to what its name implies; it provides a value for the "total maximum daily load" of pollutants that may enter a water body without impairing the water quality. In reality, a TMDL is much more than that. It is a powerful regulatory tool that helps address the problems that plague the nation's waters by identifying the sources of pollution and providing guidance on how the issue can be rectified. "The [total maximum daily load (TMDL)] program is crucial to success because it brings rigor, accountability, and statutory authority to the process." Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* 3 (1999) (quoting Robert Perciasepe, Assistant Administrator for Water, EPA).

However, the Environmental Protection Agency has faltered in its use of TMDLs as an effective tool for protecting the environment, and the state of New Union has placed industry concerns over the ability of its citizens to enjoy clean, safe water. If this damage to the integrity of the TMDL system is not repaired, it could infect the entire process and erode the rigor and accountability essential to achieving the aspirations of the Clean Water Act.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this case arises under the federal Clean Water Act (CWA). This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides that "courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Plaintiff New Union filed action No. 66-CV-2020 on January 14, 2020, and Plaintiff CLW filed action No. 73-CV-2020 on February 15, 2020.

STATEMENT OF THE ISSUES PRESENTED

I. Is EPA's rejection of New Union's Chesaplain Watershed phosphorus TMDL and subsequent adoption of its own TMDL and implementation plan for Lake Chesaplain ripe for judicial review?

II. Is EPA's rejection of New Union's Chesaplain Watershed phosphorus TMDL for failing to include wasteload allocations and load allocations contrary to the law, as an incorrect interpretation of the term "total maximum daily load" in CWA Section 303(d)?

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

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

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act (CWA) was designed to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The Act was created with the goal of "eliminating the discharge of pollutants into the nation's navigable waters." CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1). In pursuit of this goal, the CWA requires EPA to "establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). Alongside the establishment of these "effluent limitations," the CWA also requires each state to "institute comprehensive water quality standards (WQS) establishing water quality goals for all intrastate waters." *Id.* These WQS are based on the designated uses of the navigable waters. CWA § 303(c)(2)(a), 33 U.S.C. § 1313(c)(2)(A).

When a state determines that a water body does not meet its established WQS, section 303(d)(C) requires that the state "establish… the total maximum daily load, for. . . pollutants." 33 U.S.C. § 1313 (d)(1)(C). This "total maximum daily load" shall be "established at a level necessary to implement the applicable [WQS] with seasonal variations and a margin of safety." *Id*.

B. The Lake Chesaplain TMDL

In 2008, the state of New Union created the Lake Chesaplain Study Commission (the Commission) in response to declining water quality within the lake. Record at 8. In the summer of 2012, the Commission issued a report that made several conclusions regarding the health of

the lake. *Id.* In this report, the Commission determined that Lake Chesaplain was suffering eutrophication (excessive algal growth) fueled by heightened levels of phosphorus. *Id.* Following this determination, phosphorus levels were measured by the Commission and varied from 0.020 mg/l to 0.034 mg/l. *Id*. The Commission determined that the maximum level of phosphorus in a healthy lake ecosystem would be 0.014 mg/l. *Id*. The Commission also determined that the state's WQS were violated by the lake's odor and the clarity of the water.

In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted the Commission's measurement for healthy levels of phosphorus of 0.014 mg/l and listed Lake Chesaplain on its list of impaired waters, which it submitted to EPA. *Id*.

DOFEC did not submit a TMDL for Lake Chesaplain and in 2015 the environmental group Chesaplain Lake Watch (CLW) served a notice of intent to sue to EPA and the state of New Union should they fail to create a TMDL. *Id*. DOFEC began creating a TMDL using a supplemental report made by the Commission which calculated the total amount of phosphorus that may be discharged before violating WQS and the current sources of phosphorus. *Id*. at 9. The maximum amount allowed based on WQS was calculated at 120 metric tons (mt) and was found to be totaling 180 mt as of 2015. *Id*. The report found that the largest contributor of phosphorus was concentrated animal feeding operations (CAFOs) which had been given nonpoint source status despite being generally categorized as point sources by the CWA. *Id.* Additionally, the supplemental report indicated that neither of the recognized point sources had permits due to lack of guidance by EPA regarding relevant effluent limitations for the sources. *Id*.

DOFEC began public comment on the proposed TMDL in October 2017. *Id*. This proposed TMDL included an equal phased reduction in phosphorus discharges for both nonpoint

and point sources by 35%. *Id*. This 35% phased reduction would begin with a 7% decrease and would decrease by another 7% each year for a total of 5 years. *Id*. Point sources would be controlled by permit limitations and nonpoint sources would be required to implement proposed best management practices (BMPs). *Id*. DOFEC's proposed TMDL was opposed by nearly all effected parties and in 2018 DOFEC rescinded its proposed TMDL, instead adopting one consistent with the CAFOs position. Record at 10. This TMDL consisted solely of a 120 mt annual maximum, with no breakdown of wasteload and load allocations or methodology for achieving the proposed maximum. *Id*.

Under its backstop authority, EPA rejected this TMDL as inadequate and adopted the original TMDL proposed by DOFEC in 2017. *Id*. EPA used this TMDL as the basis for its "Chesaplain Watershed Implementation Plan" (CWIP). *Id*. The CWIP did not require reasonable assurance that the proposed BMP measures would be adopted by nonpoint sources. *Id*.

C. Proceedings Below

The state of New Union and CLW filed motions for summary judgment in early 2020. Record at 14. New Union challenged EPA's rejection of its proposed TMDL for the Lake Chesaplain watershed, arguing that its proposed TMDL satisfied all CWA requirements. Record at 11. It argued that EPA's regulation requiring a state's TMDL submission to include an allocation of the total maximum daily load between point, nonpoint, and natural sources is contrary to law. *Id*. CLW challenged EPA's TMDL on two fronts. *Id*. First, CLW claimed that the annual loading limit to be phased in over five years violates the CWA. *Id*. Second, CLW claimed that EPA cannot take credit for phosphorus loadings in anticipation of nonpoint sources implementing BMPs because they have no authority to require them to do so. *Id*. Finally, EPA claimed that both plaintiffs' claims were invalid because the TMDL and the CWIP it

created are consistent with CWA requirements and are adequately supported by evidence within the record. *Id*. EPA also claimed that both complaints are not ripe because implementation of its TMDL will not have any immediate effects. *Id*.

The district court denied EPA's motion for summary judgment in part, Record at 5, stating that the issue of EPA's TMDL was ripe for review and that its definition of TMDL requiring WLAs and LAs contradicts the plain meaning and intention of Congress. Record at 12, 13. The district court granted CLW's motion for summary judgment in part, holding that EPA's construction of the phrase "total maximum daily load" to allow for both an annual measurement standard and a phased percentage reduction contradicts the plain meaning and structure of the CWA. Record. at 14-15. However, the district court disagreed with CLW's second claim and held that EPA's decision to take credit for nonpoint source BMPs was not arbitrary and capricious or an abuse of discretion. Record at 16. Finally, the district court granted New Union's motion for summary judgment in part by vacating EPA's determination to substitute its own TMDL for the Lake Chesaplain watershed after rejecting New Union's. *Id*.

SUMMARY OF THE ARGUMENT

The district court was correct in determining that this action was ripe for judicial review and that EPA's TMDL allowing for an annual phased percentage reduction in pollution loading was invalid under CWA Section 303(d). The district court erred in its asserting that 40 C.F.R. 130.2(i) contradicts the plain meaning and congressional intent of CWA Section 303(d), and that the regulation is contrary to law under *Chevron* step one. *See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Additionally, it erred in determining that EPA

was not required to seek reasonable assurance of BMP implementation by nonpoint sources in order to create a credit allowing for less stringent point source loading.

EPA's rejection of New Union's TMDL is ripe for review because all the facts necessary to adjudicate the claim are well-developed in the record before the Court. While EPA's TMDL has yet to be implemented and enforced, its promulgation is a final agency action from which legal consequences will flow and for which delay of judicial review will impose hardship upon the parties. Without immediate review of the TMDL in question, New Union may not move forward with continued planning or implementation. As New Union dischargers rely on this planning and implementation to manage their operations, delayed review would impose hardship on them and also limit their ability to promptly and effectively implement any new measures required under the TMDL. For these reasons, EPA's rejection of New Union's TMDL for lack of allocations is ripe for review.

EPA's interpretation of "total" in Section 303(d) is reasonable and not contrary to the CWA. The assertion that allocations are necessary to achieve WQS is strongly supported by the Act's purpose and structure, other uses of the term "total," and the substantive requirements. An interpretation that "total" does not include allocations limits the information provided by a TMDL and diminishes its effectiveness at achieving WQS. EPA's interpretation of the term "total" within "total maximum daily load" in 40 C.F.R. 130.2(i) to include allocations is thus appropriate and a reasonable interpretation under *Chevron* step two.

EPA's TMDL is invalid under Section 303(d) of the CWA because its annual phased percentage reduction plan violates the plain meaning and language of Section 303(d) and disregards congressional intent. The TMDL substitutes the statutorily mandated "daily" standard with an "annual" one even though Congress has explicitly indicated

that "daily" is the correct standard for a TMDL through its deliberate inclusion of the term, as opposed to another standard of measurement or omission of a standard entirely. Furthermore, Section 303(d) requires that a TMDL account for seasonal variations and an annual standard does not allow for this. Accordingly, EPA's TMDL does not survive review under *Chevron* step one because there is no ambiguity within the statute regarding what measurement of time Congress intended to be utilized. Even if the TMDL survives review under *Chevron* step one it fails *Chevron* step two because it is unreasonable to allow implementation of a TMDL that does not allow for seasonal variations.

Beyond this, there is no statutory support within Section 303(d) allowing for a *phased* percentage reduction nor is there anything in the legislative history of the Act that would indicate Congress intended to let EPA administratively extend deadlines for statutory compliance.

Finally, creating credits for proposed BMPs without reasonable assurance of implementation was arbitrary and capricious and an abuse of agency discretion. The reasonable assurance standard is appropriate and necessary to achieve the goals of the CWA because it allows EPA to make practical assumptions that proposed TMDLs will actually meet statutory requirements. Furthermore, failure to require reasonable assurance of BMP implementation was arbitrary and capricious because it directly contradicts EPA's reasoned judgment on the subject.

STANDARD OF REVIEW

Appeals to a district court's grant of summary judgment brought under the Administrative Procedure Act (APA) are reviewed *de novo. Pa. Dep't of Public Welfare v. Sebelius*, 674 F.3d 139, 146 (3d Cir. 2012). Agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" must be declared unlawful and set aside. 5 U.S.C. § 706(2)(A).

This case concerns statutory construction questions regarding the CWA and therefore the Court must apply the two-step analysis established by the Supreme Court in *Chevron. See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837. The first step requires the Court to "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). If Congressional intent is clear, then analysis ends, and the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If this Court determines that the statute is ambiguous, it must proceed to the second part of the analysis and decide whether EPA's construction is permissible. *See Id*. at 843. Reasonableness is the standard used for deciding permissibility. *Am. Farm Bureau Fed'n v.* EPA, 792 F.3d 281, 307 (3d Cir. 2015).

Additionally, this case concerns an agency's interpretation of its own regulations, a review which is governed under the *Auer* standard. *See Auer v. Robbins*, 519 U.S. 451 (1997). Courts should not defer to an agency's interpretation of its own regulations when the interpretation is "plainly erroneous or inconsistent with the regulation." *Id*. When a regulation is ambiguous the agency's interpretation must reflect its "fair and considered judgment." *Id*. at 462

ARGUMENT

I. The Issues Presented Are Ripe for Review Because They Are All Pure Legal Questions in a Well-Developed Record Before The Court.

A challenge to a regulation pre-enforcement is ripe if the issues presented are fit for judicial review and the parties would experience hardship if review were further delayed. *Abbott Laby's. v. Gardner*, 387 U.S. 136, 149 (1967). EPA argues that none of the issues with the Chesaplain TMDL are ripe for review because the mere adoption of a TMDL will not impact parties without being incorporated into specific permits or other regulatory actions. Record at 12.

While the TMDL has yet to be enforced or incorporated officially into New Union's continuing planning process for TMDLs, the dischargers along the Lake must prepare for planning in anticipation of eventual TMDL implementation. Additionally, renewal of the outdated NPDES permits for point source limitations are not calculable without a determination on the issues presented. Thus, EPA is unlikely to set limits for point sources that will achieve WQS without a determination on the TMDL's validity. Accordingly, delay of review would impose hardship on New Union because without a ruling, dischargers are left with no guidance for planning plan. Therefore, this Court should affirm the district court's finding that the issues raised are fit for adjudication because New Union and CLW will be prejudiced if the validity of the Chesaplain TMDL is not subject to immediate judicial review.

All necessary administrative actions providing concrete affect or final agency action must meet two conditions. First, the action must mark the completion of the agency's decision-making process, and second, must be one from which "legal consequences will flow." *Barrick Goldstrike Mines, Inc., v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). Any level of regulatory authority which has the force of law suffices as the "finality" elements of reviewable agency actions. *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942). The purpose of the finality rule on agency actions is to prevent courts from entangling themselves in abstract disagreement of administrative policies by avoiding premature adjudication. *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971). Thus, the key concerns address whether judicial intervention would inappropriately interfere with further administrative action and whether the courts would benefit from further factual development of the issues presented. *See Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726 (1998).

Here, judicial intervention would not interfere with agency action but in reality is required for EPA and New Union to move forward with the TMDL process. If EPA's determination is valid, legal consequences will flow affecting the New Union dischargers who must prepare for changes to the TMDL. EPA relies on *City of Arcadia* and *Bravos* to argue that EPA approval of state TMDL's pre-enforcement is not ripe because the effect of approval may depend on further implementation actions. Record at 12; *City of Arcadia v. EPA*, 265 F.Supp.2d 1142, 1154 (N.D. Cal. 2003); *Bravos v. Green*, 306 F.Supp.2d 48, 55-56 (D.C. Cir. 2004). However, both cases are significantly distinguished from the facts at issue because unlike in those cases the TMDL in question here contemplates specific NPDES permits. Therefore, while review of EPA's action is pre-enforcement, review is appropriate because EPA's determination constitutes a final agency action and all steps involved in the action are well-developed in the record before this Court. EPA or New Union cannot move TMDL implementation or NPDES permit renewal forward without a decision on the validity of the determination in question and thus, further delay of review would result in hardship to the parties involved. The questions presented are thus ripe for review.

II. EPA's Rejection of New Union's TMDL Does Not Violate the CWA Because EPA Correctly Interprets "Total" to Include Allocation Requirements in "Total Maximum Daily Load" in Section 303(D).

EPA's rejection of New Union's TMDL for failure to include wasteload and load allocations is consistent with the plain language of Section 303(d). The term "total maximum daily load" indicates that there are statutory gaps in the CWA for EPA to fill. 303(d) of the CWA refers to WQS requiring only that a TMDL set load levels "necessary to attain and maintain applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). The CWA itself is silent on how

to account for point and nonpoint sources but structurally the Act supports a need to incorporate them.

New Union argues that EPA's determination to reject its TMDL for lacking wasteload and load allocations is contrary to law as an incorrect interpretation of the term "total maximum daily load." However, EPA's interpretation of "total maximum daily load" is correct because it supports the purpose and structure of the Act. The State's claims are incorrect because (1) "total" is broad enough to authorize EPA's interpretation and (2) EPA's interpretation of "total" in 40 C.F.R. 130.2(i) is consistent with the CWA's purpose and structure.

A. EPA's interpretation of "total maximum daily load" is appropriate because the term is broad enough to afford agency deference.

The *Chevron* standard requires two primary inquiries. At step one, "whether congress has spoken directly to the precise question at issue" and at step two "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 837. The case law on the promulgation process suggests that consideration of both point and nonpoint sources is required to achieve WQS, but simultaneously draws into focus the lack of any mandatory procedure for how a state may weigh that consideration. EPA has discretion to establish 40 C.F.R. 130.2(i) to achieve CWA's purpose under *Chevron* step one because the term "total" in Section 303(d) does not specify exactly how the agency shall promulgate the substantive requirement.

Case law regarding whether a TMDL can include more than just a simple quantity of a pollutant is relatively sparse, with the question first being asked in *Am. Farm Bureau Fed'n v. EPA*, 984 F.Supp.2d 289, 316-18 (M.D.Pa.2013). Following the district court's decision in that case, the case law on whether "total maximum daily load" can include anything other than a quantity has lacked development. However, several district and circuit courts have defined

existing TMDLs as harmonious with EPA regulations, implying that no problem is presented. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir.2009); *Friends of Earth v. EPA*, 333 F.3d 184, 186 (D.C. Cir. 2003). EPA maintains the authority to promulgate regulations for TMDL processes to fill the considerable gaps of the CWA. *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). In evaluating how the agency fills those considerable gaps, the Second Circuit held the EPA maintains delegated authority to enact regulations carrying the force of law regarding the terms water and "total maximum daily load" in Section 303(d). *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001).

Chevron deference developed out of a need to defer technical and dynamic expertise in subject matter on which judiciaries generally have little or no training. The Supreme Court has held that the *Chevron* standard of deference is most appropriate where an agency is charged with the administration of complex statutory schemes which require a technical and scientific skillset. *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). There can be little doubt that the CWA falls into this category of scientific and technically complex legislation.

The courts are unlikely to place review of technical rules regarding complex environmental questions solely in the hands of a single judge without weighing the views of the agency that wrote the rule and administers it. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015) (Discussing *Auer v. Robbins*, 519 U.S. 452). Agency deference is critical when it relates to dynamic and complex technical decision-making and the ambiguities of a statute show that Congress intended for reliance on agency expertise.

The term "total" in CWA is ambiguous because no explicit procedure for promulgation is defined in Section 303(d). The ambiguity in the Act relating to TMDLs shows that Congress intended EPA deference. *Chevron* step one is satisfied because Congress has not spoken directly to the question at issue, thereby affording EPA deference to lawfully promulgate 40 C.F.R. 130.2(i) and accordingly reject New Union's TMDL for failure to comply.

B. EPA's interpretation of "total" in 40 C.F.R. 130.2(i) is consistent with CWA's purpose and structure and adoption of the regulation is a reasonable interpretation under *Chevron* step two.

EPA's interpretation of "total" is correct because the CWA's statutory scheme supports a conclusion that Congress intended for both wasteload and load allocations to be included in TMDLs to achieve WQS. While the CWA does not explicitly mandate how a state is to proceed in evaluating and including wasteload and load allocations, its structure and statutory requirements suggest allocations are necessary for achievement of the Act's purpose. New Union argues that 40 C.F.R. 130.2(i) is an incorrect interpretation of "total maximum daily load" because nothing in the Act "implies that the process of setting the TMDL is meant to include allocations." Record at 13. This argument is misguided. EPA's interpretation is correct because legislative intent, other uses of total, and the substantive requirements all support the contrary conclusion that allocations are necessary for achievement of WQS. Therefore, EPA's interpretation is consistent with the CWA and for the same reasons is a "reasonable interpretation," satisfying *Chevron* step two.

The CWA's statutory scheme supports a partnership between states and the Federal Government to restore and maintain the integrity of the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The partnership between states and EPA to set TMDLs requires the creator of the TMDL (here New Union) to take nonpoint and point sources into

account. The steps for TMDL promulgation describe a back-and-forth between the state and EPA to ensure that the TMDL accurately determines the maximum amount of a pollutant a water body can absorb before violating the Act. The CWA states that TMDL establishment is required when effluent limitations are insufficient to meet WQS. 33 U.S.C. § 1313(d)(1)(A), (C). Therefore, only when limitations on point sources are not stringent enough does consideration of nonpoint sources become necessary. It would make no practical sense for limitations on nonpoint sources to be set without consideration of the limitations on point sources when it has already been determined they are insufficient.

For insight into Congress's understanding of the word "total" within TMDLs we can turn to nearby section 204(b)(1) of the CWA, where the "total" cost of operation and maintenance is identified in reference to publicly owned treatment works funded by EPA. 33 U.S.C. § 1284(b)(1), (4). This section provides that total for operation and maintenance provides that total wastewater loading shall constitute elements of waste, and other appropriate factors. Identification of total as a sum of more than one element indicates that Congress intended for the use of the term to mean something beyond a singular number. If statutory language requires a procedure to notify water users of the portion of payment to be allocated toward the cost of waste treatment, it follows then that a total number is the complete amount of various apportionments. This same concept of portions of a total can be readily applied to TMDLs and supports the notion that the total is made up of load and wasteload allocations.

The definition of "total" with regards to TMDLs is susceptible to multiple meanings because the CWA does not prescribe an exacting procedure for how EPA is to establish TMDLs. However, total in all contexts is most associated with parts that link together to form a whole and the substantive requirements within the CWA demand that TMDLs are

more than a mere number statement. EPA provides information on how it, or a delegated state agency, arrives at a conclusion regarding a TMDL. An agency must specify information which includes how and why the number is concluded, if the number is achievable, why the number is necessary to implement the WQS, when WQS will be achieved, and what will happen if the standard set is not met. 33 U.S.C § 1313(d)(1)(C). New Union's failure to include the allocations that contribute to the total in its TMDL falls short of these requirements.

Further, the APA requires the EPA to provide sufficient information and materials related to the agency's chosen use of notice-and-comment rulemaking to promulgate TMDLs. The APA's notice-and-comment information rule ensures the public have had adequate opportunity to make suggestions or comments on an agency's decision. *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007). If New Union's TMDL fails to support the APA's rulemaking procedure by only supplying a total number with no allocations, the public is unable to know whether or how the state plans to achieve discharge pollution reductions.

Section 303 creates a relationship between effluent limitations and water quality to establish "seasonal variations and a margin of safety which takes into account any lack of knowledge" associated with that relationship." 33 U.S.C. 1313(d)(1)(C). The seasonal variations and margin of safety requirement specifies that a TMDL must be established at a level necessary to implement water quality standards with 1) seasonal variations and 2) a margin of safety that 3) takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality *together*. *Id*. If an agency considers these specific variations according to section 303 to determine a total for a TMDL, it makes little sense that a final report stating the determination would exclude those considerations and variations.

New Union argues that EPA's rejection of the TMDL is erroneous because allocations are not required within CWA's meaning of "total." Total is ambiguous and thus susceptible to multiple interpretations. However, an explanation describing the calculation behind a TMDL is necessary to formulate a number, suggesting "total" must be fleshed out by regulation and in a form beyond a single number. Limiting the only requirement for "total" to a quantity is inconsistent with the primary goal of the CWA and the cooperative structure of federalism imposed upon states and the federal government to achieve that goal. EPA's interpretation of "total" in Section 303(d) is correct because it is supported by the Act's structure, purpose, other uses of "total" and the substantive requirements. For the same reasons, EPA's interpretation is a "reasonable interpretation" under *Chevron* step two. This Court should accordingly reverse the district court's ruling that EPA's promulgation of 40 C.F.R. 130(2)(i) is contrary to law within the meaning of the CWA as an incorrect interpretation of "total" in 303(d).

III. EPA's Annual Phased Percentage Reduction Plan Is Invalid Because It Is in Violation of Section 303(D) of the CWA.

EPA's annual pollution loading reduction plan is invalid because its interpretations of the terms "daily" and "total" are contrary to the plain language of Section 303(d) of the CWA. Section 303(d) requires states to "establish for the waters identified in paragraph (1)(A) …the total maximum daily load, for [pollutants]." CWA § 303(d)(1), 33 U.S.C. 1313(d)(1). This TMDL must be "established at a level necessary to implement the applicable water quality standards with seasonal variation and a margin of safety." *Id*. EPA and New Union claim that the pollution reduction plan does not violate Section 303(d) and is a valid use of EPA's agency discretion. This claim is wrong for two reasons. First, EPA's interpretation of the term "daily" is contrary to Congress's intent when creating the CWA; and second, EPA's adoption of a phased percentage reduction is contrary to the plain meaning and structure found within Section 303(d).

A. EPA's substitution of the term "daily" with "annual" is contrary to the plain meaning and language of the CWA and Congress's intent when creating the Act.

EPA's claim that their TMDL does not violate Section 303(d) is incorrect because the plain meaning and language of Section 303(d) indicates that it was Congress's intent in making the CWA to set the relevant time unit of pollutant loading as "daily." This intent is reinforced by the Act's requirement that "seasonal variations" be considered. 33 U.S.C. 1313(d)(1)(C). The district court utilized the *Chevron* two-step test, and the same test is relevant for the present analysis of this issue.

The Supreme Court created the two-step test in *Chevron* for determining if an agency action was a proper exercise of the discretion granted to the agency by Congress. *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3.d 133, 140 (D.D.C. 2018). In the first step of this test the court will ask simply whether Congress has spoken to the issue at hand through statutory language. *Id.* at 140. If Congress has spoken directly to the issue at hand and the agency decision is contrary to what Congress said, the agency's action is deemed to be an invalid use of the agency's discretion and the analysis ends. *Id*. If Congress has not spoken directly to the issue at hand or if the statutory language is ambiguous, the court will decide whether the action was based on a permissible construction of the statute. *Id*. A permissible construction generally implies that the action is reasonable. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 307. Additionally, an agency action that is based on interpretation of the agency's own regulations is not entitled to deference if it clearly contradicts the agency's reasoned considerations on the subject. *Auer v. Robbins*, 519 U.S. 451.

EPA must justify a change to the standard of time measurement. In *Nat. Res. Def. Council v. Muszynski*, EPA approved eight TMDLs that the state of New York created for reservoirs that didn't meet their WQS. 268 F.3d 91, 95. These TMDLs were to be based on

an annual measurement for phosphorus levels taken during the phase of the year in which growth was most optimal. *Id*. at 99. The Second Circuit held that EPA had discretion in choosing how they wanted to craft a TMDL regarding time periods utilized, citing 40 C.F.R. Section 130.2(i), stating "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure," but conditioned this holding by stating that there must be some justification as to why the yearly standard is more effective and how it takes seasonal variations into account. *Id*. at 103.

The D.C. Circuit disagreed with this conclusion five years later in 2006, opting for a more literal approach regarding the language of the statute. In *Friends of the Earth*, the Anacostia River was determined to not meet WQS set by the District of Columbia and the state of Maryland. *Friends of Earth v. EPA*, 446 F.3d 140, 142-143 (D.C. Cir. 2006). EPA approved two TMDLs measuring different types of pollution loading to help water quality in the river. *Id*. at 143. One of these TMDLs limited the annual discharge of pollutants and the other limited seasonal discharge of pollutants. *Id*. The Second Circuit reasoned that had Congress intended the standard to be annually or seasonally, it would have utilized those words through terms such as "total maximum daily, annual, or seasonal loads *Id*. It further reasoned that if Congress wanted to give EPA discretion to decide what period of measurement it would use in any given situation it would have omitted the word "daily" in its entirety, opting instead for the term "total maximum load." *Id*. The D.C. Circuit accordingly held that EPA's TMDLs were invalid under Section 303(d) because the plain language of the statute indicated Congress intended the standard to be daily, not annually or seasonally. *Id*. at 148.

In step one of *Chevron*, the court asks whether Congress has spoken directly to the issue at hand. Here, Congress's intent to make "daily" the relevant time measure is evident through the

plain meaning and language of Section 303(d). The D.C. Circuit in *Friends of the Earth v. EPA* thought that the wording of the statute can be no plainer or more explicit than it is already. 446 F.3d 140, 142. The statute clearly and unambiguously indicates that Congress's intended measure is "daily." *Id*. The Second Circuit's analysis of the statute in *Nat. Res. Def. Council v. Muszynski* seemingly disregarded the plain meaning of the statute and instead held that the word "daily" does not in fact mean daily because EPA's own regulations allowed for such a liberal deconstruction of the term. 268 F.3d 91, 98. Holding that Congress did not mean daily when it said "daily" simply because EPA says so is an unreasonable line of thinking that sacrifices plain meaning on the altar of agency discretion

Even if Congress was silent on the issue, EPA's regulation itself is ambiguous and represents at most a nonchalant approach to an otherwise demanding statute. 40 C.F.R. Section 130.2(i) may allow EPA to cherry-pick language and cobble together piecemeal definitions for a TMDL, but this 2003 regulation does not represent EPA's more recent reasoned considerations when it comes to creation of TMDLs. *See, e.g.* EPA, *Technical Guidance for Designing a TMDL Effectiveness Monitoring Plan* (Dec 2011), (https://www.epa.gov/sites/default/files/2015-07/documents/techguide_design_tmdl_effective_monitorp_123011-2.pdf. EPA's recommendations for states regarding TMDL implementation is full of hints at a "more data is more efficient" paradigm. *Id*. Recommendations for creation of expansive data sets, utilization of T tests, multiple location sampling, and seasonal variance measurements all point to EPA recognizing something more than "annual" is necessary for an effective TMDL. *Id*. at 6-9. EPA even states that "64% of project managers indicated that, in retrospect, they would have used a more methodical monitoring design that allowed for an improved scientific evaluation of project effectiveness." *Id*. at 1. An annual monitoring design could not be any less methodical. EPA

cautions against minimal data collection but nonetheless turns around and does the bare minimum when they are made responsible for a project. Section 130.2(i)'s allowance for an annual standard does not reflect EPA's reasoned considerations found in its recommendations to the states. Therefore, under *Auer*, EPA should not be given deference. Ultimately however, even if EPA is allowed to substitute the term "annual" for "daily" at its discretion it is still reasonable to require them to make some justification for this decision.

The terms "annual" and "daily" have very different meanings both in theory and reality. Daily refers to a time frame "covering the period of or based on a day," *Daily,* Merriam-Webster Dictionary (11th ed. 2020), whereas annual refers to a much broader time frame "occurring or happening every year or once a year." *Annual,* Merriam-Webster Dictionary. An annual measurement would create a single value that represents nothing more than the single portion of the year it was taken. This means the other values not incorporated will be unaccounted for, and therefore not part of the considerations developed during implementation and planning. The Chesaplain Committee performed their initial measurements of the water in the lake in the summertime. Record at 8. Provided that EPA takes its measurements during the same portion of the year, they will be unable to see how levels changed over the course of the year as compared to the original measurements for that specific timeframe. This does nothing to account for seasonal variations as section 303(d) requires. 33 U.S.C. 1313(d)(1)(C).

A single value for the year tells nothing about the four seasons and how they differ from each other in terms of pollution loads recorded. Something more than annual is required to accomplish this. For example, during the summer months more algae grows than in the winter due to increased temperatures. due to increased temperatures during the season. *See, e.g.*, Field Museum, *Climate Change and Lakes That Look Like Pea Soup* (Aug. 3, 2017),

https://www.fieldmuseum.org/blog/climate-change-and-lakes-look-pea-soup. This means that eutrophication is likely to occur at a higher rate and water quality is more likely to be affected during these hotter summer months as opposed to the colder winter months. However, excessive rainwater runoff carrying pollutants into water bodies is also a leading cause of eutrophication. *Id*. Generally, the months making up the spring season see the most seasonal rainfall, but rain can happen at any time of year in many places around the globe. Furthermore, runoff is increased when soil is frozen over the winter because the soil is unable to absorb additional nutrients. A measurement more frequent than an annual standard would allow these differences to be noted and considered. An annual standard only allows for one value to be recorded during just one season of the year. This is the exact opposite of accounting for seasonal variations.

Here, like the D.C. Circuit in *Friends of the Earth v. EPA*, the Court should stray from wholesale handouts of unsupported agency deference and instead read the statute as it appears. Congress has left no statutory gaps for EPA to fill, and the first step of *Chevron* is not satisfied. Therefore, this Court should not afford EPA's interpretation of "daily" any of the deference *Chevron* provides to agencies. However, even if EPA's decision survives *Chevron* step one, this is in unreasonable construction of the standard that does little to interact with the actual issues at hand. A TMDL is a powerful regulatory tool designed to aid in healing the aquatic environments of the United States; it is not just a box to be checked in order to avoid lawsuits. This Court should therefore sustain the district court's determination in favor of CLW that EPA's use of the term "annual" in its TMDL is in violation of CWA Section 303(d).

B. EPA's adoption of a phased percentage reduction in pollution loadings violates Section 303(d) because it contradicts the plain meaning and structure of the CWA.

EPA's plan for gradual pollution reduction over the course of five years is invalid because neither the plain meaning and structure of the CWA nor its legislative history allow for a TMDL that only achieves its goal five years after its inception. A TMDL is not a credit system that can be paid off in some undetermined amount of time nor is it a speculative and esoteric regulatory tool used to quiet environmental groups. The plain meaning and structure of the CWA and its legislative history do not create support for EPA's phased percentage reduction plan but instead draw a bright line EPA cannot cross. EPA's claim is unsupported and does not survive step one of *Chevron*.

Step one of *Chevron* asks whether Congress has directly spoken to the issue at hand. *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3.d 133, 140. If Congress has not spoken directly to the issue or has otherwise left something ambiguous within the statute, step two of *Chevron* assumes that Congress has given the agency discretion to make a decision resolving ambiguity in the statute and asks whether the agency's decision is a permissible construction of the statute. *Id*. Reasonableness is the standard used for deciding permissibility. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 307. It is only by passing both steps of this test that an agency's decision survives review under *Chevron*. *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3.d 133, 140.

Clarity within CWA Section 303(d) does not allow the survival of agency TMDL's that do not conform to the construction of the statute. In *Nat. Res. Def. Council v. EPA,* the water quality of the Anacostia River was found to be impaired by trash pollution; pursuant to this finding, the state of Maryland and the District of Columbia added the water body to their 303(d) lists and subsequently created a trash-focused TMDL for the Anacostia River. *Id*. at 138. This TMDL focused on cleanup rather than causation, opting to make its goals based on the amount

of trash removed from the river rather than the amount prevented from entering the river in the first place. *Id.* at 139. The D.C. district court reasoned that nothing in the CWA suggests that the word "maximum" can mean "minimum," or that the word "load" can refer to a quantity of pollution that is removed from or that is prevented from entering a water body. *Id*. at 141. It accordingly held that the TMDL "runs afoul of the definition of "total maximum daily load" in both the CWA 33 U.S.C. Section 1313(d)(1)(C), and EPA's own regulations, 40 C.F.R. Section 130.2(i)" and does not survive review under *Chevron*. *Id*. at 142.

The CWA is a statute of hard deadlines that EPA may not administratively extend. In *Bethlehem Steel Corp. v. Train*, EPA issued a permit to Bethlehem Steel Co. that required it to meet final compliance levels. *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 659 (3d Cir. 1976). These compliance levels were based on effluent limitations and contained various compliance schedules including the statutory final date for compliance of July 1, 1977. EPA, after negotiation, allowed Bethlehem to essentially continue their current activity beyond the statutory deadline in the hopes that eventually compliance wood be achieved. *Id*. at 660. The Third Circuit ultimately held that EPA is without authority to create an extension for the July 1, 1977 deadline. *Id*. at 663. It reasoned that the legislative history indicates that the deadline is an inflexible target. *Id*. at 661.

EPA's TMDL does not survive judicial review under *Chevron* because the plain meaning and language of the CWA does not support a partial or phased TMDL. Just like in *Nat. Res. Def. Council v. EPA*—where the TMDL in question was deemed invalid because it ran afoul of the plain meaning of the term "total maximum daily load"—here, EPA's TMDL similarly disregards plain meaning with only its assumed discretion as support. *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3d 133, 142. There is no statutory support for the term "total" within the phrase "total

maximum daily load" meaning "partial" or any other term in the context of a phase out plan. The existence of the term "total" within the phrase indicates that the limit is based on one value. Similarly, there is no statutory support for the term "maximum" meaning anything but maximum. A TMDL by design sets an upper limit. If the TMDL gets more restrictive year by year until some predestined value, every year leading up to this final value will fall short of this upper limit.

In addition to the plain meaning and language of Section 303(d) not providing any support for a phased percentage reduction, Congress has made it clear that the CWA is a statute of inflexible deadlines. *Bethlehem Steel Corp.*, 544 F.2d 657, 661. Like *Bethlehem Steel Corporation v. Train*, where EPA created a TMDL that essentially gave Bethlehem Steel an administrative extension to continue pollution past the hard statutory deadline of July 1, 1977; here, EPA has sought to give the state of New Union a five-year administrative extension for meeting WQS in Lake Chesaplain. *Id*. at 660. This, however, is unsupported. Congress made it clear that statutory extensions are unavailable at any time when it came to applying the law to existing facilities in the 70s. *Id*. at 662. This even applied if the facilities were experiencing economic hardship because of the CWA's mandates. *Id*. at 661-62. By allowing for a phased percentage reduction plan, EPA is essentially allowing the state of New Union to miss the target for as many as five years through administrative extension. If a statutory trigger during the immediate years following the Act's inception cannot be afforded an extension it would make little sense for an entity 50 years later to be allowed an extension based on nothing more than the whims of EPA.

Rather than implementing a stringent TMDL that has some teeth to it, EPA instead chose to roll over by essentially using its agency discretion to administratively greenlight continued

over-pollution by the state of New Union and its constituents for as many as five years from now. The plain meaning and language of the CWA and its legislative history do not support EPA's phased percentage reduction plan. Therefore, it should not be afforded any of the deference that *Chevron* grants to agencies. Even if EPA can survive *Chevron* step one, it fails to weather step two because this is not a reasonable construction of the CWA. The CWA is devoid of any language indicating that a TMDL's goal can be completed five years after it is implemented. Therefore, this court should sustain the district court's determination that EPA's phased percentage reduction plan is in violation of CWA Section 303(d).

EPA's annual phased pollution reduction plan is not supported by the plain meaning and language of the CWA or its legislative history and is therefore in violation of Section 303(d).

IV. EPA's Creation of a Credit for Anticipated BMP Pollution Reductions Was Arbitrary and Capricious Because There Was No Reasonable Assurance of BMP Implementation.

The district court erred in departing from the reasonable assurance standard stated in *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, and established in EPA guidance documents. *See e.g.* EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* (Apr. 1991) https://www.epa.gov/sites/default/files/2018-10/documents/guidance-water-tmdl-process.pdf [hereinafter *TMDL Guidance*]. Failing to require reasonable assurance of BMP implementation was arbitrary and capricious because it eroded EPA's ability to reasonably conclude that its TMDL would actually meet statutory requirements. The TMDL process is not merely a planning and information program, as the district court proposes. Rather, it is "the link between water quality standards assessment and water quality-based control actions." *Id.* at 1. Categorizing the TMDL program solely as a planning and information program would effectively sever this link and not allow for effective implementation. Furthermore, failure to

adopt the "reasonable assurance" standard likewise breaks this link as it creates uncertainty in the planning and allocation process that does harm to the reasonable implementation of methods to reduce effluent loading.

The standard of review for agency actions is the arbitrary and capricious standard. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S 402, 416 (1971). Under this standard, a reviewing court may set aside an agency rule if it determines that the rule is irrational and not based on consideration of the relevant factors. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). A court must declare a rule to be arbitrary and capricious in instances where the agency has entirely failed to consider an important aspect of the problem or has provided a solution that is so implausible that it could not be explained as a difference in view or the expert opinion of the agency. *Id*. at 43.

The CWA requires that TMDLs be set "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(c). When determining appropriate requirements governing a rulemaking, the EPA must exercise "reasoned" decision-making. *Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512, 530 (D.C. Cir. 2009). The "reasonable assurance" requirement aids in this by providing EPA with the means to proceed based on the assumption that state proposals will actually "implement the applicable water quality standards." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300. This in turn allows EPA to "exercise reasoned judgment" in evaluating proposed standards consistently with the CWA. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1087 (D.C. Cir. 2014). It is arbitrary and capricious when EPA creates standards after determining that available information is insufficient to reasonably determine that the proposed standard achieves statutory requirements. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43. Although Courts generally defer to an agency's interpretation of its own regulations, such deference is not due when the interpretation clearly contradicts an agency's reasoned considerations on the subject. *Auer v. Robbins*, 519 U.S. 451.

A. The credit for anticipated pollution reductions was arbitrary and capricious because the lack of reasonable assurance did not permit a reasoned judgment that the TMDL would achieve statutory requirements.

EPA's adoption of a credit for anticipated BMP pollution reductions was arbitrary and capricious because the lack of reasonable assurance of BMP implementation introduced substantial uncertainty about whether the TMDL would actually achieve the statutory requirements. TMDLs must be set "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). This statutory requirement means that EPA is required to reasonably judge that any proposed TMDL will meet the applicable water quality standards. Creating a TMDL when there is substantial uncertainty eroding the base of such a reasoned judgment is arbitrary and capricious.

The "reasonable assurance" requirement is fundamental to allowing reasoned judgment because it allows EPA to confidently assume that the TMDL will meet statutory requirements. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 300. EPA's own guidance states that "where there are not reasonable assurances, under the CWA, the entire load reduction must be assigned to point sources." TMDL Guidance at 15. This implies that without reasonable assurance, the only way to meet statutory requirements is to assign the entire load reduction to point sources, which EPA has statutory authority to regulate. In this instance, however, EPA has assigned load reductions to nonpoint sources without reasonable assurance that the recommended BMPs will be implemented. In reality, EPA has reasonable assurance that the recommended BMPs will *not* be implemented, as is evident

from the development process of the Lake Chesaplain TMDL. The record indicates that industry will not adopt the BMPs voluntarily and that the State will not force them to. Record at 9. Based on this, according to EPA's own guidance, the entire load reduction must be assigned to point sources

However, the TMDL cannot be achieved without assigning load reductions to nonpoint sources. The maximum load for phosphorus is 120 mt and the existing loading was calculated at 180 mt. *Id*. at 8. This 180 mt is derived from a combination of 32.3 mt from natural background sources, 61.9 mt from point sources, and 85.8 mt from nonpoint sources. *Id*. at 8-9. Without implementation of BMPs to reduce the loading from nonpoint sources, effluence from point sources would have to be almost entirely eliminated to meet the standard. Even if the point sources were to be eliminated, the standard would be barely achieved at 118.1 mt and this likely would not be sufficient to account for seasonal variance or the margin of safety required. Furthermore, complete elimination of point source effluents would likely require the shutdown of the Chesaplain Mills Sewage Treatment Plant, which is not a reasonable alternative given the necessity of sewage treatment plants for municipal water systems. To this end, the only plausible means of reducing phosphorus loading is by reducing both point and nonpoint sources, and the only way before us to reduce nonpoint source loading is through implementation of BMPs.

The adoption of the credit to make point source wasteload allocations less stringent without reasonable assurance of BMP implementation essentially sabotaged the integrity of the TMDL. The lack of reasonable assurance of BMP implementation introduced substantial uncertainty that the TMDL would actually meet statutory requirements. EPA here has proposed to achieve the WQS by arbitrarily providing a loading maximum and blithely assuming that point and nonpoint source operators will yield to it, even though the record indicates that is incredibly

unlikely. It is facially implausible that this TMDL will achieve its statutory requirements and impossible to conclude that this was anything more than an arbitrary action by EPA. This court should find this action to be arbitrary and capricious because EPA has created a standard where available information shows that it is unlikely to achieve statutory requirements.

B. Deference to EPA's interpretation of its regulations is unwarranted because the interpretation does not reflect the agency's fair and considered judgment.

Although the district court correctly ascribes significant judicial deference to the arbitrary and capricious standard of review, the *Auer* doctrine provides instances wherein such deference is not warranted. Specifically, courts should not defer to an agency's interpretation of its own regulations when the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 451. Furthermore, interpretations of an ambiguous regulation must reflect the agency's "fair and considered judgment." *Id*. at 462. *See also Mason v. Shinseki*, 743 F.3d 1370, 1374-75 (Fed.Cir. 2014).

The TMDL system is built on a hierarchy of vague rules. The CWA provides little guidance beyond merely requiring a TMDL to be established at a level necessary to implement the applicable WQS. *See* 33 U.S.C. § 1313 (d)(1)(C). The next tier of rules, EPA regulations, distill the TMDL concept further, but still leave significant gaps that must be filled to create a workable concept. 40 C.F.R. Section 130.2(i) defines a TMDL as "the sum" of WLAS and LAs. This suggests that a TMDL is merely a number; however, numbers are useless without context. The regulations try to remedy this by providing that "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure." Mass per time provides a wide range of options to choose from; grams per year, tons per day, kilograms per hour, and many other combinations satisfy this definition. The regulation also provides that they can be expressed in terms of an "other appropriate measure" but gives no hint as to what constitutes such a measure.

The regulation at issue here is likewise ambiguous. At the center of 40 C.F.R Section 130.2(i) is the phrase "If [BMPs]. . . make more stringent load allocations practicable, then wasteload allocations can be made less stringent." The word "practicable" especially calls to mind significant questions. The regulation does not quantify *how* practicable, or achievable, such stringent load allocations must be. However, as previously stated, it is arbitrary and capricious for EPA to create a standard when it is highly uncertain that it will achieve statutory requirements. To that end, although there is no threshold of practicability spelled out in the regulation, EPA has multiple guidance documents that suggest that "reasonable assurance" is a necessary requirement to bridge the gap between a load allocation being merely "practicable" and actual achievement of statutory requirements.

EPA's fair and considered judgement is that TMDLs require reasonable assurance, and this has been true since at least 1991. *See* TMDL Guidance. Guidance currently posted on EPA's website includes a TMDL review checklist which includes a box marked "reasonable assurances" and space to indicate if it is adequate. EPA, *Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992* (May 20, 2002), https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (accessed Nov. 11, 2021). Furthermore, the district court erred in asserting that the "reasonable assurance" standard had never been adopted by the EPA via notice-and-comment rulemaking. In 2000, EPA promulgated a sweeping overhaul of its CWA regulations. Among other measures meant to expand and solidify TMDLs, EPA specifically included a requirement of "reasonable assurances" as a condition for approval of TMDLs. *See* 65 Fed. Reg. 43,486, 43,597-600 (July 13, 2000). Congress prevented EPA from implementing the rule via an appropriations rider and a

subsequent EPA Administrator ultimately withdrew it. *See* 68 Fed. Reg. 13,608, 13,609 (March 19, 2003). However, even though this rule never went into effect it still goes to show that EPA has continuously expressed the belief that "reasonable assurance" of implementation is required for TMDLs to meet statutory requirements, so much so that they even went so far as to formally promulgate regulations requiring it.

By failing to require reasonable assurance that BMPs will be implemented, the EPA has created an implementation plan destined to fail, unable to live up to the clear requirements laid out in the CWA. The agency's own previous experience with TMDLs and implementation plans shows that in its considered judgement specific assurances that BMPs will be implemented must be made to allow for less stringent wasteload allocations to be offset by load reductions to nonpoint sources. Under *Auer,* this discord between the agency's reasoned conclusions and its current rule require that this court not defer to the agency, and instead set the rule aside as arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Chesaplain Lake Watch respectively requests that this Court affirm the district court's determination that EPA's annual phased TMDL was invalid under the CWA. Additionally, CLW requests that this Court reverse the district court's grant of summary judgment for EPA regarding both the inclusion of wasteload and load allocations in TMDLs and the adoption of a credit for point source reductions without reasonable assurance of implementation.