BRIEF 3 NON-MEASURING

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CICUIT

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 in consolidated cases nos. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF JURISDICTION

This appeal arises from consolidated actions No. 66-CV-2020 and No. 73-CV-2020 in federal district court, challenging a final action of the United States Environmental Protection Agency (EPA). The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because the cause of action arises under the Administrative Procedure Act, 5 U.S.C. § 702 as judicial review of a final agency action. The dispute concerns agency action under the Clean Water Act, 33 U.S.C. §§ 1251–1388 and is not a cause of action with original jurisdiction in the circuit courts. *Id*. § 1369.

The Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291 because it is an appeal from a final decision of a United States district court. The United States District Court for the District of New Union issued an Order dated August 15, 2021, granting summary judgment for New Union in No. 66-CV-2020 and granting summary judgment for EPA in No. 73-CV-2020. An order granting summary judgment is a final decision. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

All three parties—EPA, Chesaplain Lake Watch, and the State of New Union—filed timely Notices of Appeal under Fed. R. App. P. 4.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the issue is ripe for review when EPA rejects a state-submitted proposal for a Total Maximum Daily Load (TMDL) phosphorous discharge and, through notice-and-comment rulemaking, adopts a TMDL that the state had rejected, requiring the state to enforce the adopted TMDL.

II. Whether EPA violates the Clean Water Act when it rejects a state-submitted proposal for a Total Maximum Daily Load phosphorous discharge on the basis that the proposal does not also allocate maximum loads between point sources and nonpoint sources but establishes a level sufficient for applicable water quality standards.

III. Whether the Clean Water Act requires EPA to accept a state-submitted proposal for a Total Maximum Daily Load phosphorous discharge when expressed as an annual number and accompanied by a 5-year phased implementation plan

IV. Whether EPA complied with law when it allowed an offset in which reductions anticipated through Best Management Practices of nonpoint sources could reduce the stringency of required reductions for point sources.

STATEMENT OF THE CASE

New Union has historically enjoyed, benefitted from, and appreciated the beautiful water of Lake Chesaplain. Record at 7. Lake Chesaplain is a fifty-five-mile- long, five-mile-wide lake located entirely in the state of New Union. R. at 7. Lake Chesaplain shares borders with the Chesaplain National Forest, used for timber production; the Chesaplain State Park, used by the public recreationally; agricultural lands; vacation communities; and the city of Chesaplain Mills. R. at 7.

New Union has conformed with the Clean Water Act (CWA) requirements for studying and designating waters within the state—including Lake Chesaplain's water. Congress passed the CWA in 1972, allowing the Environmental Protection Agency (EPA) to aid states in regulating the pollution of state waters. 33 U.S.C. § 1251. The CWA requires each state to adopt water quality standards (WQS) for the waters within the state. *Id*. § 1313(a). The state must also classify the water quality. *Id*. § 1313(c)(2)(A). New Union initially classified Lake Chesaplain as "Class AA," the highest possible classification. R. at 8. This classification qualified the water for activities such as fish propagation, swimming, and drinking water. R. at 8.

New Union experienced strong economic development beginning in the 1990s. R. at 7. The lake's recreational options enticed many to build vacation homes along its shores. R. at 7. The lake area also attracted commercial activity, including ten large hog facilities—known as concentrated animal feeding operations (CAFOs)—and a slaughterhouse to service the facilities. R. at 7.

To protect its waters, New Union consistently met and often exceeded EPA pollution regulation requirements. CWA's permitting systems regulate public discharges into the lake from the slaughterhouse and Chesaplain Mills' public septic system. R. at 7. These are known as point sources. CWA does not require a permit for nonpoint sources—discharges from residential

development septic systems, hog facilities, and other agricultural sources. R. at 7. However, desiring to preserve water quality, New Union itself regulates nonpoint source discharges. R. at 7.

Despite New Union's efforts during the 1990s, the water quality of Lake Chesaplain visibly declined the following decade. R. at 7. Algae grew rampant, forming mats that reduced water clarity and created offensive odors. Fish productivity has declined, recreational activities such as swimming have waned, and vacation home property values and tourism have dropped. R. at 7.

To address the lake's declining water quality, New Union created the Lake Chesaplain Study Commission (the Commission) in 2008. R. at 8. After careful study, the Commission issued a report in 2012 (the 2012 Report) showing that phosphorous levels in the lake varied from 0.020 to 0.034 mg/l, well above the desired level of 0.014 mg/l. R. at 8. The Commission found that extra phosphorous had caused eutrophication, causing the lake to be less biologically productive from excessive algae growth. R. at 8 The algae growth was responsible for unpleasant odors, decreased water clarity, and decreased dissolved oxygen level, which caused the decline in fish. R. at 8.

Section 303(d) of the CWA requires a state to develop a list of impaired waters. An impaired water is any water body that fails to meet the designated WQS and, by the state's assessment, cannot meet WQS even after implementing CWA controls. 33 U.S.C. § 1313(d). A state must develop and submit to EPA a list of its impaired waters and a target pollutant level for each water that brings it back within the applicable WQS. *Id*. This level is called a "total maximum daily load" (TMDL). *Id.* The TMDL must be sufficient to account for seasonal variations and unknown factors and can be expressed as a number or as a narrative of required aesthetic qualities. *Id.* § 1313 (d)(1)(C), (c) (2)(B).

The CWA relies on cooperative federalism to be efficient and responsive to community concerns. *See New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Virginia Surface Mining*

& Reclamation Ass'n, Inc., 452 U.S. 264 (1981). EPA is responsible for evaluating state TMDLs and must accept TMDLs that are consistent with CWA requirements. *Id.* § 1313 (d). If a TMDL is inconsistent with CWA requirements, EPA must object to it and develop an acceptable TMDL. *Id*. Significantly, although EPA has statutory authority to approve a state's implementation plan, EPA lacks authority to develop an implementation plan if the state's plan is insufficient or nonexistent. *Id.* § 1313(e). EPA has the authority to act within the framework of cooperation with states. *Id.* § 1251.

After the 2012 Report, the New Union Division of Fisheries and Environmental Control (DOFEC), as the designated state agency, adopted the 0.014 mg/l standard in the 2014 WQS. R. at 8. DOFEC included the lake on its impaired water list that it submitted to EPA in 2014. R. at 8. EPA did not object to DOFEC's submission. R. at 8.

A year later, in 2015, the Chesaplain Lake Watch (CLW) threatened EPA and New Union with legal action based on the lack of a TMDL for the lake. R. at 8. Eventually, CLW agreed not to sue if New Union implemented a TMDL. R. at 8. Accordingly, the Commission began rulemaking procedures to establish a TMDL.

In 2016, in accordance with regulatory requirements to re-evaluate impaired waters every two years, the Commission re-evaluated the lake's WQS and issued the Supplemental Report. 33 U.S.C. § 303(d); 40 C.F.R. § 130.7(d). The Supplemental Report included a proposed TMDL of 120 metric tons annually—the maximum phosphorous loadings allowable to achieve the ideal standard of 0.014 mg/l as calculated by the Commission. R. at 8. The Commission noted that current loadings from both point and nonpoint sources in 2015 totaled 180 metric tons annually. R. at 9. Moreover, the Commission found that the lake area's hog facilities and private septic tanks—not regulated by EPA—contributed heavily to the increased pollution. R. at 9.

In 2017, as part of the state rulemaking process, DOFEC issued the proposed TMDL of 120 metric tons annually, accompanied by an implementation plan. R. at 8–9. In its implementation plan, DOFEC proposed to reduce phosphorous loads substantially from both point and nonpoint sources each year, reaching the TMDL after five years. R. at 9. DOFEC also stated its intent to limit point sources through permit limits and regulate nonpoint sources through issuing Best Management Practices (BMPs). R. at 9. The BMPS included modified feeds for CAFOs, physical and chemical treatment of manure streams, and constraints on spreading manure when the ground is frozen or saturated. R. at 9. Additionally, New Union required accelerated inspection and pumping schedules for private septic systems. R. at 9.

The proposed TMDL was highly controversial. R. at 9. While the residents and businesses of New Union were concerned with the cost of implementation, CLW was concerned that the TMDL did not go far enough, advocating for a 100% reduction of the phosphorous output in the point sources without allowing a credit for the BMPs of the nonpoint sources. R. at 10. DOFEC considered and evaluated the comments and ultimately adopted a phosphorous level TMDL of 120 metric tons annually with no allocations. R. at 10.

In 2018, EPA rejected New Union's submitted TMDL for the lake because it violated an agency regulation requiring a TMDL to show more than merely a maximum load. R. at 10. EPA requires states to establish not only the total maximum level of pollution for a body of water, but also to allocate the TMDL between point and nonpoint sources. 40 C.F.R. §130.2(i). But EPA regulations allow states to use nonpoint source reductions gained from Best Management Practices (BMPs) to offset the stringency of the point source regulation. *Id.*

In May 2019, after notice-and-comment rulemaking, EPA imposed the original DOFEC TMDL on New Union, limiting phosphorous levels to 120 metric tons annually and imposing BMP

requirements for nonpoint sources. R. at 10. EPA also approved New Union's desired implementation plan, which laid out a 35% reduction in phosphorous output over five years through a reduction in both point and nonpoint sources and foists implementation and enforcement burdens on New Union. R. at 10. EPA and New Union are currently within the administrative permit renewal process for point and nonpoint source discharges, respectively. R. at 10. However, the uncertainty arising from this suit severely restricts New Union's ability to issue permits with mechanisms to ensure compliance with a TMDL.

Procedural History:

New Union filed suit against EPA on January 14, 2020, challenging EPA's requirement of an allocated TMDL. R. at 11. CLW filed action on February 15, 2020, challenging EPA's adopted TMDL. R. at 11. Both actions were brought pursuant to the Administrative Procedure Act § 702. R. at 11. The District Court held that New Union had standing to sue because the imposition of a new TMDL would affect New Union's ability to receive water quality funding. R. at 11. The District Court granted New Union summary judgment against EPA and vacated EPA's rejection of New Union's TMDL. R. at 16. Further, the court partially granted EPA summary judgment against CLW. R. at 16.

Both CLW and EPA appealed. CLW appeals the District Court's determinations (1) that EPA's interpretation of TMDL to include allocations of discharges from point sources and nonpoint sources violated CWA, and (2) that EPA's credit for nonpoint source reduction achieved through BMPs was not arbitrary.

SUMMARY OF THE ARGUMENT

The district court was correct in finding the issue was ripe for review, that the total maximum daily load (TMDL) did not require allocation, and that EPA's adoption of Best Management Practices credits was not arbitrary and capricious. These rulings respect New Union's right to regulate the waters within its borders and affirm the cooperative federalism present in the Clean Water Act (CWA). The district court erred in granting Chesaplain Lake Watch's (CLW) challenge to EPA's ability to approve an annually-expressed TMDL with a phased implementation. This Court should uphold the district court's summary judgment for EPA and New Union and reverse the district court's summary judgment for CLW.

Ripeness. The ripeness doctrine is satisfied here, and the court should hold that the case is ripe for review. Here, plaintiffs challenge a final agency action completed through notice-and-comment rulemaking. This agency action foists an immediate implementation and enforcement burden on New Union. The cost of implementing the necessary steps to achieve compliance with the TMDL would create prejudice and harm to New Union if the court delayed a judicial finding here. Thus, this case is ripe for review, and the court may consider the following issues.

Allocating TMDLs. EPA's interpretation of TMDL requiring allocations among point sources and nonpoint sources violates Congressional intent in the CWA. Since EPA rejected New Union's proposed TMDL less than two years before New Union initiated this action, New Union may challenge EPA's interpretation as applied. Under *Chevron*, TMDLs only need to be expressed as a number. The plain language of the Act only requires that states express a TMDL at a level sufficient for applicable water quality standards. Other courts reaching alternative conclusions conflated "total" and "maximum" and failed to give effect to each term. Additionally, the statute as a whole shows congressional intent to let states control their pollution planning processes. Other

areas of the Act specifically give states the power that EPA asserts by requiring allocations of TMDLs. Congress's silence on any federal implementation of allocations limits EPA's authority to act in that area. Even if the CWA is ambiguous, under *Chevron*, EPA's interpretation of TMDL is impermissible. EPA's interpretation conflicts with other areas of the Act and renders some provisions superfluous. Thus, EPA's interpretation receives no deference under *Chevron*. The District Court correctly granted New Union's summary judgment motion because EPA exceeded its authority by requiring New Union to allocate its TMDL.

Annually-expressed TMDL; phased implementation. In contrast to the allocation issue, EPA acted well within its statutory authority by approving an annually-expressed TMDL along with a five-year phased implementation plan. Moreover, because Congress mandated that EPA must work in harmony and cooperation with the states in developing and implementing solutions, EPA lacks statutory authority to reject such a plan. This statutory constraint blocks CLW's assertion that EPA should have required a daily-expressed number.

Because EPA conducted its TMDL-related actions through notice-and-comment-rulemaking, the Court must use the *Chevron* analysis. Congress clearly indicated that EPA should accept TMDLs that are consistent with statutory requirements. A TMDL that is annually-expressed but, through calculations, can produce a daily-expressed number that meets water quality standards is consistent with the statute. The validity of this TMDL does not change when it is accompanied by a phased implementation plan because Congress separately gave EPA authority to approve a state-requested implementation plan while giving states full authority over enforcement. Thus, EPA cannot reject such a TMDL. Alternately, if the statute is ambiguous, the Court must defer to the agency's interpretation and allow an annually-expressed TMDL with phased implementation because this is a permissible construction.

EPA adoption of credits. EPA's adoption of the credits for Best Management Practices (BMPs) without the reasonable assurance standard was not arbitrary and capricious. The proponent arguing that an agency action is arbitrary and capricious must prove that the agency did not consider the relevant facts and that EPA made a clear error in judgment when making its decision. EPA correctly considered the relevant facts of the congressional intent and legislative history. Additionally, it correctly relied on these factors to make a reasonable decision. CLW's presentation of a non-binding guidance document does not meet CLW's burden of proof that the action was arbitrary and capricious. EPA also made the correct choice to adopt the credits without implementation requirements because EPA lacks the statutory authority to force the implementation of the BMPs. Thus, the district court correctly granted EPA's summary judgment motion because EPA's adoption of the credits was not arbitrary and capricious.

STANDARD OF REVIEW

An appellate court reviews de novo a district court's decision regarding summary judgment. *See, e.g., Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir.2000). Here, parties ask the Court to review a grant of summary judgment. Thus, de novo review is appropriate.

When reviewing agency actions, the Administrative Procedure Act mandates that courts set aside actions found to be arbitrary and capricious or beyond statutory jurisdiction. 5 U.S.C. § 706. When reviewing agency action taken through notice-and-comment rulemaking, courts use the deferential *Chevron* test. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 847, 842-43 (1984). If Congress has unambiguously addressed the precise issue at hand, a court must uphold Congress' clearly expressed intent. *Id.* at 842–43. If the statute is ambiguous, a court must uphold the agency's interpretation if the interpretation is a "permissible construction of the statute." *Id.*

ARGUMENT

I. New Unions and EPA's challenges against EPA's adoption of the New Union TMDL are ripe for review.

The first issue the Court must evaluate is whether this case is ripe for review. The ripeness doctrine requires that an agency must first take all necessary steps for a final agency action to be reviewable by the courts. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The Administrative Procedure Act (APA), in Title 5 of the U.S. Code, controls agency policy, procedure, and implementation. 5 U.S.C. § 551. Agencies receive a deferential standard of review from the courts. *Id*. There must be a statutory grant to allow the Court to review and set aside agency action. *Id.* APA § 704 is the statutory grant of review power and allows the court to review agency actions. *Id.* APA § 551 defines agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act…" 5 U.S.C § 551(13). Many courts have held that the approval of a TMDL constitutes sufficient agency action to review the proceedings. *See, e.g., Am. Farm Bureau Fed'n v United States EPA*, 792 F.3d 281, 293 (3d Cir. 2015).

The doctrine of ripeness requires two judicial considerations. First, the Court must determine that the action is fit for judicial review. Second, the Court must evaluate if there is possible prejudice if the court delays reviewing the challenge. *Abbott Laboratories*, 387 U.S. 149 (1967).

A. The challenges are fit for review because they challenge an established implementation process.

First, the Total Maximum Daily Loads (TMDLs) challenges are fit for review because the agency took action with a concrete effect. The Court can best analyze this fact-intensive inquiry by understanding the surrounding cases. EPA cites *City of Arcadia* and *Bravos* to support its proposition that a TMDL is insufficient action for a court's review. Record at 12; *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156-57 (N.D. Cal. 2003); *Bravos v. Green, 306 F. Supp. 2d*

**48, *57-58* (D. D.C. 2004). The court can meaningfully differentiate these cases from the proper case precedent of *American Farm Bureau* and *City of Kennett*. *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015); *City of Kennett v. EPA*, 887 F.3d 424 (8th Cir. 2018).

The courts in both *City of Arcadia* and *Bravos* found that the TMDL was insufficient concrete action to make the question available for review by the courts. *City of Arcadia*, 265 F. Supp. at 1157; *Bravos*, 306 F. Supp. at 57-58. The decision of these courts appears to rely on the wording of the TMDL. *Id.* Both *Bravos* and *City of Arcadia* had a generalized TMDL with no exact plans for implementation. *Id.* The *City of Arcadia* included the provision "the TMDLs allow permittees to 'employ a variety of strategies" … and… 'are free to implement trash reduction in any manner they choose.'" *City of* Arcadia, 265 F. Supp. at 1148. With a TMDL as broad as the above cases, the court was correct to decide that there was no way the parties would experience a particularized and concrete harm. The way EPA and the state wanted to implement the TMDL was suspect at best.

Even so, *American Farm Bureau* and *City of Kennett* decided the ripeness issue correctly. The TMDLs in these cases were specific implementation plans already in place. The disputes in these cases centered on the implementation planning process. *American Farm Bureau*, 792 F.3d. at 294; *City of Kennett* 887 F.3d at 434. "Although the TMDL has yet to be incorporated into a state's continuing planning process and enforced against any individual plaintiff, members of the trade associations will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation." *American Farm Bureau*, 792 F.3d. at 294. The TMDL here was not broad like the TMDLs in the cases EPA relied on. *Id.*; *City of Kennett* 887 F.3d at 434. This fact reconciles all four cases and provides a precise analysis of our current case.

This matter resembles *American Farm Bureau* and *City of Kennett* because EPA already adopted specific implementation procedures. R. at 10. Here, EPA adopted the TMDL with specific procedures that the state had already established. R. at 10. This case is unlike the cases in which lack of an implementation plan barred review. Thus, this case is fit for review under the City of Kennett and the American Farm Bureau framework. *American Farm Bureau*, 792 F.3d. at 294; *City of Kennett* 887 F.3d at 434.

B. Judicial delay in considering these challenges would cause prejudice to the parties.

The analysis of whether a decision would prejudice a party requires the court to consider adverse effects the parties would prematurely endure if the court later set aside the action. *See City of Kennett* 887 F.3d at 431. The courts in *American Farm Bureau* and *City of Kennett* held that the particularized TMDLs were sufficient to prejudice the parties if the court did not rule on them. *American Farm Bureau*, 792 F.3d. at 294; *City of Kennett* 887 F.3d at 434. The courts viewed the need for the state to begin monetary planning for the TMDLs as prejudicial. *Id.* As the court in *American Farm Bureau* noted, "If there is something wrong with the TMDL, better to know now." *American Farm Bureau*, 792 F.3d. at 294.

In the current case, EPA's adoption would require New Union to expend money to implement the TMDL. The *American Farm Bureau* and *City of Kennett* provide a clear precedent that forcing a party to expend money in planning stages is sufficient action to prejudice the parties. *Id.* Thus, this case is ripe because it is fit for judicial review, and a delay in review would cause prejudice. The court is free to consider the subsequent issues when it has ripeness.

II. EPA exceeded its authority by requiring New Union's TMDL to allocate between WLAs and LAs.

This case is about whether EPA may make local decisions on a state's behalf. These decisions may be as broad as what lands a state may use for farming or as intimate as how much

discharge from septic systems reaches state waters. By seizing power to allocate a state's TMDL among WLAs and LAs, EPA exceeded its authority under the statute. 40 C.F.R. § 130.2(i). This Court should uphold the District Court's order because EPA's interpretation of TMDL does not withstand *Chevron* scrutiny.

The Court should use the *Chevron* analysis to resolve this dispute. Courts apply the *Chevron* framework when an agency allegedly acted beyond its authority in promulgating a rule that interprets a statute. *WildEarth Guardians v. U.S. Fish and Wildlife Service*, 784 F.3d 677, 683 (10th Cir. 2015). Congress delegated gap-filling authority to EPA because it granted EPA rulemaking authority and displayed congressional intent within the statute. *See* CWA § 303; 33 U.S.C. § 1313; *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Under these facts, the *Chevron* doctrine is the correct framework to resolve this dispute.

This Court should vacate EPA's definition of "Total maximum daily load" in 40 C.F.R. § 120.2(i) for three reasons. First, New Union may challenge EPA's regulation as applied. Second, Congress conveyed a clear intent that a TMDL only requires a number. Alternatively, and addressed third, EPA's interpretation of TMDL is impermissible because it destroys the harmony of § 303(d) of the CWA with the rest of the statute.

A. New Union may challenge EPA's interpretation of "Total maximum daily load" as applied.

New Union is not barred from challenging the statutory authority of 40 C.F.R. § 130.2(i) because it may challenge the action as applied. Title 28 U.S.C. § 2401(a) bars every civil action against the United States unless brought within six years of accrual. This section also governs challenges of administrative actions. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991). A party may challenge an administrative decision by showing some direct, final agency action involving the plaintiff within six years of the date of filing. *Dunn-McCampbell*

Royalty Int. v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997). EPA rejected New Union's proposed TMDL in July 2018—less than two years before New Union started this action on January 14, 2020. R. at 10. New Union may challenge EPA's interpretation of TMDL in 40 C.F.R. § 130.2(i).

B. EPA's interpretation of TMDL receives no deference because Congress displayed a clear intent that a state's TMDL does not require allocation.

EPA's interpretation of TMDL cannot survive the first step of the *Chevron* framework. *See Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, courts and agencies must give effect to Congress's unambiguously expressed intent. *Id*. at 842-843. Courts proceed to the second prong of *Chevron* only if they find an ambiguity. *Id*. at 843. Here, congressional intent is clear that TMDLs do not require allocations for two reasons. First, the plain meaning of the statute only requires states to express TMDLs as a number. Second, the context of the statute shows congressional intent to leave pollution reduction planning with the states.

1. The plain meaning of 33 U.S.C. § 1313(d) only requires a state to express a TMDL as a number.

Congress expressed an unambiguous intent that TMDLs require only a number. When construing statutes, courts begin by giving effect to Congress's plain meaning and unambiguously expressed intent. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013). The text of 33 U.S.C. § 1313(d) does not define TMDL or require states to allocate TMDLs between point and nonpoint sources. In fact, the language only requires states to establish TMDLs at a *level* necessary to implement applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C). Merriam-Webster's dictionary defines "level" as "an amount of something." *Level Definition & Meaning*, Merriam-Webster, https://www.merriam-webster.com/dictionary/level (Last visited Nov. 21, 2021). Thus, the

statute's meaning is plain that states should express the TMDL as an amount of something—the total daily maximum.

Despite EPA's authority to set a set a state's TMDL, EPA may not require a TMDL as anything beyond a level. 33 U.S.C. § 1313(d)(2); *see NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 211 (3d Cir. 2013) ("An administrative agency may exercise only the powers granted by the statute reposing power in it."). New Union's TMDL was a 120 metric ton annual maximum with no allocations. R. at 10. New Union's TMDL satisfies the statute because it is at a level necessary to implement applicable water quality standards. Thus, a TMDL expressed as a number before allocation is sufficient under the statute.

This interpretation gives effect to the entire phrase "total maximum daily load." When interpreting a statute, courts assume that Congress intended each word to have a meaningful effect and will, if possible, construe the statute so that every word and phrase has a purpose. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). The court in *American Farm Bureau* erroneously thought the statute required more than a number by conflating the terms "total" and "maximum." *American Farm Bureau*, 792 F.3d at 297. The court there misconstrued reporting a TMDL as a level as analogous to a restaurant receipt, where the total is the sum of every charge on the receipt. *Id*. In doing so, the court treated "total" and "maximum" the same, failing to give each word a meaningful effect.

A TMDL is more analogous to a total maximum daily number of hours driven by a truck driver. Suppose a truck driver may only drive a maximum of 12 hours a day to make sure that she stays alert and focused. When establishing this level, the trucking company does not allocate the driver's total maximum hours among different deliveries or routes or rest breaks. Instead, the "total" level puts the driver on notice of how much time she may drive that day. The driver

allocates her time herself and then provides her employer with a timesheet. If the employer has a problem with the timesheet, the employer does not take control of the driver's schedule. Similarly, a TMDL puts the state on notice of how much of a pollutant can enter a specified body of water. The state allocates the TMDL itself as part of its pollution planning process and then provides it to EPA for approval, but not manipulation. *See* 33 U.S.C. § 1313(e). The TMDL represents the total number of pollutants allowed before allocating it among sources. This reading gives a different effect to each component of the phrase "total maximum daily load."

2. Congress intended to leave pollution control planning processes with the states.

Congress intended to let the states make plans to address pollution control. Congress passed the CWA to recognize, preserve, and protect states' rights to reduce pollution. 33 U.S.C. § 1251(b). EPA's interpretation of TMDL violates this intent for two reasons. First, the Act specifically assigns planning for all source allocation to the states. *Id*. §§ 1313(e), 1329(d)(2). Second, the CWA's silence on any federal allocation provision limits EPA's authority to act in that area.

a. Other sections of the Act show that Congress intended to leave pollution control planning processes with the states.

The statute as a whole gives pollution control to the states. Together with the statutory language, courts look to the design, object, and policy of a statute to determine its meaning. *See, e.g., Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018). Nothing in the legislative history suggests that Congress intended to let EPA address nonpoint source pollution by establishing allocation of sources in TMDLs. Reply Brief of Plaintiff-Appellant at 29, American Farm Bureau Federation v. U.S. E.P.A., No. 13-4079 (3rd Cir. Aug. 24, 2013), 2014 WL 4275785. Furthermore, in 1987, Congress directed states to create programs to manage nonpoint source pollution. 33 U.S.C. § 1329(b)(1). Section 319 allows EPA to approve or disapprove of, but not

manipulate, states' proposed management programs of nonpoint source pollution. *Id*. § 1329(d)(2). The statute allows states to manage their nonpoint source pollution under § 319 free from EPA manipulation, and EPA may only alter the "level" of a TMDL under § 303. *Id*. §§ 1329(b)(1), 1313(d). Congress did not give EPA authority to allocate states' TMDLs nonpoint sources under § 303(d). Instead, Congress gave states the authority to manage nonpoint source pollution planning.

Congress also gave states control over point source planning processes. Under § 303(e), states control their pollution reduction planning processes. *Id*. § 1313(e). Section 303(d) of the CWA merely provides for the identification of certain waters, establishment of the TMDL for those waters, and submission of the TMDL to EPA. *Id*. § 1313(d). But § 303(e) contains language addressing implementation, including TMDLs and schedules of compliance for water quality standards. *Id*. § 1313(e). These plans are subject to EPA approval but not EPA manipulation. *Id*. Congress did not intend to use § 303(d) to give EPA authority over point source planning beyond the scope of § 303(e). Instead, Congress gave states control over their point source planning processes.

b. The statute is silent on any EPA authority to allocate.

The statute's silence precludes EPA's allocation requirements. The CWA's failure to prohibit allocation of a TMDL does not create an ambiguity. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original) ("To suggest...that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power...is both flatly unfaithful to the principles of administrative law... and refuted by precedent."). Congress even stated that nothing in the CWA affects any rights of the states over their waters unless it does so expressly. 33 U.S.C. § 1370. Since allocation requirements necessarily affect the

rights of the states over their waters, and Congress did not expressly provide EPA with the authority, TMDLs do not require allocation.

Rather, when compared with the 1970 Clean Air Act (CAA), the CWA affirms Congress's clear intention to leave pollution reduction to the states. When Congress speaks on an issue in one Act but is silent on the same point in another Act, a court must presume that Congress's silence is intentional. *Envtl. Integrity Project v. U.S. E.P.A.*, 969 F.3d 529, 541 (5th Cir. 2020). The CAA specifically provided for a federal implementation plan under certain conditions. 42 U.S.C. § 7410(c)(1). The CWA passed only two years later, is silent on EPA's authority to create an implementation plan. *Cf.* 33 U.S.C. §§ 1251(b), 1370. Statutory silence, viewed in context, is best interpreted as limiting agency discretion. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added). Since nothing suggests a contrary intent, Congress's silence on federal implementation plans is intentional. Congress did not intend to permit allocation requirements.

To summarize, Congress required states to express their TMDL as a number only. The CWA does not authorize EPA "allocations," but only a total load expressed at a "level." The Act also gives strong deference to state planning processes. The Act's silence on allocations also limits EPA's ability to require allocations. Thus, EPA's interpretation does not withstand step one of the *Chevron* framework because congressional intent on the matter is unambiguous. Alternatively, EPA's interpretation of TMDL is impermissible.

C. EPA's interpretation of "Total maximum daily load" impermissibly destroys the harmony of the act.

Even assuming the statute is ambiguous, EPA's interpretation of TMDL is an impermissible construction of the CWA. If a statute is ambiguous on a specific issue, courts consider whether the agency's answer is based on a permissible construction of the statute under step two of the *Chevron* analysis. *Chevron*, 467 U.S. at 843 (1984). Courts uphold agency

interpretations that are permissible regardless of other possible constructions. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1978).

But EPA's interpretation is not permissible because it would destroy the harmony of the act. Courts read apparently conflicting statutes to give effect to each by preserving their sense and purpose. *See, e.g., U.S. v. Santos*, 553 U.S. 507 (2008). EPA's interpretation nullifies the effect of the Clean Water Act by deciding how a state values its various state activities contributing to point sources and nonpoint sources. But § 303 enhanced EPA's role in water pollution as it relates to point sources only. *See* House Debate on H.R. 11896 (Mar. 27, 1972). (Rep. Dorn), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 343, 466 (1973) ("The heart of the bill is the new focus on point source limitations."). And Congress addressed nonpoint source pollution control fifteen years later with § 319. Section-by-Section Analysis of the Water Quality Act of 1987, reprinted in 1987 U.S.C.C.A.N. 5, 30; 33 U.S.C. § 1329(d)(2). EPA's interpretation fails to give effect to each provision of the statute because allowing EPA allocation (1) grants EPA authority over implementing TMDLs that § 303(e) leaves to the states and (2) renders § 319 superfluous.

1. EPA's interpretation of TMDL expands EPA's authority relating to state planning processes beyond what the Act permits.

EPA's interpretation of TMDL seizes the authority that the Act gives to the states. A court's construction of a statute must, as much as possible, ensure that the statutory scheme is coherent and consistent. *Ali v. Federal Board of Prisons*, 552 U.S. 214, 222 (2008). Under § 303(e), states incorporate their approved TMDL as part of their planning processes, including schedules of compliance for water quality standards. CWA § 303, 33 U.S.C. § 1313(e). If EPA could allocate TMDLs on a state's behalf, it would undermine the state's power to control its planning processes.

EPA's regulation requiring allocation of a TMDL among WLAs and LAs is incoherent and inconsistent with the state's authority under § 303(e).

Rather, EPA's authority to approve state planning processes falls under § 303(e), which gives EPA much less authority to remedy a state's action than § 303(d). Under § 303(e), EPA has no authority to change a state plan that it disapproves of. *Id*. However, under § 303(d)(2), if EPA disapproves of a load, it may simply establish such loads as it considers necessary to implement the water quality standards. *Id*. § 1313(d)(2). EPA's interpretation of TMDL expands its authority beyond what the statute provides and puts undue influence on state planning processes.

2. EPA's interpretation of TMDL requiring allocation renders § 319 superfluous.

If § 303(d) required that states allocate TMDLs, then § 319 is superfluous and crippled in effect. Courts are deeply reluctant to interpret a statutory provision to render superfluous other provisions in the same enactment. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). Section 319 specifically reserved for the states all power to limit nonpoint sources. 33 U.S.C. §§ 1329(a)(1), 1329(b)(2). Under EPA's approach, states would be unable to exercise their rights under § 319 because EPA already allocated the state's nonpoint sources.

EPA's interpretation of TMDLs destroys the harmony of the act by usurping state authority under § 303(e) and rendering § 319 superfluous. EPA's interpretation of TMDL is impermissible.

III. EPA did not violate the Clean Water Act by accepting or proposing regulations allowing an annually-expressed TMDL with a phased implementation plan.

CLW challenges the validity of any TMDL that is annualized or that includes a phased implementation plan. R. at 11. CLW claims that such a TMDL violates Congress' expressed intent in the CWA. R. at 11. However, the statute clearly does not allow EPA to reject an annually-

expressed TMDL that can provide a daily number through calculations accompanied by an implementation plan.

EPA's approach in interpreting this issue is irreconcilable with its approach in requiring an allocated load. In rejecting a TMDL that did not allocate point and nonpoint sources, EPA stepped outside of the Congressional mandate and wrongly required more than the statute did. In contrast, by interpreting TMDL as an annual number according to New Union's practices, EPA does not step outside of the bounds of the statute but allows an alternate method of calculation preferable to the state from which a daily number can still be derived. This deviation in practice is significant because Congress limited the agency's power under the CWA by instructing EPA to develop systems in cooperation with the states. 33 U.S.C. 1251(g).

Here, EPA accepted the TMDL through an appropriate notice-and-comment rulemaking process. R. at 10; *see* 5 U.S.C. § 533. Thus, the Chevron test applies. *Chevron*, 467 U.S. at 842–43. For the reasons discussed below, the Court should find that the statute (1) requires EPA to accept an annually-expressed number that can produce a daily calculation and (2) does not disqualify a TMDL on the basis that it is accompanied by a phased implementation plan. Alternately, if the Court finds the statute allows for multiple interpretations on this issue, the Court must defer to the agency's interpretation because it is a permissible construction. *Id.*

A. The statute does not clearly require a daily-expressed TMDL, nor does it clearly foreclose an implementation plan.

First, in a *Chevron* analysis, a court must determine whether Congress has unambiguously spoken on the issue. *Chevron*, 467 U.S. at 842–43. If so, the court must adhere to that meaning. *Id.* Otherwise, if a court finds ambiguity, it proceeds to the second prong of *Chevron*. *Id.*

Here, the statute requires a "total maximum daily load" at "a level necessary to implement the applicable water standards with seasonal variations." 33 U.S.C. § 1313(d)(1)(C). This

provision simply requires a number that can be calculated to provide a daily number. Likewise, while the statute requires a number that reduces pollutants to meet applicable standards, it also supports an additional implementation plan developed in harmony with a state. 33 U.S.C. § 1251(g).

The Court should apply ordinary statutory construction to find that Congress' clearly expressed intent points to an annualized number that is not invalidated by an accompanying implementation plan. This would end the analysis at Chevron's first prong in favor of EPA's interpretation for this issue. Alternately, if the Court finds ambiguity in the statute, it should proceed to Chevron's second prong to reach the same result by deferring to the agency's interpretation.

1. A TMDL expressed as an annual number complies with Congress' unambiguous intent for a TMDL that can produce a daily number.

The statute clearly requires a TMDL that can produce a daily TMDL. 33 U.S.C. § 1313(d)(1)(C). CLW contends that a TMDL must be expressed only in a literal daily number and claims that a TMDL expressed as an annual number violates the "daily" in TMDL ("total maximum daily requirement"). R. at 14. But a TMDL expressed as an annual number does not violate the statute's clear requirement because it can produce a daily TMDL.

An annually-expressed TMDL can easily be broken down into a daily average number through a simple calculation dividing the TMDL by the days of the year. For example, the TMDL of 120 metric tons annually can be divided by 365 to reach the daily average of .33 metric tons. If the load exceeds .33 metric tons in the first few days of the year, the resulting daily TMDL for the remaining days of the year would be lowered. Or, if the load was less than .33 metric tons during the first few days, the remaining year's daily TMDL could be higher while still meeting the

pollutant reduction goals. Thus, an annually-expressed TMDL is consistent with the clear statutory requirement, and EPA must not reject it.

2. The CWA's complex statutory scheme requires an annually-expressed TMDL through application of ordinary statutory construction.

The statutory scheme itself encompasses a TMDL based on complex considerations. The CWA TMDL requirement calls for a number that accounts for seasonal variations and unknowns. 33 U.S.C. § 33(d)(1)(C). The TMDL process requires that EPA work in harmony with state programs to accomplish its purpose. 33 U.S.C. § 1251(g). Given the framework of Congress' expressed intent and specific provisions within the CWA, ordinary statutory construction points to an annual number—not a literal daily number.

In interpreting a statute, courts must avoid an absurd result. *See, e.g., Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). If statutes seem to conflict, courts should read the contrasting provisions in light of each other—*in pari materia*—considering all components of the legislative scheme to find an interpretation that avoids conflict if at all possible. *Sigmon v. Sw. Airlines Co.*, 110 F.3d 1200, 1206 (5th Cir. 1997). It is important to consider the statute in context, not in isolation. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Following these principles, the Court should find that Congress clearly intended for EPA to approve annually-expressed TMDLs.

Using statutory construction, the Second Circuit found that the complexity of the statutory scheme indicated that the word "daily" in TMDL cannot mean a daily-expressed number. *Muszynski*, 268 F.3d at 98. The Court considered it an "absurd" result to read the statute as requiring regulation of pollutant loads on a strictly daily basis. *Id.* This overly narrow reading of the statute, according to the court, "los[t] sight of the overall structure and purpose of the CWA." *Id.* Accordingly, the court accepted EPA's interpretation that a TMDL "may be expressed by

another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Id.* The Court stressed that, in this decision, the state's preference for an annual versus daily unit of expression weighed heavily. *Id.*

The "overall structure and purpose" of the CWA points to cooperation with the states—not only as an underlying theme, but as a clearly-expressed mandate. *See id.* Congress stated that Congress intended for EPA, in administering the CWA, to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). Congress also mandated that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* § 1251(g).

Here, as in *Muszynski*, New Union has proposed a TMDL expressed annually. R. at 10. As explained here, this TMDL is consistent with CWA requirements because it provides a way to calculate a daily-expressed number. EPA must approve TMDLs that are consistent with the CWA. 33 U.S.C. § 1313(c), (d). Thus, EPA lacks statutory authority to reject an annually-expressed TMDL, regardless of any reasons CLW can show favoring a daily-expressed number.

The Court should read the statutory provisions in harmony, avoiding absurdity. It would be an absurd result to suggest that Congress intended for §303(d)(1)(C) to dictate uselessly rigid requirements in light of Congress' mandate for flexibility in developing solutions in cooperation with states. 33 U.S.C. § 1251(b), (g). The sections can be read in harmony, avoiding absurdity, by allowing an annually-expressed TMDL.

3. A phased implementation plan is consistent with Congress' clearly-expressed intent.

The CWA requires a TMDL expressed as a number that establishes a pollutant load for a body of water at a level "necessary to implement the water quality standards applicable to such waters." 33 U.S.C. § 1313(d)(1)(C). Here, EPA approved a TMDL that did exactly what Congress clearly required. R. at 8–10. The TMDL is 120 metric tons per year—the quantity of phosphates over time that implements applicable clean water standards. R. at 8–10.

CLW argues that this TMDL is somehow invalid because it is accompanied by an implementation plan showing how the Lake can reach the TMDL after five years. R. at 11. Because of the Lake's current state of extreme pollution, any reasonable person should be able to ascertain that the TMDL will not be reached overnight. R. at 8. Implementation will take work and time. The mere fact that EPA, working in harmony with New Union, approved a TMDL and an implementation plan simultaneously does not mean that EPA violated statutory TMDL requirements.

Instead, the implementation plan is superfluous to this issue. CWA is clear that EPA's role is to administer and guide, not to implement. *See, generally,* 33 U.S.C. §§ 1251, 1313. However, EPA can approve a state-originated implementation plan. 33 U.S.C. § 1313(e). The fact that EPA did so does not act to bar an otherwise valid TMDL.

Here, the TMDL of 120 metric tons annually meets the statutory requirement of a load that brings pollutants within acceptable levels. The five-year implementation plan of the TMDL is distinct and does not change the actual approved TMDL. Thus, EPA's approval of the implementation plan did not deviate from Congress' clearly-expressed intent in setting a TMDL level.

B. If the Court finds ambiguity in the statute, it must defer to the agency's interpretations in this matter.

If the Court finds that the statute is susceptible of multiple interpretations for this issue, it must move to the second prong of Chevron to determine whether the agency's interpretation is a reasonable construction. *Chevron*, 467 U.S. at 843. The Court must defer to a reasonable interpretation. *Id.* The interpretation is reasonable if it is a permissible construction—in other words, if any canons of statutory interpretation could lead to that interpretation, regardless of whether the Court would prefer to use those canons. *Id.*; *Nat'l Ass'n of Home Builders*, 551 U.S. at 666.

Here, the agency has interpreted the statute as allowing an annually-expressed TMDL accompanied by a 5-year phased implementation plan. R. at 8–10. As discussed above, ordinary canons of construction easily point to this interpretation: reading the statutory scheme as a whole and giving effect to every expressed intent of Congress; reading the words in context; reading conflicting provisions in light of each other; and avoiding an absurd result. So, the agency's interpretation is a permissible construction and thus reasonable.

Nowhere does CWA forbid an annual expression or a daily number that is an average or require a daily number that is exactly the same every day. Case law suggesting otherwise is not analogous to the current situation.

CLW cites *Friends of the Earth*, in which the D.C. Circuit stated that a non-daily TMDL violated the statute. *Friends of the Earth, Inc. v. EPA.*, 446 F.3d 140, 144 (D.C. Cir. 2006). However, *Friends of the Earth* addressed multiple TMDLs for the same water system—an annual TMDL for one type of pollutant and a seasonal TMDL for another type of pollutant. *Id.* at 143. This type of split TMDL does not create a TMDL that could produce, through a simple division calculation, a daily average. The court emphasized that a TMDL must be able to produce a

maximum load for every day, not only for some days. *See id.* at 144. New Union's annual TMDL is an inapposite scenario because it can produce a daily average number—which is the criteria of the *Friends of the Earth* court for an allowable TMDL.

In contrast, the D.C. Circuit stated that a TMDL not expressed as a literal daily number was "consistent with the CWA, its implementing regulations, and common sense." *Anacostia Riverkeeper, Inc. v. Jackson.* The court allowed EPA to require daily pollutant loads in "whatever timeframe applies to those standards under state law." Thus, the court deferred to EPA's interpretation, allowing flexibility in the unit of time used to express a TMDL. *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 246 (D.D.C. 2011)

In short, an annualized TMDL accompanied by an implementation plan fulfills Congress's clearly expressed intent. This view ends the analysis at the first prong of *Chevron.* However, should the Court find the statute ambiguous and susceptible to other interpretations, the Court must defer to the agency's interpretation under the second prong of a *Chevron* analysis.

Thus, the Court should find that the district court wrongly determined that phased implementation of an annual percentage reduction TMDL violated the CWA § 303(d). Accordingly, New Union asks the Court to hold that an annually-expressed TMDL with a phased implementation plan, such as New Union promulgated for the Lake, is not contrary to statute.

IV. EPA properly adopted the New Union BMP credit portion of the TMDL.

The final issue on appeal that the Court must consider is whether EPA may adopt the credits within the New Union TMDL. The Clean Water Act mandates that the state set limits on pollution of point sources for waters throughout the state. 33 U.S.C. 1329. The collaboration of the point source allocations cannot exceed the TMDL discussed above. Even so, the CWA also allows the state to implement Best Management Practices ("BMPs") to control nonpoint source pollution. 40

C.F.R. §130.2(i). The act allows the state to "credit" the progress from nonpoint source BMP progress and use it to reduce point sources regulations. *Id*. This credit allows the state to create less stringent requirements for the point sources, making implementing the TMDL easier overall. *Id.* These credits are the center of the controversy in the fourth issue on appeal. R. at 2. EPA adopted a version of New Union's TMDL that included credits from the TMDLs.

The Court must review agency action under the highly deferential arbitrary and capricious doctrine. 5 U.S.C. § 706. The arbitrary and capricious doctrine requires that the Court analyze the facts and circumstances surrounding the action. *Citizens,* 401 U.S. 402, 416 (1972); *City of New York v. Shalala,* 34 F.3d 1161, 1167 (2d Cir. 1994). The Court must uphold the agency's decision unless the agency acted in blatant disregard of the facts. *Id.* Even if the Court believes that there is a better or more efficient way, the Court cannot substitute its judgment for the agency. *Id.* Additionally, the Court must uphold an action by an agency that has less than ideal clarity if the court can reasonably discern the agency's path. *Motor Vehicle Mfrs. Ass'n v State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43*; Rec. Fishing All. V. Evans*, 172 F. Supp. 2d 35, 41 (D.D.C. 2001); *Rojas v. Napolitano*, No. 8:13-cv-2474-T-35TGW, 2015 U.S. Dist., Lexis 181041, at *1-*16, *5 (M.D. Fla. Mar. 17, 2015); *Shays v FEC*, 337 F. Supp. 2d 28, 53-56 (D.D.C 2004) *Aff'd,* 414 F.3d 76 (D.C. Cir. 2005). The party claiming an action was arbitrary and capricious bears the heavy burden of proof. *Greenen v. Bd. of Accountancy*, 126 Wn. App. 824, 830, 110 P.3d 224 (2005), *review denied*, 156 Wn.2d 1030 (2006).

The arbitrary and capricious test consists of two prongs for court consideration. First, the agency must have considered the relevant facts. *Citizens,* 401 U.S. at 416. While this step requires judicial judgment, it is still highly deferential to the agency. *Id.* The Court must decide whether an agency's interpretation of what a relevant fact could be is a blatant disregard for the facts. *Id.* If it

is not, the Court must hold that the agency adequately considered all the relevant facts. *Id.* Second, the Court must decide whether the agency had a reasonable basis for its decision. *Citizens,* 401 U.S. at 416; *Yakus v. United States*, 321 U.S. 414 (1944). Again, this is deferential and requires the court to determine whether the decision was a clear error of judgment or a blatant disregard of facts. *Id.* Only if the action meets one of these two standards can the court set aside the action. *Id.*

A. EPA's adoption of the New Union credits in the TMDL was not arbitrary and capricious.

The Court must first evaluate whether the agency considered the relevant facts and circumstances. The court can use many sources to evaluate whether EPA considered the facts. *Citizens,* 401 U.S. at 416. The significant differentiation that courts draw is that, while the agency must consider the relevant factors, those factors do not bind the agency. *Shays*, 337 F. Supp. 2d at 54. The agency is allowed to consider and discredit a factor.

Even if insufficient evidence exists to show that EPA considered the relevant factors, an agency can still pass this first evaluation by showing a readily discernable path. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Here, the relevant facts and circumstances—legislative history and Congressional intent—strongly support EPA's conclusions in this matter. This creates a readily discernable path through which the Court can still find that EPA passes this first evaluation.

The first factor EPA properly considered was the legislative history behind the Clean Water Act. *Oregon Nat. Desert Ass'n v. Dombeck*, 172 F.3d. 1092, 1097 (9th Cir. 1998). The Water and Environmental Quality Improvement Act (WEQIA) was the act Congress passed right before the Clean Water Act. *Id.* It attempted to regulate pollution by starting at the water source and tracking the solution back to pollution sources. *Id.* The method of enforcement was largely unsuccessful and led to the passage of the CWA. *Id.* The CWA changed EPA's approach and shifted the focus

to the pollution instead of the polluters. *Id*. Under the CWA, EPA regulates point sources while the states have discretion over non-point sources. *Id.*

The second factor properly considered was the legislative intent for the CWA. Congress's intent for the Clean Water Act can be derived from the statute's language and should not, therefore, be a matter open to change by the courts. The CWA explicitly established the CWA to work cooperatively with the states while still respecting their rights. 33 U.S.C.§ 1251(g). As discussed above, § 1251(g) established an intent that EPA work cooperatively with the state agencies. Additionally, while Congress saw fit to include enforcement programs for many obligations within the CWA, the statute does not include a mechanism for EPA to compel state enforcement. 33 U.S.C. § 1313; 33 U.S.C. § 1329. Congress knew it could have implemented an enforcement mechanism on the states as it did in other areas, but it chose not to. *Id.* This choice by Congress creates a strong presumption that Congress did not intend to impose any such regulations. *See State Farm v U.S.*, 137 S. Ct. 436, 442 (2016); *Digital Realty Trust v Somers*, 138 S. Ct. 767, 777 (2018).

These two factors were the relevant factors for EPA's adoption of the New Union TMDL. The pathway EPA took to arrive at its action is reasonably discernible from a correct understanding of the legislative history and Congressional intent. Neither interpretation is in blatant disregard of the facts; therefore, the Court must find that EPA passed the first prong of the arbitrary and capricious analysis.

1. EPA had a reasonable basis for adopting the credit system of New Union's TMDL.

The second prong of the arbitrary and capricious test requires that the Court set aside the agency's action only if it finds no reasonable basis for the action. Although there are two possible reasonable bases for EPA's action—legislative history and Congressional intent—the statutory test requires only one reasonable basis to uphold the action. *Citizens,* 401 U.S. at 416. The Court cannot

set aside EPA's adoption of credits unless it finds no reasonable basis. *Id.* Specifically, to set aside EPA's action, the Court must find that both the legislative history and Congressional intent blatantly disregarded the facts and that to rely on them was a clear error of judgment.

The Court should find that the legislative history and Congressional intent provided reasonable bases for EPA to adopt the New Union TMDL because attempting to enforce stricter requirements would contradict both factors. The comparative analysis of the WEQIA and the CWA highlights the intent of Congress to limit federal implementation to only the point sources. *Dombeck*, 172 F.3d at 1097. Congress authorized the credit process and included no limitations in the authorizing passage. 33 U.S.C. 1329. EPA's decision to respect the statutes and approve the TMDL without imposing additional requirements of the TMDL is not arbitrary and capricious. Instead, it displays extraordinary respect for the laws of the country.

2. CLW fails to show that EPA's action was arbitrary and capricious because the 1991 EPA guidance document is not legally enforceable.

The party claiming an action was arbitrary and capricious bears the heavy burden of proof in a lawsuit, and CLW has failed to rise to the occasion. CLW relied on a 1991 guidance document as the basis of its arbitrary and capricious claim, an ultimately fatal error as the document is not binding on EPA and does not show the action was arbitrary and capricious. The guidance document is not binding on EPA for two reasons: either it was not legally enforceable or not precedential.

First, as discussed above, the 1991 document did not go through the notice and comment rulemaking process and is thus not legally enforceable. *Dombeck*, 172 F.3d at 1097 The Court's recognition of the lacking legal status of this document negates any claim that EPA's decision was unreasonable. EPA may properly disregard a document that is not legally enforceable. *Id.* The disregard for the decision does not make EPA's decision arbitrary and capricious. *Id*

Second, even if the Court decides that the document is legally enforceable, it is not binding on EPA and can be disregarded in a reasonable decision. The document itself notifies all parties involved that it is not another obligation and is a guidance document only. The Court cannot decide to enforce the reasonable assurance standard without violating the 1991 document. Thus, the Court cannot find that EPA erred in not using the reasonable assurances standard.

The Court should follow the lead of *Sierra* by finding that the CWA limits the power of EPA and upholding the EPA adoption. In *Sierra*, the state tried to create a TMDL for its polluted waters. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002). The Sierra Club, an activist organization, stepped in and challenged the EPA approval of the TMDL because it lacked sufficient implementation plans to ensure effectiveness. *Id.* The court discussed the lack of efficacy of the Georgia programs but ultimately concluded that while valuable information, it was not relevant to the issue at hand. *See id.* at 1033. The court held that the TMDL program was not an implementation program. *Id.* The court further held that EPA could comment, make suggestions, or pose edits to the BMPs, but it had no mechanism to force the implementation on the states. *Id.* at 1030-31.

The Court should find that EPA's adoption of the TMDL credits was an authorized agency action because it was not arbitrary and capricious. EPA had a discernible path in both its consideration of the relevant factors and basing its reasonable decisions on those factors. But these facts are unnecessary for the court's decision as CLW has failed to meet its burden of proof. CLW improperly relied on the 1991 document's "reasonable assurance" standard, but the document could not bind EPA and make the difficult showing of arbitrary and capricious.

B. Additionally, EPA cannot force the state to implement a BMP because it lacks statutory authority.

EPA lacks the authority to regulate nonpoint source BMPs. As discussed above, both the congressional history and the legislative intent support a limitation on power. *Am. Farm Bureau Fed'n v. the United States*, 792 F.3d 281, *287*-89 (3d Cir. 2015); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998). The CWA furthers this limitation. 33 U.S.C. § 1329. EPA has authority to approve or modify TMDLs created by the state. 33 U.S.C. § 1329(2)(b). If the state fails to create a TMDL, then EPA may intercede and create one itself. *Id.* EPA creates obligations on the planning of the TMDL. 33 U.S.C. § 1329(2)(c). Noticeably missing from the grant of power is EPA's ability to force states to implement TMDLs. *Dombeck*, 172 F.3d at 1097. Congress limited EPA's role in nonpoint source management to sharing and collecting information from the states and issuing monetary grants. *City of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

While the *American Farm Bureau* court seems to arise at a contrary decision, that case is distinguishable. In *State Farm*, the state had created a TMDL that was objectively insufficient to meet the obligations under the CWA. EPA stepped in and created a plan that would remedy the deficiency. *American Farm Bureau*, 792 F.3d at 287-289. *American Farm* was a case that concerned the planning of a proper TMDL. *Id.* The planning and approval of the TMDL have long been considered the province of EPA. *Id*.

This issue is factually distinguishable from *American Farm Bureau*. As discussed above, *American Farm Bureau* centered on insufficient TMDL planning. This dispute is different. New Union's TMDL was sufficient to reduce pollution by the required standards. R. at 9. New Union had not implemented the BMPs. R. at 10. This case is an implementation problem, not a planning

issue. The court's holding in *American Farm Bureau* applies to the planning process, where they have control.

CONCLUSION

For the reasons discussed above, New Union respectfully requests that the Court affirm the District Court's grant of summary judgment finding that this matter is ripe for review, that EPA must not reject a TMDL on account of its lack of allocation between point and nonpoint discharges, and that EPA's regulatory grant of credits for point source reduction based on anticipated nonpoint source reduction through BMPs is not arbitrary and capricious. Further, the Court should reverse the District Court's grant of summary judgment finding that an annually-expressed TMDL with a five-year phased implementation plan is contrary to statute. Finally, the Court should affirm the District Court's order vacating EPA's rejection of New Union's Lake Chesaplain TMDL, vacating the definition of "total maximum daily load" in 40 C.F.R. § 130.2(i), and ordering EPA to approve New Union's Lake Chesaplain TMDL.