Team 06

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellant.

Appeal from the United States District Court for the District of New Union No. 66-CV-2020 and 73-CV-2020
Judge Romulus N. Remus

BRIEF OF PLAINTIFF-APPELLANT-CROSS APPELLEE CHESAPLAIN LAKE WATCH

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STATEMENT OF JURISDICTION

This is an appeal from the U.S. District Court for the District of New Union. R. at 2. These actions were brought pursuant to the judicial provisions of the Administrative Procedure Act, APA § 702. This court has proper subject matter jurisdiction over this appeal under 28 U.S.C. § 1331 given the complaint raises issues under federal law. R. at 10. Appellants filed timely notice of appeal. R. at 2; FED. R. APP. P. 4 (a) 4. The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction over this case based on 29 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is EPA's Rejection of New Union's Proposed TMDL and Subsequent Adoption of the CWIP TMDL Ripe for Judicial Review?

II. Is Defining TMDL to Require Both Wasteload and Load Allocations Permissible?

III. Does EPA's Adoption of a TMDL Consisting of an Annual Pollution Loading Reduction Phased Over Five Years Violate of the CWA?

IV. Did EPA Abuse Its Discretion in Adopting a Nonpoint Source Pollution Credit Trading Program Absent Reasonable Assurance?

STATEMENT OF THE CASE

I. Clean Water Act

In 1972, Congress passed the Clean Water Act ("CWA") with the main objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress declared as a national goal that "the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1254(a)(1).

Water Quality Standards ("WQS"). To further the CWA's goals, the law requires that states and the Environmental Protection Agency ("EPA") work together through "cooperative

federalism," a framework consisting of measures to restore and maintain clean national waters. R. at 5. Each state must enact WQS, consisting of water quality criteria and designated uses, which include drinking water, fishing, and recreational uses. R. at 6. Additionally, states must submit regular supplemental reports with descriptions of water quality. 33 U.S.C. § 1315(b)(1).

Point and Nonpoint Sources. Pollution comes from either point sources, nonpoint sources, or natural background. Point sources are "discernible, confined and discrete conveyance[s]." 33 U.S.C. § 1362(14). Nonpoint sources consist of all other types of pollution.[1] The CWA prohibits points sources from discharging into navigable waters absent permits known as National Pollutant Discharge Elimination System ("NPDES") permits. *Id.* § 1342(a)(1). NPDES permits impose effluent limitations on point sources, requiring them to reduce pollution levels in their discharges. *See id.* The CWA orders states to develop programs to control nonpoint source pollution. *Id.* § 1329(b)(1)-(2). These programs, including Best Management Practices ("BMPs") and other nonpoint source control programs, are subject to federal oversight, while the Act leaves implementation to the states. *See id.*

Impaired Waters. States are required to identify waters as impaired where technology-based permit controls are not strong enough to implement WQS. The states must compile a list of its impaired waters and submit it to EPA every two years. R. at 6. Once an impaired waterbody is identified, the state must establish a "total maximum daily load" ("TMDL") for those pollutants which cause the impairment. R. at 6.

TMDL. EPA defines a TMDL as "the sum of individual [wasteload allocations ("WLAs")] for point sources and [load allocations ("LAs")] for nonpoint sources and natural background."

[1] *Basic Information about Nonpoint Source (NPS) Pollution*, EPA.GOV, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Nov. 20, 2021).

Water Quality Planning and Management, 40 C.F.R. § 130.2(i) (2021). These allocations represent the portion of a receiving water's loading capacity attributed to point and nonpoint sources respectively. *Id.* § 130.2(g)-(h). A TMDL must be established "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C)

A state may take credit for nonpoint source pollution reductions, as long as such stringent load allocations are "practicable," in turn allowing for less stringent waste load allocations. 40 C.F.R. § 130.2(i). EPA has interpreted this to mean that, should the TMDL rely on a credit from nonpoint source reductions, EPA must have reasonable assurance that those reductions will be achieved in order to issue the TMDL. EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991) [hereinafter "1991 Guidance"].

States first submit proposed TMDLs to EPA for approval and EPA must approve or disapprove within thirty days. 33 U.S.C. § 1313(d)(2). If EPA disapproves, it must establish a TMDL at a level necessary to implement WQS. *Id.* The CWA directs the states to implement the TMDL into their continuing planning process ("CPP"). *Id.* §§ 1313(d)-(e). The CPP shall account for effluent limitations and "adequate implementation." *Id.* § 1313(e)(3)(a), (f).

Nonpoint Sources Controls. The Act contemplates implementation of nonpoint source controls by requiring states to submit for approval Nonpoint Source Management Plans for implementation. These plans require identification of BMPs and a schedule for the "utilization of the best management practices at the earliest practicable date." *Id.* § 1329(b)(2)(a)-(c).

II. Factual Background

Lake Chesaplain is a natural lake located in the State of New Union. R. at 7. Pursuant to the New Union WQS, Lake Chesaplain is a Class AA waterbody, suitable for drinking water. R. at 8. The lake borders a national forest with recreational activities such as fishing and camping. R. at 7. Land opposite the national forest is primarily of agricultural use, but also includes lakefront homes. R. at 7.

Lake Chesaplain's clear waters prior to the twenty-first century attracted boaters and fishers, creating a boom in vacation communities. R. at 7. In the 1990s, however, the character of the surrounding area transformed following the construction of ten large-scale hog CAFOs and a massive slaughterhouse. R. at 7. Thereafter, Lake Chesaplain's water quality dramatically diminished. R. at 7. Mats of algae formed during the summer months, causing offensive odors. R. at 7. Swimming became unsafe. R. at 7. Property values, fish propagation, and tourism revenue from fishing and boating all declined. R. at 7.

Due to this declining water quality, New Union created the Chesaplain Commission in 2008. R. at 8. Four years later, the Commission's report established that Lake Chesaplain violated WQS through excess phosphorus levels. R. at 8. In 2014, New Union included Lake Chesaplain on its impaired water list, but failed to submit a TMDL. R. at 8. Despite this failure, EPA did not object to this submission. R. at 8. However, in 2015, Chesaplain Lake Watch ("CLW") compelled New Union and EPA to create a TMDL under the threat of litigation.

In response, the Chesaplain Commission conducted a supplemental report in 2016. R. at 8. Existing phosphorus loadings were calculated at 180 metric tons (mt), whereas the maximum loading to meet Class AA water standards in Lake Chesaplain was calculated at 120 mt. R. at 9. The largest phosphorus contributors were the two point sources, Chesaplain Mills Sewage

Treatment Plant (STP) and the Chesaplain Mills Slaughterhouse, along with the hog CAFOs, nonpoint sources. R. at 8-9. Most noteworthy, the hog CAFOs accounted for 54.9 mt, nearly a third of New Union's existing loads. R. at 9. Neither the Chesaplain Mills STP, nor the Slaughterhouse, had any permit limits for phosphorus. R. at 9.

New Union proposed a TMDL with a 35% reduction of phosphorus loadings allocating between individual point and nonpoint sources. R. at 9. Following vehement opposition from the hog CAFOs regarding BMP requirements, New Union changed the TMDL to consist of 120 mt annually without any WLAs or LAs. R. at 10. EPA rejected this proposal and, over a year later, adopted the original state TMDL. R. at 10. EPA referred to its control measures as the "Chesaplain Watershed Implementation Plan," hereinafter, the "CWIP TMDL." R. at 10.

For nonpoint sources, the CWIP TMDL did not specify how BMP measures would be enforced, nor has New Union taken steps to require phosphorus reduction BMPs. R. at 10. The nutrient management permits for hog CAFOs have not been modified to incorporate phosphorus reductions. R. at 10. For point sources, the NPDES permit for the slaughterhouse expired in 2018, and the Chesaplain Mills STP permit expired in 2019. R. at 10. Pursuant to the TMDL requirements, the state has proposed modifying the NPDES permit limits. R. at 10. Neither permit has been reissued. R. at 10. Lake Chesaplain continues to violate WQS. R. at 10.

III. Procedural History

On January 14, 2020, New Union filed action under APA § 702, challenging EPA's rejection of its proposed TMDL, along with regulations surrounding the TMDL. R. at 10. On February 15, 2020, CLW filed action under APA § 702, challenging the CWIP TMDL as contrary to law, arbitrary and capricious, and unsupported by the record. CLW provided affidavits with its motion for summary judgement, which identified its specific members impacted by Lake

Chesaplain's declining water quality, including individuals that reside near Lake Chesaplain and individuals that use the Lake for recreational purposes. R. at 11. On March 22, 2020, the Court granted undisputed motions to consolidate the two actions. R. at 10. All parties cross-moved for summary judgment on these claims. R. at 5. The District Court denied EPA's motion for summary judgement in part, granted CLW's motion for summary judgement in part, and granted New Union's motion for summary judgement vacating EPA's rejection of New Union's TMDL and the definition of TMDL in EPA's 1985 regulation. R. at 5. From that order, all parties timely appealed. R. at 2. The District Court acknowledged CLW and New Union each had standing to bring their respective challenges here. R. at 11.

STANDARD OF REVIEW

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The parties agree on the facts of the underlying record. R. at 5. The District Court has also made determinations on all claims. R. at 16. Thus, this grant of partial summary judgment should be reviewed *de novo* by this Court. *See Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007).

SUMMARY OF THE ARGUMENT

First, EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL and promulgation of the CWIP TMDL is ripe for judicial review. This action is fit for review because it presents purely legal questions of statutory interpretation with a fully developed record and the implementation of the CWIP TMDL requires no further action by EPA. Additionally, CLW has and will continue to suffer legal and practicable hardships absent a ruling on this matter. The matter is thus ripe for review.

Second, New Union's challenge to EPA's regulatory definition requiring TMDLs to include WLAs and LAs is time-barred. Even if EPA's challenge is considered timely, the CWA does not unambiguously forbid the agency's interpretation of TMDL. The word "total" in TMDL allows for a construction that includes the sum of its parts. The purpose and structure of the CWA also supports EPA's definition of TMDL. Moreover, requiring such allocations does not equate to implementation and is in line with EPA's authority established under the act. EPA's interpretation is reasonable, supported by congressional and judicial action and policy considerations. Therefore, EPA's regulatory definition of TMDL deserves deference.

Third, EPA's CWIP TMDL, consisting of an annual loading reduction phased in over five-years, violates the CWA. Interpreting total maximum "daily" load to allow for annual limits is contrary to the plain meaning of daily and runs counter to congressional intent. Furthermore, annual limits could have harmful effects on water quality, placing it in contention with the CWA's stated purpose. Similarly, the CWIP TMDL's phased percentage reduction is not permitted under the CWA. Expressing the TMDL as a reduction runs counter to the plain meaning of "total" and "maximum." Likewise, a phased TMDL over five years would fail to limit phosphorus to the level necessary to meet applicable water standards until the fifth year of implementation. Nor would a phased TMDL comport with the CWA's structure and deadlines. The CWIP TMDL is thus contrary to the law under *Chevron* Step One.

Fourth, EPA was arbitrary and capricious in issuing a TMDL that utilized a nonpoint source credit trading program where it lacked reasonable assurance of BMP implementation. EPA's new position conflicts with its 1991 Guidance which interpreted EPA's 1985 regulation to require reasonable assurance for nonpoint source control tradeoffs. The 1991 interpretation should receive

deference under the *Auer* deference doctrine. Therefore, issuing the TMDL absent reasonable assurance was arbitrary and capricious.

ARGUMENT

I. EPA'S REJECTION OF NEW UNION'S PROPOSED TMDL AND SUBSEQUENT ADOPTION OF THE CWIP TMDL IS RIPE FOR JUDICIAL REVIEW.

To establish ripeness, parties must weigh the "fitness" for a judicial decision with the "hardship" to be suffered absent a court rendered judgment. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In challenges to administrative action specifically, courts consider whether (1) judicial intervention would inappropriately interfere with further administrative action, (2) courts would benefit from further factual development in adjudicating the claim, and (3) delayed review would cause hardship to the plaintiffs. *See Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998). Courts review these factors "on a sliding scale," considering them together to determine if a case is ripe. *City of Kennett, Missouri v. EPA*, 887 F.3d 424, 432 (8th Cir. 2018); *see also Ohio Forestry*, 523 U.S. at 733. This doctrine assures the timing of judicial review is appropriate, preventing premature judicial intervention in "abstract disagreements" over agency policies. *See Anderson v. Green*, 513 U.S. 557, 559 (1995); *Abbott Labs.*, 387 U.S. at 148. Weighing these factors together, this action is fit for judicial review because the court will neither interrupt any further EPA action concerning the CWIP TMDL, nor will the court benefit from further factual development. Additionally, plaintiffs will suffer hardship absent a court rendered judgment due to the continued daily effects of excess phosphorus levels in Lake Chesaplain.

A. Judicial Intervention Will Not Interfere with Any Further Agency Action.

There is no risk of interfering in the agency process because there is no possibility that further EPA consideration of the CWIP TMDL will occur — its decision is final. Finality in this context is determined pragmatically. *Abbott Labs.*, 387 U.S. at 150. Under ripeness, the issue is

whether the agency action is "sufficiently final" that the court would not benefit from postponing review. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464 (D.D.C. 2006). Thus, agency actions are final where they mark the "consummation of the agency's decision-making process" and the action is one where "rights or obligations have been determined" or "from which legal consequences will flow." *Friends of Wild Swan v. EPA*, 74 Fed. Appx. 718, 720 (9th Cir. 2003) (citing *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). The first factor applies to fitness of a judicial decision, where the second factor speaks to hardship. *See infra* Part (I)(C). Applying the above factor to the CWIP TMDL, the agency action is final.

The promulgation of the CWIP TMDL marks the consummation of EPA's decision-making under the CWA. To satisfy this factor, the action must be "definitive" or not "tentative or interlocutory." *Bravos v. Green*, 306 F. Supp. 2d 48, 55 (2004); *Friends of Wild Swan*, 74 Fed. Appx. at 720. The CWIP TMDL satisfies both of these considerations because EPA engaged in rulemaking. *Abbott Labs.*, 387 U.S. at 151 (explaining finality using examples where rulemaking was complete and the parties' harm stemmed from the rulemaking). The CWA delegates rulemaking authority to EPA to carry out the Act. *See* 33 U.S.C. § 1361(a); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). The CWA specifically requires notice and comment when EPA disapproves a state's TMDL proposal and it creates its own TMDL. *See* 33 U.S.C. § 1313 (c)(4); *cf. Bravos v. Green,* 306 F. Supp. 2d at 56. (considering an action not final because it did not challenge "EPA's final action, *i.e.*, the approval of the TMDL limits . . . ."). Here, EPA disapproved New Union's proposal, triggering a duty for EPA to substitute its own standard, which it did after notice and comment rulemaking. R. at 10. This is well within the type of final agency action contemplated by the ripeness doctrine. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293 (3d Cir. 2015).

B. The Court Will Not Benefit From Further Factual Development.

All that is necessary to adjudicate this claim are the facts on the record before EPA when it made its decision. Where a case presents the court with a "purely legal issue," e.g. an agency's construction of a statute, it is fit for review because further facts will not "significantly advance" the court's ability to adjudicate the claims before them. *Abbott Labs.*, 387 U.S. at 149; *Ohio Forestry*, 523 U.S. at 737 (citation omitted). Rather, the facts necessary to resolve an agency's statutory interpretation are the facts established by a well developed administrative record. *See e.g. Am. Farm Bureau*, 792 F.3d at 295; *see also City of Kennett*, 887 F.3d at 433 ("whether EPA lawfully approved the TMDL . . . depends primarily on the administrative record supporting EPA's decision."). Here, the action solely relates to EPA's interpretation of the CWA and its own regulations. R. at 11. The record is well-developed and has been submitted to the court. R. at 10. Therefore, this case will not benefit from any more factual development.

Further, the CWIP TMDL contemplates concrete actions taken by the state towards implementation, thus the factual development here has surpassed what is necessary. An action is not ripe unless the facts have been "fleshed out, by concrete action that harms or threatens to harm the complainant." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 873 (1990). Here, preexisting permits for Lake Chesaplain's two point sources were considered and incorporated into the TMDL. R. at 8, 10. New Union has since proposed editing these permits to incorporate the phosphorus limits. R. at 10. These are concrete steps towards implementation. *Cf. Food and Water Watch v. EPA*, 5 F. Supp. 3d 62, 80-81 (2013) (reasoning further factual development was necessary because neither EPA nor the state were issuing permits in violation of the TMDL). Thus, no further factual development is required and the time to review the CWIP TMDL is now.

C. CLW Will Suffer Hardship from the Pollution Levels in Lake Chesaplain Absent a Court Judgment.

The hardship factor considers how the agency action in question forces plaintiffs to modify their behavior, creating a "direct and immediate" impact on their "day-to-day" lives. *See Ohio Forestry*, 523 U.S. at 734; *Abbott Labs.*, 387 U.S. at 152. This can be through the presence of future "adverse effects of a strictly legal kind" or through more practical hardship upon the interests of CLW in particular. *Ohio Forestry*, 523 U.S. at 733-34. Here, the TMDL creates significant legal effects, and CLW members will suffer practical harm absent a judicial decision.

The CWIP TMDL imposes strictly legal effects. "Strictly legal" adverse effects are those that would traditionally be considered by courts, including the modification of legal power or authority, or the potential for liability as a result of the agency action. *See Ohio Forestry*, 523 U.S. at 733. For example, in *Friends of Wild Swan v. EPA*, the Third Circuit considered a TMDL to impose legal consequences due to the relationship between the TMDL and the requirement that it be incorporated into a state CPP. 74 Fed. Appx. at 720-21; *see also* 33 U.S.C § 1313(d)-(e). Here, the TMDL is directly incorporated into the state's CPP. If the CPP is not approved by EPA, the state's permitting program cannot be approved. *See id.* § 1313(e)(2)*; see also Friends of Wild Swan*, 74 Fed. Appx. at 721. The CWIP TMDL, therefore, can impact the ability to issue permits that are necessary under the Act to avoid liability. *See id.* §§ 1319(a)-(c). As such, the CWIP TMDL imposes hardship in the strictly legal sense.

More importantly, members of the CLW feel the practical harm of an insufficiently protective TMDL on a day-to-day basis, both in their enjoyment of the lake for recreational and economic use. *See Sierra Club, North Star Chapter v. Browner*, 843 F. Supp. 1304, 1311 (D. Min. 1993) (holding the issue was ripe where the effects of the TMDL were "being felt in a concrete way by members of the plaintiff groups . . . ."). This pragmatic assessment of hardship includes

harm suffered "both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review." *City of Kennett*, 887 F.3d at 433. The algae growth resulting from excess phosphorus in Lake Chesaplain has endangered CLW members' source of drinking water. R. at 10. It has also affected the water's color and smell, thus diminishing the daily use of the lake for recreational purposes. R. at 10. This decline in recreational activities has decreased the value of CLW member homes. R. at 7.; *cf. City of Arcadia v. EPA*, 265 F.Supp.2d 1142, 1157 (N.D. Cal. 2003) (considering economic hardship "borne by [p]laintiffs in particular" in assessing hardship). Members of the CLW have thus suffered day-to-day harm, and will continue to feel the effects of this harm should the court withhold a decision. Indeed, considering fitness and hardship together, this action "can never get riper." *Ohio Forestry*, 523 U.S. at 737.

II. DEFINING TMDL TO REQUIRE BOTH WLAS AND LAS IS PERMISSIBLE AND CONSISTENT WITH THE CWA UNDER *CHEVRON*.

The District Court erred in vacating EPA's definition of a TMDL for encompassing both WLAs and LAs. First, New Union's challenge to EPA's longstanding regulation exceeds the statute of limitations to bring an as-applied challenge to the regulation. Second, New Union's contention that the CWA unambiguously prohibits EPA's definition of TMDL is incorrect under *Chevron* Step One. EPA's interpretation is supported by the text, purpose, and structure of the statute, and does not exceed its delegated authority under the Act. Lastly, EPA's longstanding definition of TMDL is reasonable, and thus the regulation should be afforded *Chevron* deference.

A. New Union's Challenge is Time-Barred for Exceeding the Statute of Limitations.

The limitations period to challenge a regulation is six years after the regulation is published to the Federal Register. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997); *see also* 28 U.S.C. § 2401(a). Here, EPA's regulation was published

in 1985, well over thirty years ago. Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985) (to be codified at 40 C.F.R. 130).

This action is time-barred because New Union brings a challenge to the original enactment of the regulation in question. The District Court held that EPA's application of the rule through the issuance of the CWIP TMDL restarted the limitations period. R. at 12 (citing *Dunn-McCampbell*, 112 F.3d at 1287). This reasoning, however, is now obsolete. The Fifth Circuit recently clarified that "a final agency action that applies a regulation to a particular plaintiff does not restart the clock on a challenge to the *original enactment* of the regulation." *See Am. Stewards of Liberty v. Dep't of Interior*, 960 F.3d 223, 230 (5th Cir. 2020) (emphasis added) Instead, "'an agency's application of a rule to a party creates a new, six-year cause of action' to challenge *that specific application of the rule*." *See id.* (emphasis added) (citing *Dunn-McCambell*, 112 F.3d at 1287). New Union's challenge here is to the original enactment of the regulation, not the CWIP TMDL. R. at 12. Thus, this action is time-barred.

B. The CWA Does Not Unambiguously Forbid EPA's Definition of TMDL.

Even if the court considers this challenge to be timely, EPA's longstanding regulation interpreting the phrase "total maximum daily load" should stand under a *Chevron* analysis. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Step One of *Chevron* instructs courts to consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If after applying tools of statutory interpretation, the intent of Congress is clear, the court is to effectuate that intent. See *id.* at 842-43. The CWA permits EPA's construction of TMDL. The plain meaning, purpose, and structure of the CWA support EPA's interpretation. Furthermore, EPA's definition does not amount to an overstep of its authority delegated within the Act. Thus, EPA's TMDL definition is not forbidden under Step One.

i. The Plain Meaning of "Total" in TMDL Does Not Prohibit the Possibility that the Term Requires the Components of a Whole.

The word "total" in TMDL implies a sum of parts. When conducting statutory interpretation, courts first look to the ordinary, plain meaning of the text. *See Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). "Total" can be understood from the math involved when calculating a restaurant bill. When the waiter brings the check to the table, a reasonable person would require the bill to be itemized, containing a list of the components that amount to the sum. A single figure on the bill would likely be rejected as incomplete or lacking totality. This supports an interpretation of "total" that accounts for the portions that make up a whole. This understanding is reinforced by the dictionary definition of "total." Merriam-Webster defines "total" as "comprising or constituting a whole" and "a product of addition; sum."[2] New Union argues that "total" could not possibly include multiple components. R. at 12. However, this interpretation does not align with the ordinary and plain meaning of "total." EPA's definition comports with the ordinary meaning of "total" and thus is not prohibited.

Interpreting "total" as a single, top-line figure would violate the canon against surplusage. This canon instructs courts to effectuate purpose into every word written into a statute with an assumption that no word is superfluous. *See Duncan v. Walker,* 533 U.S. 167, 174 (2001). Here, the lower court's construction would render total and maximum redundant in "total maximum daily load." Through this lens, "total daily load" and "maximum daily load" would be indistinguishable. *See Am. Farm Bureau*, 792 F.3d at 297. This both undermines New Union's interpretation and supports that EPA's regulatory definition is reasonable.

[2] *Total*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/total (last visited Nov. 21, 2021).

Additionally, the CWA read by reference to the whole statute supports that "total" should be understood as a sum of parts. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (explaining the Whole Act Rule). For example, the CWA discusses grants available for the *total* cost of operation and maintenance of waste treatment management plans. 33 U.S.C. § 1284(b)(1). The CWA instructs EPA to account for the sum of its parts, including "total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors." *Id.*; *see Am. Farm Bureau*, 792 F.3d at 297. Similarly, when conducting studies on thermal discharges, CWA instructs EPA to estimate "the *total* impact on the environment, considering not only water quality, but also air quality, land use and effective utilization and conservation of freshwater and other natural resources." 33 U.S.C. § 1254(t) (emphasis added). These clauses showcase multiple sections of the CWA where "total" is the sum of many components.

ii. The Purpose and Structure of the CWA Lends Support to EPA's Regulatory Definition.

Requiring WLAs and LAs in a TMDL provides the means to the CWA's stated ends. Congress made clear that the goal of the CWA is to "*restore and maintain* the chemical, physical, and biological integrity of the Nation's waters." *Id*. § 1251(a) (emphasis added). To meet these goals, WQS are set and achieved "through the control of both point and nonpoint sources of pollution." *Id.* §§ 1251(a)(7); 1313(a). Effluent limitations are established by EPA on point source discharges to maintain WQS. *Id.* §§ 1311(b)(1)(A). When such point source controls are insufficient, the water is deemed impaired and a TMDL is created to restore the waterbody. *Id.* § 1313(d); *see also Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1527 (9th Cir. 1995) (stating TMDLs are only created when "existing pollution controls will not lead to attainment of water standards."). Therefore, it is reasonable for EPA to conclude that a TMDL contemplates limitations on pollutant contributions not just from point sources, but from nonpoint sources as

well. *See Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1348 (N.D. Cal. 2000), *aff'd sub nom. Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). By requiring WLAs and LAs in the regulation, EPA interprets the CWA directly in line with the purpose of the Act.

The impaired waters list required under 303(d) also reinforces the need to allocate between for point and nonpoint sources. A 303(d) list must take into account the severity of pollution in the waterbody. *See* 33 U.S.C. § 1313(d)(1)(A). The CWA broadly defines "pollution" as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 1362(19). This would naturally include all pollution from both point and nonpoint sources. *See Pronsolino*, 291 F.3d at 1139 ("The list required by § 303(d)(1)(A) requires that waters be listed if they are impaired by a combination of point sources and nonpoint sources; the language admits of no other reading."). As TMDLs are established pursuant to 303(d), it follows that it is reasonable for EPA to allocate between WLAs and LAs in the regulation.

iii. EPA's Interpretation of TMDL Falls Within EPA's Power Under the CWA in Line with Principles of Cooperative Federalism.

EPA's requirement to allocate pollutant loads among point and nonpoint sources does not amount to an overstep of agency authority. The CWA is governed by cooperative federalism, a framework that instructs EPA and states to work together to achieve the Act's goals. *See Am. Farm Bureau*, 792 F.3d at 288. While EPA does not directly implement the TMDL, it serves a supervisory role to the state to ensure the achievement of WQS. *See Sierra Club v. Meiburg,* 296 F.3d 1021, 1027 (11th Cir. 2002). For example, EPA has the authority to review, approve and reject every step of the section 303(d) process. R. at 6; *see also* 33 U.S.C. § 1313(c)(3) (designated uses and WQS); *id.* § 1313(d)(1)(a) (impaired waters list); *id.* § 1313(d)(1)(c) (TMDLs); *id.* § 1313(e) (CPP). Through that supervisory role, EPA is allowed to require a TMDL to include WLAs and LAs.

The District Court conflates EPA's power to regulate the TMDL with the power to implement the TMDL. EPA does not need the authority to implement the TMDL to require allocations in its promulgated definition for TMDLs. This is because a TMDL is an informational tool and is "not self executing." *See Idaho Sportsmen's Coal. v. Browner,* 951 F. Supp. 962, 966 (W.D. Wash. 1996). Instead, a TMDL, whether authored by the state or the agency, is incorporated into a CPP. 33 U.S.C. § 1313(e). Thus, EPA's exercise of discretion here is consistent with the agency's gatekeeping authority under the CWA. *Contra* Clean Air Act, 42 U.S.C. § 7410(c)(1) (giving EPA authority to directly implement air quality standards). Indeed, issuing a TMDL that abides by regulatory requirements for eventual incorporation falls squarely within agency authority under the Act.

Additionally, the District Court was incorrect that the CWIP TMDL's allocations among individual sources was a dramatic expansion of EPA's authority. The CWA is ambiguous as to the precise issue of pollutant allocations generally. Whether EPA allocates pollution among applicable point sources and nonpoint sources as singular entities, or accounts for these sources individually is irrelevant. Neither action would deface the text of the CWA. Indeed, the Supreme Court recently clarified that EPA issuing permits to nonpoint sources, in certain instances, is not a dramatic expansion of its authority under the CWA. *See Cnty of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (deciding that indirect discharges into navigable water can be subject to permits if functionally equivalent to direct discharges). Similarly, EPA's action here was not a dramatic expansion of the CWA as the agency was acting within its rulemaking authority to carry out the provisions of the Act. *See* 33 U.S.C. § 1361(a). Accounting for individual point and nonpoint sources, such as the Chesaplain STP and hog CAFOs, respectively, enables EPA to reduce the

pollution in the Nation's waters and is in accordance with the regulation. 40 C.F.R. § 130.2(i) (defining TMDL as the sum of "*individual* WLAs for point sources and LAs for nonpoint source"). Thus, EPA has not overstepped its authority.

C. Under *Chevron* Step Two, EPA's Interpretation of TMDL is Reasonable.

The plain meaning of "total," the purpose and structure of the CWA, and principles of cooperative federalism indicate that EPA's definition of TMDL is not forbidden by the CWA, and thus passes under *Chevron* Step One. Thus, this court must assess the reasonableness of EPA's interpretation under *Chevron* Step Two. At Step Two, an agency's interpretation is given considerable deference, and assumed permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. In other words, the agency's interpretation will be upheld if it is reasonable. *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001). This is because an ambiguous term is typically viewed as Congress delegating gap-filling authority to agencies. *See Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). Here, the reasonableness of EPA's definition is supported by the *Chevron* Step One analysis. *See supra* Part II(B); *Amer. Farm Bureau*, 792 F. 3d. at 306 (stating *Chevron* Step One reasoning supports the reasonableness of EPA's interpretation). EPA's interpretation is also supported by judicial and congressional action, and public policy. Therefore, EPA's definition of TMDL is reasonable.

i. Congressional and Judicial Action Support EPA's Reasonable Definition.

Congress has supported the reasonableness of EPA's regulation. In 1987, after the promulgation of the regulation, Congress amended the CWA. This amendment added a clause governing the revision of effluent limitations "based on a total maximum daily load *or other waste load allocation* established under this section." 33 U.S.C. § 1313(d)(4)(A)-(B) (emphasis added). By writing WLAs into the CWA, a term absent from the original enactment, Congress explicitly

implied its acceptance of the regulation. Indeed, Congress's revision indicates an intent to include such allocations. Additionally, the word "other" in the amendment suggests Congress considers WLAs to at least comprise part of a TMDL. *Am. Farm Bureau*, 792 F.3d at 308. Therefore, the regulation's reasonableness is supported by Congress.

Second, this regulation has been upheld by courts throughout the decades. In fact, many courts have defined TMDLs to accord with EPA's regulations. *See, e.g. Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 21, 27 (1st Cir. 2018); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Friends of Earth, Inc. v. EPA*, 333 F.3d 184, 186 n. 5 (D.C. Cir. 2003); *Pronsolino v. Nastri*, 291 F.3d at 1132; *Idaho Sportsman*, 951 F. Supp at 976. Thus, Congress and the courts support EPA's definition as reasonable.

ii. Public Policy Supports EPA's Interpretation as Reasonable.

Fifty years after the CWA's enactment, water quality is still far from the goals set forth in the Act. As of 2014, 218 million Americans live within ten miles of impaired waters.[3] States in particular struggle to control the nonpoint sources in their waterways. For example, in 2013, the General Accounting Office examined a random sample of twenty-five water bodies with longstanding TMDLs in place. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-80, CLEAN WATER ACT: CHANGES NEEDED IF KEY EPA PROGRAM IS TO HELP FULFILL THE NATION'S WATER QUALITY GOALS 35 (2013). State officials reported that while 83% of the sampled water bodies achieved their targets for point source pollution, only 20% reached their target for nonpoint sources. *Id.* Absent a clear nonpoint source target, states may be able to ignore their responsibilities under the CWA's cooperative federalism scheme.

[3] Allison Shipp and Gail E. Cordy, *The USGS Role in TMDL Assessments* 35, USG.Gov, https://pubs.usgs.gov/fs/FS-130-01/ (last visited Nov. 20, 2021).

In Lake Chesaplain, despite existing state programs, nearly half of the lake's phosphorus loadings come from nonpoint sources. R. at 8-9. New Union has also taken no steps to require phosphorus reduction BMPs. R. at 10. Requiring WLAs and LAs provide a mechanism to control for these deficiencies in achieving WQS. Reflecting sound policy in relation to the goals of the CWA reinforces that the regulation is reasonable. *See Pronsolino*, 91 F. Supp. 2d. at 1348 ("[T]o have limited TMDLs only to point-source loadings . . . would have left state agencies guessing at how to allocate the burden of cleanup between point and nonpoint contributions of the same pollutant."). Thus, this Court should defer to the agency under *Chevron* Step Two.

III. EPA'S ADOPTION OF A TMDL CONSISTING OF AN ANNUAL POLLUTION LOADING REDUCTION PHASED OVER FIVE YEARS VIOLATES THE CWA.

A TMDL is not a phased percentage reduction in annual loadings. Rather, a TMDL is a fixed daily limit on total loadings that shall meet applicable WQS. The CWIP TMDL violates the CWA first, because the statute provides for "total maximum *daily* load[s]." 33 U.S.C. § 1313(d)(1)(c) (emphasis added). Based on the plain meaning of the word "daily," Congress intended for the pollutant period to be calculated every day. Second, the CWIP TMDL as a phased percentage reduction violates the CWA because the plain meaning of the words "maximum" and "load" requires that a TMDL should provide the greatest amount of pollution that can enter a waterbody, rather than the amount that must be removed. Moreover, a phased TMDL over five years does not allow for WQS to be achieved until the fifth year, and does not comply with a strict statutory deadline, in effect creating a five-year extension for New Union. Thus, the CWIP TMDL as a phased percentage reduction in annual loadings violates the CWA.[4]

[4] Part II(B)-(C) argues that the CWA does not unambiguously forbid EPA's interpretation that "total" can constitute components of a whole. This argument, however, does not preclude the conclusion that "maximum," "daily," and "load" are unambiguous. *See Am. Farm Bureau* 792

A. Annual Pollution Limits are Inconsistent with the Plain Meaning of the Word "Daily."

To assess the validity of a TMDL expressed annually, the Court must consider the plain meaning of the word "daily," in "total maximum daily load," and thus proceed to *Chevron* Step One. *See supra* Part II(B). Here, the CWA unambiguously requires EPA to establish "daily" load limits of pollution into impaired waters—total maximum *daily* loads. 33 U.S.C. § 1313(d)(1)(c). EPA, however, adopted a TMDL that contained annual pollution limits. By approving the facially inadequate TMDL, EPA's action is inconsistent with the CWA's language.

i. The Plain Meaning of the CWA Indicates that "Daily" Cannot Mean "Annual."

When conducting statutory interpretation, courts first look to the ordinary, plain meaning of the text. *See supra* Part II(B). Here, "total maximum daily load" establishes that the load for pollutants should be on a daily basis. Daily unambiguously means every day. Merriam-Webster defines "daily" as "occurring, made, or acted upon every day" or "issued every day."[5] This definition is consistent in all contexts. For example, the top results in a Google search of the word "daily" provide a series of news publications circulated every day, including The Daily Mail, The Daily – New York Times, Los Angeles Daily News, New York Daily News, among others. GOOGLE SEARCH FOR DAILY, http://google.com. Morever, in hospitals, patients would be surprised if a doctor's daily rounds came only once a year. *See Friends of Earth, Inc. v. EPA.,* 446 F.3d 140, 145 (D.C. Cir. 2006). Interpreting "daily" to mean anything other than every day, i.e. annual, runs counter to the plain meaning of the statute.

F.3d at 295 ("[T]he D.C. Circuit held that the word "daily" was unambiguous, though it did not consider the above phrase unambiguous in all respects.").

[5] *Daily*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/daily (last visited Nov. 21, 2021)

EPA's interpretation fails to look at the plain language of the statute. The agency's interpretation mirrors that of the Second Circuit in *National Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). Here, the court relies on the "overall structure and purpose" of the CWA as a basis for concluding that "daily" within "total maximum daily load" has flexible meanings. *Id* at 98. The Court's only textual reference was section 303(d)(1)(C)'s language that requires the establishment of TMDLs for "pollutants which the Administrator identifies . . . as suitable for such calculation." *Id*. (citing 33 § U.S.C. 1313(d)(1)(C)). This language, however, does not conflict with the requirement to establish daily loads. In fact, the language cross-references section 304(a)(2), which requires EPA to develop by 1973 "the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives." 33 U.S.C. § 1314(a)(2). The text the Second Circuit cites only reinforces the requirement that the limitations on pollutants must be daily. Moreover, interpreting "daily" to mean anything other than "every day" runs counter to the D.C. Circuit's holding, the leading court on statutory interpretation and administrative law questions.[6] *Friends of Earth,* 446 F.3d at 145. This Court should follow the D.C. Circuit's reasoning that the only interpretation of the word "daily" is "every day."

ii. Setting Annual Pollution Loads Run Counter to the Purpose of the CWA.

Setting an annual pollution limit can potentially have an adverse effect on water quality and thus, contravenes the CWA's congressional purpose. Under a system that permits more flexible standards, such as "annual" loads, scientists have indicated that this system creates a loophole whereby polluters can ignore short-term heavy levels of pollution in certain seasons of

[6] David M. Cooper, *The Role of the D.C. Circuit in Administrative Law*; ABA https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2013/winter2013-0313-role-dc-circuit-administrative-law/.

the year by maintaining lower levels of pollution the rest of the year. *See* Jason Malinsky, *Balancing the Pollution Budget after Friends of the Earth v. EPA*, 34 ECOLOGY L. QUARTERLY, 861, 884 (2007). This would, in turn, maintain the "annual" standard, where all of the pollution throughout the year is averaged. *See id.* ("[T]his would be like saying it is permissible to drive 100 miles per hour in a 55 miles per hour zone, as long as your average speed in that zone over the past month was less than 55 miles per hour."). In Lake Chesaplain, by imposing an annual pollution limit, wide seasonal fluctuations have the potential to allow the applicable water standard to be violated at certain times of the year. *See id.* Congress spoke directly to these scientific findings in section 303(d), requiring that TMDLs be implemented with seasonal variations. 33 U.S.C. § 1313(d). An outcome that would allow for seasonal fluctuations of phosphorus loadings would run counter to the purpose of § 303(d)'s TMDL program, which is to improve water quality.

iii. Congress Intended For a TMDL to Reflect Daily Loadings.

In assessing congressional intent, "[t]he most reliable guide . . . is the legislation the Congress enacted." *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002). To alter the plain meaning of a word to find the most convenient approach for the agency, runs counter to congressional intent. *See, e.g., Engine Mfg. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (an agency cannot "avoid the congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy."). Here, if Congress wanted "daily" to have any additional meaning, it could have adjusted the text to call for "total maximum daily, seasonal, or annual loads." *Friends of Earth,* 446 F.3d at 144. Moreover, Congress could have left a gap for EPA to fill by establishing "total maximum loads." *Id.* Thus, since establishing a daily load follows the ordinary meaning, purpose, and congressional intent of the statute, the CWIP TMDL is contrary to the law under *Chevron* Step One.

B. The CWIP TMDL as a Phased Percentage Reduction Runs Counter to the Plain Meaning and Structure of the CWA Under *Chevron* Step One.

First, a TMDL reflected as a percentage reduction violates the CWA. The plain meaning of the words "maximum" and "load" in section 303(d) requires that a TMDL should reflect the greatest amount of pollution that can enter a waterbody, rather than the amount that must be removed. Second, the phased CWIP TMDL runs counter to the structure and context of the statute because it (1) fails to achieve applicable WQS, and (2) creates an unlawful extension to a strict statutory deadline. Thus, the CWIP TMDL violates the CWA.

i. The CWIP TMDL as a Phased Reduction Runs Counter to the Plain Meaning of "Maximum" and "Load."

A "maximum" is "an upper limit allowed" or "the greatest quantity or value attainable in a given case."[7] A "load" is defined as "the quantity that can be carried at one time by a specified means."[8] *See also* 40 C.F.R. § 130.2(f) (EPA regulation defining "loading capacity" as "greatest amount of loading that a water can receive without violating water quality standards). In *National Resource Defense Council, Inc. v. EPA*, a court provided that in taking these unambiguous definitions together, a "maximum load" sets the greatest amount that a waterbody can hold before the applicable water standards are violated. 301 F. Supp. 3d 133, 141 (D.D.C. 2018). Contrary to the court's definition, a percentage reduction reflects that a *minimum* of the pollutant must be *reduced* or *removed* from the waterbody. Nothing in the CWA suggests that "maximum" and "load" can stray from their plain meanings. *Id.* at 142. The court compares a TMDL to a speed limit or room occupancy limit where "[a] speed limit would be no limit at all if it simply required

[7] *Maximum*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/maximum (last visited Nov., 21, 2021).
[8] *Load*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/load (last visited Nov. 21, 2021).

drivers to slow down ten miles per hour," nor "could a room's maximum occupancy be defined in terms of a number of people that must leave the room every hour." *Id.* Indeed, the CWIP TMDL cannot be expressed as a minimum amount of pollution to be reduced or removed from Lake Chesaplain, and must be expressed as the greatest quantity of pollution that can enter. Thus, since the CWIP TMDL runs counter to the plain meaning of the statute, it is contrary to the law under *Chevron* Step One.

ii. The Phased CWIP TMDL Conflicts with the Structure of the CWA Because it Fails to Implement Applicable WQS.

The CWA requires that the TMDL contain the "greatest quantity of a pollutant that a waterbody can bear." *NRDC*, 301 F. Supp. 3d at 141. Moreover, "total maximum daily load," must together satisfy the 303(d)(1)(C) clause that the TMDL "be established at a level necessary to implement the applicable [WQS]." 33 U.S.C. § 1313(d)(1)(C). The two conditions must be understood in unison. *See Friends of Earth*, 446 F.3d at 145 ("As written, the statute requires states to establish daily loads that *also* meet applicable WQS. The existence of two conditions does not authorize EPA to disregard one of them."). Under the CWIP TMDL, however, a phased plan over five years does not allow for WQS to be achieved until the fifth year. The Chesaplain Commission Supplemental Report provides that the maximum phosphorus loading was calculated at 120 mt annually. R. at 8. Under the phased reduction plan, however, 120 mt is only accomplished in the fifth year, where the phosphorus loading reduction in years one through four does not sufficiently reduce to the maximum loading. By issuing the CWIP TMDL, EPA is allowing for an amount greater than the maximum load permitted into Lake Chesaplain for four years, thus contravening the structure of the statute.

iii. The CWIP TMDL Defies the Overall Context and Structure of the CWA by Creating a Five-Year Extension to a Strict Statutory Deadline.

In connection with achievement of effluent limitations, section 303(b)(1)(C) provides a deadline whereby "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet [WQS], treatment standards, or schedules of compliance, established pursuant to any State law or regulations." 33 U.S.C. § 1313(b)(1)(C). Most noteworthy, section 303(e)(3)(A), which contemplates the state's CPP for implementation, cross references section 303(b)'s statutory deadline, only reinforcing Congress's intent for a hard deadline on achievement of effluent limitations. *Id.* §§ 1313(b); 1313(3)(A). Here, a TMDL that achieves applicable water quality over the course of five years, creates in effect, a five-year extension to the deadline. Such an extension runs counter to both sections 303(b)(1)(C) and 303(e). Moreover, complying with section 303(b)(1)(C)'s deadline, is well settled law. *See, e.g., Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976) (describing the deadline as "a rigid guidepost" to which EPA must comply); *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1235 (6th Cir. 1978), cert. denied, 440 U.S. 909 (1979) (holding that the July 1, 1977 compliance deadline is unconditional); *U.S. v. City of Hoboken*, 675 F. Supp. 189, 194 (D.N.J. 1987) ([T]his statutory limit on extensions is wholly unambiguous."). Thus, the CWIP TMDL's phased reduction runs counter to the structure of the CWA and violates the statutory deadline.

Lastly, it would defy logic for any statutory requirement to be permitted five years following the deadline. For example, Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federal assistance programs, provides an effective date of October 21, 1986. *See* 42 U.S.C. § 2000(d). If a federal program were in violation of the statute after 1986, it would be illogical for a federal agency to be able to phase in compliance, and in effect, discriminate over a certain number of years before fully in effect. It would be likewise illogical to allow a TMDL that phases over five years, in effect granting an extension well beyond the statutory deadline. Here,

the CWIP TMDL does not comport with the 120 mt maximum loading for the first four years, thus failing to meet the stringent limitation necessary to meet WQS by the deadline. The CWIP TMDL is therefore contrary to the law under *Chevron* Step One.

IV. EPA ABUSED ITS DISCRETION IN ADOPTING A NONPOINT SOURCE POLLUTION CREDIT TRADING PROGRAM ABSENT REASONABLE ASSURANCE.

For a state to receive credit for nonpoint source pollution reductions, the state must provide reasonable assurance to EPA that these reductions will be achieved. EPA's 1985 regulation establishes that TMDLs can contemplate reduced point source limitations if the implementation of BMPs make more stringent limitations on nonpoint sources practicable. *See* 40 C.F.R. § 130.2(i). EPA's 1991 Guidance elaborates that when issuing a nonpoint source reduction credit, there must be reasonable assurance that this reduction will be achieved. 1991 Guidance at 15. Here, however, EPA seeks to interpret this regulation in a new way, disregarding its longstanding guidance requiring this standard.

These dueling interpretations must be assessed according to the deference standard under *Auer v. Robbins*. 519 U.S. 452 (1997). The *Auer* doctrine instructs courts to apply tools of construction to agency interpretations of regulations. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). If the regulation is ambiguous and the interpretation is reasonable, courts defer to the agency. *See id*. In a nutshell, "*Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Northwest Env't Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring). The Supreme Court recently clarified *Auer*, adding several limiting factors requiring that the interpretation be: (1) "expertise based," (2) a "fair and considered judgment," and (3) "authoritative" in order to receive deference. *See Kisor*, 139 S. Ct. at 2416-18.

EPA's 1991 Guidance interpretation, not its new interpretation, should be afforded deference under *Auer*. First, the 1985 regulation is clear and its meaning should be given effect. The plain meaning, purpose, and structure of the regulation confirm that reasonable assurance is the applicable standard. Even if the court finds the regulation is ambiguous, EPA's new interpretation is not reasonable. The 1991 Guidance, however, should be afforded deference because reasonable assurance is consistent with the regulation. Second, regardless of the court's *Auer* analysis, EPA's new interpretation still fails after applying the additional *Kisor* factors. Whereas EPA's 1991 Guidance meets all three *Kisor* factors and should continue to receive deference. Lastly, and in light of this standard, the issuance of credits under the CWIP TMDL was arbitrary and capricious because it is contrary to the record.

A. The Regulation is Unambiguous on its Face and the Court Should Give It Effect.

Under *Auer*, courts first must determine whether or not a regulation is truly ambiguous by exhausting all tools of construction, including the plain meaning, structure, and purpose of the regulation. *See Kisor*, 139 S. Ct. at 2415. If the meaning is clear, "the regulation then just means what it means–and the court must give it effect." *Id.* Second, if the regulation is ambiguous, the interpretation asserted must be a reasonable one. *Id.* Here, the plain meaning of the 1985 regulation is unambiguous. Its plain meaning affirms the need for reasonable assurance in accord with the 1991 Guidance. Even if the court finds that the regulation is ambiguous, EPA's new interpretation is not reasonable. Thus, EPA's 1991 Guidance should receive deference.

i. The Regulation is Clear that "Practicable" Requires "Reasonable Assurance."

The regulation in question provides that, "[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations *practicable*, then [WLAs] can be made less stringent." 40 C.F.R. § 130.2(i) (emphasis added). For something to be

practicable, it must be "reasonably capable of being accomplished" or "feasible in a particular situation." *Practicable*, BLACK'S LAW DICTIONARY (11th ed. 2019). EPA has provided that reasonable assurance exists when there is a "demonstration that nonpoint source load reduction can and will be achieved."[9] Whether nonpoint source controls are reasonably capable of being accomplished and whether there is a demonstration that controls can and will be achieved are two sides to the same coin. Thus, in order to establish whether stricter LAs are practicable, reasonable assurance must be established.

The meaning of practicable as necessitating reasonable assurance is also reinforced by the structure of the regulation. Due to the relationship between TMDLs and CPPs, it would be contradictory to include a TMDL lacking reasonable assurance into a CPP that requires evidence of implementation. CPPs simultaneously consider TMDLs and the plans to implement them. 40 C.F.R. § 130.5(b). Specifically, CPPs include the process for developing TMDLs and "the process for establishing and *assuring adequate implementation* of new or revised [WQS]." 40 C.F.R. § 130.5(b)(3), (6) (emphasis added). Thus, if a state's BMPs are not capable of achieving enough nonpoint source control reductions to make a credit tradeoff practicable, this will be reflected in the CPP. *See id.* This would render the TMDL and CPP contradictory and meaningless. Alternatively, in line with EPA's 1991 interpretation, reasonable assurance should be required to maintain consistency within the structure of the regulation and the Act itself.

Enforcing reasonable assurance furthers the general purposes of both the regulation and the Act itself. The regulation mirrors the structure of the Act, expanding upon its provisions, and thus furthers the same purposes of the CWA. *See* 40 C.F.R. § 130.0. The CWA has several explicit

[9] Section 7. Reasonable Assurance and Accountability Framework, EPA.gov, https://www.epa.gov/sites/default/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf (last visited Nov. 21, 2021).

goals including that programs for nonpoint pollution controls be "developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). The reasonable assurance standard works to eliminate doubt as to the expeditious implementation of state nonpoint source pollution controls. Absent assurances that the programs will be implemented, BMPs and other nonpoint source pollution controls may go unenforced by the state, as is the case here. R. at 10. Requiring nonpoint source reductions to be practicable before allowing them to be credited to point sources is in furtherance of the goals of the CWA and EPA's subsequent regulation. The plain meaning of the regulation is thus reinforced by these goals.

ii. To Not Require Reasonable Assurance in Order to Implement a Credit Trading Program is Unreasonable.

In light of the rest of the regulation, EPA's new interpretation here is not reasonable and is contrary to the regulation as a whole. An agency determination is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Here, the reasonable assurance standard is consistent with the regulation and the CWA as a whole. Thus, EPA's 1991 Guidance is reasonable. EPA's new interpretation, however, is not. The District Court upheld EPA's new interpretation noting that TMDLs are informational tools and not implementation plans. R. at 16. In the same way that EPA defining a TMDL to require WLAs and LAs is not synonymous with agency implementation, *supra* Part II(B)(iii), nor is interpreting the regulation to require reasonable assurance. However, to hold that the regulation does not require reasonable assurance is to interpret it in a way that is inconsistent with the Act. *See Amer. Farm Bureau*, 792 F.3d at 301, 307. The TMDL is not self-executing, but the additional requirements that correspond with the TMDL and relevant WQS are incorporated into state implementation plans. *See* 33 U.S.C §§ 1313(d)-(e); 1315. It would thus be unreasonable to affirm

a process that allows TMDLs to be put into place with no assurance of its implementation. Indeed, this would render the TMDL and CPP contradictory and futile. *See Supra* Part IV(a)(i). EPA's new interpretation in the CWIP TMDL is thus unreasonable and should not be afforded deference.

B. The 1991 Guidance Interpretation Prevails Under the Additional *Kisor* Factors, While EPA's Current Litigating Position Does Not.

In addition to the threshold factors of ambiguity and reasonableness, the Supreme Court clarified that courts must assess the "character and context" of an agency's construction to see if the agency interpretation "reverses the usual presumption of deference." *Kisor*, 139 S. Ct. at 2419. This prevents agencies from inappropriately creating *de facto* new regulations. *Id.* at 2415. Courts must consider whether an interpretation is (1) "expertise based," (2) a "fair and considered" judgment, and (3)"authoritative." *Id*. at 2414. Here, setting forth the requirements for a TMDL implicates the expertise of EPA and thus the first factor is satisfied for both interpretations. The 1991 Guidance interpretation, however, satisfies all three of the *Kisor* factors, whereas EPA's new stance is not a fair and considered judgment nor authoritative. These two factors thus weigh against giving deference to EPA's new position and this court should give deference to EPA's 1991 Guidance position.

i. EPA's New Position Does Not Reflect Fair and Considered Judgment.

An interpretation lacks fair and considered judgment where it is clear the interpretation is a "convenient litigating position" or where it creates an "unfair surprise" by conflicting with previous constructions and thus disrupting expectations. *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155-56 (2012); *Kisor*, 139 S. Ct. at 2417-18. This requirement "protects reliance interests associated with longstanding agency practices or interpretations." *Goffney v. Becerra*, 995 F.3d 737, 745 (2021). Here, EPA's new position is a convenient litigating position and creates unfair surprise, thus it is not fair and considered judgment.

First, EPA's current interpretation is an opportunistic post hoc justification in light of the current litigation arising out of its own careless disregard of Lake Chesaplain's water quality. This type of agency action is considered a convenient litigating position where the "agency seek[s] to defend [itself]. . . against attack." *Christopher*, 567 U.S. at 155 (citing *Auer*, 519 U.S. at 155). Here, EPA seeks to defend itself for its insufficient actions regarding Lake Chesaplain. After years of delay, New Union submitted a 303(d) list of impaired waters in 2014 and did not include a proposed TMDL. R. at 8. EPA approved the 303(d) list anyway. R. at 8. New Union finally submitted a TMDL in 2018, years after the threat of litigation by CLW. R. at 10. EPA rejected New Union's TMDL and, in violation of the CWA, took over a year to promulgate the CWIP TMDL, relying on reductions from nonpoint sources without reasonable assurance. R. at 10; *see* 33 U.S.C. 1313(d)(2). In light of these shortcomings, EPA now seeks the justification that it is not required to have reasonable assurance. This is a convenient litigating position and deference should therefore not be given.

Second, EPA's new interpretation creates unfair surprise to those affected by the regulation and therefore cannot be a reflection of fair and considered judgement. *See Kisor*, 139 S. Ct. at 2418. *Auer* deference is rarely given to agency constructions that conflict with prior interpretations because it disrupts expectations. *See id.*; *see also Christopher*, 567 U.S. at 156 (denying deference because it "would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires.") (internal citations omitted)). Here, EPA's position is brand new and substantially diverges from its previous interpretations.[10]

[10] *See* Letter from Donald S. Welch, Regional Administrator, EPA, to Hon. John Griffin, Commissioner, Md. Dep't of Nat. Res. (Sept. 11, 2008) (available at https://www.chesapeakebay. net/channel_files/18641/epa_region_iii_letter_to_psc_091108.pdf) (explaining a TMDL should include "some additional provision…to provide reasonable assurance that the nonpoint source measures will achieve the expected load reductions."); Water

Therefore, EPA's current interpretation does not provide fair warning to parties and creates unfair surprise.

Further, EPA's 1991 interpretation has been applied for thirty years, thus reinforcing that EPA's new interpretation is inherently disruptive. For example, the Lake Champlain TMDL for Vermont was denied because it lacked sufficient reasonable assurance.[11] Additionally the Chesapeake Bay TMDL included reasonable assurances amongst a detailed accountability framework to ensure implementation.[12] The Third Circuit upheld the TMDL, noting that its reasonable assurance requirement "made sure that the EPA could exercise 'reasoned judgment' in evaluating the states' proposed standards and was thus consistent with the Clean Water Act." *Am. Farm Bureau*, 792 F.3d at 300 (citations omitted). To disregard this established EPA practice would be disruptive, create unfair surprise, and thus not reflect fair and considered judgment required under *Kisor*.

ii. EPA's 1991 Interpretation Remains the Agency's Authoritative Position.

An authoritative interpretation must "be one actually made by the agency," from actors or vehicles that are "understood to make authoritative policy in the relevant context." *Kisor*, 139 S.Ct. at 1426. This requirement stems from the logic behind *Auer* which favors "contemporaneous readings," because the actor who wrote the regulation is best equipped to interpret it. *Id.* at 2416.

Quality Trading Toolkit for Permit Writers, EPA.GOV, https://www.epa.gov/npdes/water-quality-trading-toolkit-permit-writers (last visited Nov. 21, 2021) (clarifying that to establish a credit trading program, "there must be other sources that can achieve excess reductions.").

[11] *See* Letter from Linda Murphy, Director, EPA Office of Ecosystem Protection, to Christopher Recchia, Commissioner, Vermont Department of Environmental Conservation (Nov. 4, 2002) (available at https://www.epa.gov/sites/default/files/2015-09/documents/2002-lake-champlain-phosphorous-approval-tmdl.pdf)

[12] *See* Chesapeake Bay TMDL, Section 7, "Reasonable Assurance and the Accountability Framework" (Dec. 29, 2010). https://www.epa.gov/sites/default/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf.

This is in contrast to situations where "lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before." *Id*. at 2412 (citations omitted). The CWIP TMDL is the latter situation, as it has been decades since EPA's regulation was promulgated. Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985) (to be codified at 40 C.F.R. 130). In contrast, the 1991 Guidance document was a contemporaneous interpretation, written merely six years after the original regulation. The document was endorsed by the director of the Office of Water Regulations and Standards at the time, and the guidance remains posted on EPA website. 1991 Guidance at i. This 1991 opinion was contemporaneously made by the agency and thus reflects the agency's authoritative position on reasonable assurance.

C. Issuing the CWIP TMDL with No Evidence that Reductions Would be Achieved was Arbitrary and Capricious.

Given that EPA's new interpretation does not receive *Auer* deference, it follows that EPA's promulgation of the CWIP TMDL was arbitrary and capricious for lacking reasonable assurance. *Cf. American Tunaboat Association v. Ross*, 391 F. Supp. 3d 98, 115 (D.D.C. 2019) ("Given [*Auer*] deference, it follows that the Service's decision was not arbitrary or capricious."). Under the APA, courts will vacate agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Courts consider agency action arbitrary and capricious where it is "unwarranted by the facts." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Here, the record was replete with evidence that the BMPs would not be implemented to the extent that would make less stringent WLAs practicable. Thus, EPA's decision to create a TMDL based on credit tradeoffs without any reasonable assurance was arbitrary and capricious and an abuse of discretion.

EPA's decision to promulgate the CWIP TMDL based on a credit trading program between point and nonpoint sources was unwarranted by the facts. This conclusion is supported by the record before EPA. EPA's record included the 2016 Supplemental Report that identified each source of phosphorus inputs and their corresponding amounts of pollution as of 2015. R. at 8-9. This report noted that the majority of nonpoint source pollution came from non-discharging CAFOs that were not subject to NPDES permits. R. at 9. The record also included comments from hog farmers vehemently against the imposition of any BMPs whatsoever, eventually persuading the state to abandon its original proposal that included specific BMPs methods. R. at 9-10. In spite of these facts, EPA chose to issue a TMDL based on BMP credit offsets dependent on cooperation from the hog farmers whom they knew to be vigorously opposed to BMPs. R. at 10. Indeed, the district court agreed that under a reasonable assurance standard, EPA's reliance on BMP implementation was arbitrary and capricious. R. at 16; *see also Am. Farm Bur. Fed.*, 782 F.3d at 307 ("it would surely be arbitrary or capricious for EPA to approve a plan that a state is incapable of following."). This decision was therefore lacking reasonable assurance and is thus arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Appellant-Cross Appellee CLW requests that this Court affirms the District Court's partial grant of summary judgement for CLW, reverse the District Court's partial grant of summary judgment for EPA and New Union, and remand for further proceedings consistent with that decision.