TEAM #8

THIRTY-FOURTH ANNUAL
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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

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
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of CHESAPLAIN LAKE WATCH, Plaintiff-Appellant-Cross Appellee

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STATEMENT OF JURISDICTION

This case concerns questions of water quality standards as well as the application of the Clean Water Act ("CWA"), 33 U.S.C. § 1313 (2018) et seq. The United States District Court for the District of New Union had subject-matter jurisdiction under 28 U.S.C. § 1331 (2018) because the cause of action is provided by federal law. This Court has proper jurisdiction over this appeal from the district court's final decision pursuant to 28 U.S.C. § 1291 (2018), which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States." *See also* R. at 10.

STATEMENT OF THE ISSUES PRESENTED

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

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

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

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

STATEMENT OF THE CASE

I. Statement of Facts

Lake Chesaplain, located in the State of New Union, is surrounded by Chesaplain National Forest on the west and agricultural lands and vacation communities on the east. R. at 7. To the north of Lake Chesaplain is the City of Chesaplain Mills and the Union River, which flows directly into Lake Chesaplain. R. at 7. Lake Chesaplain is a designated Class AA waterbody, which is the highest water quality classification in New Union and includes the designated uses of drink water, swimming, and fish propagation and survival. R. at 7. While Lake Chesaplain's clear and pure water used to attract recreational boaters, fishermen, and vacationers, economic development pressures in the surrounding watershed area began to take their hold. R. at 7. Consequently, Lake Chesaplain's water quality has visibly declined. R. at 7.

In the 1990's, ten large-scale hog production facilities were developed in the Union River watershed, as well as a large-scale slaughterhouse located in Chesaplain Mills to service the facilities. R. at 7. As the recreational attraction of Lake Chesaplain grew, so too did home construction and septic system installments along the lake's eastern shore. R. at 7. As the watershed became stimulated by economic growth, these developments and their discharges into the lake devastated its water quality, as mats of algae formed during the summer season, creating an offensive odor, decreasing water clarity, and killing off a noticeably large portion of the fish population. R. at 7. The clear water that once attracted tourists to Lake Chesaplain State Park became unsuitable for swimming, while both the property value of vacation home communities and tourism revenue declined drastically. R. at 7.

In response to the lake's declining water quality, New Union established the Lake Chesaplain Study Commission in 2008, which released a report in August 2012 determining that

Lake Chesaplain was suffering from eutrophication, causing drastic decreases in the water's biological productivity, clarity, and dissolved oxygen ("DO") levels. R. at 8. The source of the eutrophication were the unusually high levels of phosphorus in the water, and the report also determined that there were multiple violations of the state's odor and water quality standards. R. at 8. As a result, the New Union Division of Fisheries and Environmental Control ("DOFEC") determined Lake Chesaplain must be submitted to United States Environmental Protection Agency ("EPA") as an impaired water. R. at 8.

Despite the EPA adding Lake Chesaplain as an impaired water under CWA § 303(d), DOFEC failed to submit a Total Maximum Daily Load ("TMDL") for Lake Chesaplain, which led to Chesaplain Lake Watch ("CLW") threatening suit. R. at 8. The Chesaplain Commission issued a supplemental report in July 2016 that detailed the maximum phosphorus loading details and the sources of phosphorus inputs. R. at 9. It also determined the hog CAFOs and their manure spreading were contributing the most substantial amount of phosphorus, despite their status as "non-discharging CAFOs," due to groundwater flows and surface runoff. R. at 9. Additionally, the private septic systems were contributing a large amount of phosphorus loadings despite being exempt from CWA permitting, and none of the point sources were limited by permits. R. at 9.

In 2017, DOFEC finally provided notice of its TMDL proposal, which would be implemented through equal phased reduction over a period of five years. R. at 9. The reduction of point source discharges would be managed through permitting, while nonpoint source reductions would be implemented through "a series of [Best Management Practices] BMP programs," including modified feeds, treatment of manure streams, and restrictions on manure spreading for agricultural sources, as well as more frequent inspections of septic tanks and pumping schedules for private septic systems. R. at 9. CLW argued the BMPs would be insufficient to achieving the

35% nonpoint source phosphorus reduction and that New Union "lacked the statutory authority" to impose those BMPs onto agricultural sources. R. at 9. Chesaplain Lake Watch also argued that the 35% phased annual reduction did not comply with the CWA's TMDL requirements, and that there should be zero phosphorus discharges allowed from both point sources. R. at 10. After a notice and comment period, and the EPA's rejection of the revised TMDL, the EPA returned to and adopted the original TMDL proposal, called the "Chesaplain Watershed Implementation Plan" ("CWIP"). R. at 10.

Since adoption of the new TMDL in 2018, New Union has taken no action to implement nonpoint source BMP plans. R. at 10. Additionally, NPDES permits for the slaughterhouse and Chesaplain Mills that expired in November 2018 and February 2019 have yet to be renewed, leaving their phosphorus discharges unregulated for nearly three years. Both facilities are also seeking administrative hearings opposing the implementation of the phased annual phosphorus loading reduction due to the costs involved. R. at 10.

II. Procedural History

CLW, the State of New Union, and the EPA each filed a timely Notice of Appeal upon the issuance of an Order of the United States District Court for the District of New Union dated August 15, 2021 in 66-CV-2020 and 73-CV-2020 (consolidated cases). R. at 2. Both cases were brought pursuant to the judicial review provisions of the Administrative Procedure Act, APA 5 U.S.C. § 702 (2018). R. at 4. CLW submitted affidavits with its motion for summary judgment that established CLW's members and CLW satisfy the standing requirements of Article III of the Constitution. R. at 11. Similarly, this Court is satisfied that the State of New Union has standing to challenge the various issues. R. at 11.

SUMMARY OF THE ARGUMENT

EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review. The issues raised before this Court is fit for judicial decision because the issue tendered is a purely legal one, and it constitutes a final agency action on behalf of the EPA in implementing its own TMDL and implementation plan. Additionally, withholding court consideration would impose hardship on the parties in that the State of New Union must act without delay in implementing the specific permit limitations the EPA's TMDL determination will demand.

Under a *Chevron* analysis, this Court must reverse its ruling in favor of Lake Chesaplain's TMDL proposal because New Union failed to include wasteload allocations and load allocations in its interpretation of the term "Total Maximum Daily Load" in CWA § 303(d). The plain meaning of the term "total" is clear and unambiguous, especially when considered in the context of the definition of the term "total maximum daily load," which is defined as "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background." The meaning of the term "sum" within this definition supports the assertion that "total allocations" refers to the summation of different relevant allocations needed to alleviate water pollution. Even if the Court were to find the term "total" ambiguous, the EPA's interpretation of CWA § 303(d) is permissible because the EPA acted within its regulatory authority by requiring the inclusion of pollution level allocations from different sources in order to comply with CWA policy objectives.

The District Court's grant of summary judgement in favor of CLW's challenge to the EPA TMDL should be upheld because the TMDL was not provided in daily terms and the phased

TMDL plan does not meet the requirements to assure water quality standards are achieved. First, the use of "annual" rather than "daily" terms to express the total maximum daily load is improper, as "daily" is synonymous with "everyday" and therefore does not share its plain meaning with the term "annually," which is synonymous with "yearly." Furthermore, under the surplusage canon of interpretation, the term "daily" must be given effect in the phrase "total daily maximum load," or it is rendered useless. Second, the phrase "maximum load" is not satisfied by a phased TMDL plan, as the plain meaning of the phrase requires expression in terms of a "quantity of trash" and not a phased reduction value. Even if the Court finds ambiguity in these terms, the EPA's interpretation of TMDLs to allow for phased percentage reduction of phosphorus loadings violates the deadlines in place for achievement of effluent limitations, and the federal government retains the police power to enforce these deadlines in order to restore the quality of Lake Chesaplain's water.

Finally, this honorable Court should reverse the District Court's denial of CLW's motion for summary judgment regarding the EPA's decision to award TMDL credit to The State. Contrary to the district court's assumptions, EPA's guidance document on the TMDL process is entitled to controlling judicial deference under *Auer*. Correspondingly, there must have been a "reasonable assurance" that the State of New Union was actually going to implement BMPs as a condition precedent to the EPA awarding TMDL waste-load credit. However, the EPA granted the State of New Union TMDL waste-load credit despite having unequivocal evidence that the State had zero intention to implement the BMPs proposed by CWIP. Consequently, in light of the EPA's "reasonable assurance" requirement, EPA's decision to award TMDL credit to The State was undeniably arbitrary and capricious.

ARGUMENT

I. EPA's Determination to Reject the New Union Chesaplain Watershed Phosphorus TMDL and Adopt Its Own TMDL and Implementation Plan for the Lake Chesaplain Watershed is Ripe for Judicial Review.

A dispute is only subject for adjudication if all necessary administrative actions that give the challenged agency action concrete effect have been taken, which is known as ripeness. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). This ripeness doctrine requires two judicial evaluations: first, a determination of the fitness of the issues for judicial decision and second, the hardship the parties would endure if a court decision was withheld. *Id.* at 149. The EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is both fit for judicial decision and would cause the parties great hardship if it was withheld from court consideration; thus, the issues raised are ripe and subject to immediate judicial review.

A. EPA's determination to reject the New Union Chesaplain Watershed phosphorous TMDL and adopt its own TMDL and implementation plan is ripe for judicial review because it is fit for judicial decision.

In evaluating the fitness of the issues for judicial decision, this Court can evaluate a couple factors the United States Supreme Court laid out in *Abbot Labs*. *Id.* at 149. The first factor relates to whether "the issue tendered is a purely legal one." *Id.* at 149. The second factor relates to whether the regulations in issue constitute "'final agency action' within the meaning of § 10 of the Administrative Produce Act [APA], 5 U.S.C. § 704, as construed in judicial decisions." *Id.* at 149. This second factor in evaluating whether the issues are fit for judicial decision has become known as the finality requirement for determining ripeness. *Id.* at 149; *see* Administrative Procedure Act 5 U.S.C. § 704 (2018); *see also* Eacata Desiree Gregory, *Not Time Is the Right Time: The Supreme*

Court's Use of Ripeness to Block Judicial Review of Forrest Plans for Environmental Plaintiff's in Ohio Forestry Ass'n v. Sierra Club, 75 Chicago-Kent Law Review 613, 615 (2000).

The first factor to determine fitness, whether the issue is a purely legal dispute, is satisfied in CLW's case because this is a dispute "on a well-developed record about the EPA's process of promulgating a TMDL." *Am. Farm Bureau Fed'n v. U.S. EPA*, 792 F.3d 281, 293 (3d Cir. 2015) (finding that the pre-enforcement challenge to the EPA's TMDL regulation was ripe). The fitness test under *Abbott Labs* serves a purpose of delaying consideration of an issue "until the pertinent facts have been well-developed in cases where further factual development would aid the court's consideration." *Shady Acres Homeowner's Ass'n v. Kittitas Cty.*, 815 Fed. Appx. 181, 182 (9th Cir. 2020). CLW's record is well-developed and contains the pertinent facts, not needing further factual development to aid this Court's decision. R. at 12. ("All of the facts necessary to adjudicate the claims in this case have been developed and are part of the record before EPA"). The effect does not depend on later administrative actions, for the well-developed record incorporates pertinent facts regarding the EPA's process of promulgating its TMDL plan, sufficient for it to be fit for judicial review.

Additionally, even though the EPA's determination and TMDL plan has not yet been implemented and incorporated into the State of New Union's permitting process, those affected by the determination and plan all have reason to create limitations to their pollutant discharges in anticipation of the TMDL's implementation. *See Am. Farm Bureau Fed'n*, 792 F.3d at 293 (determining this issue before the court was fit for judicial review because even though "the TMDL [was] 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). Because the various associations and

operations withing the State of New Union will reasonably begin limiting their pollutant discharges in anticipation of the EPA's determination and TMDL implementation, the issues brought before this Court are fit for judicial decisions.

To aid in determining finality of the EPA's action, this Court can "look primarily to whether the agency's position is definitive and whether it has a direct and immediate . . . effect on the day-to-day business of the parties challenging the action." *Bravos v. Green*, 306 F. Supp. 2d 48, 55 (D. D.C. 2004) (holding a challenge to EPA's alleged mere approval of a state implementation plan, not the implementation itself, is neither definitive nor final and thus not ripe for review) (internal quotations omitted). The EPA's TMDL implementation imposed upon the State of New Union is a definitive action that has a direct and immediate effect on New Union and CLW's business due to the decision's contemplation of specific NPDS permit limits that New Union will be required to implement without delay. R. at 12. Thus, this constitutes a final agency action for purposes of the determining the issues brought before this Court are ripe for review.

B. <u>EPA's determination to reject the New Union Chesaplain Watershed phosphorous TMDL and adopt its own TMDL and implementation plan is ripe for judicial review because withholding court consideration would impose a hardship on the parties.</u>

In evaluating whether withholding court consideration would impose a hardship on the parties, this Court can focus on the practical effects EPA's action involves while balancing the validity of the EPA's desire to avoid court interference with the possibility that keeping judicial review from CLW will either injure them or preclude a remedy. *See* Gregory, *supra*, at 616.

Even though not yet implemented, the practical effects of the EPA's action include those affected by the determination and plan to create limitations to their discharges. This requires those affected by the EPA's TMDL determination to "spend more time, energy, and money" in developing new implementation plans to comply with the EPA's determination. *See Am. Farm*

Bureau Fed'n, 792 F.3d at 293–94. The effects of this implementation must be considered now, for it's "better to know now than later," if something is wrong with the EPA's action. *Id.* (determining that EPA's TMDL implementation, although not yet implemented, would impose hardship on both the EPA and the states if dispute was not heard because they are required to spend extra efforts in time, energy, and money in planning, implementing, and complying with the plan). Due to causing those affected by the plan to begin limiting discharges in anticipation and the effect implementing a new TMDL determination has on the EPA, the lack of a court decision on this case would impose hardship on both parties; thus, making this case ripe for judicial review.

Additionally, the TMDL implementation plan considers strict NPDES permit limits for the point source discharges of those affected by the determination, and the State of New Union will be required to implement these limits without delay because it is the issuer of NPDES permits with the State. R. at 12. This imposition of immediate action on the State of New Union is similar to the hardship imposed on the states in developing state implementation plans ("SIPs") as a result of the EPA's action to control the implementation of the National Ambient Air Quality Standards (NAAQS) in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (finding the implementation of agency action issue ripe for judicial review because imposed hardship to the parties).

Because the TMDL here contemplates specific NPDES permit limits that New Union will be required to implement without delay, this Court must determine the issues brought forth are ripe for review. The effect of the TMDL approval does not depend on further implementation actions by the states involved. *See City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156–57 (N.D. Cal. 2003) (holding claim unripe for review when Plaintiffs would not suffer any hardship if review was delayed because TMDLs did not impose at time of litigation any obligations on

Plaintiffs and were subject to revision before such obligations would be imposed); *see also Bravos*, 306 F. Supp. 2d at 55. The EPA's TMDL implementation forced on the State of New Union is not subject to revision before it imposes obligations, as there can be no delay in issuing NPDES permits with their new limits for point source discharges. R. at 12.

II. EPA's Determination to Reject the New Union Chesaplain Watershed Phosphorous TMDL Was Correct Because the TMDL Failed to Include Wasteload Allocations and Load Allocations in Its Interpretation of the Term "Total Maximum Daily Load" in CWA § 303(d).

In looking at a federal agency's interpretation of a statute, the Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) established a two-step test for courts to follow in deciding the amount of deference that should be given to the agency's interpretation of the statute. The first step presents the question of whether Congress has "directly spoken to the precise question at issue" based on statutory language, legislative history, and other tools of statutory instruction. *Id.* at 842–43; *see also Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). If congressional intent is clear and unambiguous, then the agency and the court must abide by it and any other interpretation by the administering agency. *Chevron*, 467 U.S. at 843; *see also* R. at 13. Conversely, if Congress is "silent or ambiguous with respect to the specific issue" in the statute, then step two is applied, in which the court must determine if the agency's interpretation of the statute is reasonable. *Chevron*, 467 U.S. at 843.

Chevron is grounded in an intent to delegate, and this issue qualifies for *Chevron* deference because it involves an administrative implementation of CWA § 303(d) where Congress delegated authority to the EPA generally in making TMDLs that carry the force of law when a state fails to implement TMDLs that comply with CWA § 303(d). *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see also* Abbe R. Gluck, *What 30 Years of* Chevron *Teaches Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 610 & n.7 (2014). This authority is

delegated to the EPA in the CWA § 501(a), and one of those functions in its rule-making authority is to approve or disapprove of § 303(d)(1) state-issued TMDLs. 33 U.S.C. §§ 1361(a), 1313(c)(3). The EPA's interpretation of CWA § 303(d) at issue exercised that authority of implementing TMDLs where states did not comply granted by Congress within the CWA. *Mead*, 533 U.S. at 226–27; *see* 33 U.S.C. § 1313(c)(3), (d)(2) (granting EPA authority to establish its own TMDLs when EPA Administrator disapproves of the state-proposed TMDLs).

EPA relies on its own definition of a TMDL to include both wasteload and load allocations in rejecting New Union's proposed TMDL. R. at 12. Pursuant to *Chevron*, this Court can look to the plain meaning of the term "total," its context within the statute, as well as the legislative history and policy of the CWA, to find that EPA's interpretation of CWA § 303(d) demonstrates the need for both wasteload and load allocations in a comprehensive TMDL.

A. The plain meaning of the term "total" within the term "total maximum daily load" is clear and unambiguous and calls for a comprehensive TMDL that includes allocations of pollution levels among different kinds of sources.

Under a *Chevron* analysis, this Court must reverse its ruling in favor of Lake Chesaplain's TMDL proposal because it lacks vital information regarding the allocation of pollution reductions required by the EPA. *Chevron*, 467 U.S. at 842; *see* R. at 14. Following scientific judgment on technical analysis under EPA's expertise in defining the word "total," this Court must defer to the agency's inclusion of wasteload allocations, load allocations, and natural resources in evaluating a TMDL. *See* Final Rule, Water Quality Planning and Management, 50 Fed. Reg. 1774, 1774 (Jan. 11, 1985) (recognizing the impossibility of evaluating whether TMDL is technically sound within accounting for both wasteload allocations and load allocations).

A TMDL, as defined by the EPA, is "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. §

130.2(i). TMDLs are established by the states and submitted to the EPA for approval once a water body has been listed as "impaired." *See Am. Farm Bureau Fed'n*, 792 F.3d at 309 (explaining that 33 U.S.C. § 1313(d) requires "impaired waters" to be listed). TMDLs also take into consideration all of the "offending pollutants" within that specific water body, and the maximum levels at which they can each exist in the water body so as to implement the water quality standards established in the CWA. R. at 6; *see* 33 U.S.C. § 1313(d)(1)(C).

The word "total" is defined as "a product of addition" or "comprising or constituting a whole." *Total*, Merriam-Webster, https://www.merriam-webster.com/dictionary/total (last visited Nov. 8, 2021). Furthermore, the word "sum," which is used in the EPA's clarifying definition of TMDL, is defined as "the whole amount; aggregate" or "the result of adding numbers." *Sum*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sum (last visited Nov. 8, 2021); *see* 40 C.F.R. § 130.2(i). Used together, these terms are vital to the understanding that "total," in the technical and scientific development of a TMDL, refers to the result of adding together various pollution sources in order to establish a comprehensive TMDL to combat the further threat of pollution in an impaired water. *Am. Farm Bureau Fed'n*, 792 F.3d at 309; *see also Pronsolina v. Nastri*, 291 F.3d 1123, 1132 (9th Cir. 2002) (recognizing that "TMDLs must be established for *all* pollutants that prevent the attainment of water quality standards" that include wasteload allocations, load allocations, and natural background sources). Equally significant is the mathematical expression that has been used for decades to calculate TMDL: TMDL = ΣWLA + ΣLA + MOS ("WLA" stands for wasteload allocations, "LA" for load allocations, and "MOS" for margin of safety, including natural resources). *Overview of Total Maximum Daily Loads (TMDLs)*, U.S. Environmental Protection Agency (last updated September 20, 2021), https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls.

In looking at the term "total" within the phrase "total maximum daily load[s]," the phrase would be redundant without that word "total" specifying "maximum daily load[s]." *See Am. Farm Bureau Fed'n*, 792 F.3d at 297. When looking at the cannon of statutory construction against surplusage, "a plausible understanding of 'total' is that it means the *sum* of the constituent parts of the load." *Id.* (emphasis added). Instead of just setting a number at a level needed to alleviate water pollution, the addition of the term "total" determines that the amount must be "expressed in terms of a total of the *different* relevant allocations." *Id.* (emphasis added). It follows that this total amount would encompass wasteload allocations for point sources, load allocations for nonpoint sources, and natural background sources.

The CWA itself helps define the term "total" in looking to other sections in the statute. This Court can refer to CWA § 204, which relates to funds the EPA can grant to publicly owned treatment works. 33 U.S.C. § 1284(b)(1). In determining the amount of funds granted, the EPA must consider "the *total* costs of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors)." *Id.* (emphasis added); *see Am. Farm Bureau Fed'n*, 792 F.3d at 297. Aiding in the understanding that "total" is not just a single number, CWA § 204(b)(4) requires an "applicant to establish a procedure under which the residential user will be notified as to the *portion* of his *total* payment which will be *allocated* to the cost of the waste treatment services." 33 U.S.C. § 1284(b)(4) (emphasis added); *see Am. Farm Bureau Fed'n*, 792 F.3d at 297. The use of "total" in the phrase "total maximum daily load" as structured by the use of "total" in § 204, shows that the plain meaning and structure of the CWA forces this Court to understand "total" has a make-up of portions that are allocated to the total amount. Thus, allowing for the total

maximum daily load to be made up of wasteload allocations, load allocations, and natural background resources.

Therefore, the term "total" in the phrase "total maximum daily load" is clear and unambiguous, especially when considered within the context of the EPA's clarifications, provided equation for calculating the TMDL, and the use of "total" in other portions of the CWA. R. at 14.

B. Even if this Court finds the term "total" within TMDL is ambiguous, EPA's interpretation of CWA § 303(d) is permissible because EPA acted within its regulatory authority which reflects a legitimate policy choice by including allocations of pollution levels from different sources.

If this Court finds the term "total" within TMDL to be ambiguous, and therefore determines congressional intent is unclear, then this Court must move to step two of *Chevron* in deciding how much deference to grant the EPA in its interpretation of CWA § 303(d). *See Chevron*, 467 U.S. at 844. Under step two, "the agency's interpretations 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Am. Farm Bureau Fed'n*, 792 F.3d at 294 (quoting *Chevron*, 467 U.S. at 844). This framework holds the EPA to a standard of operating within the bounds of reasonable interpretation, for the EPA's interpretation cannot be entitled deference if it goes beyond a bearable meaning of the CWA. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). Additionally, this Court must consider if EPA made "'a reasonable policy choice'" in its interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005) (quoting *Chevron*, 467 U.S. at 845).

Under *Chevron*, this Court is "bound to uphold [EPA's] interpretation as long as it is reasonable—regardless whether there may be other reasonable, or even more reasonable views." *Serano Labs. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). Deference to the EPA is further emphasized in matters requiring scientific or technical expertise and when a legitimate policy

choice is reflected. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (recognizing that where analysis requires a high level of technical expertise, a court must defer to the discretion of the agency)); *see also Am. Farm Bureau Fed'n*, 792 F.3d at 309 (determining that a reasonable policy choice is reflected in establishing a comprehensive TMDL that includes information about allocations for different sources, a timetable, and "reasonable assurance that it will actually be implemented").

The clear meaning of "total" as the *sum* of parts not only helps provide guidance to states in improving their waters but also "furthers the [CWA's] requirement that the TMDL account for both point and nonpoint sources." *Id.* at 306. With a purpose of achieving higher water quality standards, the CWA requires the TMDL to include all allocations of pollutants, including wasteload allocations, load allocations, and natural background sources. *See Id.* at 306–07.

If the phrase "total maximum daily load" is found ambiguous, the EPA's inclusion of both wasteload allocations and load allocations in its TMDL for New Union is an action within the EPA's regulatory power because it is "reasonable and reflects a legitimate policy choice." *Id.* at 390 (finding the EPA acted within its regulatory power when it included wasteload and load allocations in its TMDL because the EPA's actions "were reasonable and reflected a legitimate policy choice," especially if the term "total maximum daily load" was found to be ambiguous in nature). Even though the EPA's TMDL implementation results in a favorable determination for those driven by environmental protection policy, it's reasonable for agency interpretation "to result in winners and losers," even when those losers are involved with the large-scale slaughterhouses, publicly-owned sewage treatment plants, and farm operations. *Id.* at 310 (concluding that the water pollution issue plaguing the Chesapeake Bay would inevitably "result in winners and losers," and the winners in this case would be those driven by environmental protection policy, with the losers

being those with farming operations, nonpoint source polluters, and other agricultural industries that would benefit from a "lighter touch from the EPA").

The EPA and Lake Chesaplain are uniquely positioned against the District Court's decision in favor of New Union's TMDL, as the facts submitted in the affidavits by CLW are undisputed and demonstrate the dire need for a comprehensive TMDL that includes allocation information of both wasteload and load, as well as a timetable and assurance that the TMDL will be implemented properly. *Id.* at 309. Currently, both the Chesaplain Mills sewage treatment plant and the slaughterhouse continue to operate under expired permits, meaning that neither are currently subject to a limit of their phosphorus discharges. R. at 10. Additionally, New Union "has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed," and the management permits for the hog CAFOs have not been modified to reflect the phosphorus reduction measures that were implemented by the CWIP. R. at 10. Considering that 100% of the point source phosphorus load is currently unmonitored due to expired licenses, and that State of New Union has taken no steps to monitor or reduce the phosphorus load allocations from nonpoint sources, it is evident that the CWA's policy goal of restoring and maintaining the chemical, physical, and biological integrity is not being met, specifically through the development and approval of TMDLs meant to further the CWA's purpose. *See Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 26 (1st Cir. 2018). The State of New Union continues to allow unregulated and unmonitored pollutants to be discharged into Lake Chesaplain, which contradicts the purpose of the CWA and thus furthers the reasonableness of the EPA's interpretation to include both wasteload allocations and load allocations in its TMDL determination. R. at 10.

Therefore, EPA must receive deference because a TMDL that does not include wasteload and load allocations for various pollution sources (many of which are currently unmonitored) is a

direct contradiction to the available science and technology in place that should be used to collect data and monitor the health of an impaired water that is currently being polluted with little action by the state to prevent it. *See Am. Farm Bureau Fed'n*, 792 F.3d at 310. Additionally, New Union, in its lack of action, is doing little to share the responsibility with the EPA of making sure that pollutants being discharged into Lake Chesaplain are not violating the standard set forth in the TMDL. *Id.* at 299; *see* R. at 10.

It is within the EPA's rights to enforce the inclusion of wasteload and load allocations in its plan for a rational and comprehensive TMDL policy that will reverse the damage that New Union has and continues to inflict upon Lake Chesaplain. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1132 (9th Cir. 2002). Just as the nonpoint source polluters, agricultural industries, and farming operations were declared the "losers" in their fight for a "lighter touch" from the EPA in *American Farm Bureau,* so too are the Chesaplain Mills STP, slaughterhouse, and unmonitored nonpoint sources that continue to violate the primary policy purposes of the CWA. R. at 9.

Therefore, this Court should reverse the District Court's decision in favor of the State of New Union, and instead rule that EPA's rejection of the State of New Union's TMDL is justified, and the EPA's interpretation of "total maximum daily load" to include wasteload and load allocations for point and nonpoint sources is a permissible interpretation of CWA § 303(d) based in the scientific expertise of the EPA. R. at 14.

III. EPA's Adoption of the Lake Chesaplain TMDL Consisting of Annual Pollution Loading Reduction to be Phased in Over Five Years Violates CWA § 303(d) Because the TMDL Is Not Provided in Daily Terms and the Adoption of the Phased TMDL Does Not Meet the Requirements Necessary to Achieve CWA Water Quality Standards.

Under *Chevron* deference, this Court must find the EPA's adoption of the Lake Chesaplain TMDL consisting of annual pollution loading reduction to be phased over five years as a violation of the CWA § 303(d) because it does not meet the clear, unambiguous intent of Congress in using the term "daily" as opposed to "annual." *See Chevron*, 467 U.S. at 842. Even if this Court finds ambiguity in Congress's intent, the EPA's interpretation is impermissible because the adoption of a phased TMDL does not meet the requirements necessary of a TMDL to ensure that water quality standards are achieved for Lake Chesaplain. *See id.* at 844; *see also* R. at 14.

A. This Court should not grant deference to the EPA because the EPA's use of "annual" rather than "daily" terms and "phased reductions" rather than "maximum loads" in its TMDL violate the plain meaning of CWA § 303(d).

Under a *Chevron* analysis, the EPA's interpretation violates the plain meaning of CWA § 303(d) by the use of annual terms rather than daily terms in the EPA's TMDL; therefore, it must be changed to or represented additionally in daily terms, and this Court cannot grant the EPA deference in its interpretation. *See Chevron*, 467 U.S. at 842; R. at 15. Additionally, the implementation of phased percentage reduction in loadings does not reflect the plain meaning of the term "maximum load," and must be altered to accurately reflect the definition of "total maximum daily load" as Congress intended. R. at 15.

The word "daily" is defined as "occurring or being made, done, or acted upon every day." *Daily, Merriam-Webster*, https://www.merriam-webster.com/dictionary/daily (last visited Nov. 2, 2021). Contrastingly, the word "annually" is defined as "once a year; each year." *Annually*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/annually (last visited November

2, 2021). In *Friends of the Earth*, the D.C. Circuit considered and recognized the key difference between the terms "daily" and "annually" in relation to TMDLs. 446 F.3d at 144 (holding the CWA unambiguously required establishment of daily loads, and therefore EPA could not approve seasonal or annual loads). In recognizing this difference, the court determined that the plain meaning of the terms "annual" and "seasonal" could not logically substitute for the term "daily," seeing as "daily" implies "every day." *Id*. The court even cited to Biblical text, stating that "[g]ive us this day our daily bread" is not a prayer for seasonal or annual sustenance, but rather, everyday sustenance. *Id.* Furthermore, under the negative-implication cannon of interpretation, the expression of one thing implies the exclusion of others, meaning that the term "daily" was intentionally used in order to exclude other terms expressing different time frames, such as "annually." *Id.*

Furthermore, in *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006), the EPA determined that Congress should not need "to use superfluous words" in order to acknowledge the unambiguous intent of a term. In recognizing the EPA's determination, the court decided that the specific use of the word "any" in the phrase "any physical change" in regards to emission activity in the environment the EPA was intended to "signal expansive reach" when interpreting the Clean Air Act. *Id.* at 885. The court ruled that the natural meaning of the word "any" was clear and unambiguous in its expansive meaning that *all* activities contributing physical change should be included when implementing the statute. *Id.* Therefore, under the reasoning of the surplusage canon of interpretation, the term "any" must be given effect and could not be ignored when interpreting the phrase "any physical change." *Id.* at 886.

Just as the term "daily" in *Friends of the Earth* was understood to mean "everyday" and could not be substituted by the word "annually" within the term "total daily maximum load," the

term "daily" must be viewed in the same light in Lake Chesaplain's TMDL proposal. *Friends of the Earth*, 446 F.3d at 144; *see* R. at 14–15. Additionally, the explicit use of the term "daily" excludes any terms that are not synonymous with it under the negative-implication canon of interpretation, including the term "annual" limit. R. at 14–15. The terms "annual" load and "daily" load simply do not carry the same meaning, especially considering that an annual limit does not account for seasonal variations within the year itself, which is required in the definition of a TMDL. R at 15. Additionally, the EPA must acknowledge the exclusive nature of the word "daily" under the surplusage canon of interpretation to ensure it is not rendered useless, just as the term "any" must be acknowledged for its exclusive nature in the phrase "any physical change" in *New York*. 443 F.3d at 887; R. at 14–15. With this reasoning in mind, Lake Chesaplain's TMDL being proposed in terms of annual load rather than daily load violates the statute because it does not give effect to the clear and unambiguous meaning of the term "daily," rendering it useless within the term "total maximum daily load." *New York*, 443 F.3d at 884.

The plain meaning of the term "maximum load" is also not satisfied by the EPA's TMDL plan due to the proposed implementation of a phased TMDL percentage reduction plan. R. at 15; *see Nat. Res. Def. Council v. EPA*, 301 F. Supp. 3d 133, 139 (D.D.C. 2018). The plain meaning of the term "load" is previously defined by the EPA in regulation 40 C.F.R. § 130.2(e) as "[a]n amount of matter… that is introduced into the receiving water." *Nat. Res. Def. Council*, 301 F. Supp. 3d at 141–42. Furthermore, "maximum" as defined by Webster's dictionary is "an upper limit allowed be law or other authority." *Maximum*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/ maximum (last visited Nov. 8, 2021); s*ee also Gulf Power Co. v. Fed. Commc'ns Comm'n*, 669 F.3d 320, 322 (D.C. Cir. 2012) (the "maximum rate" being the limit to how much a utility may charge due to the implied meaning of "maximum"). Therefore, "maximum

load" is understood plainly and unambiguously to mean the highest amount of matter that can be introduced into receiving water without violating the water quality standards. *Nat. Res. Def. Council*, 301 F. Supp. 3d at 141.

In *Nat. Res. Def. Council*, both the District of Columbia Department of Energy and the Environment ("DOEE") and the Maryland Department of the Environment ("MDE") collected data on the amount of trash discharged into the Anacostia River every year and established a TMDL that expressed "the quantity of trash" to be removed from the river in order to comply with the river's water quality standards. *Id.* at 139. The MRDC objected to these TMDL standards, stating that expressing the TMDL in terms of trash needing to be removed, rather than the maximum amount of trash that could be added to the river, violated the CWA § 303(d) by ignoring the plain meaning of the terms "maximum" and "load." *Id.* at 141. The same sentiment was shared in the case of *Fairfield Cty. Bd. of Comm'rs v. Nally*, 143 Ohio St. 3d 93, 100 (Ohio 2005), where the "total maximum daily load" was defined as the "sum" of the wasteload allocations for point sources and load allocations for nonpoint sources and natural background.

In the case before this Court, a 35% annual phosphorus loading reduction over a period of five years does not comply with the clear and unambiguous definition of a "maximum load," nor does it comply with the clear and unambiguous direction and purpose of the CWA. R. at 15. This is because, in accordance with the ruling in *Nat. Res. Def. Council*, a phased implementation calls for the percentage of trash needing to be removed over a period of five years, while a "maximum load" specifically requires a "quantity of trash" that is to be met daily. R. at 10. Just as the term maximum load was defined as an amount of matter introduced to the water in *Nat. Res. Def. Council*, so too must the load of phosphorus into Lake Chesaplain be defined by that specific standard rather than as a percentage reduction. 301 F. Supp. 3d at 141–42.

The EPA itself states that all TMDLs should specifically include a daily increment which, in some instances, may be expressed in conjunction with other temporal expressions, such as "annual" or "seasonal." U.S. Environmental Protection Agency, Office of Wetlands, Oceans & Watersheds, *Options for Expressing Daily Loads in TMDLs*: *DRAFT,* vii (2007). This is because daily load targets are important in determining the progress in reducing watershed loads to levels required by the TMDL. *Id.* at 8. Daily maximum loads, compared alongside follow-up monitoring data, provides insight into whether the short-term loads are achieving the project long-term TMDL allocations. *Id.* at 6. Therefore, the exclusive use of annual terminology in TMDLs without the presence of a daily increment expressions leads to less data collection, which means less scientific monitoring of the pollutants that can be used to improve the water quality of an impaired water; something that the originators of the CWA most certainly did not intend. *Id.*

The terms "daily" and "maximum load" have plain meanings that, when placed in the context of the CWA and the term "total maximum daily load," are clear and unambiguous. R. at 10. Therefore, CWA § 303(d) is not silent to the precise question at issue, satisfying the first step of the Chevron analysis. *See Chevron*, 467 U.S. at 842,

B. Even if this Court finds ambiguity, the EPA's interpretation of CWA § 303(d) is impermissible because it does not abide by the time limitations and policy enacted by Congress within the CWA.

If this Court finds the terms "daily" and "maximum load" within the term TMDL to be ambiguous, and therefore decides congressional intent is unclear, then this Court must move to step two of *Chevron* in deciding how much deference to grant the EPA in its interpretation of CWA § 303(d). *See Chevron*, 467 U.S. at 844. Step two of *Chevron* deference requires that a court must uphold an agency's permissible construction of a statute, but the EPA's interpretation of CWA § 303(d) is impermissible and thus should not be given deference by this Court. *Id.*

The original language of the Federal Water Pollution Control Act ("FWPCA") established two stages of effluent limitations with time frames in regards to TMDL implementation, with the first being a requirement of achievement of effluent limitations through the application of the best "practicable control technology" by July 1, 1977. *Bethlehem Steel Corp. v. Train,* 544 F.2d 657, 659 (3d Cir. 1976); *see* R. at 15. The time limitations were put in place in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters to achieve a national goal that the discharge of pollutants into navigable waters would be eliminated." *Bethlehem Steel*, 544 F.2d at 658.

In *Bethlehem Steel,* Bethlehem (the pollutant-discharging petitioner), asked the EPA to grant a permit extending the deadline for achieving effluent limitations due to extensive construction required that would make the deadline impossible to meet. *Id.* at 659. The court determined that the date of July 1, 1977 was "intended by Congress to be a rigid guidepost," as supported by comments made by Senator Muskie and Representative Jones that all requirements of phased compliance and full compliance of point sources be met by that specific date. *Id.* at 661–62. Further, while the original FWPCA House Bill contained a provision that mentioned the possibility of extensions to meet the compliance deadline, the Senate bill and final bills did not, leading to the plausible inference that Congress did not provide the EPA authorization to allow extensions past the July 1, 1977 deadline. *Id.*

With this precedent in mind, the EPA's adoption of Lake Chesaplain's five-year phased TMDL disregards the hard deadline provided by Congress. R. at 15. Allowing the EPA to grant a five-year extension to New Union disguised as a "five-year phased reduction" opposes the conclusion in *Bethlehem* as well as the CWA's goal for achievement of water quality standards by a statutory deadline that has long since passed. *Bethlehem Steel*, 544 F.2d at 661–62; *see* 33 U.S.C.

§ 1313. Therefore, Congress has the broad police power under the CWA's overarching goals to uphold the original compliance deadline expressed clearly in the CWA in order to improve the water quality of Lake Chesaplain. *Bethlehem Steel*, 544 F.2d at 663.

Furthermore, other sections of the CWA, such as CWA § 309 which covers EPA enforcement, specifically include additional provisions that address the terms for granting an extension in order to achieve compliance by the earliest possible date. 33 U.S.C. § 1319. CWA § 301(b)(1)(C) differs from these sections in that there are no guidelines mentioned for purposes of extending compliance for effluent limitations. 33 U.S.C. § 1311(b)(1)(C); *see* R. at 15. When this exclusion is considered under the omitted-case canon, which determines that a matter not addressed in text is a matter that does not apply, it is apparent that extension guidelines were intentionally omitted from CWA § 301(b)(1)(C) and shall not be considered in order to comply with the text of the CWA. 33 U.S.C. § 1311(b)(1)(C); *see Bethlehem Steel*, 544 F.2d at 658.

EPA's construction of the phrase "total maximum daily load" to allow for phased percentage reduction in phosphorus loadings is an impermissible interpretation of CWA § 301(b)(1)(C). 33 U.S.C. § 1311(b)(1)(C); *see* R. at 15. Therefore, this Court should not defer to the EPA's interpretation in that it is an impermissible interpretation of the statute.

IV. EPA's Adoption of a Credit for Anticipated BMP Pollution Reductions to Reduce the Stringency of Wasteload Allocations for Point Sources for Implementation of the Lake Chesaplain TMDL Was Arbitrary and Capricious Due to the Lack of Assurance of BMP Implementation.

The District Court's denial of CLW's motion for summary judgment was fatally flawed for two significant reasons: first, the "reasonable assurance" provisions contained in EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* (1991) ("TMDL Guidance Document") are entitled to judicial deference, and second, under the reasonable assurance

standard, the EPA's allocation of credit based on the State on New Union's non-existent BMP is arbitrary and capricious as a matter of law.

As a preliminary matter, the Guidance Document at issue constitute "non-legislative rules" that are not subject to notice and comment requirements under the APA. *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 92 (2015); *see* 5 U.S.C. § 553(b)(3)(A). An agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019). Indeed, contrary to the District Court's conclusory assumption, not all agency rules must be issued through the notice-and-comment process. R. at. 16. Internal agency guidance documents, like the EPA's TMDL Guidance Document at issue here, fall under the umbrella of an "interpretive rule," and is therefore exempt from the rigors of notice and comment. *Reno v. Koray,* 515 U.S. 50, 52 (1995). Though, just because the TMDL Guidance Document does not need to satisfy the notice and comment requirements under the APA does not mean it is not entitled to judicial deference.

A. The District Court erred in refusing to review the EPA's allocation of credit under the "reasonable assurance" standard because the TMDL Guidance Document is entitled to judicial deference under *Auer*.

The District Court relies on *Chevron* to surmise the "reasonable assurance" standard created in the TMDL Guidance Document is not entitled to *any* form of judicial deference because it was adopted through a non-legislative rule; however, this reasoning hinges on a meritless "all or nothing" interpretation of Chevron and disregards dispositive Supreme Court precedent. R. at 16. While it may be true that *Chevron* deference is predominantly limited to legislative rules, it does not mean non-legislative rules receive no deference at all. *See generally, Mead Corp.*, 533 U.S. at 221.

The United States Supreme Court in *Mead Corp.* recognized that in some limited scenarios, *Chevron* deference may still apply even if a rule was promulgated without notice and comment. *Mead Corp.*, 533 U.S. at 221; *see e.g.*, *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co*., 513 U.S. 251, 256–57 (1995) (holding that the fact that a tariff classification was not a product of a formal process does not alone bar the application of deference under *Chevron*). Nevertheless, even if this Court finds *Chevron* deference is improper, an agency's interpretation of its own rules, even when promulgated in the form of a non-legislative rule, continues to warrant controlling judicial review. *See generally Auer v. Robbins*, 519 U.S. 452 (1997). Indeed, the Court has unambiguously expressed that an agency document that lacks force of law, like the guidance document at-issue here, are entitled to deference under *Auer*.

In *Kisor*, the Court detailed three factors that must be met in order for *Auer* deference to apply to regulatory interpretations: first, the regulatory interpretation must be one actually made by the agency in the agency's "authoritative" or "official position;" second, the agency's interpretation must in some way implicate its substantive expertise; and third, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. 139 S. Ct. at 2417. If all three prongs are met, then the court is *required* to give controlling weight to an agency's interpretation of its ambiguous regulation. *Id.* Here, the EPA TMDL Guidance Document is entitled to deference under *Auer.*

First, it is undeniable that the EPA's TMDL Guidance Document was made by the EPA in its "authoritative" or "official position" because it was published by the Assessment and Watershed Protection Division of the EPA itself. *See generally* EPA*, Guidance for Water Quality-based Decisions: The TMDL Process* (1991). Satisfying the first prong of *Auer* deference does not require the interpretive regulation to "come directly from the Secretary or his chief advisers," but instead

merely requires that the regulation does not come from not through an "ad hoc statement not reflecting the agency's views." *Kisor,* 139 S. Ct. at 2416. The EPA's TMDL Guidance Document, although not made by the Secretary himself, at least "emanates from those actors, using those vehicles, [and is] understood to make authoritative policy in the relevant context." *Id.* Therefore, it is undisputable that the EPA TMDL Guidance Document satisfies the first prong of *Auer.*

Second, the EPA's TMDL Guidance Document and the provisions at issue are not "distant from the agency's ordinary duties" nor do they "fall within the scope of another agency's authority." *Id.* at 2417 (internal citations omitted). It is common knowledge that the EPA is responsible for the proper administration of the CWA § 303(d). 33 U.S.C. § 1313(d). Section 303(d) of the CWA establishes the TMDL process to provide for more stringent water quality-based controls when technology-based controls are inadequate to achieve State water quality standards. EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* at 1 (1991). It logically follows that the EPA's TMDL Guidance Document reasonably implicates the EPA's substantive expertise, therefore satisfying the second *Auer* prong.

Third, and finally, the EPA's TMDL Guidance Document reflects "fair and considered judgment." The "reasonable assurance" provisions included in the TMDL Guidance Document are not to manufacture a "convenient litigating position" or "post hoc rationalization advanced to defend past agency action against attack." *Kisor*, 139 S. Ct. at 2417 (internal citations omitted). Rather, the EPA TMDL Guidance Document was "created to explain the programmatic elements and requirements of the TMDL processes established by section 303(d) of the Clean Water Act and by EPA's Water Quality Planning and Management Regulations (40 CFR Part 130)." EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* at 1 (1991).

In fact, the text of Section 303(d) is *completely silent* as to the question at issue; CWA § 303(d) sets out no test, definition, or other analytic tools to allow a court to ascertain what considerations are made before awarding credit for nonpoint source BMP pollutant loading reductions based on the statute alone. *See generally* 33 U.S.C. § 1313(d). Nor do the history and purpose of CWA § 303(d) reveal any guidance or precedent on the issue. *Id.* In light of this information, the TMDL Guidance Document satisfies the third prong of the *Auer* test, because it reflects a "fair and considered judgment." Thus, the District Court erred in refusing to give deference to the EPA's "reasonable assurance" standard because the TMDL Guidance Document was entitled to deference under *Auer*.

B. Under the reasonable assurance standard, the EPA's allocation of credit based on the State of New Union's non-existent BMP is arbitrary and capricious.

Section 706 of the APA provides that in all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements. *See United States v. Bean*, 537 U.S. 71, 77 (2002); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 404 (1971); 5 U.S.C. § 706(2)(A)–(D).

Here, the EPA's decision to allocate credit based on the State of New Union's non-existent BMP is arbitrary and capricious because it is in direct violation of the binding "reasonable assurance" standard promulgated by the EPA's TMDL Guidance Document. According to the EPA's own binding Guidance Document, in order to take credit for nonpoint source BMP pollutant loading reductions, there must be a "reasonable assurance" that the reductions will in fact be achieved. *See* R. at 16; *see also* EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* at 15, 24 (1991). The State of New Union has no intention, nor has it *shown* any intention to require implementation of BMPs. R. at 16. Worse, in the two years since the adoption of the

TMDL, the State of New Union has taken no meaningful steps towards implementing the BMPs contemplated by the CWIP. R. at 16. More importantly, in light of this evidence, the District Court conceded that under the reasonable assurance standard, the EPA's reliance on BMP implementation was indeed arbitrary and capricious, and contrary to the record before EPA. R. at 16. It logically follows that it is proven as a matter of law that EPA's reliance on BMP implementation was arbitrary and capricious under the "reasonable assurance" standard.

Therefore, CLW respectfully requests this honorable court reverse the District Court's decision because the District Court erred by refusing to give proper deference to the EPA TMDL Guidance Document, and the EPA's reliance on BMP implementation is arbitrary and capricious as a matter of law.

CONCLUSION

For the foregoing reasons, Chesaplain Lake Watch respectfully requests this Court find the issues to be ripe for review, reverse the United States District Court for the District of New Union's judgments in determining the EPA's interpretation of TMDL violated the CWA § 303(d) and in determining the EPA's credit for nonpoint pollution reductions achieved through BMPs was not arbitrary and capricious, and affirm the District Court's judgment in determining that phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d).