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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 the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

ORDER

Following 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), Chesaplain Lake Watch (CLW), the State of New Union, and the United States Environmental Protection Agency (EPA) each filed a timely Notice of Appeal.

CLW appeals from the District Court's determinations 1) that EPA's interpretation of the term Total Maximum Daily Load to include wasteload allocations and load allocations violated the Clean Water Act (CWA) § 303(d), 33 U.S.C. § 1313(d), and 2) that EPA's credit for nonpoint pollution reductions to be achieved through implementation of best management practices (BMPs) to make point source pollution reductions less stringent, was not arbitrary or capricious or an abuse of discretion based on the record before EPA.

EPA appeals 1) from the District Court's order vacating EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and 2) from the District Court's determination that phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C. § 1313(d).

Therefore, it is hereby ordered that the parties brief all of the following issues:

1) Whether 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. (EPA argues that it is not ripe; CLW and New Union argue that it is ripe).

2) Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus 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). (EPA and CLW argue that this interpretation is correct; New Union argues that it is not).

3) 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. (CLW argues EPA's action violates CWA § 303(d); EPA and New Union argue that it does not).

4) 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. (CLW argues that EPA's BMP credit was arbitrary and capricious and an abuse of discretion; EPA and New Union argue that it was not).

SO ORDERED

Entered 1st day of September 2021
[NOTE: No decisions decided or documents
dated after September 1, 2021 may be cited
in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW UNION

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

No. 73-CV-2020 (RNR)

THE STATE OF NEW UNION
Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

No. 66-CV-2020 (RNR)

CONSOLIDATED CASES

Judge Romulus N. Remus.

DECISION AND ORDER

These consolidated actions, commenced under Administrative Procedure Act § 702, 5 U.S.C. § 702, concern the declining water quality in Lake Chesaplain, and the regulatory response measures taken by the State of New Union and the United States Environmental Protection Agency (EPA). In these actions the State of New Union and the environmental organization Chesaplain Lake Watch, Inc. (CLW) seek to challenge various aspects of the determination of the United States Environmental Protection Agency (EPA) to reject New Union's proposed Total Maximum Daily Load (TMDL) determination for phosphorus loadings in the Lake Chesaplain watershed and to substitute its own TMDL under Clean Water Act §

303(d), 33 U.S.C. § 1313(d). In No. 66-CV-2020, New Union seeks a declaration that EPA's rejection of its proposed TMDL, and the regulations governing TMDL submissions EPA based this rejection on, are invalid. In No. 73-CV-2020, Chesaplain Lake Watch seeks a declaration that the substantive provisions of the EPA Lake Chesaplain phosphorus TMDL are insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. Cross-motions for summary judgment having been fully briefed, and all parties having agreed that the instant case should be decided on the basis of the applicable law and the administrative record before EPA, this case is ready for decision. For the reasons stated below, this Court denies EPA's motion for summary judgment in part, grants CLW's motion for summary judgment in part, and grants New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL.

I. FACTUAL AND LEGAL BACKGROUND

A. Overview of Clean Water Act Water Quality Provisions

The declining water quality in Lake Chesaplain has led to a series of regulatory actions by both the State of New Union Department of Fisheries and Environmental Control and the United States EPA. These actions have been undertaken under the regulatory framework established by the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act (CWA). The CWA established a comprehensive system of permitting and regulation for point source discharges of pollutants into the waters of the United States. Point sources are specifically defined by CWA § 502(14), 33 U.S.C. § 1362(14), but generally include pollution discharge pipes, and specifically include concentrated animal feeding operations (CAFOs) that discharge to waters. Individual numerical permit limits for point sources are established for specific water pollutants based on technology-based standards set by EPA industry by industry, as well as based on standards designed to achieve desired levels of water quality. Pollution coming from nonpoint sources, largely consisting of agricultural runoff and other unchanneled pollution, is not subject to direct regulation under the CWA permitting program.

The CWA regulatory program is based on what is known as "cooperative federalism," *see New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), under which the federal EPA establishes national standards that states are expected to implement through their own regulatory programs. States are expected to administer both the permitting aspects of the CWA, *see* CWA § 402(b), 33 U.S.C. § 1342(b), and the water quality improvement aspects of the CWA, *see* CWA §§ 208 (planning process for nonpoint sources), 303 (state establishment of water quality standards), 33 U.S.C. §§ 1288, 1313. Failure of a state to undertake the permitting or certain aspects of the water quality program results in EPA administration of these programs, with some significant limitations with respect to water quality.

It is the water quality-based regulation of water pollution that is the subject matter of these lawsuits. CWA § 303(a) directs each state to adopt water quality standards (WQS) for waters within the state. 33 U.S.C. § 1313(a). Section 303(c) directs states to review, and as

appropriate, revise these water quality standards no less frequently than once every three years. 33 U.S.C. § 1313(c). A WQS consists of the designated uses for each waterbody and the water quality criteria necessary to support the designated use. 33 U.S.C. § 1313(c)(2)(A). Water quality criteria may take the form of numerical limits on pollutant concentrations in the water body, or narrative standards for aesthetic qualities and non-specific pollutants such as toxicity. *See* CWA § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b).

Once a state has established WQS for its water bodies, it must perform an assessment of the ability of each water body to meet these standards following full implementation of the technology-based point source controls established by the CWA. *See* CWA § 303(d), 33 U.S.C. § 1313(d) (cross referencing technology-based controls of CWA § 301(b)(1), 33 U.S.C. § 1311(b)(1)). As a practical matter, as the time for achievement of technology-based permit limits has long since passed, this section requires states to identify those water bodies that presently do not meet water quality standards. By regulation, EPA requires states to review and update their impaired waters list biennially. 40 C.F.R. § 130.7(d).

Once a water is listed as impaired, CWA § 303(d) directs the state to develop, and submit to EPA, a TMDL for the offending pollutants for that water body “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.” CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). By regulation (which New Union challenges in this action), EPA defines a TMDL as “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). In essence this regulation requires a state, as part of its TMDL submission, not only to establish the total maximum level of pollutant loading for a water body, but to allocate that level of loading among CWA permitted point sources in the watershed, taking into account the non-permitted nonpoint sources and natural background sources. A state must thus decide which dischargers will have to reduce their discharges beyond existing permit limits, and by how much. Alternatively, a state may take credit for nonpoint source pollution reductions:

If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

40 C.F.R. § 130.2(i).

EPA has authority to review and approve – or reject – each step of the water quality standards process, from the designation of uses to the establishment of water quality criteria to the listing of impaired waters to the establishment of TMDLs for impaired waters. *See* 33 U.S.C. § 1313(c)(3), (d)(2). If the EPA Administrator disapproves of the proposed WQS, list of impaired waters, or TMDLs, then EPA is directed to establish its own WQS, list, or TMDLs. *Id.*

B. Lake Chesaplain Water Quality

Except as otherwise noted, the following facts are taken from the administrative record for the establishment of the Lake Chesaplain Phosphorus TMDL before EPA. Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located entirely within the State of New Union. Lake Chesaplain is bounded on the west side by the Chesaplain National Forest, which is used for timber production and harvesting as well as for recreational purposes such as hiking and fishing, and the twenty-mile-long shorefront of Chesaplain State Park, which has hiking trails, boat ramps, a public beach, and a campground. On the east side, Lake Chesaplain is bounded primarily by agricultural lands, with several lakefront vacation communities. The City of Chesaplain Mills is located at the north end of the lake, where the Union River flows into Lake Chesaplain. Lake Chesaplain's outlet is the Chesaplain River, which is a navigable-in-fact interstate body of water.

Prior to the turn of the twenty-first century, Lake Chesaplain enjoyed excellent water quality. Its clear waters attracted recreational boaters and fishers from the entire mid-north region of the country, as well as supporting the vacation communities on the east shore of the lake. However, starting in the 1990s, the Lake Chesaplain watershed experienced various economic development pressures. Over that decade, ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs), were developed in the Union River watershed, and a large-scale (greater than fifty million pounds per year) slaughterhouse was built in Chesaplain Mills to service the hog production facilities. At the same time, the recreational attractions of Lake Chesaplain led to a boom in second home construction on and near the eastern lake shore. The slaughterhouse has a CWA National Pollutant Discharge Elimination System (NPDES) permit issued by the State of New Union for a direct discharge into the Union River. Second home development on the Lake Chesaplain shoreline were largely serviced by septic systems that are not subject to CWA permits. In addition, Chesaplain Mills has a publicly owned sewage treatment plant (STP) which discharges directly into Lake Chesaplain, as regulated by a CWA point source permit. The hog CAFOs are not subject to CWA permits, because although CAFOs are included in the definition of "point source" under the CWA, 33 U.S.C. § 1362(14), they are considered to be "non-discharging" CAFOs exempt from permitting requirements under the EPA regulatory definition of CAFOs. *See* 40 C.F.R. § 122.23; *see generally Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). The hog CAFOs are, however, regulated and subject to permits under a New Union statute providing for New Union Agricultural Commission review and approval of site specific nutrient management plans for the application of liquid manure wastes to fields.

Lake Chesaplain water quality visibly declined during the first decade of the twenty-first century. Mats of algae formed during the summer months, reducing the clarity of the water and promoting offensive odors. Fish productivity declined. The swimming beach at Chesaplain State Park became unsuitable for swimming, and property values for the vacation home communities declined. Tourism revenues from fishing and boating trips also declined.

C. Lake Chesaplain TMDL and Water Quality Standards Regulatory Actions

Pursuant to the New Union WQS, Lake Chesaplain is designated as Class AA, which is the classification reserved for highest quality waters of the state. The designated uses include drinking water source, primary contact recreation (swimming), and fish propagation and survival. In response to the decline in water quality, New Union created a Lake Chesaplain Study Commission in 2008 (the Chesaplain Commission). The Chesaplain Commission issued a report in August 2012 (the 2012 Chesaplain Report),¹ which included the following scientific conclusions. First, the Commission determined that Lake Chesaplain was suffering from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. Besides being aesthetically displeasing, this algae growth was also responsible for objectionable odors, decreased water clarity, and a decrease in dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. Summertime DO levels were found to be three milligrams per litre (mg/l), well below the five mg/l DO standard designated for class AA waters in the State of New Union. This excess algae growth, in turn, was caused by excessive amounts of the nutrient phosphorus in the water body. The commission determined that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l throughout the lake. Measured phosphorus levels in the lake varied from 0.020 to 0.034 mg/l, well above the desired level. In addition to the DO violations, the Chesaplain Commission also identified violations of the state's water quality standards for odor and water clarity.

In the next triennial WQS review following the 2012 Chesaplain Report, conducted in 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality criteria for Class AA waters of 0.014 mg/l. As that standard was being violated along with the water quality criteria for DO, odors, and water clarity, DOFEC (as the designated New Union agency) included Lake Chesaplain on its impaired waters list also submitted to EPA in 2014.

DOFEC did not, however, submit a TMDL for Lake Chesaplain in its list of impaired waters. Despite this failure, EPA did not object to the § 303(d) submission. In 2015, plaintiff Chesaplain Lake Watch served a notice letter on both New Union and EPA, threatening to sue based on the failure of either agency to establish a TMDL for Lake Chesaplain. CLW agreed to refrain from suit as long as New Union conducted a TMDL rulemaking. DOFEC then commenced a state rulemaking proceeding to establish a TMDL. The Chesaplain Commission issued a supplemental report in July 2016, calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard, as well as identifying the existing sources of phosphorus inputs. The maximum loading was calculated at 120 metric tons (mt) annually. Existing loadings as of 2015 were calculated as totaling 180 mt, as follows:

Point Sources

Chesaplain Mills STP	23.4
Chesaplain Slaughterhouse	38.5

Nonpoint Sources

¹ The 2012 Chesaplain Report was ultimately included in the record before EPA, and no party has challenged any of the findings of the 2012 Chesaplain Report.

CAFO Manure Spreading	54.9
Other agricultural sources	19.3
Septic tank inputs	11.6
Natural sources	32.3
Total	180 mt

The Chesaplain Supplemental Report specifically determined that the hog CAFOs contributed substantial phosphorus loadings to the Lake Chesaplain watershed, despite their status as “non-discharging” CAFOs. A substantial portion of their manure spreading eventually reached Lake Chesaplain through groundwater flows and surface runoff, despite compliance with state-mandated nutrient management plans and the CWA exemption for agricultural stormwater runoff. *See* 33 U.S.C. § 1362(14). Likewise, a substantial amount of phosphorus reached Lake Chesaplain from private septic systems, even though these sources are exempt from CWA permitting as discharges to groundwater rather than surface water. *See Septic Systems Overview*, EPA, <https://www.epa.gov/septic/septic-systems-overview> (last visited Aug. 10, 2021). The Supplemental Report also noted that neither of the point sources in the Chesaplain Watershed had any permit limits for phosphorus, as no such limits are provided for in the relevant technology-based effluent limitations guidelines issued by EPA.

In October 2017, DOFEC publicly noticed a proposal to implement the TMDL through an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources. This reduction was proposed to be phased in over a period of five years – that is, a 7% reduction from the 180 mt baseline in the first year, a 14% reduction from the baseline in the second year, a 21% reduction from the baseline in the third year, a 28% reduction from the baseline in the fourth year, and a 35% reduction from the baseline by the fifth year. Point source reductions would be incorporated as permit limits, while the nonpoint source reductions were proposed to be achieved through a series of BMP programs designed to encourage the hog CAFOs and other agricultural sources. Proposed BMPs for agricultural sources included modified feeds for animal production facilities that would reduce phosphorus in manure, physical and chemical treatment of manure streams, and restrictions on manure spreading at times when the soil is frozen or saturated. Proposed BMPs for private septic systems consisted of increased septic tank inspection and pumping schedules.

Although the scientific conclusions of the Chesaplain Commission were not subject to substantive challenge, DOFEC’s proposal to require an equal 35% annual reduction among CAFO, other agricultural, residential septic system, and point source categories proved highly controversial. Residential lakefront homeowners objected to the expensive septic tank maintenance and pumping that would be required. The slaughterhouse and Chesaplain Mills objected to the expensive phosphorus treatment system that would be required to reduce discharges by 35%. Chesaplain Lake Watch objected to taking any credit for nonpoint source phosphorus reductions, arguing that the proposed BMPs for manure spreading, other agricultural practices, and septic tanks were insufficient to achieve a 35% reduction in nonpoint phosphorus

inputs, and that New Union lacked the statutory authority to impose and enforce such BMPs against agricultural sources. Chesaplain Lake Watch demanded that the sixty-three mt annual reduction be achieved by requiring zero phosphorus discharges from the two identified point sources. In addition, Chesaplain Lake Watch argued that a 35% phased annual reduction was inconsistent with the CWA requirement for a TMDL, which, by statutory terms, should be a daily limit based on the scientific calculation without a phased implementation. The Hog CAFOs objected to the possible imposition of BMPs on their operations, and argued to DOFEC that EPA lacked the statutory authority to require implementation of loading limits against nonpoint sources.

Ultimately, DOFEC adopted the Hog CAFO's position and, in July of 2018, adopted a TMDL that consisted solely of a 120 mt annual maximum, without any wasteload allocations or load allocations. Pursuant to CWA § 303(d)(2), EPA rejected the July 2018 TMDL, and, in May 2019, after notice and comment, adopted the original DOFEC TMDL proposal, consisting of a 35% reduction of annual phosphorus discharges by both point and nonpoint sources phased in over five years, to be implemented through permit controls on point sources and BMP requirements for nonpoint sources. EPA called its combination of phased point source limits and BMP measures the "Chesaplain Watershed Implementation Plan" (CWIP). The CWIP did not specify whether or how the proposed BMP measures would be enforced. EPA incorporated the entire record of scientific reports and public comments before the DOFEC into its own record.

Although not part of the record before EPA, the following additional facts have been established by affidavits submitted by Chesaplain Lake Watch, and are not disputed by either New Union or EPA. The NPDES permit for the slaughterhouse expired in November 2018, and has not yet been reissued. The NPDES permit for the Chesaplain Mills sewage treatment plant likewise expired in February 2019. Both plants continue to operate under their expired permits as administratively extended based on their timely applications for permit renewal. *See* 40 C.F.R. § 122.6. As such, neither plant is currently subject to any limit on phosphorus discharges. DOFEC has proposed to modify each permit to reflect the 35% annual phosphorus loading reduction phased in over five years after permit issuance, but both facilities have sought administrative hearings on this proposed requirement based on the cost of compliance. Since EPA's adoption of the Lake Chesaplain TMDL, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed. The state-issued nutrient management permits for the hog CAFOs have not been modified to incorporate any phosphorus reduction measures contemplated by the CWIP. Lake Chesaplain waters continue to violate water quality standards.

II. PROCEDURAL HISTORY AND JURISDICTION

Plaintiff New Union filed action No. 66-CV-2020 on January 14, 2020. Plaintiff Chesaplain Lake Watch filed action No. 73-CV-2020 on February 15, 2020. Both actions are brought pursuant to the judicial review provisions of the Administrative Procedure Act, APA § 702, and this court has jurisdiction pursuant to 28 U.S.C. § 1331. This Court granted unopposed motions to consolidate the two actions on March 22, 2020, and EPA lodged the administrative record with the Court on July 1, 2020.

Chesaplain Lake Watch submitted affidavits with its motion for summary judgment establishing that its membership includes individuals who reside near Lake Chesaplain and use Lake Chesaplain for recreational purposes including swimming, boating, and fishing. These affidavits further establish that these members' enjoyment of these activities has been diminished by the decline in Lake Chesaplain water quality. This Court is satisfied that Chesaplain Lake Watch meets the requirements for standing under Article III of the Constitution, having established injury in fact, causation, and redressability. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167 (2000). Likewise, this Court is satisfied that the State of New Union has standing to challenge EPA's rejection of its Lake Chesaplain TMDL and substitution of EPA's own TMDL, as EPA's action will require implementation by New Union in the form of state-issued NPDES permits as well as affecting New Union's eligibility for federal water quality planning funds under CWA § 208, 33 U.S.C § 1288, as well as its eligibility to maintain its delegated NPDES permitting program. CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2).

III. LEGAL ANALYSIS

A. Claims of the Parties

The parties make the following claims.

Plaintiff New Union challenges EPA's rejection of its proposed TMDL consisting solely of the 120 mt/year total loading for the Lake Chesaplain watershed. New Union argues that its proposed TMDL satisfied all the requirements for a valid TMDL under the CWA, and that EPA's regulation, 40 C.F.R. § 130.2(i), purporting to require that a state's TMDL submission include not just the total maximum daily load, but an allocation of that load between and among point, nonpoint, and natural sources, is contrary to law.

Plaintiff Chesaplain Lake Watch mounts two challenges to EPA's adoption of the Chesaplain TMDL. First, CLW argues that a TMDL consisting of an annual loading limit to be phased in over a period of five years is contrary to the legal requirements of the CWA, specifically the claimed requirements a) that a TMDL must be stated in terms of a daily load, not an annualized load, and b) that the TMDL must be adequate to ensure achievement of water quality standards on the date of its adoption, not five years later after a phased implementation. Second, CLW challenges the WLA and LA adopted in the CWIP TMDL. CLW argues that EPA may not take any credit for phosphorus load allocation reductions anticipated from the implementation of BMPs for nonpoint sources where EPA has no authority to require implementation of these BMPs, and there is thus no reasonable assurance the reductions will be achieved.

EPA disagrees with the merits of the claims of both plaintiffs, arguing that its final Lake Chesaplain TMDL and CWIP is consistent with the requirements of the CWA and adequately supported by scientific evidence in the record. EPA also argues that both complaints should be dismissed as lacking ripeness, as the Lake Chesaplain TMDL will not have any immediate regulatory effect and its effect will depend on later administrative actions such as modification to NPDES permits or New Union implementation of BMP requirements.

B. Analysis

1. Ripeness

EPA argues that none of the challenges to the Lake Chesaplain TMDL are ripe for judicial review, as the mere adoption of a TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or other regulatory actions. Ripeness is the doctrine requiring that for a dispute to be subject to adjudication, all necessary administrative actions giving the challenged agency action concrete effect must have been taken. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). According to the Supreme Court, a ripeness determination requires judicial evaluation first, of the fitness of the issues for judicial review, and second, of the possible prejudice to the parties if judicial review is delayed pending further agency implementation action. *Id.* at 149. EPA relies heavily on *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003), and *Bravos v. Green*, 306 F. Supp. 2d 48 (D. D.C. 2004), both cases in which the courts determined that EPA approvals of state submitted TMDLs were not ripe for review, as the effect of that approval depended on further implementation actions by the states involved. These cases are inapposite, however, as the TMDL in question here (unlike those in *Arcadia* and *Bravos*) contemplates specific NPDES permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay, as the issuer of NPDES permits within the State of New Union. All of the facts necessary to adjudicate the claims in this case have been developed and are part of the record before EPA; accordingly, this Court finds that the issues raised are fit for adjudication and that plaintiffs New Union and Chesaplain Lake Watch will be prejudiced if the validity of EPA's Lake Chesaplain TMDL is not subject to immediate judicial review. This Court notes that the Third Circuit Court of Appeals found a very similar challenge to an EPA-issued TMDL to be ripe for review in *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015), although, as noted below, this court disagrees with the Third Circuit's resolution of the merits of that case.

2. Inclusion of Wasteload Allocations and Load Allocations in TMDL

EPA's rejection of New Union's proposed unallocated Lake Chesaplain TMDL was based entirely on the failure of the New Union TMDL to include WLAs and LAs allocating the proposed total phosphorus loading among individual point sources and nonpoint sources. EPA relies on its longstanding definition of a TMDL to include a WLA and LA, adopted by regulation in 1985. *See* Final Rule, Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985). New Union argues that EPA's interpretation of the statutory phrase "total maximum daily load" to include detailed specific allocations to individual point sources and nonpoint sources is contrary to the plain meaning of the term "total," as well as being contrary to the structure of the CWA and its incorporation of principles of comity and federalism.

Although the regulation in question has been in place for some decades now, New Union may bring this as an "as applied" challenge to the regulation. *See* 5 U.S.C. § 704; *Dunn-McCampbell Royalty Int. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("[W]hen an agency applies a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority."). This Court analyzes New Union's challenge to the lawfulness of EPA's expansive definition of the term total maximum daily load

under the familiar framework of *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). First, this Court must determine whether Congress has spoken directly to the interpretation in question, based on the statutory language, legislative history, and structure. If so, then Congress's intended interpretation must prevail over a contrary interpretation by the administering agency. Second, if the meaning of the statute is unclear, or Congressional intent is otherwise ambiguous, the Court must inquire whether the agency's interpretation is a permissible one. *Id.* at 842-843.

Here, EPA's interpretation of the phrase "total maximum daily load" to require allocation of all of the proposed individual reductions needed to meet that total runs counter both to the meaning and context of CWA § 303(d). The word "total" in "total maximum daily load" does not admit of a construction that would require the total to include a specification of proposed (not existing) components of the total. The context of section 303(d) likewise supports the construction that Congress meant total when it said total. Far from containing an implementation provision for allocation of loadings among sources, section 303(d) itself appears to be nothing more than an information gathering provision, to gather the necessary information about the total pollution loading an impaired water body can withstand without remaining impaired. Nothing about section 303(d) implies that the process of setting the TMDL was meant to include an allocation and limitation process of point and nonpoint sources, which is addressed in other sections of the CWA. To the contrary, § 303(d) itself seems to defer implementation of TMDLs to the planning process contemplated by section 303(e): "such State shall incorporate [EPA approved TMDLs] into its current plan under subsection (e) of this section." Subsection (e) cross references other planning and implementation sections of the CWA. 33 U.S.C. § 1313(e) (cross referencing CWA §§ 208, 209 (basin and waste management planning), 301(b)(1) (point source controls necessary to meet water quality standards), 33 U.S.C. §§ 1288, 1289, 1311(b)(1)). Notably, section 303(e), in marked contrast to section 303(d), does not contemplate EPA imposition of a TMDL implementation plan in the event EPA is dissatisfied with the state's planning process, instead limiting EPA's remedies to denial of federal funding and denial of permit authority.

This Court is likewise mindful of the fact that when Congress adopted the 1972 CWA, it deliberately declined to include an EPA supervised state implementation requirement for water quality standards, despite having incorporated such a framework for implementation of air quality standards under the 1970 Clean Air Act, *see* Clean Air Act § 110(a), 42 U.S.C. § 7410(a), together with specific authority for EPA to impose a federal implementation plan on states that fail to submit a satisfactory plan. *See* CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1). Rather, the lack of specific direction to states to perform the pollution reduction allocation, and the lack of specific authority for EPA to perform that allocation on their behalf, seems to be an intentional omission by Congress out of deference to the primary role of states in protecting water quality and making local land use and agricultural practices decisions. *Cf.* CWA §§ 101(b), 510, 33 U.S.C. §§ 1251(b), 1370.

Thus, this Court concludes that EPA's definition of the phrase TMDL to require WLAs and LAs contradicts the plain meaning and intention of Congress in enacting CWA § 303(d), and that the regulation 40 C.F.R. § 130.2(i) is contrary to law under *Chevron* step one. In reaching this conclusion, we part company with our sister court, the Court of Appeals for the Third Circuit in *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015). However, we

believe that the Third Circuit misconstrued the plain language and structure of the Clean Water Act. In addition, EPA's assertion of the authority to direct an allocation of pollution reductions among individual sources throughout a watershed constitutes a dramatic expansion of EPA's regulatory jurisdiction without any clear support in the statute, thus violating the presumption against such regulatory authority expressed by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

Accordingly, as EPA's rejection of the New Union TMDL submissions was based solely on New Union's refusal to perform and submit WLAs and LAs for phosphorus, and EPA's regulation requiring such information as part of a TMDL is contrary to law, this Court grants summary judgment in favor of New Union and vacates the determination to reject the Lake Chesaplain TMDL. This Court also vacates the definition of "total maximum daily load" in 40 C.F.R. § 130.2(i).

3. Validity of Phased Annual TMDL

Plaintiff CLW challenges the Lake Chesaplain TMDL on the grounds that it is framed as a phased percentage reduction in annual loadings, rather than a fixed daily limit on total loadings necessary to provide for achievement of water quality standards. There are two components to CLW's challenge: first, that the TMDL is expressed in annual terms rather than in daily terms, and second, that by adopting a phased TMDL, EPA has not adopted a TMDL at the level necessary to assure achievement of water quality standards (at least until the reduction is fully phased in after five years). Although CLW's challenges to the TMDL may be partially mooted by this Court's determination to vacate EPA's rejection of the New Union Lake Chesaplain TMDL, the issues raised are still pertinent to the validity of the New Union TMDL and the Court will address them.

As with New Union's challenges, CLW's challenge to the Lake Chesaplain TMDL turns on EPA's legal construction of the phrase "total maximum daily load" in the statute. Accordingly, this Court again applies the analysis of *Chevron v. NRDC*, and must first determine whether Congress has resolved the issue through its choice of language in the statute. Section 303(d)'s full text regarding "total maximum daily load" reads as follows:

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section [304(a)(2)] of this title as suitable for such calculation. Such load shall 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). Congress chose the word "daily" to describe the relevant period of pollutant loading to be determined by the state (or EPA), and this choice is reinforced by reference to "seasonal variations." An annual limit is not a daily limit, and an annual limit does

not allow for seasonal variations. Accordingly, this issue is resolved by the plain meaning of the statute, and EPA's contrary interpretation is contrary to law under *Chevron* step one. *Accord Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006); *contra NRDC v. Muszynski*, 268 F.3d. 91, 98 (2d Cir. 2001); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d at 297.

EPA's construction of the phrase "total maximum daily load" to allow for a phased percentage reduction in phosphorus loadings likewise contradicts the plain meaning and structure of the CWA. A "total maximum daily load" does not mean a percentage reduction in loadings. *See NRDC v. EPA*, 301 F. Supp. 3d 133 (D.D.C. 2018). Likewise, the clear intent of section 303(d)'s direction to calculate a "total maximum daily load . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety," does not admit of a loading standard that will not achieve water quality standards until five years hence. This reading is reinforced by the direction of CWA § 301(b)(1)(C) that "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations." 33 U.S.C. § 1311(b)(1)(C). The TMDL calculation is clearly designed to form the basis of section 301(b)(1)(C) effluent limitations on point sources; indeed the section 303(e) planning process for state implementation of TMDLs specifically cross references section 301(b). CWA § 303(e)(3)(A), 33 U.S.C. § 1313(e)(3)(A). The July 1, 1977 deadline for achievement of effluent limitations is a hard deadline that may not be extended by administrative action. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976). EPA may not, in effect, grant a five-year extension for achievement of water quality standards when the statutory deadline has long since passed.

Accordingly, this Court grants summary judgment in favor of plaintiff CLW on its challenge to the EPA TMDL.

4. Validity of Wasteload Allocation Credits Based on Assumed Nonpoint Source BMPs

As noted, the EPA regulation governing wasteload allocations specifically allows a credit against the total maximum daily load for loading reductions achieved through BMPs: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i). CLW argues that 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, citing to a 1991 EPA guidance document. EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991).

As EPA's calculation of wasteload and load allocations is a matter of EPA applying its regulatory standards to the record before the agency, this Court applies the highly deferential "arbitrary and capricious" standard of review and must not substitute its judgment for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). Rather, this Court must simply consider whether the agency considered the relevant factors and gave a reasonable basis for its decision.

CLW points to the complete absence in the record of any indication that the State of New Union had any intention to require implementation of the BMPs contemplated by the CWIP. To the contrary, political opposition to the implementation of BMPs prompted New Union to abandon its efforts to develop its own watershed implementation plan including BMPs, and to limit its efforts to simply establishing a total loading, without any attempt to allocate the loading among sources. CLW points to the undisputed fact that in the two years since the adoption of the TMDL, New Union has in fact taken no action to implement the BMPs contemplated by the CWIP.

If the standard for taking credit for BMPs was indeed the “reasonable assurance” standard, then this Court would be convinced that EPA’s reliance on BMP implementation was indeed arbitrary and capricious, and contrary to the record before EPA. However, the “reasonable assurance” standard has never been adopted by EPA through notice-and-comment rulemaking, and accordingly receives no deference. As this Court has held in rejecting EPA’s wasteload and load allocation requirements, the CWA § 303 TMDL program is a planning and information program, not an implementation program. EPA’s TMDL provides New Union with information concerning possible BMPs that might be used to achieve compliance with water quality standards. Nothing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *City of Arcadia v. U.S. EPA*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003).

Accordingly, this Court finds that EPA’s determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance is not arbitrary and capricious or an abuse of discretion. This Court grants summary judgment in favor of EPA and against CLW on CLW’s second cause of action.

CONCLUSION

For the foregoing reasons, this Court grants summary judgment in favor of New Union and against EPA in No. 66-CV-2020, and EPA’s determination to reject the New Union Lake Chesaplain TMDL is vacated. EPA is directed to approve New Union’s Lake Chesaplain TMDL. This Court grants summary judgment in favor of EPA dismissing the complaint in No. 73-CV-2020.

IT IS SO ORDERED.

Dated this 15th Day of August, 2021,
Romulus N. Remus
United States District Judge