UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

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

And

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-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.

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

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STATEMENT OF JURISDICTION

Chesaplain Lake Watch (CLW), the State of New Union, and the United States Environmental Protection Agency (EPA) each appeal from an Opinion and Order granting partial summary judgment, entered on August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, consolidated case nos. 66-CV-2020 and 73-CV-2020. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because plaintiffs' claims arose under the Administrative Procedure Act, 5 U.S.C. § 706, and the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq. Plaintiffs all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 8 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

1. Is EPA's rejection of New Union's total maximum daily load (TMDL) and adoption of its own TMDL and implementation plan for the Lake Chesaplain Watershed ripe for judicial review?
2. Was EPA's rejection of New Union's TMDL based completely on the fact that the TMDL failed to include wasteload allocations and load allocations an incorrect interpretation of the term "total maximum daily load" in Clean Water Act section 303(d)?

3. Did EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction over a five-year period violate the Clean Water Act section 303(d) requirement for a valid TMDL?
4. Was EPA's adoption of a credit for anticipated pollution reductions using best management practices (BMP) to reduce the stringency of wasteload allocations of point sources for implementation of the Lake Chesaplain TMDL arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation?

STATEMENT OF THE CASE

Statement of Facts

The Clean Water Act (CWA) creates a cooperative federalism system to regulate point source discharges of pollutants into the waters of the United States through a permitting system. *See* 33 U.S.C. § 1362. Pollution of nonpoint sources, such as agricultural runoff, is not subject to the CWA permitting system. Federal EPA establishes national standards under the CWA, which states are expected to implement. *See* 33 U.S.C. § 1342(b); *see* 33 U.S.C. § 1288; *see* 33 U.S.C. § 1313. If a state fails to meet federal standards, the EPA can step in to administer the programs. *Id.*

Under CWA section 303, New Union must adopt water quality standards (WQS) for Lake Chesaplain. 33 U.S.C. § 1313(a). States must identify bodies of water that do not meet the WQS and list them as impaired waters, as occurred with Lake Chesaplain. 40 C.F.R. § 130.7(d); R. at 6. A state must then develop and submit to the EPA a "total maximum daily load" (TMDL) for each impaired body of water. 33 U.S.C. § 1313(d)(1)(C). The TMDL for the pollutant must

be developed "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." *Id.* EPA, through regulation, defines 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 effect, this regulation requires states to decide the level of loading between point and nonpoint sources through permit allocations and implementing best management practices (BMPs). R. at 6. EPA can reject the TMDL if the administrator disapproves of the WQS or TMDL. *Id.*

Lake Chesaplain is a natural lake entirely within the boundaries of the State of New Union. R. at 7. The lake is fifty-five miles long and five miles wide. *Id*. The lake's outlet, Chesaplain River, is a navigable-in-fact interstate body of water. *Id.* The lake is home to many interest groups with conflicting points of view, as illustrated by this lawsuit. The Chesaplain watershed hosts a large-scale slaughterhouse, ten concentrated animal feeding operations (CAFOs), dozens of homes and cabins, timber operations, miles of hiking trails and campgrounds, agriculture lands, and is the wastewater disposal source for the city of Chesaplain Mills. *Id.* Lake Chesaplain was designated as Class AA, meaning the lake is used for recreation, swimming, fish propagation, and as a drinking source, but has been downgraded in recent years. *Id.*

Declining water quality in Lake Chesaplain has resulted in action under the CWA by both the New Union Department of Fisheries and Environmental Control (DOFEC) and the United States EPA. R. at 5. The slaughterhouse operates with a "National Pollutant Discharge Elimination System" (NPDES) permit issued by the State of New Union to discharge into the lake. R. at 7. Homes around the lake have septic tanks that do not require NPDES permits.

CAFOs are not required to have NPDES permits, but are regulated by the State of New Union. *See* 40 C.F.R. § 122.23; *see generally Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011); R. at 7.

In 2012, the Lake Chesaplain Study Commission in 2008 (the Chesaplain Commission) issued a report concluding that Lake Chesaplain was experiencing eutrophication, which destroys the water quality of the lake so that organisms cannot survive, large algae blooms regularly occur, water quality decreases, and bad odors are commonplace. R. at 8. The Chesaplain Commission concluded excessive phosphorus was causing the eutrophication. *Id.* Current phosphorus levels range from 0.020 to 0.034 mg/l, above the 0.014 mg/l level required for a healthy lake. *Id.*

DOFEC failed to submit a TMDL for Lake Chesaplain, even though it was listed as an impaired water. *Id*. In 2015, plaintiff Chesaplain Lake Watch (CLW), a public interest group, threatened to sue EPA and New Union for its failure to establish a TMDL for the lake. *Id*. In response, the Chesaplain Commission calculated a TMDL of 120 metric tons (mt) annually, while existing loads were calculated at 180 mt. *Id.* The Chesaplain Commission concluded that Chesaplain Mills, the slaughterhouse, CAFO manure spreading, agriculture use, and septic tank inputs all contributed significantly to the 180 mt of phosphorus. R. at 9.

In October of 2017, DOFEC proposed a rule to implement the TMDL through 7% equal phased reductions by both point and nonpoint sources over a five-year period. *Id.* The decrease would be achieved through stricter permit limits for point sources and the implementation of BMPs on nonpoint sources. *Id.* The proposed rule was commented on by the impacted parties, and DOFEC revised its rule to solely a TMDL that consisted of a 120 mt annual maximum. R. at 10. The TMDL did not include allocation between wasteload allocations (WLAs) for point

sources and load allocations (LAs) for nonpoint sources. *Id.* Due to its regulation that a TMDL must include both WLAs and LAs, EPA rejected New Union's 120 mt annual maximum TMDL, and inserted its own TMDL. *Id.* EPA's TMDL, labeled the "Chesaplain Watershed Implementation Plan" (CWIP), reflected New Union's original proposal of implementing the TMDL through 7% annual decreases over a five-year period by both point and nonpoint sources. *Id.* Lawsuits ensued.

Procedural History

In January of 2020, plaintiffs New Union and Chesaplain Lake Watch filed suit to challenge EPA's CWIP. *Id.* The actions were brought under Section 702 of the Administrative Procedure Act (APA), and the cases were consolidated. 5 U.S.C. § 702.

EPA argued that the claims brought by New Union and CLW are not ripe for review. R. at 11. EPA further argues that its final Lake Chesaplain TMDL and CWIP are consistent with the CWA. *Id.*

Plaintiff New Union challenges EPA's interpretation of TMDL to require WLAs and LAs. *Id.* New Union argues their TMDL was sufficient to satisfy section 303 of the CWA and EPA's interpretation of TMDL, as established by 40 C.F.R. § 130.2(i), is contrary to law. 40 C.F.R. § 130.2(i); R. at 11.

Plaintiff CLW challenges EPA's adoption of the Chesaplain TMDL. CLW argues that TMDL must be stated in a daily load, not an annual load, and the TMDL cannot be phased in over a five-year period. *Id.* CLW further argues that EPA may not take credit for phosphorous reductions through BMPs for nonpoint sources because the CWA does not confer EPA the

authority to regulate nonpoint sources and the EPA has no assurance that phosphorus reductions by BMPs will be achieved. *Id.*

All three parties moved for summary judgment on their various claims.

The lower court found the case to be ripe, holding that "[a]ll of the facts necessary to adjudicate the claims in this case have been developed and are part of the record before EPA…and Lake Watch will be prejudiced if the validity of EPA's Lake Chesaplain TMDL is not subject to immediate judicial review. R. at 12.

The lower court granted summary judgment in favor of New Union and against EPA regarding New Union's challenge to EPA's TMDL. R. at 16. The court vacated EPA's rejection of the New Union Lake Chesaplain TMDL and ordered EPA to approve New Union's TMDL. *Id.* The court vacated the definition of "total maximum daily load" in 40 C.F.R. § 130.2(i). R. at 13. The court found 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." *Id.*

The lower court granted summary judgment in favor of CLW on its challenge to EPA's TMDL, holding that EPA's TMDL inclusion of phased percentage reductions over a five-year period violates the structure and meaning of the CWA. R. at 15.

The lower court granted summary judgment in favor of EPA to dismiss CWA's complaint, finding that the EPA did not act arbitrary and capricious by taking credit for nonpoint source BMP pollution loading reductions. *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

The lower court correctly held that this case was ripe for review. R. at 12. As it will be explained below, the adequacy of a TDML presents a purely legal question. Purely legal disputes are fit for judicial resolution and result in hardship to the parties awaiting judicial remedy. *Abbott Laboratories v. Gardne*r, 387 U.S. 136, 148 (1967). Therefore, this case is ripe for review.

EPA rejected New Union's TMDL solely on New Union's lack of WLAs and LAs in their TMDL. R. at 10. The lower court correctly held that EPA's interpretation of TMDL is contrary to law and granted summary judgement in favor of New Union. *Id.* at 14. The court also vacated EPAs rejection of the New Union TMDL and the definition of total maximum daily load in 40 C.F.R. § 130.2(i). *Id*. As will be explained below, summary judgement was correctly granted because (1) "total" in TMDL is not ambiguous and should not receive Chevron deference (2) even if "total" is ambiguous, EPA's interpretation is not permissible because it oversteps Congress's intent of cooperative federalism and (3) the Third Circuit opinion *American Farm Bureau* is easily distinguishable from New Union's situation.

The lower court incorrectly held that the phased annual TMDL is invalid. This is incorrect for two reasons. Firstly, prior courts have held that constructing TMDL to strictly mandate daily expressions of pollutant discharge constitutes legal absurdity. *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2001). Additionally, courts have held that nondaily expressions of pollutants, such as the one at hand, can result in better regulation than a daily expression. *Id.* Secondly the statutorily mandated deadline is inapplicable to the matter at hand. 33 U.S.C. § 1311(b)(1)(C).

The lower court correctly held that EPA's adoption of wasteload allocation credits based on assumed nonpoint source best management practices (BMPs) was not arbitrary and capricious

or an abuse of discretion. A TMDL process may provide for a tradeoff system using wasteload allocation credits based on anticipated pollution reductions using BMP in order to reduce the stringency of wasteload allocations for point sources. 40 C.F.R. § 130.2(i). CLW argues that EPA's credit was arbitrary and capricious and an abuse of discretion due to the lack of reasonable assurances of BMP implementation. However, the "reasonable assurance" standard is not the standard for taking credit for BMPs. The lower court correctly found that the "reasonable assurance" standard has never been adopted by EPA through notice-and-comment rulemaking. R. at 16. The CWA itself is silent on the extent to which the EPA may consider and express whether the reasonable assurance requirement has been met. *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 306 (3d Cir. 2015).

Additionally, the CWA section 303 TMDL program is a planning and information program, not an implementation program. As the lower court found, nothing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states. R. at 16. Congress did not speak directly to whether credits for anticipated nonpoint source pollution reductions may be used to reduce stringency of wasteload allocations for point sources where there is not "reasonable assurance" for the implementation of BMPs. EPA applied its regulatory standards to the record before the agency in deciding to adopt such wasteload allocation credits based on assumed nonpoint source BMPs. Therefore, the highly deferential "arbitrary and capricious" standard of review applies and the Court may not substitute its judgement for that of the agency on this issue of credits based on nonpoint source BMPs within the TMDL and whether "reasonable assurance" is required. *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).

This court should uphold that the EPA's adoption of a credit anticipated pollution reductions using BMP to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was not arbitrary and capricious or an abuse of discretion.

STANDARD OF REVIEW

Appellate courts review a district court's grant of summary judgment *de novo,* employing the standard of review for agency action. *See Pa. Dep't of Public Welfare v. Sebelius*, 674 F.3d 139, 146 (3d Cir. 2012). Courts must vacate agency actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

A claim must be "ripe" to be fit for judicial review. A claim is "ripe" when the facts of the case have been sufficiently developed to allow for judicial review. *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967). Courts must evaluate the fitness of the issues for review and analyze any possible prejudice to the parties due to a delay to allow for additional agency action. *Id.* at 149.

As the issue in this case is EPA's interpretation of the CWA, the court must examine EPA's regulatory interpretations and actions using the familiar framework set out in *Chevron*. *Chevron, U.S.A, Inc. v. NRDC, Inc*., 467 U.S. 837 (1984). If Congress has spoken directly to the interpretation at issue, Congress's intended interpretation must govern. *Id.* at 842-843. If the meaning of the statute or congressional intent is ambiguous, the court must decide whether the agency's interpretation is permissible. *Id.*

Because EPA is applying its on the record regulatory interpretation to the CWA, the court must apply the "arbitrary and capricious" standard of review and not replace its own judgement

for the agency's determinations. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994).

ARGUMENT

I. This Case is Ripe for Review Because Pollution Behavior Needs to Change in Anticipation of the TMDL and New Union and the EPA are Expending Resources in Developing and Implementing the TMDL.

Issues before the court must be ripe for review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). To be ripe, a dispute must be fit for judicial resolution and result in hardship to the parties awaiting judicial remedy. *Id.* In *American Farm Bureau Federation v. EPA*, the Third Circuit deemed the questions presented ripe for review. *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 293 (3d Cir. 2015). The question presented concerned a purely legal dispute based on a "well-developed record" regarding the EPA's promulgation of a TMDL, even though the TMDL was not yet incorporated into the state's CWA implementation. *Id.* This decision rested on two facts. *See id.* One, the challengers, members of trade associations, would have to change pollution behaviors "in anticipation of the TMDL's implementation." *Id.* Two, the EPA and states involved in implementing the TMDL would face hardship if the dispute was not ripe at this time because it is better to investigate the merits of the TMDL before more resources are spent in development. *Id.* 293-94.

Both of these conditions are present in the current case. The challenger here is not like the trade associations in that they are not a designated group with business interests in pollution regulation, however the challenger is an environmental group. R. at 4. The environmental group has interests in Lake Chesaplain that are not business in nature, but still inform behaviors that could change "in anticipation of the TMDL's implementation." *Am. Farm Bureau Fed'n v.*

United States EPA, 792 F.3d 281, 293 (3d Cir. 2015). This is because Lake Chesaplain is designated as Class AA, and is therefore used for primary contact recreation, fish propagation and survival, and as a primary drinking source. R. at 8. Therefore, the challengers may need to change behaviors in regards to recreation, subsistence fish sourcing, and drinking water sourcing should the water quality of Lake Chesaplain change. As for hardship, just as in *American Farm Bureau Federation v. EPA,* New Union and the EPA will continue to expend resources into the TMDL, so the deciding factor there still applies: "If there is something wrong with the TMDL, it is better to know now than later." *Id.* 293-94.

Therefore, this case is ripe for review.

II. EPA's Interpretation of "Total" in "Total Maximum Daily Load" in Section 303 of the CWA to Include Wasteload Allocations and Load Allocations is Contrary to Law.

Pursuant to the EPA's interpretation of section 303(d) of the CWA, EPA rejected New Union's proposed July 2018 total maximum daily load (TMDL) "based entirely on the failure of the New Union TMDL to include WLAs (waste load allocations) and LAs (load allocations) allocating the proposed total phosphorus loading among individual point sources and nonpoint sources." R. at 12; 33 U.S.C.A. § 1313; 40 C.F.R. § 130.2(i). EPA has interpreted the term "total" in TMDL to include specific WLAs for individual points sources and LAs for nonpoint sources through their regulation 40 C.F.R. § 130.2(i). 40 C.F.R. § 130.2(i). In essence, EPA's regulation requires states to allocate the level of permissible loading for both point sources and nonpoint sources. R. at 6. The lower court correctly held that this interpretation oversteps EPA's authority under the CWA.

A. The EPA is Not Entitled to Chevron Deference Because the Term "Total" in "Total Maximum Daily Load" is Not Ambiguous.

The lower court correctly applied the common analysis from *Chevron. Chevron, U.S.A, Inc. v. NRDC, Inc*., 467 U.S. 837 (1984). Under *Chevron*, a court first asks if the statutory language is ambiguous. *Id.* at 842-843. If the statute is unambiguous, as it is here, the statutory text must govern instead of an agency's interpretation. *Id.* Here, the EPA overstepped their statutory authority by interpreting the term "total" in "total maximum daily load" of section 303(d) to give EPA the authority to establish or require WLAs and LAs in a TMDL.

i. A Plain Language Reading of Section 303(d) Does Not Give EPA the Authority to Require the Establishment of WLAs and LAs in a TMDL.

"It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.' " *Decker v. Nw. Env't Def. Ctr*., 568 U.S. 597, 609 (2013). "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476, (1994).

The EPA's regulation that a TMDL includes WLAs and LAs is contrary to law because it is not consistent with the plain language of "total maximum daily load" in section 303(d). 33 U.S.C.A. § 1313. EPA purports the term "total" is ambiguous. "Total" is not ambiguous. "Total" is defined as "an entire quantity or amount." *Total*, Merriam-Webster Dictionary (2021). An entire quantity or amount is by definition a single number—if the number is broken up into WLAs and LAs it is no longer the total or the entire amount but instead is now parts of a total. TMDL clearly is meant to identify a single number of acceptable pollutants for a body of water, not several parts that make up that total. If Congress had wanted EPA to break up the TMDL into its various parts, they would not have included "total" in TMDL but would have instead called for "allocations" or "components" of pollution sources within the TMDL.

Section 303(d)(4)(a) specifically mentions waste load allocation: "a total maximum daily load *or other waste load allocation* established under this section…" 33 U.S.C.A. § 1313 (emphasis added). Congress's use of "or" between TMDL and WLA show the two are on equal footing—one is not the derivative of the other. EPA's reading of TMDL to be broken into WLAs and LAs does not follow logic or the plain language of the law.

If Congress "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron v. NRDC,* 467 U.S., at 843–844 (1984).

There is no gap here to fill. EPA is free to develop WLAs and LAs for a TMDL for informational purposes if it wishes, but it is not permitted to reject a state's TMDL simply because a state decided not to include specific WLAs and LAs in its TMDL. Congress left the decision on how to allocate reductions of both point and nonpoint sources to the states. Specifically, section 303(e) of the CWA requires states to use the TMDL to create implementation plans for point sources of pollution and section 319(a)-(b) requires states to identify and control nonpoint source pollutants. 33 U.S.C.A. § 1313(e); 33 U.S.C.A. § 1319(a)-(b). Invalidating EPA's regulation interpreting TMDL to include WLAs and LAs correctly gives the authority to allocate source and nonpoint source pollution back to the states, as Congress intended. EPA may have been dissatisfied with the way New Union arrived at their TMDL or their lack of detailed allocations between various pollution sources, but a single number is all the statute requires and "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. E.P.A.,* 573 U.S. 302, 328 (2014).

B. Even if "Total Maximum Daily Load" is Ambiguous, EPA's Interpretation is Not a Permissible Construction of CWA Section 303.

If the court incorrectly concludes that "total" in TMDL is ambiguous, EPA's interpretation should not receive deference under *Chevron*. An agency's interpretation of an ambiguous statute must be a permissible construction of the statutory language. *Chevron,* 467 U.S. at 842. EPA's interpretation offends the Clean Water Act's structure of cooperative federalism and would result in a massive expansion of federal power without Congressional support.

i. EPA's Interpretation of TMDL Offends the Clean Water Act's Structure of Cooperative Federalism.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regul. Grp,* 573 U.S. at 328. "An agency interpretation that is inconsistent with the design and structure of the statute as a whole, does not merit deference." *Id.*

Congress explicitly intended the CWA to be a tool of cooperative federalism, with significant power left to the states: "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources." 33 U.S.C. § 1251(b); 33 U.S.C. § 1370. Further, Congress specifically retained the power to regulate nonpoint sources and the implementation of pollution reductions from both point and nonpoint sources to the states. *See* 33 U.S.C. § 1370; *see* 33 U.S.C. § 1329; *see* 33 U.S.C. § 1288; *see* 33 U.S.C. § 1313(e). EPA's interpretation of TMDL to include WLAs and LAs destroys the cooperative federalism of the CWA and cannot be entitled to *Chevron* deference.

a. EPA's Interpretation of TMDL Gives the EPA Unlawful Regulatory Power Over Local Land Use Decisions.

The state's ability to regulate land use is "perhaps the quintessential state activity," yet EPA's interpretation of TMDL gives the federal government massive control over local land use. *FERC v. Mississippi*, 456 U.S. 742, 768 (1982). EPA's adoption of the Chesaplain Watershed Implementation Plan (CWIP) gives EPA unauthorized control over how local farmers, business owners, and homeowners can use their land. CWIP is to be implemented through "permit controls on point sources and best management practices (BMP) requirements for nonpoint sources" of 7% decreases over a 5-year period. R. at 10.

EPA, by deciding phosphorus allocations limits for each land category or source, infringes upon New Union's quintessential ability to regulate land use. The ability to regulate land use is reserved for state and local governments who are closest to the farmers, homeowners, and business owners whom it most impacts. Land use regulation is certainly one of the powers the Clean Water Act meant to reserve for the states. *See* 33 U.S.C. § 1251(b); 33 U.S.C. § 1370.

Further, giving the EPA the ability to regulate land use is a massive increase of the EPA's power into local governance that cannot simply grow out of the word "total" in TMDL. As the Supreme Court has famously stated: "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). It is absurd for Congress to have expanded EPA's authority to include the elephant of land use regulation in the mousehole of the word "total" in TMDL.

b. EPA's Interpretation of TMDL Gives the EPA Unlawful Regulatory Power Over Nonpoint Sources.

Regulatory authority over nonpoint sources is an area of regulation expressly left to the states. *See* 33 U.S.C.A. § 1319(a)-(b). By breaking up their TMDL into WLAs (for point sources) and LAs (for nonpoint sources) and assigning these sources specific allowable pollutant amounts, EPA is in practice unlawfully regulating discharge by nonpoint sources. The CWA does not give EPA the authority to assign specific pollution allocation amounts to nonpoint sources, that is reserved for the state's implementation plan. EPA may wish they had the authority to regulate nonpoint sources, but Congress did not give them that authority, and once again "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp.,* 573 U.S. at 321.

c. EPA's Interpretation of TMDL Creates a Federal Implementation Plan, in Direct Violation of Congressional Intent to Leave Implementation of the CWA to the States.

The EPA may issue a TMDL if they are not satisfied with the state's TMDL but may not create their own federal implementation plan. *See* 33 U.S.C.A. § 1313. Here, the EPA has strayed too far into implementation of New Union's TMDL. EPA's CWIP specifies allocation limits on point and nonpoint sources throughout Chesaplain Lake, thereby implementing decisions that the CWA reserves for the states. R. at 10. As the lower court correctly notes, "section 303(d) itself appears to be nothing more than an information gathering provision" to notify New Union and EPA of the level of phosphorus Chesaplain Lake can tolerate. R. at 13.

EPA's TMDL requires 7% yearly decreases by permitted point sources and various BMPs for nonpoint sources, such as modified feeds, chemical treatment of manure streams, and restrictions on manure spreading. *Id.* at 10. The EPA can take enforcement actions, including civil judicial enforcement actions and civil penalties, if New Union does not follow the

allocations set out in their TMDL. *See* 33 U.S.C.A. § 1319; 33 U.S.C.A. § 1414 of CWA. These are specific implementation decisions regarding local land use and nonpoint source regulation left to the states. EPA has overreached its Congressional mandate and is coercing states to follow its unlawful implementation plans. How New Union regulates its watersheds is an equity decision best left to a local decisionmaker who understands the local conditions of a watershed—precisely why Congress gave the implementation power to the states and not EPA.

The Clean Air Act (CAA) provides further evidence of EPA's overreaching. As the lower court notes, Congress explicitly incorporated a framework for federal implementation of the CAA. R. at 13; *see* 42 U.S.C. § 7410(a): *see* 42 U.S.C. § 7410(c)(1). Congress, while enacting the CWA just two years later, included no such legislative mandate. This intentional omission by Congress is congressional intent for CWA implementation to be reserved for the states.

C. New Union's Situation Can be Differentiated from the Third Circuit's Holding in American Farm Bureau Federation v. U.S. EPA.

The lower court correctly notes their holding parts ways with the Third Circuit's ruling in *American Farm.* R. at 13; *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015). The court in *American Farm* held the term "total" in TMDL is ambiguous and EPA's interpretation of TMDL to include allocations between WLAs and LAs was a permissible construction of section 303(d). *Id*. at 295, 306. This Third Circuit holding can be easily differentiated from New Union's situation for two important reasons.

First, in *American Farm* it was industry, not the states, who were suing EPA to overturn their interpretation of TMDL. *Id.* at 281. The district court, which was affirmed by the Third Circuit, notes this challenge to EPA's interpretation could have been resolved differently had a state been the challenger to the TMDL: "it is noteworthy that no state has filed suit challenging the TMDL, let alone alleged that their participation in the TMDL drafting process was a result of

coercion." *Am. Farm Bureau Fed'n v. United States EPA*, 984 F. Supp. 2d 289, 324 (M.D. Pa. 2013). New Union's lawsuit provides that state challenge that was lacking in *American Farm.* While industry may have a losing argument because they have no authority to implement the TMDL, the same is not true for New Union. Here, New Union is specifically arguing the EPA overstepped their statutory authority by implementing the TMDL, and it is this court's role to push EPA back to its congressionally mandated limit.

Second, the states impacted by the TMDL in *American Farm* agreed to and asked EPA to develop and establish the TMDL: "The Bay watershed TMDLs will be developed jointly between the six Bay watershed states, the District and EPA and then established by EPA." *Id.* at 302. This distinction is key. Because the states in *American Farm* asked for the EPA to develop and establish the TMDL, the court could not find that EPA had overstepped its statutory authority. This is an example of cooperative federalism working—the states wanted EPA's expertise, and EPA was able to provide that support.

New Union asked for no such help. New Union was forced to accept a TMDL it did not agree to, with specific WLAs and LAs that it does not believe are appropriate to impose on the impacted local parties. Here, cooperative federalism has turned into coercive federalism—in clear violation of the mandate by Congress.

American Farm is not the only circuit opinion interpreting TMDL. The court should instead turn to the Eleventh Circuit opinion in *Sierra Club v. Meiberg*. *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002). The issue in *Meiburg* was a challenge to a consent decree, which "provided that if Georgia failed to establish TMDLs, EPA was required to do so." *Id.* at 1029. The decree included both WLAs and LAs as constituting a TMDL. *Id*.

The court struck down the consent decree, holding that a court cannot compel EPA to develop implementation plans for a TMDL because "[t]he responsibility for implementing the TMDLs once they [are] established [is] left to [the State], as it is in the Clean Water Act itself." *Id.* at 1031. The court reasoned that the TMDL is "defined to *be a set measure or prescribed maximum quantity* of a particular pollutant in a given waterbody." *Id.* at 1030 (emphasis added). Here, EPA's interpretation of TMDL to include WLAs and LAs stretches a TMDL from a "set measure…of a particular pollutant" to an implementation plan forced on New Union. EPA has the authority to approve a single number as a TMDL, but here it is unlawfully implementing the TMDL. Just as the court struck down the unlawful decree in *Meiburg*, the court should strike down EPA's interpretation of TMDL which includes WLAs and LAs.

III. The Phased Annual TMDL is Valid.

A. An Annual Construction of a TMDL Avoids Absurdity.

When setting a TMDL, the CWA establishes standards for multiple pollutants and must do so in a way that results in effective regulation. *See* 33 U.S.C. § 1313(d)(1)(c). As such, a TMDL is susceptible to a broader range of meanings than merely establishing a discharge per day standard. *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2001). For example, the Second Circuit held that a TMDL may be regulated as "an hourly, weekly, monthly, or annual load." *Id.* 98-99. This is because "for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id.* Therefore, a strictly literal interpretation of the word "daily" in TMDL is "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id.*

New Union and the EPA promulgated a phased TMDL in regards to phosphorus with annual benchmarks. R. at 9. This is expressly permissible by *Muszynski* standards. The lower

court relies on *NRDC v. EPA* to assert that a TMDL "does not mean a percentage reduction in loadings." R. at 13 (citing *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3d 133 (D.D.C. 2018)). However, this case is not persuasive to the current challenge. This is because the pollutant at issue in that case was trash, rather than phosphorus. Trash has "unique characteristics" that differentiates it from phosphorus. *Nat. Res. Def. Council v. EPA*, 301 F.Supp.3d 133, 143 (D.D.C. 2018) Namely, trash 'is not associated with a single category of dischargers' and that 'flow does not dilute trash; it merely transports it." *Id.* Both of these conditions exist in Lake Chesaplain. Phosphorus is associated with CAFOs and is diluted in the lake. R. at 8. Therefore the phased phosphorus TMDL is permissible.

While the EPA has previously conceded that "establishing daily loads makes perfect sense for many pollutants," that concession was not made in the context of phosphorus, the very pollutant at issue. *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (2006).

The lower court's contention that this interpretation violates the "plain meaning of the statute" is fraught. This is because the case used to justify the use of the plain meaning rule towards the term "daily" is justifiable since the EPA attempted to circumvent plain meaning due to "contextual and policy arguments." *Friends of the Earth v. EPA*, 446 F.3d 140, 142 (2006). This is different from the case at hand because plain meaning is not abandoned due to policy implications, but rather to avoid absurdity. *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 99 (2001). Avoiding absurdity is a requirement of statutory interpretation developed by the common law, not a policy justification. *See, e.g.*, *United States v. Hendrickson*, 26 F.3d 321, 336 (2d Cir. 1994); *United States v. Dauray*, 215 F.3d 257, 264 (2000); *Muszynski*, 268 F.3d at 98. Further, "[c]onsiderable weight should be accorded to an executive department's construction of a

statutory scheme it is entrusted to administer." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). As such, the annual construction of Lake Chesaplain TMDL is permissible.

B. The Five-Year Phased Plan Does Not Run Afoul the Statutory Deadline.

The statutory deadline provision reads as follows: any treatment standards established to meet water quality standards must be established no later than July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). Legislative history indicates that this deadline is an inflexible target. *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976). No administrative action can change this deadline. *Id.*

It is undisputed that the Lake Chesaplain TMDL did not meet this deadline. However, Lake Chesaplain did not require a TMDL until 2014, at the earliest. R. at 8. The lower court's interpretation of the deadline as applied to Lake Chesaplain is unenforceable as a practical or legal matter. This reading of the deadline would make any proposed TMDL that did not immediately take effect invalid. This frustrates the purpose of the CWA because states are expected to implement CWA standards through their own regulatory process. 33 U.S.C. § 1342(b). By truncating state's rights due to the outdated statutory deadline, CWA cooperative federalism goals cannot be served. *New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc*., 452 U.S. 264 (1981). As such, the statutory deadline does not invalid the phased TMDL.

IV. EPA's Adoption of a Credit for Anticipated Pollution Reductions to Reduce the Stringency of Wasteload Allocations for Point Sources for Implementation of the TMDL was Not Arbitrary and Capricious or an Abuse of Discretion.

As noted, EPA regulation governing wasteload allocations specifically allows a 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). While EPA's interpretation of "total maximum daily load" in section 303 of the CWA to include wasteload allocations and load allocations is contrary to law, a TMDL process may provide for a tradeoff system using wasteload allocation credits based on assumed nonpoint source BMPs. Thus, EPA's determination to suggest nonpoint source BMPs and 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.

A. EPA Applied its Regulatory Standards to the Record Before the Agency, Therefore the Highly Deferential "Arbitrary and Capricious" Standard of Review Applies.

EPA's calculation of wasteload and load allocation is a matter of EPA applying its regulatory standards to the record before the agency. Therefore, the highly deferential "arbitrary and capricious" standard of review applies and the Court may not substitute its judgement 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). The court must simply consider whether the agency considered the relevant factors and gave a reasonable basis for its decision.

An agency's decision is arbitrary and capricious if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgement." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d at 704 (quoting *Utah Envtl. Cong. v. Troyer*, 479 F.3d 1269,

1280 (10th Cir. 2007)). "[T]he arbitrary and capricious standard focuses on the rationality of an agency's decision making process rather than on the rationality of the actual decision . . . ." *Wildearth Guardians v. United States BLM*, 870 F.3d 1222, 1233 (quoting *Colo. Wild v. United States Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). Additionally, "this standard of review is 'very deferential' to the agency's determination, and a presumption of validity attaches to the agency action such that the burden of proof rests with the party challenging it." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014).

Thus, the burden of proof rests with CLW to prove that the EPA's decision making process was not rational. CLW points to the absence of any indication that the State of New Union had any intention to require implementation of the BMPs contemplated by the CWIP. However, this does not show any failure by EPA to consider the relevant factors and give a reasonable basis for the agency's decision. While it may be true that in the two years since adoption of the TMDL, the state of New Union has not taken action to implement the BMPs contemplated by the CWIP this is not any showing of lack of rationality in the agency's decision making process. The administrative record before EPA included the 2012 Chesaplain Report, the Chesaplain Commission's supplemental report from July 2016, and the public comments that were before the DOFEC. The evidence and data in the administrative record before the EPA does not run counter to the agency's decision. Rather, EPA applied the agency's regulatory standards to the administrative record in making their determination. Therefore, CLW has not met the burden of proof in showing that the EPA's decision making was arbitrary and capricious or an abuse of discretion. The lower court correctly held that EPA's determination to suggest nonpoint source BMPs and 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.

B. The CWA § 303 TMDL Program is a Planning and Information Program, Not an Implementation Program.

The lower court was correct in determining that the CWA section 303 TMDL program is a planning and information program rather than an implementation program. TMDLs have been defined by the meaning provided at section 303(d)(1)(C) of the CWA, 33 U.S.C. § 1313(d)(1)(C) and 40 C.F.R. § 130.2(i). *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002). Neither the referenced statutory provision nor the referenced regulation includes implementation plans within the meaning of TMDLs. *Id*.

TMDLs established under section 303(d)(1) of the CWA function primarily as planning devices. *City of Arcadia v. United States EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) (quoting *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002)). A TMDL does not, by itself, prohibit any conduct or require any actions. *Id*. The lower court correctly found that EPA's TMDL provides New Union with information for possible BMPs that could be used to achieve compliance with water quality standards. R. at 16. However, nothing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states. *Id*.

As another Circuit Court recognized, state TMDLs and state implementation plans are two different things; "A TDML is defined to be a set measure or prescribed maximum quantity of a particular pollutant in a waterbody, . . . while an implementation plan is a formal statement of how that level of that pollutant can and will be brought down to or be kept under the TMDL." *Bravos v. Green*, 306 F. Supp. 2d 48, 56 (D.D.C. 2004) (quoting *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002). This distinction further indicates that the TMDL and implementation plans are discrete from one another. Thus, the TMDL itself need not include implementation plans.

C. The Standard for Taking Credit for BMPs is Not the "Reasonable Assurance" Standard.

CLW points to a 1991 EPA guidance document asserting 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. EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991). However, the standard for taking credit for BMPs is not the "reasonable assurance" standard. The CWA is silent on the extent to which the EPA may consider and express whether a state will meet the goals it sets (the "reasonable assurance" requirement). *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 306 (3d Cir. 2015).

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. *Chevron,* 467 U.S. at 843-44. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id*. at 844. Here, where the CWA has not spoken to the extent to which the EPA may consider reasonable assurances, the court must next ask whether the agency's answer is based on a permissible construction of the statute. *Id*. at 843. In answering this question, the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

As another Circuit Court recognized, while EPA may consider whether there are reasonable assurances that the TMDL will be implemented as a part of the agency's reasoned decision making in establishing the TMDL, there is no requirement for reasonable assurances. *Am. Farm Bureau Fed'n*. at 309. The lower court correctly found that the "reasonable assurance"

standard has never been adopted by EPA through notice-and-comment rulemaking, and accordingly receives no deference. R. at 16.

CONCLUSION

For the foregoing reasons, appellee the State of New Union respectfully requests that this Court affirm the district court's grant of summary judgment in favor of appellee the State of New Union and direct EPA to approve New Union's Lake Chesaplain TMDL.