TEAM 15

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 21-000123

CONSOLIDATTED WITH

C.A. No. 21-000124

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,
and

THE STATE OF NEW UNION,
Plantiff-Apellee-Cross Appellee,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

On Appeal from the United States District Court for the District of New Union

Brief for Defendant-Appellant, ENVIRONMENTAL PROTECTION AGENCY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 3

A. Facts of the Case 3

B. Procedural History 7

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. The district court erred in its decision granting judicial review based on ripeness challenges regarding the Environmental Protection Agency's adoption of its own TMDL and implementation plan because the plaintiffs cannot demonstrate the requisite fitness and substantial hardship elements of their claim. 10

A. Plaintiffs would not incur a substantial hardship by complying with the EPA's TMDL and CWIP because compliance will not incur substantial costs; the agency's action was not "final"; and the action will not have a direct and immediate effect on their primary day-to-day conduct. 12

B. The facts of the plaintiffs' case are not sufficiently developed to be considered fit for judicial review. 15

II. The district court erred when it ruled that the EPA's decision to reject the state-issued definition of total maximum daily load (TMDL) on the grounds that it failed to include waste load allocations and load allocations because it failed to apply the *Chevron* Test properly. ... 16

III. The Court should reverse the district court's decision to grant summary judgment in favor of appellee Chesaplain Lake Watch since the EPA adopted a TMDL that satisfied the requirements of CWA § 303(d). 20

A. The term "daily" in "total maximum daily load" is not an unambiguous requirement that a TMDL must be stated in a 24-hour period. 21

B. The phased TMDL across a five-year period does not violate the CWA § 303(d) requirements. 23

IV. The district court was correct in denying CLW's motion for summary judgment because the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of waste-load allocations for implementation of Lake Chesaplain TMDL was not arbitrary or capricious or an abuse of discretion. 25

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136, 148-49 (1967) 10, 12

American Farm Bureau Federation v. U.S. EPA,
792 F. 3d 281, 281 (3rd Cir. 2015) *17, 18, 24*

Arkansas v. Oklahoma,
503 U.S. 91, 101 (1992).......... 19

Bennett v. Spear,
520 U.S. 154, 177-78 (1997) 14

Bravos v. Green,
306 F. Supp. 2d 48, 48 (D.D.C. 2004).......... 13

Bullard v. Blue Hills Bank,
135 S. Ct. 1686, 1694 (2015).......... 1

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984).......... 17, 20, 21, 24

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402, 413 (1971).......... 26

City of Arcadia v. EPA,
265 F. Supp. 2d 1142, 1142 (N.D. Cal. 2003) .... passim

Dioxin/Organochlorine Ctr. v. Clarke,
57 F.3d 1517, 1520 (9th Cir.1995) 17

Food and Water Watch,
F. Supp. 3d 62, 80 (D.D.C. 2013).......... 11, 12

Friends of Earth v. EPA,
333 F.3d 184, 186 n. 5 (D.C.C. 2003) 17, 22

Iowa League,
711 F. 3d at 867 15

Kennett v. EPA,
887 F. 3d 424, 433 (8th Cir. 2018) 11, 15

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).......... 27

Nat. Res. Def. Council, Inc. v. E.P.A.,
859 F.2d 156, 166 (D.C.C. 1988) 12

Nat. Res. Def. Council, Inc. v. EPA,
301 F. Supp. 3d 133, 137 (D.D.C. 2018) 24

Nat. Res. Def. Council, Inc. v. Muszynski,
268 F.3d 91, 98 (2d Cir. 2001) 21, 22, 23

Ohio Forestry Ass'n Inc. v. Sierra Club,
523 U.S. 726 (1998) 11

Statutes

28 U.S.C. § 1291 1

33 U.S.C. § 1313(d)(1)(C) 20

40 C.F.R. § 131.2 .... 24, 25

5 U.S.C. § 706 .... 26, 27

Clean Water Act § 402(b), 33 U.S.C. § 1342(b) 3

CWA § 303(d) 4

Rules

Fed. R. App. P. 4 1

Regulations

EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: TMDL PROCESS (1991) 24

STATEMENT OF JURISDICTION

United States Environmental Protection Agency (EPA) appeals from an Opinion and Order denying the EPA's motion for summary judgment in part, granting Chesaplain Lake Watch's motion for summary judgment in part, and granting New Union's motion for summary judgment, entered on August 15, 2021, by the Honorable Judge Remus in the United States District Court for the District of New Union, No. 21-000123 consolidated with No. 21-000124. The district court had subject-matter jurisdiction under the Clean Water Act and under 28 U.S.C. § 1331because the cause of action is provided by federal law. 28 U.S.C. § 1331. Pursuant to Federal Rules of Appellate Procedure 4, EPA, CLW, and State of New Union all filed timely Notices of Appeal. Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 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." 28 U.S.C. § 1291. An order granting summary judgment is appealable because it is a final decision. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

I. 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 review.

II. 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).

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

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

STATEMENT OF THE CASE

A. Facts of the Case

The Lake

Prior to the 1990s, Lake Chesaplain was once a thriving natural ecosystem that supported recreational activities and eco-tourism for the state of New Union. R. 7. A state and national park border the lake's west side and agricultural land and lakefront communities border the east side. R. 7. In the 1990's a number of developments took place: lakeside construction, hog farms, a slaughterhouse, and a sewage treatment plant threatened the water quality of Lake Chesaplain. R. 7. As a result of these developments, Lake Chesaplain's water quality visibly declined. R. 7. The lake experienced reduced water clarity, algae blooms, offensive odors, decline of fish productivity. R. 7. Furthermore, the lake is no longer safe for swimming. R. 7. In addition, property values for the surrounding vacation homes have declined, leading to a decrease in tourism revenues. R. 7.

The Clean Water Act

The Clean Water Act (CWA) provides a comprehensive regulatory system of permitting point source discharge pollutants. R. 5. The act was intended to protect the nation's water quality through a system of "cooperative federalism" where the EPA sets a national standard and states implement that standard, or a more stringent one, through their own regulatory programs. R. 5; *See* Clean Water Act § 402(b), 33 U.S.C. § 1342(b). The Act requires states establish water quality standards (WQS) and gives the EPA authority to approve or disapprove of the state's WQS. R. 5. If a state fails to administer WQS in compliance with the CWA, the EPA will implement their own regulations. R. 5.

Water Quality standards consist of designated uses for each waterbody and may take the form of numerical limits on pollutants and or "narrative standards" enumerating the desired

aesthetic qualities. The state must revise water quality standards no less than every three years; however, once a state has established a WQS for a water body, it must assess that water body every two years. R. 6. When a state finds that water body is below the set WQS, “impaired”, CWA § 303(d), the state must submit a TMDL that not only identifies maximum daily levels of pollutants allowed in the water body, but also allocate the level of loading among CWA permitted point sources while taking into account the non-permitted point sources and natural background sources. R. 6. A state must decide which polluters must reduce their discharge beyond existing permits and by how much.

Lake Chesaplain TMDL and Water Quality Standards Regulatory Actions

In compliance with the New Union WQS, the State classified the Lake as Class AA, a classification reserved for water bodies requiring the highest level of protection in the state. R. 8. The state created a Lake Chesaplain Study Commission in 2008 which found that the lake was suffering from eutrophication, reduced dissolved oxygen and water clarity, and the algae growth was resulting in a noxious odor. R. 8. The cause of the algae growth was high levels of nutrient phosphorus. R. 8. The commission determined that phosphorus levels of 0.014 mg/l would be the minimum standard to support a healthy ecosystem. R. 8. They found that the lake held between 0.02 mg/l to 0.34 mg/l of phosphorus making the lake’s water body impaired. R. 8.

In the next triennial WQS review, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality standard of 0.014 mg/l. R. 8. Since Lake Chesaplain violated this standard in addition to the water quality criteria for dissolved oxygen, odors, and water quality, DOFEC included Lake Chesaplain on its impaired waters list and submitted it to the EPA in 2014. R. 8. Although DOFEC failed to propose a TMDL for Lake Chesaplain in its list of impaired waters, the EPA did not object to the State’s submission.

In 2015, Plaintiff CLW notified both New Union and the EPA that it would sue if neither established a TMDL for Lake Chesaplain. R. 8. As a result, DOFEC issued a supplemental report calculating that in order to reach 0.014 mg/l of phosphorus, the maximum loading could not exceed 120 metric tons (mt) annually. The existing loading calculated between the point sources, sewerage treatment plant and slaughterhouse, and the nonpoint sources, the manure from concentrated animal feeding operations (CAFO's), agricultural sources, and private septic tanks, totaled 180 metric tons with the non-point sources producing the most phosphorus input. The 2016 report found that neither point sources had any permitting limit for phosphorus discharge into the lake.

In October 2017, DOFEC proposed to implement the TMDL for Lake Chesaplain through an equal phased reduction in phosphorus discharges by both point and nonpoint sources. R. 9. The TMDL proposed the reduction to be phased over a five-year period: "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." R. 9. The TMDL proposed that the point source reductions would be achieved through permit limits, while the nonpoint source reductions would be achieved through BMP programs. R. 9.

Regarding the nonpoint sources, the BMPs for agricultural sources included "modified feeds for animal production facilities,…physical and chemical treatment of manure streams, and restrictions on manure spreading at times when soil is frozen or saturated." R. 9. BMPs for private septic systems included "increased septic tank inspection and pumping stations." R. 9.

Several affected parties objected to DOFEC's proposed TMDL to require equal reduction among point and nonpoint sources. R. 9. Residential lakefront homeowners objected to the septic

tank maintenance requirements, arguing it would be too expensive. R. 9. The slaughterhouse and Chesaplain Mills objected and argued that the proposed plan to reduce discharges by 35% would require expensive phosphorus treatment systems. R. 9. Chesaplain Lake watch objected to taking credit for the proposed BMPs arguing the BMPs would be insufficient to achieve a 35% reduction in nonpoint phosphorus inputs and because the state lacked the statutory authority to enforce BMPs. R. 10.

The EPA rejected the proposed TMDL that consisted of only the 120 mt annual maximum and did not include any wasteload allocations or load allocations. R. 10. The EPA adopted the original DOFEC proposal requiring a 35% reduction of annual phosphorus discharge by both point and nonpoint sources by limiting permits for point sources and best management practices for non-point sources. The two point source facilities have requested hearings due to the cost of compliance and the state has failed to take any steps to enforce the BMPs for the non point sources. The state has failed to modify the point sources state issue permits to reflect a reduction in phosphorus as outlined in the CWIP.

Furthermore, the slaughterhouse's NPDES permit expired in November 2018. R. 10. Similarly, Chesaplain Mill sewage treatment plant's NPDES permit expired in February 2019. R. 10. Both plants remain in operation due to an administratively approved permit renewal. R. 10. Consequently, neither plants are subject to any phosphorus discharge limitations. R. 10. The State of New Union has not taken any steps to require phosphorus reduction BMPs by nonpoint sources. R. 10. In addition, the state-issued permits for the hog CAFOs have not been modified to include a phosphorus reduction plan. R. 10. As a result, Lake Chesaplain waters do not comply with water quality standards. R. 10. The ecosystem continues to suffer from toxic volumes of phosphorus input from both the point and nonpoint sources. R. 5.

B. Procedural History

This appeal is from an order of the United States District Court for the District of New Union, issued on August 15, 2021. On January 14, 2020, Plaintiff New Union filed action No. 66-CV-2020, seeking a declaration that EPA's rejection of its proposed TMDL and the regulations governing TMDL submissions are invalid. R. 5, 10. On February 16, 2020, Plaintiff Chesaplain Lake Watch filed action No. 73-CV-2020, seeking a declaration that the substantive provisions of the EPA-proposed TMDL are insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary, and capricious. R. 5, 10.

On March 22, 2020, the district court granted unopposed motions to consolidate the two actions. R. 10. On July 1, 2020, the EPA filed the administrative record with the district court. R. 10. Parties filed cross-motions for summary judgment. R. 5. On hearing, the district court denied the EPA's motion for summary judgment in part, granted Chesaplain Lake Watch's motion for summary judgment in part, and granted New Union's motion for summary judgment. R. 5.

Thus, the district court vacated the EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL. R. 5. Following the issuance of the United States District Court for the District of New Union, Chesaplain Lake Watch, the State of New Union, and the United States Environmental Protection Agency each filed a timely Notice of Appeal. R. 2.

SUMMARY OF THE ARGUMENT

I. The district court's ripeness determination was incorrect because (1) the facts of the case are not sufficiently developed to be considered fit for judicial review and (2) the plaintiffs would not incur a substantial hardship by complying with the EPA's "total maximum daily load" TMDL and Chesaplain Watershed Implementation Plan (CWIP). Although the fitness inquiry of ripeness is straightforward, the hardship inquiry requires a determination of whether compliance

will incur substantial costs to the parties, whether the agency's action was not "final" and whether the action will have a direct and immediate effect on their primary day-to-day conduct of the parties.

In the present case, CLW and New Union have not demonstrated that they face substantial hardship due to any economic costs. Although administrative hearings were held to discuss the cost of compliance with the EPA's TMDL and implementation plan, the plaintiffs in this case will not bear any significant economic costs that are particularly unique to them. Additionally, the plaintiffs were given five years to reach the first compliance point which is ample time for them to prepare. Lastly, New Union has taken no steps to modify or reduce any phosphorus standards since the EPA adopted the TMDL and implementation plan; and they continue to violate water quality standards. Thus, neither CLW nor New Union will face substantial economic costs or adverse future events because of the EPA's TMDL and implementation. The adverse future events and economic costs of not implementing the EPA's TMDL far outweigh the cost of implementation.

Since the plaintiffs are unable to prove that they face any substantial economic costs or adverse future events because of the EPA's TMDL and implementation plan, they are unlikely to prove the hardship element required for the ripeness inquiry. For the above reasons, this Court should reverse the district court's decision granting judicial review in favor of the EPA based on the ripeness of the case.

The district court was incorrect in granting summary judgment in favor of New Union, rejecting the Lake Chesaplain TMDL, and vacating the EPA's definition of the "total maximum daily load" found in 40 C.F.R. § 130.2(i). Although the Chesaplain Lake Watch (CLW) argues that the language of a statute is vague or ambiguous, this Court should apply the Supreme

Court's *Chevron* Test standard to assess the validity of an agency's statutory interpretation. Additionally, the court must determine whether Congress has spoken directly to the interpretation in question based on the statutory language, legislative history, and structure. Finally, both the EPA and CLW argue that this interpretation is correct; only New Union is arguing that it is not. Therefore, the EPA's TMDL which requires WLAs and LAs does not contradict the plain meaning and intent of Congress in enacting CWA § 303(d) and the regulation of 40 C.F.R. § 130.2(i) is not contrary to law under *Chevron*. For the reasons discussed above, this Court should reverse its decision to vacate the EPA's definition of the "total maximum daily load" in CWA § 303(d).

This Court should reverse the district court's decision to grant summary judgment in favor of appellee Chesaplain Lake Watch since the EPA adopted a TMDL that satisfied the requirements of CWA § 303(d). The EPA's adoption of a TMDL for the Lake Chesaplain Watershed that consisted of an annual pollution loading reduction to be phased over a five-year period conforms with the CWA § 303(d) requirements for a valid TMDL. Additionally, the EPA's adoption of a TMDL is supported by the *Chevron* analysis which gives considerable deference to the administrative agency's interpretations. Since great deference should be granted to administrative agencies, this Court should also extend great deference to the EPA for its decision to approve a TMDL that was phased as an annual reduction. Furthermore, the EPA was not arbitrary or capricious in approving such a TMDL as the annual reduction plan is designed to lead to acceptable phosphorus levels. Lastly, the district court erred in holding that a phased percentage reduction TMDL violates the CWA § 303(d) requirements because a phased approach may be necessary where nonpoint source controls are involved. The *Chevron* analysis also demonstrates how the phased reduction TMDL satisfies the CWA § 303(d) requirements.

Thus, the EPA-approved TMDL that includes a phased reduction plan over a five-year period conforms with the CWA requirements for a valid TMDL. Therefore, this Court should reverse its decision to grant summary judgment in favor of CLW on its challenge to the validity of a phased annual TMDL.

The district court was correct in denying CLW's motion for summary judgment because the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of waste-load allocations for implementation of Lake Chesaplain TMDL was not arbitrary or capricious or an abuse of discretion. The EPA allows a credit against the maximum daily load for loading reductions achieved through "Best Management Practices," ("BMPs"). 40 C.F.R. § 130.2(e). In this case, the EPA's adoption of proposed BMPs was permissible because the credit for anticipated BMP pollution reductions. Furthermore, neither the facts nor the Plaintiffs suggest that the EPA violated any necessary procedural requirements. For the foregoing reasons, the EPA-approved TMDL that adopted a credit for certain proposed BMPs was not arbitrary or capricious or an abuse of discretion.

ARGUMENT

I. The district court erred in its decision granting judicial review based on ripeness challenges regarding the Environmental Protection Agency's adoption of its own TMDL and implementation plan because the plaintiffs cannot demonstrate the requisite fitness and substantial hardship elements of their claim.

Ripeness is a constitutional doctrine which requires that all necessary administrative actions that have a concrete effect on an agency be taken before a dispute may be subject to judicial intervention. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). According to the Supreme Court, a ripeness determination requires judicial evaluation of the fitness of the issues for judicial review and whether possible prejudice exists to the parties pending further agency implementation action. *Id.* at 149. The fitness element of the ripeness

inquiry rests on whether a case would benefit from further factual development. *Kennett v. EPA*, 887 F. 3d 424, 433 (8th Cir. 2018). The other factor looks at whether the parties suffered harm, both financially and as the result of uncertainty-induced behavior modification in the absence of judicial review. *Id.* To properly evaluate the above factors, the court must consider (1) whether delayed review would cause impending injury or hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative actions, and (3) whether the courts would benefit from further factual development of the issues presented. *Food and Water Watch*, F. Supp. 3d 62, 80 (D.D.C. 2013) (quoting *Ohio Forestry Ass'n Inc. v. Sierra Club,* 523 U.S. 726 (1998)).

If a court finds that a claim is ripe, the court should balance the factors above and allow for judicial review. *See Id.* However, if the plaintiff is unable to prove that any of the elements of the ripeness inquiry exist, then the claim is not ripe for judicial review. *See Id.* Claims that lack ripeness are subject to dismissal for lack of subject matter jurisdiction. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1142 (N.D. Cal. 2003).

The evidence in the record demonstrates that this case is not ripe for judicial review because the plaintiffs failed to show that the EPA's rejection of New Union's TMDL and the adoption of its own TMDL and the Chesaplain Watershed Implementation Plan (CWIP) did not cause them substantial hardship to the parties. The EPA's mere adoption of its own Lake Chesaplain TMDL and implementation plan does not cause the plaintiffs economic hardship and does not force them to make decisions under a cloud of uncertainty because the EPA's actions do not have a direct and immediate effect on the plaintiffs. Furthermore, since the EPA's actions are not "final", further factual development is necessary in order for this case to be considered ripe,

which lacks in the matter herein. Therefore, this Court should reverse the district court's decision granting judicial review in favor of the plaintiffs based on ripeness of the case.

A. Plaintiffs would not incur a substantial hardship by complying with the EPA's TMDL and CWIP because compliance will not incur substantial costs; the agency's action was not "final"; and the action will not have a direct and immediate effect on their primary day-to-day conduct.

A hardship occurs when a petitioner is forced to make the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for non-compliance. *Abbott Laboratories*, 387 U.S. at 152; *Food and Water Watch*, F. Supp. 3d at 80 (quoting *Nat. Res. Def. Council, Inc. v. E.P.A.,* 859 F.2d 156, 166 (D.D.C. 1988). The challenged administrative action must have a direct and immediate effect on the primary conduct of the petitioner. *Nat. Res. Def. Council, Inc.*, 859 F.2d at 166. A petitioner cannot show hardship by merely demonstrating a speculative or future harm. *Id*. Furthermore, the hardship inquiry neither considers the possibility that the plaintiff must make capital budgeting decisions under a cloud of uncertainty, nor the fact that the plaintiff agency may incur future expense in challenging the regulations in a later permit or enforcement proceeding. *Id.*; *Food and Water Watch*, F. Supp. 3d at 80.

1. <u>Plaintiffs cannot demonstrate that they will incur substantial economic and non-economics costs by complying with the EPA's TMDL and CWIP.</u>

In *City of Arcadia v. EPA*, the plaintiffs claimed to bear significant economic costs in complying with the EPA's trash TMDLs and implementation plan. *City of Arcadia*, 265 F. Supp. 2d at 1157. Furthermore, the plaintiffs also claimed to bear adverse direct events or conditions because of the EPA's TMDL. *Id*. There, the court held that the EPA's action was not ripe for review because the agency's action would only cause minimal hardship to the parties due to cost. *Id.* at 1156. The court reasoned that even if compliance with the EPA's TMDL and CWIP resulted in some economic costs, the three-year compliance point gave them ample time to

budget and prepare for proper implementation. *Id.* at 1157. Additionally, the plaintiffs could not point to a single future adverse event or condition that was fairly certain to happen because of the EPA's trash TMDL. *Id*. Furthermore, the EPA's adoption of the TMDLs and guidelines did not impose any obligations on plaintiffs and were subject to revision before any obligations were imposed. *Id*.

In the present case, the plaintiffs have not demonstrated that they face substantial hardship due to any economic costs. Although administrative hearings were held to discuss the cost of compliance with the EPA's TMDL and implementation plan, R. 10., like the City of Arcadia, who also claimed to bear economic costs in complying with the TMDLs, the plaintiffs in this case do not bear any significant economic costs that are particularly unique to them. *City of Arcadia*, 265 F. Supp. 2d at 1157. Additionally, New Union was given five years to reach the first compliance point which is ample time. R. 11. Lastly, New Union has taken no steps to modify or reduce any phosphorus standards since the EPA adopted the TMDL and implementation plan, and the plaintiffs continue to violate water quality standards. R. 10. Thus, New Union will not face any substantial economic costs or adverse future events because of the EPAs TMDL and implementation.

Since the plaintiffs are unable to prove that they face any substantial economic costs or adverse future events because of the EPA's TMDL and implementation plan, they are unlikely to prove the hardship element required for the ripeness inquiry.

2. <u>The EPA's issuance of its own TMDL and CWIP was not "final" agency action, so the plaintiffs will not suffer harm as the result of uncertainty-induced behavior modification in the absence of judicial review.</u>

In *Bravos v. Green*, the EPA issued its own TMDL and implementation plan, and the court held that EPA's approval of a TMDL and implementation plan did not constitute final agency action. *Bravos v. Green*, 306 F. Supp. 2d 48, 48 (D.D.C. 2004). Final agency action

means that the agency's position must be definitive and have a direct effect on the day-to-day business of the plaintiffs. *Id.* at 49. The court based its reasoning on the fact that agency action (1) must mark the completion of the agency's decision-making process and not be of a merely tentative or interlocutory nature and (2) must be one by which rights or obligations have been determined; or the action must one from which legal consequences will flow to be considered "final". *Id.* at 81 (*citing Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Since final agency action is required for the court to make a review under the Administrative Procedure Act (APA), the court concluded that the EPA's adoption of the TMDL was not ripe for review. *Id.* at 49.

Here, the EPA's implementation plan did not specify whether or how the proposed National Pollutant Discharge Elimination System (NPDES) permits and the best management practices (BMPs) measures would be enforced. R.10. Additionally, the EPA's action will require final implementation by New Union. R. 11. Furthermore, the plants are continuing to operate under expired permits. R. 10. Therefore, the EPA's actions have not had any substantial consequences nor stopped the day-to-day actions of New Union since New Union will ultimately be the one who implements the state issued NPDES permits and BMP measures. R. 11. Thus, these facts suggest that the implementation plan is tentative in nature and without any legal consequences or enforcement.

Because the EPA's current actions are multi-stage in nature, judicial intervention at this point would inappropriately interfere with further administrative actions. Therefore, the Court should not consider them to be final agency action.

3. Compliance with the EPA's TMDL and CWIP will not have an immediate and direct effect because the EPA has given New Union ample time to become compliant.

In *Arcadia*, the EPA gave the city three years to reach compliance with the regulations in the TMDL. *City of Arcadia*, 265 F. Supp. 2d at 1157. The court held that the EPA's TMDL and

implementation plan were merely informational tools that did not prohibit any conduct or require any actions. *Id.* at 1157-59. The court reasoned that the TMDL simply forms the basis for further administrative actions, such as access to federal grant funds. *Id*. Thus, judicial intervention would likely interfere with further administrative actions. *Id*. The court decided it was likely that the compliance dates and compliance points could be altered or abolished altogether because the city had three years before the first compliance point. Therefore, adequate time to file suit existed if and when the harm became imminent and certain. *Id*.

Here, the plaintiffs are unlikely to establish that the EPA's adoption of the implementation plan was final agency action. Like the City of Arcadia, which was given a three-year timeframe to comply with the EPA's TMDL and implementation plan, New Union was given five years to become compliant with the EPA's TMDL and implementation plan. R. 10. Additionally, the EPA's TMDL and implementation plan only affects New Union's eligibility for federal water quality planning funds, and is not necessarily "final" in nature. R. 11. Therefore, like the court in Arcadia, this Court should conclude that a five-year compliance standard provides plenty of time to make amendments and submit other administrative actions that will be relevant to a later action.

Since the plaintiffs are unable to prove that the EPA's TMDL and implementation plan will have a direct and immediate effect on their conduct or that they will face substantial economic costs, or will suffer direct and adverse future events, this Court should rule that the requisite hardship elements for ripeness inquiry are not met.

B. The facts of the plaintiffs' case are not sufficiently developed to be considered fit for judicial review.

The fitness element of the ripeness inquiry rests on whether a case would benefit from further factual development. *Kennett*, 887 F. 3d at 433 (*citing Iowa League*, 711 F. 3d at 867). If

the case would benefit from further factual development on the issues, then it will not be considered fit for review. *City of Arcadia*, 265 F. Supp. 2d at 1155-59. Likewise, if the facts of a case have been fully developed, then the case is considered fit for review. *Id.*

In *City of Arcadia*, the existing NPDES permit imposed no obligations on the plaintiff in connection with the state trash TMDLs and implementation plan. *Id.* at 1155. Additionally, the plaintiffs argued that the EPA failed to use the "best science" and failed to carefully consider suggestions on how to structure the TMDL program to be more effective and flexible. *Id.* at 1159. There, the court held that the case would benefit from further factual development on the issues and would not be fit for judicial review. *Id.* at 1155. The court reasoned that since the TMDLs are not self-executing and require issuance of state regulations for implementation, delaying review will enable the court to determine whether the TMDL program could have been structured more efficiently. *Id.* at 1159.

Like *City of Arcadia*, the facts surrounding the obligations imposed by state-issued NPDES permits and whether the EPA's TMDL and CWIP was not consistent with scientific evidence needs to be further elucidated. Therefore, this case would benefit from further factual development to determine its fitness for judicial review.

Ultimately, no evidence exists that the plaintiffs will undergo any undue hardship to comply with the EPA's requirements, that the EPA's replacement of the TMDL with their own was not a final agency action, and that the case would likely benefit from further development of the facts. Thus, the EPA's decision to replace the TMDL guidelines is not ripe for review.

II. The district court erred when it ruled that the EPA's decision to reject the state-issued definition of total maximum daily load (TMDL) on the grounds that it failed to include waste load allocations and load allocations because it failed to apply the *Chevron* Test properly.

The statutory language of the Clean Water Act (CWA) says the Environmental Protection Agency may reject a state-regulatory body's "total maximum daily load" (TMDL) proposal if the proposal fails to include waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources in its definition, regardless of the plain meaning. *See* 40 C.F.R. § 130.2(g)-(i); *Friends of Earth v. EPA,* 333 F.3d 184, 186 n. 5 (D.C.C. 2003); *Dioxin/Organochlorine Ctr. v. Clarke,* 57 F.3d 1517, 1520 (9th Cir.1995). However, plaintiffs may apply a challenge when the plain language of an agency's statute is vague or ambiguous. *American Farm Bureau Federation v. U.S. EPA*, 792 F. 3d 281, 281 (3rd Cir. 2015).

When the plaintiffs claim that the language of a statute is vague or ambiguous, the courts apply the *Chevron* Test. *Id.* at 294. The *Chevron* Test is a standard set out by the United State Supreme Court to assess the validity of an agency's statutory interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. Chevron*, 467 U.S. 837 (1984). The first step of the test requires the court to inquire whether Congress's intent when drafting the statute was clear. *American Farm Bureau Federation,* 792 F. 3d at 281. If the intent is clear, then the matter ceases to exist. *Id*. Furthermore, the court is the final authority on issues of statutory construction and must reject agency interpretations which are contrary to clear congressional intent. *Id*. On the other hand, if the court determines that a statute's interpretation is expressed ambiguously, the court proceeds to the second step of *Chevron*. *Id.* at 294. Under the second step, the agency's interpretation is given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id*. Then, the court must determine whether Congress has spoken directly to the interpretation in question based on the statutory language, legislative history, and structure. *Id*.

Plaintiffs argue that the interpretation of "total" within the CWA's definition of total maximum daily load (TMDL) is vague. R. 13. Although the plaintiffs argue that the plain language of the statute is vague, the EPA's decision to reject the state-issued definition of "total maximum daily load" is not contrary to law because the long-accepted definition of TMDL demonstrates the agency's intent to include waste load allocations (WLA) and load allocations (LA). This shows that the agency's interpretation is congruent with the structure of the Clean Water Act CWA § 303(d), passes the *Chevron* Test, and is a reasonable interpretation of the statute.

In the landmark case *American Farm Bureau v. EPA*, American Farm Bureau argued that the Environmental Protection Agency exceeded its statutory authority by including WLAs for point sources and LAs for nonpoint sources in its definition of "total maximum daily load". *American Farm Bureau Federation,* 792 F. 3d at 287. The district court ruled in favor of the EPA and held that the EPA's definition of TMDL including WLA and LA was reasonable. On appeal, the Third Circuit affirmed the district court's decision. *Id*.

The Third Circuit applied the first step of *Chevron* by considering the case law and the statutory structure and purpose of the CWA. *Id.* at 295-301. The court acknowledged that jurisprudence demonstrates that many circuit and district courts have defined TMDLs to include WLAs and LAs, implying that the EPA's interpretation did not present a problem. *Id*. at 195. The Third Circuit stated on many occasions that it "gives considerable deference to the agency and only inquires whether the agency made a reasonable policy choice in reaching its interpretation". *Id*. Likewise, the court also noted that the Supreme Court gives deference to a government agency's interpretation when that agency is charged with administering a complex statutory scheme that requires technical or scientific sophistication. *Id.* at 296. Therefore, because the

Clean Water Act falls within this category, the statutory language of the CWA, which states the "total maximum daily load" was designed to be a comprehensive framework for pollution designed to restore and maintain the ecological integrity of the nation's waters, demonstrates the fact that "total maximum daily load" is broad enough to include the EPA's WLA and LA allocations. *Id.* at 299 (*citing* 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)). Furthermore, the court reasoned that the EPA's construction of TMDL to include WLA and LA in the total comports with the Clean Water Act's structure and purpose because word "total" is open to multiple interpretations, one being that the sum of its constituent parts consists of point and nonpoint sources. *Id.* at 297-99.

Lastly, the Third Circuit performed the second step of *Chevron* by considering the legislative history to determine whether the EPA made a reasonable policy choice in its interpretation. *Id.* at 307. Although the term "total maximum daily load" is not explicitly defined in the Clean Water Act, the court noted that states have traditionally relied on the EPA's definition of a TMDL to include WLA allocations for point sources and load allocations from nonpoint sources when the states fail to define their own TMDLs. *Id.* at 288-291. Further, the court reasoned that the EPA previously drafted "thousands of TMDLs", each identifying WLA allocations from point sources and load allocations from nonpoint sources as part of the definition of TMDL. *Id.* at 291. The court considered the legislative history and Congressional acquiescence as evidence to support the fact that the EPA had reasonably carried out Congress' directives in administering the TMDL section of the Clean Water Act to include WLA and LA. *Id.* at 308.

Therefore, like the trial court in *American Farm Bureau*, which held that the EPA did not exceed its statutory authority by including WLA and LA in its definition of TMDL, the EPA's

interpretation here also did not exceed its statutorily authority by including WLA and LA in its definition of TMDL because it is congruent with the Congressional purpose and structure of the CWA. Thus, this Court should also rule that the EPA's decision to reject the state-issued definition of TMDL does not contradict the plain meaning of "total" in the Clean Water Act.

III. The Court should reverse the district court's decision to grant summary judgment in favor of appellee Chesaplain Lake Watch since the EPA adopted a TMDL that satisfied the requirements of CWA § 303(d).

The EPA's adoption of a TMDL for the Lake Chesaplain Watershed that consisted of an annual pollution loading reduction to be phased over a five-year period conforms with the CWA § 303(d) requirements for a valid TMDL. After a state identifies impaired water standards within its borders, the state must establish a "total maximum daily load" ("TMDL") for each pollutant causing the impairment. 33 U.S.C. § 1313(d)(1)(C). Each state must submit their TMDLs for approval. 33 U.S.C. § 1313(d)(2). The CWA states that a TMDL "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). As stated above, the CWA does not further define the term "TMDL," but the EPA has defined TMDL as the sum of the waste-load allocations allotted to point sources, the sum of load allocations allotted to nonpoint sources, and a margin of safety. 40 C.F.R. § 130.2(i).

Using the *Chevron* analysis, the courts must first inquire whether Congress has directly spoken on the issue. *Chevron, U.S.A.*, 467 U.S. at 842. If Congress' intent is clear, there is no further questioning. *Id.* However, if the court determines that Congress has not directly addressed the issue, the court is unable to impose its own interpretation of the statute. *Id.* at 842-43. Second, if Congress is "silent or ambiguous" with respect to the issue at question, the court must

consider whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* In assessing whether the agency's interpretation is based on a "permissible construction," the court will consider whether the interpretation is "arbitrary, capricious, or manifestly erroneous to the statute." *Id.* at 844. This analysis gives considerable deference to the administrative agency's interpretations. *Id.*

The EPA-approved TMDL for the Chesaplain Lake meets the requirements for a valid TMDL. First, the term "daily" in "total maximum daily load" is not restrictive in its literal meaning, and an annual pollution loading is sufficient. Second, the phasing of the TMDL in terms of a percentage reduction over a five-year period is a permissible interpretation of the statute's meaning.

A. The term "daily" in "total maximum daily load" is not an unambiguous requirement that a TMDL must be stated in a 24-hour period.

The district court erred in holding that the CWA requires the EPA to establish TMDLs in terms of daily load allocations. Statutory analysis begins with looking at the plain meaning of the statute. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Plain meaning can be determined by applying a word's ordinary meaning. *Id.* If there are two or more reasonable meanings of a word, the text should be placed in the context of the entire statutory structure. *Id.* Furthermore, a court should avoid "absurd results" and "internal inconsistencies" in the statute. *Id.* In addition, the court shall also apply the above-mentioned *Chevron* analysis. *See Chevron, U.S.A., Inc.*, 467 U.S. 837 (1984). Finally, if the above analysis does not resolve the question of interpretation, great deference should be given to the administrative agencies. *Id.*

Neither the United States Supreme Court nor this Court has determined what "daily" means in terms of "total daily maximum load." However, the Second Circuit and the D.C. Circuit Court of Appeals differed as to the meaning of the term "daily" with respect to "total

daily maximum load." In *Natural Resources Defense Council, Inc. v. Muszynski*, the Second Circuit Court of Appeals held that an EPA-approved TMDL that was based on an annual period satisfied the CWA § 303(d) requirements. *Muszynski*, 268 F.3d at 99. In its analysis, the court looked at the plain meaning of the term "daily" and the intent of Congress. *Id.* at 98-99. The court reasoned that certain pollutants, such as phosphorus, do not require daily regulation as "harmful consequences of excessive amounts may not occur immediately." *Id.* at 99. In addition, the court reasoned that such a restrictive and limited construction of the term "daily" to only mean a 24-hour period was "absurd" and not the intention of Congress. *Id.*

In contrast, in *Friends of Earth, Inc. v. EPA,* the D.C. Circuit Court of Appeals determined that "daily" unambiguously meant only "daily" in the plain meaning of the word: a 24-hour period. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C.C. 2006). In this case, the EPA approved a TMDL that limited the "annual discharge of oxygen-depleting pollutants" and limited the "seasonal discharge of pollutants contributing to turbidity." *Id.* at 143. In applying the *Chevron* analysis and looking at the CWA's statutory language, the court reasoned that Congress unambiguously and clearly intended the term "daily" to mean nothing other than "daily." *Id.* at 145-46.

The Second Circuit Court of Appeals' analysis yields a more reasonable conclusion and demonstrates how, in the present case, the EPA-approved TMDL that is phrased as an annual reduction does not violate the CWA § 303(d) requirements. Both the *Chevron* analysis and the *Muszynski* court's approach illustrate how an annual reduction is valid. First, Congress has not spoken directly to the issue of the interpretation of the term "daily." Therefore, the intent of Congress must be determined. Second, although the plain meaning of the term "daily" does suggest a 24-hour period, "daily" is subject to multiple meanings. The term should be analyzed

in conjunction with the entire statutory scheme to avoid "absurd results" and "internal inconsistencies." In analyzing the term "daily" with respect to the rest of the statute, it would be unreasonable to interpret "daily" so narrowly because the entire statute is aimed at ultimately reducing the total pollutant level.

Furthermore, the interpretation of the term "daily" as including annual is a "permissible construction" of the CWA. The purpose of the CWA was to establish TMDLs for many different pollutants to reduce water pollution. As described in *Muszynski*, not all pollutants require daily reduction periods, and negative effects are only seen after longer periods. *Muszynski*, 268 F.3d at 99. Like *Muszynski*, the TMDL in the present case seeks to reduce phosphorus levels. As the court reasoned in *Muszynski*, the amount of phosphorus levels that a waterbody can tolerate fluctuate depending on the season and type of waterbody. *Id.* Such a pollutant in the present case does not require daily reduction regulation. Such a narrow interpretation would be "absurd" and result in "internal inconsistencies" as the statute seeks to regulate a variety of pollutants, not all of which require daily reduction regulation. *Id.* at 98.

Finally, since great deference should be granted to administrative agencies, this Court should also extend great deference to the EPA for its decision to approve a TMDL that was phrased as an annual reduction. The EPA was not arbitrary or capricious in approving such a TMDL as the annual reduction plan is designed to lead to acceptable phosphorus levels. Therefore, deference is appropriate because the EPA is reasonable in its belief that a TMDL phrased as an annual reduction conformed with the CWA § 303(d) requirements. For the foregoing reasons, a TMDL that is phrased as an annual reduction is a permissible interpretation of the term "daily."

B. The phased TMDL across a five-year period does not violate the CWA § 303(d) requirements.

The district court erred in holding that a phased percentage reduction TMDL violates the CWA § 303(d) requirements. As this determination requires an interpretation of the statute, the above *Chevron* analysis applies. A phased approach is sometimes required to establish a control measure based on a TMDL. EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: TMDL PROCESS (1991). A phased approach may be necessary where nonpoint source controls are involved. *Id.* Furthermore, a waterbody's TMDL for a particular pollutant "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 131.2. *See also Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 137 (D.D.C. 2018).

American Farm Bureau Federation v. EPA demonstrates how phased reductions over a time period conform with the CWA § 303(d) requirements. *Am. Farm Bureau Fed'n.*, 792 F.3d 281, 281 (3rd Cir. 2015). In this case, the court held that the CWA's directive to establish TMDLs was ambiguous and subject to multiple meanings. *Id*. The court approved a two-part phased reduction that sets total completion dates over five years in the future to limit point sources and nonpoint sources. *Id.* at 292. In applying the *Chevron* analysis, the court reasoned that although Congress required the EPA to establish a TMDL, it did not specify how to do so. *Id.* at 298. Furthermore, the court reasoned that it was consistent with the CWA for the EPA to set target dates or deadlines to achieve applicable water quality standards for all impaired waters. *Id.* at 300.

Here, the *Chevron* analysis also demonstrates how the phased reduction TMDL satisfies the CWA § 303(d) requirements. First, Congress has not spoken directly to the issue of whether a phased reduction is a permissible interpretation of the meaning of TMDL. Although Congress has not directly spoken on the issue of phasing over a time period, it is a "permissible construction" of the CWA. *Chevron, U.S.A.*, 467 U.S. at 844. Similar to *American Farm Bureau*

Federation, this Court should hold that a plan that includes phasing over a five-year period is not an "arbitrary, capricious, or manifestly erroneous" interpretation of the CWA. 40 C.F.R. § 131.2 specifically permits that a TMDL for a particular pollutant can be employed in "any appropriate measure" to reduce and eliminate the pollutant. It is not "arbitrary, capricious, or manifestly erroneous" for the EPA to determine a phased reduction plan that was to be implemented over a five-year period is an appropriate measure to reduce the pollutant levels of phosphorus in the Chesaplain Lake. R. 9.

Furthermore, great deference should be given to the EPA's determination that such a phased reduction plan was a necessary and permissible interpretation of the CWA requirements. The EPA created a plan that they believed would effectively and efficiently reduce the pollutant levels of phosphorus in Lake Chesaplain. R. 9. Thus, the EPA-approved TMDL that includes a phased reduction plan over a five-year period conforms with the CWA requirements for a valid TMDL.

IV. The district court was correct in denying CLW's motion for summary judgment because the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of waste-load allocations for implementation of Lake Chesaplain TMDL was not arbitrary or capricious or an abuse of discretion.

The EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of waste-load allocations was neither arbitrary nor capricious. The EPA allows a credit against the maximum daily load for loading reductions achieved through "Best Management Practices," ("BMPs"). 40 C.F.R. § 130.2(e). The EPA stated that if BMPs "make more stringent load allocations practicable, then wasteload allocations can be made less stringent." *Id.* Therefore, the TMDL process accounts for the possibility of "nonpoint source control tradeoffs." *Id.*

In assessing a reviewing agency's action decisions, the courts apply a standard of review set out in Section 706 of the Administrative Procedure Act. 5 U.S.C. § 706; *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). The APA sets out that a court shall hold agency actions as unlawful that fail to meet six standards. 5 U.S.C. § 706. In every case, the court shall look to whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or whether the agency action violated constitutional, statutory, or procedural requirements. *Id.* In some cases, the court is to apply a "substantial evidence" standard and review whether the action was supported by "substantial evidence." *Volpe*, 401 U.S. at 414. However, this standard is only applied when an agency action is taken pursuant to a rulemaking provision of the APA or is based on a public adjudicatory hearing. *Id.* In other situations, a court may employ a *de novo* review of the action and set the action aside if it was "unwarranted by the facts." *Id.* (quoting 5 U.S.C. § 706(2)(F)). This *de novo* review standard is only applied when the action is "adjudicatory in nature and the agency's fact-finding procedures are inaccurate." *Volpe*, 401 U.S. at 414.

Here, the EPA's adoption for proposed BMPs was permissible because the credit for anticipated BMP pollution reductions was not arbitrary, capricious, or an abuse of discretion. In assessing whether an agency's action was "arbitrary or capricious or an abuse of discretion," the court will first examine whether the agency acted within its scope of authority. *Volpe*, 401 U.S. at 417. If an agency is found to be acting within its scope of authority, the court will then consider whether the agency's action was "arbitrary or capricious." *Id.* This is a narrow standard of review that requires the court to consider whether the agency's action was based on a "consideration of relevant factors" and whether there was a "clear error of judgment." *Id.* at 417. In applying this standard of review, the court is unable to supply its own judgment for that of the

agency. *Id.* Finally, the courts will consider whether the agency's action followed all procedural requirements. *Id.*

Motor Vehicle Manufacturers Association of U.S. v. State Farm Mutual Automobile Ins. Co. illustrates the applicable standard of review for assessing an agency's action. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In *Motor Vehicle Mfs. Ass'n of U.S.*, the National Highway Traffic Safety Administration rescinded crash protection requirements of the federal motor vehicle safety standard that required that newer vehicles be equipped with passive restraints to protect the occupants of the vehicle in case of collision. *Id.* at 34-35. In applying the § 706 APA review standard described above, the court held that the Administration's actions were "arbitrary and capricious." *Id.* at 44. The court reasoned that the actions were "arbitrary and capricious" because it failed to reasonably consider alternatives that would still maintain the safety standard goals, such as new airbag technology. *Id.* at 51.

In contrast, the EPA's adoption of the credit for the BMPs is not "arbitrary and capricious." Because the EPA's adoption of the credit for the BMPs is neither a rulemaking provision of the APA, based on a public adjudicatory hearing, or adjudicatory in nature, the court will apply a narrow "arbitrary and capricious" standard of review. 5 U.S.C. § 706. Similar to the Administration in *Motor Vehicle Manufacturers Association of U.S.*, the EPA was acting within its scope of duty. The CWA explicitly tasks the EPA with approving TMDLs for impaired waters. R. 5. Within this scope of authority, the CWA explicitly authorized the use of BMPs as nonpoint source control tradeoffs.

Furthermore, in considering whether the EPA's decision was "arbitrary or capricious," the relevant factors of the present case do not indicate that there was a "clear error of judgment." The EPA-approved TMDL proposed BMPs that were designed to encourage Concentrated

Animal Feeding Operations ("CAFOs") and other agricultural sources to reduce pollutant levels. R. 9-10. These BMPs included modified feeds for animal production facilities that would reduce the phosphorus in manure, physical and chemical treatment of manure streams, and restrictions on manure spreading. *Id.* BMPs for private septic systems included increased septic tank inspection and pumping schedules. *Id.* Unlike the Administration in *Motor Vehicle Manufacturers Association of U.S.*, these management practices were not arbitrary or capricious because they all promoted more stringent regulation of phosphorus level reduction. Although the facts indicate that New Union has not taken any actions to implement the BMPs, this does not defeat the fact that the EPA's adoption of such credit was neither arbitrary nor capricious. R. 9-10. Furthermore, neither the facts nor the Plaintiffs suggest that the EPA violated any necessary procedural requirements. For the foregoing reasons, the EPA-approved TMDL that adopted a credit for certain proposed BMPs was not arbitrary or capricious or an abuse of discretion.

CONCLUSION

For the reasons stated above, we respectfully request that this Court (1) affirm the district court's decision to reject the plaintiff's ripeness challenges, (2) reverse the district court's decision to vacate the definition of "total maximum daily load" in 40 C.F.R. § 130.2(i), (3) reverse the district court's decision to grant summary judgment in favor of plaintiff CLW on its challenge to the validity of a phased annual TMDL, and (4) affirm the district court's decision to grant summary judgment in favor of EPA on the validity of wasteload allocation credits based on assumed nonpoint source BMPs.