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

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

THE STATE OF NEW UNION,

Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

-and-

CHESAPLAIN LAKE WATCH,

Plaintiff-Appellant-Cross Appellee,

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

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

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INTRODUCTION

Central to the Clean Water Act ("CWA") is a cooperative federalist regulatory regime where the federal government and the states engage in joint efforts to improve water quality across the United States. This case considers the degree to which the U.S. Environmental Protection Agency ("EPA") can subvert state participation in water cleanup efforts. Specifically, it considers whether EPA can reject New Union's plan to clean up Lake Chesaplain and adopt its own preferred plan.

Congress first passed water legislation in 1948, but because of a growing public concern and scientific awareness of water pollution in the United States, Congress revamped the water legislation in 1972 to what is now commonly known as the Clean Water Act. EPA, *History of the Clean Water Act* (May 27, 2021) https://www.epa.gov/laws-regulations/history-clean-water-act. The cooperative framework of the CWA utilizes the states' specialized knowledge about their own waterbodies and the best strategies for mitigating water quality. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953, 993-994 (2014) (stating that "States in a federal system possess useful information on local circumstances, on political and economic trends, and most famously, on the results of their own regulatory experiments."). The CWA's reliance on the states' local understanding and knowledge of its waterbodies has drastically improved water quality across the United States since the CWA's enactment. William L. Andreen, *Water Quality Today--Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 573 (2002).

Here, New Union undertook efforts to clean up Lake Chesaplain—a lake within New Union's borders that is used for drinking, recreational, and commercial activities. Despite the CWA's cooperative federalist spirit, EPA rejected New Union's plan to clean up Lake

Chesaplain. In violation of the CWA, EPA required that New Union submit a plan to regulate both point source and nonpoint source polluters. However, CWA plans must allow flexibility for New Union to incorporate mitigation strategies that work best for its residents, businesses, and the scientific circumstances of Lake Chesaplain's water quality. To foster a cooperative partnership, New Union advocates creating cleanup plans on flexible timelines and working with stakeholders to limit their discharges even though they are not directly regulated under the CWA.

Implementing flexible and supportive strategies not only improves cooperation between the federal government and states, it also substantially improves water quality across the United States. Given the resources of the federal government and the states' specialized knowledge of their own waterways and communities, the only path forward for cleaning up U.S. waters is through cooperation between federal and state actors.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction to review EPA's actions related to this case under the Administrative Procedure Act ("APA") 5 U.S.C. § 702 and under federal question jurisdiction authorized by 28 U.S.C. § 1331. New Union had standing to challenge EPA's rejection of the Lake Chesaplain TMDL because EPA's rejection of its Lake Chesaplain TMDL is a concrete injury and is redressable. *See Friends of the Earth, Inc v. Laidlaw Env't Servs., Inc.,* 528 U.S. 167 (2000). This case is also ripe. *See infra* Argument I.

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to review appeals from final orders of the District Court under 28 U.S.C. § 1291. This is an appeal from a final judgment entered by the District Court on August 15, 2021, that disposed of all claims. Record at 2. All parties filed a timely notice of appeal. Record at 2; Fed. R. App. P. 4(a).

STATEMENT OF ISSUES PRESENTED

I. Is EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL and the adoption of its own TMDL and implementation plan ripe for judicial review?

II. Is EPA's rejection of New Union's Lake Chesaplain phosphorus TMDL because of the failure to include wasteload and load allocations contrary to law according to EPA's interpretation of the term "total maximum daily load" under CWA, § 303, 33 U.S.C. § 1313?

III. Is the EPA's adoption of an annual pollution load for the phosphorous TMDL a violation of the Clean Water Act considering the diverse pollutants that can be regulated under the Act and the discretion the Act gives to the EPA?

IV. Is the EPA's use of a phased-in TMDL for phosphorous contrary to the Clean Water Act given the Act's lack of a specific timeline and the implementation realities states face?

V. Is EPA's BMPs suggestion, which would limit nonpoint discharges to relax point source discharge limitations, arbitrary and capricious or an abuse of discretion if BMPs implementation was not assured?

STATEMENT OF THE CASE

A. The Clean Water Act is Premised on Cooperative Federalism.

The Federal Water Pollution Control Act Amendments of 1972, known as the Clean Water Act, creates a cooperative regulatory framework between the federal government and states to protect the "waters of the United States." *See* CWA §101, 33 U.S.C. § 1251(b); *New York v. United States*, 505 U.S. 144, 167 (1992). Under the CWA framework, EPA—the federal agency charged with enforcing the CWA—promulgates national water standards; however, the

states implement the regulatory programs. CWA § 402(b), 33 U.S.C. § 1342(b). For instance, the CWA created the framework for water permitting and water quality programs and the states, not the federal government, are tasked with administering these programs. CWA §§ 208, 303, 33 U.S.C. §§ 1288, 1313.

The CWA grants EPA the power to regulate point sources, which are any "discernible, confined and discrete conveyance" of a pollutant into a waterbody. CWA § 502(14), 33 U.S.C. § 1362(14). For example, a "pipe, ditch, channel, tunnel, conduit," among other things, are point sources if they discharge pollutants into a waterbody. *Id.*

On the other hand, states regulate nonpoint sources, which are not defined in the CWA, and are all other pollution sources that are not point sources, such as chemicals from agricultural runoff or sediment from industrial runoff. *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008); EPA, *Basic Information about Nonpoint Source (NPS) Pollution*, (July 8, 2021), https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution. Because nonpoint sources are difficult to regulate, both technologically and practically, the U.S. Congress left the regulation of nonpoint source programs to the states. CWA § 319(a), 33 U.S.C. § 1329 (a); *see also* S. REP. NO. 92-414 at 3706 (noting that "many nonpoint sources of pollution are beyond present technology of control"). Under CWA § 319, states may submit to EPA plans that regulate nonpoint sources using best management practices ("BMPs")—strategies to reduce nonpoint source pollution. 33 U.S.C. § 1329; 40 CFR 130.2(m). In exchange, states can receive federal funding to implement the nonpoint source management plans. 33 U.S.C. § 1329(b), (h). If nonpoint source BMPs achieve discharge levels well below the acceptable discharge amount, then point source discharge restrictions can be relaxed. See 40 CFR 130.2(i) (stating that "the TMDL process provides for nonpoint source control tradeoffs").

B. EPA Rejects New Union's Plan to Clean Up Lake Chesaplain.

The present case involves the remediation of Lake Chesaplain in the State of New Union. Record at 5. Lake Chesaplain is connected to Chesaplain River, which is an interstate waterbody. Record at 7. The water in Lake Chesaplain was previously unpolluted, but an increase of economic development around the lake caused Lake Chesaplain's water quality to decline. Record at 7. With the poor water quality, aquatic wildlife suffered, and lake recreation and tourism decreased. Record at 7. Because the public uses Lake Chesaplain for drinking water, recreation, and fishing, New Union assigned Lake Chesaplain the highest water quality standards ("WQS") under the CWA. Record at 8. These water standards get submitted to EPA based on the waterbody's use and importance. CWA § 303(a), 33 U.S.C. 1313.

In response to Lake Chesaplain's decline, New Union created a commission ("Commission") that released a 2012 report about Lake Chesaplain's water quality. Record at 8. The Commission reported that Lake Chesaplain had decreased oxygen levels, offensive odors, and poor water quality because of disproportionate amounts of phosphorus in the water. Record at 8. Moreover, in 2014, the New Union Division of Fisheries and Environmental Control ("DOFEC")—the state agency charged with state water regulation—determined that phosphorus levels exceeded the WQS. Record at 8. The DOFEC listed Lake Chesaplain as an impaired water with EPA. Record at 8.

After DOFEC listed Lake Chesaplain as impaired, DOFEC gave notice of its intention to create the requisite total maximum daily load ("TMDL") and began taking comments. Record at 8. The TMDL enables states to restore impaired waters by specifying the maximum amount of a pollutant, in this case phosphorus, that can enter a waterbody and still allow the waterbody to satisfy the WQS. CWA § 303(d), 33 U.S.C. 1313(d). The Commission conducted a second study

and found that the Chesaplain's mills and slaughterhouse—which are point sources—and a concentrated animal feeding facility ("CAFO"), other agricultural sources, and residential septic tanks—which are nonpoint sources—contributed 180 metric tons ("mt") of phosphorus to Lake Chesaplain. Record at 8-9. The DOFEC determined that only 120 mt of phosphorus may enter the lake annually to meet WQS. Record at 10.

DOFEC proposed two TMDLs to lower phosphorus amounts to 120 mt annually. Record at 9-10. DOFEC's first TMDL proposed an incremental 35% reduction of both point and nonpoint source phosphorus discharge levels over a five-year period. Record at 9. Point sources would discharge less phosphorus through stricter permitting, and nonpoint sources would reduce their phosphorus levels through BMPs such as treating the CAFO's animal manure, restricting manure spreading, and increasing residential septic tank inspections and pumping schedules. Record at 9.

After consulting with stakeholders, DOFEC learned that the first TMDL would pose excessive hardships and costs on Chesaplain agriculture and residents. Record at 9-10. Therefore, DOFEC proposed another TMDL that would achieve the 120 mt annual goal by limiting only the point sources' phosphorus discharge. Record at 10. Relying on CWA § 303(d)(2) and 40 CFR 130.2(i), EPA rejected DOFEC's second TMDL and adopted the first TMDL, known as the Chesaplain Watershed Implementation Plan ("CWIP"). Record at 10; *see* 33 U.S.C. 1313 (stating that EPA can reject a state's proposed discharge limit of an impaired waterbody and establish its own discharge limit); *see also* 40 CFR 130.2(i) (stating that a TMDL is the sum of point source, nonpoint source, and natural background pollutants).

In accordance with the CWIP, DOFEC has proposed to adjust the point source permits to implement the 35% reduction of phosphorous over a five-year period. Record at 10. However,

the mills and slaughterhouse have sought administrative review of the 35% reduction and are currently not subject to phosphorus discharge limits. Record at 10. As for the nonpoint sources, EPA's CWIP did not specify how the BMPs will be enforced, and so, New Union has not yet implemented phosphorus reducing BMPs for nonpoint sources. Record at 10.

C. New Union Successfully Challenged EPA's Rejection of its TMDL in the District Court.

After EPA rejected DOFEC's first TMDL, New Union filed suit against EPA, claiming that DOFEC's second TMDL was valid under the CWA. Record at 11. Moreover, New Union asserts that EPA's requirement that a state's TMDL plan include both point source and nonpoint source discharge limits is inconsistent with the CWA's statutory text. Record at 11.

A nonprofit watchdog—the Chesaplain Lake Watch ("CLW")—intervened under Fed. R. Civ. P. 24(a), challenging EPA's CWIP on two grounds. First, the CWIP's five-year plan to reduce phosphorus levels by 35% annually is contrary to the CWA because a TMDL must specify a daily discharge limit, and a TMDL must advance WQS on the day of its adoption, not five years later. Record at 11. Second, CLW argues that EPA lacks authority to enforce BMPs against nonpoint source polluters; therefore, there is no guaranteed enforcement mechanism requiring nonpoint source polluters to implement BMPs to reduce phosphorus discharge. Record at 11.

EPA contends that both New Union and CLW's complaints lack ripeness because the CWIP will not have immediate regulatory effect; rather, the CWIP depends on further action from New Union such as modifying point source discharge permits and implementing BMPs. Record at 11. On the merits of the complaints, EPA contends that the CWIP does not violate the CWA. Record at 11.

The District Court considered four issues: (1) whether EPA's adoption of the CWIP was ripe for review; (2) whether EPA's rejection of DOFEC's second proposed TMDL, based on EPA's interpretation that TMDL's require both point source and nonpoint source discharge limits, is warranted by the CWA; (3) whether the CWIP's five year implementation plan to reduce phosphorus levels on a year-by-year basis violated that the statutory meaning of TMDL under the CWA; and (4) whether EPA's adoption of BMPs for nonpoint sources in the CWIP was arbitrary and capricious given that the BMPs implementation is not guaranteed. Record at 12-16.

First, the District Court held that the issues were ripe for review because the CWIP requires New Union to implement discharge limits for point sources, without delay, and New Union and CLW will be prejudiced if they do not receive judicial review. Record at 12.

Second, the Court held that EPA's interpretation, that TMDLs require both point source and nonpoint source discharge limits, contradicts the plain meaning of CWA § 303(d). Record at 14. The Court reasoned that CWA § 303(d) does not state or imply that TMDLs require both point and nonpoint source allocation limits. Moreover, the court noted that CWA § 303(d) is a TMDL planning provision, and CWA § 303(e) is an implementing provision. Record at 13; 33 U.S.C. 1313(d), (e). But EPA's rejection of New Union's second TMDL plan under CWA § 303(d) does not give EPA the power to replace New Union's second TMDL implementation plan under CWA § 303(e) because CWA § 303(e) does not authorize EPA to impose its own implementation plan onto states. See Record at 13 (stating that "section 303(e), in marked contrast to section 303(d), does not contemplate EPA imposition of a TMDL implementation plan in the event EPA is dissatisfied with the state's planning process"). Conclusively, the Court vacated EPA's interpretation of CWA § 303(d) as requiring TMDL planning for both point

source and nonpoint sources, and consequently, EPA's rejection of New Union's second TMDL was invalid.

Third, the Court held that the CWIP's five-year implementation period is contrary to CWA § 303(d)(1)(C) because the word "daily" in "total maximum daily load" demonstrates that polluters must adhere to a daily discharge limit, not a yearly limit. Record at 14. Moreover, TMDL discharge limitations must meet WQS while considering "seasonal variations;" however, the court asserted that yearly discharge limits do not consider seasonal variations. Record at 14-15. Moreover, the Court wrote that the CWA does not permit achievement of WQS to occur five years after a TMDL is implemented, and therefore, the CWIP's five-year implementation period is invalid. Record at 15.

Finally, the Court held that EPA's decision to include BMPs in the CWIP was not arbitrary and capricious. Record at 16. The Court viewed the inclusion of BMPs in the CWIP as a suggestion from EPA to New Union on how to reach 35% phosphorus reduction. Record at 16. However, New Union was under no obligation to actually implement the BMPs, and given the fact that CWA § 303(d) is a TMDL planning provision, the court held that EPA's BMPs suggestion was only for planning purposes and not arbitrary and capricious. Record at 16.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court rightly held that this matter is ripe for adjudication, that EPA's definition of the phrase TMDL to require the inclusion of both wasteload allocations ("WLAs")—the amount of discharge allowed for point sources—and load allocations ("LAs")—the amount of discharge allowed for nonpoint sources—is contrary to law. Moreover, the Court held that EPA's use of BMPs for nonpoint sources to offset point source pollution reductions

was "not arbitrary and capricious or an abuse of discretion." Record at 16. The court granted summary judgment incorrectly to CLW on the issue of whether a TMDL can be phased in over five years.

The ripeness doctrine prevents premature litigation and judicial involvement in regulatory actions. There are two factors that determine whether an issue is ripe: the fitness of the dispute for judicial decision and the hardship to the parties if a court withholds consideration of the dispute. Here, EPA argues primarily that the dispute is not ripe because the outcome depends on administrative actions that have not yet occurred.

EPA's argument fails the two-factor ripeness test, however. First, the dispute over the Chesaplain phosphorus TMDL requires no additional factual development to be properly adjudicated. Accordingly, EPA's rejection of the TMDL is fit for decision. Second, failing to adjudicate this dispute now will cause undue hardship to New Union. If New Union does not comply with EPA's TMDL, it will face the prospect of losing federal CWA funding. Furthermore, New Union also faces the hardship of incurring costs associated with implementing and enforcing EPA's TMDL. Thus, the District Court correctly held that this dispute is ripe for adjudication.

Turning from ripeness to EPA's rejection of the Chesaplain phosphorus TMDL, the CWA TMDL provision requires only one, single "total" figure. Analyzing and interpreting the CWA statute in question necessitates performing a two-step *Chevron* analysis. *See Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). Step one requires determining whether the statutory language Congress employed was unambiguous. *Id*. at 843. If so, courts must follow Congress's intent. *Id.* On the other hand, if the statutory language is

ambiguous, then step two of the analysis requires determining whether the agency's interpretation is reasonable. *Id*.

Here, the use of the word "total" in "total maximum daily load" is unambiguous. The plain meaning of the word "total" suggests one number, not multiple. Moreover, other statutory interpretation methods, such as contextual canons, also suggest that "total" in TMDL requires just one number. As previously discussed, the CWA is animated by principles of federalism and balancing authority between states and EPA. This context suggests that a definition of "total" that allows EPA to usurp regulatory authority from the states would not have been the intent of Congress.

Furthermore, even if the use of "total" is ambiguous, step two of the analysis shows that EPA's interpretation of "total" is unreasonable. EPA's interpretation of "total" is unreasonable because it ignores the federalist principles underlying the CWA. This interpretation prevents states from having the flexibility to achieve water quality standards. EPA also failed to provide sufficient justification for rejecting New Union's Chesaplain phosphorus TMDL, as New Union's TMDL would achieve the necessary phosphorous reductions for Lake Chesaplain to achieve the desired WQS. Consequently, EPA's interpretation of "total," if found to be ambiguous, is unreasonable and cannot stand.

On the other hand, the CWA's use of the word "daily" in "total maximum daily load" is ambiguous. It is not defined by the statute. Looking at this term in light of the rest of the statute—which gives EPA discretion to require TMDLs for an open-ended number of pollutants—Congress did not intend so many diverse pollutants with various properties and impact timelines to be regulated in the same exact manner. The CWA gives EPA tremendous

flexibility to use its expertise in implementing the Act. Therefore, when viewed in light of the entire statute, TMDL is ambiguous when it comes to requiring a specific time measure.

Proceeding to *Chevron* step 2, EPA's definition of TMDL as "expressed in terms of either mass per time, toxicity, or other appropriate measure" and its use of an annual TMDL for Lake Chesaplain phosphorus is reasonable. 40 C.F.R. § 130.2(i). The annual pollution load aligns with how the pollution in Lake Chesaplain functions and with how New Union's NPDES permit regulates phosphorus. All of this is found in the record, and EPA merely applied these facts when deciding the pollution load time metric to use.

The CWA's use of "total maximum daily load" is also ambiguous as to whether it allows for phased TMDL reductions. Once again, TMDL is not defined in the statute. Instead, it must merely be set "at a level necessary to implement the applicable water quality standards." CWA § 303, 33 U.S.C. 1313(d). This says nothing about the timeline upon which the TMDL must be developed and implemented. Therefore, Congress has not "directly spoken to the precise question at issue" and the statute's TMDL implementation timeline is ambiguous.

EPA's interpretation of TMDL, allowing a phased-in TMDL approach, is reasonable and requires judicial deference. EPA's phased-in TMDL creates requirements that are both aggressive and achievable. If an aggressive TMDL was implemented immediately, it would be impossible for non-point source reduction programs and NPDES permit changes to be implemented on the same timeline, setting states up for failure. Not only does failure reduce program credibility, but it means a phased-in TMDL would achieve similar reductions to an immediately implemented TMDL. Additionally, this phased-in approach aligns with EPA guidance and how EPA has been implementing water quality standards for decades.

Lastly, the District Court correctly decided that EPA's recommendation to include BMPs in the CWIP was not arbitrary and capricious. Under the arbitrary and capricious standard, the Court must determine whether the agency made a rationale decision based on the information contained in the agency record. Meanwhile, the Court must not substitute its own judgement for that of the agency nor justify an action on behalf of an agency *sua sponte.*

Here, EPA's BMPs recommendation in the CWIP was not arbitrary and capricious because EPA's CWIP is simply a water cleanup plan that does not require or prohibit action from DOFEC. DOFEC must still meet WQS for Lake Chesaplain, regardless of whether it ultimately uses BMPs. But EPA's BMPs recommendation was merely a suggestion that does not foreclose DOFEC from using other strategies to meet WQS. Similarly, EPA's BMPs recommendation does not automatically trigger EPA's TMDL regulation, which requires that BMPs make nonpoint discharge reduction practicable as a prerequisite to relaxing point source discharge limitations. Here, BMPs are not practicable in New Union, despite EPA's recommendation, so point source reduction cannot be relaxed.

In addition, BMPs need not be reasonably assured for EPA to recommend BMPs because EPA has not made a rule requiring such. Despite EPA's past guidance, which says that BMPs should be reasonably assured before taking credit for point sources, EPA guidance is not binding on the agency and as stated above, EPA's BMPs recommendation does not automatically allow crediting for point sources. Furthermore, at the time that EPA suggested BMPs in the CWIP, there was no affirmative evidence in the agency record that New State would not implement BMPs to relax point source discharge permits. Therefore, EPA reasonably relied on the record at the time it adopted the CWIP, and EPA's recommendation of BMPs was not arbitrary and capricious.

STANDARD OF REVIEW

This is an appeal from an order granting summary judgment. Record at 2. All parties agree that there are no factual disputes, and therefore the administrative record before EPA is the complete factual record. Record at 5.

This Court reviews the District Court's review of EPA's action *de novo*. *See United States v. Int'l Bhd. of Teamsters,* 170 F.3d 136, 142 (2d Cir.1999); *Pastore v. Bell Tel. Co. of Pennsylvania,* 24 F.3d 508, 511 (3rd Cir. 1994); *Sierra Club v. Babbitt,* 65 F.3d 1502, 1507 (9th Cir. 1995).

Under the APA, a court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The court must not substitute its own judgment for that of the agency and must instead conduct a "searching and careful" inquiry into the administrative record to determine whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). Even an agency "decision of less than ideal clarity" should be upheld "if the agency's path may be reasonably discerned." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). However, the agency must still justify its choice because it is "an axiom of administrative law that an agency's explanation of the basis for its decision must include a rational connection between the facts and the choice made." *Bowen v. Am. Hosp. Ass'n,* 476 U.S. 610, 626 (1986).

ARGUMENT

I. EPA's Rejection of the New Union Chesaplain Watershed Phosphorous TMDL and its Adoption of its Own TMDL and Implementation Plan are Ripe for Judicial Review.

The ripeness doctrine assists courts in deciding whether disputes over agency regulatory action require judicial intervention. *Stein, Mitchell*, Administrative Law § 48.01 (2021). In particular, the doctrine helps courts avoid becoming involved "in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). Thus, "until the scope of a controversy has been reduced to more manageable proportions" courts will hesitate to adjudicate disputes. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 875 (1990).

When analyzing ripeness two factors are relevant: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 149. The instant dispute over EPA's rejection of the New Union phosphorous TMDL and EPA's subsequent adoption of its own TMDL and implementation plan are ripe for review because they are fit for adjudication as no additional facts are needed and New Union will face hardship without court review.

A. EPA's Rejection of the New Union Phosphorus TMDL and Adoption of Its Own Implementation Plan are Fit for Review Because no Additional Factual Development is Necessary.

The determination of whether a dispute is fit for judicial decision hinges on whether additional development of the factual record would aid the court in deciding the issue. *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 812 (2003) (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978)). Accordingly, the dispute over EPA's

decision to reject New Union's TMDL and adopt its own TMDL and implementation satisfies the fitness element of the ripeness doctrine. No further factual findings nor development of the record are necessary for the court to review EPA's action here.

In arguing against ripeness, EPA argues that the effect of the Lake Chesaplain TMDL "will depend on later administrative actions such as modification to NPDES permits or New Union implementation of BMP requirements." Record at 11. The Eighth Circuit rejected this argument in *City of Kennett v. EPA*—a case also dealing with an EPA TMDL. The *City of Kennett C*ourt reasoned that no further factual development was necessary after EPA had issued the TMDL because even "assuming the [city's] means of implementation [of the TMDL at issue] are relevant, there is little dispute what they are. The upcoming permit must implement the TMDL by imposing limits on discharge consistent with the TMDL's wasteload allocations for the City." *City of Kennett v. EPA*, 887 F.3d 424, 433 (8th Cir. 2018).

In this case a full factual record exists. Both New Union and EPA provided detailed factual supporting records in making decisions regarding their respective TMDLs and related plans. No parties argue that the factual record lacks necessary information to review EPA's TMDL. Thus, although not controlling in the Twelfth Circuit, the Eighth Circuit's reasoning also applies well to this dispute. New Union will have to issue NPDES permits that are consistent with the already-established TMDL meaning no additional factual development is necessary.

The court will also consider additional factors that point towards fitness. For example, in *Am. Farm Bureau Fed'n v. United States EPA*, the Third Circuit considered the fact that "the parties present[ed] a purely legal dispute" when deciding that a dispute over EPA's TMDL for the Chesapeake Bay was ripe for adjudication. 792 F.3d 281, 293 (3d Cir. 2015). In *Abbott Labs*, the Supreme Court concluded that a dispute was ripe based on the facts that "[b]oth sides moved

for summary judgment in the District Court," no side requested "further administrative proceedings," and that the regulations in question were a "final agency action." 387 U.S. at 149.

Applying these considerations to the facts of this case, it becomes all the more evident that the dispute is fit for judicial review. EPA's TMDL was a final action (Record at 11), both sides here have moved for summary judgment (Record at 5), and no party has requested additional administrative proceedings (*see generally* Record). For these reasons, as well as the existence of a fully developed factual record, the dispute is fit for judgment by the court.

B. Lack of Adjudication of EPA's Chesaplain Phosphorous TMDL and Implementation Plan Will Cause Hardship for New Union.

"[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the APA and the Declaratory Judgment Act must be permitted, absent a statutory bar." *Abbott Labs,* 387 U.S. at 153. The hardship piece of ripeness thus examines whether "the impact of the regulations . . . is sufficiently direct and immediate as to render the issue appropriate for judicial review." *Id.* at 152. EPA's Chesaplain phosphorous TMDL and implementation, accordingly, are ripe for review because New Union will have to comply directly and immediately with the TMDL or risk losing federal funds. Record at 13.

The *Am. Farm Bureau Fed'n* case from the Third Circuit provides a useful illustration of the hardship analysis. That Court argued that, although EPA's TMDL "ha[d] yet to be incorporated into a state's continuing planning process and enforced against any individual plaintiff, [plaintiffs] will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation." *Am. Farm Bureau Fed'n*, 792 F.3d at 293-94. The court reasoned that there would be sufficient hardship placed on the litigants to not "hear this dispute now because [the litigants] are poised to spend more time, energy, and money in developing an

implementation plan. If there is something wrong with the TMDL, it is better to know now than later." *Id*. at 293-94.

EPA's rejection of the New Union TMDL and subsequent adoption of its own TMDL and implementation plan will cause hardship to all parties involved if the dispute is not adjudicated. New Union will have to implement EPA's plan, issue permits for the point sources, and enforce BMPs for the nonpoint sources. Record at 10. All these activities will have an economic cost to New Union, its residents, and its businesses as they wait to figure out the cost of compliance for the new phosphorous reduction standards. Record at 10. Moreover, complying with EPA's TMDL and implementation will impact New Union's ability to receive federal funding under the CWA. Record at 11.

As a result, both the fitness and hardship element of ripeness are satisfied. Consequently, the court should affirm the District Court's finding "that the issues raised are fit for adjudication and that plaintiffs New Union and Chesaplain Lake Watch will be prejudiced if the validity of EPA's Lake Chesaplain TMDL is not subject to immediate judicial review." Record at 12.

II. EPA's Rejection of the New Union Chesaplain Watershed Phosphorous TMDL Based on New Union's Failure to Include Wasteload and Load Allocations Is Contrary to Law.

The CWA's TMDL provision unambiguously means a single "total" figure. However, even if "TMDL" is ambiguous, EPA's interpretation is unreasonable. Whether EPA's rejection of New Union's TMDL violates CWA § 303(d) is a question of statutory interpretation. When reviewing agency actions involving statutory interpretation, the level of judicial deference to agency action is governed by the two-step framework established in *Chevron*. *See generally Chevron,* 467 U.S. 837.

First, the Court must determine if "Congress has directly spoken to the precise question at issue." *Id*. at 842. Because "[t]he judiciary is the final authority on issues of statutory construction," courts are to look at this question *de novo*, "employing traditional tools of statutory construction." *Id*. at n.9. If Congress's intent is unambiguous, the court and Congress must follow Congress's intent. *Id*. at 842. On the other hand, if the statute is ambiguous, the court does not impose its own construction but instead assesses if the agency's interpretation "is based on a permissible construction of the statute." *Id*. at 843.

A. "Total" is Unambiguous and Therefore Does Not Require Both Load Allocations and Wasteload Allocations.

Congress's use of the word "total" in the total maximum daily load is unambiguous. This means that EPA's reasoning for rejecting New Union's TMDL—because it lacked specific wasteload allocations—was contrary to law.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975).). As defined by *Merriam-Webster's Dictionary*, "total" means "comprising or constituting a whole." *Total*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/total (last visited Nov. 20, 2021). Given that the statute only requires a "total" figure for a pollutant when establishing the TMDL, the common meaning of "total" would not support EPA's interpretation that a state plan must provide additional figures for specific load and wasteload reductions.

Moreover, the D.C. Circuit has "consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point." *NRDC v. EPA*, 749 F.3d 1055, 1064-65 (D.C. Cir. 2014). Thus, one TMDL figure should suffice under any common understanding of the word "total," and EPA may not promulgate rules that would

hold a state's TMDL invalid for lack of allocating discharge limits on both point and nonpoint sources.

An examination of contextual canons also fails to support EPA's interpretation of "total." For example, examining the whole text of the statute demonstrates that the duty of distinguishing between point and nonpoint sources is left to the states, not EPA. CWA § 303(e) covers point sources and § 319(a)(1) covers non-point sources, and both provisions grant regulatory jurisdiction to the states. CWA §§ 303(e), 319(a)(1), 33 U.S.C. §§ 1313(e), 1329(a)(1). These provisions align with the basic construction of the act, which "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting CWA, §101, 33 U.S.C. § 1251(a)). Accordingly, stripping states of the power to regulate point and nonpoint pollutants violates the spirit of federalism that animates the CWA. In addition, the District Court correctly noted the differences in flexibility afforded to states between the CWA and the Clean Air Act. Record at 13. Had Congress intended for EPA to supervise state water quality plan implementation, Congress could have included provisions like those in the Clean Air Act that allow EPA "to impose a federal implementation plan on states that fail to submit a satisfactory plan." Record at 13.

B. Even if "Total" is Ambiguous, EPA's Interpretation that TMDLs Must Include Wasteload Allocations and Load Allocations is Unreasonable.

EPA's interpretation is contrary to law even if "total" in TMDL is ambiguous because EPA's interpretation that TMDLs be split into wasteload and load allocations is unreasonable and contrary to the system of cooperative federalism that the CWA relies upon. Under the CWA, states implementing water quality standards are not subject to EPA oversight for their plan. Instead, the Act recognizes that:

> "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 (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." CWA, §101, 33 U.S.C. § 1251(b).

If EPA is allowed to require strict load and wasteload allocations, then states—the parties primarily responsible for meeting TMDLs—would lose the flexibility they need to achieve water quality standards. Because wasteload allocations cannot be reduced through NPDES permits, implementing wasteload allocations involves uncertain programs that are often voluntary or with large room for error. States need flexibility to adapt their allocations if wasteload allocation reduction problems are more or less successful than anticipated. Otherwise, states could exceed their rigid TMDLs and fail to achieve their water quality goals.

Additionally, EPA did not give any justifications as to why New Union's TMDL was invalid. New Union's TMDL of 120 mt annual maximum, without any wasteload allocations, is reasonable. It is a value that, based on the same science and data EPA looked at, will allow Lake Chesaplain to achieve its designated uses. It gives New Union flexibility in allocating the load between point and nonpoint sources instead of locking the state into rigid allocations that may not be efficient or ideal.

Because EPA gave no explanation as to why New Union's single allocation was contrary to law and did not justify why its own interpretation was reasonable, EPA's interpretation should not be given deference and is unreasonable. *See*, *e.g., Consumer Fed'n of Am. v. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1504-05 (D.C. Cir. 1996); *Envtl. Def. Fund v. EPA*, 82 F.3d 451, 467 (D.C. Cir. 1996); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406-07 (D.C. Cir. 1995); *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526, 529 (7th Cir. 1994).

III. The Adoption of Annual Pollution Loading Reduction Does Not Violate CWA § 303(d).

The word "daily" in "total maximum daily load" in CWA § 303(d) is ambiguous and EPA's use of a phased-in annual pollution load is reasonable. Whether EPA's adoption of an annual pollution loading violates CWA § 303(d) is a question of statutory interpretation. When reviewing agency actions involving statutory interpretation, the level of judicial deference to agency action is governed by the two-step framework in *Chevron*. 467 U.S. 837.

A. The Clean Water Act § 303(d)'s Use of "Daily" in "Total Maximum Daily Load" is Ambiguous.

When a water body is listed as impaired, CWA § 303(d) requires that states develop and submit a "total maximum daily load" (TMDL) for all offending pollutants in that water body "at a level necessary to implement the applicable water quality standards." CWA, §303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). The CWA does not define "total maximum daily load," and Congress's intent for how EPA and states should express TMDLs is ambiguous.

In assessing whether "TMDL" is ambiguous, courts must look beyond the exact words and look at them in context of the statute as a whole. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). Therefore, when looking at a specific part of a statute, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citations and internal quotations omitted). This applies more strongly to the CWA, which the DC Circuit has held "is to be given a reasonable interpretation

which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments." *Env't Def. Fund, Inc. v. Costle,* 657 F.2d 275, 292 (D.C. Cir. 1981).

Looking at the phrase "total maximum daily load" in light of the entire statute shows that Congress's intent is not clear. The CWA allows for the creation of TMDLs for a potentially huge range of pollutants. 33 U.S.C. § 1313(d)(1)(c) (stating that states must establish TMDLs for all "pollutants which the Administrator identifies . . . as suitable for such calculation."). Each of these potential pollutants requires states and EPA to understand how "the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody." *NRDC v. Muszynski,* 268 F.3d 91, 98 (2d Cir. 2001). Pollutants interact with bodies of water differently, and harmful consequences may be immediate or slow forming. *Id*. With thousands of diverse pollutants potentially falling under this regulation and with so much discretion given to EPA and states in regulating these pollutants, it is unlikely that Congress would intend for them all to be regulated in the exact same manner regardless of their different impacts and characteristics.

The structure of the CWA at large shows that Congress intended for EPA and states to have flexibility. When interpreting a statute's meaning, we must look to Congress's intent: "[T]he fair interpretation of a statute is often . . . revealed more by the demonstrable purposes that produced it than by its precise phrasing." *Universal Camera Corp v. NLRB*, 340 U.S. 474, 489 (1951). In this case, the CWA gives EPA broad discretion when reviewing state-submitted TMDLs. The Act does not specify the grounds that would require an agency to disapprove a TMDL, suggesting that EPA has broad discretion over the implementation of TMDL. CWA § 303, 33 U.S.C. § 1313. Furthermore, the Act's overall structure is designed to allow cooperative federalism between the states and EPA to keep bodies of water in compliance with their

designated uses. *Id*. EPA has broad discretion to use its scientific expertise in deciding which pollutants to regulate and what TMDLs to approve or reject. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Therefore, Congress created this Act to give EPA the authority and discretion it needed to protect the nation's bodies of water. Allowing EPA to determine the most appropriate unit of mass per time therefore fits in with the overall constitutional structure.

Additionally, the fact that Congress did not define TMDL indicates that they did not intend for TMDL to have a rigid meaning. CWA § 303, 33 U.S.C. § 1313. Acknowledging the lack of a definition, EPA has filled the gap left by Congress and has interpreted CWA § 1313 to require that a TMDL be "expressed in terms of either mass per time, toxicity, or other appropriate measures." 40 C.F.R. § 130.2(i). This definition of "mass per time" is consistent with the rest of the CWA, stating that TMDLs must be set at a number "necessary to implement the applicable water quality standards." CWA § 303(d), 33 U.S.C. § 1313(d). They must be established in a way specific both to the individual pollutant as well as the waterbody being regulated. *Id*. And for some pollutants, being measured on a time frame other than daily could make the most scientific and practical sense.

Other courts have acknowledged the ambiguity of TMDL requirements and have held that Congress has given EPA broad authority to identify and promulgate TMDLs. The Twelfth Circuit should follow the sound reasoning of these courts and hold that the meaning of "TMDL" is vague, and EPA has the ability to interpret the meaning of TMDL and apply it in a reasonable way. *See Pronsolino v. Nastri,* 291 F.3d 1123, 1131 (9th Cir. 2002) ("[T]he EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of § 303(d)(1) waters and TMDLs."); *Muszynski,* 268 F.3d at 98–99 ("We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to

regulation of pollutant loads on a strictly daily basis . . . . Accordingly, we agree with [the] EPA that a 'total maximum daily load' may be expressed by another measure of mass per time.").

This Court should follow the Second Circuit's *Muszynski* decision and determine that Congress did not clearly require EPA to set TMDLs in daily loads when regulating an open-ended number of different pollutants. *Muszynski*, 268 F.3d 91.

B. EPA's Use of an Annual Pollution Load is Reasonable.

Because the statute is ambiguous, the Court now must assess whether EPA's interpretation of TMDL is reasonable. *Chevron*, 467 U.S. 837. EPA's use of an annual pollution load for phosphorus in Lake Chesaplain is reasonable. The decision is supported by evidence because it aligns with how pollution in Lake Chesaplain actually works (Record at 7), the effects of phosphorus are not instantaneous but depend on the overall loading of phosphorus (Record at 8), and the EPA's TMDL interpretation aligns with how New Union's NPDES permit can regulate phosphorus.

The use of an annual load is also appropriate because it aligns with NPDES permit timeframes. The CWA prohibits anyone from discharging pollutants through a point source into a water of the United States unless they have a NPDES permit. CWA § 402(b), 33 U.S.C. § 1342(b). States are responsible for administering NPDES permits, which set the permissible level of pollutants allowed. *Id*. Therefore, NPDES permitting is key to the implementation of TMDLs because permits must not allow for the discharge of more pollutants than an impaired body of water is able to accommodate. However, NPDES permit regulations "do not require that effluent limits in permits be expressed as maximum daily limits" and could therefore be expressed as an annual load. OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, ESTABLISHING TMDL "DAILY" LOADS IN LIGHT OF THE DECISION BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT IN

FRIENDS OF THE EARTH, INC. V. EPA, ET AL., NO.05-5015, (Apr. 25, 2006) AND IMPLICATIONS FOR NPDES PERMITS (Nov. 15, 2006). Therefore, having an annual pollution TMDL could align best with how pollution regulation actually works in New Union, making an annual TMDL a reasonable interpretation.

Additionally, using annual instead of daily TMDLs reflects how phosphorus pollution operates in Lake Chesaplain. Most phosphorus loading is the result of nonpoint sources, and none of the nonpoint sources in New Union pollute in regular, daily increments. Record at 9. Phosphorus from CAFOs enters Lake Chesaplain through surface runoff, which occurs during precipitation events, and from groundwater, where the flow is not consistent every day across the year. Record at 9. Likewise, phosphorus from agricultural sources is often linked to precipitation events. Furthermore, the septic systems input phosphorus into Lake Champlain on an irregular basis because the houses using the septic systems are mostly second homes and thus not occupied continuously throughout the year. Record at 7. Therefore, daily TMDLs would not properly reflect the actual dynamic of phosphorus flows into Lake Chesaplain and using a different timeframe besides a daily load allocation is reasonable.

IV. Phasing in Pollution Loading Reduction Over Five Years Does Not Violate Clean Water Act § 303(d).

Whether or not EPA can construct "total maximum daily load" to allow for a phased percentage reduction in phosphorus loading is a question of statutory interpretation and must be analyzed under the *Chevron* framework. *Chevron*, 467 U.S. 837.

A. CWA § 303(d)'s Use of "Total Maximum Daily Load" is Ambiguous when it Comes to Phased Reductions.

"Total maximum daily load" is ambiguous when it comes to phased reductions. In CWA § 303(d), "total maximum daily load" is not defined. 33 U.S.C. 1313(d). While the TMDL must

be "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," this says nothing as to the timeline at which it must be implemented. 33 U.S.C. 1313(d)(1)(C). The lack of a timeline for full TMDL implementation shows that Congress has not "directly spoken to the precise question at issue," indicating ambiguity. *Chevron*, 467 U.S. at 842. Furthermore, taken in light of the entire statute which gives states discretion to develop designated uses and TMDLs that will restore impaired waters, and considering the discretion EPA has in approving or denying TMDLs, it follows that the statute intended to give EPA discretionary authority to implement this program in a way that makes sense for the waterbody and pollutant, unless the statute clearly states otherwise.

B. EPA's Use of a Phased-in "Total Maximum Daily Load" is Reasonable.

EPA's use of a phased-in TMDL is reasonable. If the target TMDL to get a body of water in compliance with its designated use had to be fully implemented the year that a TMDL is approved, then states and regulated entities would be set up to fail. Reducing the TMDL can require technological adoption, participation in voluntary programs to reduce nonpoint sources, and the establishment of new NPDES permit limits. If EPA or a state required a 35% reduction from the TMDL baseline immediately, the likelihood of being able to immediately meet that TMDL is very low. Setting up a program in a way where compliance is nearly impossible reduces the credibility of the program, creates skepticism around the program, and unfairly burdens regulated entities with impossible mandates. Furthermore, creating an immediately implementable TMDL that is not achievable does not advance the water body's achievement of designated uses more than a staged approach would. Having EPA use its scientific expertise to

decide the best time period for TMDL implementation is a reasonable assessment of "total maximum daily load." CWA § 303, 33 U.S.C. 1313.

EPA has used and thoroughly justified the use of multi-year TMDLs for over a decade. In a 2006 EPA Memorandum, EPA clarified three types of phased TMDLs that are used. OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, MEMORANDUM: CLARIFICATION REGARDING "PHASED" TOTAL MAXIMUM DAILY LOADS (Aug. 2, 2006). When TMDL uses a "staged implementation" when its actions are staged over a period of time to eventually restore a water body to its designated use. *Id*. The memo recognizes that some TMDLs will require "staged implementation to a degree, particularly if they include nonpoint sources, and that in many of these cases the staging will be significant." *Id*. The memo demonstrates that EPA has considered the value of staged implementation to stakeholders and water quality.

Furthermore, courts have upheld a similar implementation program in the Chesapeake Bay TMDL scheme. *Am. Farm Bureau Fed'n*, 792 F.3d at 297. The Chesapeake Bay TMDL was established in December 2010 and is "designed to ensure that all pollution control measures needed to fully restore the Bay . . . are in place by 2025." *Frequent Questions about the Chesapeake Bay TMDL*, EPA, https://www.epa.gov/chesapeake-bay-tmdl/frequent-questions-about-chesapeake-bay-tmdl (last visited Nov. 11, 2021). Therefore, the TMDL set target dates 15 years out by which EPA said the states should meet their quality standards. *Am. Farm Bureau Fed'n*, 792 F.3d at 300. That Court went on to note that "promulgating an accurate TMDL . . . requires consideration of a timeline and of changes over time." *Id*. Timelines for restoration and a pollution-reduction plan could vary depending on "the dynamic nature of watersheds." *Id.*

Therefore, EPA's interpretation of "TMDL" to allow phased implementations—enabling reductions to be achieved and the water body to be restored without creating instantaneous and impossible compliance timelines—is reasonable.

V. EPA's Recommendation of BMPs was Not Arbitrary and Capricious.

EPA's BMPs suggestion was not arbitrary and capricious because: (1) EPA's BMPs suggestion did not require New Union to implement BMPs to reach WQS, (2) EPA's TMDL regulation requires that BMPs are made practical before point source discharge can be relaxed, (3) BMPs do not need to be reasonably assured before EPA can suggest BMPs, and (4) the lack of BMPs implementation since EPA adopted the CWIP does not make EPA's suggestion of BMPs arbitrary and capricious because there was no positive evidence in the record—at the time that EPA adopted the CWIP—that New Union would not enforce BMPs.

As previously discussed, the court uses an "abuse of discretion" scope of review to judge whether the agency decision is "arbitrary and capricious" when judging the efficacy of an agency's decision. 5 U.S.C. § 706(2)(A). The scope of the arbitrary and capricious review is narrow, giving deference to the agency's authority and expertise in the subject matter. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 42-43. A court must not substitute its own judgment for the agency's judgment; however, the court must still find a "rational connection between the facts found and the choice made" by the agency. *Id.* at 43. When assessing the agency's reasoning for its decision, a court may only rely upon the agency record and must not look to external matters beyond the scope of facts that the agency relied on to make its decision. *Id.* at 44. The agency's decision need not even be ideal, so long as the agency gives reasonable justification for its decision making. *Id.* at 43. However, a court should not, *sua sponte*, give a reasoned basis for an

agency decision if the agency itself has not proffered that reason. *Id*. An agency decision is arbitrary and capricious, for example, if it:

> [R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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.

Id.

Here, EPA's BMPs recommendation in the CWIP was not arbitrary and capricious. First, EPA's BMPs suggestion did not require New Union to implement BMPs nor foreclose it from using other strategies besides BMPs to reach WQS for Lake Chesaplain. Second, EPA's TMDL regulation requires that BMPs for nonpoint sources be practicable before point source discharge limitations can be relaxed. Furthermore, EPA does not need to assure that BMPs will actually occur before it can suggest BMPs. Finally, the lack of BMPs since EPA adopted the CWIP does not render EPA's suggestion of BMPs arbitrary and capricious because there was no affirmative evidence in the record—at the time that EPA adopted the CWIP—that New Union would not enforce BMPs.

A. EPA's BMPs Recommendation was Not Arbitrary and Capricious Because they Merely Suggested how New Union Could Reach Discharge Requirements Under the CWIP.

EPA's recommendation of BMPs was not arbitrary and capricious because CWA § 303(d) is only a planning provision for TMDLs, which does not require or prohibit any state actions but merely informs the TMDLs implementation. *City of Arcadia v. U.S. Env't Prot. Agency*, 265 F. Supp. 2d 1142, 1144-1145 (N.D. Cal. 2003); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996). BMPs, which EPA recommended at the CWA § 303(d) planning stage, will not obligate New Union to carry out BMPs. Record at 10; *See City of Arcadia*, 265 F. Supp. 2d at 1144-1145 (stating that "a TMDL does not, by itself,

prohibit any conduct or require any actions"). Hypothetically, if EPA had recommended against using BMPs at the CWA § 303(d) planning stage, New Union would not be required to abstain from BMPs because TMDLs do not enforce pollution reduction themselves; rather, they "inform the design and implementation" of TMDLs at the CWA § 303(e) stage. *Idaho Sportsmen's Coal.*, 951 F. Supp. at 966. Because EPA's recommendation of BMPs under CWA § 303(d) does not bind New Union's TMDL implementation under CWA § 303(e), New Union may ultimately choose to meet TMDL discharge requirements through other measures such as stricter permitting on point sources. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Therefore, EPA's recommendation to include BMPs in the planned CWIP was not arbitrary and capricious because it was merely a suggestion as a way for New Union to reach its discharge requirements in the CWIP.

B. EPA's BMPs Recommendation was Not Arbitrary and Capricious Because the Regulation About TMDLs is Conditional and was Not Triggered.

The language of EPA's TMDL regulation is conditional, and therefore EPA's BMPs suggestion does not automatically relax nonpoint source discharge limitations. 40 CFR 130.2(i). EPA's TMDL regulation states the following: "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." *Id*. The regulation's construction is conditional, requiring that BMPs make the reduction of nonpoint source discharges workable before point source discharge limitations can be relaxed.

Here, EPA's suggested BMPs in the CWIP do not automatically trigger the first half of the conditional regulation—that BMPs must make the reduction of nonpoint discharges workable. Just because EPA recommended BMPs to New Union, that does not mean that these BMPs are practicable to New Union and its stakeholders. Order 9-10. Indeed, New Union took

comments from agricultural and residential stakeholders regarding BMPs, and New Union ultimately decided to exclude nonpoint source reductions from its preferred TMDL plan. Order 9-10. Thus, the BMPs for nonpoint sources are not workable, or "practicable," under EPA's regulation, so relaxation of point source discharges cannot occur. In consequence, New Union will have to restrict point source allocations more than EPA had submitted in the CWIP; but, because planning TMDLs do not require or prohibit action in and of themselves, New Union has the freedom to restrict point source allocation further since it cannot rely on BMPs to relax restrictions for point sources under 40 CFR 130.2(i).

C. EPA's BMPs Recommendation was Not Arbitrary and Capricious Because the Implementation of BMPs do Not Need to be Reasonably Assured.

In response to CLW's claim at the trial level, EPA's guidance that there must be a reasonable assurance that BMPs will be achieved is not an agency rule and therefore non-binding. EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991) ("EPA 1991 Guidance"); *see also Nat'l Min. Ass'n v. McCarthy,* 758 F.3d 243, 252 (D.C. Cir. 2014) (stating that stakeholders "may ignore EPA's Final Guidance without facing any legal consequences"). The guidance states the following: "In order to allocate loads among both nonpoint and point sources, there must be reasonable assurances that nonpoint source reduction will in fact be achieved." EPA 1991 Guidance.

Here, New Union does not need to provide a "reasonable assurance" that BMPs will be enforced so that EPA can recommend BMPs at the TMDL planning phase under CWA § 303(d). New Union does not need to provide a reasonable assurance because EPA's guidance is non-binding on states and stakeholders. If EPA were to propose a reasonable assurance standard for BMPs, EPA must go through formal rulemaking or the informal notice-and-comment process to create binding rules on the public. 5 U.S.C. § 553. Because BMPs do not need to be reasonably

assured at the TMDL CWA § 303(d) stage, EPA's BMPs suggestion was not arbitrary and capricious.

D. EPA's BMPs Recommendation was Not Arbitrary and Capricious Because there was no Affirmative Evidence in the Record that New Union Would Not Enforce BMPs.

Regardless of whether New Union has not enforced BMPs since EPA's adoption of the CWIP, EPA's BMPs recommendation was not arbitrary and capricious because the arbitrary and capricious standard scrutinizes only the record that EPA had at the time of approving the CWIP. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) (holding that a court's review of an administrative action must be "based on the record the agency presents to the reviewing court"); *see also Miezgiel v. Holder*, 33 F. Supp. 3d 184, 189 (E.D.N.Y. 2014) (stating that "arbitrary and capricious is a legal question to be resolved on the basis of agency records in existence at the time of the action").

Here, CLW asserts that New Union has not taken steps to enforce EPA's suggested BMPs. However, this was not a part of the record when EPA made its decision to adopt the CWIP. Record at 10. Although the public comments opposing BMPs were included in the agency record, there is still no affirmative indication in the record that New Union would not enforce BMPs. Record at 10. Moreover, as stated earlier, EPA's BMPs recommendation in the CWIP do not require or prohibit New Union's actions because the CWIP is merely a plan to reduce water pollutants under CWA § 303(d). Therefore, EPA's BMPs recommendation in the CWIP, when there was no information in the agency record at the time that positively implied that New Union would not enforce BMPs, was not arbitrary and capricious because EPA reasonably relied upon the record to suggest BMPs in the CWIP.

CONCLUSION

For the foregoing reasons, New Union respectfully requests that this Court affirm the District Court's holdings— (1) that New Union has standing and that the issue is ripe for adjudication, (2) that EPA's regulatory interpretation of TMDL was contrary to the CWA, and (3) that EPA's BMPs recommendation was not arbitrary and capricious—and vacate the District Court's holding that a TMDL phased over five-years violates CWA § 303(d) requirements.