TEAM 19

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

CHESAPLAIN LAKE WATCH
Plaintiff-Appellant-Cross Appellee

and

THE STATE OF NEW UNION
Plaintiff-Appellee-Cross Appellee

v.

UNITED SATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellant

ON APPEAL FROM
THE UNITED STATES COURT
FOR THE DISTRICT OF NEW UNION

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

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INTRODUCTION

This case is about whether the Clean Water Act (CWA) authorizes the United States Environmental Protection Agency (EPA) to make state-level decisions regarding management of water pollution. It does not. The CWA preserves states' authority to make such local decisions. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("regulation of land use [is] a function traditionally performed by local governments"). The case arose when EPA usurped the State of New Union's statutory authority to regulate water quality through setting TMDLs and issuing NPDES permits—this was an overreach and outside of EPA's power.

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(4), the State of New Union (New Union) appeals the District Court's grant of summary judgment in part for Chesaplain Lake Watch (CLW) and asks the Court to affirm the District Court's order vacating EPA's disapproval of New Union's phosphorus TMDL, entered August 15, 2021, by the Honorable Judge Romulus N. Remus, Nos. 66-CV-2020 and 73-CV-2020. The District Court had subject matter jurisdiction under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 1331 because the cause of action is under the Clean Water Act, 33 U.S.C. §§ 1251, a federal statute which requires actions by a federal agency. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which states, "[t]he courts 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 a final decision, and therefore may be appealed. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015). New Union, EPA, and CLW all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4(a).

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 judicial review.

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

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

IV. 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).

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act (CWA) aims to prevent, reduce, and eliminate water pollution to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA calls for two types of regulation: discharges of pollutants into waters of the United States and water quality standards for surface waters. The CWA incorporates the notion of "cooperative federalism," under which states can may implement regulatory programs to meet federally established standards for permitting and water quality improvement. As such, states retain the "primary responsibilities and rights" to address water quality within their borders and "plan the development and use. . . of land and water resources." 33 U.S.C. § 1251(b).

The CWA divides sources of pollution into two types: point source and nonpoint source. Point source pollution means "confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The CWA's definitions do not comprehensively define nonpoint source pollution; only point source polluters can "discharge of a pollutant." 33 § 1362(12). Permits authorizing the discharge of pollutants to navigable waters by point sources are issued under § 402 of the CWA by either the U.S. Environmental Protection Agency (EPA) or by a state with a program approved by EPA as meeting the requirements of CWA § 402(b). 33 U.S.C. § 1342(b). This permitting program is called the National Pollutant Discharge Elimination System (NPDES). The program prohibits point sources, including factories, power plants, municipal sewage treatment plants, and certain farms, from discharging pollutant to surface waters without

an NPDES permit. Each permit is unique and has a set of effluent limitations developed for the specific applicant.

The permits limit the amount and/or concentration of a particular pollutant that may be discharged. *See* 40 C.F.R. §§ 122.44, 122.45. The CWA contains two strategies for determining pollution reduction requirements for point sources: technology-based standards and water quality standards (WQS). CWA § 303(d) requires states to (1) develop WQS programs consisting of the designation of uses and the establishment of criteria, and (2) submit the programs to EPA for approval. 33 U.S.C. § 1313(d)(1)(A). Should a state fail to develop WQS, the CWA requires EPA to issue them for that state. 33 U.S.C. § 1313(b). The CWA directs states to review and, if necessary, revise WQS at least once every three years. 33 U.S.C. §§ 1313(c)(1).

After establishing WQS, § 303(d) requires that states perform an assessment of the ability of each waterbody to meet those standards after full application of technology-based point source controls. *See* 33 U.S.C. § 1313(d). If a water body does not meet WQS requirements after all dischargers have complied with the technology-based standards and other state pollution controls, the state lists it as "impaired." 40 C.F.R. § 130.7(b)(1). Once listed, the state must then calculate the maximum amount of a certain pollutant that the water body can receive and still meet WQS. This amount is referred to as the total maximum daily load (TMDL). Administered by the state, the TMDL should be "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which [considers] any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Notably, the CWA empowers the EPA Administrator to review, approve, or reject TMDLs. 33 U.S.C. § 1313(d)(2). Should the Administrator disapprove of a state's proposed TMDL, EPA is authorized to establish its own. *Id*.

TMDLs are composed of wasteload allocations for point source pollution and load allocations for nonpoint sources with an added margin of safety. 40 C.F.R. § 130.7(c). The CWA focuses water-quality based regulation on controlling point source discharges through permitting and wasteload allocations. Wasteload allocations (WLA) are a portion of the water's loading capacity allocated to either current or future point source pollution. 40 C.F.R. § 130.2(h). Load allocations (LA) are estimated loading capacity for nonpoint source pollution—the LA estimate can range from reasonably accurate to gross allotments depending on data, natural pollution, and other various techniques. 40 C.F.R. § 130.2(g). Best management practices are one of the tools available to the states to control nonpoint sources via a TMDL. Best management practices can be any "method, measure, or practices" chosen to reduce nonpoint source pollution. 40 C.F.R. § 130.2(m).

B. The Proposed TMDL for Phosphorus Loadings in Chesaplain Lake

Lake Chesaplain is a large, natural lake located entirely within the State of New Union. The Union River watershed feeds the lake, and it flows out into the Chesaplain River, a navigable-in-fact interstate waterbody. The lake's clear water used to attract many people, from boaters and fishers to eventual business owners and lakefront residents. Order at 7. In the 1990s, ten large-scale hog production facilities (classified as concentrated animal feeding operations, or CAFOs) and a large-scale slaughterhouse (greater than fifty million pounds per year) were built due to economic development pressure. *Id.* Water quality in the lake rapidly declined during the first decade of the twenty-first century. *Id.*

The declining water quality in Lake Chesaplain led to several regulatory actions implemented by the State of New Union Department of Fisheries and Environmental Control (DOFEC)—the designated New Union agency—and EPA. *Id.* at 5. New Union designates Lake

Chesaplain as a Class AA water body pursuant to the state's adopted WQS. *Id*. at 8. Class AA water bodies are the highest quality; safe for drinking, swimming, and fish propagation and survival. *Id*. In 2012, the Lake Chesaplain Study Commission issued a report in response to the lake's declining water quality. *Id*. The report declared that (1) the lake was experiencing eutrophication; (2) the lake's dissolved oxygen levels were below necessary to support a healthy fishery; and (3) the lake contained excessive amounts of phosphorus. *Id*. Specifically, the report concluded that measured phosphorus levels in the lake ranged from 0.020 to 0.034 mg/l, well above the desired level of 0.014 mg/l. *Id*. In the 2014 WQS review, DOFEC's list of impaired waters included Lake Chesaplain because it violated the water quality criteria for dissolved oxygen, odor, water clarity, and phosphorous levels. *Id*. EPA did not object to the § 303(d) impaired waters submission. *Id*. After encouragement from environmental organization Chesaplain Lake Watch (CLW), New Union sought to create a TMDL that worked to reduce the amount of phosphorus in the lake without creating an undue burden on the homeowners and businesses that relied on Lake Chesaplain. *Id.*

In July 2016, DOFEC issued a supplemental report that calculated maximum phosphorus loadings at 120 metric tons (mt). *Id.* This amount was lower than the existing calculated loadings (2015) which totaled 180 mt. *Id.* The report concluded that hog CAFOs (a type of nonpoint source pollution exempted under 33 U.S.C. § 1362(14)) contributed to the amount of phosphorus in Lake Chesaplain. *Id.* at 9. The report also found private septic tanks from homeowners along the lake to be a nonpoint source polluter of phosphorous. *Id.* New Union aimed to solve this issue with its own regulatory program meant to control the amount of phosphorus that enters the lake from hog CAFOs. *Id.* at 7. The New Union Agricultural Commission (NUAC) reviews and approved site-specific nutrient management plants for the application of manure waste to fields. *Id.* DOFEC

conducted the rulemaking process that requires nonpoint source and point source polluters alike to reduce their phosphorus discharges through an equal phased reduction plan. *Id.*

The suggested five-year TMDL plan called for a 7% reduction from the 180 mt baseline the first year; a 14% reduction the second year; a 21% reduction the third year; a 28% reduction the fourth year; and a 35% reduction by the fifth year. *Id.* The phased TMDL called for point sources to be controlled through limits on their discharge permits. For nonpoint source polluters not subject to the CWA permitting regime, the TMDL proposed to implement best management practices. The TMDL also called for further controls on hog CAFOs (who were already subject to control under the New Union statute), as well as physical and chemical treatment of manure and strict restrictions on manure spreading practices. The hog CAFOs followed New Union law but became frustrated with the new federal regulations because hog CAFOs are not traditionally subject to direct control under the CWA. The proposed best management practices for private homeowners included increased septic tank inspection and pumping schedules, a cost that homeowners would have to cover. *Id.*

The phased TMDL met wide opposition. Private homeowners objected to the cost. *Id.* The hog CAFOs objected to the best management practices because EPA lacked statutory authority to impose loading limits on nonpoint sources. *Id.* Chesaplain Mills and the slaughterhouse objected to the phosphorus treatments needed to reach 35% reduction. *Id.* CLW objected the plan, arguing that (1) the phased TMDL violated the terms of the CWA; (2) the best management practices were insufficient; and (3) New Union should achieve phosphorus reduction by completely reducing the amount of phosphorus discharged from point sources. *Id.* at 9-10. Despite these arguments, CLW did not object to the science in the July 2016 report. *Id.* at 10.

In response to the dissatisfaction with the phased TMDL, New Union adopted a TMDL tailored to the concerns of its constituents in July 2018. *Id*. The TMDL included no wasteload allocations or load allocations, but rather a 120 mt annual maximum phosphorus discharge limit. *Id.* EPA—who had not been a part of the process at all until this point—rejected New Union's TMDL. *Id*. Instead, EPA adopted the highly contested and controversial phased TMDL, calling it the "Chesaplain Watershed Implementation Plan" (CWIP). *Id.* The CWIP required the five-year phased reduction to meet 35% phosphorus reduction through permit limits for point sources and unspecified best management practices for nonpoint sources. *Id.* New Union has not re-issued the expired NPDES permit for the slaughterhouse to reflect the new TMDL and phosphorus loadings. *Id.* at 11.

C. Proceedings Below

The current action is based on EPA's determination to (1) reject New Union's and (2) substitute its own TMDL under § 303(d), 33 U.S.C. § 1313(d). New Union commenced this action under the Administrative Procedure Act (APA), 5 U.S.C. § 702, against EPA less than a year after EPA's adoption of the CWIP, arguing that EPA's rejection of its TMDL and the regulations governing TMDL submission (that EPA based its decision off) are invalid. Order at 10, 5. CLW filed shortly after, mounting two main challenges: (1) that a TMDL consisting of an annual loading limit to be phased over a period of five years is contrary to the legal requirements of the CWA and (2) that there is "no reasonable assurance the reductions will be achieved" under the CWIP. *Id*. at 11. The District Court granted unopposed motions to consolidate the two cases. *Id.*

The lower court provided four holdings, which different parties appeal here. First, that New Union and CLW's claims are ripe for judicial review. *Id.* at 12. Second, that EPA's interpretation of the phrase "total maximum daily load" to require allocation of all the proposed individual

reductions required to meet such total counteracts the meaning and context of § 303(d). *Id*. at 13. Third, that EPA's construction of the same phrase to allow for a phased percentage reduction in phosphorus loadings likewise contradicts the plain meaning and structure of the CWA. *Id*. at 15. Lastly, the EPA's decision to suggest nonpoint source best management practices to raise the point source cap was not an arbitrary and capricious decision. *Id*. at 16. This appeal followed.

SUMMARY OF THE ARGUMENT

EPA overstepped the bounds of the CWA and encroached on New Union's ability to manage its own natural resources by disapproving New Union's TMDL and implementing its own. The CWA places the power of water quality governance in the hands of the states, with EPA acting as the proverbial backstop. However, instead of leaving a statutorily required mandated power to New Union, EPA usurped this power, presented its own TMDL for notice and comment, and approved its own TMDL. As a result, New Union must issue new NPDES permits to New Union businesses. New Union challenged EPA's TMDL to ensure the issuing NPDES permits did not open the door to liability and impact New Union's right to operate its NPDES permit system and eligibility for federal water quality funds.

First, this controversy is ripe for judicial review. All three parties moved for summary judgment at the trial level, which only left legal determinations for the Court on how to interpret the language of § 303(d). Additionally, because EPA pushed through the approval of its TMDL, there are no lingering agency actions required. The next step is issuing NPDES permits that reflect the implementation of the TMDL designations. Issuing these NPDES permits can pose a threat to New Union's eligibility for water quality funds, later water quality standard liability under the CWA, and the ability to continue operating its NPDES permits. This impending harm

underscores why the Court must rule on the merits of this controversy, instead of dismissing it to allow a later court to make the decision, after the harm is irreparable.

Second, best management practices are merely a discretionary tool that allow states to manage nonpoint source pollution. EPA has defined best management practices broadly to reflect the broad discretion given to the states. The CWA does not require "reasonable assurances" to control nonpoint source pollution. EPA has not adopted any mandatory best management practices because that would circumvent the structure of the CWA in regulating point sources only. New Union's statute imposes best management practices on hog CAFOs by regulating their nutrient management plans and manure spreading. New Union has discretion to implement nonpoint source controls to reduce the amount of phosphorus in Lake Chesaplain, and neither the Court nor EPA should require or mandate a discretionary program left to the states.

The TMDL is a planning method used to curb nonpoint source pollution. A phased TMDL adopted by EPA is valid under the CWA when used to regulate phosphorus. "Daily" in "total maximum daily load" is ambiguous because the CWA, in one sentence, directs EPA to approve TMDLs for numerous pollutants. Because "daily" is ambiguous, courts should defer to EPA's interpretation of TMDL for phosphorus because phosphorus and eutrophication are unique compared to other types of pollution, so stating the TMDL in "daily" terms would not effectuate the purpose of the phased TMDL; a phased TMDL could reduce nonpoint phosphorus pollution and meet the water quality standard established by New Union.

Finally, EPA's decision to reject the New Union phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is an incorrect interpretation of the statutory term "total maximum daily load" and is contrary to law. Section 303 does not allow EPA to require allocation of all the proposed individual reductions (WLA

and LA) among individual sources needed to meet the necessary *total* maximum daily load. Additionally, EPA's rejection of New Union's TMDL, on the grounds that it did not include wasteload allocations and load allocations, exceeds any permissible construction of the statute and amounts to EPA exceeding its statutory authority as granted by the CWA.

This Court should hold that EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL was arbitrary and capricious, and direct EPA to approve New Union's Lake Chesaplain TMDL.

STANDARD OF REVIEW

A district court's grant of summary judgment is proper if the moving party shows that "there is no genuine dispute as to any material fact," thus the moving party merits judgment as a matter of law. Fed. R. Civ. P. 56(a). The appellate court reviews a grant of denial of summary judgment *de novo*. *Ohio Valley Env't. Coal., Inc. v. Pruitt*, 893 F.3d 225, 229 (4th Cir. 2018).

ARGUMENT

I. New Union's Claims Are Ripe for Judicial Review

"Ripeness is peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). Before the Court can address the merits, it must first establish that it has jurisdiction. The Ripeness Doctrine prevents courts from entangling themselves in "abstract disagreements over administrative policies," and protects administrative agencies until they formalize their decisions. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732–33 (1998). In this case, the Court must determine whether the claims made by the CLW and New Union are ripe for judicial review. The EPA contended at the trial court level that the present issue was not ripe for judicial review; however, the District Court agreed with New Union's and CLW's argument that the present issue was ripe.

A case is ripe if the challenging parties face a direct and concrete injury, such as liability from an impending agency regulation. *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). There are two elements that determine a cause of action's ripeness: (1) whether the present issues are fit for a judicial decision, and (2) whether the parties would suffer a hardship if the Court withheld consideration. *Id.* at 149. In administrative matters, the Court must also consider: "1) whether delayed review would cause hardship to the plaintiff; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the court would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n*, 523 U.S. at 733. Essentially, a claim is ripe when there is a manageable scope of controversy with fleshed-out facts, and some concrete action harms or threatens to harm the claimants. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990).

A. The present controversy is fit for a judicial decision because it is a legal issue that does not need any more factual development or any further administrative action.

In determining if the controversy is fit for a judicial decision, the *Abbott Labs* Court considered whether the present issue was a legal one, whether there was any further factual development needed, and whether there was any administrative action remaining. *Abbott Labs*, 387 U.S. at 149. Much of the analysis required for the first element of *Abbott Labs* aligns with the second and third elements in *Ohio Forestry Association* for administrative actions. *Ohio Forestry Ass'n*, 523 U.S. at 735–36. A controversy's fitness rests on whether it would benefit from more factual development, as a case with purely legal issues is more likely to be ripe for judicial review. *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013).

While the Supreme Court has yet to rule on the ripeness of TMDL challenges, circuit courts have held that challenges to TMDLs are fit for judicial decision when the challenging party must

issue NPDES permits that comply with the TMDL. *City of Kennett v. EPA*, 887 F.3d 424, 433 (8th Cir. 2018). The Eighth Circuit held a TMDL challenge was fit for judicial decision because the TMDL dictated how the city would reissue its NPDES permits, and even if the TMDL changed later, that was not enough to delay the reissuing. *City of Kennett*, 887 F.3d at 433–34. In *City of Kennett*, EPA claimed the controversy was not ripe because implementation was a "contingent future event." *Id*. at 433. However, EPA's argument failed because EPA approved the TMDL, and the only "contingent future event" was a potential change in DO measurements, which was not enough to stop the city from processing permits. *Id*. The City of Kennett's suit merited a judicial decision because the City needed to issue new NPDES permits that complied with the TMDL to replace the expired NPDES permits. *Id*. at 429.

Akin to *City of Kennett*, New Union's challenge to EPA's TMDL is fit for a judicial decision, because the TMDL legally implicates New Union's ability to issue new NPDES permits, its eligibility for federal water quality planning funds, and its ability to maintain its NPDES permitting program. The TMDL requires no further agency action, as it has already completed the notice and comment stage and subsequent adoption. Order at 11. Also, both parties moved for summary judgment at the trial level, thus indicating that there is no more factual development necessary. *Id*. Consequently, the cogs of justice will turn slower if this court holds the current issues are not fit for judicial decision, thus facing challenges each plant and citizen group, like CLW, asking for a judicial decision challenge on the same root problem as here. *See id*. at 10 (discussing plants own challenge to TMDL because they need reissued NPDES permits).

Additionally, the issue at hand is purely legal, as the issue relates to an interpretation of a provision of the CWA and challenges an agency's action under the APA. *Id*. at 11. There is no further administrative action pending, except for the issuing of the NPDES permits, which are the

essential means to water quality regulations and standards. *See City of Kennett,* 887 F.3d at 433 (upcoming NPDES permit forces plaintiffs to adopt TMDL and impose limitations on discharging parties if not for legal challenge). The present issue represents the same kind of challenge in *Abbott Labs*, New Union is asking the Court to interpret legal questions that will have a direct impact on the involved parties, who all face legal ramifications for violating the same rule they challenge here. *See Abbott Labs*, 387 U.S. at 149 (concluding the first ripeness element is met because the parties only wish to know the statute's breadth, not the facts behind them).

B. The Court must rule on this controversy now to prevent imminent harm to the parties.

The second ripeness element determines if delaying judicial review for pending further agency action would prejudice the claimant. *Abbott Labs*, 387 U.S. at 149. An agency action that is ripe for review can only be final agency action, as the Court cannot properly adjudicate "abstract disagreements over administrative policies." *Id*. at 148. Regulations that have the force of law, even before the threat of sanctions arise, are final agency actions if the rulemaking process is complete. *Id*. at 151 (citing *United States v. Storer Broadcasting Co*., 351 U.S. 192, 198 (1956)). The potential harm suffered by a claimant from a proposed plan is a substantial factor in modern ripeness cases. *Ohio Forestry Ass'n*, 523 U.S. at 734. When analyzing the hardship element, courts must also look towards legal implications. *See Id*. (noting different traditional legal harms that qualify as hardship factors).

The lower court correctly relied on *American Farm Bureau Federation v. EPA*, because the TMDL in this case poses the same harm. Order at 12. In *American Farm Bureau Federation v. EPA*, the Third Circuit held a challenge to the TMDL was ripe in part because of the potential hardship the TMDL posed to local trade associations. 792 F.3d 281, 293 (3d. Cir. 2015). Unique to the Third Circuit's analysis was an accounting for EPA's and State's time and financial costs if

they faced future litigation. *Id*. Because the issues were purely legal, and the parties faced hardship both in costs and anticipated liability if the TMDL took effect, the court decided "[i]f there is something wrong with the TMDL, it is better to know now than later." *Id*.

The TMDL has a direct impact on New Union's ability to run its state and manage its natural resources. The impending TMDL could open New Union up to liability if the Court fails to review the case now. Order at 10. Unlike other TMDL cases that EPA cites, the proximity in timing between issuing new NPDES permits and the challenge to the TMDL—which otherwise would be the basis for the new NPDES permits—illustrates the hardship that New Union risks. New Union also faces implications that impact its ability to coordinate its own NPDES permit powers and open itself up to liability under federal water quality standards. *See* 33 U.S.C. § 1288(f) (detailing the grant program states must follow for maintaining and improving water quality standards). While prior courts denied judicial review because it could disrupt the agency's ability to refine its policies, the current policies do not need any refining, nor does EPA claim there is any refining left. *Cf. Ohio Forestry Ass'n*, 523 U.S. at 735 (finding judicial review could impede the agency's ability to act on site-specific issues required under its own agency guidance). New Union could face liability and harm on multiple fronts if the Court dismisses this action before reaching the merits, which will harm New Union's Lake Chesaplain and the people that rely on it for their livelihood and enjoyment.

C. EPA misplaces its reliance on cases that deny a TMDL controversy for ripeness.

The District Court disregarded EPA's reliance on *City of Arcadia v. EPA* and *Bravos v. Green* because the NPDES permits New Union will have to issue must comply with the TMDL. Order at 12. Both cases support the District Court's ruling by illustrating the importance of timing

under the Ripeness Doctrine. Both cases EPA relies on fail to address the TMDL itself, instead both cases challenge parts of the TMDL process, which is not at issue here. Order at 12.

City of Arcadia held the City's challenge to EPA's TMDL was not ripe, because the city merely challenged the process that created the TMDL. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal 2003). While New Union must re-issue expired NPDES permits—the City of Arcadia faced no impending regulation, and the TMDL had not been finalized. *See id*. at 1155 (providing the Los Angeles Regional Board planned to revisit the TMDLs at the end of the monitoring period). The TMDL in *City of Arcadia*, which was subject to change, was not subject to challenge because at the time of the suit, it was just a threshold without pending ramifications. *Id*. The court found the case was not ripe because the Los Angeles Regional Board's reconsideration after the end of the monitoring period was "a rational basis for delaying judicial review." *Id*. at 1156.

Like *City of Arcadia*, *Bravos v. Green* also disposed of a TMDL challenge because the challenge was not ripe, as there was no impending harm under the second element of *Abbott Labs*. *Bravos v. Green*, 306 F. Supp. 2d 48, 53 (D.D.C. 2004). In *Bravos*, the challenge to EPA's TMDL centered on the TMDL implementation plan and the implementation plan's voluntary nature. *Id.* at 50. EPA set the TMDL, but the challenge was to the implementation plan, which was the state's responsibility. *Id*. at 58. Additionally, the issue in *Bravos* dealt with whether EPA's letter that discussed the nature of implementation plans could be "final agency action." *Id*. at 55. The court subsequently held that the controversy was not ripe because sending an EPA letter mentioning the TMDL in passing was not a final agency action, and the TMDL approval could not constitute harm by itself. *Id.* at 50.

Ripeness is a question of timing, which is the key distinguishing factor from *City of Arcadia* and *Bravos*. In both cases, there is no impending harm caused by the TMDL, like the responsibility to re-issue NPDES permits based on the TMDL presents impending harm here. It is the proximity of the NPDES permits' expiration and required re-issuance that underscores the ripeness here and distinguishes from *City of Arcadia* and *Bravos*. While there is no threat of sanctions relating directly to the TMDL, the TMDL has the force of law behind it, which makes it a final agency action. Order at 10 (describing the administrative process the EPA's TMDL went through to get approval and how it represents a final agency action). *City of Arcadia* and *Bravos* did not address the same legal issues or have the same facts that illustrate a choice with dire implications regarding the relationship between a TMDL and expired NPDES permits, thus EPA's reliance of those cases is misplaced. The present issue is ripe for judicial review.

II. EPA's Adoption of a Credit for Anticipated Best Management Practices to Reduce The Stringency of Wasteload Allocations for Point Sources for Implementation of the Lake Chesaplain TMDL was not Arbitrary and Capricious or an Abuse of Discretion Due to the Lack of Assurance of Best Management Practices Implementation

Under § 706 of the APA, "[T]he reviewing court shall . . . 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. An agency's interpretation of its own regulations gets substantial deference when, like here, the regulations require actions that go beyond what is required in the authorizing statute. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The structure and intent behind the CWA is the regulation of point sources through permitting; the CWA does not regulate nonpoint sources directly; nonpoint sources are left to the states to control through TMDLs and best management practices. *Nat'l Wildlife Fed'n v. Gorsuch*,

693 F.2d 156, 176 (D.C. Cir. 1982) (recognizing that Congress made a clear distinction between point sources and nonpoint sources, the former of which is the only one subject to direct federal regulation) (citations omitted). Nonpoint source pollution controls are left to the states to study and implement. 33 U.S.C. § 1329(b)(1); 40 C.F.R. § 130.7. Best management practices exist to make point source pollution controls less stringent. 40 C.F.R. § 130.2(i). Best management practices are one of many tools available to the states to "meet its nonpoint source control needs." 40 C.F.R. § 130.2(m). Best management practices are any method, measure, or practice selected to control nonpoint source pollution, and can include structural or nonstructural controls. *Id.* Best management practices are implemented, "before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters." *Id.*

EPA defines best management practices as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.'" 40 C.F.R. § 122.2. The broad definition of best management practices in EPA's regulations is notable here, especially when considering how states have full authority to implement them. *Nat'l Wildlife Fed'n*, 693 F.2d at 176. When it comes to EPA's definition of best management practices implemented by the states, "A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Auer*, 519 U.S. at 463.

Here, CLW claims it lacked "reasonable assurance" that the proposed best management practices will be implemented, and that New Union abandoned its efforts to implement best management practices when faced with political opposition. The CWA does not require "reasonable assurance" that best management practices will be implemented because best

management practices are a discretionary tool that may make point source load allocations less stringent if implemented. 40 C.F.R. § 130.2(m). EPA has required, and courts have reviewed, "reasonable assurance" on a case-by-case basis, but it has not been adopted through notice and comment rulemaking and is not applicable here. *Compare Am. Farm Bureau Fed'n*, 792 F.3d at 292 (stating multiple states had given reasonable assurance of best management practices when many states had to work together) *with Bravos*, 306 F. Supp. 2d at 52 ("The revised regulations [which were never formally adopted] would also have required States to provide 'reasonable assurances,' which was defined as 'a demonstration that TMDLs will be implemented through regulatory or voluntary actions[,]' as a part of the State's implementation plan.").

New Union imposes mandatory best management practices on hog CAFOs under a New Union statute where the hog CAFOs are regulated and subject to permits by the New Union Agricultural Commission (NUAC). Order at 7. The NUAC reviews and approves site specific nutrient management plans for the application of hog liquid manure waste to fields. *Id*. Implementing best management practices against private homeowners who live along the lake is less practicable given the cost concerns. It is within New Union's discretion to not implement best management practices on privately-owned septic tanks. Neither EPA nor the Court should require implementation of a discretionary program entrusted to the states.

CLW also claims that two years have passed without implementation of best management practices to control nonpoint source phosphorus discharges, and New Union took no steps to require best management practices for phosphorus reduction in the Lake Chesaplain watershed. The state-issued nutrient management permits for the hog CAFOs have not been modified to incorporate any phosphorus reduction measures contemplated by the CWIP because ongoing litigation regarding the water-quality based regulation of Lake Chesaplain means New Union

cannot impose best management practices until the TMDL is established. *Id*. at 10. Once resolving the TMDL litigation, then New Union can update the hog CAFO permits under the statute and can consider whether best management practices on septic tanks is practicable. This issue, which is ripe for review, must be resolved before New Union expends any resources implementing a discretionary program. Because best management practices are discretionary, left to the states to implement, and interpreted broadly, EPA's actions regarding best management practices are not arbitrary and capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706.

III. 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 Does Not Violate the § 303(d) Requirements for a Valid TMDL

A valid TMDL does not require annual pollution loading reduction in "daily" amounts because there is no uniform approach to controlling nonpoint source pollution. CLW argues that a TMDL phased in over five years violates § 303(d) because it is not expressed in "daily" amounts, thereby violating the statutory meaning of "total maximum daily load." A phased TMDL is valid because it complies with the purpose of the statute. There is a circuit split on the definition of "daily" in TMDL. Therefore, under the second prong of *Chevron v. NRDC*, the phased TMDL is a reasonable interpretation of the statute and should not be set aside by the Court.

A. The term "daily" in "total maximum daily load" is ambiguous under the first step of *Chevron*.

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One mechanism employed by the CWA is the water-quality based standards that set limits on the amount of pollutants that can exist in an impaired body of water. 33 U.S.C. § 1311(b). States issue National Pollutant Discharge Elimination System (NPDES) permits to authorize individual polluters to discharge into an impaired body of water so long as they comply with the other requirements of the CWA. 33 U.S.C.

§ 1342(a). The CWA tasks states with identifying which water bodies cannot meet the water quality standards. 33 U.S.C. § 1313(d)(1)(A). Once a body of water is identified as impaired, the state must establish a Total Maximum Daily Load (TMDL) for the pollutants in the water. 33 § 1313(d)(1)(C). If EPA disapproves of the State's TMDL, EPA sets its own TMDL for the waterbody. 33 U.S.C. § 1313(d)(2).

The CWA does not define TMDL in express terms; it merely states that for a TMDL to be valid, "Each State shall establish . . . the total maximum daily load . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety . . . ." 33 U.S.C. § 1313(d)(1)(C). A TMDL consists of the combination of wasteload allocations for point sources, plus load allocations for nonpoint sources and natural background, with an added margin of safety. OVERVIEW OF TOTAL MAXIMUM DAILY LOADS, https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls. EPA has further stated that the TMDL "may be established using a pollutant-by-pollutant or biomonitoring approach." 40 C.F.R. § 130.7(c)(1)(i). The Supreme Court has held that the complexities in the CWA favor judicial deference to EPA's construction of the statute over the court's own construction. *Train v. NRDC*, 421 U.S. 60, 75 (1975).

TMDLs are important "informational tools" that serve as a "link in the implementation chain" to allow States to attain their water quality goal. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). A TMDL is incompatible with one discrete day-by-day formula because the content and structure of the TMDL varies based on the substance that is causing pollution in the water. *NRDC v. Fox*, 93 F. Supp. 2d 531, 555 (S.D.N.Y. 2000). "Congress, in one sentence, directs EPA to approve TMDLs for hundreds of different pollutants in thousands of different waterbodies,

and it is excessively formalistic to suggest that EPA may not express these standards in different ways, as appropriate to each unique circumstance." *Id.*

The Court must turn to *Chevron* deference when facing a question of statutory interpretation involving the administering agency. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under the familiar *Chevron v. NRDC* framework, step one the courts inquire "whether Congress has directly spoken to the precise question at issue." *Id.* at 842–43. If Congress's intent is clear, courts must give effect to the unambiguous intent of Congress. *Id.* But if the statutory term is ambiguous with respect to the issue, the court analyzes "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. When an agency is empowered to carry out a regulatory scheme and a term is ambiguous, the authorized agency has implicit delegation to administer the statutory program. *Id.* at 843-44. Under *Chevron,* courts cannot substitute their judgment for the agency's, because courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* at 844. "In the face of conflicting evidence at the frontiers of science, courts' deference to expert determinations should be at its greatest." *NRDC v. Muszynski*, 268 F.3d 91, 101 (2d Cir. 2001). Thus, when the statutory term is ambiguous, courts should defer to the administering agency's interpretation. *Id.* at 98. A term is ambiguous if it is open to more than one interpretation. *See id.* at 98 (stating no plain meaning if term is open to more than one interpretation, i.e., ambiguous).

Here, the term "daily" in TMDL is ambiguous because it is open to more than one interpretation. The Second Circuit in *NRDC v. Muszynski* stated that Congress did not intend for "such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis," and that requiring so would be absurd. *Id.* at 98-99. Courts have

consistently disagreed over the meaning of the word "daily." *Compare Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (2006) ("Congress specified 'total maximum daily loads.' We cannot imagine a clearer expression of intent."); *with NRDC v. Muszynski*, 268 F.3d 91, (2d Cir. 2001) (stating TMDL does not always require "daily" loads and can be expressed by another mass per time). The D.C. Circuit in *Friends of the Earth v. EPA* reasoned that even for an oxygen-depleting pollutant like phosphorus, which does not consistently reflect the daily levels of pollution in a body of water, a TMDL expressed in "daily" terms is still required because any TMDL that is set low enough, even at zero, will achieve the water quality standard. *Friends of the Earth,* 446 F.3d at 145. Extending that logic here, the phased TMDL can be broken down into daily increments (0.019% daily the first year, and so on), and in that way it would comply with the Third Circuit's reasoning. Any pollutant set low enough in the TMDL will achieve the applicable standard. *Id.* But even the D.C. Circuit extended its holding in *Friends of the Earth* to include seasonal or annual loads for pollutants that were not suited to daily loads, because the CWA is silent on whether another time frame is acceptable when better suited to the pollutant at issue. *Anacostia Riverkeeper Inc. v. Jackson*, 798 F. Supp. 2d 210, 245 (D.D.C. 2011).

A circuit split on the meaning of a term in a statute conveys the debated term is ambiguous. *See Muszynski*, 268 F.3d at 98 (discussing how a term is ambiguous if open to two or more reasonable interpretations); *see also* 40 C.F.R. § 130.7(c)(1)(i) (stating TMDL can vary pollutant-by-pollutant). The Second Circuit has stated "[i]n the case of . . . pollutants, like phosphorus, the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately." *Muszynski*, 268 F.3d at 98. In that case, the court analyzed whether the TMDL, which expressed phosphorus in annual loads, was a valid construction of the statute. *Id.* at 93. The court used two canons of

statutory construction when analyzing the term "daily" under *Chevron* step one. *Id.* at 98. First, the text should be placed within the context of the entire statutory structure. *Id.* Second, the court should avoid absurd results. *Id.* The court held that "the CWA does not require that all TMDLs be expressed strictly in terms of daily loads," and remanded the case for EPA to justify inconsistencies in the record. *Id.* at 103.

CLW argues that the phased TMDL should not be permitted under the CWA; however, like the third and second circuit reason, the term "daily" should be considered in context of the broad statutory and regulatory definition, as well as the ambiguity determined by the courts. 33 U.S.C. § 1313(d)(1)(C); *Muszynski*, 268 F.3d at 98. If the term "daily" can have a different meaning or expression in a valid TMDL depending on the pollutant at issue, then it is ambiguous, and should proceed to *Chevron* step two.

B. The phased TMDL is one of many permissible constructions under *Chevron* Step Two.

Under the second prong of *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Because the term "daily" is ambiguous given that multiple interpretations are acceptable, this Court should follow the general rule, that "courts must give . . . 'deference to the interpretation given to the statute by the officers or agency charged with its administration.'" *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166-67 (1982) (citing *EPA v. National Crushed Stone Association*, 449 U.S. 64, 83 (1980)). By phasing in more stringent phosphorus controls over time, the TMDL complies with the broad goal of achieving clean water in the waters of the United States. 33 U.S.C. § 1251.

Here, the phased TMDL is a valid interpretation under the statute because it could effectively reduce phosphorus pollution and is expressed in mass per time. The TMDL has a

reduction that begins at 7% from the 180mt baseline, 14% reduction in the second year, 21% in the third year; 28% reduction in the fourth; 35% reduction by the fifth year. The phased TMDL is valid because phosphorus could be effectively reduced using a phased implementation. In 2012 DOFEC reported phosphorus levels that varied from 0.020 to 0.034 mg/l throughout the lake. A phased TMDL is one way to bring the phosphorus levels down to the 0.014 mg/l limit throughout the lake. Even if the TMDL for phosphorus was broken down into daily amounts, the varying levels in the lake mean the changes may be noticed in some areas but not others. Reducing the total amount of phosphorus over time is the goal of the TMDL and phasing out phosphorus discharge from nonpoint source polluters is one permissible way to do so under the CWA. *See* 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i); *Muszynski*, 268 F.3d at 98. Therefore, CLW's argument is without merit, and should not prevail.

IV. EPA's Decision to Reject the New Union Phosphorus TMDL on the Grounds that the TMDL Failed to Include Wasteload Allocations and Load Allocations is an Incorrect Interpretation of the Statutory Term "Total Maximum Daily Load" and Is Contrary To Law.

This issue concerns EPA's interpretation of the phrase "total maximum daily load" to include specific allocations to individual point sources and nonpoint sources. In this context, there is a significant distinction between the acronym "TMDL" and the words "total maximum daily load." The former refers to the comprehensive document submitted to EPA while the latter refers to the statutory term. *See Am. Farm Bureau Fed'n*, 792 F.3d at 288–89.

As with the previous issue, this issue concerns EPA's interpretation of perceived authority within the CWA. "[U]sing all the traditional tools of statutory construction," the Court must once again use the *Chevron* framework to analyze the term total maximum daily load and determine whether Congress has "spoken directly" with regards to the scope of EPA's authority based on the statutory language, legislative history, and construction. *Chevron*, 467 U.S. at 843.

If Congress' intent is clear, the analysis stops there: "that is the end of the matter," and the Court "must give effect to the ambiguously expressed intent of Congress." *Id.* at 842–83. Should the Court determine Congress' intent is not yet clear, it must continue to step two of the *Chevron* analysis to "determine whether the regulation harmonizes with the plain language of the statute, its origin, and purpose." *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005).

Section 303 plainly limits EPA's authority in implementing total maximum daily load to only a "total…load… a level necessary to implement the applicable water quality standards…." 33 U.S.C. § 1313(d)(1)(C). It does not permit EPA to require allocation of all the proposed individual reductions among individual sources needed to meet that total. Not only is EPA's interpretation contrary to the plain meaning of the term "total," but it also contrary to the structure of § 303(d) and its incorporation of principles of comity and federalism. Even if the language of § 303(d) was ambiguous, an interpretation that it authorizes EPA to require wasteload allocations and load allocations is an impermissible construction of the statute—one requiring EPA authority over nonpoint sources.

A. EPA's interpretation of the statutory term "total" is contrary to its plain meaning.

Section 303(d) instructs states to establish a TMDL for offending pollutants "at *a level* necessary to implement the applicable water quality standards…." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Based on this instruction, EPA and CLW argue that a valid TMDL needs to distribute this amount of pollution among point and nonpoint sources discharging into that waterbody. EPA and CLW rely on the decision of the Court of Appeals for the Third Circuit in *Am. Farm Bureau Fed'n,* which held that the term "total" was "ambiguous enough" to allow EPA to require a TMDL to include not just the maximum load necessary to implement water quality standards, but also the WLAs and LA that make up that maximum load. *See Am.*

Farm Bureau Fed'n, 792 F.3d at 306. They further rely on regulation which states that a TMDL consists of "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). EPA and CLW also point to EPA's "longstanding definition to a TMDL to include a WLA and LA, adopted by regulation in 1985." Order at 13. In that regulation, EPA states that "it is necessary for EPA to review and approve or disapprove a TMDL in conjunction with component WLAs and LAs." Final Rule, Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985). This reliance is misplaced. The District Court was correct in holding that any such requirement "runs counter both to the meaning and context of § 303(d)." Order at 13.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). To start, § 303(d) fails to specifically mention either WLAs or LAs. Next, when addressing individual loading limits, the statute exclusively refers to TMDL levels in the singular form of "level." *See* 33 U.S.C. § 1313(d)(1)(C) ("such load shall be established at *a level* necessary…"); 33 U.S.C. § 1313(d)(3) ("thermal discharges [should be established] at *a level* that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.") (emphasis added). The singular tense of the operative word "level" is significant. The word "a" means "one" when used before a noun expressing quantity. A, Dictionary.com (2021), https://www.dictionary.com/browse/a. Here, the word "level" is exactly that—a total quantity. Indeed, over a decade before *Am. Farm Bureau Fed'n*, the Ninth Circuit came to a similar conclusion when it held that "[a] TMDL defines the specified maximum amount of pollutant which can be discharged or 'loaded' into the waters at issue from all *combined* sources." *Pronsolino*, 291 F.3d at 1128 (emphasis added).

EPA's interpretation of the term "total" is thus contrary to its plain meaning. When used as an adjective, "total" means 1) "constituting or comprising the whole; entire" and 2) "of or relating to the whole of something." Total, Dictionary.com (2021), https://www.dictionary.com/browse/total. Section 303(d) contains no mention of requirements for either (1) *sub*total allocations generally or (2) *sub*total allocations for specific sources (point or nonpoint) of pollution. Nor does it make any mention regarding a summation scheme of subtotals of specific source allocations. Section 303(d) only considers "a" "total" level. This confirms the District Court's interpretation that (1) New Union correctly submitted a single, aggregate limit (0.014 mg/l) on a particular offending pollutant—phosphorus—which polluters may discharge into Lake Chesaplain and (2) EPA's regulation requiring individual WLA and LA allocations as part of a TMDL is contrary to law.

Congress' intent for a single number total becomes even more clear when read in relation to other parts of the statute. As the District Court correctly illuminates, "[n]othing about section 303(d) implies that the process of setting the TMDL was meant to include an allocation and limitation process of point and nonpoint sources." Order at 13. Such allocation and limitation processes are addressed in various subsections throughout the statute. For example, § 303(e) provides states with details for "continuing the planning process," while paying specific attention to "adequate implementation" and "effluent limitations and schedules of compliance." *See* 33 U.S.C. §§ 1313(e)(3)(F), (A); *also see* 33 U.S.C. §§ 1288(f), 1329(g) (EPA authorization to influence implementation plans via grants and federal funding).

The statutory term "total" is unambiguous. Section 303(d) plainly directs the establishment of a total load—a single number—at a specific level. Squarely addressing both the

plain language and construction of the statute, the District Court rightly concluded that "Congress meant total when it said total." Order at 13.

B. Even if the meaning of "total" is ambiguous, EPA's decision to reject the New Union phosphorus TMDL based on failure to include wasteload allocations and load allocations exceeds any permissible construction of the statute (and EPA's authority to regulate).

EPA's rejection of New Union's TMDL, on the grounds that the TMDL failed to include wasteload allocations and load allocations, exceeds any permissible construction of the statute. Beyond the statute, Congress—conscious of the delicate balance between state and federal interests involved in regulating water pollution—structured the CWA on a framework of cooperative federalism. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . ."). At least one legal scholar contends that the partnership is nevertheless heavily weighted in favor of federal authority. *See*, e.g., Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ENV'T L. REP. & ANALYSIS 10426, 10428–29 (2014).

Congress reflected a collective understanding that "nationwide uniformity in controlling [pollution] is virtually impossible and that such uniformity might have dire implications for land and water uses in individual states. *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, Non-point Source Pollution, ENV'T L. PRACT. GUIDE § 18.13 (2008)). Congress saw to implement the separate regulation schemes for point and nonpoint source pollution. As such, the CWA grants the federal government (through EPA) substantial, but circumscribed, authority to set and achieve water quality standards through cooperation with the various states. Furthermore, Congress "deliberately declined" to implement a system in which EPA has supervisory oversight over specifically how states implement WQS.

Order at 13. *See* 33 U.S.C. § 1313(e); *cf.* 42 U.S.C. § 7410(c)(1) ("The Administrator shall promote a Federal implementation plan at any time. . .").

In rejecting New Union's 2018 TMDL and instead adopting its own—one consisting of a 35% reduction of annual phosphorus discharges by *both* point and nonpoint sources phased in over five years—EPA exceeded its authority to regulate. Even if the Court finds ambiguity in the term "total" in the context of § 303(d), EPA's combination of phased point source limits and best management practices measures (the CWIP) wholly disregards the critical distinction of federally managed point source pollution and state-managed nonpoint source pollution. Simply put, EPA cannot regulate nonpoint source pollution. The CWIP's micromanagement of nonpoint sources, all in the name of approving a valid TMDL for Lake Chesaplain, exceeds any permissible construction of the CWA. *See Defenders of Wildlife v. EPA*, 415 F.3d 1121 (10th Cir. 1995) ("Unlike point source pollution, EPA lacks the authority to control non-point source discharges through a permitting process."); s*ee also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (holding that EPA's interpretation of the Clean Air Act would bring about an "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

Under the *Chevron* test, courts presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. This is not the case here. Because the term "total" is unambiguous, Congress had no intention of empowering EPA to resolve any perceived ambiguity in the statutory term "total maximum daily load." Thus, EPA's rejection of the New Union TMDL is contrary to law. Additionally, EPA's regulation requiring WLAs and LAs for phosphorus as part of a TMDL exceeds EPA's authority to regulate.

CONCLUSION

Plaintiff-Appellee-Cross Appellee the State of New Union respectfully requests that this Court affirm the District Court's grant of summary judgment for New Union, affirm the dismissal of complaint No. 73-CV-2020, and uphold the District Court's order vacating EPA's rejection of New Union's TMDL.