Non-Measuring Brief

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,

Plaintiff-Appellant-Cross Appellee,

-and-

THE STATE OF NEW UNION,

Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

On Appeal from the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020 (Hon. Romulus N. Remus)

Brief for Defendant-Appellant,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The United States Environmental Protection Agency (EPA) appeals an Order 1) vacating EPA's rejection of New Union's phosphorus Total Maximum Daily Load (TMDL) for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and 2) the district court's determination that a phased implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C. § 1313(d), entered August 15, 2021 by the honorable Judge Remus in the United States District Court for the District of New Union, Nos. 66-CV-2020 and 73-CV-2020. EPA, CLW, and the State of New Union each filed timely Notices of Appeal according to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has subject-matter jurisdiction over this case pursuant 28 U.S.C. § 1291. The courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States.[1]

STANDARD OF REVIEW

The district court interpreted 33 U.S.C. § 1131(d) in granting motions for summary judgment in favor of New Union and CLW. We maintain these holdings to be in error as a matter of law. Questions of law are to be reviewed by appellate courts without deference to the district court's conclusions.[2] The disputed interpretation of this statute with respect to the proper methods of implementing TMDLs presents a question of law over which this Court reviews de novo.[3] The Court also reviews the district court's error in determining EPA's rejection of the New Union Chesaplain Watershed phosphorous TMDL as ripe for judicial review under an

[1] 28 U.S.C. § 1291
[2] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).
[3] *Id.*

abuse-of-discretion standard. The abuse-of-discretion standard may be applied by appellate courts when the court commits a clear error of judgment in weighing the proper factors of a case.[4]

STATEMENT OF THE ISSUE

1. Is 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 ripe for judicial review?
2. Is 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 an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d)?
3. Is 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 a violation of the CWA § 303(d) requirements for a valid TMDL?
4. Is EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation?

[4] *Richards v. Amtrak Servs., Inc.*, 108 F.3d 925, 927 (8th Cir. 1997)

STATEMENT OF THE CASE

A. Statement of the Facts

The Clean Water Act (CWA) governs water quality standards and implementation guidelines for the effective control of pollutants from point and nonpoint sources. Under § 303, the Act provides a cooperative framework for regulating pollutants of interstate waters. The CWA established a comprehensive system for permitting and regulating the point source discharges of pollutants into the waters of the United States. Pollution coming from nonpoint sources, largely consisting of agricultural runoff and other unchanneled pollution, is not subject to direct regulation under the CWA permitting program.

The CWA regulatory program is based on cooperative federalism under which the federal EPA establishes national standards that states are expected to implement through their own regulatory programs. States are expected to establish their own water quality standards pursuant CWA § 303. The water quality-based regulation of water pollution gives rise to the case at hand. Under the CWA, water quality criteria may take the form of numerical limits on pollutant concentrations in the water body, or standards for aesthetic qualities and non-specific pollutants such as toxicity. See CWA § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b).

The Clean Water Act directs each state to adopt water quality standards (WQS) for waters within the state. Once a state has established WQS for its water bodies, it must perform an assessment of the ability of each water body to meet these standards.

Once a water is listed as impaired, CWA § 303 (d) directs the state to develop and submit a TMDL for the offending pollutants for that water body at a level necessary to implement the

applicable water quality standards with seasonal variations and a margin of safety which accounts for any lack of knowledge concerning the relationship between effluent limitations and water quality. EPA defines a TMDL as "the sum of individual wasteload allocations for point sources and load allocation for nonpoint sources and natural background." 40 C.F.R. § 130.2(i).

Per 40 C.F.R. § 130.2, the EPA has authority to review and approve or reject each step of the WQS process, including the establishment of TMDLs for impaired waters. If the EPA disapproves of the proposed TMDLs, the EPA is directed to establish its own TMDLs. This suit was brought by plaintiffs New Union, challenging the EPA's rejection of the proposed TMDL, and Chesaplain Lake Watch (CLW), challenging the EPA's adoption of the Chesaplain TMDL.

B. Lake Chesaplain Water Quality

The series of regulatory actions by both the State of New Union Department of Fisheries and Environmental Control (New Union) and the United States EPA (EPA) arise due to the declining water quality in Lake Chesaplain. The Clean Water Act provides the regulatory framework for these actions. Lake Chesaplain water quality visibly declined during the first decade of the twenty-first century. New Union created a Chesaplain Commission, which issued a report in August 2012 pursuant to this decline in water quality. In 2012, New Union Division of Fisheries and Environmental Control (DOFEC) adopted water quality criteria for impaired waters but did not submit a TMDL for Lake Chesaplain. Despite this failure, EPA did not object to the § 303(d) submission.

In 2015, plaintiff Chesaplain Lake Watch served a notice letter on both New Union and EPA, threatening to sue based on the failure of either agency to establish a TMDL for Lake Chesaplain. CLW agreed to refrain from suit as long as New Union conducted a TMDL

rulemaking. DOFEC then commenced a state rulemaking proceeding to establish a TMDL. In October 2017, DOFEC publicly noticed a proposal to implement the TMDL through an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources. The TMDL was highly controversial. Residential lakefront homeowners objected to the expensive septic tank maintenance and pumping that would be required. The Chesaplain Mills slaughterhouse and Chesaplain Mills sewage treatment plant objected to the expensive phosphorus treatment system that would be required to reduce discharges by 35%. Ultimately, DOFEC adopted the slaughterhouse's position in its TMDL.

In July of 2018, DOFEC adopted the new TMDL. Pursuant to CWA § 303(d)(2), EPA rejected the July 2018 TMDL. In May 2019, after notice and comment, EPA adopted the original DOFEC TMDL proposal which had been objected to by the slaughterhouse, consisting of the 35% reduction of annual phosphorus discharges by both point and nonpoint sources phased in over five years, to be implemented through permit controls on point sources and BMP requirements for nonpoint sources. The TMDL was to be phased in over five years and implemented through permit controls on point sources and BMP requirements for nonpoint sources.

Today, The NPDES permit for the slaughterhouse expired in November 2018, and has not yet been reissued. The NPDES permit for the Chesaplain Mills sewage treatment plant likewise expired in February 2019. Both plants continue to operate under their expired permits as administratively extended based on their timely applications for permit renewal. Lake Chesaplain waters continue to violate water quality standards, and New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed since EPA's adoption of the Lake Chesaplain TMDL.

C. Procedural History

Plaintiff-Appellee-Cross Appellant Chesaplain Lake Watch commenced the action against Defendant-Appellant EPA according to 5 U.S.C. § 702, seeking the declaration of substantive provisions of EPA's Lake Chesaplain TMDL as contrary to law. Chesaplain Lake Watch (1) argues that its proposed TMDL satisfied all the requirements for a valid TMDL under the CWA, and (2) argues that EPA's regulation, 40 C.F.R. § 130.2(i), is contrary to law (purporting to require that a state's TMDL submission include not just the total maximum daily load, but an allocation of that load between and among point, nonpoint, and natural sources).

Plaintiff-Appellee-Cross Appellee the State of New Union sought a declaration that EPA's rejection of its proposed TMDL, and the regulations governing TMDL submissions EPA based this rejection on, are invalid. CLW argues that (1) a TMDL consisting of an annual loading limit to be phased in over a period of five years is contrary to the legal requirements of the CWA, claiming it is required that a) that a TMDL must be stated in terms of a daily load, not an annualized load, and b) that the TMDL must be adequate to ensure achievement of water quality standards on the date of its adoption, not five years later after a phased implementation; (2) EPA may not take any credit for phosphorus load allocation reductions anticipated from the implementation of BMPs for nonpoint sources where EPA has no authority to require implementation of these BMPs, and there is thus no reasonable assurance the reductions will be achieved.

EPA disagrees with the merits of the claims of both plaintiffs and argues (1) that its final Lake Chesaplain TMDL and CWIP is consistent with the requirements of the CWA and adequately supported by scientific evidence in the record, (2) that both complaints should be

dismissed as lacking ripeness, as the Lake Chesaplain TMDL will not have any immediate regulatory effect and its effect will depend on later administrative actions.

The district court denied EPA's motion for summary judgment in part and granted CLW's motion for summary judgment in part. The district court granted New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL.

SUMMARY OF ARGUMENT

This case comes before the Court on appeal from the United States District Court for the District of New Union. EPA requests that the Court reverse and affirm the district court in part. The district court had jurisdiction over the actions brought by CLW and the State of New Union according to 28 U.S.C 1331. These actions were consolidated pursuant to Fed. R. Civ. P. 42(a). The district court was correct in granting summary judgment in part to EPA in No. 73-CV-2020, however, the court erred in granting summary judgment in favor of New Union in No. 66-CV-2020 and in part to CLW in No. 73-CV-2020.

This Court should hold that the issues raised by the challenging parties—namely, the EPA's decision to reject New Union's second TMDL proposal in favor of the original TMDL submission (the CWIP TMDL herein)—are not ripe for judicial review. The issues before this Court are not fit for judicial review because adjudication at this stage in the chain of administrative actions would interfere with the consummation of final agency action, whereby the State of New Union will be responsible for implementing wasteload and load pollutant reductions in accordance with the EPA's approved TMDL. Thus, the mere approval of the CWIP TMDL by the EPA will not have the regulatory effect of law unless and until further

administrative actions are taken by the State of New Union. As such, the requisite finality of agency action under the ripeness doctrine has not been satisfied, nor can it be established that the mere approval of the CWIP TMDL has a concrete adverse effect on the challenging parties. Even if, assuming judicial review is delayed, we were to contemplate the potential adverse effects on the parties that could be engendered by the State of New Union's further implementation plan, the plaintiffs in the case at bar have failed to allege how the implementation of EPA's CWIP TMDL will adversely affect the parties *themselves*. Ergo, because judicial review at this stage will interfere with final administrative action and the challenging parties won't be unduly prejudiced if judicial review is to be delayed, the issues at bar are not ripe for judicial review. This Court should, therefore, dismiss all causes of action against the EPA, as the Court lacks the necessary subject matter jurisdiction to adjudicate the issues at bar.

On the second issue, this Court should hold that EPA's determination to reject the New Union Chesaplain Watershed proposed phosphorus TMDL in favor of the CWIP is valid pursuant CWA § 303(d). The district court fundamentally misapplies the Chevron framework to the EPA's definition of TMDL as a matter of law. The district court, in their holding, fails to establish the necessary unambiguous Congressional intent, under *Chevron* step one, that prohibits the EPA's administrative authority from defining TMDL's to include both wasteload and load allocations. The district court relies primarily on what they contend to be the implied intent of Congress in their determinations, which, even assuming that implied intent would be dispositive under *Chevron* Step One, the intent is dubious at best. Moreover, the statutory language of the CWA is silent on the issue. Therefore, a correct analysis under the *Chevron* framework would have necessarily required the Court to analyze the EPA's decision in defining TMDL's to include both wasteload allocations and load allocations under Step Two—that being

whether the EPA's decision was an arbitrary and capricious use of congressionally delegated authority. Had the court reached this level of analysis, it is doubtful that the EPA's decision could rise to the level of arbitrary and capricious when accounting for the deference given to administrative agencies under the *Chevron* framework and the sound public policy considerations that EPA relied on in considering the appropriate TMDL definition within the parameters set out by the CWA.

On the third issue, the Court should hold that EPA's adoption of a TMDL consisting of an annual pollution loading reduction to be phased in over five years does not violate CWA 303(d) requirements. EPA should be given controlling weight in determining the standards for a valid TMDL. A phased percentage reduction implementation schedule accounts for seasonal variation and is therefore a reasonable construction of "total maximum daily load."

On the fourth issue the Court should hold that the CLW has not met their burden of establishing that the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion. Because EPA engaged in notice and comment rulemaking from July 2018 to May 2019, the court should find the agency's statutory interpretation permissible. Because the arbitrary and capricious standard of review has a very narrow scope, the issue before the district court is the issue before this court– whether the agency considered the relevant factors and gave reasonable basis for its decision.

ARGUMENT

1. Complaints from both plaintiffs should be dismissed on the grounds that the issues at bar are not ripe for judicial review.

We challenge the determination that the issues raised on appeal will not interfere with further administrative action, 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. As the district court noted, the *Abbott Laboratories v. Gardner* decision held in interpreting the ripeness doctrine that a dispute against an administrative agency will not be subject to judicial interference unless and until the act by the agency giving rise to the controversy has been consummated, and this formalization of agency action has affected the challenging parties in a concrete way.[5] Moreover, the Supreme Court, in this decision, established two main issues to consider in evaluating ripeness: the fitness—in accordance with the aforementioned holding—of the issues for judicial decision, and whether prolonging adjudication would be unfairly prejudicial to the challenging parties.[6] On appeal, we raise two arguments in contesting the district court's conclusion on ripeness: (1) the district court fallaciously distinguishes the case at bar from *City of Arcadia v. U.S. EPA*[7] and *Bravos v. Green*[8] insofar that, although these cases may be incidentally distinguishable, the distinctions made are immaterial to the application of the ripeness doctrine and inconsonant with the applicable authority—that is, the necessary assumption of the district court's holding relies on a broad interpretation of "final agency action," which we contend, by textual argument, lacks merit as a matter of law; and (2) in determining whether the issues at bar are fit for judicial decision and

[5] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 – 149 (1967).
[6] *Id.* at 149.
[7] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003).
[8] *Bravos v. Green*, 306 F. Supp. 2d 48 (D. D.C. 2004).

whether delayed adjudication would be unfairly prejudicial to the challenging parties, the application of the three factors elucidated by the Supreme Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*[9] indicate that the complaints by plaintiffs New Union and Chesaplain Lake Watch are not ripe for judicial review.

The district court, in holding that the issues at bar are ripe for judicial review, argues that the context of our issues, here, are inapposite with the authority relied on at trial—*City of Arcadia v. U.S. EPA*[10] and *Bravos v. Green*[11] —insofar that the challenges to the TMDL at bar, if implemented, would require specific NPDES permit limits for point sources, which, as the purveyor of NPDES permits within the State of New Union, falls on the State of New Union to administer without delay. While we concede that this distinction may be factually correct, it does not permit the implicit inference relied on in the district court's holding; that is, the argument by implication that the district court seems to be making is as follows: because the TMDL in question may, if implemented by the State, require the State of New Union to issue NPDES permits without delay, this constitutes final agency action as contemplated by the ripeness doctrine, which, therefore, indicates that it is fit for judicial review.[12] We disagree.

In determining whether an agency action is fit for judicial review under the ripeness doctrine, the finality of the alleged agency action is an essential consideration so as not to prematurely interfere with executive function.[13] To that end, holding that the EPA approved TMDL in question constitutes final agency action fundamentally misconstrues the role of

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[9] *Ohio Forestry Ass'n, Inc v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).
[10] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003).
[11] *Bravos v. Green*, 306 F. Supp. 2d 48 (D. D.C. 2004).
[12] *Id.* at 55 (citing *Transport Robert (1973) Ltee v. United States Immigration & Naturalization Service*, 940 F. Supp. 338, 340 (D.D.C. 1996)).
[13] *Id.* (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 143 U.S. App. D.C. 274, 443 F.2d 689, 698 (D.C. Cir. 1971)) (also citing *Ciba-Geigy Corp v. EPA*, 225 U.S. App. D.C. 216, 801 F.2d 430, 435–36 (D.C. Cir. 1986)).

TMDL's under the CWA *§303(d)*.[14] On the contrary, the primary function of TMDL's established under CWA *§303(d)(1)* of the CWA is that of a planning device, which is further supported by the notion that TMDL's cannot be self-executed.[15] That is, it cannot, by itself, prohibit any conduct or require any action, but rather, it contemplates a goal to be accomplished through the further implementation of NPDES permits by the State to reduce point source pollution, practices enforced by the State to limit nonpoint source pollution, or both.[16] Ergo, it is even doubtful that the EPA's approval of a TMDL under the CWA can be considered an "agency action," much less a "final agency action," as the definition of "agency action" set out by the APA includes "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent denial thereof, or failure to act."[17]

Nevertheless, even if the EPA's rejection of the revised TMDL in 2018 and subsequent adoption of the original TMDL, submitted by DOFEC in 2017, constitutes an agency action under the APA, it is untenable to conclude that it is also a final agency action fit for adjudication. In order to be a final agency action under the APA—this being inextricably consonant with fitness for judicial review under the ripeness doctrine—two elements must be met: (1) "the action must mark the 'consummation' of the agency's decision-making process…" and (2) "the action must be one which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[18] As far as the TMDL itself is concerned within the EPA's course of regulatory authority under the CWA, the informational gathering function of the TMDL serves

[14] 33 U.S.C. § 1313(d).
[15] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) (citing *Pronsolino v. Nastri*, 291 F. 3d 1123, 1129 (9th Cir. 2002)).
[16] *Id.* (citing *Sierra Club v. Meibury*, 296 F.3d 1021, 1025 (11th Cir. 2002)).
[17] *Id.* at 1153 (quoting *5 U.S.C § 551(13))*.
[18] *Bravos v. Green*, 306 F. Supp. 2d 48, 55 (D. D.C. 2004) (citing *Barrick Goldstrike Mines, Inc., v. Browner*, 342 U.S. App. D.C. 45, 215 F.3d 45, 48 (D.C. Cir. 2000)).

its purpose in informing the design and implementation of pollution control measures.[19] It is merely a step along the chain of implementation that contemplates further regulatory actions by state or local government.[20] It follows then, that "a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies."[21] Therefore, with the proper understanding of the administrative role of TMDL approval under the CWA in mind, finding that the EPA's approval of DOFEC's original TMDL satisfies the two elements of final agency action stretches the definition of "final" beyond any logically plausible interpretation.

With respect to the first element—that the action is the "consummation of the agency's decision making process"—the argument could be, and it seems like the district court follows this line of reasoning, that the TMDL is the final agency action by the EPA because it is their last administrative decision before state and local government takes on the role of implementing pollution reduction schemes in accordance with the goals set by the EPA approved TMDL; however, this argument requires the assumption that the "consummation of an agency's decision making process" constitutes decision making *within the same agency*, but the legislative intent behind the APA's definition of finality would indicate an interpretation to the contrary—that is, it was enacted to prevent premature judicial encroachment on the executive branch's power in implementing administrative regulations.[22] When read with the legislature's intent in mind, a stronger argument can be made that interpreting the "consummation of an agency's decision making process" should be logically extended to include the decision making process *of the same*

[19] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1145 (N.D. Cal. 2003) (citing *Pronsolino v. Nastri*, 291 F. 3d 1123, 1129 (9th Cir. 2002)).
[20] *Id.* (citing *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996)).
[21] *Id.*
[22] *Bravos v. Green*, 306 F. Supp. 2d 48, 55 (D. D.C. 2004) (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 143 U.S. App. D.C. 274, 443 F.2d 689, 698 (D.C. Cir. 1971)).

regulatory action between *any and all administrative agency's involved*. Assuming for the sake of argument that the EPA's approval of a state-agency submitted TMDL constitutes an "agency action" under the APA (we maintain that this proposition is dubious), when adopting our proposed interpretation of the first element for "final agency action" under the APA, in accordance with the legislatures intent, it is inconceivable how the EPA's approval of a TMDL could be the consummation of the agency's decision making process when it necessarily contemplates later administrative actions by state administrative agencies, such as modification to NPDES permits or New Union's implementation of BMP requirements, both of which would involve the consummation of the decision making processes by the State of New Union's administrative agencies. Here, regulatory implementation by New Union would fulfill the meaning of "final agency action" contemplated by the APA, as opposed to the EPA merely approving the penultimate, planning step—the TMDL—which, we maintain, is therefore not ripe for judicial review.

In analyzing the second element, whether the action is one which "rights or obligations have been determined" or that "legal consequences will flow [from]," we maintain that the EPA's approval of DOFEC's 2017 TMDL, consisting of a 35% phased reduction for both point sources and nonpoint sources, has no regulatory effect unless and until it is incorporated into specific permits or other regulatory actions by the State of New Union and its administrative agencies. At which point, failure to comply with the state-issued NPDES permits may then affect New Union's eligibility for federal water quality planning funds,[23] as well as its eligibility to maintain its delegated NPDES permitting program,[24] thus fulfilling the definition of legal consequences contemplated by this second element; however, it should be noted that these legal

[23] CWA § 208, 33 U.S.C. § 1288.
[24] CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2).

consequences do not arise as a result of the EPA's approval of the TMDL itself. Rather, they arise when and only when the State of New Union takes further administrative actions to modify its NPDES permits. Furthermore, plaintiff Chesaplain Lake Watch acknowledges itself and alleges, as part of the reason they have filed suit, that New Union lacks the statutory authority to impose and enforce the BMPs for nonpoint sources set out by the EPA's approved TMDL, so no rights or obligation could be determined from which legal consequences could flow. Thus, the load allocations established by the TMDL at bar couldn't possibly satisfy this requirement of finality. In sum, EPA's approval of the TMDL imposes no rights or obligations, nor does it engender legal consequences, as the point sources cannot be regulated without further implementation by New Union's administrative agencies, and New Union lacks statutory authority to regulate the nonpoint sources; therefore, the alleged administrative action by the EPA fails the second element of finality under the APA, necessarily implying that this isn't the type of final agency action fit for adjudication, as required by the ripeness doctrine.

The district court also contends 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," which we maintain is not supported by the record. In analyzing whether the hardship sustained by the plaintiffs would be inequitable from delaying judicial review, we note three factors that, in accordance with the Supreme Court's holding in *Ohio Forestry Ass'n, Inc. v. Sierra Club,* should be considered under the ripeness doctrine: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[25] We have already determined that judicial

[25] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

intervention would prematurely interfere with subsequent administrative action here, as the EPA's approval of the TMDL requires further implementation by the state to have any regulatory effect; however, whether delayed review would cause hardship to the plaintiffs should also be evaluated under the totality of the circumstances, including whether the court would benefit from further factual development, as some detriments to the plaintiff could be legally overcome by an overwhelming benefit to the court—a benefit incurred from further factual development.[26]

The plaintiffs in the case at bar have failed to establish how delaying judicial review may cause substantial hardship, if any, to the challenging parties. Delaying judicial review for plaintiff New Union would cause, at most, minimal hardship to the state's interests. Although they may be required to implement the NPDES permits without delay, New Union has not alleged how implementing NPDES permits in accordance with the EPA's TMDL would, on its own, cause hardship to the state's interests. Indeed, New Union alleged at trial that failure to comply with the EPA's TMDL guidelines in its NPDES permitting system may affect its eligibility for federal water quality planning funds under the CWA,[27] as well as its eligibility to maintain its delegated NPDES permitting program.[28] However, this assertion indicates that hardship will result only if they do not comply with the EPA's TMDL guidelines when judicial review is withheld; yet, at this juncture, there is a legally significant distinction to be drawn here—that is, there is a difference between a party being subject to hardship as a result of following the EPA's TMDL guidelines, and hardship as a result of willfully failing to comply with the EPA's administrative authority. The latter—what New Union is arguing—would be a bad faith attempt by New Union to manipulate its position under the ripeness doctrine in order to

[26] *Id.* at 1159.
[27] CWA § 208, 33 U.S.C. § 1288.
[28] CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2).

establish harm from delayed adjudication. As a matter of public policy, this prong of the ripeness analysis—that delayed judicial review is not unduly burdensome on the parties—should only have credence when the party subject to the burden is acting in good faith compliance with the administrative regulation. Without the assumption that New Union shall willfully decide not to comply with the EPA's TMDL guidelines, New Union has not alleged "a single future event or condition that is fairly certain to occur and will adversely impact plaintiffs *themselves*," which, under the holding from *City of Arcadia v. U.S. EPA*, is insufficient for establishing that substantial harm will follow from the delayed adjudication of the issues at bar.[29]

Similarly, plaintiff Chesaplain Lake Watch fails to allege how delaying judicial review will adversely affect their interests as an organization. Certainly, they allege that the EPA's TMDL guidelines are insufficiently stringent for protecting the environmental concerns of the community writ large, yet they fail to allege any facts concerning how delayed judicial review would impose hardship on their organization *itself*, which, indubitably, is the lens that this prong of the ripeness analysis is to be considered for redress.[30] Since we have established that neither plaintiff New Union nor plaintiff Chesaplain Lake Watch will be subjected to substantial hardship if judicial review of the issues is to be delayed, we need not reach the issue of whether the court would benefit from delaying to judicial review to allow further factual development in the record. As decided in *City of Arcadia v. U.S. EPA*, "in the absence of any indication that they will suffer imminent hardship, these claims are premature… the court lacks jurisdiction to grant such relief where plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy."[31] Since plaintiffs have failed to allege any imminent or future harm to

[29] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156–157 (N.D. Cal. 2003).
[30] *Id.*
[31] *Id.* at 1160.

themselves as a result of the EPA's TMDL guidelines, it is an open question whether future events could also obviate the controversy.

As the record strongly supports the conclusions that judicial intervention would improperly interfere with further administrative action and that delayed adjudication would not be unduly prejudicial to the challenging parties, we need not address whether the court would benefit from further development of the issues; therefore, the issues before this court are not ripe for judicial review. Because the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction,"[32] and "unripe claims are subject to dismissal for lack of subject matter jurisdiction,"[33] we maintain that this court lacks the necessary subject matter jurisdiction to hear the issues at bar; all issues before the court should, therefore, be dismissed accordingly, as further adjudication of the issues would be inherently unconstitutional.

2. The district court fundamentally misapplies the *Chevron* framework to the EPA's definition of TMDL as a matter of law.

The district court analyzes New Union's challenge to the EPA's definition of the term "total maximum daily load" under the correct framework—that of *Chevron, U.S.A., Inc. v. NRDC, Inc.*—but, we maintain, misapplies the mechanics of the test to EPA's TMDL definition as a matter of law.[34] In holding that the EPA's definition of TMDL is not consistent with the intention of Congress in enacting CWA § 303(d), and that, therefore, 40 C.F.R. 130.2(i) is contrary to law under *Chevron* step one, the district court relies on two dubious arguments: (1) that "Congress meant total when it said total" because "nothing about section 303(d) implies that

[32] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003) (quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993).
[33] *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1156 (N.D. Cal. 2003) (quoting *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000).
[34] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

the process of setting the TMDL was meant to include an allocation and limitation process of point and nonpoint sources; and (2) that Congress "deliberately declined to include an EPA supervised state implementation requirement for water quality standards." We disagree with the significance of both contentions under the *Chevron* framework.

The *Chevron* framework involves a two-part test for determining the amount of deference that courts should give to an administrative agency's decision that is subject to federal statutory interpretation.[35] Under *Chevron* Step One, "courts inquire 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[36] However, when Congress's intent is not unambiguous, the issue turns on "whether the statute unambiguously forbids the Agency's interpretation."[37] But, when the statute does not expressly forbid the Agency's interpretation and "the intent of Congress is expressed ambiguously in some way relevant to the case at hand, courts proceed to 'Step Two.' There, the agency's interpretations 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[38]

The district court argues that the word "total" in "total maximum daily load" literally means "total," not the sum of the allocations between component pollutants, because section 303(d) is nothing more than an information gathering provision, and nothing about the section implies that the process of setting the TMDL was meant to include the allocation and limitation process of point and nonpoint sources. This contention is raised in support of the conclusion that the issue at bar can be resolved under *Chevron* Step One—namely, by virtue of explicit

[35] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).
[36] *Id.* at 842-843
[37] *Barnhart v. Walton*, 535 U.S. 212, 217–18, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002).
[38] *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281, 294 (3d Cir. 2015).

Congressional intent.[39] However, the district court misses the mark in applying Step One to the statute in question; that is, the issue in question is not whether Congress implicitly expressed the intent for the EPA not to be able to include allocations in its definition of TMDL, but "whether the statute unambiguously forbids the Agency's interpretation."[40] If Congress had spoken directly on the issue, then the district court's analysis would be correct in affirming the resolution at Step One; however, because Congress never expressly addresses the issue—evidenced by the fact that the district court is making an argument for implied Congressional intent here—the dispositive issue at bar is actually whether the language of the statute explicitly forbids the Agency's interpretation.[41] Since the intent of Congress is not sufficiently unambiguous in its expression of intent—again, supported by the district court's need to argue by implication—and since the statute doesn't expressly forbid the EPA's interpretation of the TMDL to include pollutant allocations, the district court should have proceeded to *Chevron* Step Two analysis to resolve the issue. At this juncture, the district court would have had to argue that EPA's interpretation is arbitrary and capricious—an exceptionally strict standard of review.

The district court also contends that because Congress declined to sanction an EPA supervised state implementation requirement for water quality standards, this is further evidence of Congress's explicit intent to bar the definition of TMDL from including pollutant allocations by the EPA. However, this assertion is far from the explicit intent of Congress for defining TMDL's that the district court contends. First, the district court errs by equivocating between a TMDL and a state implementation requirement for water quality standards. The role of the TMDL is an information gathering and goal setting provision, which leaves further

[39] *Id.*
[40] *Id.*
[41] *Id.*

implementation to the states under the framework of cooperative federalism.[42] True, the EPA does have some limited authority to enforce regulations on point sources through effluent limitations and the state-issued NPDES permitting programs, but, if anything, this point speaks to Congress's intent to *allow* pollutant allocations under the TMDL framework, since the EPA does have limited authority to sanction a state's compliance with the implementation of limitations on point sources.[43] Nonpoint sources, on the other hand, are left to the states discretion when guidelines are established by the EPA's TMDL.[44] The fact that Congress hasn't spoken on EPA's authority to certify the complete implementation of a TMDL, with respect to nonpoint sources, isn't evidence that Congress intended to prevent the EPA from making pollutant allocations under the definition of TMDL, but rather, it shows deference to the states, which is consistent with the cooperative federalism model that the CWA was intended to follow. Nevertheless, because Congress's failure to establish an EPA supervised state implementation requirement for water quality standards doesn't explicitly address the role of a TMDL's, as allocations are an inherently different step than enacting an implementation plan, this contention is nondispositive under *Chevron* Step One analysis.[45] Ergo, this issue, similarly, points to the need for further analysis under Step Two by the Court.[46]

The district court erred in treating the issues at bar as dispositive under *Chevron* Step One as a matter of law. Had the court properly analyzed the issues before it, they would have necessarily advanced to the Step Two analysis and considered whether the EPA's decision to include the allocation of pollutants under the definition of TMDL was arbitrary and capricious.

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[42] *Id.* at 289, 291.
[43] *Id*. at 289.
[44] *Id.*
[45] *Id*. at 294
[46] *Id.*

Because this definition is backed by legitimate public policy concerns and does not violate the statutory language of the CWA, it is doubtful, at best, that a court could find the EPA's definition to be arbitrary and capricious.

3. EPA's adoption of a TMDL consisting of an annual pollution loading reduction to be phased in over five years does not violate CWA 303(d) requirements because EPA must be given controlling weight in determining the standards for a valid TMDL, and a phased implementation schedule accounts for seasonal variation.

The annual pollution loading reduction and phased implementation prescribed in the Chesaplain Bay TMDL adopted by the EPA is in accordance with CWA § 303(d) and federal regulation. The district court below erred in its grant of summary judgment in favor of the plaintiff CLW on its challenge to the adopted TMDL. The EPA's application of the phrase "total maximum daily load" has controlling weight and a TMDL expressed in annual terms, to be implemented in phased percentage reductions, is consistent with CWA § 303(d). This Court should find EPA's approval of the TMDL in accordance with § 303(d) and reverse the district court's grant of summary judgment to CLW.

Each state is required under CWA § 303(d) to establish the total maximum daily load for pollutants identified under § 304(a)(2) "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."[47] The Code of Federal Regulations specifically states "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure"[48] in its definition of "total maximum daily load." Neither of these mandatory authorities require TMDLs to be implemented under rigid daily terms.

[47] 33 U.S.C. § 1313(d)
[48] 40 C.F.R. § 130.2(i)

It is not essential for TMDLs to be expressed in daily terms. In *Nat. Res. Def. Council, Inc. v. Muszynski*, it was determined that effective regulation of water quality standards requires consideration of the ways in which pollutants enter and impact a body of water.[49] Regulation in daily terms may be appropriate for certain substances, while others, like phosphorous, vary in the way they affect bodies of water over more broad units of time.[50] The court affirmed that CWA does not require total maximum daily loads to be expressed in terms of daily loads only.[51] Instead, "total maximum daily load" can be expressed by another measure of mass per time to effectively regulate pollutants.. To accomplish this objective, agency discretion must be relied upon to develop TMDLs which would be implemented most effectively under differing terms. CWA § 303(d) is ambiguous in its guidance on the unit of time in which TMDLs can be implemented. Despite the inclusion of "daily" in the term, per diem phrasing cannot be found in CWA 303(d) nor federal regulatory guidance.

CLW argues the statutory term "total maximum daily load" does not allow for phased percentage reductions of loading allocations. The district court likewise held the EPA's application of the phrase to include a percentage reduction contradicted the plain meaning of the CWA. However, a phased implementation schedule is a reasonable application of the term "total maximum daily load" according to seasonal variations and the varying nature of pollutants. Allowing for "seasonal regulation" under CWA 303(d) contradicts an exclusively per diem interpretation of "total maximum daily load". As the nature of different pollutants widely vary, a reasonable interpretation of the statute must accommodate varying forms of TMDL implementation plans to remedy affected waters. EPA's approval of an annual phased TMDL is

[49] *Nat. Res. Def. Council, Inc. v. Muszynski 268* F.3d 91, 98 (2nd Cir. 2001).
[50] *Id.*
[51] *Id.* at 99.

a reasonable exercise of 303(d) guidelines. Like *Nat. Res. Def. Council, Inc. v. Muszynski*, EPA is tasked with regulating the discharge of phosphorous into the Lake Chesaplain Bay. Variation from a rigid daily reduction in pollution loads to an annual phased plan is a reasonable and perhaps necessary method for regulating this certain pollutant.

EPA's reasonable choice of interpretation of "total maximum daily load" to be applied in annual, phased percentage loading reductions should therefore be given controlling weight in this Court's determination. Deference should be granted to the agency due to statutory ambiguity according to the *Chevron* test.[52] CWA is ambiguous with respect to implementing TMDLs under per diem or other terms of timing.[53] EPA's choice of interpretation in this instance is a permissible construction of "total maximum daily load" based on previous applications of this standard and the agency's purpose in implementing the interpretation. Likewise, EPA's interpretation of its own regulations is entitled to "controlling weight" unless "plainly erroneous or inconsistent with the regulation."[54] This deference is especially warranted when the application of a contested interpretation "concerns a complex and highly technical regulatory program in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns."[55] In congruence with these findings, EPA's adoption of an annual phased TMDL is a reasonable expression of an interpretation of "total maximum daily load."

[52] *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).
[53] *Id.*
[54] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).
55 *Id.*

4. EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was not arbitrary and capricious nor an abuse of discretion.

An agency's action is entitled to a presumption of validity, and the petitioner challenging that action bears the burden of establishing that the action is arbitrary or capricious.[56] CLW has not met their burden of establishing that the EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion. CLW is unable to show that the EPA did not consider the relevant factors nor give a reasonable basis for its decision.

CLW argues that to take credit for nonpoint source BMP pollutant loading reductions, there must be a "reasonable assurance" that the reductions will in fact be achieved. CLW cites EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991), which states that when establishing permits for point sources in the watershed, the record should show that in the case of any credit for future nonpoint source reductions, 1) there is reasonable assurance that nonpoint source controls will be implemented and maintained, or, 2) that nonpoint source reductions are demonstrated through an effective monitoring program.[57]

The district court correctly held that the standard for taking credit for BMPs was not the "reasonable assurance" standard. The reasonable assurance standard has never been adopted by EPA through notice-and-comment rulemaking. In the case at hand, the EPA engaged in notice and comment rulemaking from July 2018 to May 2019 when it adopted its combination of

[56] *Am. Farm Bureau Fed'n v. United States EPA*, 984 F. Supp. 2d 289, 294 (M.D. Pa. 2013).
[57] See Guidance for Water Quality-based Decisions: The TMDL Process, EPA 440-4-91-001, April 1991.

phased point source limits and BMP measures, called the "Chesaplain Watershed Implementation Plan". EPA incorporated the entire record of scientific reports and public comments before the DOFEC into its own record. In *American Farm Bureau*, the court held that "A court is more likely to find an agency's statutory interpretation permissible if there is a complex and highly technical regulatory program, or if the agency has employed formal procedures, such as notice and comment rulemaking."[58] The notice and comment period has been met in this case, and lasted for ten months, which far surpasses the minimum thirty days required for notice and comment rulemaking.

The district court was correct in applying the highly deferential arbitrary and capricious standard because EPA's calculation of wasteload and load allocations is a matter of EPA applying its regulatory standards to the record before the agency. An agency action is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem. An arbitrary and capricious action is also defined as willful and unreasonable action without consideration or in disregard of facts or without determining principle.[59] The arbitrary and capricious standard of review has very narrow scope; therefore, the appellate court should be highly deferential to the EPA's decision to apply credit for nonpoint pollution reductions, as was the District court.[60] Under this standard of review, the issue before the District court is the issue before this Court— within the administrator's authority, reasoned, and supported by substantial evidence in the record.[61]

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[58] *Am. Farm Bureau Fed'n v. United States EPA*, 984 F. Supp. 2d 289, 294 (M.D. Pa. 2013)
[59] *J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*, 2012 MP 2, ¶ 1, 9 N. Mar. I. 8, 9.
[60] *Dawson v. Saganey,* Civil Action No. 07cv10807-NG, 2008 U.S. Dist. LEXIS 52232, at *1 (D. Mass. July 3, 2008).
[61] *Id.*

The role of the TMDL is an information gathering and goal setting provision, which leaves further implementation to the states under the framework of cooperative federalism.[62] A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. EPA's TMDL provides New Union with information concerning possible BMPs that might be used to achieve compliance with water quality standards. Nothing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states.[63] BMPs are allowed per the U.S. Code—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.[64] Because the TMDL process provides for nonpoint source control tradeoffs, and further implementation of these nonpoint source control tradeoffs is left to the states, the district court correctly found that EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance is not arbitrary and capricious or an abuse of discretion.

[62] 40 CFR § 130.2(i)
[63] *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).
[64] 40 CFR § 130.2(i)